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RIGHTS AND REMEDIES REGARDING STOLEN PROPERTY:

Law Enforcement, Pawnbrokers, and Victims

Introduction. A borrower pawns personal property. The pawnbrokers loans the borrower money, collateralized by the property. The property turns out to be stolen, or allegedly stolen. Law enforcement places a hold on the collateral, or worse, seizes the collateral. A victim claims the stolen property is his or hers. What are the rights, obligations and remedies of this legal quadripartite of borrower, pawnbroker, victim and law enforcement?

Pawnbrokers (i.e., “secondhand dealers;” see **B&P § 21626(a)**) are legally required, pursuant to **Business and Professions Code sections 21628 and 21630**, to report detailed descriptions of pawned property to their local law enforcement agency. This enables law enforcement to locate stolen property that is subsequently pawned, authorizing the preservation of such evidence for the benefit of an eventual prosecution while preserving the interests of the lawful owner, with the added benefit of providing an excellent tool for investigating burglaries and other thefts. But, when the criminal investigation and prosecution is over, it often also creates a dilemma for law enforcement, being caught between competing claims for the return of the property.

What are the Various Legal Interests in Stolen, Pawned Property? There can be three or sometimes even more parties who have a potential legal or possessory interest in pawned property. (See, *Wolfenbarger v. Williams I* (10th Cir. 1985) 774 F.2nd 358, 361-362; *G & G Jewelry, Inc. v. City of Oakland* (9th Cir. 1993) 989 F.2nd 1093, 1096-1098.)

- ◆ The “Pledger” (i.e., the one pawning the property). The thief, or other person who has knowingly received stolen property, obviously, has no real, defensible legal right to reclaim the property and has therefore been largely ignored in the case law. If the one who pawns the property unknowingly received stolen property, he or she may also have a legitimate interest in the property. In order to obtain the return of property seized, a person must show satisfactory proof of ownership; a requirement difficult for the thief to satisfy. (See *Penal Code* §1413(b), and *People v. Superior Court (McGraw)* (1979) 100 Cal.App.3rd 154.)

- ◆ The “Pledgee” (i.e., the one receiving the property, in good faith, for value). The pawnbroker, as the “pledgee,” at least where he lends against the property for value and in good faith, has a “lawful,” albeit qualified, possessory interest, enforceable against everyone else in the world other than the legal owner. (See Business & Professions Code, §21628(h); Penal Code §484.1.
- ◆ The “Victim.” Where the pawned property is shown to have been stolen, the “true owner” obviously has an interest. The owner, with “title” to the stolen property, has a “legal interest” which is enforceable against the whole world. (*Sanders v. City of San Diego* (9th Cir. 1996) 93 F.3d 1423, 1426-1427.)

The law is clear that even one who acquires stolen property from a thief, at least when purchased for value and in good faith, has a lawful and enforceable property interest in such property. (See Business & Professions Code, §21628(h); *G & G Jewelry, Inc. v. City of Oakland*, supra; *Sanders v. City of San Diego*, supra.) But note, every swap meet vendor “and every person whose principal business is dealing in, or collecting merchandise or personal property” (including their agents, employees and representatives), “who buys or receives any property of a value in excess of nine hundred dollars and fifty dollars (\$950) that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person . . . to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry,” is guilty of a felony (wobbler). (Emphasis added; Penal Code §496(b)) The same section provides for misdemeanor punishment if the property is worth \$950 or less.

Note also that Penal Code §484.1(a), makes it a “theft” for a person to knowingly give the pawnbroker or secondhand dealer false information or false verification as to his true identity or as to his ownership interest in property or his authority to sell the property, for the purpose of obtaining money or other valuable consideration, and does in fact receive money or other valuable consideration, from the pawnbroker or secondhand dealer. §484.1(b) provides for restitution being made to the pawnbroker or secondhand dealer. And §484.1(c) requires the probation department to notify the pawnbroker or secondhand dealer (or “coin dealer,” which is not referred to under subsections (a) or (b)) of the time and place for sentencing. See also Penal Code §1191.1, which addresses the right of victims to appear at sentencing and address the court concerning restitution.

