

Date of Hearing: June 28, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 688 (Wieckowski) – As Amended June 21, 2022

As Proposed to be Amended

SENATE VOTE: 29-7

SUBJECT: CIVIL ACTIONS: JUDGMENTS BY CONFESSION

KEY ISSUE: SHOULD CALIFORNIA JOIN OTHER STATES IN OUTLAWING CONFESSIONS OF JUDGMENT, WHICH ALLOW A LENDER TO UNILATERALLY DEEM A BORROWER TO BE IN DEFAULT ON A LOAN, OBTAIN A COURT JUDGMENT WITHOUT FILING SUIT, AND COMMENCE COLLECTIONS?

SYNOPSIS

This author-sponsored measure would eliminate the confession of judgment from California law. Principally targeted at small businesses, a confession of judgment, also known as a “cognovit,” allows a lender to apply to court for a money judgment against a borrower without having to file a lawsuit. As summarized by the U.S. Supreme Court, “The cognovit is the ancient legal device by which the debtor consents in advance to the holder’s obtaining a judgment without notice or hearing....” (D.H. Overmeyer v. Frick Co. (1972) 405 U.S. 174, 176.)

Essentially, by signing a loan contract that includes a cognovit clause, the borrower “confesses” liability on the debt, at a time and under circumstances that are in the sole discretion of the lender. The confession eliminates the need for the lender to prove to the court that the borrower actually breached the contract and therefore owes the money. The key point is that exercise of the confession of judgment is unilateral.

Once a court enters judgment on the basis of a confession, the creditor can proceed to collect by garnishing the debtor’s wages, seizing and selling the debtor’s personal property, placing a lien on any real property that a debtor owns, and seizing funds from a debtor’s bank account. There is no judicial oversight of these collection methods, which are typically performed by county sheriffs’ offices. The potential for abuse ought to be evident.

If this bill becomes law, California would join several other states that have banned confessions of judgment. Author’s amendments ensure that the bill does not affect the enforceability of existing confessions of judgment, as doing so might be deemed an unconstitutional taking. This bill has no opposition on file.

SUMMARY: Eliminates the use of confessions of judgment in California. Specifically, **this bill:**

- 1) Deems a judgment by confession unenforceable and declares that it may not be entered in any superior court.
- 2) Clarifies that the prohibitions in 1) do not apply to a judgment by confession obtained or entered before January 1, 2023.

- 3) Removes references to confessions of judgment from various provisions of the Government Code and Probate Code.

EXISTING LAW:

- 1) Defines “judgment creditor” as a person in whose favor a judgment is rendered. (Code of Civil Procedure Section 680.240. Unless otherwise noted, all further references are to this code.)
- 2) Defines “judgment debtor” as a person against whom a judgment is rendered. (Section 680.250.)
- 3) Defines “money judgment” as that part of a judgment, entered in a California court, which requires the payment of money. (Sections 680.230, 680.270.)
- 4) Establishes that a judgment is enforceable upon entry. (Section 683.010.)
- 5) Specifies, except where the law provides otherwise, that all property of a judgment debtor is subject to enforcement of a money judgment. (Section 695.010.)
- 6) Permits a judgment by confession to be entered in any superior court. (Section 1132 (a).)
- 7) Provides that a judgment by confession can be entered for money due or to become due, or to secure a person against contingent liability (i.e., their liability to another, if some condition occurs), or both. (*Ibid.*)
- 8) Permits entry of a judgment by confession only if an attorney, who independently represents the signer, also signs a certificate that they (the attorney) examined the proposed judgment and advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure. (Section 1132 (b).)
- 9) Requires the confession of judgment to include a signed statement in writing that:
 - a) Authorizes the entry of judgment for a specified sum.
 - b) If it is for money due or to become due, states concisely the facts out of which the confession arose, and show that the sum confessed is justly due.
 - c) If it is for securing against a contingent liability, states concisely the facts constituting the liability, and show that the sum confessed does not exceed the liability. (Section 1133.)
- 10) Specifies procedures for filing a confession of judgment with the clerk of the court and obtaining the ensuing judgment. (Section 1134.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: A confession of judgment, also known as a “cognovit,” allows a lender to apply to court for a money judgment against a borrower without having to file a lawsuit. As summarized by the U.S. Supreme Court, “The cognovit is the ancient legal device by which the debtor consents in advance to the holder’s obtaining a judgment without notice or hearing....”

(*D.H. Overmeyer v. Frick Co.* (1972) 405 U.S. 174, 176.) In *Overmeyer*, the Supreme Court held that, in order to satisfy a challenge to a confession of judgment on due process grounds, it must be shown that the signer “voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences.” (*Id.* at 187.)

