

Eighth Supplement to Memorandum 79-29

Subject: Study D-300 - Enforcement of Judgments (Sale and Distribution of Proceeds)

This memorandum reviews Articles 3 (Sections 703.610-703.760) and 4 (Sections 703.810-703.820) of Chapter 3, which relate to sale of property seized in execution and the distribution among the parties of the proceeds of sale and of money collected on execution.

§ 703.610. Sale of property levied upon

Section 703.610 permits sale of property under execution except for certain types of property that are peculiarly susceptible to sacrifice sales. The section allows those types to be sold only on noticed motion. A number of issues have been raised with respect to this procedure.

Mr. Robert Sprague states that the notice of motion for an order permitting sale under Section 703.610(b) should be sent to the judgment debtor's current or most recent address, if known, or to the most recent address contained in the court file. The staff agrees and is drafting provisions to deal with this problem generally. See Sixteenth Supplement to Memorandum 79-29 (manner of giving notice).

Mr. Frederick Holden asks how fair consideration is to be determined under Section 703.610(b), whether appraisers must be appointed, and what terms and conditions would be necessary to permit the sale of property pursuant to motion. (Exhibit 13, p. 9.) As the Comment to this section states, the court is given broad authority to determine these matters under the circumstances of the case.

Mr. Holden also asks in the case where sale is not permitted but payments are to be collected, how payments not made are to be enforced. As subdivision (c) provides, rights to payment are collected pursuant to Section 703.190. If payments are not made under Section 703.190, the garnishee is liable to the judgment creditor and the judgment creditor has the responsibility of any further enforcement necessary.

The staff believes that whether property such as accounts receivable or negotiable instruments should be sold or collected is a question that must be answered individually for each piece of property in the

circumstances of each case. The staff recommends that this section be revised to provide that property of this type is either sold or collected, as agreed by the parties. Only if the parties are unable to agree should the court be authorized to order sale. Likewise, court order should also be required for collection, and the court should be authorized to permit collection for longer periods than one year, where appropriate.

§ 703.630. Notice of sale of personal property

Section 703.630 prescribes the notice to be given in the case of a sale of personal property and the persons to whom it is given.

The Sheriffs' Association Committee suggests that Section 703.630(a) be amended to provide that the levying officer shall give notice to any person requesting notice of sale. (Exhibit 8, p. 5.) The reason for this suggestion is that the draft eliminates an existing procedure pursuant to which interested persons could request notice of sale by filing a request with the court clerk. The staff recommends that the request for notice of sale provision be restored, thereby eliminating the need to provide for further notice from the levying officer. This provision would read as follows:

§ 702.760. Request for notice of sale

702.760. (a) After judgment has been entered, any person may file with the clerk a written request for notice by mail of any sale pursuant to a writ issued pursuant to the judgment. The request shall specify the title of the court, the case and number of the action in which the judgment was rendered, and the date of entry thereof, and shall state the address to which the notice of sale is to be mailed.

(b) Whenever a writ is issued pursuant to the judgment, the clerk shall note upon the writ whether notice by mail has or has not been requested. If notice has been requested, the clerk shall note upon the writ the name and address of the person requesting notice.

(c) The levying officer conducting a sale under a writ upon which appears a notation that notice has been requested shall mail a copy of the notice of sale to such person at the address noted upon the writ. The copy of the notice shall be mailed at the time notice is posted pursuant to Section 703.630 or 703.640.

Comment. Section 702.760 continues the substance of former Section 692a except that Section 702.760 is not limited to writs of execution. Sales of property take place under writs of execution and writs of sale as a matter of course (see Sections 703.610,

710.130) and under writs of possession of real or personal property as an ancillary matter (see Sections 708.130, 708.160, 709.130). Notice of sale is required to be given to the judgment debtor and lienholders of record of real property in all cases. See Sections 703.640, 710.130(b). Failure to give the required notice may subject the levying officer to liability. See Section 703.650.

Mr. Rick Schwartz suggests that the 10-day notice of sale is too short because the judgment debtor may not have sufficient time to claim an exemption. (Exhibit 12, p. 3.) He suggests that this period be extended to 20 days. The 10-day period is derived from existing law which counts the period from the date of levy rather than from the date notice of levy is sent to the judgment debtor as provided in Section 703.630(d). The problem with extending this period is that further costs will be incurred. The staff believes that on balance 10 days is adequate. If this period is extended, it should be extended only for sales of property of individual, as opposed to corporate, judgment debtors since only individual judgment debtors may claim exemptions.

