

**CONFESSIONS OF JUDGMENT -
THE GOOD, THE BAD AND THE UGLY**

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I. INTRODUCTION

A. Advantages

1. Potentially reduces court time and attorneys' fees.
2. Shifts burden of proof to debtor/tenant in his Petition to Open or Strike.
3. Locks in lien for priority purposes.
4. If plaintiff loses on technical or procedural grounds a lawsuit can still be filed against tenant/debtor.

B. Constitutionality

1. An entry of a judgment by confession is not, per se, unconstitutional, so long as debtor/tenant has knowingly, intelligently and voluntarily waived his rights to a pre-deprivation, or prompt, post deprivation, notice and hearing. Swarb v. Lennox, 405 U.S. 191 (1972); D.H. Overmayer Co., Inc. v. Frick Co., 405 U.S. 74 (1972);
2. Judgments by confession are prohibited in consumer transactions, i.e., where the funds or services are used primarily for personal, family or household purposes. Pa.R.C.P. 2950, Explanatory Comment. They are also prohibited in respect to residential leases executed by a person (as opposed to a corporate entity). Pa.R.C.P. 2970.
3. In Jordan v. Fox, Rothschild, O'Brien and Frankel, 20 F.3d 1250 (3rd Cir.1994), the court held that a landlord, and its attorneys, were now subject to a claim for damages pursuant to 42 U.S.C. Section 1983 if an execution of the tenant's assets pursuant to a warrant of attorney was performed when the tenant did not knowingly, intelligently and voluntarily waive his rights to a predeprivation, or a prompt post deprivation, notice and hearing.

C. 1996 revisions to Pennsylvania Rules of Civil Procedures Regarding Confessed Judgments Pa.R.C.P. 2950 et seq.

1. Substantive Changes

The new rules were drafted specifically in response to Jordan, supra. They aim to remedy the potential constitutional problems in the application (execution) of confession of judgment and execution procedure, while preserving the essential confession of judgment remedy. The new rules provide that creditors/landlords may proceed in either one of two ways when executing upon a confessed judgment for money or possession.

- (a) Landlord/creditor may confess judgment and serve notice upon debtor/tenant that he will file Praeceptum for a writ of execution or possession in

30 days (Pa.R.C.P. 2956.1(c)(2), 2958.1, 2964, 2973.2 and 2974.2), or

(b) Landlord/creditor may file a judgment and a Praecipe for writ of execution or possession simultaneously. However, creditors/landlords must also provide a separate notice informing debtor/tenant that he can file a petition to strike the judgment and obtain a hearing on the sole issue of whether debtor/tenant knowingly, intelligently and voluntarily waived his right to a prior notice and hearing before judgment was taken. This petition must be filed by debtor/tenant within 30 days after service. Once debtor/tenant files this petition, the court must hold a hearing on this sole issue within three (3) business days. All execution proceedings are stayed from the date debtor/tenant files the notice until the hearing, but the judgment and lien created thereby will still remain in effect. At the hearing, creditor/landlord has the burden of proof, by a preponderance of the evidence, that debtor/tenant knowingly, intelligently and voluntarily waived his rights to a prejudgment hearing. Pa.R.C.P. 2958.3, 2959(a)(3), 2966, 2967, 2973.3, 2974.3.

2. Which Option to Choose?

If the landlord/creditor chooses the first option, the element of surprise is taken away, as the debtor/tenant now has 30 days between notice of the execution, and that actual execution. Surprise is particularly valuable in a confession of judgment for money so that a debtor/tenant is deprived of the opportunity to hide his assets. However, even though the new rules were drafted to remedy due process problems, the constitutionality of the new rules has not yet been tested. As such, certain Sheriff's departments (Montgomery and Philadelphia counties, for example) generally will not execute until 30 days after notice has been provided to debtor/tenant to avoid potential post-Jordan liability, even though it has been over 15 years since the new rules became effective. Most attorneys will choose the 30 day notice option in an effort to insulate their clients and themselves from liability under 42 U.S.C.A. Section 1983. My approach is somewhat more aggressive: with certain exceptions (i.e., non-English speaking debtors/tenants), if I have a well drafted, post-Jordan warrant, I will not hesitate to use the second approach. Absent the Jordan language, I will usually choose the first option.

II. NEGOTIATING THE WARRANT OF ATTORNEY

- A. Evaluate your client's bargaining position.
- B. Compromises

1. Keep the confession of judgment for possession, take out the confession for money
2. Limit the amount of accelerated rent
3. Reduce the Attorneys' fees and costs
 - (a) Reduce percentage
 - (b) Limit to fees and costs incurred
 - (c) Add a minimum attorney fee
4. Remove warrant of attorney, or obtain other concessions, if debtor/tenant has performed for a certain period of time
5. Agree to wait 30 days after judgment filed before execution;
6. Agree to jurisdiction;
7. Etc.

III. DRAFTING THE WARRANT OF ATTORNEY

A. Elements

1. Court where judgment may be entered. As broad as possible. "...any Prothonotary, Clerk of Court as attorney of any Court of Record..." Make sure that this authority does not contradict a venue clause elsewhere in the document. This clause is enforceable. the Court in Midwest Financial Acceptance Corp. v. Lopez, 78 A.3d 614 (Pa. Super. 2013) held that the general venue terms of Pa.R.C.P. 1006 do not apply to judgments by confession. Procedures in confession of judgment are specifically defined by Pa. R.C.P. 2950 and Pa. R.C.P. 1006 only applies to "actions" as defined by Pa.R.C.P. 1001. Furthermore, Pa.R.C.P. 1003 permits the rules of venue to be waived by agreement of the parties. Ferrick v. Bianchini, 69 A.3d 642 (Pa. Super. 2013)
2. Notice. "...without prior notice...", or as little as possible. Check for conflicts with other notice provisions in the document.
3. Successive Judgments "Such authority shall not be exhausted by one exercise thereof..." A warrant may be used for successive judgments only if it authorizes multiple uses, and only for debt not confessed in prior judgment. Pa.R.C.P. 2953; Bank of Nanty Glo v. Schnabel, 139 A.2d 862 (Pa.1927); B. Lipsitz Company v. Walker, 522 A.2d_562 (Pa. Super. 1986). However, clause may not be used twice on the same debt, even if original Complaint struck on procedural grounds and even if authorized in warrant. Scott Factors v. Hartley, 228 A.2d 887 (Pa.

1990); Continental Bank v. Tuteur, 450 A.2d 32 (Pa.Super.1982); Kohl Building Products, Inc. v. Al-Joy, Inc., Cumberland L.J. (1998). But see PNC Bank, supra. This is a matter of substantive law, and cannot be modified by the language of the warrant of attorney. TCPF Limited Partnership v. Skatell, 976 A.2d 571 (Pa. Super.2009); B. Lipsitz, supra. In TCPF, supra, a landlord entered a judgment by confession involving its right to overdue rent for the entire balance of the unexpired term in the amount of \$65,196.91. Upon realizing that it had erred in its calculation of the amount as it had not included the amount due for another portion of the unexpired term, landlord filed a Motion to Amend Complaint to increase the amount of the judgment to \$203,420.45. The Superior Court affirmed the trial court's denial of the request. Even though a single warrant may be used to confess judgment on severable portions of the debt, the plaintiff in this case attempted to use it to collect on the same debt (the unexpired balance of the term), albeit in differing amounts. The court found that Pa. R.C.P. 1033, which allows for the amendment of pleadings, does not permit an amendment where it is against a positive rule of law.

