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Do Electronic Signatures Render Cognovit or Confession of Judgement Provisions Ineffective?

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With almost every state adopting the Uniform Electronic Transaction Act (UETA)¹ and the federal government enacting the Federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7000, et seq.) (E-SIGN), the acceptance of electronic signatures has grown steadily in the past 20 years. The effects of the coronavirus pandemic accelerated such acceptance into hyper-drive such that electronic signatures are commonplace in some industries. Even financial institutions, and the lending industry in general, who were just starting to dip their toes into the waters of electronic signatures prior to the pandemic, quickly set aside their hesitation and started accepting electronic signatures in certain instances. However, there remains a strong and general apprehension on the part of most lenders to accept electronic signatures on promissory notes – particularly promissory notes containing cognovit or confession-of-judgment provisions.

A cognovit note or a note containing a confession-of-judgment, like any note, is a legal instrument that evidences a debt. However, a note with a cognovit or confession-of-judgment provision provides the holder/creditor with an extraordinary remedy; upon default or maturity, such a note permits the holder to obtain an immediate judgment against the borrower without providing any notice or an opportunity to contest the judgment. Due to their power and severe consequences, cognovit or confession-of-judgment provisions are prohibited in most states, and if they are allowed, they are subject to exacting statutes. For instance, Ohio Revised Code § 2323.13(D) provides that for the cognovit feature to be effective, either immediately below or immediately above the maker's signature, a specific warning block (cognovit warning block) must appear "more clearly and conspicuously" than any other text within the document. Further, Ohio courts are exacting in enforcing this provision. Even if the cognovit warning block is on the signature page and is the most conspicuous text on the page, if it does not appear immediately below or above the signature block, Ohio's

statutory requirements are not met. In such instances, the note will remain a valid debt instrument, but courts will not permit the creditor to utilize the cognovit feature.

In addition to providing specific requirements for the document itself, the cognovit statutes include provisions governing how such documents should be presented to the court when seeking a judgment. Typically, most statutes provide that the original or a copy of the original instrument must be presented to the court or filed with the clerk; generally courts need to inspect the instrument to ensure statutory compliance and execution. *See, e.g.* ORC § 2323.13(A); Md. Rule 2-611; MCLS § 600.2906; 231 Pa. Code § 2951. Nevertheless, despite most statutes providing that copies of the original note are sufficient, many courts expect to examine the original note with an original “wet ink” signature in order to verify that the plaintiff/presenting creditor is the holder of the note. In fact, various guidance followed by courts or provided by courts to counsel with respect to obtaining a cognovit judgment or confession-of-judgment indicate that the original note should be presented to the court or the clerk. For example, a cognovit judgment checklist published by the Ohio Judicial Conference lists the presentation of the original note as a requirement.² Similarly, in Virginia, a number of circuit court clerks’ websites provide that the original note is a required document when seeking a confession-of-judgment.³ Often, even if a court is silent on the presentation of the original note, there is a longstanding expectation that the original note will be presented. Further, some courts or clerks have a process that “requires” them to stamp the note to indicate that judgment has been awarded. Given courts’ prior, longstanding expectation of inspecting an original, “wet ink” note, coupled with guidance and procedures that reinforce this expectation, will lenders – and more importantly judges – accept electronic signatures on promissory notes with cognovit or confession-of-judgment features?

Both UETA and E-SIGN provide that a signature may not be denied legal effect or enforceability solely because it is in electronic form – provided certain conditions are met. For example, if an applicable law requires that an agreement be in writing (e.g., statute of frauds), UETA and E-SIGN impose additional terms requiring that the parties must be able to retain and later retrieve accurate versions of the agreement. Similarly, UETA and E-SIGN provide that the parties must affirmatively consent to the use of electronic signatures.⁴

Currently, 49 states (including the District of Columbia, Puerto Rico and the Virgin Islands) have adopted some form of UETA.⁵ Congress passed E-SIGN in 2000, in part, to preempt state laws that were inconsistent with the general principles of UETA. While a state may modify, limit or supersede the UETA, it may only do so if (a) the state has adopted a version of UETA as approved by the National Conference of Commissioners on Uniform State Laws, (b) the state law is not inconsistent with E-SIGN and (c) the law is technologically neutral.

