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## COMMERCIAL BANKING, COLLECTIONS & BANKRUPTCY LAW

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### Play it as it lies: Dealing with unlawful judgment by confession clauses

By Michael G. Cortina

In the October, 2014, edition of *Illinois Bar Journal*, Andrew R. Schwartz authored an article titled "Defending Confession Judgment Cases in Illinois." Mr. Schwartz's article argues primarily about possible defenses to judgments by confession against guarantors. This raises the question, however, about what a court is supposed to do when it holds that a judgment by confession clause in a guaranty is unlawful. Rather than vacating the judgment, which has been the historic course of action, the court should leave the parties where it finds them—meaning that the judgment should remain in place.

#### Draconian Law

Judgments by confession are obtained without notice to the debtor and often result in the freezing of assets before the debtor even knows that a judgment has been obtained. If there were no remedy or way to contest a judgment by confession, anyone would be hard-pressed to argue that this type of judgment is not draconian. Confession of judgment clauses are viewed with such disdain that they are only allowed to exist in non-consumer loans.<sup>1</sup> However, objections to the judgments by confession principle fail to mention how the Illinois Supreme Court Rules insure that the harshness of a judgment by confession is ameliorated. *Rule 276* specifically pertains to judgments by confession and how a judgment debtor that has a meritorious defense can easily avoid the consequences of such a judgment. *Rule 276* states:

A motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule

191 for summary judgments, and shall be accompanied by a verified answer which defendant proposes to file. If the motion and affidavit disclose a *prima facie* defense on the merits to the whole or a part of the plaintiff's claim, the court shall set the motion for hearing. The plaintiff may file counteraffidavits. If, at the hearing upon the motion, it appears that the defendant has a defense on the merits to the whole or a part of the plaintiff's claim and that he has been diligent in presenting his motion to open the judgment, the court shall sustain the motion either as to the whole of the judgment or as to any part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial upon the complaint, answer, and any further pleadings which are required or permitted. If an order is entered opening the judgment, defendant may assert any counterclaim, and plaintiff may amend his complaint so as to assert any other claims, including claims which have accrued subsequent to the entry of the original judgment. The issues of the case shall be tried by the court without a jury unless the defendant or the plaintiff demands a jury and pays the proper fee (if one is required by law) to the clerk at the time of the entry of the order opening the judgment. The original judgment stands as security, and all further proceedings thereon are stayed until the further order of the court, but if the defense is to a part only of the original

judgment, the judgment stands as to the balance and enforcement may be had thereon. If a defendant files a motion supported by affidavit which does not disclose a defense to the merits but discloses a counterclaim against the plaintiff, and defendant has been diligent in presenting his motion, the trial court may permit the filing of the counterclaim and to the extent justice requires may stay proceedings on the judgment by confession until the counterclaim is disposed of.<sup>2</sup>

*Rule 276* makes it clear that if the judgment debtor has a meritorious defense to the judgment that was entered against him, then he has the right to "open" the judgment and proceed to a trial on the merits. This rule makes it so that if anyone has a judgment wrongfully confessed against them, then that person has a remedy just like any other defendant. With notice or without, a confessed judgment can be attacked if there is a defense. Prior to *Rule 276* or its predecessor, no vehicle existed for challenging a judgment that was entered by confession, so *Rule 276* became a welcome relief to what is often viewed as a caustic clause in commercial contracts. This ability to challenge a judgment obtained by confession turns something "draconian" into nothing more than an expedited method of obtaining a valid judgment. The difference between this and non-confession cases is that a judgment debtor in a confession of judgment case can only "open" the judgment if the judgment debtor has a meritorious defense; if there is no meritorious defense to the judgment, it will stand.

The outrage that defendants express of a having a lender sneak around and obtaining a judgment “without notice to the judgment debtor” suddenly loses its steam when the realization sets in that a debtor with a meritorious defense can require proof of a debt just like any other debtor. If the debtor does not truly owe the debt, then a judgment by confession is hardly a threat.

