

Memorandum 78-72

Subject: Study D-500 - Confession of Judgment Procedures

Summary

This memorandum suggests a manner of proceeding with our study of confession of judgment procedures. The memorandum first gives background concerning the status of this matter on our agenda and the need to deal with it now. The memorandum then outlines the nature of confessions of judgment, their advantages and disadvantages as a creditors' remedy, and existing California law governing them. Finally the memorandum examines the constitutionality of the California confession of judgment procedures and possible cures for the constitutional defects. The memorandum concludes that before we can sensibly decide how to dispose of this matter, whether by repealing the confession of judgment statute or by making it constitutional, we should get additional information on the need for confessions of judgment and how procedures that would make them constitutional would affect their usefulness. To this end the staff proposes a questionnaire designed to draw the requisite information.

Background

One matter that is specifically included in the Commission's authorization to study creditors' remedies is confession of judgment procedures. The Commission discussed this matter briefly in 1972 at the time the United States Supreme Court decided the cases of D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) and Swarb v. Lennox, 405 U.S. 191 (1972). The Overmyer case held that confession of judgment procedures do not violate due process if the waiver of constitutional rights made by a confession of judgment is voluntary, knowing, and intelligently made. The Swarb decision likewise did not hold confession of judgment procedures unconstitutional on their face, but emphasized the concept of Overmyer that confessions must be reviewed on a case-by-case basis, noting that where the contract is one of adhesion, where there is great disparity of bargaining power, and where the debtor receives nothing for the confession, the waiver of rights may not be valid.

Because the confession of judgment procedures were not held unconstitutional, the Commission deferred study of them in order to work on attachment, claim and delivery, and other creditors' remedies that

had been held to violate due process of law. This year, however, the California Supreme Court held that a portion of the California confession of judgment procedures violates due process in Isbell v. County of Sonoma, 21 Cal.3d 61 (1976). The court in Isbell, following the test of constitutionality announced in Overmyer, reasoned:

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. [Isbell, 21 Cal.3d at 65.]

The dissenters in Isbell argued that the statute should not be ruled invalid on its face but should be applied on a case-by-case basis in recognition of the fact that many waivers, such as the one before the court, were voluntary, knowing, and intelligent. A copy of the Isbell case is attached as Exhibit 1.

The Commission's experience in the past in dealing with creditors' remedies has been that it is difficult, if not impossible, to achieve any substantial reform in the law unless real pressure can be brought to bear on the special interests involved. The unconstitutionality of a statute is a perfect opportunity to review the policies of the statute. "Problems of this kind are peculiarly grist for the legislative mill." Swarb, 405 U.S. at 202. There will perhaps never be a more opportune time for the Commission to investigate confession of judgment procedures.

What Is a Confession of Judgment?

The confession of judgment also goes by the name of cognovit note or warrant of attorney. "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." Overmyer, 405 U.S. at 176. A confession of judgment operates as a submission by the debtor, in advance of any legal controversy, to the in personam jurisdiction of an appropriate court of the creditor's choosing, and as an authorization to enter judgment against the debtor for a specified sum, without further notice or the filing of a complaint.

The effect of the confession of judgment is that "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." Hulland v. State Bar, 8 Cal.3d 440, 449, 303 P.2d 608, ___, 105 Cal. Rptr. 152, ___ (1972).

As one commentator has stated, "Any remedy that so completely ousts the judiciary from its function is bound to meet with a negative reception from the legal system, and this one has." Ayer, Clearing the Smog Surrounding Consumer Auto Leasing, 6 Pac. L.J. 447, 465 (1975). And as the United States Supreme Court stated in Overmyer, "The cognovit has been the subject of comment, much of it critical." 405 U.S. at 177.

Functions of Confession of Judgment

Although the confession of judgment is one of the blacker sheep of the creditors' remedies family, it does appear to serve a number of purposes. These purposes can be classified generally as (1) use as a security device, (2) jurisdictional purposes, (3) procedural efficiency, and (4) facilitation of debt collection.

The most important purpose the confession of judgment serves is that of a security device. A creditor may be willing to take a confession of judgment as a substitute for collateral in a loan or other transaction that might not otherwise be possible for lack of security or credit. The confession assures the creditor that all that is necessary if the debtor runs into financial difficulties is to enter the judgment, which can be done speedily, and thereby obtain a priority over other creditors. It is a very quick and inexpensive means of obtaining a judgment lien, and therefore is a good substitute for security. For the same reasons, the confession is frequently used by mutual agreement between debtor and creditor after default, as a means of encouraging the creditor to give the debtor an extension of time for payment. The confession enables the creditor to keep pressure on the debtor to cure the default, and ensures the creditor a remedy if the debtor fails.

The confession of judgment is also used to obtain in personam jurisdiction over the judgment debtor. The filing of the confession subjects the debtor to the jurisdiction of the court without the need

for procedural devices or reliance on long-arm statutes. This may be particularly important in the case of interstate commercial transactions.

Almost as important as its function as a security device is the use of the confession of judgment for procedural efficiency. Historically, the confession was used to avoid unnecessary trial of actions and to allow the debtor to avoid unnecessary court costs. The trial avoidance purpose is no longer as predominant as it once was, for there are a variety of procedural devices enabling judgment without trial, such as default, offer to compromise, and express consent or stipulation to judgment in the action. But the cost avoidance purpose remains valid since a confession of judgment may be utilized without the need to commence an action at all, thereby eliminating filing fees and service costs. The procedural efficiency of the confession aids in avoiding needless litigation and saving court time and expense, as well as unnecessary costs.

The confession of judgment also facilitates debt collection. It provides the judgment creditor a quick and inexpensive means of entering judgment so that the creditor may move rapidly to execution or other enforcement devices. This is of particular importance in the case of an absconding debtor or a debtor who seeks to avoid payment through delaying tactics and court maneuvers, but may also have some use where the debtor is in financial trouble and there are other unsecured creditors.

Problems With Confession of Judgment

"In the absence of abuse, the judgment note affords a speedy and efficient means of entering judgment quickly on claims which in the great majority of cases cannot be successfully defeated. However, the ever present possibility of abuse should not be ignored." Note, Confessions of Judgment, 102 U. Pa. L. Rev. 524, 538 (1954). The primary problem with confessions of judgment is that despite their utility in appropriate cases--for example where the debtor acknowledges the debt and there is no possible defense--there appears to be a "well-documented history of abuse of this device." 59 Ops. Cal. Att'y Gen. 432, 434 (1976).

Confessions are commonly signed by debtors under pressure of their creditors without any understanding of their legal significance nor of the sweeping character of the waiver of constitutional rights that they

represent. The debtor may waive rights despite the possible availability of defenses of which the debtor is unaware. A creditor armed with a confession of judgment is in a position to exert tremendous pressure upon the debtor for the slightest default, and on occasion does so.

The California Department of Consumer Affairs, Bureau of Collection and Investigation Services in 1972 undertook an investigation of confession of judgment practices by collection agencies in several municipal court districts:

Among the abuses that have been documented by the Bureau are: improper collection charges; improper escalation of contracts; improper interest charges; contract provisions prohibited by Rees-Levering and Unruh Act refinancing provisions; improper attorney fees; absence of supporting documents with filing; improper conformance to the requirements of CCP 1132-1135; inducing debtor to sign confession without full knowledge of its contents; and practice of law by collection agency personnel. [Informational Bulletin No. 20 (Dec. 1972).]

The California Supreme Court, in Isbell, concluded that confessions were commonly buried in adhesion contracts signed by debtors in inferior bargaining positions at the instance of overreaching creditors. The court noted that historical experience has shown that confessions of judgment are most frequently employed against those who are unaware of the significance of that procedure and who often do not realize that they are not only waiving their rights to notice and hearing, but as well the opportunity of presenting any defense to the claim. "In sum, sad experience has shown that the confession of judgment procedure lends itself to overreaching, deception, and abuse." 21 Cal.3d at 71.

California Law Governing Confessions of Judgment

Because of the problems with confessions of judgment, most jurisdictions limit its use. The statutory treatment varies widely. Some states specifically authorize confessions, while others disallow it. Some go so far as to make its employment a misdemeanor. "The majority, however, regulate its use and may prohibit the device in small loans and consumer sales." Overmyer, 405 U.S. at 178.

California follows the majority, prohibiting the device in certain types of cases and imposing procedural safeguards that abolish the "warrant of attorney." The California statute is found in Code of Civil Procedure Sections 1132-1134, a copy of which is attached as Exhibit 2.

