

SENATE THIRD READING
SB 688 (Wieckowski)
As Amended June 30, 2022
Majority vote

SUMMARY

Eliminates the use of confessions of judgment in California.

Major Provisions

- 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), above, 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.

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 United States (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 pre-judgment notice and hearing, and that it did so with full awareness of the legal consequences."

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.

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

- 1) 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.).)

- 2) 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."].)
- 3) 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.)
- 4) Several states already prohibit confessions of judgment, including Alabama (Alabama Code, Title 8, Chapter 9, Section 11), Florida (Florida State, Section 55.05), and Massachusetts (Massachusetts General Laws Chapter 231, Section 13A).
- 5) Indiana goes so far as to make it a misdemeanor to obtain a confession of judgment. (Indiana Code Section 34-54-4-1.)
- 6) 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.

According to 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...

Arguments in Support

No support on file.

Arguments in Opposition

No opposition on file.

FISCAL COMMENTS

According to the Assembly Appropriations Committee, possible cost pressure (Trial Court Trust Fund) of an unknown, but potentially significant amount, beginning in fiscal year (FY) 2023-24, to the trial courts in increased staff workload to hear and adjudicate breach of contract cases initiated by lenders that otherwise have avoided filing a lawsuit as a result of a confession by judgment clause. One eight-hour day of court time costs approximately \$8,000 in staff workload. It is unknown how many lawsuits would result from eliminating the confession by judgment statute, but if 10 civil actions are filed statewide annually, requiring five days of court time, the cost to the court would be \$400,000 annually.

VOTES**SENATE FLOOR: 29-7-4**

YES: Allen, Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Hurtado, Kamlager, Laird, Leyva, McGuire, Min, Newman, Pan, Portantino, Roth, Rubio, Skinner, Umberg, Wieckowski, Wiener

NO: Dahle, Grove, Jones, Melendez, Nielsen, Ochoa Bogh, Wilk

ABS, ABST OR NV: Bates, Borgeas, Limón, Stern

ASM RULES: 8-0-3

YES: Cooley, Bennett, Flora, Lee, Maienschein, Mathis, Blanca Rubio, Valladares

ABS, ABST OR NV: Mike Fong, Gipson, Villapudua

ASM JUDICIARY: 9-2-0

YES: Stone, Cunningham, Bloom, Haney, Kalra, Maienschein, Reyes, Mia Bonta, Wicks

NO: Davies, Kiley

ASM APPROPRIATIONS: 12-4-0

YES: Holden, Bryan, Calderon, Arambula, Mike Fong, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, McCarty

NO: Bigelow, Megan Dahle, Davies, Fong

UPDATED

VERSION: June 30, 2022

CONSULTANT: Jith Meganathan / JUD. / (916) 319-2334

FN: 0003366