

Written Testimony of
Benjamin R. Picker, Esq.
McCausland Keen + Buckman*
Devon, Pennsylvania

***“Crushed by Confessions of Judgement:
The Small Business Story”***

U.S. House of Representatives
Small Business Committee

June 26, 2019

*The opinions expressed herein are mine alone and do not necessarily represent the position of McCausland Keen + Buckman.

Chairwoman Velázquez, Ranking Member Chabot, and members of the House Small Business Committee, thank you for the opportunity to be here today as an invited guest of the Committee to discuss the history, law, uses, and important due process and fairness considerations relating to confessions of judgment.

A confession of judgment clause, also known as a warrant of attorney or cognovit provision, is a contractual provision permitting the plaintiff to take a judgment against a purportedly defaulting defendant without prior notice and before commencement of a lawsuit, thereby skipping the entire normal litigation process. The concept of confession of judgment dates back to perhaps the 13th Century. Howard H. Hoekje, *Confession of Judgment Under a Warrant of Attorney*, Akron Law Review (August 2015).

During my nearly fifteen years of practicing law, a large part of which has been litigating business disputes, I have both utilized and defended against confessed judgments. When asked if I like confession of judgment my canned response is usually, “It depends on who is using it, me or the other guy.” That is because it is a very powerful tool that can be abused in the wrong hands. However, when used in appropriate circumstances, it is often a far less expensive way to reach the same result that would usually be reached after years of costly and needless litigation.

In my home state, the Commonwealth of Pennsylvania, confessions of judgment are permitted, but only in connection with commercial transactions. They are prohibited in consumer contracts, such as residential leases and consumer financing transactions. In most states, confession of judgment is generally prohibited.

It should be noted that through its Credit Practices Rule, which was promulgated in 1985, the Federal Trade Commission outlawed the use of confession of judgment in consumer credit transactions. The primary reasons for the Credit Practices Rule were: (1) consumers often suffer substantial economic and emotional injury from the use of confession of judgment in consumer credit transactions; (2) consumer credit contracts are often contracts of adhesion where individual consumers have little or no negotiating power; (3) consumers did not understand the provisions; and (4) default usually occurred because of issues beyond a consumer’s control, such as unemployment or illness.

The Pennsylvania Supreme Court has described confession of judgment as “perhaps the most powerful and drastic document known to civil law.” *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A.2d 234 (1953). The Court explained that “[t]he signing of a warrant of attorney is equivalent to a warrior of old entering a combat by discarding his shield and breaking his sword.” Therefore, in Pennsylvania “the law jealously insists on proof that this helplessness and impoverishment was voluntarily accepted and consciously assumed.”

As a result, states that permit confession of judgment, including Pennsylvania, require that the provision be placed conspicuously within the contract, that certain formalities be strictly followed, and that there be a way for the defendant to challenge the judgment.

A warrant of attorney that is bolded or capitalized will ordinarily be sufficiently conspicuous. The Pennsylvania Supreme Court has compared a non-conspicuous confession of judgment clause to actions of the Roman tyrant Caligula, who was said to have had “the laws inscribed upon pillars so high that the people could not read them.” *Cutler*, 374 Pa. at 6.

Regarding formalities, for example, confessions of judgment in Pennsylvania must be accompanied by a complaint describing, paragraph by paragraph, the factual basis for the judgment, and a copy of the instrument or contract permitting the confession of judgment must be attached. In addition, an affidavit must be included attesting to the fact that the defendant has income of more than \$10,000. The confessed judgment is filed subject to the misdemeanor penalty relating to the criminal offense of unsworn falsification to authorities.

In some Pennsylvania counties, including my home county of Montgomery County, the court clerk, known as the Prothonotary, has its legal counsel review all confession of judgment filings before they are accepted to ensure that they comport with all legal requirements. This can serve to protect both the plaintiff and Prothonotary from lawsuits.

The confession of judgment procedure in Pennsylvania also comports with the constitutional guarantee of due process. It requires knowing and voluntary relinquishment of pre-deprivation process and provides a procedure for challenging the confessed judgment. In Pennsylvania, a confessed judgment can be challenged by filing a petition with the court within thirty days of receiving notice of the judgment. It can be stricken where there is a clear defect on the face of the judgment

papers. Moreover, judgment can be opened where the defendant shows that it has a meritorious defense.

As I mentioned earlier, confession of judgment can be abused in the wrong hands. It appears that sometimes, small business owners do not read or negotiate contracts before signing them. Sometimes, small businesses do not have the resources to hire an attorney to litigate such matters. And sometimes, the most unscrupulous, including some of the companies mentioned in the series of Bloomberg articles, provide small business financing with the hope and expectation from the very time the loan documents are signed that the loan will never be repaid, and leveraging that as a way to take the borrower's assets as part of the lender's business model.

There are some common sense ways that Congress could act to protect small business borrowers against unscrupulous lenders while protecting the interests of lenders who act appropriately.

First, it is my opinion that any legislative action should be limited to small business loans. It should not be expanded to include any and all confessions of judgment, such as those ordinarily contained in commercial leases. Leases are not loans. Furthermore, I am not aware of any evidence that commercial landlords are abusing confessions of judgment. In any such legislation, the term "small business" should be clearly defined (whether by number of employees or annual revenue, or both), because larger businesses tend to be more sophisticated and often times employ attorneys or have outside attorneys on retainer who can regularly review contracts and protect their interests.

Second, any such legislation should require that the confession of judgment provision be capitalized and bolded, and that a plain language disclosure be placed on the first page of the contract and immediately before the signature block of the contract. The plain language disclosure should, at a minimum, inform the borrower that the confession of judgment provision permits the entry of a civil judgment upon default and with limited right to contest it, and that the borrower has the right to consult with an attorney before signing the contract. This requirement will help ensure that the borrower is aware of the provision, and has a basic understanding of its import, before signing the contract.

Finally, any such legislation should require that the confessed judgment be filed only in the state where the borrower is location. The small business loan contracts often have consent to jurisdiction provisions that allow the lender to confess judgment or file suit in states that have no connection to the borrower. This will protect small businesses from having to litigate in states that may be across the country from their business location and it will alleviate the burden on certain court systems, like those in New York and Philadelphia, which have been magnets for such judgment filings. Of course, this requirement will serve to prohibit the use of confessions of judgment in instances where the borrower is located in a state that prohibits confession of judgment. However, I do not know whether this will result in lenders refusing to lend money to small businesses located in states where confession of judgment is prohibited, or whether lenders will simply omit confession of judgment clauses from contracts with small businesses located in such states.

Thank you again for giving me the opportunity to speak here today. I would be happy to take any questions that you may have.