§ 703.640. Notice of sale of real property

The Sheriffs' Association Committee suggested a number of technical changes in the provisions for notice of sale of real property, which the staff plans to make. See Exhibit 8, p. 6; Exhibit 12, p. 3.

Lieutenant Bernard Morgan (Exhibit 9, p. 4) suggests that the responsibility for furnishing directions to the property to be sold be left with the "beneficiary" as provided in existing Section 692. From the legislative history of this provision, the staff assumes that "beneficiary" refers only to a beneficiary of a deed of trust. See 1977 Cal. Stats. ch. 139 (amending the power of sale provisions of Civil Code Section 2924f and Code of Civil Procedure Section 692). It is not clear that Section 692 applies to judgment creditors; hence, Section 703.640 was drafted to provide a general procedure applicable to all sales of real property pursuant to a writ of execution or a writ of sale.

Mr. Rick Schwartz suggests that 30 rather than 20 days' notice of sale be given pursuant to subdivision (b). (Exhibit 12, p. 3.) The staff recommends no change. The notice of sale is already delayed for 120 days and the judgment debtor is not put in the position of losing an exemption because of a quick sale.

Two writers comment on the proposed elimination of the right of redemption. Mr. George Ballard disapproves this proposal on the grounds that it would further delay proceedings and complicate the procedure. (Exhibit 6, p. 1.) Mr. Frederick Holden approves of the proposal. (Exhibit 13, p. 10.) The staff recommends no change.

§ 703.680. Manner of payment

Mr. Rick Schwartz approves of the provision permitting credit bids on property at execution sales but suggests that the credit bidder should be allowed only five business days to complete the purchase rather than 30 days as provided in Section 703.680. (Exhibit 12, p. 4.) Mr. Frederick Holden also approves of this provision. (Exhibit 13, p. 10.) The credit bid provisions are based largely on Revenue and Taxation Code Section 3693.1 governing credit sales of tax deeded property to private persons. Section 3693.1 affords 60 days for the credit bidder to complete the purchase. Sixty days is too long, but it was felt that 30 days might be needed for an individual to obtain financing for a large purchase. The staff recommends that this period be shortened to 20 days, which should still be sufficient to obtain financing. The staff also suggests that the credit bidder be required to pay interest on the amount bid since, by taking advantage of the credit bid provision, the credit bidder has delayed payment of the proceeds of sale to the judgment creditor. Subdivision (c) of Section 703.680 would be revised to read:

(c) If the highest bid for an item, group, or lot of property sold exceeds five thousand dollars (\$5,000), the highest bidder may elect to treat the sale as a credit transaction. A person who makes the election shall deposit five thousand dollars (\$5,000) or 10 percent of the amount bid, whichever is greater, and shall pay within 20 days after the date of the sale the balance due plus costs accruing with regard to the property sold and interest accruing at the legal rate on the amount bid, from the date of sale until the date of payment. A person who makes the election is not entitled to possession of the property sold until the amount bid, plus accruing costs and interest, has been paid.

§ 703.690. Defaulting bidder

In response to comments by Mr. Robert Sprague, Mr. Carl Olsen (Exhibit 14, p. 2), and Mr. Rick Schwartz (Exhibit 12, p. 4), the staff plans to make technical improvements in this section.

§ 703.760. Sale set aside

Mr. Frederick Holden suggests that execution sales be made final so that a purchaser does not forfeit the property if the judgment is reversed or if the property turns out to be not subject to levy. (Exhibit 13, pp. 11-12.) The rationale for this proposal is that potential purchasers will be inhibited if the property may later be lost. Mr. Holden suggests that the judgment debtor's remedy where property not subject to levy is sold would be to seek a court order restraining sale and that the judgment debtor should not be able to reverse the sale several years thereafter. In order to provide an opportunity for the judgment debtor to object to the sale proceedings, Mr. Holden suggests that the distribution of proceeds of sale be delayed for 10 days.

The staff agrees with these comments and would replace Section 703.760 with the following provision:

§ 703.760. Sales absolute

703.760. (a) A sale of property pursuant to this article is absolute and shall not be set aside for any reason.

(b) If the judgment is discharged, whether because it is reversed or for any other reason, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the discharged judgment with interest at the legal rate to the extent the proceeds were improperly applied to the satisfaction of the judgment.

(c) If the sale was improper, whether because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason, the judgment debtor may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. If damages are recovered against the levying officer, they shall be applied to the judgment to the extent the judgment is not satisfied.