The California statute is drawn from the Field Code revision of confession of judgment procedures, which altered the common law confession of judgment. "California's confession of judgment statutes, enacted in 1852 and codified in 1872, follow common law practice with the notable exception that they do not permit an attorney to confess judgment on behalf of the defendant." Isbell, 21 Cal.3d at 67. The history is traced in Comment, Confession of Judgment in California, 8 Pac. L.J. 99 (1977). Thus under Section 1132 a confession of judgment is authorized to be entered "without action." Section 1133 requires a written statement, verified under oath and signed by the defendant, that authorizes entry of judgment for a specified sum and stating the facts constituting the liability and showing that the sum confessed is justly due or to become due. Section 1134 limits the fees for filing a confession of judgment.

The significant feature of the California scheme is that because it requires the defendant personally to make the confession and prohibits a general warrant of attorney to enter judgment on the debtor's behalf, the possibility of abuse is greatly limited.

Replying to appellant's arguments, it is to be noted that the pertinent code sections require a statement by the defendant, verified by his oath, and do not permit a statement by an attorney purporting to act under an unverified or unauthenticated power of attorney contained in a promissory note. If appellant's arguments were upheld, then the provisions of the code sections here involved could readily be subverted by the simple device of including in any promissory note a warrant of attorney, whereby any attorney could make the statement in writing, verify it, and confess judgment. Clearly, such is not the policy contemplated by the Legislature. [Barnes v. Hilton, 118 Cal. App.2d 108, 110-111, 257 P.2d 98, ___-___ (1953).]

Of course the utility of the remedy is also greatly limited, since its desirability is in effect destroyed as a speedy and inexpensive means of entering judgment. 4 B. Witkin, California Procedure, Proceedings Without Trial § 159 (2d ed. 1971). "In this connection, it is significant that confession of judgment notes are not in general use in this state and the clerks of the various superior courts adhere strictly to the rules set forth in sections 1132 and 1133, supra, of the Code of Civil Procedure." Barnes v. Hilton, 118 Cal. App.2d at 111.

In addition to imposing procedural safeguards on the use of confessions of judgment, California also restricts or eliminates use of confessions in situations where the risk of inequity is high:

Financial Code § 18673 (industrial loan companies)
Financial Code § 22467 (personal property brokers)
Financial Code § 24468 (small loan companies)
Civil Code § 1689.12 (home solicitation sales contracts)
Civil Code § 1804.1 (retail installment sales contracts)
Civil Code § 2983.7 (automobile conditional sales contracts)

California has one other important restriction on confessions of judgment that is unique. The Legislature in 1975 added to Section 1132 a provision that invalidates a confession in a consumer case unless an attorney independently representing the defendant certifies that the attorney has examined the judgment, has advised the defendant with respect to the waiver of rights and defenses, and has advised the defendant to utilize the confession procedure. The effect of this restriction is to practically eliminate use of the confession procedure in consumer cases. "The rules governing confessions are often so complex as to make the device effectively unavailable." Reith, Supplement to California Debt Collection Practice (Cal. Cont. Ed. Bar March 1976).

Constitutionality of Confession of Judgment

The California Supreme Court in the Isbell case did not deal with confession of judgment in consumer cases. It would appear that the California law applicable to consumer cases satisfies constitutional requirements of a voluntary, knowing, and intelligent waiver of rights, since specific advice by independent counsel is required.

Whether something short of requiring advice of independent counsel in nonconsumer cases would satisfy constitutional requirements under the Isbell case is not clear. Under Overmyer, a confession of judgment is permitted if the state provides an adequate review procedure to determine whether the waiver was voluntary, knowing, and intelligent. See discussion in Note, Cognovit Revisited: Due Process and Confession of Judgment, 24 Hastings L.J. 1045 (1973). This requirement would be satisfied by a notice to the debtor at the time of entry of judgment, with an opportunity to be heard promptly, and perhaps, though not necessarily, a stay of enforcement pending hearing.

However, a close reading and analysis of the Isbell case, particularly 21 Cal.3d at 71-74, indicates that the California Supreme Court would not find postjudgment review constitutionally adequate. A pre-

judgment procedure is required to ensure that the waiver is voluntary, knowing, and intelligent:

A postjudgment determination of the validity of the debtor's waiver is not a determination "at a meaningful time." Once judgment has entered, the damage is done; the debtor is now subject to an obligation imposed in violation of his due process rights, and the creditor can immediately employ legal process to enforce that obligation. Thus as the court explained in Osmond v. Spence, supra, 359 F.Supp. 124, 127, unless the validity of the waiver is determined "before the judgment is entered, an alleged debtor will be deprived of his due process rights on every occasion when an effective waiver has not occurred."

6. Osmond v. Spence (D.Del. 1972) 359 F.Supp. 124; Virgin Islands Tropical Ventures, Inc., supra, 358 F.Supp. 1203. Courts in Illinois and Pennsylvania have reached a slightly different conclusion than stated in the text, holding that the debtor is entitled to a determination of the validity of the waiver before execution of judgment. (Scott v. Danaher, supra, 343 F.Supp. 1272; Chitester v. LC-DC-F Employees of G.E. Fed. Cr. Un. (W.D.Pa. 1974) 384 F.Supp. 475; North Penn Consumer Discount Co. v. Schultz (1977) ___ P.Super. ___ [378 A.2d 1275].)

The court in Isbell went on to note that in any event, the California statute does not provide for adequate postjudgment review. Whether the California statute would satisfy due process if it were made to provide adequate postjudgment review is questionable in light of the language quoted above. The staff notes that Isbell was a 4-3 decision, and we suspect that as a practical matter if the California statute were improved to provide adequate postjudgment review it would withstand judicial scrutiny the next time around.

As it stands, Isbell appears to require a prejudgment procedure that assures that any confessed judgment entered has been executed voluntarily, knowingly, and intelligently. A requirement that an independent attorney advise the debtor before signing, as required in California for consumer cases, would appear to satisfy this standard. The standard might also be satisfied by a confession that on its face appears adequate. Such a confession might be one executed after the default occurs, as a separate document, indicating in large type and plain language that the debtor acknowledges the debt and understands that the confession waives any right to defend or raise objections and subjects the debtor's property to execution, and that the debtor may seek the advice of an attorney. The confession actually used in the Isbell case was along these lines and took the following form:

I hereby confess judgment in favor of the County of Sonoma, the plaintiff above named, for the sum of \$_____, and authorize entry of judgment thereof against me. This judgment applies to any personal and real property I now own or may acquire.

This confession of judgment is for a debt justly due from me to the said County of Sonoma, and arises upon the following facts: to wit _____.

The Supreme Court held not that this particular confession was not a valid waiver, but that the statute authorizing confessions provided no means to assure that all confessions were valid waivers, since the court clerk must ministerially enter all confessions and has no authority to reject a confession on the ground it is not a valid waiver. "In short, the California statutes do not permit a prejudgment judicial determination of the validity of the debtor's waiver, but require the clerk to enter judgment upon a document which is ordinarily insufficient to demonstrate a valid waiver." 21 Cal.3d at 71. If the statute prescribed a form of confession in all cases that informed the debtor of the rights being waived, it is arguable that the Isbell standard is satisfied.

It is the staff's conclusion that the Isbell requirements for constitutionality would be satisfied by extending the advice of attorney procedure presently applicable in consumer cases to nonconsumer cases as well. Providing a postjudgment review of the confession appears to run afoul of a strict reading of Isbell, but an adequate postjudgment procedure might well withstand constitutional attack nonetheless. Providing an informative prejudgment confession notice might also satisfy Isbell, although this is not clear. Probably a combination prejudgment notice with postjudgment review would be constitutionally sufficient.

Where Does It All Lead?

Assuming the California confession of judgment procedures can be made constitutional, the question still remains, should they be? Is confession of judgment really a useful credit or collection device, which if the problems of its abuse are cured, should be retained?

