

## Memorandum 79-5

Subject: Study D-500 - Confession of Judgment (Analysis of Questionnaire Responses)

Background

The California statute governing confessions of judgment was held unconstitutional as applied to non-consumer cases by the California Supreme Court in Isbell v. County of Sonoma, 21 Cal.3d 61 (1978). The creditor in Isbell petitioned the United States Supreme Court for a writ of certiorari, but the petition was denied for failure to file within the 90-day period prescribed by law. The Commission, at its December 1978 meeting, reviewed the Isbell decision along with a staff memorandum analyzing the utility of confessions, problems with confessions, and possible statutory amendments to cure the constitutional defects. The staff concluded that the confession appears to be useful primarily in commercial cases as a security device and for purposes of procedural efficiency, where it may benefit both creditor and debtor, but that more information was needed to ascertain whether the confession would remain useful after amendment to satisfy constitutional requirements.

The Commission determined to send out a questionnaire to gather the necessary information. The questionnaire was distributed to our entire mailing list (over 600 persons) immediately after the December meeting. A copy of the questionnaire is attached as Exhibit 1 (pink). We have received 45 responses so far. The responses are too voluminous to reproduce and distribute. The staff in this memorandum attempts to tabulate the responses and to indicate the predominant themes and give a flavor of the responses. The staff will supplement this memorandum if additional responses are received between now and the time of the meeting.

General Observations

The questionnaire respondents were predominantly creditor oriented. While only 4 respondents identified themselves as debtor representatives, 14 identified themselves as creditor representatives. In addition, of the 20 who represent both debtors and creditors, the majority appeared to show a creditor viewpoint in their responses. There were also 7 respondents who represented neither creditors nor debtors (judges,

law professors, public agencies). The staff has attempted to take the orientation of the respondent into account in analyzing the questionnaire responses. In general, however, the responses seemed knowledgeable and thoughtful regardless of the orientation of the respondent.

The viewpoints defied easy classification, and there were no overwhelming trends apparent in the responses. However, general groupings of common responses were possible, and these will be indicated where they occurred.

#### Frequency of Confessions of Judgment

The responses indicated, somewhat to our surprise, that confessions are still used in consumer cases notwithstanding the requirement of Code of Civil Procedure Section 1132(b) that the certificate of an independent attorney who has advised the debtor be filed with the judgment. We had been led to believe from the literature that the advice of attorney requirement had ended the use of confessions in consumer cases. But 3 respondents indicated they were used frequently and 14 that they were used infrequently; only 11 did not use them at all in consumer cases.

The use of confessions of judgment in commercial cases was greater. Six respondents indicated they are used frequently and 16 use them infrequently; 8 do not use them at all in commercial cases.

Confessions are also used somewhat in other types of cases. Six respondents used them frequently; these were primarily public entities involved in such activities as collecting child support obligations and county welfare reimbursement--the type of collection involved in the Isbell case. In addition, 10 respondents reported infrequent use in other types of cases, such as tax liability, insurance subrogation, attorney's fees.

#### Usefulness of Confessions of Judgment

A common theme of most of the responses was that confessions of judgment, if properly used, can be an expeditious and cost-saving tool that benefits both creditors and debtors. A number of respondents expressed dismay at the Isbell case and felt that due process protections tended to hamper effective commercial dealings. Typical comments are:

As a result of the Isbell case we simply file complaints and take stipulations to judgment. There certainly should be some method whereby a debtor can agree he owes the money and that judgment can be entered against him, with little or no cost to the creditor (and the debtor, if there is an attorneys fee provision). I agree that the debtor should not be permitted to sign confessions of judgment at the time of taking out the loan and that there should be some procedure to protect, in those hopefully rare cases, the debtor from unscrupulous creditors. In my practice however, the confession of judgment has been useful, served its purpose, and not been subject to abuse. . . . I agree entirely with the dissent in Isbell. [Melinda Collins, Brobeck, Phleger & Harrison, San Francisco (creditors--bank collections).]

I think the confession of judgment is a highly useful device which avoids the filing of litigation. I believe Isbell v. County of Sonoma did nothing for the debtor and was an over-technical interpretation of the Constitution. The problem is that the debtor is not disputing the debt and is in fact stipulating to a judgment rather than forcing the creditor to go through judicial proceedings to achieve the same result--which the debtor eventually pays for. [Jack Allen, Acting City Attorney, Beverly Hills (collections on unpaid utility bills, ambulance bills, day care service bills, and damage to city property).]