Whose Side is Law Enforcement On? Law enforcement officers who take it upon themselves to return stolen property to the victim of a theft, believing that as between the victim and the pawnbroker, the victim has the stronger claim to the property, are ignoring the pawnbroker’s rights and subjecting themselves to serious civil liability. See, *G & G Jewelry, Inc. v. City of Oakland*, supra; *Sanders v. City of San Diego*, supra; *Wolfenbarger v. Williams II* (10th Cir. 1987) 826 F.2d 930; *Zeltser v. City of Oakland* (9th Cir. 2003) 325 F.3d 1141. While the officer may be

perfectly correct in believing that the victim of a theft has a superior interest in the stolen/pawned property, it is for the courts to decide this issue. Statutes have been enacted, as described below, for the purpose of defining the rights and interests of the parties in such property, and must be complied with.

It is not uncommon for the pawnbroker to insist that a law enforcement officer have a search warrant before seizing property from his or her business. Contrary to older federal authority (see *Wolfenbarger v. Williams II*, supra, at pp. 934-937.), no search warrant is needed to seize the property if that property is in “plain sight” while the officer is at a place he or she has a lawful right to be; e.g., inspecting pawned property pursuant to authority granted under *Financial Code* §21206; *G & G Jewelry, Inc. v. City of Oakland*, supra, at pp. 1099-1101, and fn. 4; see also *Christians v. Chester* (1990) 218 Cal.App.3rd 273, 276-277; seized ring displayed in a case in plain view.)

“(T)he Fourth Amendment permits the warrantless seizure of merchandise from a pawnbroker for investigatory purposes where (1) the police officer is lawfully on the premises, (2) the pawnbroker is required by statute to produce the pawned property for inspection, and (3) the examination of the property reveals that there was probable cause to believe it was stolen.” *Sanders v. City of San Diego*, supra, at p. 1427 *Financial Code* §21206 also grants law enforcement authority to inspect pawned property. (**G & G Jewelry, Inc. v. City of Oakland**, supra, at pp. 1099-1101, and fn. 4.)

The pawnbroker, therefore, may not have a right to insist upon a search warrant, nor to deny an officer access to the property for purposes of inspecting it. Also, if a search warrant is used, note that pursuant to Penal Code §1536, the property may not be disposed of without a court order. The thief’s plea of guilty before a judge to the theft of the property from the victim, by itself, neither constitutes a court determination that the stolen property belongs to the theft victim nor an authorization for the release of that property to the victim without complying with the statutory procedures described herein. *Zeltser v. City of Oakland*, supra.

Pawnshops often demand that officers who attempt to seize pawned property first sign an agreement to return the property to the pawnbroker when no longer needed in a criminal prosecution. Often, the agreement purports to determine who will be responsible for the attorneys’ fees should the pawnbroker be forced to sue to protect his interests. Law enforcement is under no obligation to sign these agreements. Moreover, when a law enforcement officer seeks to take stolen property from a pawnbroker, it may be a criminal violation (e.g., Penal Code §148) for the pawnbroker to refuse to provide the property upon demand. Instead, pursuant to *Financial Code* §21206.7, all that an officer must provide is a receipt for the items seized that contains a description of the property, the reason for seizure, and the names of the pawnbroker and the offer. Nothing more is required of law enforcement. If seized pursuant to a search warrant, a copy of the required “receipt and inventory” would serve this purpose.

Disposition of Stolen Property upon Completion of a Criminal Investigation and/or Prosecution. Things get a bit murkier here, particularly amongst the rights of the borrower, victim and pawnbroker. Here are some of the rules to play by. First, the law enforcement officer may not take sides in any dispute between those claiming the right to title and/or possession of the stolen property. And second, the officer's only concern should be to first make sure it the property is available for any related criminal prosecution. After that, absent a court order, the status quo should be maintained, leaving the owner and pawnbroker to either reach some sort of agreement between themselves or to litigate the issue in the courts. *G & G Jewelry, Inc. v. City of Oakland*, supra, at pp. 1096, 1098; *Zeltser v. City of Oakland*, supra.

Pending a criminal prosecution of the person who stole and/or pawned the property, other than when a pawnbroker merely turns over property voluntarily, the law enforcement officer has two ways he or she may proceed; place a hold upon, or seize, the property. See, *Zeltser v. City of Oakland*, supra, for a detailed description of the two alternatives.

Option #1: 90-Day Hold. The first option, placing a hold, is authorized by Business and Professions Code §21647(a) which provides that a law enforcement officer, upon developing probable cause to believe property may be stolen, "may" place a 90-day hold upon the property. Section 21647 reads in its entirety:

(a)(1) If a peace officer has probable cause to believe that property, except coins, monetized bullion, or "commercial grade ingots" as defined in subdivision (d) of Section 21627, in the possession of a licensed pawnbroker or secondhand dealer is lost, stolen, or embezzled, the peace officer may place a hold on the property for a period not to exceed 90 days.

(2) A 90-day hold issued pursuant to this section:

(A) Is created upon the receipt by a licensed pawnbroker or secondhand dealer of a written notice by a peace officer that contains the following:

(i) An accurate description of the property being placed on the 90-day hold.

(ii) An acknowledgment that the property is being placed on hold pursuant to this section and denoting whether physical possession will remain with the licensed pawnbroker or secondhand dealer or

will be taken by the law enforcement agency instituting the 90-day hold.

(iii) The law enforcement agency's police report or department record number, if issued, for which the property is needed as evidence.

(iv) The date the notice was delivered to the licensed pawnbroker or secondhand dealer that shall initiate the notification period set forth in subdivisions (c) and (g).

(B) Shall not exceed a period of 90 calendar days, but may be renewed as provided in subparagraph (C).

(C) May be renewed as often as is required for a criminal investigation or criminal proceeding by any peace officer who is a member of the same law enforcement agency as the peace officer placing the hold on the property.

(D) Permits a peace officer to either take physical possession of the property as evidence, consistent with a peace officer's right to a plain view seizure for a criminal investigation or criminal proceeding, or to leave the property in the possession of the licensed pawnbroker or secondhand dealer as a custodian on behalf of the law enforcement agency.

(E) Requires the licensed pawnbroker or secondhand dealer to maintain physical possession of the property placed on hold and prohibits the property's release or disposal, except pursuant to the written authorization signed by a peace officer who is a member of the same law enforcement agency as the peace officer placing the hold on the property.

(F) Terminates when the property is no longer needed as evidence in a criminal investigation or criminal proceeding, at which time the property shall be disposed of pursuant to subdivision (d).

(G) Shall not be applicable to secure lost, stolen, or embezzled property found in the possession of an unlicensed pawnbroker or secondhand dealer that has not duly and correctly reported the acquisition pursuant to Section 21628. In such a circumstance, a

peace officer, having probable cause to believe the property found in the possession of an unlicensed pawnbroker or secondhand dealer is lost, stolen, or embezzled, may seize the item or items consistent with the authority granted the peace officer under the Penal Code or any other law.

(b)(1) Whenever property that is in the possession of a licensed pawnbroker or secondhand dealer, and that has been placed on hold pursuant to this section, is required by a peace officer in a criminal investigation, the licensed pawnbroker or secondhand dealer, upon reasonable notice, shall produce the property at reasonable times and places or may deliver the property to the peace officer upon the request of any peace officer.

(2) If property placed on hold pursuant to this section is physically surrendered or delivered to a law enforcement agency during the period of the hold, the hold and the pawnbroker's lien against the property shall continue.

(c) Whenever a law enforcement agency has knowledge that property in the possession of a licensed pawnbroker or secondhand dealer has been reported as lost, stolen, or embezzled, the law enforcement agency shall, within two business days after placing the hold on the property pursuant to this section, notify in writing the person who reported the property as lost, stolen, or embezzled of the following:

(1) The name, address, and telephone number of the licensed pawnbroker or secondhand dealer who reported the acquisition of the property.

(2) That the law neither requires nor prohibits payment of a fee or any other condition in return for the surrender of the property, except that when the person who reported the property lost, stolen, or embezzled does not choose to participate in the prosecution of an identified alleged thief, the person shall pay the licensed pawnbroker or secondhand dealer the "out-of-pocket" expenses paid in the acquisition of the property in return for the surrender of the property.