The discussion of the functions of the confession of judgment indicates that it has some utility as a security device and for purposes of procedural efficiency. Just how much utility it has in California is questioned by commentators who suggest that it has not received widespread use because of the abolition of the warrant of attorney in California. However, these suggestions are belied by indications that

confessions are being both used and abused. The California Association of Collectors has stated that confessions are useful and should be preserved. See Report of Advisory Board Liaison Committee, Confession of Judgment, Collector's Ink at p.15 (March 1973). The Collectors also opposed in the Legislature the 1975 legislation requiring advice of attorney in consumer confessions. The 1972 report of the California Department of Consumer Affairs, Bureau of Collection and Investigation Services on abuses of confession of judgment precedures also indicates more than incidental use, particularly among collection agencies. See also 59 Ops. Cal. Att'y Gen. 432, 433 (1976): "Confessions of judgment are still in use, however, by collection agencies who take assignments of consumer accounts after default on the original contract."

Whether the confession of judgment procedure would be at all useful if amended to conform to due process is not clear. It appears that advice of attorney required in consumer cases has terminated its utility in those cases. However, it would not necessarily terminate the utility of the confession in nonconsumer cases. In many cases the confession is a bargained-for part of the contract, or settlement after default, between knowledgeable parties represented by counsel; this was the situation in the Overmyer case. Advice of attorney might be entirely appropriate in such cases.

Likewise, adequate prejudgment notice or postjudgment opportunity to review would not necessarily destroy the usefulness of the confession. Before an action is commenced the confession can save service and filing fees, and can give the creditor a priority. These purposes would be served regardless of the form of the confession or the opportunity for a prompt judicial review in a case where the debtor believes the confession was improperly filed.

If the constitutional problems of the confession are cured so that the confession is no longer subject to abuse, and if the confession still has some usefulness as a security device and a means of saving costs, then an effort probably should be made to preserve it. We would be obviously acting in ignorance if we assumed the confession of judgment as revised to meet constitutional requirements, would in fact be useful. What is needed, the staff believes, is more information about the need for confession of judgment in commercial transactions. The staff recommends that rather than making any recommendation as to the

repeal or revision of confession of judgment procedures at this time, the Commission should distribute a questionnaire that seeks to answer some of the questions that have been raised in this memorandum. A copy of the staff's proposed questionnaire is attached as Exhibit 3. We would distribute this questionnaire to debtor and creditor groups and to the business law section of the State Bar, and also seek input from other interested persons and agencies. The responses on the questionnaire should provide some basis to enable us to formulate a recommendation on this subject.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Exhibit 1

[S.F. No. 23604. Apr. 24, 1978.]

EVA ISBELL et al., Plaintiffs and Appellants, v.
COUNTY OF SONOMA et al., Defendants and Respondents.

SUMMARY

Plaintiffs, who in 1966 and 1967, after obtaining excessive welfare payments, had executed confessions of judgment in favor of their county, brought suit for declaratory relief, challenging the constitutionality of the statutory procedure under which the judgments had been obtained and entered (former Code Civ. Proc., § 1132 (now § 1132, subd. (a)), Code Civ. Proc., §§ 1133, 1134, and former Code Civ. Proc., § 1135). It was stipulated that plaintiffs were lay persons who had signed the confessions with no training in matters of law and without consulting an attorney. Without receiving additional evidence, the trial court entered a declaratory judgment holding that a confession of judgment obtained in conformity with the statutory procedure did not violate due process, and consequently that the judgments rendered to the county against plaintiffs were valid. (Superior Court of Sonoma County, No. 78372, Joseph P. Murphy, Jr., Judge.)

The Supreme Court reversed, with directions to enter a declaratory judgment in favor of plaintiffs determining that, in cases not involving consumer transactions, the statutory procedure is unconstitutional as violating due process standards of the Fourteenth Amendment, and determining further that plaintiffs' confessed judgments were void. The statutory procedure, the court held, was constitutionally defective because a confession of judgment is insufficient to show that the debtor has voluntarily, knowingly, and intelligently waived his due process rights to notice and to an opportunity to be heard. Such defect, furthermore, is not cured by the debtor's limited opportunity to seek postjudgment relief. The instant decision, the court held, is to be given a limited retroactive application to permit any such judgment debtor to apply for a hearing challenging the validity of the waiver in his

confession of judgment. At such a hearing the creditor, who must overcome the presumption against waiver of constitutional rights, bears the burden of proving the validity of the waiver, and if he fails to sustain that burden, the court must vacate the judgment. (Opinion by Tobriner, J., with Bird, C. J., Mosk, J., and Thompson (Homer B.), J.,* concurring. Separate dissenting opinion by Richardson, J., with Clark and Manuel, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) Constitutional Law § 107—Procedural Due Process.—Under the due process clause of the federal Constitution, a court may enter judgment against a defendant, involving a deprivation of his property, only if the record shows that either he has received notice and an opportunity to be heard or he has voluntarily, knowingly, and intelligently waived his constitutional rights.

(2a-2c) Judgments § 6—By Confession—Unconstitutionality of Statutory Procedure in Nonconsumer Cases—Improper Welfare Benefits—Retroactive Application.—Plaintiffs in a declaratory relief action, who in 1966 and 1967, after obtaining excessive welfare payments, had, as lay persons unversed in the law and without obtaining counsel, followed the statutory procedure in executing confessions of judgment in favor of their county, were entitled to a judgment declaring, in support of their contention, that the statutory confession of judgment procedure (former Code Civ. Proc., § 1132 (now § 1132, subd. (a)), Code Civ. Proc., §§ 1133, 1134, and former Code Civ. Proc., § 1135) was unconstitutional as violating due process standards of the Fourteenth Amendment. Furthermore, on the principle of providing an incentive in future cases for parties who may have occasion to raise issues involving renovation of unsound or outmoded legal doctrine, they were entitled to the retroactive benefit of such determination and to have their own confessed judgments declared void.

(3a-3e) Judgments § 6—By Confession—Unconstitutionality of Statutory Procedure in Nonconsumer Cases.—A judgment based solely upon

*Assigned by the Chairperson of the Judicial Council.

an executed confession pursuant to former Code Civ. Proc., § 1132 (now § 1132, subd. (a)), Code Civ. Proc., §§ 1133, 1134, and former Code Civ. Proc., § 1135), is constitutionally defective because that confession is insufficient to demonstrate that the debtor has voluntarily, knowingly, and intelligently waived his due process rights to notice and to an opportunity to be heard. No court, after the instant decision becomes final, may enter a confessed judgment pursuant to that statutory procedure.

[See Cal.Jur.3d, Judgments, § 6; Am.Jur.2d, Judgments, § 1098 et seq.]

- (4) **Estoppel and Waiver § 18—Waiver—Constitutional Rights—Presumptions.**—A waiver of constitutional rights is not presumed; on the contrary, courts indulge every reasonable presumption against such a waiver.
- (5) **Clerks of Court § 3—Powers and Duties—Confessions of Judgment.**—A clerk of court is not a judicial officer; he has no authority, for example, to reject confessions of judgment for inadequate proof that the debtor has made a constitutionally valid waiver of his due process rights.
- (6) **Judgments § 6—By Confession—Unconstitutionality of Statutory Procedure in Nonconsumer Cases—As Not Cured by Availability of Postjudgment Relief.**—The unconstitutionality of a judgment by confession, pursuant to former Code Civ. Proc., § 1132 (now § 1132, subd. (a)), Code Civ. Proc., §§ 1133, 1134 and former Code Civ. Proc., § 1135, entered without sufficient proof of a valid waiver of the debtor's due process rights is not cured by the only opportunity available to the debtor to seek postjudgment relief, namely, by motion pursuant to Code Civ. Proc., § 473, to set aside a judgment procured by extrinsic fraud or by motion, filed within six months, to set it aside for mistake, inadvertence, surprise, or excusable neglect.
- (7a, 7b) **Judgments § 6—By Confession—Unconstitutionality of Statutory Procedure in Nonconsumer Cases—Limited Retroactivity—Procedure.**—The decision in the instant case holding that the statutory procedure governing confessions of judgment in nonconsumer cases is unconstitutional (former Code Civ. Proc., § 1132 (now § 1132, subd. (a)), Code Civ. Proc., §§ 1133, 1134, and former Code Civ.

Proc., § 1135) is to be given a limited retroactive application to permit any such judgment debtor to apply for a hearing challenging the validity of the waiver in his confession of judgment. At such a hearing the creditor, who must overcome the presumption against waiver of constitutional rights, bears the burden of proving the validity of the waiver, and if he fails to sustain that burden, the court must vacate the judgment.

- (8) **Courts § 34—Prospective and Retroactive Decisions.**—No hard and fast rules determine the extent to which a judicial decision is given retroactive effect; determinations of this nature turn on considerations of fairness and public policy.

