

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

**H. JEFFREY BRAHIN, ESQUIRE**

37 North Hamilton Street  
Doylestown, PA 18901-3616  
Phone: (215) 348-3500  
Fax: (215) 345-1014  
E-mail: [hjb@brahinlaw.com](mailto:hjb@brahinlaw.com)  
[www.brahinlaw.com](http://www.brahinlaw.com)

The Philadelphia Building  
1315 Walnut Street  
Suite 1006  
Philadelphia, PA 19107

## **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 even while a Petition to Open or Strike is pending.
4. If plaintiff loses on technical or procedural grounds, a lawsuit can still be filed against tenant/debtor or it can be refiled if the property authority is contained in the cognovit clause.

### **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 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 pre-deprivation, 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 confessions 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 Praeclipe 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 Praeclipe 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 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 the 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 30 years since the new rules became effective. Many 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 or attorney tenants, see Egyptian Sands Real Estate, Inc. v. Polony, 294 A.2d 799 (Pa. Super. 1972) where a judgment was opened when the Court found that Hungarian speaking tenants did not understand the cognovit clause). However, 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. 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, and 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. 2019)
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. Scott Factors v. Hartley, 228 A.2d 887 (Pa. 1990); Continental Bank v. Tuteur, 450 A.2d 32 (Pa. Super. 1982). But see PNC Bank, supra. In TCPF Limited Partnership v. Skatell, 976 A.2d 571 (Pa. Super. 2009), 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.

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.

A series of recent cases, including Dominic's, Inc. v. Tony's Famous Tomato Pie & Bar & Restaurant, Inc., 214 A.3d 259 (Pa. Super. 2019) and Dime Bank v. Andrews, 115 A.3d 358 (Pa. Super. 2015) culminated in the holding of SDO Funding II D 32, LLC v. Donahue, 234 A.3d 738 (Pa. Super. 2020) where the Superior Court reasoned that a creditor or landlord may confess judgment multiple times on the same warrant of attorney if authorized in the warrant. The language in this particular clause reads in part as follows: "No single exercise of the foregoing warrant to confess judgment or a service of judgment, shall be deemed to exhaust the power . . ." However, the case does not make clear whether the warrant was used on the same debt.

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 Centric Bank v. Sciore, 2021 WL 4025262 (Pa. Super.) (10% fee upheld, particularly when creditor's counsel performed substantial work); Dollar 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 even if authorized in the warrant of attorney, as this simply provides grounds for the debtor/tenant to file a Petition to Strike or Open. I will typically authorize attorneys' fees "up to 15% of the principal balance due, at the sole discretion of Landlord, but not less than \$2,500." 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. See also Dollar Bank v. Northwood Cheese Co., 637 A.2d 309 (Pa. Super. 1994). However, in an "Ethics Forum" column in the Pennsylvania Law Weekly, Samuel Stretton, Esquire stated that presenting a percentage fee to a Court in excess of the fee actually incurred by the Landlord is in violation of Pa.R.P.P.C. 3.3, 4.1 and 8.4.

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

### **III. 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.

#### **IV. CONFESSING AND EXECUTING UPON THE JUDGMENT**

A. 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:

1. 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)(3). See Centric Bank v Sciore, supra, where no consumer credit transaction found when loan extended for commercial purposes but used for personal expenses.
- (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 Davis v. Woxall Hotel, Inc. 577 A.2d 636 (Pa. Super. 1990); Stahl Oil Co. v. Helsel, 860 A.2d 508 (Pa. Super. 2004); and Gur v. Nadav, 178 A.2d 851 (Pa. Super. 2017), which held that it is sufficient if detail is provided in discovery prior to the Court deciding the Petition to Open or Strike.
- (g) An averment of any notice of default which must be attached as an exhibit to a Complaint. Dime Bank, supra; A. B. & F. Contracting Corporation v. Matthews Coal Company, Inc., 166 A.2d 317 (Pa. Super. 1960).
- (h) Demand for judgment
- (i) Signature and verification
- (j) Separate counts for money and possession
- (k) No Notice to Defend 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. 2952(a)(3) (can be included in Complaint)
4. Affidavit of non-military service (for individual Defendants)
5. Certificate of residence of Plaintiff and Defendant – Pa.R.C.P. 2951(a)(2)(ii)
6. Confession of Judgment
  - (a) Money - Pa.R.C.P. 2962
  - (b) Possession- Pa.R.C.P. 2974
7. 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
8. Notice of Entry of Judgment. Pa.R.C.P. 236
9. 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
10. Praeclipe 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
11. Writ of Execution
  - (a) Money
  - (b) Possession
12. Waiver of Watchman

B. 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. However, there is a (weak) 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 Praeclipe 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 certified 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)
  - v. 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).

