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Comment

Assignment and Negotiation: A Violation of Due Process

INTRODUCTION

An installment contract is an agreement between a buyer and a seller, whereby, for consideration received, the buyer agrees to pay a certain specified amount to the seller in periodic installments until the total contract price is paid. This type of contract may arise in an infinite variety of situations, ranging from loan agreements and retail purchases to club memberships. Generally these contracts are drafted by the seller and the language contained is usually incomprehensible to the average consumer. As a result, the consumer often finds that he has waived rights to which he would otherwise be entitled. Simply stated, the problem is that most consumers do not know what they are signing.

Realizing this problem, the United States District Court for the Eastern District of Pennsylvania recently held Pennsylvania's confession of judgment practice unconstitutional.¹ The decision was based on the theory that there was not a knowing waiver of constitutional rights by the debtor-petitioners. The purpose of this comment is to demonstrate that the rationale of this case also applies to negotiable instruments and assignable contracts in which consumers may likewise unknowingly waive their constitutional rights.

In order to demonstrate the unconstitutionality of current contract practices, confessions of judgment must first be examined. Discussion will center around their history and practices and why they have been held unconstitutional.² Using this as the basis for later discussion, the history and practices of negotiable contracts will be explored and their possible unconstitutionality will be demonstrated.

1. *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1971).

2. *Id.*

CONFESSIONS OF JUDGMENT

Installment contracts and negotiable instruments appear to be very similar to confessions of judgment, both in their practices and in their problems. Since the questionable constitutionality arising from the transfer of negotiable instruments and assignment of installment contracts will later be discussed, it is important to first understand confessions of judgment and why they have been held unconstitutional.

Confessions of Judgment—Practices and Problems

The confession of judgment, variously known as a cognovit note or a judgment note, traces its origin to the common law.³ Blackstone states that:

[I]n order to strengthen a creditor's security, [a] debtor [may] execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment . . . in an action of debt to be brought by the creditor against the debtor for the specific sum due: which judgment, when confessed, is absolutely complete and binding;⁴

A warrant of attorney to confess judgment apparently creates in the creditor an "agency coupled with an interest." This being so, it is not an agency at all since the creditor is acting upon a security interest which he holds in his own right.⁵ The Restatement of Agency 2d properly views it as a "power given as security" and defines this power as:

[A] power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration.⁶

After conveying a security interest to the creditor, the debtor cannot revoke the creditor's power of attorney to confess judgment—to do so would allow the debtor to deny the creditor his contract rights. Only

3. *Consumers Mining Co. v. Chatak*, 92 Pa. Super. 17 (1927) stated that the right to confess judgment was a right at common law and the confession statutes only apply to procedure.

4. 3 BLACKSTONE, COMMENTARIES *397.

5. See *Mellon v. Ritz*, 332 Pa. 97, 2 A.2d 699 (1938).

6. RESTATEMENT (SECOND) OF AGENCY § 138 (1957).

satisfaction of the debt, destruction of the subject matter, or conveyance to a bona fide purchaser⁷ will terminate this power.

Confessions of judgment in America may be classified into three different categories: void, limited, and allowed. Twenty jurisdictions declare confessions of judgment void.⁸ Of these jurisdictions, three declare such use a crime.⁹ Seventeen allow them only under certain limited circumstances.¹⁰ Three have completely repealed their confessions of judgment statutes¹¹ and of the ten remaining jurisdictions allowing confessions,¹² they are widely used in only Illinois, Ohio and Pennsylvania.

Pennsylvania's statute provides that the clerk of courts, upon application of the holder of a confession of judgment, confess judgment against the defendant for the face amount of the instrument.¹³ Essen-

7. *Id.* § 139. Pennsylvania also allows the death of the debtor to terminate the power, *Stucker v. Shumaker*, 290 Pa. 348, 139 A. 114 (1927); *Lanning v. Pawson*, 38 Pa. 480 (1860). In this respect a warrant of attorney to confess judgment does not fulfill the requirements of an "agency coupled with an interest" since death of the debtor will affect the creditor's rights.

8. ALA. CODE tit. 20, § 16 (1958); CAL. COMM. CODE § 1804.1 (West 1964); COLO. REV. STAT. ANN. § 13-16-6 (1963); CONN. GEN. STAT. REV. § 42-88 (1958); FLA. STAT. § 55.05 (1969); IND. ANN. STAT. § 2-2904 (1968); LA. R. S. 6:585 (Supp. 1971); MD. ANN. CODE art. 83, §130b (1957); MASS. GEN. LAWS ANN. ch 255B, § 20 (Supp. 1971); MINN. STAT. § 56.12 (1969); MONT. REV. CODES ANN. § 13-811 (1947); N.H. REV. STAT. ANN. § 361-A:7VIII-I (1966); N.J. STAT. ANN. § 17:16C-37 (1970); N.M. STAT. ANN. § 21-9-16 (1953); N.Y. PERS. PROF. LAW § 403(3)(c) (McKinney 1962); N.D. CENT. CODE § 51-13-02 (13) (1960); ORE. REV. STAT. § 83.670(1) (1969); S.C. CODE ANN. § 8-800.13 (1970); TENN. CODE ANN. § 25-201 (1955); TEX. REV. CIV. STAT. art. 2224 (Vernon 1964).