A few respondents indicated that they rarely, if ever, use confessions:

As a practical matter I usually use a stipulated judgment after a complaint is filed. Prior to suit I usually use a letter agreement which gives plenty of time, four years, to bring suit, if not performed by debtor. In my experience a confession of judgment is not useful and the potential for abuse by creditors is high. [Charles A. Claesgens, Oakland (debtors and creditors--commercial and insurance subrogation cases).]

I use a confession of judgment only when my client advises that it is inconvenient to appear in court. [Lawrence Schorr (debtors--family law).]

We believe the restrictions now render confession useless. There are so many problems that most aren't honored which causes great embarrassment to the attorney who convinced his client to take the confession to end a fight and expedite the matter. [Hal L. Coskey, Coskey, Coskey & Boxer, Los Angeles (debtors and creditors--collections).]

Most of the respondents, however, emphasized the savings that the confession of judgment can provide, and the virtues of being able to stay out of court. A typical comment is:

Most debtors and their attorneys [in commercial cases] like the procedure and it proved to be highly effective and substantially reduced the number of lawsuits that had to be filed. Now without the procedure we are forced into filing more suits which frequently result in stipulations for judgment and which increase the cost for both parties. [Joseph Wein, Buchalter, Nemer, Fields & Chrystie, Los Angeles (creditors--general practice).]

The savings made by use of the confession noted by most respondents were the costs of filing and service. The fee for filing a confession of judgment is substantially less than the fee for filing a complaint. In addition, a number of respondents noted that contracts may call for payment of attorneys' fees by the debtor, which may result in additional charges against the debtor if a complaint has to be filed in order to take a stipulated judgment. The confession avoids or reduces these costs to the debtor.

The other major function of the confession noted by a few respondents is its use as a security device:

We have used confession of judgment procedure as a valuable device in sophisticated extension or "work out" arrangements. Virtually all of these were negotiated by counsel. Creditors are often willing to grant generous terms where they are assured of their ability to move promptly and effectively in the event of further default. The Isbell decision deprived both debtors and creditors of a valuable tool. We are unaware of any other device that serves the same purposes. Representing both debtors and creditors, we had no problems with the device prior to Isbell. [Robert A. Holtzman, Los Angeles (debtors and creditors--general practice).]

The confession of judgment was particularly effective in non-consumer cases particularly in those situations where the agreement was that it would be held and not filed with the court unless there was a default in making payments in accordance with a prearranged schedule. In these situations the plaintiff knew that if there was a default he could move quickly and the defendant knew that as long as he made the payments no suit would be filed and the fact of his obligation was not made public which could affect his credit rating. [Joseph Wein, Buchalter, Nemer, Fields & Chrystie, Los Angeles (creditors--general practice).]

Most respondents thus felt that the confession of judgment was a useful tool that should be preserved if possible. The reasons given for

its usefulness--that it can promote procedural efficiency, save costs, and act as a security device, particularly in commercial cases--conform to the suggestions found in the literature and identified by the staff at the December 1978 meeting.

#### Proposals for Reform

While there was general agreement among the respondents that the confession should be preserved in some form, there was general disagreement as to what that form should be. The questionnaire suggested 3 possible amendments to the confession of judgment statute--(1) permit a confession only on advice to the debtor by independent counsel; (2) require the confession to be separately signed by the debtor and include a statement of rights, to be made only after a default in payment occurs; or (3) require prompt notice to the debtor of entry of judgment and a 30-day period in which to raise defenses to the judgment. The reaction to each of these proposals is analyzed separately below.

The questionnaire also solicited other suggestions for reform from the respondents. A few made general suggestions of what they felt might be appropriate.

The only limit I would propose is to proscribe a pre-signed document being used by the potential creditor. If further safeguards are needed, it could be processed like a plea of guilty, supervised by judicial safeguards. [Bernard Lauer, Beverly Hills (debtors and creditors--general practice).]

The staff notes that the proposal to have simply a post-default confession does not appear to satisfy the Isbell requirement of a knowing waiver of due process rights; and judicial oversight of the confession would destroy its usefulness.