There are exceptions to this rule. A warrant may be used for a successive judgment if the first judgment was mistakenly stricken by the trial court. Kwasnik v. Hahn, 615 A.2d 84 (Pa. Super. 1992), or if a stipulated order provides that the striking or opening of a judgment shall not preclude landlord from entering in second judgment on the same warrant, Atlantic National Trust, LLC, supra.

4. Attorneys Fees and Costs Usually a percentage of the debt (5%-20%, usually 10%-15%). There can be a minimum such as \$1000 or \$2500.00. Fees can be limited to those which are incurred. Attorney's fees, the warrant, even if a percentage, are valid. A fee of \$450,000.00, or 15% of the judgment was upheld as the provision was contained in the warrant. Rait Partnership, L.P. v E. Pointe Properties I, 957 A.2d 1275 (Pa. Super. 2008); See also Dillon Bank v. Northwood Cheese Co., 637 A.2d 309 (Pa. Super. 1994); Colony Federal Savings and Loan Association v. Beaver Valley Engineering Supplies Co., 361 A.2d 343 (Pa. Super. 1970). However, if the cognovit clause limits the fees to those which are "reasonable" the Court may modify the judgment to reduce the amount of attorneys' fees. See PNC Bank v. Bolus, 655 A.2d 997 (Pa. Super. 1995) (\$70,000.00 fee reduced to \$60,000.00) See also Colony Federal, supra; Faulke v. Hatfield Fair Grounds Bazaar, Inc. 173 A.2d 703 (Pa. Super. 1961). These reductions are within the discretion

of the Court. PNC, supra; Bolus, supra.

From a practical standpoint, although tempting, it is probably not a good idea to confess judgment for clearly excessive attorneys' fees if authorized in the warrant of attorney, as this simply provides grounds for the debtor/tenant to file a Petition to Strike or Open. Also, Courts often order that a hearing be held at the end of the case - after the Petition to Strike or Open has been denied - to determine the specific amount of attorneys' fees.

5. Release of errors. "Tenant releases and agrees to release Landlord and any aforementioned attorney, from all errors and defects whatsoever of a procedural nature in entering such judgment or causing such writ to be issued or in any proceeding thereon or concerning the same."

6. Waiver of Rights. Include a separate paragraph that debtor/tenant has consulted with an attorney or has had the opportunity to do so; he is aware that judgment may be entered against him; that his personal property and bank accounts may be attached and levied upon without a prior notice or hearing, and that he knowingly intelligently and voluntarily waived his federal and Pennsylvania Constitutional rights to such prior notice or hearing.

B. Visibility- Knowing, Voluntary and Intelligent Waiver

1. Bold type
2. Capitalized letters
3. Different color ink
4. Signature line
5. Waivers on separate page

IV. CONFESSING AND EXECUTING UPON THE JUDGMENT

- A. Complaint v. Praeipce – Pursuant to the 2008 revisions to Pa. R.C.P. 2951, a complaint in confession of judgment, rather than a praecipe, must be used. This rule simply confirms the prior practice that a praecipe cannot be used as the amount owed is usually not apparent from face of

the lease or loan documents. Van Arkel & Moss Properties, Inc. v. Kendor Ltd., 419 A.2d 593 (Pa. Super. 1980).

- B. Confession of Judgment Package - As confessions of judgments are creatures of statute and in derogation of common law, they are strictly construed, so be sure to conform to all pleading requirements set forth in statutes, case law and local rules. Include-

I. Complaint

Requirements-Pa.R.C.P. 2952

- (a) Original or copy of lease or note containing warrant of attorney
 - (b) Averment that judgment is not being entered by confession against a natural person in connection with a consumer credit transaction. Pa.R.C.P. 2950; 2952(a)(30). Beneficial Savings Bank v. Gbemudu, 2013 Phila.Ct. Com. Pl. Lexis 280
 - (c) A statement of any assignment of the lease or note
 - (d) A statement that either the judgment has not been entered on the warrant, or if it has, an identification of the proceedings.
 - (e) An averment of the default which allows judgment to be entered.
 - (f) An itemized computation of the amount due. But see Stahl Oil Co. v. Helse, 860 A.2d 508 (Pa.Super.2004)
 - (g) Demand for judgment
 - (h) Signature and verification
 - (i) A separate count for money and possession
 - (j) No Notice to Defend or Plead necessary.
2. Affidavit - usually required by the warrant of attorney. Verified Complaint can be considered an affidavit. Pa.R.C.P. 76.
3. Affidavit that judgment is not being entered by confession against a natural person in connection with a consumer credit transaction. Pa.R.C.P. 2951(a)(3) (can be included in Complaint)
4. Affidavit of not-retail installment sales transaction (can be included

in Complaint)

5. Affidavit of non-military service (for individual Defendants)

6. Certificate of residence of Plaintiff and Defendant - Pa.R.C.P. 2951(a)(2)(ii)

7. Confession of Judgment

(a) Money - Pa.R.C.P. 2962

(b) Possession- Pa.R.C.P. 2974

8. Petition to Strike Judgment/Request for Prompt Hearing (only if execution proceeds pursuant to Pa.R.C.P. 2958.3 (money) or 2973.3 (possession)). Form at Pa.R.C.P. 2967

9. Notice of Entry of Judgment. Pa.R.C.P. 236

10. Notice of Writ of Execution or Possession

(a) Money - Pa.R.C.P. 2964 or 2965

(b) Possession - Pa.R.C.P. 2974.2 or 2974.3

(c) Prior law: Notice pursuant to 42 Pa.C.S. A. §2737.1; First Union National Bank, et al. v. Portside Refrigerated Services, Inc. 827 A.2d 1224 (Pa.Super.2003). No longer required. See Pa.R.C.P. 2959(g)

11. Praeipce for Writ of Execution or Writ of Possession with Certification.

(a) Money - Pa.R.C.P. 2963

(b) Possession - Pa.R.C.P. 2974.1

12. Writ of Execution/Possession

(a) Money

(b) Possession

13. Waiver of Watchman

14. Stamped, addressed envelope to debtor/tenant

C. Service of Judgment and Notices

1. Judgment: Pursuant to Pa.R.C.P. 236 by ordinary mail, together with all documents filed with the Prothonotary. A stamped envelope addressed to the defendant must also be provided to the Prothonotary, as the Prothonotary sends notice as well. However there is an argument that the judgment must be treated as “original process” and served pursuant to Pa.R.C.P. 400(a), or at least by a competent adult pursuant to Pa.R.C.P. 402(c) (See Section IV (2)(b)).

