

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 93-3

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WITHDRAWN BY OPINION 2014-3 ON AUGUST 8, 2014

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is proper under Ohio's Code of Professional Responsibility for an attorney to sign an answer confessing judgment against a debtor pursuant to a warranty of attorney in a cognovit note when requested to do so by a creditor's attorney provided that the confession of judgment is not in violation of applicable law.

It is improper under Ohio's Code of Professional Responsibility for a creditor's attorney to confess judgment pursuant to a warranty of attorney in a cognovit note, unless the warrant of attorney contains an express waiver of conflict of interest or specifies that the creditor's attorney may confess judgment.

It is improper under Ohio's Code of Professional Responsibility for an attorney to accept a legal fee from a creditor for confessing judgment pursuant to a warranty of attorney contained within a cognovit note, unless the warrant of attorney contains express consent by the debtor that the confessing attorney may receive a legal fee from the creditor.

OPINION: This opinion addresses the propriety of an attorney confessing judgment pursuant to a warrant of attorney in a cognovit note. The questions are set forth below.

1. Is it proper under Ohio's Code of Professional Responsibility for an attorney to sign an answer confessing judgment against a debtor pursuant to a warranty of attorney in a cognovit note when requested to do so by a creditor's attorney?
2. Is it proper under Ohio's Code of Professional Responsibility for a creditor's attorney to confess judgment pursuant to a warranty of attorney in a cognovit note?
3. Is it proper under Ohio's Code of Professional Responsibility for an attorney to accept a legal fee from a creditor for confessing judgment pursuant to a warranty of attorney contained within a cognovit note?

Op. 93-3

Question One

A cognovit note is a written instrument signed by a debtor authorizing an attorney to confess judgment against the debtor if the obligations within the note are not met. By signing a cognovit note containing a warranty of attorney to confess judgment, a debtor consents in advance to a creditor obtaining a judgment against the debtor without notice or hearing.

The validity of such extraordinary notes is acknowledged by Ohio statute. See Ohio Rev. Code Ann. § 2323.13 (Baldwin 1990). However, the Ohio legislature prohibits the use of cognovit notes in consumer loans or consumer transactions, in rental agreements, and in home solicitation sales contracts. See Ohio Rev. Code Ann. § 2323.13 (E) (Baldwin 1990), § 1345.23 (D) (Baldwin 1988), § 5321.13 (B) (Baldwin Supp. 1992). The use of cognovit notes is also acknowledged by past and present case law. See First National Bank of Findlay v. Trout, 58 Ohio St. 347, 353 (1898) (stating that the use of judgment notes in Ohio is inveterate), Patton v. Diemer, 35 Ohio St. 3d 68 (1988) [interpreting Ohio Rev. Code 2323.13 (A) and (E)], Shore West Construction Co., v. Sroka, 61, Ohio St. 3d 45 (1991) [interpreting Ohio Rev. Code 2323.13(E)].

The constitutionality of a cognovit note as authorized by Ohio Revised Code §2323.13 was challenged as to due process, but was upheld by the Supreme Court in D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). In Overmyer, the Supreme Court held that the debtor in the execution and delivery to the creditor of the note containing a cognovit provision, "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to pre-judgment notice and hearing, and that it did so with full awareness of the legal consequences." Id. at 187. An Ohio appeals court has held that a local court rule requiring notice and hearing is in conflict with Ohio Rev. Code §2323.13. Fogg v. Friesner, 55 Ohio App. 3d 139, 140 (Ct. of App. Wood County 1988).

Section 2323.13 (A) (Baldwin 1990) of the Ohio Revised Code requires that "[a]n attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession." Under Section 2323.13 (D) (Baldwin 1990) courts are without authority to render judgment based upon such a warrant unless the warrant of attorney contains the following language:

Warning--By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.

Thus, in Ohio a confessing attorney must produce a warrant of attorney in order to confess judgment on a cognovit note. The warranty of attorney must include a warning as to the rights being relinquished.

