

CONFESSIONS OF JUDGMENT: PRACTICES IN NEW YORK, PENNSYLVANIA, AND OHIO

New York attorneys representing commercial lenders often find use for the confession of judgment. This unique tool enables creditors to obtain a monetary judgment against debtors by filing a previously executed affidavit, thus forgoing the time and expense of a lawsuit. The confession of judgment can be a quick means of recovery in the event of a loan default or security in a settlement agreement, ensuring the obligor fulfills its commitments under the settlement, lest the confession be presented in court and judgment be entered against it.

New York has permitted this practice for decades, but most states severely restrict or prohibit altogether their use in the interest of public policy. New York itself has adopted heightened restrictions on confessions of judgment in recent years. Other states, such as Pennsylvania and Ohio, see this practice widely implemented with comparatively few limitations.

This article will examine the specifics of confessions of judgment in each of those three states.

New York

Confessions of judgment in New York (or “judgments by confession”, as referenced in the statute) are governed by CPLR 3218. Per CPLR 3218, confessions of judgment must: (i) be in the form of an affidavit executed by the debtor; (ii) state the dollar amount for which judgment may be entered; (iii) concisely state the facts out of which the debt arose and demonstrate that the amount confessed is fair; (iv) concisely state the facts constituting the liability if the judgment is used to secure a creditor against a contingent liability. A judgment cannot be entered if more than three years have passed since its execution or if the debtor is deceased.

In response to concerns about out-of-state lenders abusing the statute in their transactions with borrowers having no connections to New York, an amendment to CPLR 3218 was enacted in 2019 to narrow the venues in which judgments could be entered. Prior to the amendment, judgments were permitted to be entered in the NY county in which the debtor resided, or the county authorized in the affidavit if the debtor was a non-resident. As of August 30, 2019, however, judgment may only be entered in the NY county the debtor resided in at the time of the confession’s execution *or* the NY county in which the debtor resides at the time judgment is entered. The amendment (which applies retroactively) makes it more difficult for lenders to employ confessions in their transactions with out-of-state borrowers, with lenders having to rely on borrowers having NY residency at the time the affidavit is signed or at the time it is filed.

Since this new restriction was put in place, questions have arisen as to its scope. An answer to that question was offered in *Express Trade Capital, Inc. v. Horowitz*, 2021 N.Y. Slip Op. 5773 (1st Dept. Oct. 21, 2021). In *Express Trade*, a New York lender loaned \$1.4 million to a California corporate borrower. The loan was guaranteed by multiple individual guarantors, also California residents. The borrower eventually defaulted and, in 2017, the borrower, along with the guarantors, entered into a settlement agreement with the lender. The agreement contained a forum selection clause mandating New York County as the venue for any related litigation and provided for the borrower and guarantors to execute confessions of judgment. The borrower subsequently defaulted

again, upon which the lender filed a motion for summary judgment with the New York County Supreme Court based on the agreement and the various confessions of judgment. The Supreme Court granted the motion and the borrower and guarantors appealed, arguing that the court lacked jurisdiction over them since they resided in California and the transactions between the parties took place there. The Appellate Division affirmed the Supreme Court's decision, concluding that CPLR 3218 as amended only concerns entry of a judgment against a non-resident *where no action is initiated*. In *Express Trade*, the lender entered the confessions as instruments for payment in connection with a summary judgment motion and did not enter the confessions on their own. Since the forum selection clause in the settlement agreement was found to be enforceable, jurisdiction was held to exist based on the agreement and confessions.

The *Express Trade* decision represents an attempt by the First Department to balance New York's prior historic willingness to enforce confessions of judgment to resolve civil actions with more recent public policy concerns regarding their potential abuse. New York practitioners should make sure corporate clients using these instruments stay within the new rules.

Pennsylvania

Pennsylvania is quite possibly first among all other states in its use of confessions of judgment. They may be entered to recover monetary damage, take possession of a mortgaged property, or eject a commercial tenant from a property. It is common to see them executed in loan transactions in the form of a "warrant of attorney." This document is signed by the borrower at closing and permits the lender's attorney to enter judgment in the appropriate court pursuant to the warrant.

Whether the confession is drafted as a warrant of attorney or in some other form (such as a cognovit clause found in a mortgage), the language must be conspicuous, and the borrower's signature must bear a direct relation to the confession so there can be no doubt the borrower understands it is authorizing entry of judgment against itself without notice or hearing. Confessions are typically drafted in bold, capitalized text so that Pennsylvania courts, known for their strict scrutiny of these instruments, can see the terms are made explicit to the signatories.

Pursuant to Chapters 2950 to 2986 of the Pennsylvania Rules of Civil Procedure, an attorney seeking enforcement must file with the prothonotary (a clerk assigned to the Court of Common Pleas) the confession of judgment as an attachment to a civil complaint. The complaint must include: (i) the names and addresses of the pertinent parties; (ii) an original or copy of the executed confession of judgment; (iii) an affirmation indicating that the confession is not against a natural person in connection with a consumer loan; (iv) a statement of assignment of the confession, if applicable; (v) a statement that judgment has not been entered in any other jurisdiction or, if it has been entered, an identification of the judicial proceedings; (vi) an affirmation of a default or occurrence of a condition precedent triggering entry of judgment; (vii) an itemization of the amount due, if applicable; (viii) a demand for judgment; (ix) if the confession is more than twenty (20) years old, or if a copy is not attached to the complaint, an application for an order granting leave to enter judgment after a hearing; and (x) signature and verification in accordance with the civil procedure rules. The procedures for enforcement vary somewhat when it concerns confessions for possession of property or ejection of a tenant.

Ohio

Like Pennsylvania, confessions of judgment are common in Ohio lending practice. They can be seen in the context of commercial lending, commercial real estate finance, and real estate leases, with explicit exception made for consumer lending. Confessions are typically memorialized as warrants of attorney (similar to Pennsylvania) or as “cognovit notes.” A cognovit note is a promissory note that contains its own warrant of attorney clause permitting the note holder to confess judgment in court on behalf of the note maker.

Per Section 2323.13 of the Ohio Revised Code, the warrant of attorney must include the following statutory language in conspicuous text directly above or below the maker’s signature:

“Warning--By signing this paper you give up your right to notice and court trial. If you do not pay on time a court judgment may be taken against you without your prior knowledge and the powers of a court can be used to collect from you regardless of any claims you may have against the creditor whether for returned goods, faulty goods, failure on his part to comply with the agreement, or any other cause.”

In addition to this statutory language, a lender seeking to enforce a warrant of attorney must file a complaint in the OH county where either the borrower resides or the borrower signed the warrant. The original warrant or a copy thereof must accompany the complaint and the complaint must include the borrower’s last known address.

Conclusion

Confessions of judgment are a potentially useful instrument for lenders and other creditors. While much of the country prohibits or severely limit their use, New York still permits judgments by confession, albeit with certain qualifications not seen in Pennsylvania and Ohio, where such judgments are more common. Knowing the state-by-state particulars for confessions of judgment can be valuable for a lender’s counsel working across various jurisdictions.