2. 2958.1 or 2973.2 Notice

(a) Must be served at least 30 days prior to filing of Praecipe for Writ of Execution.

(b) Must be served:

- i. By Sheriff or an adult who is not a party to the action pursuant to Pa.R.C.P. 402(a)
- ii. By mail pursuant to Pa.R.C.P. 403
- iii. By special order of Court pursuant to Pa.R.C.P. 430 if necessary.
- iv. If Defendant has entered his appearance, pursuant to Pa.R.C.P. 440. Although Rule 440 permits legal papers which are not original process to be served upon the attorney of record, I would serve Defendant directly pursuant to Pa.R.C.P. 440(a)(2)(1)

(c) A return of service must be filed pursuant to Pa.R.C.P. 405.

3. 2958.3 or 2973.3 Notice. Served with the Writ of Execution.

Practical Hint. In the Order for Service, list all documents to be served by the Sheriff, including the 2958.3 Notice, to prevent an assertion by debtor/tenant that he was not served with the Notice.

4. Notice Upon Subsequent Executions. Not necessary to reserve the 2958.1 or

2958.3 Notices upon subsequent executions on the judgment. Pa.R.C.P.
2958.4(b).

D. Execution on Residential Real Property

41 P.S. §407 prohibits the execution on residential real property (as defined by 41 P.S. §101) by a confession of judgment until plaintiff files another lawsuit against the debtor, and obtains a judgment in that action. The subsequent judgment shall then merge with the confessed judgment, the confessed judgment must be conformed to the judgment amount in the subsequent judgment, and execution on the residential real property may then commence on the confessed judgment. Higgins v. Pavidis, 839 A.2d 445 (Pa. Super 2003).

V. PETITIONS TO OPEN OR STRIKE

These are the only means by which a judgment by confession may be challenged.

A. Petition to Strike - If the confessed judgment includes any item not authorized by the warranty or a “fatal defect on the face of the record” it will be stricken. Ferrick, supra; ESB Bank v. McDade, 2 A.3d 1236 (Pa. Super. 2010); Germantown Savings Bank v. Talacki, 657 A.2d 1285 (Pa. Super. 1995) (maker died); PNC Bank, N.A. vs. Bolus, supra (included real estate taxes not authorized by warrant) ; Langman v. Metropolitan Acceptance Corp., 465 A.2d 5 (Pa. Super. 1983) (included estimate of repairs not performed). May be stricken only if defects on the face of the document. Petition to Strike acts as a demurrer to the record. DeCoatsworth v. Jones, 639 A.2d 792 (Pa.1994); Rait Partnership, L.P. supra; Germantown Savings Bank, supra; Davis v. Woxall Hotel, Inc., supra. If the judgment is excessive, a court will open and modify the judgment. Dollar Bank v. Northwood Cheese Co., supra. However, a judgment may be stricken if the amount is unauthorized by the warrant or grossly excessive. Germantown Savings Bank, supra; Davis, supra; Leasing Service Corp. v. Benson, 464 A.2d 402 (Pa. Super. 1983). Otherwise, it will be opened.

An exception to this rule is that interest is allowed if contained in lease or loan documents, but not specifically authorized in warrant. Heller v. Lombard, 223 A.2d 716 (Pa. 1966); McDowell National Bank of Sharon v. Vasconi, 178 A.2d 589 (Pa. 1962); Willow Grove Bank v. ATS Products Corp., 823 A.2d 1037 (Pa. Super. 2003).

B. Petition to Open - A Petition to Open is addressed to the equitable powers of the trial court, Crum v. F.L. Shaffer; 693 A.2d 984 (Pa. Super. 1997), and the result will not be disturbed absent a manifest abuse of discretion. PNC Bank National Association v. Bluestream, supra; PNC Bank v. Kerr, 802 A.2d 634 (Pa. Super. 2002). Matters outside the record may be

considered. May be opened only if:

1. Petitioner acts promptly (within 30 days if tenant proceeds pursuant to Pa.R.C.P. 2956.1(c))
2. Petitioner has a meritorious defense and
3. Petitioner has presented sufficient evidence supporting the defense to require submission of the issues to a jury. First Seneca Bank v. Laurel Mountain Development Corporation, 485 A.2d 1086 (Pa. 1984); Resolution Trust Corporation v. Copley Qu-Wayne Assoc, 683 A.2d 269 (Pa. 1996); Atlantis National Trust, LLC v. Stivala Investments, Inc., 922 A.2d 919 (Pa.Super.2007); Rittenhouse v. Barclay White, Inc., 625 A.2d 1208 (Pa. Super. 1993). Petitioner must offer "...clear, direct, precise and believable evidence, sufficient to raise a jury question." Germantown Savings Bank, supra; Crum v. F.L. Shaffer Co., 693 A.2d 984 (Pa. Super. 1997). The court will view all evidence in the light most favorable to the petitioner. Stahl, supra; Crum, supra; Weitzman v. Ulan, 450 A.2d 173 (Pa. Super. 1982).

C. Procedure

1. Timelines

- (a) Petition to Open - Must be filed within 30 days of service of the notices required by Pa. R.C.P. 2956.1(c)(2) or 2973.1(c), unless compelling reasons are stated for the delay. Pa. R.C.P. 2959 (a)(3). Greater North American Funding Corp. v. Tara Enterprises, 814 A.2d 258 (Pa. Super. 2002); Thomas Associates Investigative and Consulting Services, Inc. v. GPI Ltd., Inc., 711 A.2d 506 (Pa. Super. 1998).
- (b) Petition to Strike - Despite the language of Pa. R.C.P. 2959(a)(3), the Pennsylvania Supreme Court has ruled that there is no time limit for the filing of a Petition to Strike if the judgment is void. Typically, Petitions to Strike are granted in cases involving judgment because the judgment was entered without the authority of the warrant of attorney. A void judgment is one upon which a court has no authority to enter. Thus, in cases where the judgment is void, there is no time limit. M&P Management, L.P. v. Williams, 937 A.2d 398 (Pa. 2007) (amended promissory note did not contain cognovit clause). However, if a judgment is merely voidable, the 30 day time period still applies.

Nonetheless, it is always advisable to file your Petition within 30 days. Don't count on the judgment being void. Furthermore, the 30 day time period is still applicable to Petitions to Open, which are typically filed with Petitions to Strike.