9. IND. ANN. STAT. § 2-2906 (1968); N. M. STAT. ANN. § 21-9-18 (1953); ORE. REV. STAT. § 83.990(1) (1969).

10. ALASKA STAT. § 09.30.050 (1962); ARIZ. REV. STAT. ANN. 22-219 (1956); ARK. STAT. ANN. § 29-301 (1962); GA. CODE ANN. § 110-601 (1935); HAWAII REV. STAT. § 633-3 (1968); IDAHO CODE § 10-901.904 (1948); KY. REV. STAT. ANN. § 454.090 (Baldwin's 1969); MICH. STAT. ANN. § 27A.2906 (1962); MISS. CODE ANN. § 1551 (1942); MO. ANN. STAT. §§ 511.070-.080 (Vernon 1949); NEB. REV. STAT. § 25-907 (1943); OKLA. STAT. ANN. tit. 12, § 689 (1961); R.I. GEN. LAWS ANN. § 19-25-24 (1968); S.D. CODE § 37:0301 (Supp. 1960); VT. STAT. ANN. tit. 12, § 2139 (1958); VA. CODE § 8-355 (Supp. 1971); WASH. REV. CODE §§ 4.60.010-.070 (1956). These limited circumstances may vary from state to state. Some limitations are: monetary limitation of amount confessed, allowing confession in only certain types of contracts, requiring that the defendant personally appear before the Clerk of Courts in order to confess judgment, requiring that confessions of judgments are only valid if made under oath, or restricting their use in only cases of default.

11. IOWA CODE § 676.1 (Supp. 1970); N.C. GEN. STAT. §§ 1-247, 1-249 (1969); KAN. STAT. ANN. § 52-205(2) (1966).

12. DEL. CODE ANN. tit. 10, § 2306 (1953); ILL. ANN. STAT. ch. 110, § 50 (3) (Smith-Hurd 1968); ME. REV. STAT. ANN. tit. 9, § 3084 (1964); NEV. REV. STAT. § 17-090 (1957); OHIO REV. CODE ANN. §§2323.12, .13 (Supp. 1970); PA. STAT. ANN. tit. 12, § 739 (Supp. 1971); UTAH CODE ANN. § 78-22-3 (1953); W. VA. CODE § 56-4-48 (1966); WIS. STAT. § 270.69 (1969); WYO. STAT. ANN. §§ 1-309-312 (1957).

13. PA. STAT. ANN. tit. 12, § 739 (Supp. 1971):

It shall be the duty of the prothonotary of any court of record, within this Commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney at law, or other person to confess judgment, to enter judgment against the person or persons, who executed the same

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tially a warrant of attorney to confess judgment authorizes the creditor to appear on behalf of the debtor and have the clerk of courts enter judgment against the debtor.¹⁴ In addition to authorizing a confession of judgment, a debtor may also waive personal allowances which are exempt from execution,¹⁵ procedural defects,¹⁶ and the right to appeal from such procedural defects.¹⁷

When a consumer purchases an item under a retail installment contract, he agrees to pay a certain portion of the principal plus interest for a stipulated period of time. This is often all the consumer knows. Even if the consumer were to read the contract, it is highly doubtful he would understand its legal phraseology. In *Swarb v. Lennox*, after reading a confession of judgment clause which she had previously signed, a witness testified that she could not understand, nor could she explain, its meaning.¹⁸ Should the consumer question the meaning of such a clause, he is simply told it is a "judgment note,"¹⁹ and if he

for the amount, which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing, on which the judgment may be founded, which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court, and in term time; and the defendant shall not be compelled to pay any costs, or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid.

14. A confession of judgment clause, appearing in note 14 of *Swarb v. Lennox*, 314 F. Supp. 1091, 1097 (E.D. Pa. 1970) provided that:

Each buyer and co-buyer, jointly and severally, hereby authorize and empower the Prothonotary, Clerk or any attorney, of any court of record within the United States or elsewhere, at any time, to appear for each buyer and co-buyer and to confess judgment as often as necessary against each buyer and of co-buyer and in favor of the holder, as of any term, with or without declaration filed for such sum or sums as may be payable hereunder with the cost of suit with 20 per cent added as attorney's fees. With respect to any judgment and exemption under any law now or hereafter in force [sic*], and each hereby agrees that real estate may be sold under a writ or execution and voluntarily condemns the same and authorize the Prothonotary or Clerk to enter said condemnation of such writ; and each buyer and co-buyer agrees that a true copy hereof, verified by affidavit made by the holder or someone acting on its behalf, may be filed in such proceeding in lieu of filing the original as warrant of attorney, any rule of court, custom to practice to the contrary notwithstanding. Any judgment entered hereon or of any prior note for which the note is in whole or in part mediately or immediately renewal shall be secured, security for the payment hereof and of any future note which is in whole or in part mediately or immediately renewal hereof.

* It would appear that a clause was left out where the buyer waived any exemption laws.

15. PA. STAT. ANN. tit. 12, § 2161 (1967) created a \$300 exemption from execution, however, *Bowyer's Appeal*, 21 Pa. 210 (1853) held that the judgment-debtor must elect to take advantage of the statute and it could be waived.

16. *Hazlewood Savings & Trust Co. v. Zahniser*, 78 PRR. L.J. 332 (Pa. C. P. 1929).

17. *Consumers Mining Co. v. Chatak*, 92 Pa. Super. 17 (1927).

18. 314 F. Supp. 1091, 1097 (E.D. Pa. 1970). See the testimony of Mrs. Doris Mims who read and signed the confession of judgment clause appearing in note 14.

19. *Id.* See the testimony of Mr. Casnoff, an officer in a consumer finance company.

were to ask for an explanation, he would be told that this clause of the contract allows the creditor to sue the debtor if the debtor were to default in his monthly payments. It becomes obvious the consumer never knows the true ramifications of such a clause.²⁰

By signing a contract containing such a clause, the debtor authorizes an attorney, chosen by the creditor, to enter an appearance before the court on behalf of the debtor, thereby giving the court personal jurisdiction. The confession statute does not require that the defendant-debtor receive notice²¹ and would seem to be invalid under the rationale of *Wuchter v. Pizzutti*,²² where the Supreme Court held that a non-resident motorists long-arm statute was unconstitutional unless it contained a provision reasonably calculated to give actual notice to the defendant. This situation is easily circumvented by the defendant-debtor's express consent (versus implied consent as in *Wuchter*) to the jurisdiction of the court.²³ Some confession clauses even contain, as additional protection, an express waiver of notice. Such practice does not violate due process, as the Supreme Court of the United States recognized in *National Equipment Rental, Ltd. v. Szukhent*,²⁴ "[a]nd it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even waive notice altogether."²⁵

Having impliedly waived notice by authorizing a warrant of attorney, the defendant-debtor never has the opportunity to defend, though a valid defense may be available. Even where the debtor does not default, confession may be entered against him at any time under Pennsylvania's confession statute,²⁶ with enforcement of the judgment being held in abeyance until default.²⁷ Such practice is not followed if the creditor wants the note to be negotiable, since a "confession at any

20. *Id.* See the testimony of Thomas Veney, a detective with the Consumers Fraud Division of the Philadelphia County District Attorney's Office, who noted that after debtors learned the meaning of confessions of judgment clauses in contracts which they had signed, they expressed both shock and disbelief at the existence of such a clause and its legal meaning.