A confession of judgment procedure whereby the defendant has a clear understanding of what it is and what he may be giving up is highly desirable and necessary if we are to reduce court congestion. [Joseph Wein, Buchalter, Nemer, Fields & Chrystie, Los Angeles (creditors--general practice).]

The staff notes that this suggestion, while it would appear to satisfy constitutional requirements, lacks necessary specifics. This suggestion is typical of others that stated a general need for a cost-cutting procedure but appeared unable to make concrete suggestions in the light of the Isbell requirements:

The major commercial use of confessions of judgment is in settlement situations where further costs of suit are to be avoided. If further hearings can be avoided this use can be preserved. [Jeffrey P. Newman, San Francisco (debtors and creditors--general practice).]

I think confessions should be a way to get to judgment with least incurred expense, as a means of saving the debtor the full costs of contested litigation. Where the debt is acknowledged by the debtor, adding hurdles cuts down the savings. [Pauline Epstein, Sherman Oaks (debtors and creditors--general practice).]

And more than one respondent felt that no additional safeguards would result in any additional protection for the debtor:

I cannot see how a debtor is protected better under any new procedure or different procedure than the old confession of judgment. That there will be any greater protection under a different procedure is a fiction because practically speaking debtors will not seek counsel. If the debtor feels he or she owes the debt, he or she is not going to contest any judicial proceeding--otherwise the debtor would not sign the confession of judgment. (Jack Allen, Acting City Attorney, Beverly Hills (collections on unpaid utility bills, ambulance bills, day care service bills, and damage to city property).]

The respondents were generally much better at criticizing the proposals contained in the questionnaire than in coming up with constructive suggestions.

#### Advice of Attorney Requirement

The first proposed amendment suggested in the questionnaire was that no confession of judgment be valid unless accompanied by the certificate of an attorney independently representing the debtor that the attorney has advised the debtor of the effect of the confession and has advised the debtor to utilize the confession. This is currently the law for consumer debts under Code of Civil Procedure Section 1132(b), and was not addressed in the Isbell case which involved a non-consumer debt. As noted above, this provision appears from the questionnaire responses to have decreased, but not eliminated, the use of confessions of judgment in consumer cases.

If the respondents approached unanimity on any item in the questionnaire, it was on the question whether the advice of attorney requirement would be constitutional in commercial cases. Twenty-eight

respondents thought it was probably constitutional and 3 others thought it was likely, although their attitude seemed to be "Who knows what the Supreme Court will do next?" Only 3 people felt the provision would probably not be constitutional. Their concern was that no amount of advice to a debtor is sufficient to replace notice and an opportunity to be heard; there is no guarantee that the debtor understands the advice and has made a valid waiver of due process rights.

Thirty of the respondents felt the statute would remain useful if it were amended to require advice of attorney. A number of respondents indicated that in fact they never use confessions of judgment now unless an attorney represents both sides.

The only times I've used a confession of judgment is where the debtor was represented by counsel. [David A. Wexler, Rosenfeld, Meyer & Susman, Beverly Hills (creditor representative--general practice).]

Other respondents felt that advice of attorney would be a good way to ensure that the debtor's waiver of constitutional rights is knowing and intelligent.

A confession of judgment could be a useful tool in many types of cases if attorneys were involved and if the defendant fully understood what was occurring. [Herschel T. Elkins, Office of Attorney General, Los Angeles (consumer protection unit).]

The summary nature of a confession of judgment would still give benefit to creditors while assuring debtors a fair assessment of their liability. This is especially true in welfare cases where severe limitations exist on recovery in "non-fraud" cases. The amendment would prevent unjustified use of this summary process while allowing those clearly justifiable cases to be processed. [Terrence Terauchi, Legal Aid Society of San Mateo County (welfare cases).]

However, 9 of the respondents, mainly creditor representatives, felt that the advice of attorney requirement would render the confession unuseful. Their primary concern was that the debtor would be unable or unwilling to hire an attorney, so valid confessions would not be executed.

Debtors often don't have or can't afford counsel, and sign a stipulated judgment or confession to avoid further litigation. [Robert L. Baker, Alhambra (debtors and creditors--general practice).]