C. Filing

Judgments by Confession can be efiled in Philadelphia, Chester, Delaware and Lehigh Counties. In Bucks County, they must be filed in person or by mail. Montgomery County will only accept these if filed in person or by mail, and they must be reviewed and accepted by the Prothonotary's solicitor, which could take up to several weeks.

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 – “A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record and … may be granted only for a fatal defect or irregularity appearing on the face of the record.” Dime Bank, pg. 364. Accord, Stolzfus v. Green Line Labs, LLC, 303 A.3d 447 (Pa. Super. 2023). 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. Centric Bank v. Sciore, supra; Ferrick, supra; ESB Bank v. McDade, 2 A.3d 1236 (Pa. Super. 2010); Knickerbocker Russell Co., Inc. v. Crawford, 936 A.2d 1145 (Pa. Super. 2007); 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); SDO Fund II D32, LLC v. Donahue, 2020 WL 3261492 (Pa. Super. 2020); Gur v. Nadov, 178 A.3d 851 (2018); “If the record is self-sustaining, the judgment will not be stricken. However, if the truth of the factual averments contained in such record are disputed, then the remedy is by a proceeding to open the judgment and not to strike.” Lechowitz, p. 1274, quoting Resolution Trust Co. v. Coplay Qu-Wayne Associates, 683 A.2d 269, 273 (Pa. 1966); Accord, Gur, supra; Driscoll v. Arena, 2018 Pa. Super. LEXIS 96. If the judgment is excessive, a court may 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).

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, Centric, supra; Gur, supra; 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. Dominic's, Inc. v. Tony's Famous Tomato Pie Bar & Restaurant, Inc., 214 A.3d 259 (Pa. Super. 2019); 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); Centric Bank v. Sciore, *supra*; Dominic's, *supra*; Pops PCE TT, LP v. R&B Restaurant Group, Inc., 208 A.3d 79 (Pa. Super. 2019). Petitioner must offer "...clear, direct, precise and believable evidence, sufficient to raise a jury question." Germantown Savings Bank, *supra*; Pops, *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). However, the petitioner need not produce evidence proving that if the judgment is opened, the petitioner will prevail. Dominic's, *supra*; Miller v. Sacred Heart Hospital, 753 A.2d 829 (Pa. Super. 2000).

## 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). Lebowitz v. Moser, 164 A.3d 506 (Pa. Super. 2016); 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 – Must be filed within 30 days of service of the notices required by Pa.R.C.P. 2956.1(c) (2) or 2973(a) (3). Driscoll v. Arena, 213 A.3d 253 (Pa. Super. 2019). However, 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 where, for example, the court lacks subject matter jurisdiction, which cannot be made valid by the passage of time, and as such, the 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). Driscoll, *supra*, (statute of limitations is an effective defense and would be rendering the judgment voidable but is not void) See also Rouick v. Neducsin, 231 A.3d 994 (Pa. Super. 2020). If a judgment is merely voidable,

the 30-day time period still applies. In Driscoll v. Arena, 2019 WC 2498935 (Pa. Super. 2019) the Court found a judgment was voidable, and not void, and that the 30-day time limit applied when the petitioner averred a statute of limitations argument, a waivable defense.

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); Stahl, supra; Davis v. Woxall, supra. 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, 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. Pa.R.C.P. 2959(a)(2)(ii).
  - (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 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). 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) and extensions, Scott v. 1523 Walnut Corp., 447 A.2d 951 (Pa. Super. 1982); SDO Funding, supra. A general incorporation of all terms and conditions of the lease is insufficient. Scott, supra. However, the clause does not have to be repeated in its entirety. Language which specifically refers to the original warrant in a subsequent document is sufficient. See, e.g., SDO Funding, supra, where a second Guaranty stating that a debtor “ratifies and confirms the deficient confession of judgment and waiver of jury trial provisions” prevented him from striking the judgment. However, 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 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.2d 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).