21. See confession of judgment statute, note 13; also *O'Hara v. Manley*, 140 Pa. Super. 39, 12 A.2d 820 (1940).

22. 276 U.S. 13 (1928).

23. EHRENZWEIG, *CONFLICT OF LAWS*, Part one: Jurisdiction and Judgments, § 27 at 89 (1962); GOODRICH, *CONFLICT OF LAWS*, § 73 at 121 (4th ed. 1964); LEFLAR, *AMERICAN CONFLICTS LAW*, § 26 at 46 (Stu. ed. 1968); *RESTATEMENT (SECOND) OF AGENCY*, § 81 (1957).

24. 375 U.S. 311 (1964).

25. *Id.* at 315.

26. See confession of judgment statute, note 13; also *Harwood v. Bruhn*, 313 Pa. 337, 170 A. 144 (1934).

27. *Shapiro v. Malarkay*, 278 Pa. 78, 122 A. 341 (1923).

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time note" is rendered nonnegotiable under Uniform Commercial Code § 3-112.²⁸ Though a defendant-debtor may be defenseless against the initial judgment, he may still avail himself of two remedies: a motion to strike and a petition to open the judgment.²⁹ A judgment can be stricken only if some irregularity appears upon the face of the record.³⁰ If no irregularities appear, the debtor's only recourse is to petition to open the judgment. A petition to open is an appeal in equity and in its discretion the court may open the judgment in order to allow a meritorious defense.³¹ The debtor must proceed on depositions,³² because these are the only bases for the court to make a factual determination as to whether the defense can be established at trial.³³ These two remedies presuppose that the defendant-debtor has sufficient time to move or petition the court³⁴ and has sufficient funds

28. UNIFORM COMMERCIAL CODE (1962 version) § 3-112. Terms and Omissions Not Affecting Negotiability.

(1) The negotiability of an instrument is not affected by

(d) a term authorizing a confession of judgment on the instrument if it is not paid when due;

(2) Nothing in this section shall validate any term which is otherwise illegal.

Id. Comment 2.

As under the original Section 5(2), paragraph (d) is intended to mean that a confession of judgment may be authorized only if the instrument is not paid when due, and that otherwise negotiability is affected. The use of judgment notes is confined to two or three states, and in others the judgment clauses are illegal and ineffective either by special statutes or by decision. Subsection (2) is intended to say that any such local rule remains unchanged, and that the clause itself may be invalid although the negotiability of the instrument is not affected.

29. *Miller v. Michael Morris, Inc.*, 361 Pa. 113, 63 A.2d 44 (1949) holding that these two remedies are not exclusive of one another or *res judicata*.

30. *Id.*

31. *Girard Trust Bank v. Remick*, 215 Pa. Super. 375, 258 A.2d 882 (1969).

32. *Kine v. Forman*, 404 Pa. 301, 172 A.2d 164 (1961).

33. *Girard Trust Bank v. Remick*, 215 Pa. Super. 375, 258 A.2d 882 (1969), which held sufficient facts must be pleaded to show the defense is meritorious and the defense can only be established at trial.

34. PA. R. Civ. P. 2958. Execution. Notice of Entry of Judgment

(a) Within twenty (20) days after the entry of judgment the plaintiff shall mail to the defendant, by ordinary mail addressed to the defendant at his last known address, written notice of the entry setting forth the date, the court, term and number and the amount of the judgment, and file with the prothonotary an affidavit of mailing of the notice. Failure to mail the notice and file the affidavit shall not affect the lien of the judgment.

(b) Within twenty (20) days after the entry of judgment the plaintiff may issue a writ of execution even if the notice has not yet been mailed and the affidavit of mailing has not yet been filed. The lien of any levy or attachment made pursuant to such a writ within or after the twenty (20) day period shall be valid. However, *no further proceedings may be had pursuant to such writ until twenty (20) days after the notice has been mailed and the affidavit of mailing has been filed.* (Italics added).

The court in *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970) after discussing this twenty day provision, summarily dismissed it as not affording the defendant-debtors enough time to obtain counsel and prepare a motion to strike off or a petition to open the

to pay an attorney,³⁵ in addition to paying for the costs of depositions and Sheriff's costs incurred in staying execution. Often these additional expenses to the defendant-debtor preclude any such action.³⁶ The burden in these proceedings is placed upon the debtor and "is in direct contrast to the burdens in a normal or pre-judgment creditor-debtor action. In those cases instituted by a creditor against a debtor, the creditor is considered the proponent of a claim and the burdens are his."³⁷

The vast majority of judgment debtors earn marginal incomes.³⁸ The companies employing such clauses in their contracts justify their use as "convenience."³⁹ The creditor does not incur attorneys' fees or execution costs since the confession clause adds these costs into the total judgment.⁴⁰ Judgment need not wait in congested courts but is immediate. The companies argue that the vast majority of defaulting debtors have no valid defenses against collection, and were it not for the easy collection procedures offered by the use of confessions of judgment, consumer transactions with marginal income consumers would not be feasible.⁴¹ Since the default rate of these consumers is so high, the selling institutions would incur such high collection costs that transactions with these high-risk consumers would be virtually impossible. Consequently, the selling institutions argue, it is the marginal income consumer who benefits from confessions of judgment. These arguments ignore how the selling institutions conduct business with marginal income consumers in jurisdictions which have no confessions of judgment. In those jurisdictions the debtor signs a default clause

judgment. It is interesting to note that under PA. R. Civ. P. 1026, a defendant is only given twenty days after service of the complaint in which to locate an attorney and to draw up an answer—*something which the Swarb court failed to discuss at all.*

35. For the filing of a petition to open, the *Philadelphia Bar Association Minimum Fee Schedule* suggests attorneys' fees of \$150 and the *Allegheny County Bar (Pittsburgh) Minimum Fee Bill* suggests attorneys' fees of \$100 for drawing up a petition or motion and presenting it to the court.