The problem is that confessions of judgment are useful because there is no question of liability. The debtor never contests that fact. The debtors cannot afford legal counsel so that it would be useless if that was a requirement. The confession of judgment is a simplified procedure that avoids filing a court action and taking a default. [Jack Allen, Acting City Attorney, Beverly Hills (collections on unpaid utility bills, ambulance bills, day care service bills, and damage to city property).]

It should be noted that of the respondents who felt that the advice of attorney requirement should make the confession unuseful, one did not use confessions at all, 4 used them exclusively or predominantly in consumer cases, 3 used them in other non-commercial cases, and only 1 used them infrequently in commercial cases. It was primarily persons involved in commercial practice who felt that the advice of attorney would not affect the usefulness of the confession.

The respondents also suggested a number of additional features that an advice of attorney requirement should have. These included such items as the attorney giving the advice must be a member of the California Bar, the confession should include language expressly waiving notice and an opportunity to be heard, the confession should be a sworn statement, the confession should be filed only after notice to the debtor's attorney, the advice of attorney should be coupled with an opportunity for post-judgment review, debtor should have a 30- to 60-day cooling off period before the judgment may be entered, judgment should not be entered until after the debtor defaults.

By far the most frequent suggestion was that the debtor be permitted to waive the advice of attorney requirement. The problem raised was that the debtor is already in financial trouble and will be unwilling to spend additional money for an attorney.

Should be ability in debtor to waive attorney as long as he is aware of his rights and it can be shown to be in the debtor's best interests. [John K. Spencer, Jr., San Francisco (debtors and creditors--general practice).]

Practical problem is that in my experience most debtors freely acknowledge debt or a compromise is reached, but that debtor needs time to pay. Debtor does not want to use funds to pay attorney but rather to make creditor go away. There is also a problem of pro forma signing by attorneys without investigation. Debtors don't want to pay what a thorough investigation of the facts and law would cost. [Charles A. Claesgens, Oakland (debtors and creditors--commercial and insurance subrogation cases).]



The difficulty with this suggestion, in the staff's opinion, is that a waiver of the advice of attorney permitted by statute would render the statute unconstitutional. There would be no means of ensuring that the waiver of constitutional rights was knowing and intelligent.

#### Adequate Notice to Debtor Requirement

The second amendment to the confession of judgment statute suggested in the questionnaire was that the confession would be valid only if it is a separately signed document in large type executed after default on the obligation that informs the debtor that signing the document waives due process rights and that the debtor has the right to consult an attorney. The purpose of this suggested amendment was to give the debtor necessary information so that any waiver of due process rights would be knowing and intelligent.

The reaction to this proposal was more mixed than the reaction to the advice of attorney requirement. Twenty-one respondents felt it would pass constitutional muster, while 11 felt it would not. The persons who felt the notice provision would not be constitutional were primarily concerned with the ability to understand the notice and appreciate the consequences of the confession, stating that the notice would "not provide sufficient safeguards to assure that the debtor in fact executed an intelligent waiver", that the notice is "no real protection", and that advice of attorney should be mandatory. "The court may currently require a more formal review procedure prior to a party waiving its rights under law."

Opinion as to whether such a confession procedure would be useful was also split. Twenty-three respondents felt it would remain useful, 4 felt its utility would be somewhat lessened, and 13 thought it would not be useful at all. One major concern that was expressed was that the debtor would ignore the contents of the notice.

People read what they want to read, and most of us understand what we want to understand. [Lawrence Schorr, Hawaiian Gardens (debtors--family law).]

Hard-handed techniques could still be used and debtors could be coerced into signing without advice of counsel. A simple statement of rights without further explanation is not enough. [Bill Kennedy, California Rural Legal Assistance, Modesto (family support collections).]

The other major concern was that requiring the confession to be executed only after default will mean that confessions are never executed.

Why only after default? How tell if there is a default? What if the confession is desired even though there is no default? [Michael R. Palley, Los Angeles (debtors and creditors--general practice).]

Confession of judgment is ordinarily used as part of extension or work-out arrangement. Debtor's cooperation is almost certainly unavailable in event of further default. [Robert A. Holtzman, Los Angeles [(debtors and creditors--general practice).]

A large number who felt that the confession would be useless after default apparently did so on the misconception that the reference to "default" was a reference to taking a judgment by default rather than a reference to default on the obligation.