Practical Hint – Repeat and include the full cognovit clause in all guaranties, assignments, amendments 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). 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 in 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 Praeclipe 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). Only a “minimal offering” is necessary to satisfy the requirement of the issuance of a Rule to Show Cause. Ohio Pure Foods, supra. A more recent Superior Court opinion, Dominic’s, Inc. v. Tony’s Famous Tomato Pie Bar & Restaurant, Inc., 214 A.3d 259 (Pa. Super. 2019) reaches a contrary (and in my opinion, a mistaken) finding. The Dominic’s Court found that a Rule to Show Cause Order must be issued as a matter of course, relying upon Pa.R.C.P. 206.6. However, Pa.R.C.P. 206.6 governs Rules to Show Cause entered upon Petitions and the Note to Pa.R.C.P. 206.1(a)(2) states that the Petitions for Relief from a judgment entered by confession are governed by Rule 2959. Nonetheless, most courts issue Rules as a matter of course even when the grounds set forth in the Petition are patently frivolous.

After the issuance of a Rule to Show Case 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 thirty (30) 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 (3<sup>rd</sup> 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, Determine Objections or for a 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. See Gur, supra, where appellate court remanded the case to the trial court for a hearing.
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. The judgment remains in place during the pendency of the Petition. Pa.R.C.P. 2959(f).

#### 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); A. B. & F., supra; Dime Bank v. Andrews, 115 A.3d 358 (Pa. Super. 2015); PNC v. Bluestream, 14 A.3d 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) provides 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., pg. 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.” Id., pg. 1076. (Usurious rate of interest cured by praecipe to assess damages). Accord, Mulcahy v. Loftus, 267 A.2d 872 (Pa. 1970); Blackbourn v. King Investment Group, LLC, 162 A.3d 461 (Pa. Super. 2017); 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 non-military service not filed at time of judgment but subsequently filed). Even if the judgment is entered “for items clearly within the judgment note but excessive in amount, the court will modify a judgment and cause a proper judgment to be entered.” Dime Bank v. Northwood Cheese Co., 637 A.2d 309, 313 (Pa. Super. 1994); Accord, Blackburn v. King Investment Group, LLC, 2017 Pa. Super. LEXIS 222); W. H. Keech Co. v. O'Herran, 41 Pa. Super. 108 (1909).

This is particularly the case when the warrant contains “release of all errors” language. West Penn, *supra*; Atlantic National Trust, LLC, *supra*.

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). 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); subleases, Stewart v. Lawson, 37 A. 519 (Pa. 1897); and 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.3<sup>rd</sup> 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).

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). However, the entire clause does not have to be repeated in its entirety. Language which specifically refers to the original warrant in a subsequent document is sufficient. See, e.g., SDO Funding, *supra*, where a second Guaranty stating that a debtor “ratifies and confirms the deficient confession of judgment and waiver of jury trial provisions “prevented him from striking the judgment.”

Practical Hint – I would still 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); Pops PCE TT, LLC. v. R&B Restaurant Group, LLC, 208 A.3d 79 (Pa. Super. 2019) (which opened the judgment based on, *inter alia*, the principle of unjust enrichment); Byrne v. Bernicker, 731 A.2d 191 (Pa. Super. 1998); PCE, *supra*; 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. 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); Ferrick, *supra*; B. Lipsitz, *supra*. A cognovit clause is not extinguished if landlord confesses judgment in a different portion of the debt than in his prior confession. Ferrick, *supra*: However, the 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. Harley, 228 A.2d, 886 (Pa. 1987); Continental Bank v. Tuteur, 450 A.2d 32 (Pa. Super. 1982). But see Kohl v. PNC Bank 912 A.2d. 237 (Pa. 2006). This is a matter of substantive law, and cannot be modified by the language of the warrant of the 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 accelerated 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, it 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.

7. Venue – Most cognovit clauses allow for a landlord to confess judgment “in any court of record” or “in any court in the Commonwealth of Pennsylvania, or elsewhere.” The Superior Court in Midwest Financial Acceptance Corporation v. Lopez, 78 A.3d 614 (Pa. Super. 2013) held that Pa.R.C.P. 1006 does not govern the venue of judgments entered by confession as the judgments are not “civil actions” to which Pa.R.C.P. 1006 is applicable, and the parties waived the ordinary venue requirements in the warrant of attorney.
8. 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 creditor/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.2d 714 (Pa. Super. 1959)

9. 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).
10. 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. Teadore; *supra*; Bryne, *supra*.
11. 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, in 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, Teadore, *supra*; Sears, Roebuck & Co. v. 69th St. Mall, L.P., 126 A.3d 959 (Pa. Super. 2015) also permits a tenant to withhold rent if there is a constructive eviction.