COUNSEL

David C. Lewis, William C. McNeill and Richard M. Pearl for Plaintiffs and Appellants.

James P. Botz, County Counsel, and Caroline Kerl, Deputy County Counsel, for Defendants and Respondents.

Michael E. Barber as Amicus Curiae on behalf of Defendants and Respondents.

OPINION

*Modified
21 Cal 3d 562*

TOBRINER, J.— (1a) 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. The California confession of judgment statutes (Code Civ. Proc., §§ 1132-1135), however, direct the court clerk in nonconsumer cases to enter judgment on the basis of the signed confession without notice and hearing. We shall explain that a signed confession of judgment is not adequate proof that the debtor has validly waived his due process rights; rather than emerging from negotiations between knowledgeable bargainers, such confessions are most often executed by debtors who have little under-

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standing of the significance of their waiver and little choice in the matter. 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 ~~1135~~ violates the due process clause of the Fourteenth Amendment.

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1. *Summary of facts.*

(2a) Although confessions of judgment are usually employed to enforce claims of private creditors, the instant action presents perhaps a more doubtful usage. In 1966 and 1967, each of the plaintiffs was a Sonoma County welfare recipient.¹ Plaintiff Isbell pleaded guilty to welfare fraud and was sentenced to 30 days in jail. Because the court did not order restitution, a county representative visited Isbell at the jail on January 27, 1967, and induced her to execute a confession of judgment for the alleged overpayment, \$596.98 "plus medical to be determined." The county filed this document with the clerk of the municipal court, which then issued a judgment against Isbell. The county recorded an abstract of the judgment; thus when Isbell purchased a house in 1974, the judgment became a lien on that realty.

Although plaintiffs Clevie and Omega Pearson were not charged with a criminal offense, the county claimed their alleged misuse of trust funds rendered such funds additional income to the Pearsons, and thus that the Pearsons had received excess welfare payments. On February 8, 1966, the Pearsons, at the behest of a county representative, executed a confession of judgment for \$193, the amount of the alleged overpayment.² The county filed this document with the municipal court clerk,

¹The parties submitted the case for decision upon stipulated statements pursuant to Code of Civil Procedure section 1138. This section provides that "Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought. . . . The Court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending."

²Both Isbell and the Pearsons executed a confession of judgment form furnished by the County. This form provides: "I hereby confess judgment in favor of the County of Sonoma, the plaintiff above named, for the sum of \$—, and authorize entry of judgment thereof against me. This judgment applies to any personal and real property I now own or may acquire. [f] This confession of judgment is for a debt justly due from me to the said County of Sonoma, and arises upon the following facts: to wit _____"

who entered judgment for the confessed sum on February 16, 1966. The county subsequently recorded an abstract of the judgment and has attempted to collect the judgment debt.

Neither Isbell nor the Pearsons were advised by counsel before signing the confessions of judgment. The parties have stipulated that plaintiffs "are lay persons with no training or background in matters of law and have only a lay person's understanding of the legal consequences of a confession of judgment." The parties finally stipulated that "There is an actual and present controversy between plaintiffs and defendants. Plaintiffs contend that the California laws authorizing and governing confession of judgment are unconstitutional, but defendants deny and dispute this."

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On the basis of the stipulated facts, without receiving additional evidence, the trial court entered a declaratory judgment holding that a confession of judgment obtained in conformity with Code of Civil Procedure sections 1132 to ~~1135~~ did not violate due process, and consequently that the judgments rendered to the county against plaintiffs are valid. Plaintiffs appeal from that judgment.

2. *A judgment based solely upon an executed confession is constitutionally defective because that confession is insufficient to demonstrate that the debtor has voluntarily, knowingly, and intelligently waived his due process rights.*

(3a) The striking feature of the confession of judgment at common law lies in its authorization for entry of final judgment against a debtor without notice, hearing, or opportunity to defend. As we explained in *Hulland v. State Bar* (1972) 8 Cal.3d 440, 449 [105 Cal.Rptr. 152, 503 P.2d 608]: "a confession of judgment . . . puts at the disposal of the creditor the most drastic of enforcement proceedings. [It] 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." The New York Court of Appeals described confessed judgments as "the loosest way of binding a man's property that ever was devised in any civilized country." (*Atlas Credit Corporation v. Ezrine* (1969) 25 N.Y.2d 219 [303 N.Y.S.2d 382, 250 N.E.2d 474, 478], quoting *Alderman v. Diamet* (1828) 7 N.J.L. 197, 198.)

California's confession of judgment statutes, enacted in 1851 and codified in 1872, follow common law practice with the notable exception that they do not permit an attorney to confess judgment on behalf of the defendant. (See *Barnes v. Hilton* (1953) 118 Cal.App.2d 108, 110-111 [257 P.2d 98].) Code of Civil Procedure section 1132, subdivision (a), provides generally that "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 court having jurisdiction for like amounts." Section 1133 specifies that the confession must be in writing, verified by the defendant, and must state concisely the facts constituting the liability.³ ~~In courts other than justice courts the creditor should file the judgment with the court clerk, who must endorse upon it, and enter a judgment of such court for the amount confessed" (Code Civ. Proc., § 1134); in justice courts the confession may be filed with either the judge or the clerk (Code Civ. Proc., § 1135).~~

In recent years the Legislature has enacted numerous statutes limiting the use of confessions of judgment. The Financial Code prohibits the use of confessions of judgment by industrial loan companies (§ 18673), licensees under the California small loan law (§ 24468), and licensees under the personal property broker law (§ 22467). Civil Code section 1689.12 voids any cognovit provision in a home solicitation contract.⁴ Finally in 1975 the Legislature added subdivision (b) to Code of Civil Procedure section 1132, providing that in any sale or loan primarily for personal, family, or household use, the clerk may enter judgment on a confession only if an attorney independently representing the defendant certifies that he has advised the defendant with respect to the waiver of rights and defenses and has recommended the use of the confession of judgment procedure.

³Section 1133 reads as follows: "A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

- "1. It must authorize the entry of judgment for a specified sum;
- "2. 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;
- "3. 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."

⁴Civil Code section 1804.1 states that no retail installment sale contract may include "a power of attorney . . . to confess judgment"; section 2983.7 similarly provides that no automobile conditional sales contract may include "a power of attorney . . . to confess judgment." Since Code of Civil Procedure section 1132 does not permit confession of judgment by warrant of attorney in any case (see *Barnes v. Hilton*, *supra*, 118 Cal.App.2d 108, 110-111), it is unclear whether sections 1804.1 and 2983.7 impose any additional restrictions on the use of confessions of judgment.

The creditor files the judgment with the court clerk, who must endorse upon it, and enter a judgment of such court for the amount confessed (Code Civ. Proc., § 1134).

1134 (2b) Plaintiffs, welfare recipients charged with receipt of overpayments, derive no protection from any of the recent enactments banning or restricting the use of cognovit agreements. The present case falls under the provisions of Code of Civil Procedure sections 1132 through 1135, unaffected by the 1975 amendment. Because these provisions permitted entry of judgment against plaintiffs without a voluntary and knowing waiver, plaintiffs claim the statutes in question are unconstitutional.

(1b) It is settled constitutional law that "in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing." (*Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 458 [121 Cal.Rptr. 585, 535 P.2d 713]; see *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 313 [94 L.Ed. 865, 872-873, 70 S.Ct. 652].) Notice and hearing must always precede entry of a final judgment depriving one of property (see *Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [47 L.Ed.2d 18, 32, 96 S.Ct. 893]; *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 307 [138 Cal.Rptr. 53, 562 P.2d 1302]); indeed, except in extraordinary circumstances notice and hearing are required before even a temporary deprivation of property. (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80-82 [32 L.Ed.2d 556, 569-571, 92 S.Ct. 1983]; *Brooks v. Small Claims Court* (1973) 8 Cal.3d 661 [105 Cal.Rptr. 785, 504 P.2d 1249].) A confession of judgment, as we have explained, purports to authorize entry of judgment without prior notice and hearing. Consequently all courts agree that a judgment entered pursuant to such a confession is constitutional only if the confession constitutes a *valid waiver* of the debtor's due process rights. (See *D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 184-188 [31 L.Ed.2d 124, 133-136, 92 S.Ct. 775]; *Tunheim v. Bowman* (D.Nev. 1973) 366 F.Supp. 1392; *Scott v. Danaher* (N.D.Ill. 1972) 343 F.Supp. 1272; *Irmco Hotels Corp. v. Solomon* (1975) 27 Ill.App.3d 225 [326 N.E.2d 542].)