2. Single Petition - All grounds for relief must be asserted in a single petition Pa. R.C.P. 2959(a)(1) (except where a due process rights waiver issue is raised and a separate Petition is filed on this sole issue. Pa. R.C.P. 2958.3, 2959(a)(2)). All defenses are waived if not included in the Petition. Pa. R.C.P. 2959(c) See also (Huntingdon National Bank v. K-Cor, Inc., 107 A.3d 783 Pa. Super. 2014). The prayer for relief in each count should often be to strike, or in the alternative, to open the judgment. What may not be good enough to strike may be good enough to open.
3. Briefs/Memorandum of Law Upon Filing of Petition – Normally briefs or a memorandum of law will only be required when the matter is ready for disposition by the court. However, in counties which require electronic filing, the electronic system requires that all Petitions be accompanied by briefs or a memorandum of law, pursuant to the local rules – even though prior to the advent of electronic filing, these briefs were not required with Petitions to Open or Strike. In counties which utilize manual filing (i.e. Delaware) briefs are not required to be filed with the Petition. In the electronic filing counties, judges will normally permit supplemental briefs after discovery has been taken.
4. 2958.3 and 2973.3 Petition to Strike – Filing a Petition pursuant to these Rules, as opposed to Pa.R.C.P. 2959 is the only means to challenge whether a tenant's due process rights were violated because he did not knowingly, intelligently and voluntarily waive his right to notice and a hearing prior to the entry of judgment. Resolution Trust Corporation, supra.; Beneficial Mutual Savings Bank, supra; Beneficial Savings Bank v.Gbemudu, supra.
 - (a) On form prescribed by Pa. R.C.P. 2967
 - (b) Must be filed within 30 days after service of notices required by Pa. R.C.P. 2956.1(a)(2) or 2973.1(c).
 - (c) Limited to issue of whether defendant knowingly, intelligently and voluntarily waived his right to notice and hearing prior to entry of judgment. Note – This defense may only be raised in a 2958.3 or 2973.3 Petition to Strike, and not in an “ordinary” 2959 Petition.

Pa. R.C.P. 2959(a)(2).

- (d) Hearing on Petition shall be three (3) business days after Sheriff presents Petition to Court.
- (e) Plaintiff must prove, by a preponderance of the evidence, that defendant knowingly, intelligently and voluntarily waived his right to notice and hearing prior to entry of judgment.
- (f) Execution proceedings shall be stayed pending disposition of Petition.
- (g) Knowing, Intelligent and Voluntary Waiver of Rights. Given the fact that confessions of judgment are in derogation of the constitutional right to a trial, the courts are careful to ensure that they be entered only upon those who knowingly, intelligently and voluntarily waiver their rights. Accordingly, the warrants of attorney must be clearly visible in the executed document. Cutler, supra.; (warrant stricken when among items on reverse side of a five (5) page contract). The document containing the warrant must be signed. Frantz Tractor Col, Inc. v. Wyoming Valley Nursery, 120 A.2d 303 (Pa. 1956); Reinvestment Fund, Inc. v. Brewey Park Associates, L.P., 2011 Phila. Ct. Com. PI LEXIS 283. The same rationale requires confession of judgment clauses to be set forth in all assignments (Frantz Tractor Co., supra. “Where a lease contains a warrant of attorney, the signature of the lessee must bear such direct relation to the provision authorizing the warrant as to leave no doubt that the lessee signed, conscious of the fact that he was there by conferring . . . such plenary power on the donee.” Id. at 305; Accord, JBG/Rosenfield Retail Properties v. Anspach, 803 A.2d 783 (Pa. Super. 2002) and subleases, Stewart v. Lawson, 37 A. 519 (Pa. 1897); and all guaranties, Solebury National Bank of New Hope v. Cairns, 380 A.2d 1273 (Pa. Super. 1977); Am Quip Corp. v. Pearson, 101 F.R.D. 332 (e.D. Pa. 1984). A cognovit clause which is contained in an unsigned addendum to a lease, even though the addendum is “incorporated by reference” into the lease, is unenforceable. Hazer v. Zapala, 26 A.3d 1166 (Pa. Super. 2011). Confession of judgment clauses are not binding upon a successor company. Centennial Bank v. Germantown-Stevens Academy, 419 A 2.d 698 (Pa. Super. 1980) However, a confession of judgment clause is enforceable

in a holdover situation. City of Pittsburgh v. Charles Zubick & Sons, Inc., 171 A. 2d (Pa. 1961). Where a guarantor executes a guaranty with a cognovit clause, a modification to the loan document states that the guarantor consents to the modification, yet the guarantor does not execute a separate guaranty to the modifications, a trial court struck the judgment by confession entered against the guarantor. The Bancorp Bank v. Mancini, 28 Pa. D. & C. 5th 388 (Phila. 2013).

However, a trial court has found that if a cognovit clause is clearly and expressly incorporated into a modified lease or contract, it is binding. T.D. Bank, N.A. v. Aqua Partners, LLC, Phila. Ct. Com. Pl. LEXIS 428 (2102), aff'd without opinion, 2013 Pa. Super LEXIS 3775. See Ferrick v. Bianchi, *supra*, where the Court refused to strike a judgment when the addendum to the lease was merely for a temporary reduction in monthly rent and the amendment specifically stated that the confession of judgment provisions "are hereby republished and . . . Tenant . . . agree[s] to be bound thereby" A general incorporation of all of the terms and conditions of the lease is insufficient. Scott v. 1523 Walnut Corp. 447 A.2d 951 (Pa. Super. 1982)

A trial Court found that a warrant of attorney contained in a commercial condominium declaration never signed by the purchaser but incorporated into the deed, was binding. Abbot Square Condominium Association v. Stabba Residential Associates, L.P., 2013 Phila. Ct. Com. Pl. LEXIS 294. And a confession of judgment clause does not have to be incorporated in and along which narrowly modifies the terms of a loan. First Bank v. Market East, 14th LLC, 2013 Phila. Ct.com.Pl. LEXIS 304. A judgment may be entered against a general partner of a limited partnership even if he is not a signatory to the cognovit clause, as the general partner is liable for the obligations of a limited partnership. D'Amerlio v. Capponi, 2013 Phila. Ct. Com.Pl. LEXIS 266.

Practical Hint – Repeat and include the full cognovit clause in any document other than the lease, including guaranties, riders, addenda, extensions and modifications.

Nonetheless, despite the burden of proof being on the landlord, it is difficult for the tenant to establish, in a commercial setting and with a well drafted cognovit clause and waiver, that the tenant did not knowingly waive his rights. See e.g. Germantown Savings Bank, *supra*; Standard Venetian Blind Co. v American Emp. Ins. Co., 496 A.2d 563 (Pa. 1983); Olson Estate, 291 A.2d 95 (Pa. 1972); North Penn Consumer Discount Co. v. Schultz, 378 A.2d 1275 (Pa. Super. 1985) (not voluntary, knowing or intelligent if finely printed, unsigned and on reverse of a document).

