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The Honorable Jonathan Dever
Chair, House Financial Institutions, Housing & Urban Development Committee
Ohio House of Representatives

Dear Chairman Dever and members:

The Ohio Association for Justice is proud to support HB 67, legislation that reaffirms the right of small business operators to contest unjust collection activities. Cognovit clauses are not only unfair; they are offensive to our core values as Americans and as guaranteed in our Bill of Rights. We applaud Rep. Young for his leadership in sponsoring HB 67.

Cognovit clauses are fundamentally unfair to Ohio's small businesses. A cognovit clause is a contractual provision whereby a small business customer agrees to allow a judgment against him or her without any notice or opportunity to be heard, much less present a defense. Cognovit clauses are typical, almost universal in Ohio, in contracts offered to small businesses. In real estate contracts, contracts for the sale of equipment, and particularly in loan agreements, these clauses give the lender or supplier the power to call a loan due and payable in full, without notice to the small business, and for virtually any reason. Not only does the small business face judgment for the amount owed, but they also may have to pay interest and attorneys' fees. Collection is swift. Within a matter of days, the lender can collect on the judgment and begin to garnish wages, attach their bank account and place liens on their real estate and equipment.

You might ask: If these cognovit clauses are so one-sided, why do small business owners agree to these contract terms? In some cases, the small business operator is unaware of the existence or meaning of the cognovit clause. But even if they are aware, the small business owner does not have the power to negotiate or modify the terms of the contract and cannot insist on the removal of a cognovit clause. Small businesses must accept cognovits clauses if they want to obtain the loan or service or good.

In many cases, the small business owner against whom a judgment is taken has a valid defense. The small business owner may be current on their loan payments or may be dissatisfied with the lender or supplier's performance. The interest rate charged by the lender may not be the interest rate agreed upon, the commercial landlord may not be improving the property as promised, or the equipment sold may be broken down or not what the seller agreed to provide. The list of valid defenses goes on.

But having a defense usually doesn't matter. In a 2008 case, the Franklin County Court of Appeals stated in *Classic Bar and Billiards vs. Samaan*:

"A cognovit note contains provisions designed to cut off defenses available to a debtor in the event of default. * * * The holder of a cognovit note in default obtains a judgment

without a trial of possible defenses which the signers of the note might otherwise assert. * * * This is so because, under a cognovit note, the debtor consents in advance to the holder obtaining a judgment without notice or hearing. * * * An attorney, whom the note holder may designate, appears on behalf of the debtor and, pursuant to provisions of the cognovit note, confesses judgment and waives the debtor's right to notice of the proceedings."

This paragraph has been quoted in other recent cases.

Defenses to a cognovit clause are very limited. The only remedies available for a small business is to file a motion for relief for judgment under rule 60(B) of the *Ohio Rules of Civil Procedure* or by filing a counterclaim in an enforcement action. Rule 60, titled "Relief from Judgment or Order," provides an opportunity for a party to dispute a judgment. But Rule 60 motions and counterclaims are costly. In cases where the debt is small, filing such a motion is not feasible financially. Even a defense for lack of consideration, which means the small business didn't receive what they paid for, is not a valid defense in a cognovits claim, according to the Franklin County Court of Appeals in a 2011 case, *Mock Road Supermarket vs. MiraCit Development Corp.*

Small business operators should not be compelled to accept such abusive contract clauses. The solution is to enact HB 67 and restrict the use of cognovit clauses to a very narrow set of circumstances. We urge you to support HB 67.

Thank you for your attention to this important matter.

Sincerely,



John Van Doorn