(3b) Since the relevant statutes direct the clerk to enter judgment upon the creditor's presentation of a verified confession, the crucial issue becomes whether that document itself demonstrates that the debtor has in fact made a voluntary, knowing, and intelligent waiver. (4) In resolving that issue, we are guided by well-established constitutional principles: that waiver of constitutional rights is not presumed (*D. H. Overmyer Co. v. Frick Co.*, *supra*, 405 U.S. 174, 186 [31 L.Ed.2d 124,

134]; *Ohio Bell Tel. Co. v. Comm'n* (1937) 301 U.S. 292, 307 [81 L.Ed. 1093, 1103, 57 S.Ct. 724]]; on the contrary, "courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 [82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357]; *Scott v. Danaher, supra*, 343 F.Supp. 1272, 1277; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 274 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206].)

(3c) We look first to the question whether the debtor's assent to the confession demonstrates the *voluntary* character of his waiver of due process rights. Cognovit clauses most commonly appear in form contracts dictated by the party with a bargaining advantage. (See 70 Colum.L.Rev. (1970) 1118, 1130-1131; see generally Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit* (1961) 29 U.Chi.L.Rev. 111, 138 fn. 166.) Thus when the United States Supreme Court in *D. H. Overmyer Co. v. Frick Co., supra*, 405 U.S. 174, held in the context of a cognovit agreement negotiated between equal bargainers that confessions of judgment were not per se unconstitutional, it added the following caveat: "Our holding . . . is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." (405 U.S. at p. 188 [31 L.Ed.2d at p. 135].) In *Hulland v. State Bar, supra*, 8 Cal.3d 440, we observed that this caveat casts "serious doubt on the constitutionality . . . of cognovit clauses contained in contracts of adhesion, in which there is great disparity in bargaining power and the debtor receives nothing for the cognovit provision." (8 Cal.3d at p. 450; see also *Blair v. Pitchess, supra*, 5 Cal.3d at p. 275.)

In *Blair v. Pitchess, supra*, 5 Cal.3d at page 275, we discussed an analogous issue involving the validity of a debtor's contractual waiver of his constitutional protection against warrantless entry to seize property claimed by the creditor under a conditional sales contract. Observing that "most of those contracts appear to be adhesion contracts, the terms of which are specified by the seller or lender," we concluded that "a consent obtained in such a contract of adhesion is ineffective to waive the constitutional protections. . . ." (Pp. 275-276.)

By parity of reasoning, the debtor's assent to a contract of adhesion with a cognovit clause, or to a confession of judgment form presented by the creditor, cannot operate as a valid waiver of constitutional rights. But

even if the terms of the confession are not dictated by the creditor, the drastic nature of the device—the debtor's advance waiver of all possible defenses and even the right to be notified of the existence of the proceeding—strongly suggests a substantial disparity in bargaining position and implies overreaching on the part of the creditor. Thus except in the rare case in which the cognovit agreement itself shows that it was a negotiated agreement between equal bargainers, as in *D. H. Overmyer Co. v. Frick Co.*, *supra*, 405 U.S. 174, a court presented only with the verified confession of judgment cannot assume the voluntariness of any waiver of due process rights implicit in that confession.

The debtor's execution of the confession of judgment equally fails to establish a *knowing* and *intelligent* waiver of constitutional rights. Although the face of the document itself often will not reveal the debtor's lack of legal sophistication, historical experience shows that confessions of judgment are most frequently employed against those who are unaware of the significance of that procedure. (See *Swarb v. Lennox* (E.D.Pa. 1970) 314 F.Supp. 1091; *Hopson*, *op cit. supra*, 29 U.Chi.L.Rev. 111.) Many courts and commentators have observed that persons who sign confessions of judgment often do not realize that they are not only waiving their rights to notice and hearing, but as well the opportunity of presenting any defense to the claim. (See *Virgin Islands National Bank v. Tropical Ventures, Inc.* (D.V.I. 1973) 358 F.Supp. 1203, 1206; *Scott v. Danaher*, *supra*, 343 F.Supp. 1272, 1278; *Osmond v. Spence* (D.Del. 1971) 327 F.Supp. 1349, 1359; *Pyes*, *Reappraisal of the Confession of Judgment Law* (1960) 48 Ill. Bar J. 764, 769.) Thus the debtor's signature on the confession of judgment creates no inference that the debtor knowingly and intelligently waived his due process rights.

Because of the high risk of an involuntary, unknowing and unintelligent waiver, we held in *Hulland v. State Bar*, *supra*, 8 Cal.3d 440, that an attorney could not use a confession of judgment to collect legal fees; we stated that the use of a confession of judgment "creates a situation in which the client's ignorance of legal matters makes it unlikely that he will understand the character and effect of the instrument." (8 Cal.3d at p. 450.) When the Legislature amended Code of Civil Procedure section 1132 to provide that in a consumer transaction the proposed judgment must be accompanied by the certificate of independent counsel that he has advised defendant of his rights and advised him to sign the confession, it also recognized that these requirements are impelled by predicates of due process of law. As the Attorney General explained, this amendment rests on the rationale that "confessions of judgment are

special cases" in which lay knowledge does not adequately ensure a knowing and voluntary waiver. (59 Cal.Ops.Atty.Gen. 432, 438 (1976).)

In sum, sad experience has shown that the confession of judgment procedure lends itself to overreaching, deception, and abuse. Such a confession cannot on its face represent a voluntary, knowing and intelligent waiver.

Defendants point out that some confessions may in fact evidence a voluntary, knowing, and intelligent waiver by the debtor; thus the sufficiency of a confession to justify entry of judgment, they argue, must be determined on a case by case basis. The California statutes, however, do not provide for a case by case determination of the validity of the debtor's waiver. Code of Civil Procedure sections 1133 and 1134 direct the court clerk to enter judgment upon all written confessions which state the amount due and the basis for the debt. (5) The clerk is not a judicial officer (*Lane v. Pellissier* (1929) 208 Cal. 590, 593 [283 P. 810]; *People v. Kuder* (1928) 90 Cal.App. 594, 600 [266 P. 337]); he has no authority to reject confessions on the ground that they do not adequately prove a constitutionally valid waiver (cf. *Oliphant v. Whitney* (1867) 34 Cal. 25, 27; *Rose v. Leland* (1912) 20 Cal.App. 502, 503 [129 P. 599]). (3d) In short, the California statutes do not permit a prejudgment judicial determination of the validity of the debtor's waiver, but require the clerk to enter judgment upon a document which is ordinarily insufficient to demonstrate a valid waiver. Thus a judgment entered pursuant to the California procedure is constitutionally defective.

3. *The debtor's opportunity to seek postjudgment relief does not cure the unconstitutionality of a judgment by confession entered without sufficient proof of a valid waiver of the debtor's due process rights.*

(6) We reject defendants' contention that a debtor's opportunity to attack a confessed judgment by motion filed after entry of judgment is an adequate remedy.⁵ In *Payne v. Superior Court* (1976) 17 Cal.3d 908, 911 [132 Cal.Rptr. 405, 553 P.2d 565], we observed that "Few liberties in

⁵We distinguish *Mitchell v. W. T. Grant Co.* (1974) 416 U.S. 600 [40 L.Ed.2d 406, 94 S.Ct. 1895] and *Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803 [132 Cal.Rptr. 477, 553 P.2d 637]. Both decisions upheld the constitutionality of statutes permitting a temporary taking of specific property in which the creditor claimed an interest without prior notice and hearing. The confession of judgment statutes, in contrast, permit entry of a final judgment, pursuant to which the creditor can levy upon any nonexempt property of the debtor without notice or hearing or a knowing and intelligent waiver of that right.

America have been more zealously guarded than the right to protect one's property in a court of law. This nation has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them 'at a meaningful time and in a meaningful manner.' " (Citing *Fuentes v. Shevin, supra*, 407 U.S. 67, 80 [32 L.Ed.2d 556, 570].) (Italics added.)

A postjudgment determination of the validity of the debtor's waiver is not a determination "at a meaningful time." Once judgment has entered, the damage is done; the debtor is now subject to an obligation imposed in violation of his due process rights, and the creditor can immediately employ legal process to enforce that obligation.⁶ Thus as the court explained in *Osmond v. Spence, supra*, 359 F.Supp. 124, 127, unless the validity of the waiver is determined "before the judgment is entered, an alleged debtor will be deprived of his due process rights on every occasion when an effective waiver has not occurred."