If it gets to court as regular suit and goes to default, I don't see the advantage of the confession, to the debtor or creditor. [Pauline Epstein, Sherman Oaks (debtors and creditors--general practice).]

The staff believes that to satisfy due process requirements, the confession must either be signed by the debtor after default on the obligation or else execution on the confessed judgment must be stayed until the debtor has an opportunity to raise defenses such as lack of default. This is the only way to ensure that either the debtor has notice and an opportunity to be heard or the debtor's waiver of due process rights is knowing and intelligent.

Despite the split in opinion as to the constitutionality and usefulness of the notice to the debtor, there were many who felt that the notice would be good and effective.

It seems more practical, especially in the commercial setting, to draft the statutes in such a manner that all the required disclosures necessary to constitute a knowing waiver of constitutional rights be included in the confession of judgment. [John D. Bessey, Dahl, Hefner, Stark & Marois, Sacramento (creditors--collections).]

Dennis Kerr of the Family Support Division, Yuba County District Attorney's office, sent us copies of the form they have been using in collection of child support obligations that requires separately initialed

statements of waiver of specific rights by the debtor, with or without counsel.

I acknowledge that I have been told and informed by the Yuba County District Attorney's Office that I have the following rights:

1. To have a trial on the issue of paternity and the amount of any child support. That in such trial the burden of proof will be on the District Attorney's Office and that I can have such trial either before a Judge or a Jury. \_\_\_\_\_

2. That I have the right to be represented by an attorney at all times in such proceeding. \_\_\_\_\_

3. That if I sign an agreement admitting paternity and consenting to pay child support in an agreed sum I will not have a trial, I will give up my rights to produce evidence and testimony, I will give up my right to a notice of hearing and an opportunity to be heard, and to be represented by an attorney. \_\_\_\_\_

4. I understand that upon my signing the agreement stated below a judgment will be entered based thereon by a Court declaring that I am the father of the child \_\_\_\_\_ born \_\_\_\_\_ to my former spouse. Further I understand that I will be required to pay child support in the sum of \_\_\_\_\_ per month or such other sum as the Court may from time to time decree and that in the event I fail to make payments I may be liable to penalties such as fine or imprisonment for failure to provide or by reason of contempt of court. \_\_\_\_\_

5. I understand that the agreement that I have signed may be modified at any time by myself or a representative of the child upon a showing of changed circumstances with respect to need and/or ability to pay. \_\_\_\_\_

6. I acknowledge that I have been represented by an attorney of my choice in this matter, \_\_\_\_\_ of \_\_\_\_\_.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_

I have discussed and advised my client, \_\_\_\_\_, with respect to the waiver of constitutional rights and agreement for paternity and support attached herein. I concur in his waiver of rights and his entering into the agreement and he does so with my advice.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_ Attorney for Petitioner

Judge Robert Kingsley (Appellate Court), while declining to comment on the constitutionality of the proposed amendments because of his position, felt that on the merits the notice to the debtor "is the best and fairest" of the three proposals in the questionnaire.

#### Postjudgment Procedure

The third amendment proposed in the questionnaire was to require notice to the debtor immediately upon entry of a confessed judgment, and

a 30-day stay of execution during which an expeditious procedure is provided for the debtor to challenge the validity of the judgment. This proposal also met with mixed reaction.

Seventeen of the respondents felt the amendment would satisfy constitutional requirements. Six felt it would not. Most of those who felt it would not satisfy constitutional requirements based their opinion on the concept that a valid waiver of rights is necessary and that the opportunity to attack the judgment does not assure a knowing and intelligent waiver; for this purpose, consultation with an attorney is necessary. The staff does not agree with this analysis. A knowing and intelligent waiver is only necessary if there is no notice and opportunity to be heard before being deprived of a property right. Under the proposed amendment the defendant would be afforded notice and an opportunity to be heard before being deprived of a property right, so it would appear to satisfy due process requirements. There is language in Isbell that would seem to indicate the contrary, however, and this may be the basis of the reasoning of those who feel advice of attorney is essential.