36. A study by David Caplovitz, Ph. D., entitled *Consumers in Trouble* (1968), cited in *Swarb v. Lennox*, 314 F. Supp. 1091, 1097 (E.D. Pa. 1970), showed that of 245 judgment debtors in Philadelphia which were studied: 56 per cent had incomes below \$6,000, 18 per cent less than \$3,000, 12 per cent \$8,000—\$10,000, and 4 per cent exceeding \$10,000. These are what is termed low income or marginal income consumers and as can be seen do not have much of a capital outlay.

37. *Swarb v. Lennox*, 314 F. Supp. 1091, 1095 (E.D. Pa. 1970).

38. See Caplovitz, *Consumers in Trouble*, note 36.

39. Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit*, 29 U. CHI. L. REV. 111 (1961) in which the author undertook a comprehensive survey of the use of confessions of judgment by sending out questionnaires to numerous financial institutions.

40. See confession of judgment, note 14.

41. See Hopson, *supra* note 39.

providing for reasonable attorneys' fees and collection costs. Upon default the creditor files the complaint, and since the defaulting debtor usually has no defenses, he fails to enter an appearance even though served with notice. The creditor then obtains a default judgment and executes. An additional advantage is that this procedure of using default judgments avoids the difficulties which are often encountered in enforcing confessed judgments in foreign jurisdictions.⁴²

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The problem is simply that most consumers do not know nor do they understand what they are signing.⁴³ Some suggested remedies have ranged from declaring such contracts unconscionable,⁴⁴ to finding such procedure violative of the debtor's constitutional right to due process—failure to provide for notice,⁴⁵ to abolishing confessions of judgment because of their harshness and providing for garnishment procedures.⁴⁶ Recently in a class action, the United States District Court for the Eastern District of Pennsylvania, in *Swarb v. Lennox*⁴⁷ took a new approach. Though restricting its holding to judgment notes in leases and consumer financing transactions for individuals having incomes less than \$10,000, which in itself may be a violation of equal protection,⁴⁸ the court found that the Pennsylvania confession practice violates due process. Relying upon *Ohio Bell Tel. Co. v. Comm'n.*⁴⁹ and *Brookhart v. Janis*⁵⁰ the court quoted *Brookhart*:

There is a presumption against the waiver of constitutional rights, (citing cases) and for a waiver to be effective it must be clearly

42. *Id.* See *Atlas Credit Corp. v. Erzine*, 25 N.Y.2d 219, 303 N.Y.S.2d 382, 250 N.E.2d 474 (1969) which held that Pennsylvania's confession of judgment procedure was not a "judicial proceeding" within the meaning of the full faith and credit clause of the U.S. Constitution. See also 45 N.Y.U. L. REV. 367 (1970) for a critical analysis of the Erzine court's holding.

43. See footnotes 17, 18, and 19.

44. Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMPLE L.Q. 125 (1962); Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 73 DICK. L. REV. 115 (1968).

45. See Hopson, *supra* note 39; and Comment, *supra* note 44. The distinction should be drawn here in that these commentators felt that a defendant should always receive notice, whereas the *Swarb* case dealt with an unknowing waiver of the right to notice.

46. Comment, *Confessions of Judgment*, 102 U. OF PA. L. REV. 524 (1954).

47. 314 F. Supp. 1091 (E.D. Pa. 1970).

48. *Swarb v. Lennox*, 314 F. Supp. 1112 (E.D. Pa. 1970), *prob. juris. noted*, 401 U.S. 991 (1971), in which a motion to expand relief, from the first *Swarb* case, 314 F. Supp. 1091 (E.D. Pa. 1970), to include consumers earning more than \$10,000 was refused. See also 75 DICK. L. REV. 169 (1970) for a criticism of the *Swarb* case's \$10,000 limitation based upon equal protection.

49. 301 U.S. 292 (1937).

50. 384 U.S. 1 (1966).

established that there was "an intentional relinquishment or abandonment of a known right or privilege." (Citing cases).

In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver.⁵¹

The court concluded after examining the facts that the debtor-petitioners did not understand or know that by signing confession clauses they were waiving their right to notice prior to judgment.⁵² This right, being essential to the due process requirement of the fourteenth amendment of the United States Constitution, must be knowingly waived. Though restricting its holding to the unknowing waiver of the due process notice requirement, the court recognized the real problem—most consumers do not know, nor can they understand, what they are signing.⁵³

NEGOTIABLE INSTRUMENTS AND INSTALLMENT CONTRACTS

Negotiable instruments when transferred and installment contracts when assigned may give rise to the same constitutional argument which was raised against confessions of judgment. For the purposes of this comment, it is not necessary to distinguish between negotiable contracts and those which are nonnegotiable but can be assigned. As will become apparent, the same basic principles will apply with one exception and so the material which immediately follows is intended to serve only as a basis for an examination of the constitutionality of such contracts.

Negotiable Instruments and Installment Contracts— Practices and Problems

In order to qualify as a negotiable instrument, the contract must meet the requirements of § 3-104(1) of the Commercial Paper Article of the Uniform Commercial Code (hereinafter referred to as the U.C.C.) which has been adopted by all the states, except Louisiana. § 3-104 provides:

(1) Any writing to be a negotiable instrument within this Article must

51. 314 F. Supp. at 1100 citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966).