(3) That if the person who reported the property as lost, stolen, or embezzled takes no action to recover the property from the licensed pawnbroker or secondhand dealer within 60 days of the mailing of

the notice, the licensed pawnbroker or secondhand dealer may treat the property as other property received in the ordinary course of business. During the 60-day notice period, the licensed pawnbroker or secondhand dealer may not release the property to any other person.

(4) That a copy of the notice, with the address of the person who reported the property as lost, stolen, or embezzled deleted, will be mailed to the licensed pawnbroker or secondhand dealer who is in possession of the property.

(d) When property that is in the possession of a licensed pawnbroker or secondhand dealer is subject to a hold as provided in subdivision (a), and the property is no longer required for the purpose of a criminal investigation or criminal proceeding, the law enforcement agency that placed the hold on the property shall release the hold on the property and return the property to the licensed pawnbroker or secondhand dealer from which it was taken if the law enforcement agency took physical possession of the property.

(e) If a pledgor seeks to redeem property that is subject to a hold, the licensed pawnbroker shall advise the pledgor of the name of the peace officer who placed the hold on the property and the name of the law enforcement agency of which the officer is a member. If the property is not required to be held pursuant to a criminal prosecution the hold shall be released.

(f) Whenever information regarding allegedly lost, stolen, or embezzled property is entered into the Department of Justice automated property system or automated firearms system, and the property is thereafter identified and found to be in the possession of a licensed pawnbroker or secondhand dealer, the property shall be placed on a hold pursuant to this section and Section 11108.5 of the Penal Code.

(g) If the hold, including any additional hold, is allowed to lapse, or 60 days elapse following the delivery of the notice required to be given by subdivision (c) to the person who reported the property to be lost, stolen, or embezzled without a claim being made by that person, whichever is later, the licensed pawnbroker or secondhand dealer may mail under a certificate of mailing issued by the United

States Post Office, addressed to the law enforcement agency that placed the property on hold, a written request to delete the property listing from the Department of Justice automated property system or automated firearms system, as is applicable. Within 30 days after the request has been mailed, the law enforcement agency shall either cause the property listing to be deleted as requested or place a hold on the property. If no law enforcement agency takes any further action with respect to the property within 45 days after the mailing of the request, the licensed pawnbroker or secondhand dealer may presume that the property listing has been deleted as requested and may thereafter deal with the property accordingly, and shall not be subject to liability arising from the failure of the removal of the property listing from the Department of Justice automated property system or automated firearms system.

(h) A licensed pawnbroker or secondhand dealer shall not refuse a request to place property in their possession on hold pursuant to this section when a peace officer has probable cause to believe the property is lost, stolen, or embezzled. If a licensed pawnbroker or secondhand dealer refuses a request to place property on hold pursuant to this section, the property may be seized with or without a warrant. The peace officer shall issue a receipt, as described in Section 21206.7 of the Financial Code, left with the licensed pawnbroker or secondhand dealer. The property shall be disposed of pursuant to procedures set forth in Section 21206.8 of the Financial Code, which shall apply to both licensed pawnbrokers and secondhand dealers under this section.

(i) If a search warrant is issued for the search of the business of a licensed pawnbroker or secondhand dealer to secure lost, stolen, or embezzled property that has been placed on hold, the hold shall continue for the duration that the property remains subject to the court's jurisdiction. Notwithstanding any other law, when the use of the property seized for a criminal investigation or criminal proceeding has concluded, the property shall be disposed of pursuant to subdivision (d).

(j) If a civil or criminal court is called upon to adjudicate the competing claims of a licensed pawnbroker or secondhand dealer and another party claiming ownership or an interest in the property that is or was subject to a hold pursuant to this section, the court

shall award possession of the property only after due consideration is given to the effect of Section 2403 of the Commercial Code.

(k) A licensed pawnbroker or secondhand dealer is not subject to civil liability for compliance with this section.