The usefulness of the statute would not be impaired in the opinion of 21 of the respondents, and its usefulness would be impaired somewhat for 3 of the respondents. Eleven felt it would be useless. The most common and strongly-expressed complaint was that the very purpose of the confession is to enable the creditor to move promptly when necessary, without time-consuming court proceedings, and this amendment would frustrate that purpose.

It appears to me to invite an additional area for contested litigation. Legislation should seek to avoid further areas of judicial fact finding process. [Bernard Lauer, Beverly Hills (debtors and creditors--general practice).]

Whole point of the confession of judgment procedure is to enable a creditor to get judgment quickly and be able to record an abstract, etc.--a way to help a creditor who may not have pushed the debtor as hard as others. [Daniel Reith, Monterey (debtors and creditors--collections).]

Could still make limited use of procedure but would be creating opportunity for delay and probably multiple "stalling" procedures. [Robert A. Holtzman, Los Angeles (debtors and creditors--general practice).]

Another respondent felt that the 30-day delay would give the debtor an opportunity to hide assets, and that a debtor unable to afford an attorney would be able to attack the judgment at some later time on equal protection grounds. Others were opposed in principle to a provision allowing the debtor to attack the judgment:

I do not feel that the debtor should have the right to challenge the judgment after he has signed the confession. He or she is fully aware of the judgment at the time of signing. [Emmett J. Serochi, Hayward (creditors--collections).]

I don't agree with these types of statutes. If the defendant is properly advised of the consequences of his actions he should be bound by them. [Dennis C. Kerr, Yuba County District Attorney's Office, Family Support Division (collections).]

There were also objections to this proposal from debtor representatives who felt that it put the debtor at a disadvantage:

It would have limited usefulness to those debtors who seek counsel within the 30-day period only. It would be unlikely that many people would seek counsel during this period due to possible guilt and possible creditor's guile--it is unfortunate but true that debtors respond generally after execution. [Terrence Terauchi, Legal Aid Society of San Mateo County (welfare cases).]

Many years could pass between the signing of the confession and the enforcement procedures. Debtor may not have ability to raise defenses. [Bill Kennedy, California Rural Legal Assistance, Modesto (family support collections).]

Despite the objections, there were many people, debtor as well as creditor representatives, who felt that the opportunity for a prompt review of the judgment would be an improvement in the procedure and would solve some of the current problems with the confession of judgment procedure, particularly if combined with some sort of notice of rights at the time of signing.

### Conclusion

In addition to the questionnaire responses received, we also received a communication from the Law Reform Commission of British Columbia expressing an interest in this study. The Counsel to the Commission, Arthur L. Close, indicated that warrants of attorney to confess judgment and similar devices are obsolete in British Columbia, largely

due to the rigorous requirements of a series of English statutes enacted in the first half of the 19th Century. Mr. Close added, "Indeed, it is a bit surprising that they remain in use in any jurisdiction that places a value on due process."

The questionnaire responses indicate that if the due process problems can be resolved, the confession of judgment can and does serve a useful purpose for both debtors and creditors, both as a credit extension and security device and as a means of saving time and money and avoiding the judicial process. In fact, of the 4 respondents who represent debtors exclusively, one used confessions frequently in family support cases and infrequently in consumer cases, and another used confessions infrequently in welfare cases and in consumer cases.

Based on the questionnaire responses, the staff believes it is worth making an effort to attempt to provide a constitutional, fair, and workable confession of judgment statute. The question remains, what would such a provision entail?

Although each of the proposals in the questionnaire found favor with a number of respondents, each appeared to have serious problems.

Proposal number one--require the confession to be executed upon advice of independent counsel--met with substantial debtor and creditor approval. The questionnaire responses indicate that the confession would certainly remain a useful commercial credit device, and that even in non-commercial cases it would retain some utility. The major drawback of this provision is that it would practically deny the availability of the confession remedy in many cases where the debtor is unable to afford independent counsel. Allowing the debtor to waive advice of counsel would not, in the staff's opinion, satisfy constitutional requirements of a knowing and intelligent waiver.

Proposal number two--require a separately signed notice of the debtor's rights--would likely result in greater usage by creditors. But there was substantial concern expressed in the questionnaire responses that a notice alone would not really be sufficient to ensure that the debtor was aware of what he was doing in signing the confession.

