

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SB 688 (Wieckowski)  
Version: March 25, 2021  
Hearing Date: April 6, 2021  
Fiscal: Yes  
Urgency: No  
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**SUBJECT**

Civil actions: judgments by confession

**DIGEST**

This bill makes confessions of judgment entered into on or after January 1, 2022, unenforceable.

**EXECUTIVE SUMMARY**

California currently permits a judgment by confession to be entered without action either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both. Such a “confession of judgment” therefore provides a creditor or other contractual party with a method to enter judgment against another party without notice and without providing that party with the opportunity to assert relevant defenses.

Such devices have been outlawed or severely restricted in other states, including recent legislation in New York that sought to curb creditors’ abuse of confessions of judgment.<sup>1</sup> Federal Trade Commission regulations declare it an unfair act or practice for an extension of credit to consumers to include a confession of judgment.<sup>2</sup> California already specifically prohibits use of confessions of judgment in various contexts, but this bill finally eliminates their use wholesale.

The bill is author sponsored. There is no known support or opposition.

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<sup>1</sup> Dan M. Clark, *NY Gov. Cuomo Signs Measure to Curb Creditors’ Abuse of Confessions of Judgment* (August 30, 2019) Law.com, <https://www.law.com/newyorklawjournal/2019/08/30/ny-gov-cuomo-signs-measure-to-curb-creditors-abuse-of-confessions-of-judgment/?slreturn=20210221161800> [as of Mar. 21, 2021].

<sup>2</sup> 16 C.F.R. § 444.2.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Provides, in federal regulations, that it is an unfair act or practice for a lender or retail installment seller, in connection with the extension of credit to consumers in or affecting commerce, to directly or indirectly take or receive from a consumer an obligation that constitutes or contains a cognovit or confession of judgment. (16 C.F.R. § 444.2.)
- 2) Permits a judgment by confession to be entered without action either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed. Such judgment may be entered in any superior court. (Code Civ. Proc. § 1132(a).)
- 3) Provides that a judgment by confession shall be entered only if an attorney independently representing the defendant signs a certificate that the attorney has examined the proposed judgment and has 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. (Code Civ. Proc. § 1132(b).)
- 4) Requires the above certificate to be filed with the filing of a statement in writing, signed by the defendant and verified by their oath, to the following effect:
  - a) it must authorize the entry of judgment for a specified sum;
  - b) if it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due; and
  - c) if it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same. (Code Civ. Proc. §§ 1132(b), 1133.)

This bill:

- 1) Provides that a confession of judgment is unenforceable and may not be entered in any superior court unless entered before January 1, 2022.
- 2) Repeals Sections 133 and 1134 of the Code of Civil Procedure and deletes various references to confessions of judgments and the relevant statutes.

## COMMENTS

### 1. A brief history of confessions of judgment

A “confession of judgment” or “cognovit” clause is a device by which a debtor or a party to a contract agrees that if it later defaults or breaches the contract, the creditor or other party is permitted to summarily obtain a legal judgment that it may enforce against the defaulting or breaching party’s assets. This judgment is generally without action, and therefore without judicial involvement, and becomes immediately enforceable. A party agreeing to such a clause is therefore waiving foundational procedural rights such as the right to notice of the judgment and to assert any defenses to the other party’s claims. A report from the Congressional Research Service has described this tool:

Creditors laud confessions of judgment as an efficient means to collect assets from recalcitrant debtors, as they enable creditors to avoid the “costly and time-consuming” litigation process. Others, however, maintain that confessions of judgment undesirably permit creditors to collect money and assets that they otherwise could not collect if the debtor retained the ability to assert meritorious legal defenses against the creditors’ claims.<sup>3</sup>

Confessions of judgment have an infamous history of questionable uses and for being challenged on due process grounds. Former United States Supreme Court Justice Harry Blackmun put a fine point on it:

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, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder. It was known at least as far back as Blackstone's time. In a case applying Ohio law, it was said that the purpose of the cognovit is "to permit the note holder to obtain judgment without a trial of possible defenses which the signers of the notes might assert." And long ago the cognovit method was described by the Chief Justice of New Jersey as "the loosest way of binding a man's property that ever was devised in any civilized country." Mr. Dickens noted it with obvious disfavor. The cognovit has been the subject of comment, much of it critical.<sup>4</sup>

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<sup>3</sup> Kevin M. Lewis, *Agreeing in Advance to Lose? Legal Considerations in Regulating Confessions of Judgment* (June 13, 2019) Congressional Research Service, <https://crsreports.congress.gov/product/pdf/LSB/LSB10239/4> [as of Mar. 21, 2021].

<sup>4</sup> *D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 176-177, internal citations omitted.