Counterclaim – Quiet Enjoyment/Constructive Eviction. Every lease has an implied covenant of quiet enjoyment, and it is expressly set forth in many commercial leases. This right constitutes the ability to fully use and possess the premises without interference from landlord. Counterclaim by tenant may be brought only for substantial impairment by landlord of tenant's use of premises by landlord. Kelly v. Miller, 94 A.21055 (Pa. 1915); Sears Roebuck & Co., *supra* (deficient lighting and electrical systems in parking deck, deteriorated structural aspects of parking garage deck, water and sewer leaks and backup, deterioration of store façade, etc.); Branish v. NHP Property Management, Inc. 694 A.2d 1106 (Pa. Super. 1997); Rittenhouse v. Barclay White, Inc., 625 A.2d 1208 (Pa. Super. 1993); 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies of Greater Philadelphia, 489 A.2d 733 (Pa. 1985). A counterclaim may entitle the tenant to lost profits or an abatement of rent. A tenant may be awarded punitive damages if the landlord's actions are considered wanton or malicious. Sears, *supra*. A tenant may also obtain

injunctive relief to require landlord to repair the premises if the condition prevents actual use thereof. Elfman v. Berman, Philadelphia C.C.P., February Term, 2001, No. 2080.

A recent, but somewhat incomplete analysis of the distinction between a breach of the covenant of quiet enjoyment and a constructive eviction, is provided in Sears, Roebuck, supra. A breach of the covenant of quiet enjoyment lies when tenant's impairment of its enjoyment of the premises, or the utility of the premises for tenant's business, is substantially impaired. The court did not specifically state whether such a breach would entitle a tenant to a counterclaim or to withhold rent. However, the court did set forth specific holdings in regard to constructive eviction, which it found to be a subset of the breach of the covenant of quiet enjoyment. In Sears, there were significant issues with the premises, including deficient lighting and electrical systems in the parking garage, serious deterioration in the store facade, water, and sewer leaks and sewage backup into the store, to name a few. Sears was patient, provided numerous notices to landlord and finally vacated the premises. The court found a constructive eviction. The court found that a mere failure to maintain the premises, or even complying with building codes is insufficient to establish a constructive eviction. However, it is also not necessary to find that the use of the premises for the intended purpose is impossible. Rather, the premises must be rendered substantially unsuitable for the purpose for which they are leased or have conditions which seriously interferes with the beneficial enjoyment of the premises. Relying in part on Pollack v. Morrelli, 369 A.2d 458 (Pa. Super. 1976), the court found that a business' commercial "attractiveness" has a bearing upon the constructive eviction inquiry, and whether any such condition remain unremedied or a substantial period of time. In this case, Sears was entitled to terminate the lease.

### Practical Solutions

- a. Have independence of obligations language in lease. But see Pawco, supra; Teadori, supra; McDaniel v. Mack Realty Co., 172 A. 97 (Pa. 1934);
- b. Limitations on obligations to repair premises;
- c. Tenant to accept premises "as is" and has had the opportunity to inspect;
- d. Pictures, punch list.

### 12. Surrender v Abandonment

- a. Abandonment – Unilateral decision by tenant that discontinues tenant's use of property and evidences his decision not to return. Turnway Corp. v. Suffer, 336 A.2d 871 (Pa. 1975). See also Eckel v.

Eiswerth, 92 A.2d 174 (Pa. 1952). Abandonment constitutes a breach of the lease. Gamesa Energy USA, LLC v. Ten Penn Center Associates, L.P., 181 A.3d 1188 (Pa. Super. 2018) (based on terms of lease). Permits landlord to re-enter premises and take possession without resort to judicial process. Turney, supra; Ferrick v. Bianchi and SAB, LLC, 69 A.3d 642 (Pa. Super. 2013); Restatement (Second) of Property: Landlord & Tenant, Section 14.2, Comment g. A tenant who abandons premises is liable for future rent (so long as a judgment for possession is not obtained). Stonehenge, supra; Ferrick, supra; Abandonment found when tenant ceased to operate restaurant and removed fixtures. Ferrick, supra.