Comment. Section 703.760 supersedes former Section 708, which provided rights for the purchaser in case the sale is set aside. Section 703.760 does not permit the sale to be set aside. The judgment debtor is protected by provisions enabling a stay of enforcement pending appeal and court determination whether property is subject to execution pending sale. See Sections 702.140 (stay of enforcement) and 707.380 (determination of exempt property and property not subject to enforcement). Proceeds of sale are held 15 days before distribution, during which time the judgment debtor may raise objections to their distribution. See Section 703.820.

Section 703.760 also supersedes the first sentence of subdivision (a) of former Section 700a which made absolute only sales of personal property and of leasehold estates with unexpired terms of

less than two years. Section 703.760 reflects the repeal of the statutory right of redemption from execution and foreclosure sales. See former Sections 700a-707. Sales of interests in real property (except leasehold estates with less than two years' unexpired term at the time of levy) are delayed 120 days, however, in order to provide an opportunity for the judgment debtor to redeem the property from the judgment creditor's lien before sale or to advertise the sale and give notice to potential buyers. See Civil Code § 2903; Code Civ. Proc. § 703.640(f). The elimination of the statutory right to redeem after a sale pursuant to this article does not affect rights to redeem afforded by other law. See, e.g., Harb. & Nav. Code § 504 (20-day redemption period after sale of vessel on lien for repairs); Rev. & Tax. Code § 4101 (redemption of tax-deeded real property); Sts. & Hy. Code § 6530 (12-month redemption period after sale by treasurer to collect assessments under Improvement Act of 1911); I.R.C. § 6337 (120-day redemption period after sale of real property to collect federal taxes).

§ 703.810. Distribution of proceeds of sale or collection

A few letters suggested clarifying changes in the language of Section 703.810. See Exhibit 13, p. 12, and Exhibit 14, p. 3. The staff will make clarifying changes in the next draft.

One policy decision in this section is how the order of priority is to be determined by the levying officer, particularly where there are disputes among the various claimants to interests in the property. The staff proposes to add a new procedure to replace Section 703.820. The new procedure is drawn from Pennsylvania law and requires the levying officer to prepare a proposed schedule of distribution. The interest claimants are notified and can except to the levying officer's proposed schedule, in which case a court will determine the priorities. A draft of this provision follows.

§ 703.820. Schedule of proposed distribution of proceeds

703.820. (a) Within five days after a sale or collection under this title, the levying officer shall prepare a schedule of proposed distribution of proceeds which shall be available for inspection in the office of the levying officer. Notice thereof shall be mailed to the judgment debtor, judgment creditor, and any other person known to the levying officer to have or claim a lien or other interest in the property.

(b) Within 15 days after a sale or collection by a levying officer, any interested person may file exceptions to the schedule of proposed distribution of proceeds with the levying officer and apply to the court for a determination of exceptions. Notice of motion shall be given to the judgment creditor, the judgment debtor, and any other person listed in the schedule of proposed distribution of proceeds whose share is affected by the motion.

(c) Upon receipt of exceptions pursuant to subdivision (b), the levying officer shall file the schedule of proposed distribution of proceeds with the court and deposit the proceeds excepted to with the court.

(d) At the hearing on the motion, the court shall determine the exceptions and make an order for the distribution of the proceeds deposited with the court.

Comment. Section 703.830 is derived from Pa. R. Civ. P. 3136. It is intended to provide an orderly manner for distributing proceeds of a sale or collection under this title and for the determination of any disputes concerning the distribution. Section 703.820 also provides a delay during which the debtor has an opportunity to claim any available exemptions, and during which persons concerned about the sale or collection can object.

Another policy decision is the treatment of subordinate liens on the property sold. Ordinarily, when property is sold on execution, superior liens on the property are preserved and liens subordinate to the judgment creditor's lien are wiped out. The reason for wiping out subordinate liens is to assure the judgment creditor maximum recovery on the judgment. There may be cases, however, where the property sold is adequate to satisfy the judgment, with money to spare. Should the excess money be returned to the judgment debtor, or should it be used to pay the subordinate lienholders? It may be that the liens of the subordinate lienholders are not yet due, so that payment would be inappropriate; on the other hand, since sale wipes out the liens, the subordinate lienholders are losing their security. The staff recommends that Section 703.810 be revised to cover this situation and that any excess proceeds of sale be used to discharge subordinate liens in their order of priority, whether or not the obligation secured by the lien is due.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary