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### **DISPOSITION OF PAWNED PROPERTY**

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#### ***Introduction:***

##### *The Problem:*

Mishandling of pawned property by law enforcement carries with it certain *civil liability* pitfalls.

When stolen property is pawned by the thief or other person not in legal possession of the property, and the pawnbroker pays money for the property without any knowledge or reason to suspect that the property lawfully belongs to another, law enforcement must consider the respective interests of the parties involved.

##### *The Issues:*

- Who gets the property?
- Who suffers the financial loss?
- What are law enforcement's responsibilities and limitations in handling the property?

*Reporting Requirements:* 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.

### ***Legal Interests in Stolen, Pawned Property:***

*Who Has a Interest in Stolen/Pawned Property?* The courts tell us that there may be *three* (or, sometimes even more) parties who have a potential legal or possessory interest in pawned property (*Wolfenbarger v. Williams I* (10<sup>th</sup> Cir. 1985) 774 F.2<sup>nd</sup> 358, 361-362; *G & G Jewelry, Inc. v. City of Oakland* (9<sup>th</sup> Cir. 1993) 989 F.2<sup>nd</sup> 1093, 1096-1098.):

*The “Pledgor”* (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 **P.C. § 1413(b)**, and *People v. Superior Court (McGraw)* (1979) 100 Cal.App.3<sup>rd</sup> 154.)

*The “Pledgee”* (i.e., the one receiving the property, in good faith, for value);

*The pawnbroker*, however, as the “pledgee,” at least where he purchases 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 **B&P § 21628(h)**)

See also **P.C. § 484.1**, below.

*The “Victim” of a Theft:* Where the pawned property is later 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* (9<sup>th</sup> Cir. 1996) 93 F.3<sup>rd</sup> 1423, 1426-1427.)

While a thief may be able to deprive a victim of “*possession*” of his or her

property, he cannot deprive the victim of his or her “title” to the property.

*Interest of the Pawnbroker:* The law is quite 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 **B&P § 21628(h)**; **G & G Jewelry, Inc. v. City of Oakland**, *supra*; **Sanders v. City of San Diego**, *supra*.)

*But note, every swap meet vendor* (per **B&P § 21661**), “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 four hundred dollars (\$400) 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; **P.C. § 496(b)**)

The same section provides for misdemeanor punishment if the property is worth \$400 or less.

Note also **P.C. § 484.1(a)**, making 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.

**P.C. § 484.1(b)** provides for restitution being made to the pawnbroker or secondhand dealer.

**P.C. § 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 P.C. § 1191.1:* Right of victims to appear at sentencing and address the court concerning restitution.

*Interference with the Interest of the Pawnbroker:* 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. (**G & G Jewelry, Inc. v. City of Oakland**, *supra*; **Sanders v. City of San Diego**, *supra*; **Wolfenbarger v. Williams II** (10<sup>th</sup> Cir. 1987) 826 F.2<sup>nd</sup> 930; **Zeltser v. City of Oakland** (9<sup>th</sup> Cir. 2003) 2003 DJDAR 3851.)

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.

***Pawnbroker's Attempts to Interfere with Seizure of Stolen Property by Law Enforcement:***

*Necessity for a Search Warrant:* 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 section 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.3<sup>rd</sup> 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.)

Municipal Codes commonly require a pawnbroker to produce pawned property for inspection by a law enforcement officer. (E.g., See **San Diego Muni Code, § 33.1101**.)

See also **Financial Code section 21206**; granting law enforcement authority to inspect pawned property. (*G & G Jewelry, Inc. v. City of Oakland, supra*, at pp. 1099-1101, and fn. 4.) It is unknown whether this section can be interpreted to excuse the lack of a search warrant.

*However, note Zeltser v. City of Oakland, supra*, where the Court made reference to the need for a *valid search warrant* “*or an applicable exception.*”

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 **P.C. § 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.*)

*Agreement to Return Property:* Pawnshops may 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.

The form commonly used purports to determine who will be responsible for the attorneys' fees should the pawnbroker be forced to sue to protect his interests.

Attached to this form might be another form entitled "Notice to Seizing Officer." This single-page document, listing some very authentic looking case law and legal mumbo-jumbo, is also to be signed by the "seizing officer."

Neither form, at least that is in common usage at the time of the writing of this outline, accurately describes the law. Both forms are written for no other purpose than to give the pawnbroker an unfair, and legally unsupportable, advantage over the person who truly owns the property in issue.

Pawnbrokers may not legally insist upon a law enforcement officer signing either or both forms as a condition to seizing stolen property.

*Pawnbroker's Criminal Liability:* When a law enforcement officer seeks to take stolen property from a pawnbroker, it may be a criminal violation (e.g., **P.C. § 148**; "Interfering with an Officer in the Performance of his Duties") for the pawnbroker to refuse to provide the property upon demand. (*Christians v. Chester, supra.*)

The officer need only remember that, pursuant to **Financial Code section 21206.7** (see below), he or she must provide a *receipt* for the items seized. If seized pursuant to a search warrant, a copy of the required "*receipt and inventory*" would serve this purpose.