5. Stay of Execution - A judgment and lien are preserved while all proceedings to open or strike are pending, and execution on the judgment may proceed. Pa. R.C.P. 2959(f) and Explanatory Comment; FRG, Inc. v. Manley, 919 F.2d 850 (3rd Cir. 1990); In re Zampatti, 300 B.R. 415 (Bankr. W.D. Pa. 2003); Macioce v. Glinatsis, 522 A.2d 94 (Pa. Super. 1987); Rochester Machine Corp. v. Mulach Steel Corp., (Pa. Super. 1981). An order for “a stay of all proceedings” prevents the judgment from being transferred to another county. Reed Oil Co. v Forbes, Lawrence County C.C.P. 2011, PICS No. 11-1146. If a bond is posted sufficient to cover payment of the judgment, the attachment may be removed. Pa. R.C.P. 3143(b)(1). Execution may also be stayed by the court in its discretion, Pa. R.C.P. 2959(e); 3121(b)(2); Continental Bank v. Frank, 495 A.2d 565 (Pa. Super. 1985); Beth - Westgate, *supra* if a Petition to Stay Execution is filed. Some counties (e.g., Bucks, B.C.R.C.P. 206.4(c)(3), Philadelphia, Phila. Civ.R. 206.4(c)) provide for this Petition to be heard at a conference, rather than a hearing. A stay may also be granted ex parte (Philadelphia) in the appropriate case. Accordingly, it is strongly advised that debtor/tenant file a Petition to Stay Execution together with his Petition to Strike/Open if the Praecipe and Writ of Execution was filed simultaneously with the judgment or immediately following any subsequent filing of a praecipe for writ of execution or possession. These Petitions should rightfully be granted if there are prima facie grounds upon which to strike or open the judgment.

Although there is no caselaw or statutes on the subject, I would advocate that a stay of execution should be granted if:

- (a) Defendant establishes a prima facie case that the Petition to Strike or Open should be granted;
- (b) The stay is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages (i.e., eviction of a commercial tenant, or the levy and execution of personal property or bank account);

Certainly, the Court could enter an order enjoining defendant from disposing of certain assets if a bond is not posted.

6. Disposition - A Petition to Open or Strike is disposed of pursuant to Pa. R.C.P. 2959 and 206.7. If the Petition sets forth prima facie grounds for relief the Court will issue a Rule to Show Cause. Pa.R.C.P. 2959(b) Ohio Pure Foods, Inc. v. Barbe, 697 A.2d 252 (Pa. 1997); Ferrick, *supra*. City of Pittsburgh v. Allegheny County Distributors, Inc., 339 A.2d 109 (Pa. Super. 1985); Prime

Funding, Inc. v Okolo, 2013 Phila. Ct. Com. Pl. LEXIS 183.

Only a “minimal offering” is necessary to satisfy the requirement of the issuance of a Rule to Show Cause. Ohio Pure Foods, supra. Nonetheless, I have seen Courts issue Rules as matter of course even when the grounds set forth in the Petition are patently frivolous. After the issuance of a Rule to Show Cause on the Petition, depositions and other discovery may be taken pursuant to the order of the Court pursuant to the Rule, although the Court is not obligated to authorize discovery. Ohio Pure Foods, supra; Ferrick, supra. A briefing schedule is often set forth in the Order as well. In Northampton County, Rule N 2959 mandates that depositions must be taken within ten (10) days of this notice, otherwise, debtor/landlord may file a Motion to dismiss the Petition.

7. Federal Court - In the federal courts, motion procedure is governed by F.R.C.P. 60(b). However, as F.R.C.P. 60(b) does not contemplate the factual issues which can be raised in a Petition to Open Judgment, the federal courts will generally allow discovery prior to the motion being decided, despite the fact that no discovery procedure is outlined in the Rule. See Federal Deposit Insurance Corporation v. Deglau, 207 F.3d 153 (3rd Cir. 2000).
8. Discovery - The court will typically allow 30-45 days for discovery, which can include interrogatories, requests for production of documents and depositions. If there is a (legitimate) discovery dispute, a Motion to Compel Discovery or Motion for Protective Order can be filed and heard by the Court. These Motions can significantly delay the final disposition of a Petition to Strike/Open.
9. Hearing - The court will usually, but not always, have a hearing on the Petition. Sometimes, a court will simply require that a memorandum of law and supporting evidence (i.e., deposition transcripts, affidavits, etc.) be presented, and the court will make a decision based upon this documentation.
10. Procedure Upon Opening of Judgment - If a Petition to Open is granted, Plaintiff's case is still preserved, and no responsive pleading to the Complaint is necessary as the issues to be tried shall be defined by the Complaint, Petition, Answers and the Order opening the judgment, Pa. R.C.P. 2960. A trial will ensue, although additional discovery will typically be allowed. The right to a jury trial is waived unless a demand for jury trial is filed within 20 days of the Order opening judgment. Pa. R.C.P. 2960. An Order of Court opening the judgment does not impair the lien of judgment; Resolution Trust Corp., supra; Ferrick; supra; Hazer, supra.

D. Grounds to Strike or Open

1. Strict Construction - The warrant of attorney, as it is in derogation of common law and involves a waiver of Constitutional rights, is strictly construed. Cutler v. Latshaw, 97 A.2d 234 (Pa. 1953); PNC v. Bluestream, 14 A.3rd 831 (PA Super 2010); PNC Bank v. Bolus, 655 A.2d 997 (Pa. Super. 1995). Construed against the party benefitted by the warrant, not necessarily the party who drafted it. Grady v. Schiffer, 121 A.2d 71 (Pa. 1956); Ferrick, supra; Egyptian Sands, supra. Ambiguities in the language of the warrant of attorney are resolved against the party entering judgment. Scott Factors, Inc. v. Hartley, 228 A.2d 887 (Pa. 1967). May be entered only by “rigid adherence to the provisions of the warrant of attorney, and can only include items contained in the warrant.” First Union National Bank, supra; Accord, Scott Factors, supra; Dollar Bank v. Northwood Cheese Company, 637 A.2d 309 (Pa. Super. 1984).

The Pennsylvania Supreme Court in Cutler Corp. v Latshaw, 97 A.2d 234 (Pa. 1953) provided some powerful language on this subject:

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, and he places his cause in the hands of a hostile defender. The signing of the warrant of attorney is equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword.

Id. At 236. Accord, Ferrick, supra; Drum v. Leta, 512 A.2d 36 (Pa. Super. 1986).

2. Technical Defects - The court in Stein v. Penncrest Construction Corp., 421 A.2d 1074 (Pa. Super. 1980) held that “...notwithstanding the rule that warrants of attorney to confess judgment must be strictly construed, we believe these principles are more properly applicable to basic and substantive questions (such as exceeding the scope of the warrant) as opposed to a technical irregularity.” (Usurious rate of interest cured by praecipe to assess damages). Accord, Mulcahy v. Loftus, 267 A.2d 872 (Pa. 1970); PNC v. Bluestream, supra; Atlantic National Trust, LCC v. Stivala Investments, Inc., 922 A.2d 919 (Pa. Super. 2007) (failure to include language required by Pa. R.C.P. 2952(a)(5) as

to whether a prior judgment has been entered upon the warrant insufficient to strike judgment). Essentially, a Petition to Strike may not be granted on a technicality which can be cured by amendment "...where the ends of justice require the allowance of such amendment and where the substantive rights of defendant...will not be prejudiced thereby." West Penn Sand & Gravel Co., v. Shippingport Sand Co., 80 A.2d 84 (Pa. 1951) (notice of default referred to in affidavit but not attached thereto). Accord, W.H. Keech Co. v. O'Herron, 41 Pa. Super 108 (1909) (amount of judgment slightly more than warrant allowed); George H. Althof v. Spartan Inns of America, Inc., 441 A.2d 1236 (Pa. Super. 1982) (verification not attached); Parliament Industries, Inc. v. William H. Vaughn & Co., 430 A.2d 981 (Pa. Super. 1980) (complaint verified by attorney instead of plaintiff); Tabas v. Robert Development Co., 297 A.2d 481 (Pa. Super. 1972) (affidavit of military service not filed at time of judgment but subsequently filed). This is particularly the case when the warrant contains "release of all errors" language. West Penn, supra; Atlantic National Trust, LLC, supra; But see First Union National Bank, supra where the court found that even with "release of all errors" language in the warrant, this was insufficient to overcome a failure to provide notice to the debtor of the procedure required to file a petition to strike (This notice is no longer required. See Pa. R.C.P. 2959(g)).

