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A Primer on Confession of Judgment Provisions in Commercial Lease Contracts

Wouldn't it be nice to win your client's court case before even filing the complaint? In Pennsylvania, a properly drafted confession of judgment clause in a commercial lease can accomplish just that.

By **Megan E. Moyer** and **Kevin M. Levy** | April 26, 2021



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Wouldn't it be nice to win your client's court case before even filing the complaint? In Pennsylvania, a properly drafted confession of judgment clause in a commercial lease can accomplish just that. The provision befuddles many out-of-state practitioners, but can be one of the most valuable tools in a Pennsylvania landlord's toolkit for enforcing its leases and preserving its remedies.

A confession of judgment is a legal procedure where, after a commercial tenant defaults under a lease for nonpayment of rent or any other breach under the lease, the landlord can file an action in the local court of common pleas and simultaneously file a "confession of judgment" on behalf of the tenant to forfeit the

case. The right to file the confession of judgment stems from language in the body of the lease agreement whereby the tenant, in the event of its default under the lease, voluntarily submits to the jurisdiction of the court and entry of a judgment against the tenant. Simply by filing the confession of judgment, the landlord essentially skips a large chunk of the usually quite lengthy litigation process.

Pennsylvania is just one of only a few states that allow the enforcement of confession of judgment clauses. In addition to use within commercial leases, these provisions are permitted in loan documents such as promissory notes and mortgages. These clauses are, however, prohibited in all residential leases and in many consumer transactions. There are two separate confessions of judgment clauses that may both appear in a commercial lease: a confession of judgment for rent and a confession of judgment for possession.

The rights associated with a confession of judgment provision within a lease are extraordinarily powerful as they substantially limit a tenant's ability to litigate. As such, Pennsylvania courts strictly construe these provisions against landlords and require that specific drafting formalities are adhered to in order to uphold landlords' rights to file an action under these clauses.

Components of a Confession of Judgment

First and foremost, courts will require that the confession of judgment provision giving a landlord its rights be in writing. In no circumstances will a court read a confession of judgment provision into a lease contract where it does not appear. Next, the provision must be conspicuously worded so that it is clear that the tenant knows that it is waiving its rights. This requirement is two-fold—both the text and the substance of the clause must be conspicuous. The provisions are almost always recommended to be drafted in large, bold and all capitalized text so that a reader's eyes are naturally drawn to them. Confession of judgment paragraphs will also ordinarily include a clause stating that the signatory has personally reviewed the confession of judgment provisions (sometimes called *cognovit*) with their attorney. Individual paragraphs for confession of judgment are sometimes initialed as well to provide further evidence of a tenant's consent.

The "standard language" of the confession of judgment provision has evolved over time, and the modern requirements stem from a 2011 Superior Court case. In this case, the court rejected a landlord's use of a confession of judgment provision because the provision appeared in an unsigned addendum attached to the lease, which the landlord attempted to incorporate generally by reference. The Superior Court reaffirmed the long-standing requirement that the confession of judgment provision(s) be directly signed by the party being bound thereby, as "requisite signatures must be a direct relation to the warrant of attorney and may not be implied." This requirement may sometimes lead to blocky and complicated execution logistics, since sometimes signatures are collected for commercial documents prior to the conclusion of negotiations. Practitioners should consider setting off a confession of judgment provision on a separate page of the lease separated from other paragraphs with [intentionally left blank] markers so as to not interfere with formatting or other document concerns.

A confession of judgment may be for rent or for possession, and it is important to specifically call out which remedy is being granted to the landlord (keeping in mind that a landlord may negotiate for both provisions). Confessions of judgment for rent often include provisions for the landlord's attorney fees, too. Some courts have questioned whether a confession of judgment is a once-per-lease-term remedy available to landlords, so landlords will often specify that the authority and power to confession judgment is not exhausted by an initial use, and that the landlord's rights under the confession of judgment provisions are not limited by occurrence.

Attorneys should also be cognizant of the effect of an amendment or an assignment of lease on a

confession of judgment provision. Although Pennsylvania real estate attorneys will often copy and paste the confession of judgment provision from the original lease into an amendment or assignment and have the tenant proactively ratify the exact language, Pennsylvania courts do not require such overboard drafting. In another Pennsylvania Superior Court case, the court found that a specific reference and direct citation to the confession of judgment language was sufficient to bind an assignee tenant. The language used in the lease at issue very briefly stated that “the confession of judgment provisions contained in both the [lease] and the [assignment] are hereby republished and both tenant and assignee agree to be bound thereby in accordance with the terms thereof.” A strong citation and a specific call-out to the confession of judgment language (preferably by name) in a proposed assignment or amendment should be able to save a landlord from a litigious headache.

Heading to Court

Once a tenant has defaulted under a lease, the landlord should immediately review the confession of judgment provision contained in the lease and confirm its available remedies with its attorneys. The Pennsylvania Rules of Civil Procedure have specific rules for confession of judgment proceedings, appearing at Rule 2950 for confessions for money damages and Rule 2970 for confessions for possession. There are exacting requirements for confession of judgment complaints, so landlord attorneys should have a familiarity with the procedural and content requirements for these complaints because a failure to strictly adhere to them can result in a dismissal.

After the complaint has been served on the defendant and the confession of judgment filed with the court, a landlord’s attorney must also provide the tenant a notice of its intent to take possession/rent by confession of judgment and give an opportunity to the tenant to object (by moving to strike the judgment or to petition to open the judgment) to the procedure.

Practice Tip

Many leasing attorneys may not have active litigation practices, but it is important to understand the litigation implications of their drafting. Oftentimes, substance is more important than form in transactional law practice, but form matters just as much (if not more) in confession of judgment provisions. Adhering to a form of confession of judgment that is time- and battle-tested can mean the difference between a drawn-out litigation and a swift resolution to a property dispute.

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