### ***In Pari Delicto***

In Mr. Schwartz’s article, the example is given with a confession of judgment clause in a commercial guaranty. It has been the law for over 40 years in Illinois that the amount of the debt must be evidenced by the document itself without reliance on extrinsic evidence, so the fact that the guaranty was just a general guaranty without any specificity as the amount actually being guaranteed makes the confession language in that guaranty unenforceable.<sup>3</sup> Of this, there is no real argument. The question then becomes: what is the remedy for parties who find themselves dealing with an illegal clause in a contract?

Those attempting to challenge judgments by confession that are unlawful (e.g. the judgment by confession clause in the *Westfall* case) simply argue that the clause is void and any judgments based on the void provision must be voided as well. This, however, does not amount to a full and complete discussion of how courts are supposed to deal with parties who find themselves as being parties to illegal contracts. The proper question is not whether the contract or the clause is illegal, but what are courts to do when they find themselves confronted with parties to an illegal contract?

When courts find that a clause is illegal and unenforceable and the parties are equally at fault, or *in pari delicto*, the court is to aid neither party and simply leave them as it finds them.

In *Vine Street Clinic v. HealthLink, Inc.*, the parties were engaged in what the courts found to be an unlawful contract for the sharing of fees for medical services. The Illinois Supreme Court agreed that the contract for paying a percentage of the medical fees earned was unlawful and in violation of the *Medical Practice Act of 1987*<sup>4</sup> and void as against public policy. The lower courts had allowed the defendant to retain the fees that they had previously been paid by the plaintiff that were based on the unlawful contract, and the Supreme Court affirmed the decision. The high court held that the “lower

courts’ decision not to reimburse plaintiffs for the fees paid pursuant to their *HealthLink* contracts reflects the maxim that ‘the law will not aid either party to an illegal act, but will leave them without remedy as against each other,’ with the caveat that they are of equal knowledge, wilfulness and wrongful intent, or *in pari delicto*.”<sup>5</sup>

In *O’Hara v. Ahlgren, Blumenfeld and Kempster*,<sup>6</sup> the plaintiff sued the defendant law firm for breach of contract. The plaintiff was a non-lawyer widow of a lawyer that had contracted to sell the “goodwill” of her late husband’s law practice to the defendant for a percentage of the fees obtained by the defendant from the decedent’s clients. The plaintiff had transferred many files to the defendant and the defendant had earned a substantial sum of money on the files that were transferred. The court held that the contract, which was essentially a lawyer agreeing to split legal fees with a non-lawyer, was illegal and unenforceable. After ruling that the contract was illegal, the court did not order the files returned to the plaintiff or require that the defendant to pay the plaintiff for the value of the goodwill that it had obtained; instead, the court simply held that “where enforcement of an illegal contract is sought, the courts will aid neither party, but will leave them where they have placed themselves.”<sup>7</sup>

We already know from *Westfall* that a confession of judgment clause in a general, blanket guaranty is unenforceable. However, vacating the judgment obtained by confession, as is usually requested by defendants against whom the judgment has been confessed, assists the defendant and violates the *in pari delicto* doctrine. In applying what has been learned from *Vine Street Clinic* and *O’Hara* to confessions of judgments in guaranties, courts should leave the parties as it finds them and not take any action to assist either party; in order to do this, the court, under the maxim of “aiding neither party to an illegal act,” should let the judgment against the guarantor stand since that is how the court “found” the parties.

If the guarantor had filed a declaratory judgment complaint to declare the confession of judgment clause illegal prior to judgment being entered, then the court could void the clause and prevent a judgment by confession being entered because it found the parties before a judgment had been rendered. However, because the judgment had already been entered, the court should leave

the parties as it found them, and that is with a judgment in favor of the lender and against the guarantor firmly in place.

Courts like the *Westfall* court have ruled that judgments by confession that were based on unlawful confession clauses were invalid and any judgment entered under the invalid confession was void.<sup>8</sup> *Westfall* relied on old precedent for holding that the invalid confession was void. In *Weber v. Powers*,<sup>9</sup> cited to in *Westfall*, the Illinois Supreme Court held that a judgment by confession was void because the power to confess the judgment did not exist in the situation where a tenant was holding-over his lease and the power to confess only extended for the duration of the lease. Thus, in *Weber*, the problem was not the language of the confession clause, but the fact that the contract with the confession clause in it was not the basis of the suit. *Weber* was not a situation pertaining to an unlawful confession clause, but rather was a judgment by confession where no right to obtain a judgment by confession existed.