Ethics Query (No CLE credit!) - Pa. R.P.C. 3.1 provides in part, that a lawyer "...shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Does the assertion of a technical defect in a debtor's Petition to Strike or Open violate the Rule?

My humble, and un-authoritative opinion is that it does not. A defect is still a defect, and at the very least, an amendment to the judgment will have to be made.

3. Knowing, Intelligent and Voluntary Waiver of Rights - Given the fact that confessions of judgment are in derogation of the constitutional right to a trial, the courts are careful to ensure that they be entered only upon those who knowingly, intelligently and voluntarily waive their rights. Accordingly, the warrants of attorney must be clearly visible in the executed document. Cutler, supra; (warrant stricken when among items on reverse side of a five (5) page contract). The document containing the warrant must be signed. Frantz Tractor Co., Inc. v. Wyoming Valley Nursery, 120 A.2d 303 (Pa. 1956); Reinvestment Fund, Inc. v. Brewey Park Associates, L.P., 2011 Phila. Ct. Com. P1 LEXIS

283. The same rationale requires confession of judgment clauses to be set forth in all assignments, Frantz Tractor Co., *supra*. “Where a lease contains a warrant of attorney the signature of the lessee must bear such direct relation to the provision authorizing the warrant as to leave no doubt that the lessee signed, conscious of the fact that he was there by conferring...such plenary power on the done.” *Id.* at 305; Accord, JBG/Rosenfield Retail Properties v. Anspach, 803 A.2d 783 (Pa. Super. 2002) and subleases, Stewart v. Lawson, 37 A. 519 (Pa. 1897); and all guaranties, Solebury National Bank of New Hope v. Cairns, 380 A.2d 1273 (Pa. Super. 1977); AmQuip Corp. v. Pearson, 101 F.R.D. 332 (E.D. Pa. 1984). A cognovit clause which is contained in an unsigned addendum to a lease, even though the addendum is “incorporated by reference” into the lease, is unenforceable. Hazer v. Apala, 26 A.3rd 1166 (Pa. Super. 2011). Confession of judgment clauses are not binding upon a successor company. Centennial Bank v. Germantown – Stevens Academy, 419 A.2d 698 (Pa. Super. 1980). However, a confession of judgment clause is enforceable in a holdover situation. City of Pittsburg v. Charles Zubick & Sons, Inc., 171 A.2d 776 (Pa. 1961). Where a guarantor executes a guaranty with a cognovit clause, a modification to the loan document states that the guarantor consents to the modification, yet the guarantor does not execute a separate guaranty to the modifications, a trial court struck the judgment of confession entered against the guarantor. The Bancorp Bank v. Mancini, 28 Pa.D.&C. 5th 388 (Phila. 2013).

However, a trial court has found that if a cognovit clause is clearly and expressly incorporated into a modified lease of contract it is binding. T.D. Bank, N.A. v. Aqua Partners, LLC, Phila.Ct. Com. Pl. LEXIS 428 (2012), *aff’d* without opinion, 2013 Pa. Super. LEXIS 3775. See Ferrick v. Bianchi, *supra*, where the Court refused to strike a judgment when the addendum to the lease was merely for a temporary reduction in monthly rent, and the amendment specifically stated that the confession of judgment provisions “are hereby republished and...Tenant...agree[s] to be bound thereby...” A general incorporation of all the terms and conditions of the lease is insufficient. Scott v. 1523 Walnut Corp. 447 A.2d 951 (Pa. Super. 1982).

A trial court found that a warrant of attorney contained in a commercial condominium declaration never signed by the purchaser but incorporated into the deed, was binding. Abbott Square Condominium Association v. Stabba Residential Associates, L.P., 2013 Phila.Ct.Com. Pl. LEXIS 294. And a confession of judgment clause does not have to be incorporated in an alonge which narrowly modifies the terms of a loan. First Bank v. Marke E. 14th St. LLC, 2013 Phila.Ct.Com.Pl. LEXIS 304. A judgment may be entered against a general partner of a limited partnership if he is not a signatory to the

cognovit clause, as the general partner is liable for the obligations of a limited partnership. D'Amerlio v. Capponi, 2013 Phila.Ct.Com.Pl. LEXIS 266.

Practical Hint - Repeat and include the full cognovit clause in any document other than the lease, including guaranties, riders, addenda, extensions and modifications.

Nonetheless, despite the burden of proof being on the creditor/landlord, it is difficult for the debtor/tenant to establish, in a commercial setting and with a well drafted cognovit clause and waiver, that the debtor/tenant did not knowingly waive his rights. See e.g. Germantown Savings Bank, supra; Standard Venetian Blind Co. v. American Emp. Ins. Co., 469 A.2d 563 (Pa. 1983); Olson Estate, 291 A.2d 95 (Pa. 1972); North Penn Consumer Discount Co. v. Schultz, 378 A.2d. 1275 (Pa. Super. 1977) But see, e.g., Commonwealth National Bank v. Boetzelen, 487 A.2d 943 (Pa. Super. 1985) (not voluntary, knowing or intelligent if finely printed, unsigned and on reverse of a document.).

4. Residential Leases - A Confession of Judgment in Ejectment may not be entered against a person pursuant to a residential lease. Pa.R.C.P. 2970. Be careful if your tenant is using the premises for both his commercial enterprise and residence.
5. Possession and Accelerated Rent - Judgment may not be confessed for both possession and accelerated rent. Teodari v. Werner, 415 A.2d 31 (Pa. 1980); Byrne v. Bernicker, 731 A.2d 191 (Pa. Super. 1998); Homart Development Co. v. Sorenci, 662 A.2d 1092 (Pa. Super. 1995); Such a result would constitute an impermissible double recovery for the landlord.

If you represent the landlord, which option should you choose? Typically if the premises are occupied by the defaulting tenant, the landlord is more concerned about evicting the non-paying tenant and reletting the space to a performing tenant. If the tenant has vacated the space, then a judgment for the accelerated rent is often taken. If the premises have been "abandoned" by the tenant, landlord doesn't need a judgment for possession - he can just retake the space, and then file a judgment for accelerated rent. The potential problem, however, is that if a tenant pays the accelerated rent, he has the right to possession. However, I have never had to face this issue in my practice. Either the landlord doesn't get paid in full or the tenant pays and has no desire or financial ability to re-occupy the space.