Proposal number three--opportunity for a postjudgment review by the debtor--met with substantial opposition by both creditor and debtor representatives. Many creditor representatives felt that the 30-day

delay would destroy its usefulness for them, and debtor representatives were concerned about the pressure such a scheme would place on the debtor and the fact that the debtor would have to consult an attorney during that period in order to make the remedy effective. The staff also notes that it does not appear to be sound policy to permit a debtor to sign a document in ignorance of its meaning in reliance on the debtor's right later to go to court to overturn it; this does not appear to be a fair resolution of the problem.

The staff recommends that the confession of judgment statute at least be amended to require that a certificate of an independent attorney who has advised the debtor be filed with the confession of judgment. This will make available the remedy in some commercial cases, for which there was an expressed need in the questionnaire responses.

What about the cases where advice of the debtor's attorney is impractical? The staff recommends the following alternative provision. A confession of judgment that is not accompanied by a certificate of attorney is nonetheless enforceable if it was executed as a separate document that includes a statutorily prescribed statement of rights after default on the obligation in a commercial case. Enforcement is stayed until 30 days after the creditor gives notice of the entry of judgment, during which period the debtor may raise any defense to the judgment.

Such a provision has some obvious shortcomings--it is restricted to commercial cases and it destroys the effectiveness of the confession as a device to enable immediate enforcement. But it does offer an option in some types of cases where the debtor is unable or unwilling to hire an attorney and immediate enforcement is not essential to the creditor. For the creditor who needs immediate enforcement, or for the non-commercial creditor, the advice of attorney provision would remain available as an alternative. By combining the statement of rights with notice and an opportunity for hearing we reduce the likelihood of overreaching by the creditor; similarly the limitation to commercial cases helps to cure the problem of the unsophisticated debtor who is unduly pressured by the 30-day response time.

Whatever position the Commission takes on this matter, the staff feels that we can and should act quickly on it. Drafting any proposal in this area should be a fairly straightforward matter. We believe we can move expeditiously once the policy has been determined.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary



December 8, 1978

## 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 known 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. The California Supreme Court in Isbell v. County of Sonoma, 21 Cal.3d 61 (1978), held confession of judgment procedures in nonconsumer cases unconstitutional. If the nonconsumer confession of judgment statute were amended in one or more of the following ways, please indicate what you believe might be the effect of the amendment:

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

Usefulness

Statute would remain useful \_\_\_\_\_  
Statute would become unuseful \_\_\_\_\_  
No opinion \_\_\_\_\_

Comment: \_\_\_\_\_

Problems

Statute would have no apparent problems \_\_\_\_\_  
Statute would have potential problems (please specify) \_\_\_\_\_

No opinion \_\_\_\_\_

Constitutionality

Statute probably constitutional \_\_\_\_\_

Statute probably not constitutional \_\_\_\_\_

Statute probably constitutional if combined with other amendments (please specify) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
No opinion \_\_\_\_\_

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.

Usefulness

Statute would remain useful \_\_\_\_\_

Statute would become unuseful \_\_\_\_\_

No opinion \_\_\_\_\_

Comment: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
Problems

Statute would have no apparent problems \_\_\_\_\_

Statute would have potential problems (please specify) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
No opinion \_\_\_\_\_

Constitutionality

Statute probably constitutional \_\_\_\_\_

Statute probably not constitutional \_\_\_\_\_

Statute probably constitutional if combined with other amendments (please specify) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
No opinion \_\_\_\_\_

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, during which period enforcement of judgment may not proceed.

Usefulness

Statute would remain useful \_\_\_\_\_

Statute would become unuseful \_\_\_\_\_

No opinion \_\_\_\_\_

Comment: \_\_\_\_\_

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Problems

Statute would have no apparent problems \_\_\_\_\_

Statute would have potential problems (please specify) \_\_\_\_\_

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No opinion \_\_\_\_\_

Constitutionality

Statute probably constitutional \_\_\_\_\_

Statute probably not constitutional \_\_\_\_\_

Statute probably constitutional if combined with other amendments (please specify) \_\_\_\_\_

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No opinion \_\_\_\_\_

5. Please add any other comments you may have concerning confessions of judgment, whether in consumer or nonconsumer cases, including the need for them and the purposes they serve, the availability of other devices that serve the same purposes, problems with confessions, requirements of constitutionality, and suggestions for reform.