52. See notes 18 and 19 for parts of the relevant testimony.

53. See page 106 *infra*, for a more detailed discussion.

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- (a) be signed by the maker or drawer; and
- (b) *contain an unconditional promise* or order to pay a sum certain in money and no other promise, order, obligation or power or given by the maker or drawer except as authorized by this Article; and
- (c) be payable on demand or at a definite time; and
- (d) *be payable to order or to bearer.*⁵⁴ (Emphasis added.)

The words "payable to order or assigns of"⁵⁵ or "payable to bearer"⁵⁶ may be the only indication in the contract that it is negotiable. Even appearance of the words "Negotiable Instrument" on the face of the contract in bold type does not inform the consumer of the importance of negotiation. The retailer may negotiate the note to a finance company, who may qualify as a holder in due course under U.C.C. § 3-302(1).

A holder in due course is a holder who takes the instrument

- (a) for value; and
- (b) in good faith; and
- (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

By authorizing the negotiation, the consumer, in effect, waives some of his defenses, if the transferee qualifies as a holder in due course. Section 3-305 of the U.C.C. states that:

To the extent that a holder is a holder in due course he takes the instrument free from

- (1) all claims to it on the part of any person; and
- (2) all defenses of any party to the instrument with whom the holder has not dealt except
 - (a) infancy, to the extent that it is a defense to a simple contract; and
 - (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

54. UNIFORM COMMERCIAL CODE (1962 version), § 3-104(1).

55. Section 3-110 of the U.C.C. defines "payable to order" as:

(1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee.

56. § 3-111 of the U.C.C. defines "payable to bearer" as:

An instrument is payable to bearer when by its terms it is payable to

- (a) bearer or the order of bearer; or
- (b) a specified person or bearer; or
- (c) "cash" or the order of "cash," or any other indication which does not purport to designate a specific payee.

- (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
- (d) discharge in insolvency proceeding; and
- (e) any other discharge of which the holder has notice when he takes the instrument.

This doctrine of a holder in due course taking an instrument free of certain defenses of the debtor was first recognized at common law⁵⁷ and later in the Negotiable Instruments Law.⁵⁸ The distinction is made in types of defenses. Incapacity to contract, duress, fraud in the execution, and insolvency proceedings are considered "real" defenses and are valid against a holder in due course under U.C.C. § 3-305. Failure of consideration, breach of warranty, non-performance of a condition precedent, fraud in the inducement, and theft of the instrument are considered "personal" defenses and under U.C.C. § 3-306⁵⁹ are valid against anyone *except* holders in due course. The problem moves from the academic to reality when the consumer purchases a consumer item with a ninety day warranty against defects in parts or workmanship. In so purchasing, he signs a note promising to pay in installments which qualifies as a negotiable instrument. The retailer immediately discounts the instrument to a finance company. A few days after the purchase, the product breaks down, and the retailer refuses to repair it. The consumer then refuses to make additional installments on the promissory note until the retailer complies with the guarantee. Normally, the personal defense of breach of warranty would

57. Gill v. Cubitt, 3 B. & C. 466, 107 Eng. Rep. 806 (K.B. 1824).

58. NEGOTIABLE INSTRUMENTS LAW, § 57 (act withdrawn 1952). Rights of a Holder in Due Course. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

59. UNIFORM COMMERCIAL CODE (1962 version), § 3-306. Rights of One Not a Holder in Due Course:

Unless he has the rights of a holder in due course any person takes the instrument subject to

- (a) all valid claims to it on the part of any person; and
- (b) all defenses of any party which would be available in an action on a simple contract; and
- (c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and
- (d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

be a valid defense to a suit brought by the retailer. Since the note has been negotiated, however, this defense is no longer available to the consumer in a suit for collection brought by the finance company. The finance company qualifies as a holder in due course under U.C.C. § 3-302 in that it took the note in good faith, without notice of any defense and paid value for it. As a result, the consumer must pay the finance company, even though having a valid defense against the retailer.

The concept of "holder in due course" applies only to instruments which are negotiable. If the "promise to pay" contained in the contract is *conditional*, the contract is nonnegotiable.⁶⁰ This fact however, does not prevent the creditor from obtaining the effect of a negotiable instrument. The contract simply contains a clause stating that the consumer agrees not to assert any defenses, which he may have against the seller, against the assignee of the contract. Such agreements are valid and the assignee takes the contract free of any "personal" defenses, "real" defenses still being valid against the assignee.⁶¹ Thus, by virtue of such a clause, the assignee has, in effect, the same rights as a holder in due course. In the above fact situation, if the consumer had signed a nonnegotiable contract which contained such a clause, the same result would have prevailed. The consumer must pay the finance company, the assignee of the contract, even though having a valid defense against the retailer.⁶²

60. UNIFORM COMMERCIAL CODE (1962 version) § 3-104(1)(b). For purposes of this comment, it is not necessary to distinguish between those promises which are conditional, and those promises which are not. The U.C.C. has largely left to each individual jurisdiction that determination. As a result jurisdictions vary as to what constitutes an *unconditional promise to pay*. In *Webb and Sons, Inc. v. Hamilton*, 30 App. Div. 2d 597, 290 N.Y.S.2d 122 (1968) it was held that an agreement to pay within sixty days "from jobs now under construction" did not constitute an unconditional promise to pay. An even narrower approach was taken in *General Motors Acceptance Corp. v. Dewese*, 1 U.C.C. Rept. 204 (M.D. Tenn. 1963) where it was held §§ 3-201, 3-202, 3-401 are not applicable to conditional sales contracts since § 3-104(2) *expressly states* that only drafts, checks, certificates of deposit and notes are negotiable instruments.

61. UNIFORM COMMERCIAL CODE (1962 version) § 9-206(1). Agreement Not to Assert Defenses Against Assignee; Modification of Sales Warranties Where Security Agreement Exists.

(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

62. As can be seen, the concepts of holder in due course and assignee taking free of defenses are nearly identical, and hereinafter no effort will be made to distinguish them.

