



**State Representatives**  
**Ron Young**  
***Sponsor Testimony HB 67***

Chairman Dever, Vice Chairman Sprague, Ranking Member Smith, Members of the House Financial Institutions, Housing and Urban Development Committee, thank you for taking the time to hear sponsor testimony on HB 67, a bill that will promote fairness in commercial contract law. Right now many financial institutions in Ohio offering private commercial loans add a clause onto their promissory notes that allow them to immediately call for and collect a debt without informing the debtor or giving the debtor any opportunity to defend themselves in court.

Even if the lender has provided faulty goods, breached the agreement, or failed in a number of other ways, the lender can still demand and use a court to receive full payment of the loan balance immediately. This is called a confession of judgment, or in contract language a cognovit provision.

In Ohio, it leaves a borrower with little to no recourse, even when the lender is at fault. The old "Buyer Beware" adage does not apply. In the vast majority of cases refusal to sign the note means that a person or business will not obtain the loan. Below is what is required by current state law to be placed on a note with a cognovit provision:

"WARNING--BY SIGNING THIS PAPER, YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE."

In summary, by signing a commercial loan in Ohio with a cognovits provision;

- 1) The borrower waives his/her right to trial
- 2) Any pre-judgement hearing, in-put or defense on the part of the borrower is not possible because judgement is simply declared unilaterally by the lender without warning or notice to the borrower.
- 3) Borrower's due process rights are being violated as no opportunity to file an objection before judgement is declared
- 4) After judgement is declared the following may happen; attachment of the commercial and in many cases the private property of the debtor, some form of garnishment, freezing of the checking and savings accounts of borrowers and many other forms of collection.

In Ohio, the use of a cognovit provision in commercial loans is boiler plate. Therefore, since financial institution authored commercial loans without a cognovit agreement are essentially non-existent in Ohio, even a schooled, well informed and wary borrower is left with very few options. In Ohio if you need a commercial loan to hire, buy equipment, or simply expand your business you will most probably be forced to sign a cognovit note. I have spoken with reputable construction contractors, one of whom is on the board of directors of a local bank, that have attempted to borrow from banks outside of Ohio in order to avoid cognovit agreements. They report that in

some cases where such banks are not familiar with Ohio law regarding the use of cognovits they obtain loans without the offending provision. However, when out of state banks discover Ohio law supports the use of a cognovit agreement they apply those provisions to subsequent loans.

A case in Pennsylvania, *Cutler Corp. v. Latshaw*, summarizes cognovit agreements well, stating:

“A warrant of attorney authorizing judgment is perhaps the most powerful and drastic document known to civil law. The signer deprives himself of every defense and every delay of execution.”

When a borrower signs a cognovit note, they are essentially signing away all of their rights. The real effect is that nearly every commercial contractor, doctor, dentist, veterinarian and small mom and pop business in Ohio, potentially signs away their business, their homes, their checking accounts, and their personal property, without notice and without the right to defend themselves even in cases where the lender was at fault.

Ethan W. Smith, the noted award winning co-founder and partner of Starfield & Smith, P.C., a recognized author and expert in commercial law and cognovit clauses stated that <sup>1</sup> “Historically, the use and acceptance of these clauses was more widespread; however, most states have abandoned their use because the clauses have been seen to deprive debtors of their property without due process of law.” Mr. Smith also said “Confession of judgment clauses are most widely used in the mid-Atlantic states. However, other states may also retain vestiges of confession of judgment laws.”

In his article Mr. Smith describes Delaware, Maryland, Pennsylvania, Ohio and Virginia as the only ones in the region as still allowing cognovit clauses in commercial transactions. Due to the nature of these cognovit notes, they are outlawed in Ohio consumer loans, such as for cars or homes. The same problems that lead to banning them in consumer loans exist in commercial contracts. In Indiana it is a criminal offense for lenders to use a cognovit note in consumer as well as commercial loans.

The bill before you would in like manner ban cognovit notes except in the case of the settlement of a dispute.

House Bill 291, the cognovits legislation from the last GA, passed out of the House Judiciary Committee with a 9-4 vote.

House Bill 67 has been introduced with the support of the Ohio Home Builders Association and the Ohio Association for Justice.

Thank you again for your time. I would be happy to answer any questions you might have at this time.

---

<sup>1</sup>An Examination of Confession of Judgment Statutes in the Mid-Atlantic States

by *Ethan W. Smith*

<http://starfieldsmith.com/article/an-examination-of-confession-of-judgment-statutes-in-the-mid-atlantic-states/>