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## Lis Pendens and Procedural Due Process

Because of the recent and expanding protection of procedural due process,<sup>1</sup> the *lis pendens* statute has been subject to re-evaluation. *Lake Tullock Corporation v. Dingman*<sup>2</sup> recently declared the *lis pendens* statute violated procedural due process in not providing for notice and hearing prior to recordation of the notice. In *Empfield v. Superior Court*,<sup>3</sup> the constitutionality of the *lis pendens* statute was upheld without discussion of the relevant issues involved.

This note will analyze the application of procedural due process to the *lis pendens* statute in the light of the recent trend to expand procedural due process protections to all summary prejudgment remedies which deprive a person of a *significant* property interest without prior notice and hearing. Two distinct problems are raised by the procedure itself: first, whether there has been a *deprivation* of a *significant* property interest; second, assuming a deprivation of a significant property interest, whether the *lis pendens* statute, narrowly drawn and limited only to actions affecting title or the right of possession to real property, is a circumstance requiring special protection to a state or creditor interest. This note will attempt to illustrate how a reasonable interpretation of *Sniadach v Family Finance Corp.*<sup>4</sup> and subsequent decisions do not include the *lis pendens* procedure within their scope.

In an action concerning real property, including issues of title or the right of possession, the plaintiff may file a notice of pendency with the county recorder at the same time he files his civil complaint. The defendant may do so when he files his answer or at any time thereafter. Such notice may only be filed in the county where the realty is located.<sup>5</sup> The notice is to contain the names of the parties, the object of the action or defense, and a

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1. See notes and accompanying text, *infra*.

2. Civil No. WEC 27140 (West Los Angeles County Superior Court, Memorandum of Decision filed June 1, 1973).

3. 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375, 377 (1973).

4. 395 U.S. 337 (1969).

5. CAL. CODE OF CIVIL PROC. § 409 (West 1973).

description of the property.<sup>6</sup> The purpose of a recordation of a statutory notice of *lis pendens* is merely to furnish constructive notice to all interested persons of the pendency of the action.

The scope of the *lis pendens* statute is limited to actions concerning real property or those which affect the title or the right of possession of real property. The statute provides for a method of immediate review at any time after notice of pendency of an action has been recorded. The court in which the action is pending shall order the notice expunged if it is shown to the satisfaction of the court by "clear and convincing proof" that the action "does not affect title to or right of possession of the real property described in the notice; or insofar as the action affects title to or right of possession of the real property described in the notice the party recording the notice has commenced or prosecuted the action for an improper purpose or not in good faith."<sup>7</sup> At any time after notice of pendency of the action has been recorded, the court may order the notice expunged upon the filing of an undertaking in an amount fixed by the court.<sup>8</sup> An order granting or denying a motion to expunge the *lis pendens* is reviewable by petition for writ of mandate.<sup>9</sup>

#### CONSTITUTIONAL CONSIDERATIONS

*Sniadach v. Family Finance Corp.*<sup>10</sup> established that before a state can deprive a person of a *significant* property interest, prior notice and hearing must be afforded.<sup>11</sup> Since *Sniadach*, the due process clause has undergone an expanding interpretation in California resulting in a host of attacks on a wide variety of prejudgment creditor remedies.<sup>12</sup> Such deficiency procedures include garnishment of wages and attachment procedures.<sup>13</sup> Lien statutes have been struck down.<sup>14</sup> Statutes authorizing claim and delivery of personal property<sup>15</sup> and seizure of real property through a writ

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6. *Id.*

7. *Id.*, § 409.1 (West 1973).

8. *Id.*, § 409.2 (West 1973).

9. *Id.*, § 409.4 (West 1973).

10. 395 U.S. 337 (1969).

11. *Id.*

12. *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

13. *Randone v. Appellate Department*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1970).

14. *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (California Innkeeper's Lien).

15. *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

of immediate possession<sup>16</sup> have also been declared to violate the mandate of procedural due process. Many of the conflicts of opinion concerning the expansive or restrictive reading to be given *Sniadach* were resolved by the United States Supreme Court in *Fuentes v. Shevin*<sup>17</sup> in which the Court refused to limit the application of *Sniadach* to absolute necessities. Thus, the general rule is that prejudgment remedies not providing notice and hearing opportunity violate procedural due process except in extraordinary situations.

Whether or not a prior hearing is required in a given situation is dependent upon a judicial weighing of the seriousness of the deprivation against the importance of the governmental or public interest served by summary procedure.<sup>18</sup> In certain areas, the existence and severity of the deprivation are not questioned. For example, where the individual is threatened with the deprivation of title to or possession of property, or where he is completely deprived of the use and enjoyment of the property, there is no question. The test against which the validity of the *lis pendens* procedure must be measured is two pronged: first, whether the deprivation can be classified as "insignificant" or "de minimus;" and second, whether the *lis pendens* procedure constitutes that extraordinary situation which justifies postponing the hearing until after the event.

#### LAKE TULLOCH

In *Lake Tulloch Corporation v. Dingman*<sup>19</sup> the plaintiffs sued the defendant, Dingman, for breach of contract, mismanagement and fraudulent misrepresentations in connection with the operation and development of a subdivision known as Poker Flat Resort, located at Tulloch Lake in Calaveras County. Title to the property was vested in the plaintiff corporation. The defendant was at one time the president and managed the enterprise.

The defendant filed a cross-complaint, joining as cross-defendants the plaintiffs and the previous owners of the property, alleg-

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16. *Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 87 Cal. Rptr. 17 (1970).

17. 407 U.S. 67 (1972).

18. *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).

19. *Supra*, note 2.

ing that a written contract had been entered into between the cross-complainant, Dingman, and the previous owners to purchase the property and seeking damages in the amount of \$6,000,000 against the previous owners. In the cross-complaint, Dingman alleged he assigned the contract to the Lake Tulloch Corporation in consideration of a 50% interest in the venture and a salary of \$3,000 a month.

A demurrer to the cross-complaint was sustained and a first amended cross-complaint was filed which again sought only money damages. A demurrer to the first amended cross-complaint was also sustained.

Prior to filing the second amended cross-complaint, a *lis pendens* was recorded by the cross-complainant, Dingman, on the real property owned by the cross-defendant, Lake Tulloch Corporation. A motion to expunge the *lis pendens* was filed by the cross-defendants. The second amended cross-complaint was then filed predicated on new facts in conflict with facts in the two previous cross-complaints and including causes of action allegedly concerning real property in order to justify the recordation of the *lis pendens*.

Taking judicial notice of the facts alleged in the two previous cross-complaints seeking only money damages, the Court expunged the *lis pendens* declaring the cross-complainant did not possess an interest in real property or have a right of possession thereto which would warrant the recordation of the *lis pendens*.

The Court in *Lake Tulloch* then proceeded to discuss the constitutionality of the *lis pendens* statute relying principally upon the California Supreme Court case of *Randone v. Appellate Department*<sup>20</sup> which declared that a segment of the prejudgment attachment statute violated procedural due process in not affording notice and an opportunity for a hearing prior to the deprivation of a significant property interest.

The Court went on to state that "in a real sense where *lis pendens* is resorted to the owner is deprived of the use of his property by restricting the marketability of his property."<sup>21</sup> The common fear of exceptions in a title company report makes the mere notice, once recorded, a severe restriction upon the marketability of land. Thus, the owner of the property "is as much deprived of the use of his property where a *lis pendens* is recorded as the depositor

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20. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

21. *Lake Tulloch Corp. v. Dingman*, Civil No. WEC 27140 (West Los Angeles County Superior Court, Memorandum of Decision filed June 1, 1973).

whose bank account has been attached.”<sup>22</sup> The Court concluded that the *lis pendens* procedure did not present any “extraordinary circumstance or a countervailing state interest of overriding significance”<sup>23</sup> which would distinguish the *lis pendens* procedure from other summary prejudgment procedures already held to violate procedural due process.

In *Lake Tulloch* the Court, in declaring the *lis pendens* statute unconstitutional, relied substantially upon the effect the recordation of the *lis pendens* would have on a subsequent attempt to sell the land during the pending law suit. Once the *lis pendens* appears on the record, the landowner will be hard pressed to find either prospective purchasers or respectable lending institutions willing to deal with the property.<sup>24</sup> The threat of loss of profits or purchasers will force the property owner to settle and to settle quickly.

#### PROTECTION OF A STATE OR CREDITOR INTEREST

It is important to point out that all prejudgment remedies held unconstitutional in the aftermath of *Sniadach* have suffered from the same constitutional infirmity, overbreadth. In *Randone*, the statute which authorized prejudgment attachment of *any* property of the debtor defendant without prior notice or hearing, was held to be fatally “overbroad.” The statute had not been narrowly drawn to confine such deprivation to those “extradordinary circumstances in which a state or creditor interest of overriding significance” must justify summary procedures.<sup>25</sup>

Although the issue was not decided, the Court in *Randone* indicated:

Because the attachment of real estate does not deprive an owner of the use of his property, but merely constitutes a lien on the property, the “taking” generated by such attachment is frequently less severe than that arising from other attachments. In view of this basic difference in the effect of such attachment, it has been suggested that a statute which dealt solely with the attachment of real estate might possibly involve constitutional considerations of a different magnitude than those discussed hereafter. (Cita-

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22. *Id.*

23. *Id.*

24. 39 CALIF. L. REV. 108 (1966).