The Board notes that the Illinois State Bar Association has advised that "A lawyer may act as attorney of record in a confession of judgment proceeding without consulting the debtor, providing

Op. 93-3

the confession of judgment is not in violation of applicable law." Illinois State Bar Ass'n, Op. 88-1 (1988). The Illinois opinion was affirmed by the Illinois State Bar Association Board of Governors in January 1991.

The requester is concerned with whether the confessing attorney fails to fulfill his or her duty to represent a client zealously under Disciplinary Rule 7-101 of the Code of Professional Responsibility by confessing judgment against a debtor whom the attorney may never have met. The Board acknowledges the uniqueness of the act of confessing judgment pursuant to a warranty of attorney in a cognovit note, but does not find such act to be a violation of Disciplinary Rule 7-101 for several reasons. The confessing attorney is serving as an officer of the court with statutory authority to confess judgment. The confessing attorney through the warrant of attorney has the written authority of the debtor to confess judgment. The warranty of attorney limits the attorney's responsibilities to the act of confession which was consented to and authorized by the debtor with knowledge of the rights being relinquished.

In conclusion, it is the Board's advice that it is proper under Ohio's Code of Professional Responsibility for an attorney to sign an answer confessing judgment against a debtor pursuant to a warranty of attorney in a cognovit note when requested to do so by a creditor's attorney provided that the confession of judgment is not in violation of applicable law.

Question 2

In considering the question of whether it is proper under Ohio's Code of Professional Responsibility for a creditor's attorney to confess judgment pursuant to a warranty of attorney in a cognovit note this Board notes that several courts have not found fault with such practice. See Northern Ohio Tractor, Inc. v. Richardson, 8 App 3d. 171, 173-74, (Ct. App. Summit County 1982) (plaintiff's attorney may confess judgment on behalf of the defendants), Hadden v. Rumsey Products, Inc., 196 F. 2d 92, 96 (2d Cir. 1952) (construing Ohio statute--the fact that the holder's attorney confessed judgment without informing the court that the signers had asserted defenses was not a fraud on court).

It can be argued that when a creditor's attorney confesses judgment on behalf of a debtor there is a conflict of interest that would be prohibited under Disciplinary Rule 5-105 (A) and

(B). However, under Disciplinary Rule 5-105 (A) and (B) conflict of interest may be waived if the requirements of Disciplinary Rule 5-105 (C) are met. Disciplinary Rule 5-105 (C) provides that "[i]n the situations, covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he [she] can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his [her] independent professional judgment on behalf of each." Thus, this Board advises that it is improper under Ohio's Code of Professional Responsibility for a creditor's attorney to confess judgment pursuant to a warranty of attorney in a cognovit note, unless the warrant of attorney contains an express waiver of conflict of interest or specifies that the creditor's attorney may confess judgment.

Op. 93-3

Question 3

The final question is whether it is proper for an attorney to accept a legal fee from a creditor for confessing judgment pursuant to a warranty of attorney contained within a cognovit note. Disciplinary Rule 5-107 (A) (1) and (2) of the Code of Professional Responsibility places restrictions upon a lawyer accepting compensation from one other than the client.

DR 5-107(A) Except with the consent of his [her] client after full disclosure, a lawyer shall not:

- (1) Accept compensation for his [her] legal services from one other than his [her] client.
- (2) Accept from one other than his [her] client anything of value related to his [her] representation of or his [her] employment by his [her] client.

A lawyer should not accept legal fees from a creditor for confessing judgment on behalf of a debtor without the consent of the debtor. The statutory warning language in a warrant of attorney does not contain a consent by a debtor for a confessing lawyer to accept a legal fee from a creditor. In conclusion, the Board's opinion is that it is improper under Ohio's Code of Professional Responsibility for an attorney to accept a legal fee from a creditor for confessing judgment pursuant to a warranty of attorney contained within a cognovit note, unless the warrant of attorney contains express consent by the debtor that the confessing attorney may receive a legal fee from the creditor.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.