

An illustration of two hands in business suits shaking a large gold dollar sign. The hands are yellow with orange shading, and the suits are dark grey with white cuffs. The dollar sign is a large, stylized gold '1' with a white outline. The background is a light blue gradient.

By Michael G. Cortina

Confessions of an Illinois Judgment

As more loans go bad, banks looking for better ways to collect from defaulting borrowers are turning to judgments by confession. The author explains how they work and argues they typically can be enforced as soon as they're entered, with no notice to the debtor.

Judgments by confession are becoming more and more popular, yet when and how they can be enforced is disputed by attorneys, judges, and even clerks. Whether a judgment by confession needs to be confirmed by sending a subpoena to the debtor before it can be enforced is hotly contested by legal professionals.

This article argues that judgments by confession are completely enforceable once entered by the court, with only one exception, which is discussed below. Thus, confirmation of a judgment by confession is a waste of time and money, unless the creditor is seeking a wage garnishment against the judgment debtor.

What is a judgment by confession?

No notice required. A confession of judgment is the modern-day form of a cognovit judgment – i.e., the written authority given by a debtor for entry of judgment against him or her in the event of a default.¹ A cognovit note operates under the same theory, except the promissory note itself gives the authority to confess judgment against the defaulting debtor.²

Judgments by confession are controversial because of their summary nature and the lack of notice to debtors. A creditor

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need only have an attorney sign a confession of judgment to obtain a judgment by confession (assuming that the creditor has the right to such a judgment), and can do so without ever notifying the debtor.

This lack of notice is why they are sometimes disfavored by the courts. However, the Illinois Supreme Court ameliorated the harshness of judgments by confession by enacting a rule governing how they may be challenged.³ By creating the vehicle for “opening” judgments by confession, the Illinois Supreme Court has insured that debtors have access to the court and that due process is guaranteed.

Consumer transactions exempted. In Illinois, authority to enter a judgment by confession is found in the Code of Civil Procedure.⁴ Note that it can only be used in transactions that are not considered “consumer” in nature. A “consumer transaction” is defined as the sale, lease, assignment, loan, or other disposition of an item of goods, a consumer service, or an intangible to an individual for primarily personal, family, or household purposes.⁵

In the past, in fact, Illinois allowed judgments by confession in consumer transactions. But the Code of Civil Procedure was amended to forbid that for consumer transactions after September 24, 1979.⁶

The magic words. Promissory notes that allow for a confession of judgment usually contain language such as the following:

To further secure payment hereof, Borrower irrevocably authorizes any attorney of any court of record to appear for Borrower, at any time from time to time after payment is due, whether by acceleration or otherwise, and confess a judgment, without process, in favor of the Lender against the Borrower for such amount as may be unpaid, together with costs of such proceeding and reasonable attorneys’ fees, and waives and releases all errors which may intervene in any such proceeding and consents to immediate execution upon said judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof. Borrower hereby waives any errors and fully releases any attorney-in-fact obtained by Lender to confess judgment on Borrower’s behalf.

With this language in place, a creditor can enter a judgment by confession against its debtor.

What is the procedure for obtaining a judgment by confession?

A creditor who has the right to a judgment simply needs an actual confession of judgment signed by the debtor or any attorney. Once the lawsuit is filed, the creditor can simply appear before a judge to obtain the judgment by filing the confession with the court.

While the procedure for entering a judgment by confession is straightforward, however, the road to the judgment is sometimes more tortuous.

Who can sign the confession?

One question that sometimes arises is who can sign the confession of judgment. Must it be an attorney for the debtor? The answer is “no.” Indeed, it can even be an attorney in the same firm as the creditor’s attorney, as long as the language authorizing the confession allows “any attorney” to do so.

In *Citibank, NA v Bearcat Tire, AG*, the defendant, Bearcat, moved to open a judgment by confession and alleged as one of its affirmative defenses that it was confessed by a member of the same law firm that prepared the note and represented the plaintiff in that case.⁷

The court stated “it would not be hyperbolic to term [this defense] frivolous,”⁸ finding that the note at issue specifically

1. *Black’s Law Dictionary* 277 (8th ed 2004).

2. *Id.*

3. See Ill S Ct R 267.

4. 735 ILCS 5/2-1301(c).

5. *Id.*

6. *Id.*

7. *Bearcat*, 550 F Supp 148, 150 (ND Ill 1982).

8. *Id.*

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allowed the plaintiff to designate “any attorney” to confess judgment and that Illinois courts have squarely held that the confession of judgment by an attorney of the same firm as plaintiff’s counsel does not invalidate the judgment.⁹ The *Gecht v Suson* case, cited by the *Bearcat* court as authority, held that the “contention that the confession of judgment by an attorney of the same firm as plaintiffs’ counsel invalidates the judgment is without merit.”¹⁰

But while “any attorney” means “any attorney,” many courts are hesitant to allow a confession to be signed by the plaintiff’s attorney or another attorney at the same firm. On its face, it appears to be a blatant conflict of interest, so some courts neither condone nor allow this practice.