California's confession of judgment statutes, moreover, do not even provide for a postjudgment determination of the validity of the waiver. The debtor's only remedies are (1) to move to set aside the judgment under Code of Civil Procedure section 473—a remedy available only if, despite the absence of notice, he learns of the judgment and files his motion within six months of entry of judgment—or (2) to act to set aside a judgment procured by extrinsic fraud (see Code Civ. Proc., § 473; *Olivera v. Grace* (1942) 19 Cal.2d 570, 575 [122 P.2d 564]). As we pointed out in *Kash Enterprises, Inc. v. City of Los Angeles, supra*, 19 Cal.3d 294, 309, "[n]ot one of the scores of recent procedural due process decisions . . . suggests that the availability of a collateral judicial remedy can sustain a . . . procedure" which provides for no judicial determination whatsoever, either before or after the taking.

Defendants do not take issue with the principles and the reasoning which lead us to conclude that a confessed judgment based solely upon the debtor's signature to a cognovit agreement is constitutionally defective, and that the debtor's opportunity to seek postjudgment relief does not cure that defect. Instead, defendants argue from precedent,

⁶*Osmond v. Spence* (D.Del. 1972) 359 F.Supp. 124; *Virgin Islands National Bank v. Tropical Ventures, Inc., supra*, 358 F.Supp. 1203. Courts in Illinois and Pennsylvania have reached a slightly different conclusion than stated in the text, holding that the debtor is entitled to a determination of the validity of the waiver before execution of judgment. (*Scott v. Danaher, supra*, 343 F.Supp. 1272; *Chittester v. LC-DC-F Employees of G. E. Fed. Cr. Un.* (W.D.Pa. 1974) 384 F.Supp. 475; *North Penn Consumer Discount Co. v. Shuliz* (1977) — Pa.Super. — [378 A.2d 1275].)

contending that the United States Supreme Court decision in *D. H. Overmyer Co. v. Frick Co.*, *supra*, 405 U.S. 174, definitely establishes the constitutionality of the challenged California confession of judgment procedure.

Although defendants seek to equate *Overmyer* and the instant matter, the cases are distinguishable in several relevant respects. First, the Ohio statutory procedure at issue in *Overmyer* provided a debtor with a number of procedural and substantive safeguards unavailable under California procedure. Thus, while in California a debtor receives no notice at the time the confession of judgment is entered so as to permit him to make a speedy attack on the judgment, the Ohio statutes required the court clerk to give a judgment debtor notice of the entry of the confessed judgment. (See 405 U.S. at p. 175, fn. 1 [31 L.Ed.2d at p. 128].) Moreover, whereas California procedure permits a postjudgment attack on a confession of judgment only upon specified procedural grounds, the Ohio procedure enabled a judgment debtor to overturn a confessed judgment whenever the debtor could show the existence of a valid defense on the merits. (See 405 U.S. at p. 188 [31 L.Ed.2d at pp. 135-136]; see also *Billingsley v. Lincoln National Bank* (1974) 271 Md. 683 [320 A.2d 34]; *Irmco Hotels Corp. v. Solomon*, *supra*, 326 N.Ed.2d 542.) Consequently, the statutory procedure upheld in *Overmyer* was not nearly as harsh in operation as the California procedure at issue here.

Second, and perhaps more significantly, the *Overmyer* decision nowhere addresses the issue, crucial to the present case, whether the Ohio statutes established a constitutionally adequate procedure for assuring that a valid waiver of constitutional rights had occurred. In *Overmyer* the judgment debtor did not attack the adequacy of the record, but instead broadly claimed that an individual could never validly waive all rights to notice and hearing through a confession of judgment agreement. The *Overmyer* decision went no further than to reject this broad proposition and to hold on the facts before it that *D. H. Overmyer Co.*, a large corporation which entered into a negotiated cognovit agreement in return for valuable consideration, had "voluntarily, intelligently and knowingly" waived its constitutional rights. (405 U.S. at p. 187 [31 L.Ed.2d at p. 135]; see *Swarb v. Lennox*, 405 U.S. 191, 201-202 [31 L.Ed.2d 138, 146-147, 92 S.Ct. 767].)

Since it is axiomatic that "cases are not authority for propositions not considered therein" (*Worthley v. Worthley* (1955) 44 Cal.2d 465, 472 [283

P.2d 19]), we conclude that *Overmyer* did not resolve that a confession of judgment procedure which requires the entry of judgment without a sufficient showing of a valid waiver is consonant with due process. (See *Osmond v. Spence, supra*, 359 F.Supp. 124; *Virgin Islands National Bank v. Tropical Ventures, Inc., supra*, 358 F.Supp. 1203; cf. *Scott v. Danaher, supra*, 343 F.Supp. 1272; but see *Tunheim v. Bowman, supra*, 366 F.Supp. 1392; *Irmco Hotels Corp. v. Solomon, supra*, 326 N.E.2d 542; *Billingsley v. Lincoln National Bank, supra*, 320 A.2d 34.) *Overmyer* therefore does not conflict with our conclusion that the California confession of judgment procedure is constitutionally infirm.

4. *Our holding that the California confession of judgment procedure is constitutionally defective should be given limited retroactive effect.*

(3e) Having concluded that the California confession of judgment procedure is constitutionally defective, we hold that after this decision becomes final no court may enter a confessed judgment pursuant to that procedure.⁷ (7a) A question remains, however, as to the application of this decision to judgments entered prior to the finality of this opinion. (8) As we explained in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], no hard and fast rules determine the extent to which a decision is given retroactive effect; "determinations of this nature turn on considerations of fairness and public policy." (13 Cal.3d at p. 829.)

(7b) Such considerations of fairness and public policy militate against a fully retroactive application of the present decision. Although confessions of judgment have not found widespread use in California (see *Barnes v. Hilton, supra*, 118 Cal.App.2d 108, 111), judgments were entered pursuant to that procedure, some of venerable age. In many of such cases the debtor owed the debt; in some the creditor has probably by this date collected all or part of the judgment. Little would be gained, and much confusion engendered, by a decision which would automatically void all such judgments. (Cf. *In re Marriage of Brown* (1976) 15 Cal.3d 838, 850-851 [126 Cal.Rptr. 633, 544 P.2d 561].)

On the other hand, many of those existing judgments may well have been entered without a valid waiver of the debtor's constitutional rights; and in some cases the debtors, believing they have a defense to the

⁷Since the instant case does not involve a consumer transaction within the scope of Code of Civil Procedure section 1132, subdivision (b), we do not here decide the constitutionality of judgments entered pursuant to that provision.

underlying obligation, may seek to reopen those proceedings. We therefore believe that our decision should be given a limited retroactive application to permit any judgment debtor to apply for a hearing challenging the validity of the waiver in his confession of judgment. At such a hearing the creditor, who must overcome the presumption against waiver of constitutional rights, bears the burden of proving the validity of the waiver;⁸ if he fails to sustain the burden the court must vacate the judgment.

(2c) Finally, as in *Li v. Yellow Cab Co.*, *supra*, 13 Cal.3d 804, we conclude that the litigants before the court should be given benefit of our decision holding a judgment based on a confession invalid, in order "to provide incentive in future cases for parties who may have occasion to raise 'issues involving renovation of unsound or outmoded legal doctrine.'" (13 Cal.3d at p. 830.)

The judgment is reversed and the cause remanded with directions to enter a declaratory judgment in favor of plaintiffs determining that the confession of judgment procedure of Code of Civil Procedure sections 1132, subdivision (a), 1133, 1134, and ~~1135~~ does not conform to the due process standards of the Fourteenth Amendment to the United States Constitution, and further determining that the judgment entered against plaintiff Isbell on January 27, 1967 and the judgment entered against plaintiffs Pearson on February 16, 1966, are void.

Bird, C. J., Mosk, J., and Thompson (Homer B.), J.,* concurred.