In determining whether electronic signatures may be acceptable for cognovit or confession-of-judgment notes, first one must determine if any note may be signed electronically. While UETA and E-SIGN are credited with helping to bring electronic signatures into the mainstream, they do not govern whether an electronic signature on a promissory note is valid. In fact, the scope of the UETA and E-SIGN excludes many transactions governed by the Uniform Commercial Code.⁶ However, some states have modified statutes that provide for electronic signatures on loan documents. For example, ORC § 1303.41 provides that signatures may be made manually or “by device or machine.” Other states have provided for similar provisions.⁷

Once it is determined that electronically signed notes are permissible in the subject jurisdiction, the next step is to establish whether a cognovit or confession-of-judgment feature would remain effective if a note is signed electronically. Most state statutes have not been revised to specify outright whether electronic signatures compromise the confession-of-judgment/cognovit feature of a note. Thus, it is left for the courts to interpret existing statutes and to determine whether to enforce a cognovit or confession-of-judgment provision when a note is signed electronically. Some state courts have already addressed this issue. For example, a Pennsylvania court upheld the validity of a choice of law confession-of-judgment clause that was executed electronically. The court specifically noted that “the warrant of attorney was conspicuously stated in the agreement, and appellant’s electronic signature appears directly below it.” *RideSafely.com, Inc. v. Thiam*, 2015 Pa. Super. Unpub. LEXIS 1818, 122 A.3d 1136. Other states – like Ohio – lack not only a statute on point but also a judicial ruling that would provide a lender or its legal counsel guidance as to whether an electronic signature would impair a note’s cognovit feature. A literal reading of the applicable Ohio statutes indicates that courts should enforce a cognovit feature if a note was signed electronically. First, both the UETA and E-SIGN provide that a document should not be without legal effect solely because of its electronic form.⁸ Second, Ohio has adopted a statute that allows for electronic signatures on loan documents. ORC §1303.41. Third, nothing in the statutory provisions governing cognovit notes and contracts require that an original, “wet ink” signature be provided prior to a judgment being awarded. Rather, it just requires a signature.⁹ If the applicable law requires a signature on a cognovit note, then an electronic signature should satisfy the law. [ORC §1306.06(D)]. However, given prior guidance offered to Ohio courts that indicates that an original note with a “wet ink” signature be produced and procedures that require the clerk’s office to stamp the judgment on the face of the note – despite the statute only requiring that a copy be produced – there is no guarantee that an Ohio court seeing a cognovit note with an electronic signature for the first time will award a cognovit judgment. Absent an unambiguous statute or authoritative guidance, some courts may be hesitant to enforce a cognovit provision or confession-of-judgment when the note is signed electronically.

In sum, electronic signatures have become prevalent in a number of settings and accepted in most industries – including financing. However, lenders still need to remain cautious when accepting electronic signatures on instruments containing a cognovit or confession-of-judgment provision. Absent a statute directly on point or a court ruling that binds the applicable jurisdiction, lenders may find it difficult to enforce a cognovit or confession-of-judgment provision without being able to produce an original, “wet ink” signature to the court.

¹ Surprisingly, New York is the only state that has not adopted the UETA. See Matthew R. Slaughter, *Using Electronic Contracts and Signatures While Social Distancing*, American Bar Association (Sept. 29, 2020), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/using-electronic-contracts-and-signatures-while-social-distancing/>. See also Uniform Electronic Transactions Act, 2021 Bill Text IL S.B. 2176.

² See *Cognovit Judgments*, <http://www.ohiojudges.org/Document.ashx?DocGuid=e3c39a5e-89d9-4655-ada9-1822b4777df1>

³ See, e.g., Confession-of-judgment, Arlington Virginia, <https://www.arlingtonva.us/Government/Departments/Courts/Confession?BestBetMatch=confession%20of%20judgment|d2f86bd7-6525-489c-b1eb-fbe9efd2bbfb|6244aa32-b2d4-441b-b20e-1096256a4671|en-US>; see also Confession-of-judgment, Loudoun County, Virginia, <https://www.loudoun.gov/2141/Confession-of-Judgment>.

⁴ It should be noted that this article does not focus on the UETA's and E-SIGN's specific requirements, particularly demonstrating consent and providing access to the electronically signed document. Accordingly, prior to accepting electronic signatures, parties need to assess and ensure compliance with E-SIGN and applicable state law.

⁵ See Matthew R. Slaughter, *Using Electronic Contracts and Signatures While Social Distancing*, *American Bar Association* (Sept. 29, 2020); see also 2021 Bill Text IL S.B. 2176; D.C. Code Ann. §28-4901; 11 V.I.C. § 101; and 10 L.P.R.A. § 4081.

⁶ See Unif. Electronic Transactions Act Prefatory Note (noting that “The exclusion of specific Articles of the Uniform Commercial Code [from the UETA] reflects the recognition that, particularly in the case of Articles 5, 8 and revised Article 9, electronic transactions were addressed in the specific contexts of those revision processes.”); see also 15 U.S.C. § 7003(a)(3).

⁷ See e.g., 13 Pa. Code 3401; Md. Code 3-401. Because not all state legislatures have modified the relevant statutes to permit the endorsement of a promissory note by electronic means, Lenders should review the applicable state law before accepting an electronic signature on a note.

⁸ U.E.T.A. § 13 (1999); 15 U.S.C. § 7001(a)(1).

⁹ See ORC § 2323.13(D).