This does not leave the consumer remediless. He can always bring an action against the retailer under U.C.C. § 2-714⁶³ for breach of warranty, but in reality this is usually impractical. Thirty to forty per cent of any damages awarded will go to attorney's fees. In addition, the consumer will be compelled to pay some of the costs incident to litigation. As a result, the net damages awarded to the consumer do not cover his actual loss, and the inner satisfaction of winning a case is small recompense compared to the time and trouble experienced. Unless the stakes are high, either financially or in principle, few consumers will avail themselves of any remedies they may have against the retailer.

Courts and commentators have long recognized the problems presented by allowing holders in due course and assignees of contracts containing a waiver of defense clause a protected status against personal defenses and the harsh results upon the consumer. It has only been recently that in certain situations this protected status has been stripped away. One approach suggests that such installment contracts are by their very nature "adhesive," and courts should declare them unconscionable and deny enforcement under the broad language of U.C.C. § 2-302.⁶⁴ Even before the adoption of the Uniform Commercial Code, courts begin to recognize what has been termed the "close connectedness" doctrine—the possible existence of a close relationship between the seller and the finance company. In *Commercial Credit Corp. v. Orange County Machine Works*,⁶⁵ where the plaintiff finance company advanced money to the seller to finance the transaction and otherwise advised the seller, the California Supreme Court decided that:

When a finance company actively participates in a transaction of this type from its inception, counseling and aiding the future vendor-payee, it cannot be regarded as a holder in due course of

63. UNIFORM COMMERCIAL CODE (1962 version) § 2-714(1). Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

64. Shuchman, *supra* note 44. UNIFORM COMMERCIAL CODE (1962 version) § 2-302(1). Unconscionable Contract or Clause.

(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.

65. 34 Cal. 2d 766, 214 P.2d 819 (1950).

Comment

the note given in the transaction and the defense of failure of consideration may properly be maintained.⁶⁶

In *Unico v. Owen*,⁶⁷ the New Jersey Supreme Court held that a partnership formed for the purpose of financing a seller of consumer goods, which exercised extensive control over the seller's entire business operations, could not avail itself of the protected status of a holder in due course with respect to notes assigned to the partnership by the seller. Aside from the cases representing the "close connectedness" doctrine, there is authority that the test should be the finance company's lack of good faith.⁶⁸

These approaches afford some relief to the consumer, but all deal either with the finance company-seller relationship or look purely at the finance company's conduct. None of these approaches look to the consumer and his defenses. Some recent legislation has taken a different approach and requires that the assignee of a retail installment contract notify the consumer of the assignment and allow the consumer a specified period of time in which to assert any defense, real or personal, against the enforcement of the contract.⁶⁹ If the assignee is notified of the defense, he has *actual notice* and cannot qualify as a holder in due course under U.C.C. § 3-302 (1) (c),⁷⁰ or as an assignee taking free of "personal" defenses under U.C.C. § 9-206 (1).⁷¹ Such statutes may remedy some of the consumers' problems, but they are not the solution. Of what avail is a statute which allows the consumer to assert personal defenses against an assignee for a period of forty-five days after assignment; when the note is assigned by the seller the day following the sale, and the product sold, having a ninety day guarantee, proves defective sixty days after purchase? By extending the length of time beyond the period of the warranty, the assignee may never acquire the protected status to which he is entitled.

66. *Id.* at 771, 214 P.2d at 822.

67. 50 N.J. 101, 232 A.2d 405 (1967).

68. *Davis v. Commercial Credit Corp.*, 87 Ohio App. 311, 94 N.E.2d 710 (1950). See Littlefield, *Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test*, 39 S. CAL. L. REV. 48 (1966). These authorities suggest that rather than look for bad faith in each case, as the "close connectedness" cases did, the better approach is to look to the holder's relationship with all sellers, not just the one in question and also to look to all the holder's transactions and not just the one in question.

69. PA. STAT. ANN. tit. 69, § 1402 (Supp. 1971) which allows a consumer 45 days after notice of assignment of a retail installment contract to assert personal defenses against the assignee. See also PA. STAT. ANN. tit. 73, § 500-208 (Supp. 1971) which allows the consumer 15 days for home improvement installment contracts.

70. See UNIFORM COMMERCIAL CODE (1962 version) § 3-302(1)(c) at page 101; Comment, *The Pennsylvania Goods and Services Installment Sales Act*, 12 VILL. L. REV. 643 (1967).

71. See note 6.

Indeed, there is nothing wrong with the protection afforded holders in due course or assignees of contracts containing waiver of defense clauses, so long as the consumer realizes that his personal defenses will be cut off by the transfer or assignment and agrees to it. It becomes obvious that such statutes cannot strike a balance between protecting transferees or assignees and the personal defenses of consumers without destroying one or the other.⁷² It would seem that legislation along this line is not the solution—the problem still remains.

A Violation of Due Process

The problem, as presented in the commercial setting is that most consumers do not know what they are authorizing. Well over ninety per cent of consumer contracts are standard form agreements, unilaterally drafted, which have been generally described as “adhesive.”⁷³ No adequate explanation of the contract’s terms or ramifications is made to the consumer.⁷⁴ Invariably sellers refuse to allow unsigned contracts to be removed from the business premises which, in turn, would enable the consumer to obtain knowledge of the contract’s terms. In some cases the seller may even refuse to allow the consumer to inspect the contract before it is signed.⁷⁵ Obviously an attorney cannot offer good advice without first seeing the contract. It becomes apparent that the consumer cannot avail himself of an attorney’s advice without the contract, even if he could afford to visit an attorney every time he signed an installment contract. In simple terms, most consumers do not understand nor can they be expected to understand what they are signing. The *Swarb* case recognized the problem and dealt with it on a constitutional level—that the confession-debtors did not knowingly waive their constitutional rights of due process. The same argument made in *Swarb* can be made for the protection of the consumer who unknowingly authorizes the transfer of his note or assignment of his contract containing a clause waiving defenses.