⁸Courts of other jurisdictions have disagreed as to whether the debtor or the creditor bears the burden of proof in a postjudgment hearing concerning the validity of the debtor's waiver. (Cf. *Osmond v. Spence*, *supra*, 359 F.Supp. 124, 127 with *Virgin Islands National Bank v. Tropical Ventures, Inc.*, *supra*, 358 F.Supp. 1203 and *Irmco Hotels Corp. v. Solomon*, *supra*, 326 N.E.2d 542.) We believe this issue was correctly resolved in the Court of Appeal opinion below, and therefore adopt that court's language, which stated that: "In *Blair v. Pitchess*, *supra*, 5 Cal.3d 258 at page 274, the Supreme Court held that "Where government officials rely on consent to justify the lawfulness of a search, the burden is on them to show by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given." . . . Although *Blair* involved the waiver of Fourth Amendment rights, its rationale is nevertheless controlling here. Due process rights are no less fundamental than the Fourth Amendment protection against unreasonable searches and seizures, and the presumption against waiver is equally applicable to the constitutional guarantee of notice and hearing. Thus where a creditor relies upon waiver of due process rights, he should be charged with proving that the waiver was valid."

*Assigned by the Chairperson of the Judicial Council.

[Apr. 1978]

9. We hold here only that sections 1132, subdivision (a), 1133, and 1134 of the Code of Civil Procedure enact an unconstitutional procedure. The validity of judgments entered pursuant to stipulation or agreement under the authority of other statutes or rules of court is not before us in the present case, and we do not imply that such judgments are void.

113f
RICHARDSON, J.—I respectfully dissent. In its praiseworthy zeal to protect the unwary victims of standardized adhesion contracts containing confession of judgment provisions, the majority unnecessarily and improperly strikes down a major portion of California's confession of judgment statute (namely, Code Civ. Proc., §§ 1132, subd. (a), 1133-1135). With all due deference, I suggest that in a situation calling for use of a surgeon's scalpel the majority reaches for a meat axe. The majority's holding of facial unconstitutionality conflicts with the latest expressions of the United States Supreme Court on the subject, and has the unfortunate (and wholly unnecessary) effect of invalidating even those confessions executed by willing and knowledgeable debtors for the purpose of avoiding unnecessary litigation over matters already in controversy. Because the confession procedure operates in an entirely proper fashion in such cases, and because the Legislature in 1975 has added adequate safeguards applicable to most adhesion-type contracts (see Code Civ. Proc., § 1132, subd. (b)), we should uphold the challenged legislation and require those debtors who may assert that their signatures were obtained improperly to raise the defense through appropriate post-judgment relief.

Initially, I stress that the case before us does not involve the typical, much-criticized, "cognovit note or agreement," of the sort contained in many adhesion-type contracts. As described by one observer, "This type of note, incorporated in a contract or other document, attempts *in advance* of any legal controversy to authorize . . . the entering of judgment without notice and hearing for the amount confessed." (Note, *Cognovit Revisited: Due Process and Confession of Judgment* (1973) 24 Hastings L.J. 1045, 1046, italics in original, hereafter cited as *Note*.) It was this type of *advance* confession which we condemned in the case relied upon by the majority, *Hulland v. State Bar* (1972) 8 Cal.3d 440, 449 [105 Cal.Rptr. 152, 503 P.2d 608]. In *Hulland* an attorney (who, of course, owed a continuing *fiduciary* obligation to his client) had exacted such a confession from a new client as security for payment of future legal services. (*Id.*, at p. 443.)

In marked contrast, we are not presented with a case bearing any factual similarity to *Hulland*. In the matter before us, defendant county obtained the written confessions of judgment following its discovery of what it claims was welfare fraud perpetrated on it by plaintiffs. In the case of plaintiff Isbell the claim was followed by a *criminal* prosecution

under section 11482 of the Welfare and Institutions Code; Isbell *pled guilty* to the charged offense and was *jailed*. Plaintiffs Pearson were alleged to have received an overpayment of welfare benefits before they executed their confession of judgment. While plaintiffs did not have the advice of counsel when the confessions of judgment were signed, in the language of a unanimous Court of Appeal herein, "... there is not a scintilla of evidence that they did not knowingly, intelligently and voluntarily waive their due process rights." It is significant that the confessions were not buried in the fine print of an adhesion contract. Furthermore, they were directed toward resolving an actual, existing controversy between the parties. The two confessions involved herein bear the caption "County of Sonoma, plaintiff vs. [Eva Isbell] [Omega and Clevie Pearson] defendant," recite that each defendant confesses judgment in a specific sum, and contain a paragraph, *handwritten by the respective debtors*, which admits the facts of the fraud and sets forth a repayment plan. (For example, Isbell's confession stated, in her own handwriting, that "I gave false statements to in [*sic*] which to receive welfare. I plan to pay it back at \$20.00 Twenty dollars a month until said debt is paid, after I am released from jail.")

Given the fact that the plaintiffs executed the confessions shortly after the controversy with the county had arisen (rather than as part of an adhesion contract for goods or services executed in advance of default), we may reasonably presume that plaintiffs fully understood their potential liability to the county, and knowingly and voluntarily confessed judgment in order to avoid the expense and inconvenience of contested litigation. So long as a debtor has notice of the existence of the dispute with his creditor and an opportunity to contest the claim if he chooses to do so, the confession of judgment procedure "raises no significant due process problems. This method of confessing judgment without action avoids needless litigation." (*Note, supra*, at p. 1046.)

As previously observed, in 1975 the Legislature acted to protect most adhesion contract debtors from the confession of judgment procedure. Under new section 1132, subdivision (b), a confession of judgment may not be entered against the debtor in an ordinary sale, service or loan transaction unless the debtor's own independent attorney certifies that he has fully informed his client of the facts and consequences, and has advised him to use the confession of judgment procedure.

By reason of the enactment of section 1132, subdivision (b), the interests of the typical adhesion contract debtor have been adequately protected; indeed, the majority does not purport to invalidate that subdivision along with the rest of the statute. The majority's principal reason for striking down the *remaining* provisions appears to be that "a consent obtained in such a contract of adhesion is ineffective to waive the constitutional protections" (*Ante*, p. 69, quoting from *Blair v. Pitchess* (1971) 5 Cal.3d 258, 276 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206].) As I have previously explained, however, we are not dealing with the typical *advance* confession clause in an adhesion contract.

The majority, ignoring a record which discloses no evidence whatever of overreaching, concludes that confessions of judgment "*most often*" are executed by debtors "who have little understanding" and "little choice" (*ante*, pp. 64, 65); the cognovit clauses appear "*most commonly*" in adhesion contracts; the nature of the device "*suggests*" a substantial disparity in bargaining power and "*implies*" overreaching; "*historical experience*" shows that "confessions" are "*most frequently employed* against those who are unaware" (*ante*, pp. 69-70, italics added). "Many courts" have observed that signators "*often* do not realize" they are waiving defense rights; thus the debtor's signature creates no inference of a knowing intelligently exercised waiver. (*Ibid.*) "In sum, sad *experience has shown* that the confession of judgment procedure lends itself to overreaching, deception, and abuse," so on its face the confession cannot be voluntary and knowing. (*Ante*, p. 71, italics added.) In short, ignoring the factual record before us, the majority predicates a result based on what it perceives has been the *general* experience with confession judgments, an area which has had, and continues to have, very active legislative interest and attention.

I am convinced that we should, much more wisely, approach this task on a case-by-case basis, invalidating the offending practice only in those situations in which due process standards are actually violated. The majority asserts that the statutes themselves "do not provide for a case by case determination" of the waiver question. (*Ante*, p. 71.) Yet, as the majority recognizes, judicial review is readily available, for the debtor may either move to set aside the judgment (Code Civ. Proc., § 473), or may file an independent action alleging fraud in procuring the judgment (see, e.g., *Olivera v. Grace* (1942) 19 Cal.2d 570, 575 [122 P.2d 564, 140 A.L.R. 1328]). As I explain below, the availability of such postjudgment relief clearly satisfies any due process objections. (*D. H. Overmyer Co. v.*

Frick Co. (1972) 405 U.S. 174, 188 [31 L.Ed.2d 124, 135-136, 92 S.Ct. 775].) Although such a "case-by-case" approach may lack the simplicity of invalidating the confession of judgment procedure in its entirety, I suggest that such an approach is dictated by the fact that the confession procedure operates in an entirely proper manner in the vast majority of cases.