For that reason, it may be necessary for plaintiff’s attorneys to hire attorneys outside of their firm to enter an appearance for the defendant and sign the confession. Using this procedure may be slightly more expensive than using another attorney in the same firm, but it avoids the problems and delays that occur when courts insist on other attorneys signing the confession. Knowing the practices of the judge before whom the plaintiff’s attorney appears is the key to deciding how to proceed.

Is confirmation of the judgment by confession necessary for enforcement?

A point of contention among many in the legal community is whether a judgment by confession is immediately enforceable or must be “confirmed” by serving a summons on the judgment debtor. Simply put – the cases say that a judgment by confession is completely enforceable the moment it is entered, and confirmation is only necessary if you seek a wage garnishment against the judgment debtor.

I have seen judges refuse to allow citations to discover assets to move forward without a judgment by confession being confirmed. I even had a clerk refuse to issue a memorandum of judgment obtained through confession. The law, however, is clear that only a wage garnishment requires confession.

The case that provides the most guidance is *Valley Pontiac-Cadillac-Jeep-Eagle, Inc v Thornton Pontiac Cadillac, Inc.*¹¹ In *Valley*, the plaintiff obtained a judgment by confession against

the defendant and a few days thereafter served a citation to discover assets and a third-party non-wage garnishment to collect the debt. The defendant immediately moved to quash the citation and non-wage garnishment. The trial court granted both motions, and these orders (and others) were appealed.

The appellate court, before rendering its holding, stated:

We parenthetically note that, while the subject appeal does not raise due process arguments, the issues brought for review implicitly concern the constitutional sufficiency of a garnishment proceeding based upon an unconfirmed judgment by confession. To the extent that this concern is evident, we believe the contention is misplaced. The Illinois Code of Civil Procedure has codified safeguards in the statute which provides for judgments by confession. [Citation omitted.] The current statute has been considered in light of the aforementioned federal authority and is without constitutional objection. There is considerable judicial awareness of the nature of judgments by confession since they are entered without contest. For this reason, the courts exercise equitable jurisdiction and apply different considerations from those involved when a party seeks relief from other types of judgments. Trial courts, and courts of review, afford adequate opportunity for consideration in accordance with the factual situations presented by petitions to vacate or to open judgments by confession.¹²

The court clearly wanted to quash any notion, even though it was not raised by the parties, that judgments by confession did not withstand constitutional muster. So long as plaintiffs follow the statute, judgments by confession meet due process requirements.

The *Valley* court then engaged in an excellent review of the various vehicles of collection used in Illinois. This review was necessary because the court found that only one vehicle – wage garnishments – required a judgment by confession be confirmed. The court simply reviewed the language of the statutes themselves and determined that only the statute pertaining to wage garnishments defined a “judgment creditor” as “a recipient of any judgment, except a judgment by confession.”

The court further reviewed the statute and found that Part 8 (wage deductions)

contained a section 813¹³ that specifically required a confirmation of a judgment by confession when the creditor sought a wage deduction. The court found that “there is no parallel requirement of a prior issuance and service of a summons confirming judgment, in the context of a nonwage proceeding.”¹⁴ It went on to

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hold that no confirmation was necessary for the judgment creditor to issue a non-wage garnishment summons.

After discussing non-wage garnishments, the court reviewed the order quashing the judgment creditor’s citation to discover assets. It made short work of this argument, stating that the proceeding to discover the judgment debtor’s assets was proper.

In its holding, the *Valley* court stated, “[i]n conclusion, we believe that both the nonwage garnishment proceeding and the supplemental proceeding procedures are constitutionally sound. Therefore, the trial court’s decision to quash the garnishment summons and citation proceedings initiated by Valley Pontiac was in error.”¹⁵

Conclusion

While the United States economy may be rebounding, the effects of its downturn will be felt for some time. Consequently, the use of judgments by confession will certainly rise, as will the need to understand how they can be used. In turn, all legal professionals who might encounter judgments by confession should understand who is legally able to sign a judgment by confession and when it needs to be confirmed. ■

9. Id at 150-51, citing *Gecht v Suson*, 3 Ill App 3d 183, 188, 278 NE2d 193, 196 (1st D 1971).

10. *Gecht* at 188, 278 NE2d at 196.

11. *Valley*, 187 Ill App 3d 699, 543 NE2d 950 (3d D 1989).

12. Id at 701-02, 543 NE2d at 951-52.

13. 735 ILCS 5/12-813 still exists in the modern Code of Civil Procedure.

14. *Valley* at 703, 543 NE2d at 952.

15. Id at 703-04, 543 NE2d at 953.

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Vol. 98 #11, November 2010.
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