72. An example of a statute where the protected status has been destroyed altogether is PA. STAT. ANN. tit. 69, § 615 G. (1965) which states:

No installment sale contract shall require or entail the execution of any note or series of notes by the buyer, which when separately negotiated, will cut off as to third parties any right of action or defense which the buyer may have against the original seller.

73. See Shuchman, *supra* note 44, at page 128.

74. *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), see the testimony of Thomas Veney, *supra* note 20.

75. See Shuchman, *supra* note 44 citing insurance policies as the most flagrant example,

Comment

The similarities between confessions of judgment and installment contracts are striking. In the former, the debtors did not know what they were authorizing. They may have had valid defenses against actions brought by the creditors, but the unilateral act of the creditors (confessing judgment) rendered the defenses worthless.⁷⁶ In the assigned installment contract situation, again consumers do not know what they are authorizing. They may have a valid defense against actions brought by the seller-creditors, but the unilateral act of the seller-creditor (transfer or assignment) renders any personal defenses worthless as to a suit brought by the transferee or assignee.

It should be noted at this juncture that the *Swarb* case restricted its holding to the unknowing waiver of notice, but the court also found:

[T]here was no intentional waiver of a known right by the members of the above class in executing the confession of judgment clauses. The evidence indicates that *the debtors did not fully understand the rights which they were relinquishing by signing these notes, that is, the right to have notice and an opportunity to be heard prior to judgment, the right to have the burden of proving default rest upon the creditor before their property could possibly be exposed to execution, and, finally, the right to avoid the additional expense of attorney's fees and costs incident to opening or striking off a confessed judgment under the above—described Pennsylvania procedure.*⁷⁷ (Emphasis added).

This language bears close scrutiny, for as can be seen, the court talks broadly in terms of due process rights. Due process rights may be categorized as either procedural or substantive. Notice and opportunity to be heard are procedural due process rights as recognized in *Powell v. State of Alabama*⁷⁸ where the United States Supreme Court stated:

It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. [T]he necessity of due process and an opportunity

where the insured does not receive the policy (contract) until after he has paid his premium.

76. See note 34, regarding the *Swarb* court's weak discussion of the judgment-debtors' defenses. It should be noted here that his weakness in *Swarb* in no way weakens the rationale for extending *Swarb* to negotiable contracts where, once the contract is assigned, the debtor has no personal defenses to raise by means of a petition to open as in the confessed judgment situation.

77. *Swarb v. Lennox*, 314 F. Supp. 1091, 1100 (E.D. Pa. 1970).

78. *Powell v. State of Alabama*, 287 U.S. 45 (1932).

to be heard is described as among the "immutable principles of justice which no member of the Union may disregard."⁷⁹

The *Swarb* court apparently recognized the "right to have the burden of proving default" and the "right to avoid additional expenses" to be substantive due process rights,⁸⁰ but restricted its holding specifically to the unknowing waiver of notice. Perhaps the strongest Supreme Court support for the *Swarb* holding can be found in *National Equipment Rental v. Szukhent*.⁸¹ That case involved a Michigan farmer who leased two incubators from the plaintiff-petitioners in New York. The contract designated the wife of one of the corporate lessor's officers as the lessee's agent for the purpose of accepting service of process. In a 5-4 decision, the majority, through Justice Stewart, stated: "We need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claims has been made."⁸² In a strong dissent, Justice Black presented the issue with which the *Swarb* court was confronted:

In effect the Court treats the provision as a waiver of the Szukhents' constitutional right not to be compelled to go to a New York court to defend themselves against the company's claims. This printed form provision buried in a multitude of words is too weak an imitation of a genuine agreement to be treated as a waiver of so important a constitutional safeguard as is the right to be sued at home. Waivers of constitutional rights to be effective, this Court has said, must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language. It strains credulity to suggest that these Michigan farmers ever read this contractual provision about Mrs. Weinberg and about "accepting service of any process within the State of New York." And it exhausts credulity to think that they or any other laymen reading these legalistic words would have known or even suspected that they amounted to an agreement of the Szukhents to let the company sue them in New York should any controversy arise. *This Court should not permit valuable constitutional rights to be destroyed by any such sharp contractual practices.* The idea

79. *Id.* at 64.

80. It is fortunate that the court restricted its holding to the unknowing waiver of notice, for if it had relied upon those heretofore unrecognized rights, which this court recognized as substantive due process rights, it would be a very weak decision subject to almost immediate reversal.

81. 375 U.S. 311 (1964).

82. *Id.* at 315.

that there was a knowing consent of the Szukhents to be sued in the courts of New York is no more than a fiction—not even an amiable one at that.⁸³ (Emphasis added).

The opportunity to be heard means the opportunity to present a defense.⁸⁴ The opportunity to be heard is implicit in the notice requirement of due process. Of what value is the opportunity to defend if the defendant never receives notice of a suit pending against him? And likewise, of what value is notice if the defendant is not able to defend? Notice and opportunity to defend are not distinguishable one from the other. A denial of one is tantamount to a denial of the other.⁸⁵ The *Swarb* case, therefore, stands for a much larger proposition than it would appear at first glance. The *Swarb* case, in recognizing the unknowing waiver of notice, a fortiori recognized the unknowing waiver of the opportunity to defend.⁸⁶

When a creditor, who qualifies as a holder in due course, or as an assignee of a contract containing a waiver of defenses clause, files suit against a defendant-consumer, the defendant-consumer is served with notice. He can make pleadings, file motions, and otherwise attack the plaintiff-creditor's case, but under U.C.C. § 3-305 and § 9-206, he cannot assert a defense if the only defenses available are "personal." In signing the contract authorizing assignment, the consumer has, in effect, waived his personal defenses against the transferee or assignee. The opportunity to be heard contains several essential elements, the denial of any one of which is unconstitutional as violative of due process.⁸⁷ If a court were to arbitrarily refuse to allow a defendant to assert what may constitute a valid defense, without question, it would be a violation of the opportunity to defend requirement of due process. There is no doubt but that a defendant may waive his constitutional rights,⁸⁸ but unless that waiver is knowingly made, it is

83. *Id.* at 332.

