

## PROPOSED NEW RULE 2.602(B)(5)&(6) OF THE MICHIGAN COURT RULES

### Issue

Should the Representative Assembly recommend adoption of the following addition to Michigan Court Rule 2.602(B):

(B) Procedure of Entry of Judgments and Orders. An order or judgment shall be entered by one of the following methods:

(1) The court may sign the judgment or order at the time it grants the relief provided by the judgment or order.

(2) The court shall sign the judgment or order when its form is approved by all the parties and if, in the court's determination, it comports with the court's decision.

(3) Within 7 days after the granting of the judgment or order, or later if the court allows, a party may serve a copy of the proposed judgment or order on the other parties, with a notice to them that it will be submitted to the court for signing if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed judgment or order and proof of its service on the other parties.

(a) If no written objections are filed within 7 days, the clerk shall submit the judgment or order to the court, and the court shall then sign it if, in the court's determination, it comports with the court's decision. If the proposed judgment or order does not comport with the decision, the court shall direct the clerk to notify the parties to appear before the court on a specified date for settlement of the matter.

(b) Objections regarding the accuracy or completeness of the judgment or order must state with specificity the inaccuracy or omission.

(c) The party filing the objections must serve them on all parties as required by MCR 2.107, together with a notice of hearing and an alternate proposed judgment or order.

(4) A party may prepare a proposed judgment or order and notice it for settlement before the court.

(5) Upon presentation to the court of a proposed judgment signed and approved by the creditor(s) and debtor(s) thereto or their counsel of record, if an action is pending between those parties or was pending previously.

(a) If so provided in the proposed judgment, no notice to the opposing party of submission for entry is required, and submission of the judgment to the court for entry shall serve to re-open the prior case if closed.

(b) If the proposed judgment does not provide for entry without prior notice to the debtor, the submitting party must file a motion and give notice to the debtor under MCR 2.107(C) at least 14 days before the date of the motion hearing. The presenting party shall file and serve a notice of hearing for entry of the proposed judgment. If the debtor does not file and serve specific objections within that time, the court shall enter the judgment.

(c) The proposed judgment must be accompanied by an affidavit of the submitting party or its counsel averring as to the basis for entry of the judgment.

(d) Service of the entered judgment shall be as provided for in the judgment or else in accordance with MCR 2.602(D) and the manner prescribed in MCR 2.105. Within 21 days of service, the judgment debtor may file a motion to challenge the propriety of the entry of the judgment or the calculation of the judgment amount. The motion must be heard within 14 days of filing. The filing of such a motion does not extend the stay of MCR 2.614(A)(1) or prevent the court from enjoining the transfer of assets under MCR 2.621(C). The court may modify or set aside the judgment or enter such other relief as it deems appropriate.

(6) Where one or more persons or entities have consented to entry of a judgment, under MCL 600.2906 or otherwise, and there is no existing or prior action between those parties related to the consent judgment.

(a) The creditor must file a civil action in accord with these Rules. The creditor may file a motion for entry of the consent judgment and notice of hearing simultaneously with the filing of the complaint, and serve all upon the judgment debtor. The moving party may notice the motion for hearing after expiration of the time period stated in MCR 2.108 to respond to the summons and complaint. The moving party must file and serve a notice of hearing for entry of the proposed consent judgment. The motion must be accompanied by an affidavit of the moving party or its counsel stating the basis for entry of the judgment.

(b) If defendant fails to appear at the hearing, the court shall enter the proposed consent judgment upon the finding of proper service of the complaint and motion in accord with these Rules.

### **Synopsis**

Parties often utilize consent judgments either as part of the settlement of litigation or as part of a business transaction. The present court rules provide no express mechanism for the timely and efficient entry of consent judgments in accord with the expressed desires of the parties. The proposed additions to MCR 2.602 permit for the efficient, prompt entry of consent judgments where there is an active or past litigation matter (subrule (B)(5)) and where there has been no litigation (subrule (B)(6)).