6. Successive Judgments. See Section III.A.3.
7. Attorney's Fees. See Section III.A.4. The fee may be challenged as unauthorized by the loan document or lease. For example, the cognovit clause may provide for an attorneys' commission of 15 % of the judgment, but another section of the loan document or lease may provide that debtor/tenant shall pay creditor/landlord all attorneys' fees incurred by lender/landlord, which may be substantially lower than the percentage. The fees may also be challenged as an unenforceable penalty, as opposed to enforceable liquidated damages. See Pantuso Motors, Inc. v. Corestates Bank, N.A., 798 A.2d 1277 (Pa. 2002); A.G. Cotler Construction Co., Inc. v. State System of Higher Education, 898 A.2d 71 (Pa. 1956); Colony Federal Savings and Loan Association v. Beaver Valley Engineering Supplies Co., 361 A.2d 343 (Pa. Super. 1970); Post-Main Co. v. Fayette National Bank & Trust Co., 152 A.2 714 (Pa. Super. 1959)
8. Assignment of Warrant - Landlord may assign a warrant of attorney. Warrant doesn't have to specifically allow assignment, but must not specifically forbid. Pa. R.C.P. 2951(a); Kine v. Forman 172 A.2d 164 (Pa. 1961); B. Lipsitz Company v. Walker, 522 A.2d 562 (Pa. Super. 1987); Botnik v. Chapkis, 70 A.2d 401 (Pa. Super. 1950). Complaint must clearly set forth assignee's interest in lease. Manor Building Corp. v. Manor Complex Assoc., 645 A.2d 543 (Pa. Super. 1994); Botnik, supra; Testa v. Lally, 55 A.2d 552 (Pa. Super. 1947); WAMCO, XXV Ltd. v. Desouza, 51 Pa D. & C.4th 328 (Phila. 2000).
9. Acceleration of Rent - These clauses are valid in Pennsylvania, See e.g., Byrne v. Bernicker, 700 A.2d (Pa. Super. 1997); Bell Federal Savings and Loan Association of Bellevue v. Lanes, 435 A.2d 1285 (Pa. Super. 1985). A landlord may only collect accelerated rent if there is such a clause in the lease. Pierce v. Hoffstrot, 236 A.2d 828 (Pa. Super. 1967); Onal v. Amoco Corp., 275 F. Supp. 2d 650 (E.D. Pa. 2003). Courts may enforce acceleration without present value discount, unless that language is in the acceleration clause. Teadori, supra; Byrne, supra.
10. Condition of Premises - A tenant may use the poor condition of premises as a defense to a rent collection or eviction action. Although there is no implied warranty of habitability in commercial leases, Pawco, Inc. v. Bergman Knitting Mills, 424 A.2d 891 (Pa. Super. 1980), a tenant is not without remedies if the premises are in poor condition, even though the lease provides no specific remedies. Pawco, supra holds that these remedies are, after reasonable notice provided to landlord to cure the conditions, (1) termination of lease (2) repair and deduct, or (3) deduction of difference of the fair market rental value of the

premises and the rent provided in the lease. Accord, Teodori, supra. See also Beth - Westgate, Inc. v. Sound & Visions II, Inc., C.P. Lehigh County No. 99-N-526 (withholding of CAM charges proper if common areas not maintained by landlord; poor condition of premises allows tenant to open a confessed judgment.

11. Material Breach – Probably the most frequently litigated ground asserted for the opening of a judgment. Creditor/landlord must establish sufficient breach of lease to establish forfeiture of rights, Barraclough v. Atlantic Refining Company, 326 A.2d 477 (Pa. Super. 1974) (minor infraction insufficient for termination even if lease provides for termination upon breach), as forfeiture of leasehold interests are disfavored. Liazis v. Kosta, Inc., 618 A.2d 450 (Pa. Super. 1992). But see Barraclough, supra, which also holds that courts should hesitate in enforcing forfeiture only when the lease has been carried out or its literal fulfillment has been prevented by oversight or uncontrollable circumstances. Accord, Atlantic LB, supra; Lynch v. Versailles Fuel Gas Company, 30 A.984 (Pa. 1985); The Old Creek Railroad Company v. The Atlantic and Great Western Railroad Company, 57 Pa. 65 (1868). In Cimina v. Bronich, 503 A.2d 427 (Pa. Super. 1985), rev'd on other grounds 537 A.2d 1355 (Pa. 1988), the Superior Court in a contract case set forth some of the criteria for determining materiality of a breach:

(a) The extent to which the injured party will obtain the substantial benefit which it could have reasonably anticipated; (b) the extent to which the injured party may be adequately compensated for damages for lack of complete performance; (c) the extent to which the party failing to perform has already partly performed or made preparation for performance; (d) the greater or lesser hardship on the party failing to perform in terminating the contract; (e) the willful neglect or innocent behavior of the party failing to perform.

Id. at 429.

For cases establishing material breach of a lease, see Lynch, supra; The Old Creek Railroad Company, supra; Brown v. Brown, 64 A.2d 506 (Pa. Super.1949); Elizabethtown Lodge No. 596, Local Order of Moose v. Ellis, 137 A.2d 286 (Pa. 1955); Barroclough, supra; (non-payment of rent); Burgess v. Cleary, 34 A.2d 265 (Pa. Super. 1943) (unauthorized assignment); O'Brien v. Bunt (5 Pa. D&C 552, (1924) (removing goods not in ordinary course of business); Woldman v. Baer, 81 (Pa. Super.390, 1923) (Unlawful activity on premises); Ross v. Gulf Oil Corp., 522 A.2nd 97 (Pa. Super. 1987); McKnight-

Seibert Shopping Center, Inc. v. National Tea Co., 397 A.2d 1214 (Pa. Super 1979) (only if specifically prohibited in lease); Slater v. Pearle Vision Center, Inc., 546 A.2d 676 (Pa. Super 1988) (non-use of premises). Brown, supra (multiple chronic breaches can amount to a material breach).

12. Waiver and Estoppel. Creditor/landlord may waive a breach, or may be equitably estopped from asserting forfeiture by acceptance of a late payment. Brown v. Pittsburgh, 186 A.2d 399 (Pa. 1962); Meehan v. Connell Anthracite Mining Co., 178 A. 833 (Pa. 1935); Yellow Cab Co. v. Carpol Realty Co., 289 A.2d 236 (Pa. Super. 1972); In re TM Carlton House Partners Ltd., 97 B.R. 819 (Bankr.E.D.Pa.1989) These defenses may still be used even if there is an integration or “no modification except by writing” clause in the lease or loan documents. Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10 (Pa. Super.1968); Borczek v. Pascoe Equipment Co., 450 A.2d 75 (Pa. Super 1982). If the landlord changes positions and insists on strict performance after a period of non-enforcement, there must be reasonable notice to the tenant of the change in policy. Daniels v. Fair Housing Commission, 513 A.2d 501 (Pa. Comwth. Ct. 1986). But see Brown, supra (acceptance of rent is not waiver per se, only evidence thereof).