Essentially, by signing a loan contract that includes a cognovit clause, the borrower “confesses” liability on the debt, at a time and under circumstances that are in the sole discretion of the lender. The confession eliminates the need for the lender to prove to the court that the borrower actually breached the contract and therefore owes the money. The key point is that exercise of the confession of judgment is unilateral. As stated by the author:

While confessions of judgment are not a pervasive problem, it is sensible to eliminate such a clause in...commercial contracts. [...] No one—whether an individual or small business owner—should be subject to such contractual language in order to secure a loan. A confession of judgment effectively permits a creditor—who typically is the drafter of the contract and sets terms—to unilaterally decide that an obligor has breached the contract, bypass the court, and go directly to collections...

Once a court enters judgment on the basis of a confession, the creditor can proceed to collect by garnishing the debtor’s wages, seizing and selling the debtor’s personal property, placing a lien on any real property that a debtor owns, and seizing funds from a debtor’s bank account. There is no judicial oversight of these collection methods, which are typically performed by county sheriffs’ offices.

This bill would eliminate the confession of judgment from California law. This appears to be sound public policy, for the following reasons:

- Courts have long viewed confessions of judgment with skepticism. Nearly 200 years ago, the Chief Justice of New Jersey described the cognovit as “the loosest way of binding a man’s property that ever was devised in any civilized country.” (*Alderman v. Diamant* (N.J. 1824) 7 N.J.L. 197, 198.) In 1978, the California Supreme Court struck down our state’s previous confession of judgment statutes on due process grounds, writing: “[R]ather than emerging from negotiations between knowledgeable bargainers, such confessions are most often executed by debtors who have little understanding of the significance of their waiver and little choice in the matter.” (*Isbell v. County of Sonoma* (1978) 21 Cal. 3d 61, 64-5 (Tobriner, J.))
- Our current statutes, enacted in response to *Isbell*, have not been struck down on due process grounds. Nevertheless, California courts confronted with a cognovit remain suspicious enough as to continue to apply the U.S. Supreme Court’s due process test. (*See, e.g., Commercial Nat. Bank of Peoria v. Kermeen* (1990) 225 Cal. App. 3d 396, 398 [vacating a California judgment entered on the basis of an out-of-state confession of judgment because “there is nothing in the record to show these rights [to notice and a hearing] were knowingly and voluntarily waived.”].)
- Federal regulations deem it an unfair act or practice under the Federal Trade Commission Act for a lender or retail installment seller to obtain a confession of judgment from a consumer being extended credit. (16 C.F.R. Section 444.2.)

- Several states already prohibit confessions of judgment, including Alabama (Ala. Code, Tit. 8, Chap. 9, Sec. 11), Florida (Fla. Stat., Sec. 55.05), and Massachusetts (Mass. Gen. Laws Chap. 231, Sec. 13A).
- Indiana goes so far as to make it a misdemeanor to obtain a confession of judgment. (Ind. Code Sec. 34-54-4-1.)
- A recent multi-part Bloomberg investigative series detailed an array of abuses of small businesses nationwide, including some in California, facilitated through use of confessions of judgment drafted under New York law. (*Sign Here to Lose Everything*, Bloomberg Businessweek, available at <https://www.bloomberg.com/confessions-of-judgment>.) In 2019, in response to the Bloomberg stories, New York outlawed confessions of judgment entered against out-of-state borrowers. (NY CPLR Sec. 3218; see also Mider, *Cuomo Signs Bill Cracking Down on Small-Business-Loan Abuses*, Bloomberg Businessweek (Aug. 30, 2019), available at <https://www.bloomberg.com/news/articles/2019-08-30/cuomo-signs-bill-cracking-down-on-small-business-loan-abuses>.)

Given the foregoing, and the lack of opposition to this bill, there seems little reason for California to persist in allowing confessions of judgment.

Author’s amendment—avoiding potential takings. The operative provision of this bill declares confessions of judgment unenforceable and prohibits their entry in any superior court. As currently in print, the bill would exempt from this ban confessions of judgments *entered* before January 1, 2023, the bill’s effective date (if enacted). However, the bill is currently silent as to whether confessions of judgments *obtained* before January 1, 2023, but not yet entered, would remain valid.

The bill’s silence on the latter point raises a potential takings issue. Under the Fifth and Fourteenth Amendments to the U.S. Constitution, neither the federal nor a state government may deprive a person of property (i.e., effect a taking) without just compensation. “In order to state a claim under the Takings Clause, a plaintiff must first establish that he possesses a constitutionally protected property interest.” (*McIntyre v. Bayer* (9th Cir. 2003) 339 F.3d 1097, 1100.) A creditor that obtained a valid confession of judgment before this bill’s effective date arguably has a vested property interest in that judgment. Rendering the confession unenforceable, without compensation to the creditor for the value of the judgment, would arguably effect a taking.

The following amendment will avoid the issue by ensuring that a valid confession of judgment obtained before this bill’s effective date remains enforceable in California:

Code of Civil Procedure Section 1132. (a) A judgment by confession is unenforceable and may not be entered in any superior court.

(b) This section does not apply to a judgment by confession *obtained or* entered before January 1, 2023.

With this amendment, a creditor could still obtain entry of judgment by filing a valid confession of judgment obtained before January 1, 2023 with the court.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file

Opposition

None on file

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