### **Background**

There are at least three types of ‘consent judgments’ utilized by parties: (1) a judgment signed by all parties in litigation to be entered by the Court immediately; (2) a judgment held by parties to litigation as part of a resolution thereof, to be entered upon occurrence of some defined event (such as default in a payment schedule); or (3) a “pocket judgment” used as security in a private arrangement (i.e., not in the context of pending litigation), to be entered upon occurrence of some defined event (such as default in a payment schedule).

The common features of these three types of consent judgments are that they are to be entered upon occurrence of a defined, triggering event and that they are intended to be entered upon submission to the Court usually without notice or an opportunity for judgment

debtor to object before entry. The entire point of the consent judgment is to not have to litigate (or re-litigate) the underlying debt or obligation.

Michigan statutorily recognizes one form of consent judgment, a cognovit. Cognovit agreements between lenders and debtors authorize lenders, in the case of default, to obtain a judgment against a debtor without giving notice to the debtor. *DH Overmyer Co v Frick Co*, 405 US 174, 176; 92 S Ct 775; 31 L Ed 2d 124 (1972).<sup>1</sup> The statute requires that “authority for confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract or other evidence of the demand for which such judgment was confessed.”<sup>2</sup> The statute also expressly allows parties to enter confessed judgments without a lawsuit pending between the parties. The statute has received scant attention by the courts although it has been held to comply with due process. *Paramount Pictures Corp v Miskinis*, 418 Mich 708; 344 NW2d 788 (1984).<sup>3</sup> There is no procedural counterpart to the statute found in the Michigan Court Rules. Indeed, MCR 2.602, which governs the entry of judgments, does not contain a provision readily adaptable to submission and entry of a consent judgment, particularly where there is no action pending between the parties.

Aside from the technical statutory cognovit recognized in MCL 600.2906, the general device of a consent judgment has been upheld over time in multiple jurisdictions. The U.S. Supreme Court defines a cognovit as “the ancient legal devise 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.” *DH Overmyer Co v Frick Co*, 405 US 174; 92 S Ct 775; 31 L Ed 2d 124 (1972). The issue raised in *Overmyer* was, under the then-existing Ohio statute, the alleged denial of due process because cognovits do not require the defaulting debtor to be served or give the debtor an opportunity to initially respond to his/her alleged wrongdoings. In *Overmyer*, the cognovit clause in the contract read:

The undersigned (debtor) hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judgment against

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<sup>1</sup> A debtor gives consent in advance to a lender obtaining a judgment against him without notice or a hearing. *Johnson v Booker*, 806 NE2d 31, 34 (Ind Ct App 2004). Essentially, a cognovit clause is a *confession of judgment* included in a loan agreement where the debtor agrees that if he defaults the lender can obtain judgment against the debtor without notice or a hearing. *Johnson*, 806 NE2d at 34 (emphasis added). Cognovit agreements permit lenders to obtain judgment without having to disprove defenses which the debtor may assert. *Id.* Parties to a cognovit waive their rights to a notice and hearing through contract. *Id.*

<sup>2</sup> *USA Jet Airlines v. Schick*, 247 Mich App 393; 638 NW2d 112 (2001) examines the “distinct” requirement of MCL 600.2906. Although the cognovit agreement and the underlying employment agreement at issue were part of the same document, the court held that the two were distinct from each other. *USA Jet Airlines*, 247 Mich App at 402. The document defendant signed was titled “Employment Agreement and Cognovit Note” in capitalized and bold letters. *Id.* In addition, the cognovit was located on the bottom half of the page and preceded by a large heading entitled “Cognovit Note,” in capital, bold and underlined letters. *Id.* In light of this, the court held, “it is clear the plaintiff took pains to demonstrate to defendant that the cognovits was a separate instrument from the employment agreement, and therefore defendant is bound by its terms.” *Id.*

<sup>3</sup> As this finding was one based in contract law, the normal exceptions apply – “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.” *Id.*

the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest and if said default shall continue for a period of fifteen (15) days. *Id.* at 180-181.