See also **B&P § 21465**, making it a misdemeanor to violate any of the provisions of this article.

### ***Disposition of Stolen Property upon Completion of a Criminal Investigation and/or Prosecution:***

#### *Rules:*

#1: The law enforcement officer is not to take sides in any dispute between those claiming the right to title and/or possession of the stolen property.

#2: The officer's only concern is to first make sure it 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*.)

*Available Alternatives:* 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):

1. *Placing a Hold:* **Business and Professions Code section 21647(a)** 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.

*Written notice* to the pawnbroker is required. The pawnbroker is thereafter precluded from releasing or disposing of the property except by court order or upon written authorization signed by any peace officer working for the same agency which placed the hold.

There is also a provision for extending this 90-day hold period, if necessary. (**B&P § 21647(f)**)

While the property is on hold, a pawnbroker must make it available to the police to aid in their criminal investigation. (**B&P § 21647(b)**)

Pursuant to **Business and Professions Code section 21647(d)**, whenever the property being held is no longer required for purposes of a criminal investigation, the law enforcement agency that placed the hold must do one of the following:

If the agency has no knowledge of it being reported stolen, the property shall be released from the hold. The pawnshop owner is then able to deal with it as if a hold had never been placed. (**B&P § 21647(c)(3), (d)**)

If the law enforcement agency has knowledge that the property has been reported stolen, the investigating officer must then give written notice to the person reporting it stolen of the name and address of the pawnbroker, authorize release of the property to that person, and advise that person that the law neither requires nor prohibits payment of a fee or any other condition in return for the

surrender of the property. (**B&P § 21647(c), (d)**)

A copy of this notice, with the claimant's address deleted, must also be mailed to the pawnbroker.

It is then up to the person reporting the property to be stolen (i.e., *the owner*) to go to the pawnbroker and seek its return. In so doing, the statute requires the owner to show the pawnbroker his or her copy of the release upon claiming the property.

Under the terms of the statute, if the alleged owner did not choose to participate in the prosecution of an identified alleged thief, the owner is required by the statute to pay at the very least the pawnbroker's "*out of pocket*" expenses incurred in the acquisition of the alleged stolen property.

Otherwise, there are no other statutory provisions setting out the rights to possession of the property between the owner and the pawnbroker.

The statute does not require, but rather "authorizes," the pawnshop owner to return the property to the person reporting it stolen. (*G & G Jewelry, Inc. v. City of Oakland, supra*, at p. 1097.)

The parties are free to attempt to negotiate the conditions under which the property will be returned, or settle the issue in civil court. (*Zeltser v. City of Oakland, supra*.)

If after *60 days* of the mailing of the notice to the victim, the person reporting it stolen fails to attempt recovery of the property, the pawnbroker may treat the property as if regularly acquired in the due course of business. (**B&P § 21647(d)**)

If no hold was placed on the property, the 60-day waiting period is measured from when the pawnbroker is advised by law enforcement that the property may be stolen.

Note that these statutory procedures provided under **B&P 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.)

For a law enforcement officer to unilaterally take stolen property from a pawnbroker being held pursuant to **B&P § 21647(a)** 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 in section **21647(c)**, and will subject the officer to potential civil liability in the federal courts. (*Wolfenbarger v. Williams I, supra*, at pp. 362-365; *G & G Jewelry, Inc. v. City of Oakland, supra*, at pp. 1097-1098; *Sanders v. City of San Diego, supra*, at p. 1426; *Zeltser v. City of Oakland, supra*; see also **42 U.S.C. § 1983**.)

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. (*Ibid.*)

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. (See also *G & G Jewelry, Inc. v. City of Oakland, supra*.)

2. *Seizure*: **B&P § 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 section 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 **section 21647(b)**, instead of subjected to a 90-day hold pursuant to **section 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 section 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.)

*Situation #1:* Theft victim claims his/her property:

Under the terms of **Financial Code section 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)**)

*Note:* **P.C. § 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. (See below)

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.3<sup>rd</sup> 153.)

Also, where **sections 1408 et seq.** are not used, **P.C. § 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 (See “*Prosecutor’s Brief, Special Issue: The Retention and Return of Property*,” Vol XVIII, Number 4), *but only after*:

- Receiving 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;
  - A 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. (P.C. § 1413(b) & (c); *Sanders v. City of San Diego*, *supra*, at pp. 1431, 1434.)

If an insurance company has already reimbursed the theft victim, that company would seem to have some interest in the stolen property in the place of the victim, and be entitled to litigate its right to restitution. (See *People v. Birkett* (1997) 54 Cal.App.4<sup>th</sup> 1438.)

*Situation #2: Theft 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 P.C. § 1411; “Disposition of Unclaimed Property.”)

*In All Other Cases:* The disputed ownership of property not determined to have been stolen, and which is not evidence in any criminal prosecution, or arguably, in any situation not covered by the above statutes, will have to be determined in civil court. (See *Sims v. Superior Court* (1985) 172 Cal.App.3<sup>rd</sup> 1065; \$70,000 recovered from a vehicle when Sims, denying any knowledge of the money, was arrested, after which no criminal charges were filed.)