

Los Angeles

LAWYER

JANUARY 1990 / VOLUME 12 / NUMBER 10

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A GUIDE TO MARSHAL'S SALES

A golden opportunity for creditors.

California has experienced a tremendous growth in real property values, especially in and around large urban areas where market values have increased dramatically over the last few years. This growth means an increase in equity for the homeowner and a golden opportunity for the creditor.

An uncollectable judgment entered five years ago could be an untapped gold mine for the creditor because of the increase in equity for the homeowner. The vehicle for reaching that equity is the marshal's sale, the statutory right of a judgment creditor to force the sale of the home of a judgment debtor.

The process is long, somewhat complicated and fraught with important legal issues that can thwart the creditor at every turn. Understanding the procedural aspects of the marshal's sale and the many legal issues facing the creditor attempting to conduct a marshal's sale may help avoid some common pitfalls in this procedure. Actually, most of the work should be done before the creditor levies and consists of reducing your judgment to an enforceable judgment lien and determining the market value of the property and the liens and encumbrances on it. After investigation of the property and liens, the creditor levies, files its paperwork and, after a hearing, obtains an order for sale.

The first step is to obtain an enforceable judgment lien, which is not as easy as it sounds. Normally, that is done through an abstract of judgment, which must be recorded in the county in which the real property is located.¹ Although in federal actions the recordation of a certified copy of the judgment constitutes a valid judgment lien under Code of Civil Procedure Section 697.060, most federal courts will issue abstracts, which provide better notice to both the debtor and other lienholders.

If title to the property sought to be sold is vested in any manner other than in the sole name of the debtor, procedures to have a judgment lien attach to the whole property include: fraudulent conveyance actions to reach property conveyed to a third person,² charging orders to reach property owned by a partner,³ or an application to levy upon community property.⁴ While there is some authority that the marshal can levy upon property held by a third person, clearly the better practice is to clean up title to the property and clarify the judgment lien before the levy process.⁵

The rules concerning the contents of the abstract must be strictly followed, and the abstract must contain the full name of the judgment debtor, his driver's license number if known and his social security number. If that information is not spelled out in the abstract, it may be defective and could be voidable.⁶ However, the creditor

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may record an amended abstract which results in regaining its priority except as to subsequent purchasers or encumbrances without actual knowledge of the defective abstract.⁷

The second step in conducting a marshal's sale is to investigate the property, the lienholders and the nature and extent of the liens on the property. This is the most important step in the process and the creditor's failure to properly comply with this step may void its sale.

Since the code requires that the application state the names and addresses of all lienholders and the amounts of all liens, a thorough investigation is required.⁸ The creditor probably should start this process by obtaining a preliminary title report, litigation guaranty or lot book report with judgment lien information, copies of all liens, and should write to each lienholder requesting a pay-off balance. The lienholder must respond or it will be liable for damages.⁹

The creditor will have to advance payment for senior liens and encumbrances, so it is important that the creditor obtain exact balances for all senior liens to avoid overpaying those creditors. Moreover, since junior liens are extinguished under Code of Civil Procedure Section 701.630, it is equally important that all junior lienholders be notified and their addresses verified. Their exact balances are relatively unimportant, but the creditor should make every effort to give junior lienholders actual notice of the proceedings.

Since the code requires the court to determine the fair market value of the premises, the creditor should obtain a drive-by appraisal and include it in the application with a declaration of the appraiser. This should be sufficient in most circumstances, but the court has the authority to order an appraisal which presumably could be recovered as a cost item.¹⁰

When the creditor has satisfied itself that there is sufficient equity in the premises after applying the applicable homestead amount, an application should be prepared and the subject property levied upon. Procedurally, the levy occurs first, but because the code allows only 20 days to file the application after levy, the creditor should start working on the application first.

The levy procedure is relatively straightforward and is governed by Code of Civil Procedure Section 700.015.

The application will be the foundation for the marshal's sale and must be as detailed as possible. It is signed by the judgment creditor, under penalty of perjury, and should state: the value of the property (use a drive-by appraisal), whether or not the property is a homestead (use a preliminary title report), the name and address of lienholders on the property (use the preliminary title report and verify the addresses), and the exact amount of those liens (use beneficiary demand letters sent to lienholders). If lienholders fail to provide the creditor with the exact balance, they can be subject to a civil action for damages under Civil Code Section 2943. The creditor also should consider the possibility of subpoenaing senior lienholders to the hearing where there has been no response to creditors demand.

The application is filed on an ex parte basis, and the court sets a hearing date not less than 45 days from the date of the filing of the application.¹¹ After filing the application, a copy must be served on the marshal or levying officer within 20 days from the date of levy to insure that the levy is not released.¹² Additionally, the judgment debtor must be served with a copy of the application, the order to show cause, and a notice to homeowner (a judicial council form) by ordinary mail. An occupant must be personally served or the property posted. Of course, proofs of service should be filed in the department where the order to show cause will be heard.

There is an important distinction in selling a dwelling which is a homestead and a non-homestead property. Non-homestead property could include vacant land, income property or a vacation home. If the creditor wants to sell non-homestead property, there is no minimum bid and the property is sold to the highest bidder. Moreover, the creditor does not have to advance senior liens and the property is sold subject to the senior liens.¹³ The creditor should probably prepare a similar investigation and application, although no drive-by appraisal is required. However, the creditor should perform an appraisal to assist in determining whether to credit bid and, if so, for how much.