Written notice to the pawnbroker is required that contains an accurate description of the property placed on hold; an acknowledgment that the property is being placed on hold pursuant to this section and denoting whether the property will remain in the possession of the pawnbroker or law enforcement; the law enforcement agency's report or department record number; and the date the notice was delivered to the pawnbroker.

The hold shall not exceed 90 days, but may be renewed as often as required for the criminal investigation. The hold terminates when the property is no longer needed for the criminal investigation or proceeding. This section also makes clear that the pawnbroker's lien against property on hold that is delivered to law enforcement remains in place during the hold period(s).

Section 21647 also requires law enforcement to notify the party reporting the property lost, stolen or embezzled, within two days after placing the hold, of the name, address, and phone number of the pawnbroker; that the law neither requires nor prohibits payment of a fee or any other condition in return for the surrender of the property, except that when the "victim" reporting the stolen/lost property does not participate in the prosecution of the alleged thief, the person shall pay the pawnbroker the "out-of-pocket" expenses the pawnbroker incurred in exchange for the return of the property; and should the "victim" take no action to recover the property within 60 days after the mailing of the notice, the pawnbroker may treat the property as received in the ordinary course of business. During this 60-day period, the pawnbroker may not release the property to any other person.

Section 21647 further provides that when the property on hold is no longer required for criminal investigation or proceedings, it shall be returned to the pawnbroker

Note that these statutory procedures provided under §21647 do not purport to resolve ownership (i.e., "title") of the property. They only dictate who is entitled to "possession" while ownership is resolved. If the pawnbroker declines to return the property to the owner, as is his right, it is incumbent upon them to resolve the issue of ownership by negotiation or in the civil courts. *G & G Jewelry, Inc. v. City of Oakland*, supra, at pp. 1096, 1098 Therefore, for a law enforcement officer to unilaterally take stolen property from a pawnbroker being held pursuant to §21647 and return it to the true owner, despite the best of intentions, is a Fourteenth Amendment "due process" violation of the pawnbroker's qualified interest in the property, short-circuiting the statutory procedures set forth above, and may subject the officer to potential civil liability.

Thus, if an officer takes it upon him or herself to “award” the property to the victim, the officer will not be able to claim even a “qualified immunity” (which he/she is normally entitled to when “reasonable” mistakes are made) should he or she later be sued by the pawnbroker. (*Wolfenbarger v. Williams II*, supra, at pp. 931-934. In performing discretionary functions, governmental officials are only shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory and constitutional rights of which a reasonable officer should have known. Given the pawnbroker’s well-established constitutionally protected interests in at least possession of the property, and California’s statutory procedures for determining the right to ownership as between the true owner and the pawnbroker, California peace officers cannot claim ignorance of the pawnbroker’s rights to the pawned property. Therefore, a law enforcement officer’s legal duty under the relevant statutes is to do no more than inform the parties when the property is no longer required as evidence, allowing the owner and pawnbroker to resolve their respective possessory rights through agreement or by the judgment of a civil court.

Option #2: Seizure. Business and Professions Code §21647(b) authorizes a peace officer to seize the stolen property whenever required as a part of a criminal investigation, whether or not a hold has already been placed on it. “The police can either place a hold on the property, take possession of the property upon voluntary delivery by the pawnbroker, or seize the property and provide the receipt required by (Financial Code) section 21206.7.” *G & G Jewelry, Inc. v. City of Oakland*, supra, at pp. 1101-1102; 59 *Ops.Cal.Atty.Gen.* 195 (1976); *Christians v. Chester*, supra.)

Financial Code §21206.7 provides that whenever property is taken from a pawnbroker by a peace officer that is alleged to be stolen, the officer “shall” give the pawnbroker a receipt for the property which contains a description of the property, the reason for the seizure, and the names of the pawnbroker and the officer. When property is seized pursuant to §21647(b), instead of subjected to a 90-day hold pursuant to §21647(a), disposal of the property after termination of a criminal prosecution related to the property must be done under the terms of *Financial Code* §21206.8. (*Sanders v. City of San Diego*, supra, at pp. 1429-1430.) This procedure has been held to be sufficient to protect the pawnbroker’s due process rights. (*Sanders v. City of San Diego*, supra, at pp. 1429-1433)

Under the terms of *Financial Code* §21206.8, stolen or embezzled property taken from a pawnbroker shall not be delivered to anyone else claiming ownership until after the pawnbroker is given notice by the officer of the owner’s claim and the pawnbroker fails to make a claim on the property within 10 days of such notification. Fin. Code, §21206.8(b). Section 21206.8 was recently amended to clarify that a Court must give due consideration to the effect of Section 2403 of the Commercial Code between competing claims. Section 2403 holds that a purchaser of goods acquires all title which his transferor had, and a person with voidable title has power to transfer good title to a bona fide purchaser for value.