The California Supreme Court has also weighed in on such devices:

When an extension of credit is secured by a confession of judgment it puts at the disposal of the creditor the most drastic of enforcement proceedings. A confession of judgment forecloses the presentation of any possible defense or controversy for judicial resolution; to the contrary it is a personal admission of a debt obligation upon which the court places its primatur. Because the very nature of the confession of judgment is apt to encourage the filing of fraudulent claims against debtors, a majority of states have enacted legislation either banning or restricting its use.<sup>5</sup>

Although the United States Supreme Court has held that such clauses are not per se unconstitutional, the California Supreme Court has noted that “sad experience has shown that the confession of judgment procedure lends itself to overreaching, deception, and abuse.”<sup>6</sup> The court explained the relevant constitutional requirements: “Under the due process clause of the federal Constitution, a court may enter judgment against a defendant only if the record shows that either (a) the defendant has received notice and an opportunity to be heard, or (b) the defendant has voluntarily, knowingly and intelligently waived his constitutional rights.”<sup>7</sup> The court then struck down an earlier confession of judgment statute as “constitutionally defective”:

Because the California statutes provide insufficient safeguards to assure that the debtor in fact executed a voluntary, knowing, and intelligent waiver, and because the debtor's opportunity to seek post-judgment relief does not cure the unconstitutionality of a judgment entered without a valid waiver, we conclude that the confession of judgment procedure established in sections 1132 through 1134 violates the due process clause of the Fourteenth Amendment.<sup>8</sup>

## 2. Eliminating confessions of judgment

Revised Section 1132 provides: “A judgment by confession may be entered without action either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any superior court.” However, it requires that the judgment be entered only if “an attorney independently representing the defendant signs a certificate that the attorney has examined the proposed judgment and has 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.” The certificate must be filed with a statement in

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<sup>5</sup> *Hulland v. State Bar of California* (1972) 8 Cal.3d 440, 449.

<sup>6</sup> *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 71.

<sup>7</sup> *Id.* at 64.

<sup>8</sup> *Id.* at 65-66.

writing and signed by the defendant that authorizes the entry of judgment for a specific amount and includes details about the sum due.

This bill provides that a judgment by confession is unenforceable and may not be entered in any superior court. This applies to judgements of confession filed on or after January 1, 2022. The bill also removes various references to confessions of judgment elsewhere in the law.

California law already prohibits use of confessions of judgments in various contexts.<sup>9</sup> The change joins California with various other states that outlaw the procedural device, including Massachusetts,<sup>10</sup> Alabama,<sup>11</sup> and Indiana,<sup>12</sup> where procuring a cognovit note is a misdemeanor.

According to the author:

SB 688 strikes confessions of judgment from California law. 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: seizing assets, levying accounts, and garnishing wages.

### SUPPORT

None known

### OPPOSITION

None known

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<sup>9</sup> See, e.g., Financial Code § 18440 (“An industrial loan company shall not take any confession of judgment . . . at the time of making the loan.”); Civil Code § 1689.12 (making certain confessions of judgment in connection with home solicitation contracts void and unenforceable).

<sup>10</sup> ALM GL ch. 231, § 13A: “Any stipulation in a contract, promissory note or other instrument, or in any memorandum or writing relating thereto, whereby a party thereto agrees to confess judgment in any action which may be brought thereon or authorizes or agrees to authorize another person to confess judgment as aforesaid shall be void and any judgment by confession taken in pursuance of such a stipulation shall be set aside or vacated on motion of the defendant.”

<sup>11</sup> Code of Ala. § 8-9-11: “All agreements, contracts, or stipulations to confess judgment in any of the courts of this state, to be sued in any county other than that fixed by the venue statutes of this state, or to authorize another to confess judgment in any of the courts of this state made before the commencement of the action in which such judgments are so confessed shall be void, and all judgments by such unlawful confession, or otherwise taken or had in violation of this section, shall be set aside and annulled on motion if made within six months after the entry of such judgment.”

<sup>12</sup> Ind. Code Ann. § 34-54-4-1.

**RELATED LEGISLATION**

Pending Legislation: SB 531 (Wieckowski, 2021) establishes consumer protections in connection with the sale and collection of certain debts, including notice requirements and access to debt information. This bill is currently in the Senate Banking and Financial Institutions Committee.

Prior Legislation: AB 1526 (Kalra, Ch. 247, Stats. 2018) requires debt collectors to provide certain notices to consumers when attempting to collect on time-barred debts. It would also provide that the limitations period on commencing actions to collect on certain debts is an outright bar on initiating such proceedings, rather than allowing the expiration of the statute of limitations to serve simply as an affirmative defense.

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