Other cases, however, have held that the warrant granting the power of the confession was invalid thereby precluding the court from having personal jurisdiction and making the confession itself void.<sup>10</sup> None of those cases, however, explored the *in pari delicto* doctrine, so they cannot be considered to be contrary authority. Further, *Westfall* was decided in 1971, and the cases it relied upon as precedent are far older. In contrast, *Rule 276* did not come into existence until 1982.

*Rule 276* gives relief to parties that find themselves subject to a judgment by confession. If a meritorious defense exists to the confessed judgment, then the debtor has a way of presenting the defense and not find herself without any legal recourse. Prior to *Rule 276*, debtors had no method of challenging confessed judgments and therefore challenged the contracts upon which the judgments were obtained. Even those challenges, however, failed to address the *in pari delicto* doctrine and may have had different outcomes if they had.

Some might argue that allowing the judgment to stand when the confession clause was unlawful flies in the face of our system of justice. However, in *Vine Street Clinic*, the Supreme Court held that payments made on an unlawful fee-splitting contract could not be recovered. If money paid pursuant to an illegal contract cannot be recovered, why should a judgment based on an illegal con-

fession of judgment clause be treated any differently?

### Conclusion

Every defendant in every civil case has a right to defend against the claims of the plaintiff. This is a basic premise to our judicial system and one that is not disputed. This right, however, can be waived just like other rights and those rights are waived by parties that agree to allow the lender to obtain a judgment against them by confession. Attorneys representing guarantors should not allow confession of judgment language to exist in guaranty documents if the attorney believes such language to be illegal and unenforceable. If language exists in commercial loan documents that have been negotiated at arm's length by both parties, then they are both at fault if the agreement is unlawful. If a clause in a contract is unlawful, courts should leave the parties that as it found them and provide assistance to neither. In the game of

golf, the ball should be played from where the player finds it without any improvement to the situation; the same should occur if a court finds itself dealing with parties to an unlawful confession of judgment clause, which is to leave the parties where it finds them. Play it as it lies.

While many defendants were successful in challenging judgments that were confessed against them by challenging the legality of the confession clause itself, no court that reviewed the legality of confession clauses considered the *in pari delicto* doctrine. If they had, the doctrine would have required the court to aid neither party and simply leave them where it found them. With the adoption of *Rule 276*, courts now have a method by which to assist defendants who find judgments confessed against them rather than simply leaving them where it found them. *Rule 276* allows courts to aid defendants with meritorious defenses to confessed judgments without running afoul of the *in pari*

*delicto* doctrine. ■

1. 735 ILCS 5/2-1301(c).
2. *IL Sup. Ct. R 276*.
3. See, e.g., *Grundy County Nat. Bk. v. Westfall*, 49 Ill.2d 498, 502 (1971)(holding that the power to confess a judgment was invalid because it required the ascertainment of the amount of the judgment from evidence other than the guaranty document itself).
4. 225 ILCS 60/1, et seq.
5. *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill.2d 276, 297 (2006).
6. *O'Hara v. Ahlgren, Blumenfeld and Kempster*, 158 Ill. App. 3d 562 (1st Dist. 1987).
7. *Id.* at 565.
8. See *Westfall*, at 502.
9. *Weber v. Powers*, 213 Ill. 370 (1904).
10. See, e.g., *Little v. Dyer*, 138 Ill. 272 (1891) (holding that a confessed judgment was void because the power to confess a judgment for an unliquidated amount did not exist); but see, *Sears Bk. and Tr. Co. v. Scott*, 29 Ill. App. 3d 1002 (1st Dist. 1975)(holding that a question on the amount of the liquidity of the judgment questioned the amount of the judgment and not the validity of the power to confess).

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