84. *Ray v. Norseworthy*, 90 U.S. 116 (1874) where the court, at 118, said: "No man is . . . to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded."

85. *Windsor v. McVeigh*, 93 U.S. 274 (1876) where the court reversed a trial court's refusal to allow a defendant in a civil action to enter a personal appearance. The court stated that the notice requirement is a nullity if the defendant is not afforded the opportunity to be heard.

86. This is further evidenced by the *Swarb* court's refusal to give any validity to the right of a judgment-debtor to petition the court to open judgment in order to allow a presentation of a meritorious defense. See note 34.

87. *Powell v. Alabama*, 287 U.S. 45 (1932), where a defendant was not permitted to have the assistance of counsel in his defense, thereby depriving him of the opportunity to defend in violation of the due process clause.

88. See EHRENZWIEG, GOODRICH, LEFLAR, *supra* note 23.

ineffective.⁸⁹ Granted this waiver is not effective until the note is assigned, but neither was the waiver of notice effective in the *Swarb* case until the note was confessed.

A state may validly legislate to create or abolish defenses,⁹⁰ and it may be argued that this is the effect of U.C.C. § 3-305 and § 9-206, merely a state regulation of defenses. This approach, however, ignores the issue which is presented. The problem encountered here concerns itself with the unknowing waiver of existing defenses. The consumer should be given the opportunity to make an intelligent and knowing choice: either sign a contract and waive his personal defenses against a subsequent transferee or assignee, or sign a contract which is non-negotiable or contains no waiver clause and retain all his defenses.⁹¹

It is submitted that the current practice of allowing a consumer to unknowingly waive his right to raise personal defenses is violative of due process and therefore unconstitutional. This does not mean that the protected status of holders in due course or assignees of contracts containing waiver of defense clauses is to be forever destroyed. On the contrary, it may be strengthened with little additional burden upon the finance companies. The ideal solution should insure the knowing waiver of the consumer, yet retain the protected status of transferees and assignees. This result can be achieved very easily. Section 3-307 of the U.C.C. deals with the burden of proof in establishing defenses and due course.⁹² Paragraph (2) states that after the authenticity of the instrument is established, the defendant can raise his defenses.⁹³ Once a personal defense is raised, the plaintiff-creditor, under paragraph (3),

89. *Brookhart v. Janis*, 384 U.S. 1 (1966).

90. *Anderson v. Carnegie Steel Co.*, 255 Pa. 33, 99 A. 215 (1916) which held that PA. STAT. ANN. tit. 77, § 41 (1952), Pennsylvania's Workmen's Compensation Act, which abolished the defenses of contributory negligence and assumption of the risk and the fellow servant rule, did not violate deprivation of property without due process of law.

91. This perhaps ignores the realities and assumes that the seller will bargain in such a manner. But even where the consumer has the choice of signing a negotiable instrument or "no deal," when he knowingly chooses, procedural due process is met.

92. UNIFORM COMMERCIAL CODE (1962 version) § 3-307. Burden of Establishing Signatures, Defenses and Due Course:

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue

(a) the burden of establishing it is on the party claiming under the signature; but

(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

93. *Id.* subsection (2).

then has the burden of proving his protected status.⁹⁴ If the plaintiff meets his burden, the personal defenses are invalid as against him. The solution to the problem is to impose an additional burden upon the plaintiff-creditor—that of proving that the defendant-consumer knowingly waived his constitutional rights. This is what the *Swarb* court required of its creditor-respondents.⁹⁵ In practice, the defense of an unknowing waiver of personal defenses would always be available to the defendant-consumer, and once raised, the burden of proving knowledgeable waiver would rest upon the plaintiff-creditor.

This solution does not ignore realities. In practice, a finance company deals with a steady clientele of sellers and retailers. Rarely is a negotiable instrument assigned more than once, so the finance company usually personally knows the original seller. Often, in order to acquire the status of a holder in due course, finance companies will turn their heads so as not to see obvious abuses by sellers. By imposing this additional burden upon finance companies, not only will they take note of obvious abuses, but they will also take steps to insure that there is always a knowing waiver on paper they buy. Indeed, if the financial institutions wish to preserve their protected status, they will cooperate or lose the status altogether.

CONCLUSION

The *Swarb* case and the various commentators offer ample evidence that most consumers do not understand, nor are they afforded the opportunity to learn, what they are signing. Despite its various shortcomings, the approach of the court in the *Swarb* case was refreshing because it recognized the problem and alleviated it. By applying the holdings of the Supreme Court that there is not a presumption that a person acquiesces in the waiver of his constitutional rights, the *Swarb* court held the confession of judgment practice to be violative of due process.

The consumer is now protected from confessions of judgment, but he is still left unprotected when it comes to negotiable instruments or assignable contracts. “[The Supreme] Court should not permit valuable constitutional rights to be destroyed by such sharp contractual

94. *Id.* subsection (3).

95. The *Swarb* cases established a hearing for all those confessions of judgment already entered, the burden to prove a knowing waiver by the consumers was to rest upon the plaintiff-creditors.

practices."⁹⁶ This statement by Mr. Justice Black in *National Equipment Rental v. Szukhent*⁹⁷ recognizes the constitutional dimensions of contracts. It should make no difference what form the contract takes; be it an instrument that when negotiated to a holder in due course waives the drawer's personal defenses, or be it a contract that when assigned also waives such defenses. Likewise, it should make no difference what constitutional right is waived, if indeed any distinction *can* be made between notice and opportunity to defend. *All that is important is that the constitutional right be knowingly waived.*

It is submitted that by following the approach suggested in this comment, finance companies would earn their protected status by policing the practices of retailers. Failure to do this would result in the loss of this protected status.

Most importantly, this approach would protect the consumer by allowing him to make a *knowing and intelligent choice. Is that not what the Constitution is all about?*

JOHN C. REED

96. *National Equipment Rental v. Szukhent*, 375 U.S. 311, 333 (1964).

97. *Id.* taken from Justice Black's dissenting opinion.