

# COGNOVIT JUDGMENTS

*The form of the cognovit note is governed by R.C. 2323.13.*

## CHECKLIST:

- Original Note produced and Complaint has copy of note attached as exhibit?
- Complaint includes statement regarding last known address of the defendant either in averment or within caption?
- At least one maker resides in jurisdiction or Note executed in jurisdiction where Complaint is filed?
- Note includes “warrant of attorney” with statutory language above or below signature?

*“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.”*

- The Note does not arise from a consumer transaction?
- Default consists of nonpayment on note, rather than default of other provision unrelated to payment?

## **IF ALL OF THE ABOVE CAN BE ANSWERED IN THE AFFIRMATIVE, THE COGNOVIT NOTE IS VALID AND CAN BE ENFORCED AGAINST THE DEBTOR.**

**Relief from a cognovit claim** must be requested pursuant to Civ.R. 60(B), with most jurisdictions requiring satisfaction of only the first and third prongs (*GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976)):

To prevail on a motion brought under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. **[The Third District Court of Appeals noted, without expressly adopting, the less stringent form of the GTE test adopted by all other jurisdictions.] Payment is a defense** against enforcement of the note *First Natl. Bank v. Freed*, 3d Dist. Hancock No. 2004-Ohio-3554 quoting *Advanced Clinical Mgmt., Inc. v. Salem Chiropractic Ctr., Inc.*, 5th Dist. Stark No. 2003CA00108, 2004-Ohio-120, ¶ 18.



## GUIDING CASE LAW:

- R.C. 2323.13 governs cognovit judgments, and proceedings must strictly adhere to the statutory requirements. *Lathrem v. Foreman*, 168 Ohio St. 186, 151 N.E.2d 905 (1958), paragraph one of the syllabus.
- There is a split among Districts as to whether copy of a note may be presented for the Court to reduce to judgment, but the majority of jurisdictions reject the interpretation of Fogg as misconstruing the statutory language, contrary to the holding in *Lathrem*. *Buzby v. Chamoun*, 8th Dist. Cuyahoga No. 100755, 2014-Ohio-4676, 22 N.E.3d 202; *Huntington Natl. Bank v. 199 S. Fifth St. Co., LLC*, 10th Dist. Franklin No. 10AP-1082, 2011-Ohio-3707; *Natl. Bank v. Gwinn*, 4th Dist. Athens No. 11CA20, 2012-Ohio-768. (cf. *Fogg v. Freiser*, 55 Ohio App.3d 139, 562 N.E.2d 937 (6th Dist. 1988))
- The complaint must be filed “where the maker or any of several makers resides or signed the warrant of attorney.” R.C. 2323.13(A). “[I]f judgment on the cognovit note is not obtained in the county where the maker resides or the county in which the cognovit note with warrant of attorney is executed, then the court is without subject matter jurisdiction and the cognovit judgment is void ab initio.” *B & I Hotel Mgmt., LLC v. Ditchman Holdings, LLLP*, 8th Dist. Cuyahoga No. 84265, 2004-Ohio-6294, ¶21 (citations omitted.)
- Where a defendant’s address is listed in the caption of the cognovit complaint, the requirement of assertion of the defendant’s last known address, pursuant to R.C. 2323.13(B), is satisfied. *BJ Bldg. Co. v. LBJ Linden Co.*, 2d Dist. Montgomery No. 21005, 2005-Ohio-6825; *Marion Steel Co. v. Moltrup Steel Prods. Co.*, 3d Dist. Marion No. 9-98-3, 1998 Ohio App. LEXIS 2298 (May 21, 1998).
- The warning language must be conspicuous and appear adjacent to the signature lines, “directly above or below the space or spaced provided for the signature of the makers[.]” *Klosterman v. Turnkey-Ohio, LLC*, 182 Ohio App.3d 515, 2009-Ohio-2508, 913 N.E.2d 993.
- Courts apply the six-year statute of limitations to promissory notes, including notes with cognovit provisions, pursuant to R.C.1303.16(A), finding the promise to pay embodied in the note creates a negotiable instrument. See *Brisk v. Draft Indus.*, 10th Dist. Franklin No. 11AP-233, 2012-Ohio-1311, ¶17 The inclusion of a warrant of attorney provision, moreover, does not impair the negotiability of the note. See *Watson v. Payne*, 25 Ohio St. 340, 346 (1874)
- Cognovit notes are not suitable for consumer transactions and cognovits for consumer transactions are prohibited. *Ist Natl. Fin. Servs. v. Ashley*, 10th Dist. Franklin No. 16AP-18, 2016-Ohio-5497, ¶22, quoting *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972). If a cognovit note originated with a loan or transaction for any consumer purpose, the court granting a cognovit judgment had no subject matter jurisdiction to do so, and the judgment is void. *Shore W. Constr. Co. v. Sroka*, 61 Ohio St.3d 45, 48, 572 N.E.2d 646 (1991).
- Because the statutorily required warrant of attorney references only nonpayment as triggering judgments by confession, no other type of default is contemplated under R.C. 2323.13. *Henry Cty Bank v. Stimmels, Inc.*, 3d Dist. Henry No. 7-12-19, 2013-Ohio-1607.
- Non-payment on the note may include failure to pay taxes, where the cognovit provisions specify non-payment of taxes as default under the note. *Henry Cty Bank v. Stimmels, Inc.*, 3d Dist. Henry No. 7-12-19, 2013-Ohio-1607; *Fifth Third Bank v. Pezzo Constr., Inc.*, 10th Dist. Franklin No. 11AP-251, 2011-Ohio-5064; *25400 Euclid Ave., LLC v. Universal Rest. Holdings, LLC*, 8th Dist. Cuyahoga No. 92905, 2009-Ohio-6467.
- Where there is more than one note between a creditor and debtor, the creditor may apply payments to any of the debts, absent an express agreement within the note or the debtor’s direction at time of payment. *Security Natl. Bank & Trust Co. v. Broock*, 2d Dist. Clark No. 3006, 1993 Ohio App. LEXIS 5098, \*9 (Oct. 20, 1993); see also *Reliance Universal, Inc. v. Deluth Constr. Co.*, 67 Ohio St.2d 56, 64, 456 N.E.2d 404 (1981)
- An attorney confessing judgment pursuant to a warrant of attorney under a cognovit provision represents only the creditor, and not the debtor. The attorney acts only as authorized by the note and the statute. *DiBenedetto v. Miller*, 180 Ohio App.3d 69, 2008-Ohio-6506, 904 N.E.2d 554 (1st Dist.), ¶ 15.
- “[B]y definition, cognovit notes cut off every defense, except payment, which the maker of the note may have against enforcement of the note.” Freed, 2004-Ohio-3554, ¶ 9, quoting *Advanced Clinical Mgmt., Inc. v. Salem Chiropractic Ctr., Inc.*, 5th Dist. Stark No. 2003CA00108, 2004-Ohio-120, ¶ 18.
- A defense other than “non-default” may support relief from the judgment. Freed, ¶ 9. Other recognized defenses include those that go to “the integrity and validity of the creation of the debt or note, the state of the underlying debt at the time of confession of judgment, or the procedure utilized in the confession of judgment on the note.” Freed, ¶ 10.