Note that Penal Code §1413(b) gives the pawnbroker 15 days (from the date of receipt of the notice) to respond to a notice of the owner's claim to the property. Just as when the property is subjected to the 90-day hold, whenever there are competing claims (i.e., between the theft victim and the pawnbroker), the parties must seek to resolve the matter between themselves or submit the issue before a judge. For instance, P.C. §§1408 to 1410 provide for a judicial determination by "the magistrate before whom the complaint is laid, or who examines the charge against the person accused of stealing or embezzling it" (§ 1408), or "comes into the custody of" (§ 1409), or "before which a trial is had for stealing or embezzling it" (§ 1410), to determine who gets the property. See *Sanders v. City of San Diego*, supra, at p. 1431, fn. 12; and *People v. Chabear* (1984) 163 Cal.App.3d 153.) Also, where §§1408 et seq. are not used, Penal Code §1413(b) ostensibly gives "the clerk or person in charge of the property section" of a law enforcement agency in possession of stolen or embezzled property the power to determine who gets the property, so long as that person:

- Receives satisfactory proof of ownership from the one claiming to own the property;
 - The "owner" presents proper personal identification;
 - The clerk makes a photographic record of the property;
 - The person claiming ownership signs, under penalty of perjury, a declaration of ownership;
- and
- The person from whom custody of the property was taken is given notice of a claim of ownership (with a copy of the owner's proof of ownership); 15 days from receipt of notice to respond, asserting a claim to the property; and a reasonable opportunity to be heard as to why the property should not be delivered to the person claiming ownership.

The property clerk's determination, however, is without prejudice to the parties' right to seek a review of the clerk's decision before the judge before whom the criminal case was heard. Penal Code §1413(b) & (c); *Sanders v. City of San Diego*, supra, at pp. 1431, 1434.

A second scenario is also possible, where the victim does not claim the property. If no one else comes forward to claim the property, the pawnbroker from whom the property was taken must be given notice and allowed three months to claim the property before the officer may dispose of the property as otherwise provided by law. Fin. Code, §21206.8(c); see also Penal Code §1411.

Conclusion. The laws governing the rights, obligations and remedies of borrowers, victims, pawnbrokers and law enforcement officers relating to stolen, lost or embezzled property are complex. When in doubt, consult your legal advisor.

David S. Fisher, Partner with Gray·Duffy, LLP, has more than 25 years' experience handling complex real estate litigation, business litigation and transactions.

His real estate practice includes the representation of private and institutional lenders, developers and investors in all areas of real estate, including commercial leasing, ground leasing and financing, construction and permanent financing, loan restructuring and workouts, commercial development and construction litigation. He acts as outside corporate counsel to real estate developers, general contractors, architects and engineers in matters involving real estate.

His practice also includes administrative law before the Department of Real Estate, Employment Development Department and the Department of Corporations. He also represents escrow companies, real estate brokerage firms and affiliated businesses in licensing and compliance issues.

Mr. Fisher also has significant expertise in securitized personal property lending, representing pawnbrokers, title pawn, payday lenders, and other consumer finance lenders in forming businesses, preparing leases, buy-sell agreements, stock purchase agreements, warrants, options and other business agreements. In addition, he serves as legal counsel to a myriad of members of the California Pawn Association, which actively promotes the image of collateral lenders.

With his combined experience in litigation and transactional law, Mr. Fisher meticulously and personally guides every case from inception to resolution.

Mr. Fisher has also been a licensed real estate broker for over 20 years with substantial experience handling residential and commercial foreclosures, loan workouts, sales, and property management.

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