Predictably, the debtor defaulted and the holder attempted to use this clause in obtaining a judgment against the debtor/defendant without giving notice. The defendant's due process was not violated because the defendant, "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and . . . did so with full awareness of the legal consequences." *Id.* at 187.

In *Clobset v No Name Corp*, 296 Mich App 525 (2012), *vacated on other grounds*, 494 Mich 874 (2013), the court noted the contract-based nature of consent judgments:

Moreover, "[a] consent judgment is different in nature from a judgment rendered on the merits because it is primarily the act of the parties rather than the considered judgment of the court. No pleadings are required to support an agreed or negotiated judgment. Consequently, a judgment by consent is distinct from a judgment rendered by the court after trial." 46 Am Jur 2d Judgments § 184 (2010) (Emphasis added). Consent decrees differ from typical judgments because the "voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93 Int'l Assoc of Firefighters, AFL-CIO CLC v Cleveland*, 478 U.S. 501, 521-522; 106 S. Ct. 3063; 92 L. Ed. 2d 405 (1986) (the agreement of the parties "serves as the source of the court's authority to enter any judgment at all."). See also, *Goldberg v Trustees of Elmwood Cemetery*, 281 Mich 647; 275 NW 663, 664 (1937) ("A judgment by consent cannot ordinarily be set aside or vacated by the court without the consent of the parties thereto, for the reason that it is not the judgment of the court, but the judgment of the parties."); *Walker v Walker*, 155 Mich App 405; 399 NW 2d 541 (1987) ("When a party approves an order or consents to a judgment by stipulation, the resultant judgment or order is binding upon the parties and the court. . . . Absent fraud, mistake or unconscionable advantage, a consent judgment cannot be set aside or modified without the consent of the parties, . . . nor is it subject to appeal.") (citations omitted). *Id.* at \*17-18.

See also *Grand/Sakwa Props. v City of Troy*, 2013 Mich App LEXIS 781 (May 2, 2013). This consensual nature of consent judgments is what validates the streamlined procedure for entry of and challenges to the judgment.

### **Notes Regarding Proposed Rule:**

The proposed rule text is intended to address the following:

- Subrule (B)(6) anticipates situations where no action is pending. In any such action, unless (personal) jurisdiction and venue are stipulated to in the judgment itself, the court must otherwise have proper jurisdiction and venue. This language should also

be sufficiently clear to authorize entry of judgments when there is no pre-existing court file.

- The supporting affidavit, aside from any additional requirements if the submission falls under MCL 600.2906, must aver “as to the basis for entry of the judgment,” by which is intended that the attorney must describe the “trigger event” which makes entry of the judgment proper.
- The relatively short time frame for challenging the judgment once entered and served is designed to effectuate the intent of consent judgments, *viz.*, once triggered, they quickly are entered and become effective. This also addresses the lack of time frame issue which arose in *Clobset v No Name Corp, supra*.
- The Motion which may be filed after entry of the consent judgment may only be to “challenge the propriety of the entry of the judgment or the calculation of the judgment amount.” The intent is to limit the challenge to whether the trigger event occurred properly or whether the math was done correctly (for example, giving credit to payments made before default). What is not intended is a wholesale attack on the underlying instrument or a re-litigation of the underlying dispute. However, other potential defenses, such as those under MCR 2.612, would still be available, although via a separate proceeding, as noted in the last sentence of the proposed rule.

### **Opposition**

None known.

### **Prior Action by Representative Assembly**

None known.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None.

## **STATE BAR OF MICHIGAN POSITION By vote of the Representative Assembly on September 19, 2013**

Should the Representative Assembly adopt the above resolution regarding Michigan Court Rule 2.602(B)(5) and (6)?

(a) Yes

or

(b) No