Practical Solution: - Place rent in escrow account, with letter to tenant indicating that acceptance of money, or mesne profits does not waive rights. Warren Tank Car Co. v. Dodson, 199 A. 139 (Pa. 1939); WAMCCO XX v. DeSouza, Phila. C.C. P., July Term, 2000, No. 4385. Also, have “no waiver” clause in lease. Motion can then be filed with Court for release of funds without admissibility or evidence of waiver or estoppel.

13. Failure to Attach All Documents Upon Which Judgment is Based to Complaint. Pa. R.C.P. 1019(i) provides that when any claim or defense is based upon a writing, the pleader must attach a copy of the writing or the material part thereof to the Complaint. Accord, Feigley v. Department of Conversions, 872 A.2d 189 (Pa. Comwth. Ct. 2005); Delgrasso v. Gruesio, 389 A.2d 119 (Pa. Super. 1978); General State Authority v. Lawrence and Green, 356 A.2d 851 (Pa. Comwth. Ct. 1976). If Plaintiff, for example, attaches the guaranty which contains the warrant of attorney, but fails to attach the loan agreement upon which the guaranty is based, a debtor may avail himself of this ground to strike or open. From a practical standpoint, the missing documents may be supplied in discovery, or filed as an amendment to the Complaint. Nonetheless the additional documentation may provide additional defenses for the debtor, e.g., venue, notice requirements, etc. See also Provident Consumer Discount Co. v.

Rice, 12 Pa D&C 3d. 388 (1979), which held that although a creditor attached the note which contained the warrant of attorney to its Complaint, as the note referred to obligations of the debtor in a security agreement, the security agreement also had to be attached to the Complaint.

Additionally, if the underlying documents are not affixed to the Complaint, debtor/tenant may have grounds to have the judgment stricken as there may be no authority in the Complaint or exhibits to enter a judgment.

14. Notice - Carefully review the lease or loan document to determine:
 - (a) If notice of default is required prior to entering judgment. Notice is not required if waived in the lease or loan documents. Eagle National Bank v. Pier 1 Hays Terminal, Inc. 2013 Phila. Ct. Civ. Pl. LEXIS 421 (Pa. C.P. 2013); Beneficial v Gbemudu, supra.
 - (b) If the grace or cure period, if any, has expired. First Commonwealth Bank v. Federated Home & Mortgage Co., Centre County C.C.P., January 18, 2010. A judgment by confession will be stricken if notice to cure is not sent in conformity with the lease or loan documents. Dime Bank v. Andrews, 2015 Pa. Super. LEXIS 247.
 - (c) By whom the notice must be sent. If required to be sent by “landlord” or “lender”, these definitions may not include their attorney or real estate management company. See Parkside Baking Co. v. Firehauf Trailer Co., 40 A.2d 268 (Pa. 1944); 117-07 Hillside Ave Realty Corp. v. RKO Century Warner Theatres, Inc., 151 A2d. 732 543 N.Y.S. 21 1511 (1989). Siegel v. Kentucky Fried Chicken of Long Island, Inc., 67 N.Y. 21 792 501 N.Y.S. 2d 317, 492 N.Y. 2d 390 (1980).
 - (d) By whom the notice must be received (i.e., the tenant or debtor, as apposed to his attorney).
 - (e) The manner by which notice must be sent (i.e., certified mail, overnight delivery, etc.)

Additionally, some leases or loan documents provide that a default only occurs after notice and any applicable grace or cure periods. Accordingly, without proper notice, there may not be a default.

15. Material Modification of Risk to Guarantor

If a lease, or the terms of a loan have been modified without the consent of the guarantor¹, a judgment against the guarantor may be stricken or opened. If there has been a material modification in a creditor/debtor relationship without a gratuitous surety's consent, the gratuitous surety is completely discharged. A compensated surety (either specifically compensated for the suretyship or if he has a beneficial relationship with the debtor, i.e., shareholder, director, spouse, etc) is discharged if without the surety's consent, there has been a material modification in the creditor/debtor relationship and the modification has substantially increased the risk of the surety. Reliance Insurance Co. v. Penn Paving, Inc., 734 A.2d 833 (Pa. 1999); McIntyre Square Associates v. Evans, 827 A.2d 446 (Pa. Super. 2003); Continental Bank v. Axler, 510 A.2d 721 (Pa. Super. 1986); Restatement of Security 128. Even standard language in a guaranty which purportedly continues to hold the guarantor liable despite modifications in the lease or loan terms will not bind the guarantor unless the provision states that the guarantor is still liable if there is a material modification which increases his risk. McIntyre, supra.

16. Attorneys' Fees Under 41 P.S. §407(b)

41 P.S. §407(b) states in rather broad language, that “[a]ny debtor who prevails in any action to remove, suspend or enforce a judgment entered by confession shall be entitled to recover reasonable attorneys’ fees and costs as determined by the court.” Although this section is part of Act 6 which deals primarily with residential mortgages and the subsection is part of a statute which deals with the execution on residential real estate on a confessed judgment, Section 407(b) is drafted broadly enough that it may provide protection to any debtor who prevails on a petition to strike, open or stay execution.

VI. ISSUES ON APPEAL

A. Appeal from Order Refusing to Strike/Open Judgment

Ordinarily, an appeal must be taken from a final Order Pa. R.C.P. 341. However, appeals may be taken from certain interlocutory orders, including orders refusing to strike or open a judgment Pa. R.A.P. 311 (a) (1).

B. Appeals from Denial of Stay of Execution

1. There is a distinction between a “guaranty” or a “surety.” In a suretyship agreement, the creditor may pursue the surety for payment of the debt before, after or simultaneously looking to the debtor. In a guaranty, the creditor must look first to the tenant/debtor before pursuing the guarantor. McIntyre Square Associates v. Evans, 827 A.2d 446; Reuter v. Citizens & Northern Bank, 599 A.2d 673 (Pa. Super. 1991). However, “guaranties” are presumed to be suretyships unless specifically stated otherwise. 8 Pa. C.S.A. 1.

These orders are not appealable. They are not final orders and do not fall under any of the exceptions for interlocutory orders which can be appealed as of right order Pa. R.A.P. 311.

- C. Specific Appeal Issues Regarding Petitions to Open - A judgment must be entered to perfect an appeal to the Superior Court. If a Petition to Open is granted by the trial court and a trial ensues, an appeal cannot be taken from the order disposing of the post verdict motions. The trial court must first enter a judgment or the appeal is interlocutory and not appealable. Atlantic LB. supra; Fanning v. Davne, 795 A.2d 388. (Pa. Super. 2002); Brown v. Philadelphia College of Osteopathic Medicine, 760 A.2d 863 (Pa. Super. 2000). If creditor/landlord receives an unfavorable verdict in the trial court, and neither the debtor/tenant nor the trial court enters a judgment on that verdict, creditor/landlord is placed in the unusual, but necessary position of having to file a Praecipe to enter judgment against itself in order to appeal. However, in Stahl Oil Company, Inc. v. Hesel, 860 A.2d 508 (Pa. Super. 2004), the Superior Court, for reasons of judicial economy, allowed an appeal to proceed upon an order issued by the trial court on post trial motions.