

# Tell It to the Clerk: A Practical Refresher on Confession of Judgment Provisions

*Jamie Watkins Bruno and Ryan C. Kenrick\**

**In this article, the author reviews the dynamics of confession of judgment provisions and highlights a few practical steps that can help to maximize the effectiveness of a confession of judgment.**

In today's lending climate, confession of judgment provisions ("COJ Provisions") have become a fact of life for bankers. Indeed, as troubled loans become more prevalent, a properly drafted COJ Provision can often be a creditor's best friend. No longer can creditors afford to lump COJ Provisions into that fuzzy "boilerplate" category that is so easily glossed over. More and more bankers are coming to the realization that a COJ Provision is one of the most powerful tools a creditor can have against a defaulting debtor.

The purpose of this article is to provide a brief refresher on the dynamics of COJ Provisions. The article begins by reviewing the basic concepts underlying COJ Provisions. From there, it explores the statutory requirements in one state in particular—Virginia—that are necessary to ensure that these provisions are enforceable. Finally, the article concludes by highlighting a few practical tips that should help to maximize the effectiveness of the COJ Provision.

## The Basics

In order to fully understand the importance

of a COJ Provision, one must first appreciate the underlying confession of judgment process. Here is how it works: any debtor can appear before a circuit court clerk and "confess" to the clerk his liability to a creditor. The circuit court clerk then enters the confession into the court's records, and a judgment decree is issued having all the power and enforceability of any other court-ordered judgment. In Virginia, for example, the law allows a debtor to appoint a third party as its agent, or "attorney-in-fact," to confess judgment against the debtor just as if the debtor confessed judgment against himself or herself.

A COJ Provision in a promissory note or guaranty is an agreement between the debtor and the creditor whereby the debtor appoints the creditor (or someone designated by the creditor) as his agent to appear before the court and confess judgment against the debtor upon an event of default. In essence, when a default occurs the creditor can seek an immediate judgment by directing the attorney-in-fact to proceed with the confession of judgment. It is truly an extraordinary

\* Jamie Watkins Bruno, an attorney with Williams Mullen, focuses her practice on banking and real estate matters. She can be reached at [jbruno@williamsmullen.com](mailto:jbruno@williamsmullen.com). Ryan C. Kenrick, an attorney with Williams Mullen, focuses his practice on financial services and real estate matters. He can be reached at [rkenrick@williamsmullen.com](mailto:rkenrick@williamsmullen.com).

remedy, allowing the creditor to obtain an enforceable judgment against a debtor without ever filing a lawsuit or going before a judge. The process completely spares the complications and expense of litigation. The debtor has the right to contest the judgment during a limited time after the judgment has been entered—21 days—but if the debtor fails to contest within such period, the judgment becomes final and unappealable.

### What's Required

Once one understands the basic concept behind COJ Provisions, it is not hard to appreciate why creditors consider them to be so useful. In practice, however, such provisions must be enforceable if they are to be of any use to a creditor. Courts recognize the extraordinary authority that COJ Provisions grant to creditors and will strictly and narrowly construe such provisions to prevent abuse by creditors. For this reason, when it comes to COJ Provisions, enforceability means dotting the I's and crossing the T's. With this in mind, let's review some of the basic statutory requirements under the law of one state—Virginia—that every banker should be aware of when dealing with COJ Provisions.

First, probably the most recognizable of the statutory requirements is the notice provision. The front page of any document purporting to evidence a debt on which the creditor desires to preserve the right to confess judgment must contain the following notice in boldface print of not less than eight point font:

#### IMPORTANT NOTICE

THIS INSTRUMENT CONTAINS A CONFESSION OF JUDGMENT PROVISION WHICH CONSTITUTES A WAIVER OF IMPORTANT RIGHTS YOU MAY HAVE AS A DEBTOR

AND ALLOWS THE CREDITOR TO OBTAIN A JUDGMENT AGAINST YOU WITHOUT ANY FURTHER NOTICE.

Second, the COJ Provision must identify by name each person being designated as attorney-in-fact, as well as the Virginia circuit court in which the confession of judgment is to be entered. The Office of the Attorney General issued a critical advisory opinion in November of 2010 finding that permitting "full power of substitution" for the named attorney-in-fact under a COJ Provision would violate public policy. In other words, only the attorney-in-fact who is listed in the instrument has the ability to confess judgment against the debtor. Therefore, any COJ Provision purporting to allow a lender to appoint any of its officers as the attorney-in-fact (which officers have not been named in the document) is unenforceable. If the attorney-in-fact's name does not appear in the COJ Provision, it will be futile to show up in court—the confession will not be allowed.