At the hearing on the order to show cause, the court makes a number of important determinations, including whether or not the property is subject to a homestead exemption, the fair market value of the premises, the sale amount for the property and the distribution of the sale proceeds. The order for sale is the most important document required by the court and the

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creditor should carefully follow the governing statute to insure that it contains all of the requisite elements.¹⁴

At the hearing, the court will specify the minimum bid required to sell the premises, which is either 90 percent of the appraised value or the total of liens and encumbrances on the property, whichever is greater.¹⁵ This is an often overlooked point and unless the creditor expects a great deal of third party bidding at the sale, the creditor should be prepared to advance senior liens, costs and the debtor's homestead exemption.

If the creditor's application is unopposed and no appearance made by the debtor, the creditor must serve the order for sale on the debtor personally or by mail within 10 days, along with a notice (a judicial council form), and a proof of service must be filed with the court and with the levying officer. The judgment debtor has 10 days to contest the hearing, based on his mistake, inadvertence or neglect, and the court will reset the hearing within 20 days. If the debtor does not attempt to set aside the order, the order will become final after 10 days.¹⁶

No sooner than 120 days after levy, the marshal must prepare a written notice of sale notifying the debtor and the lienholders listed on the order for sale of the date, time and place for the sale of the property. The sale cannot occur for a period of at least 20 days after the notice of sale has been served.¹⁷

The judgment creditor can credit bid at the sale but must be prepared to advance senior liens and the debtor's homestead exemption.¹⁸ If third parties bid, they must pay in cash or by cashier's check. Third parties may deposit 10 percent of the sales price and may have an

additional 10 days to obtain the balance of the sales price. If they fail to do so, the next highest bidder has an equal opportunity to purchase the property.¹⁹ If the property fails to sell for the minimum bid, there is little the creditor can do except obtain another order for sale.²⁰

The judgment lien does not have priority over a subsequently recorded purchase money deed of trust. Thus, even though the judgment lien precedes a purchase money deed of trust, the purchase money deed of trust will have priority.²¹

A judgment lien does not have priority over a prior unrecorded transfer or a bonafide encumbrance of an earlier date, due to special recording laws.²²

Another issue is whether or not the creditor must advance all liens and encumbrances. Code of Civil Procedure Section 704.800 seems to require this. However, the requirement of advancing all liens, instead of just senior liens, is not consistent with the intent of the marshal's sale process for two reasons. First, a judgment lien attaches to the property as of the date of the recording of the abstract, which establishes the creditor's priority.²³ Second, once a marshal's sale is completed, all junior liens are extinguished.²⁴ There would be no reason for these two statutes if the creditor had to advance all liens and encumbrances instead of only senior liens.

A bankruptcy filing by the debtor does not necessarily preclude a marshal's sale. Unless the bankruptcy is filed within 90 days from the date of the abstract, the judgment lien is valid and is not a preference.²⁵ If an attachment lien has been obtained and the debtor files a bankruptcy after judgment

but before an abstract is issued, the issuance and recordation of the abstract does not violate the automatic stay and is not a preference because the abstract will relate back to the attachment levy.²⁶ Once discharged, the bankruptcy discharge voids the judgment²⁷ but has no effect on the judgment lien.²⁸ However, the debtor may void judgment liens which impair the debtors right to claim a homestead exemption under Bankruptcy Code Section 522. The formula used in voiding a creditor's lien is complicated and unsettled.²⁹ ♦

¹ CODE CIV. PROC. § 674.

² CIV. CODE § 3439.

³ CODE CIV. PROC. § 708.310.

⁴ CODE CIV. PROC. § 695.020, CIV. CODE §§ 5100, *et seq.*

⁵ CODE CIV. PROC. § 700.015.

⁶ *Keele v. Reich*, 169 Cal. App. 3d 1129 (1985).

⁷ CODE CIV. PROC. § 674 (d).

⁸ CODE CIV. PROC. § 704.760.

⁹ CIV. CODE § 2943 (3) (4).

¹⁰ CODE CIV. PROC. § 704.780.

¹¹ CODE CIV. PROC. § 704.770.

¹² CODE CIV. PROC. § 704.750.

¹³ CODE CIV. PROC. § 701.260.

¹⁴ CODE CIV. PROC. § 704.780.

¹⁵ CODE CIV. PROC. § 704.800.

¹⁶ CODE CIV. PROC. § 704.790.

¹⁷ CODE CIV. PROC. §§ 701.540, 701.545.

¹⁸ CODE CIV. PROC. §§ 701.590, 704.800.

¹⁹ CODE CIV. PROC. §§ 701.590, 701.600.

²⁰ CODE CIV. PROC. § 704.800.

²¹ CIV. CODE § 2898.

²² CIV. CODE § 1214.

²³ CODE CIV. PROC. § 704.950.

²⁴ CODE CIV. PROC. § 704.630.

²⁵ BANKR. CODE § 547 (b).

²⁶ *In re Wind Power*, 841 F. 2d 288 (Bankr. App. 9th Cir. 1987).

²⁷ BANKR. CODE § 524 (a).

²⁸ *Long v. Bullard*, 117 U.S. 617 (1985).

²⁹ See *In re West*, 68 B.R. 647 (Bankr. C.D. Cal. 1986), *In re Baxter*, 19 B.R. 674 (Bankr. App. 9th Cir. 1982).

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