- b. Surrender – A consensual act by both parties. Tenant must offer to give up leasehold and landlord must accept offer by tenant. Brill v. Haifetz, 44 A.2d. 311 (Pa. Super. 1945); In re Allegheny Intern, Inc., 136 B.R. 396 (Bankr W.D. Pa. 1991). A surrender is essentially an agreed upon termination of the lease and does not constitute a breach. Unequivocal action or words may constitute acceptance of surrender. In re Fifth Ave. Jewelers Inc., 203 B.R. 372 (Bankr. W.D. Pa. 1996). The courts look at the intention of the parties. Stonehenge, supra. If tenant's offer to surrender is accepted by landlord, tenant relieved of obligation for future rent, as a surrender is not a breach. Auer v. Penn, 99 Pa. 370 (1882). Burden is on tenant to prove acceptance of surrender. Stonehenge, supra.
- c. Reletting – Does not necessarily constitute an acceptance of surrender. Jenkins v. Root, 112 A.2d. 153 (Pa. 1920); Trizechuan, supra, unless tenant can prove such by “clear and convincing evidence.” In Hirsh v. Carbon Lehigh Intermediate Unit #21, 65 Pa. D&C 4th 390 (Lehigh County 2003), there was no acceptance of surrender when landlord sent letter to tenant demanding accelerated rent. If a tenant abandons the premises, and landlord obtains a judgment for acceleration of rent and relets, tenant is entitled to a credit for rent received. Stonehenge, supra; Ferrick, supra.
- d. Practical Solutions
  - i. Clause in lease – acceptance of surrender must be in writing
  - ii. Clause in lease that acceptance of surrender by landlord does not waive landlord's rights.
  - iii. Send letter to tenant who vacates indicating that landlord believes tenant has abandoned, offer of surrender (if any), not accepted by landlord and landlord holds tenant fully responsible for obligations.

iv. If there is a surrender, have a lease termination agreement.

13. Notice of Renewal – If a lease provides that a renewal of the term is effectuated by written notice from tenant to landlord, the notice must be provided. A mere holding over by tenant is insufficient Adams v. Dunn, 64 Pa. Super. 303 (1915). Oral notice is insufficient unless the parties have established a pattern of oral notice. Matter of Opus One, Inc. 33 B.R. 190 (Bankr W.D. Pa. 1983); McClelland v. Rush, 24 A.2d 354 (Pa. 1982); Bantam Four Cinemas, Inc. v. Zamias, 544 A.2d 487 (Pa. Super. 1988).

14. Material Breach – Probably the most frequently litigated ground asserted for the opening of a judgment. A landlord must establish sufficient breach of lease to establish forfeiture of rights, Barracough 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 Barracough, 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 or 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., pg. 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); 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) (unauthorized activities); 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).

15. Waiver and Estoppel. A landlord may waive a breach or may be equitably estopped from asserting forfeiture by acceptance of a late payment if it is determined that the lease was modified. 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). But see Brown, supra (acceptance of rent is not waiver *per se*, only evidence thereof). See also Nitardy v. Chabot, 195 A.3d 941 (Pa. Super. 2018) where the court found that a verbal agreement to end a lease 125 days early, and landlord's acceptance of payment for the partial month, resulted in a waiver of landlord's claim for the remaining rent. Clairton Corp. v. Geo-Con, Inc., 635 A.2d 1058 (Pa. Super. 1993); Federal Realty Investment Trust, supra; Brown v. Pittsburgh, supra.

Practical solution – Place rent in escrow account with letter to tenant indicating that acceptance of money or mesne profits does not waive rights. Also, have “no waiver” clause in lease. Motion can then be filed with Court for release of funds without admissibility or evidence of waiver.

Enforcement of a clause in a lease which has not previously been enforced may not constitute grounds for eviction as the parties may have modified the lease. 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).

Waiver and estoppel defenses may still be used even if there is an integration or “no modification except by writing” clause in the lease, although an oral modification must be proven by “clear, precise and convincing evidence.” Universal Builders, Inc. v. Moon Motor Lodge, Inc., 244 A.2d 10 (Pa. Super. 1968); Borczeck v. Pascoe Equipment Co., 450 A.2d 75 (Pa. Super. 1982).

16. Destruction of Premises – In the absence of a contrary provision in the lease, tenant is not obligated to pay rent if premises are damaged to the extent that it is impossible to carry out the business of the tenant, Albert M. Greenfield v. Kolea, 380 A.2d 758 (Pa. 1977); Pawco, supra.

17. Pandemic Related Defenses – There are very few Pennsylvania cases on the subjects, and none of the cases related to the pandemic have been decided by the appellate courts.