With many banking professionals transitioning jobs and possibly even moving to different organizations, some banks may be concerned that they'll lose their confession of judgment remedies if the named attorney-in-fact is no longer an employee of the bank at the time of default and confession. While it may be more difficult to coordinate with (and incentivize) a former employee who may have moved on from the bank, the privacy regulations permit financial institutions to share non-public financial information with third parties as necessary to effect, administer or enforce a transaction. Therefore, a bank may reach out to a former employee or officer named as the attorney-in-fact under a COJ Provision to enforce its confession of judgment rights.

Finally, it is important to remember that certain loan documents must be notarized for

the COJ Provision to be enforceable. Any document that is not the direct debt instrument is required to be executed in the same manner as a deed (before a notary). In other words, while a promissory note only needs to be signed for confession purposes, a guaranty agreement must be notarized to be accepted by the clerk.

### **Best Practices**

This article has discussed the powerful remedy that a COJ Provision can provide to a creditor and the requirements to ensure enforceability. Now this article reviews a few useful tips that, if followed, can greatly increase the utility of these remarkable provisions.

#### ***“Reasonable Attorney Fees”***

A typical COJ Provision will allow the attorney-in-fact to confess judgment on all debts owed by the debtor pursuant to the debt instrument, including attorneys' fees. Oftentimes, borrowers or their counsel will attempt to qualify such attorneys' fees as "reasonable." Remember, however, that judgment is confessed before the clerk of the court and not a judge. "Reasonableness" is a subjective measurement, and clerks lack the authority to determine what constitutes "reasonable" fees. In order to avoid possible refusal by the clerk to permit judgment for legal fees, the best practice is to insert language directly into the COJ Provision specifying the amount of attorney fees to be added to the judgment in a way that can be calculated by the clerk, such as a percentage of the outstanding debt owed at the time judgment is confessed (typically, 10-25%) or a specific dollar threshold (such as \$100,000).

#### ***Make the COJ Provision Convenient***

Virginia law allows a COJ Provision to name multiple attorneys-in-fact to act on behalf of the debtor, and creditors should take advantage of this. The best practice is to name at least two officers of the bank and one attorney outside the bank to act as attorneys-in-fact. By designating more than one attorney-in-fact, a creditor can avoid any inconvenience that may arise if one of the attorneys-in-fact is not available when it becomes necessary to confess judgment. Further, while only one Virginia circuit court can be designated as the court where judgment will be confessed, there is no restriction on which circuit court must be chosen. In keeping with the convenience theme, when drafting the COJ Provision, consider the location of the attorneys-in-fact, and choose a circuit court that is most convenient for them. There is no requirement (despite popular belief) that judgment must be confessed in the jurisdiction where the collateral, if any, is located.

#### ***Tracking the Statutory Notice Back to the Original Document***

In a time of defaults and workouts, evidenced by numerous amendments, restatements and forbearance agreements, it is imperative that the document evidencing the debt that is being confessed contains the statutory notice language displayed prominently on the first page. Failure to do so may lead to the voiding of a confessed judgment.

Recently, the creditors in *Superior Paving Corporation v. Bud & the Boyz Construction* learned this lesson the hard way. In that case, the plaintiff relied on the COJ Provision in a 2005 credit agreement to confess judgment against the defendant for an unpaid invoice stemming from a 2008 contract that was ancillary to the 2005 credit agreement.

Although the 2005 credit agreement contained the appropriate statutory language, the 2008 contract did not. The court ultimately set aside the judgment, finding that the plaintiff did not comply with the legislative intent behind the statute, which mandates that explicit notice language be included in the instrument on which the confession of judgment is based. The court elaborated that the statute is designed to protect the debtor; individual parties cannot negotiate around its requirements.

If a creditor tries to confess judgment on an instrument that lacks the required language, the confession may be void, even if other loan documents in the transaction—or even a prior version of the same instrument—contain the notice language. It is important to keep an eye on the courts to see if a more definitive standard emerges that affirmatively requires all documents that touch the original debt instrument (such as a modification) to contain the appropriate statutory language. Note however that, even if an original document does not contain a COJ Provision, a creditor has not necessarily given up that right altogether—COJ Provisions can always be added in a subsequent modification of the

original instrument, and in fact they often are as a part of the workout process with a defaulted debtor.

### ***Call the Clerk***

Each circuit court has slightly different policies and procedures for entering confessions of judgment in its respective jurisdiction. For instance, some circuit courts require appointments for an attorney-in-fact seeking to confess judgment, and court costs can vary by jurisdiction as well as the total judgment amount. It can save lots of time (and frustration) to call the clerk beforehand to set up an appointment, if necessary, confirm the amount of fees due at the time of confession and familiarize yourself with the customs of confessions in that jurisdiction.

### **Conclusion**

In today's market, a well drafted COJ Provision can go a long way in helping bankers maximize returns on troubled loans. As COJ Provisions become more prevalent, it is imperative that bankers not only understand the dynamics behind such provisions, but also how to make those provisions work best for them.