The majority holds that the confession of judgment procedure is unconstitutional on its face under due process principles because judgment may be entered without "a prejudgment judicial determination of the validity of the debtor's waiver . . ." (*Ante*, p. 71.) Apart from the fact that in the present case we properly may presume such a valid waiver from the face of the handwritten confessions, in 1972 the United States Supreme Court *unanimously* rejected a similar claim of facial unconstitutionality. Thus, in *D. H. Overmyer Co. v. Frick Co.*, *supra*, 405 U.S. 174, the high court reviewed the validity of an Ohio judgment entered *by the creditor without notice to the debtor*, on the basis of the latter's prior execution of a promissory note containing a confession-of-judgment clause. In affirming the judgment, the court expressly noted that "The due process rights to notice and hearing prior to a civil judgment are subject to waiver" (p. 185 [31 L.Ed.2d at p. 133]); that although such a waiver must be knowingly and voluntarily made, the debtor had not contended that it was unaware of the significance of the note's provisions (p. 186 [31 L.Ed.2d at p. 134]); and that the facts disclosed no unequal bargaining power or overreaching by the creditor (*ibid.*). The court concluded in these words, which are fully dispositive of the majority's major constitutional premise: "Our holding necessarily means that a cognovit clause is not, *per se*, violative of Fourteenth Amendment due process. [Debtor] could prevail here only if the clause were constitutionally invalid. The facts of this case, as we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack. [¶] Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." (Pp. 187-188 [31 L.Ed.2d at p. 135].)

The majority has found that ~~four~~^{three} sections of the Code of Civil Procedure violate due process principles. However, the United States Supreme Court, as I have noted, has said that due process rights may be

waived in the cognovit situation. While the waiver must be made knowingly in this case, that fact appears from the face of the handwritten confessions. Having been formally charged with a welfare fraud, and having pled guilty and while serving a jail term therefor, Isbell should, reasonably, be held to have possessed both knowledge of the charge and full opportunity to defend. Similarly, nothing in the record suggests that the Pearsons were ignorant of the nature of the claims against them, the amount involved, and of their opportunity to resist the claim; their own confession, on its face, demonstrates this knowledge.

The high court concluded in *Overmyer* that the debtor was not left without remedy by entry of the confessed judgment, as he may move to vacate the judgment upon a proper showing of a valid defense. (405 U.S. at p. 188 [31 L.Ed.2d at pp. 135-136].) We should follow *Overmyer* and uphold the constitutionality of California's confession of judgment procedure. Although that procedure may, in rare cases, operate unfairly, the Legislature has reformed the procedure as it applies to adhesion contracts, and in all other cases the debtor is afforded the opportunity to nullify the confessed judgment through an appropriate motion to vacate it. There is, moreover, a presumption of constitutionality of a statute. (*In re Ricky H.* (1970) 2 Cal.3d 513, 519 [86 Cal.Rptr. 76, 468 P.2d 204]; 5 Witkin, Summary of Cal. Law (8th ed. 1974) p. 3281.) No satisfying reason appears for invalidating the entire statutory scheme, thereby precluding legitimate use of the confession procedure in those situations where the parties desire to avoid unnecessary contested litigation.

I conclude, in accordance with the *Note* cited above, that "The cases considered clearly state that cognovit judgments are alive and well. They have withstood attacks under the due process clause of the Fourteenth Amendment. Even though a property interest sufficient to warrant notice and hearing is involved, the judicial policy reflected in *Sniadach* and *Fuentes* has not been extended to cognovit judgments. Due process rights can be waived and cognovit judgments can be entered if waiver is evident from the contract containing the cognovit note. [¶] *Overmyer* indicates that the Fourteenth Amendment is almost certainly satisfied if there is an appellate procedure conforming to the requirements of due process [¶] It can be argued that the duty of the courts is to provide an impartial, neutral forum. Their function is not to demand litigation in every dispute. Since waiver of due process rights can be made, the court's

function is to provide a forum for attacking the validity of waiver if, but only if, the debtor wants to challenge it." (*Note, supra*, at pp. 1064-1066.)

I would affirm the judgment.

Clark, J., and Manuel, J., concurred.

Exhibit 2

Code of Civil Procedure §§ 1132-1134

§ 1132. Judgment may be confessed for debt or contingent liability: [Entry]. (a) 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 court having jurisdiction for like amounts.

(b) When the debt or liability arises out of the sale of goods or services primarily for personal, family, or household use, or a loan or other extension of credit for personal, family or household purposes, or a claim involves a promissory note which is based upon such a sale or loan or other extension of credit, such judgment by confession shall be entered only if an attorney independently representing the defendant signs a certificate that he 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 shall be filed with the filing of the statement required by Section 1133. [1872; 1975 ch 304 § 1.] *Cal Jur 3d Actions § 19, Bills and Notes § 71; Cal Jur 2d Judgm § 11; Cal Practice §§ 1:6, 34:2, 61:110; Witkin Procedure 2d p 2814; Summary p 575.*

§ 1133. Statement [by defendant] in writing and form thereof. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;

2. 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;

3. 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. [1872.] *Cal Jur 2d Judgm § 12; Cal Practice §§ 1:6, 34:3; Witkin Procedure 2d pp 2815, 2816.*

§ 1134. [Filing and endorsement of statement: Entry of judgment: Fees to be paid as court costs: Judgment roll.] In all courts the statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judgment of such court for the amount confessed with the costs hereinafter set forth. At the time of filing, the plaintiff shall pay as court costs which shall become a part of the judgment the following fees: in superior courts fifteen dollars (\$15) and in municipal courts and justice courts ten dollars (\$10). No fee shall be collected from the defendant. No fee shall be paid by the clerk of the court in which said confession of judgment is filed for the law library fund nor for services of any court reporter. The statement and affidavit, with the judgment endorsed thereon, becomes the judgment roll. [1872; 1933 ch 745 § 1; 1951 ch 1737 § 150; 1957 ch 1982 § 1; 1974 ch 1285 § 1; 1975 ch 766§ 1; 1977 ch 1257 § 37, effective October 3, 1977.] *4 Cal Jur 3d Appellate Review § 325, Courts § 163; Cal Jur 2d Judgm § 12; Cal Practice §§ 1:6, 34:5, 61:109, 61:110; Witkin Procedure 2d pp 494, 2815, 2816, 4344.*

EXHIBIT 3

Questionnaire--Confession of Judgment

This questionnaire is designed to assist the California Law Revision Commission in gathering information for its study of confession of judgment procedures. Any information or suggestions you can give will be appreciated and thoughtfully considered. If you feel uncomfortable with the form or contents of this questionnaire, if your responses do not conform to the categories suggested in the questionnaire, or if you require more space for a full response, please feel free to make your views know by letter. Please return by February 1, 1979 to:

California Law Revision Commission
Stanford Law School
Stanford, California 94305

1. Name: _____

Address: _____

Check below if you would you like to receive additional materials produced by the Commission concerning confessions of judgment:

_____ tentative recommendations
_____ final recommendations

2. Do you represent:

debtors

general practice _____
legal services _____
other (please indicate) _____

creditors

general practice _____
collection agency _____
other (please indicate) _____

both debtors and creditors

general practice _____
other (please indicate) _____

neither debtors nor creditors

law professor _____
public agency _____
other (please indicate) _____

3. Do you use confessions of judgment (or are they used in):

consumer cases

frequently _____
infrequently _____
not at all _____
other (please indicate) _____

commercial cases

frequently _____
infrequently _____
not at all _____
other (please indicate) _____

other (please indicate) _____

frequently _____
infrequently _____
other (please indicate) _____

Comment: _____

4. What are the main advantages you see in confessions of judgment-- why are they used; what purposes do they serve? If there is another device that serves the same purpose, does it serve the purpose as well as, better than, or worse than confession of judgment?

5. What are the main problems you see with confession of judgment? Are the problems curable, and if so how?

6. To comply with constitutional requirements announced by the California Supreme Court in Isbell v. County of Sonoma, 21 Cal.3d 61 (1978), it may be necessary to amend the confession of judgment statute in one or more of the following ways. Please indicate whether any of these would affect the usefulness of the confession of judgment, and in what way.

A. Require advice of independent counsel to debtor before signing confession, in same manner as consumer cases under Code of Civil Procedure Section 1132(b).

B. Require that a confession of judgment be a separately signed document in large type and plain language executed only after default, that informs the debtor that signature waives all rights to assert defenses and subjects property to immediate execution, and that the debtor may seek the advice of an attorney.

C. Require notice to the debtor immediately upon entry of judgment and permit debtor to challenge validity of judgment in court by raising defenses for a period of 30 days after entry of judgment.

7. Please add any comments you may have concerning confessions of judgment, including the need for them, problems with them, requirements of constitutionality, and suggestions for reform.