(a) Impossibility of Performance – Section 261 of the Restatement (Second) of Contracts §261 (1981) provides that “...after a contract is made, a party's performance is made impractical without his fault or the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless

the language or the circumstances indicate to the contrary.” Accord, Davis-Haas v. Exeter Township Zoning Hearing Board, 166 A.3d 527 (Pa Comwlth Ct. 2017). See also West v. Peoples First National Bank & Trust Co. 106 A.2d 427 (Pa. 1954); 1954; In re Busik, 759 A.2d 417 (Pa. Comwlth Ct. 2000).

(b) Force Majeure – “In order to use a Force Majeure clause as an excuse to non-performance, the event alleged as an excuse must have been beyond the party’s control and not due to any fault or negligence by the non-performing party. Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse. Gulf Oil Corp. v. Federal Energy Regulatory Commission, 706 F.2d 444 (3d Cir. 1983).... “acts of a third-party making performance impossible to not excuse failure to perform if such acts were foreseeable. Yoffe v. Keller Industries Inc., 297 Pa. Superior Ct. 178, 443 A.2d 358 1982.” Martin v. Commonwealth of Pennsylvania, 548 A.2d 675 (Pa. Comwlth Ct. 2008).

18. 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. Comwlth. Ct. 2005); Delgrasso v. Gruesio, 389 A.2d 119 (Pa. Super. 1978); General State Authority v. Lawrence and Green, 356 A.2d 851 (Pa. Comwlth. Ct. 1976). If Plaintiff, for example, attaches the guaranty which contains the warrant of attorney, but fails to attach the loan agreement or lease 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. As such, 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.

19. 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, 115 A.3d 358 (Pa. Super. 2015).
- (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).
- (d) By whom the notice must be received (i.e., the tenant or debtor, as opposed to his attorney).
- (e) The manner by which notice must be sent (i.e., certified mail, overnight delivery, posting, etc.)

Leases or loan documents often 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.

Attach a copy of the notice letter and any documents confirming delivery as receipt, as an exhibit to the Complaint.

#### 20. Material Modification of Risk to Guarantor

If a lease, or the terms of a loan have been modified without the consent of the guarantor<sup>1</sup>, 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

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<sup>1</sup> 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.

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.

21. 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.

22. ECOA Defense to Spousal Guaranty

The Equal Credit Opportunity Act (“ECOA”) provides that it is unlawful “for any creditor to discriminate against any [credit] applicant, with respect to any aspect of a credit transaction … on the basis of … marital status.” 15 U.S.C.A. §169(a)(1). Federal regulations implementing the ECOA provide that a creditor cannot require the signature of an applicant's spouse if the applicant qualifies under the creditor's standards of creditworthiness 12 C.F.R. §202.7(d)(1). Truist Bank v. Pennsylvania Muscle, Bone and Joint, supra; Silverman v. Eastich Multiple Investor Fund, 51 F.3d 28 (3d Cir. 1995). Only the spousal guarantor can raise the defense. Truist, supra. And the lender does not violate the ECOA where spouses are joint applicants or where the credit applicant is not individually creditworthy without the spouse's signature. Truist, supra; Southwestern Regional Pennsylvania Council v. Gentile, 776 A.2d 276 (Pa. Super. 2001).

E. Issues on Appeal

1. 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). If an order which modifies the amount of the judgment is entered subsequent to an interlocutory order dismissing a petition to strike, the 30-day appeal period runs from the first interlocutory order. Dollar Bank v. Northwood Cheese, supra.

The denial of a petition to open a confessed judgment can only be overturned if the trial court abused its discretion or committed a manifest error. Truist Bank v. Pennsylvania Muscle, Bone and Joint, supra; Neducsin v. Caplan, 121 A.3d 498 (Pa. Super. 2015); Atlantic National Trust, LLC v. Stivala Investments, Inc. 922 A.2d 925 (Pa. Super. 2007).

2. Appeals from Denial of Stay of Execution – 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 under Pa. R.A.P. 311.
3. 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 landlord receives an unfavorable verdict in the trial court, and neither the tenant nor the trial court enters a judgment on that verdict, landlord is placed in the unusual, but necessary position of having to file a Praecept to enter judgment against itself in order to appeal. However, in Stahl Oil Company, Inc. v. Helsel, 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.
4. Appeal from Order Striking or Opening Judgment – An order striking a judgment is considered a final order as it ends the litigation between the parties and therefore appealable. Pa. R.A.P. 341; Stoltzfus v. Green Line Labs, LLC, A.3d WL 6206454 (Pa. Super. 2023); United Parcel Services v. Hohider, 954 A.2d 13 (Pa. Super. 2008).