25. 5 Cal. 3d 536, 546, 488 P.2d 13, 19, 96 Cal. Rptr. 709, 715 (1971).

tion) The instant statute is not so limited, however, and the great majority of cases arising under it do involve the deprivation of an owner's use of his property; thus we have no occasion in this proceeding to speculate as to the constitutionality of a prejudgment attachment provision which does not significantly impair such use.<sup>26</sup>

The *lis pendens* statute is such a narrowly drawn statute, i.e. it is limited to actions affecting title to real property or the right to possession thereof.<sup>27</sup> Thus, it does not appear to suffer from the constitutional infirmity of "overbreadth."

Also, the *lis pendens* procedure does not appear to constitute a taking a deprivation of a significant property interest in violation of procedural due process. All prejudgment remedies held unconstitutional since *Sniadach* have dealt with an actual taking and denial of the beneficial use and enjoyment of property.

In *Black Watch Farms, Inc. v. Dick*,<sup>28</sup> the Court held that notice or hearing opportunity before prejudgment attachment of real property of a resident defendant is not required because due process was satisfied by the subsequent hearing in the main action. The Court further emphasized that the owner of the property is neither deprived of the use or enjoyment of the property pending a trial on the merits, nor is his livelihood threatened by the deprivation of the right to freely transfer the realty. A real property attachment is not a final proceeding nor is it unduly harsh; therefore, there is no necessity for prior notice or hearing opportunity since due process is satisfied by the subsequent plenary hearing in the main action.

The prohibition of the Fourteenth Amendment forbidding the deprivation of property without due process refers only to *direct appropriation*.<sup>29</sup> The *lis pendens* procedure involves no direct appropriation of property, nor does the incidental effect of impairing marketability constitute a "deprivation" of property protected by the due process clause.

The deprivation which results from the filing of a *lis pendens* is *de minimis*. The creditors' remedies thus far invalidated have completely deprived the owner of the use of his property. Although the notice incidentally hampers use, in that selling the property or borrowing on the property may be more difficult, it in no way prevents sale, encumbrance or lease of the property.

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26. *Id.*, at 545, 488 P.2d at —, 96 Cal. Rptr. at —.

27. CAL. CODE OF CIVIL PROC. § 409 (West 1973).

28. 323 F. Supp. 100 (1971).

29. *California Teachers Assn. v. Newport Mesa Unified School Dist.*, 333 F. Supp. 436, 443 (1971).

Assuming *arguendo* that the *lis pendens* procedure violates procedural due process in not providing for notice and a hearing opportunity, the *lis pendens* statute, narrowly drawn and limited only to actions affecting title or the right of possession to real property, constitutes a circumstance "requiring special protection to a state or creditor interest."<sup>30</sup>

In *Property Research Financial Corp. v. Superior Court*<sup>31</sup> the Court, in upholding the constitutionality of prejudgment attachment of a nonresident debtor's property, emphasized the state and creditor interest to be protected:

The creditor's need to safeguard the collectibility of a judgment is substantially greater when the debtor is a resident, for a non-resident has contacts and roots outside the state which make it far more likely he will be willing and able to transfer assets outside the state to defeat his creditor's recovery than is true in the case of a resident debtor. Prior notice and hearing inevitably provide the non-resident debtor with opportunity to defeat the primary purpose of foreign attachment by transferring his assets to his home state before the desired attachment can take effect. In summary attachment against non-residents, the element of surprise is vital to the effectiveness of the procedure and indispensable to the state's interest in making its process locally effective. The principle is much the same as that embodied in the statutes allowing summary filing of a *lis pendens* at the commencement of property litigation (Code Civ. Proc. § 409): the subject matter of the litigation should be preserved until a hearing is held on the merits in order to make the judgment of the court practically enforceable. Although ownership of the attached property may not itself be at issue, its preservation against willful or negligent dissipation or its sale to innocent purchasers is often necessary if the court is to do full justice to a plaintiff with a valid claim.<sup>32</sup>

The purpose to be served by the *lis pendens* procedure parallels that of prejudgment attachment of a non-resident debtor's property which involves a situation requiring a special protection to a state and creditor interest. The function of notice of pendency of action involving realty is to carry out the public policy that a party's interest in the realty shall not be defeated by an aliena-

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30. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969); *Property Research Financial Corp. v. Superior Court*, 23 Cal. App. 3d 413, 421, 100 Cal. Rptr. 233, 238 (1972); *Banks v. Superior Court*, 26 Cal. App. 3d 143, 146, 102 Cal. Rptr. 590, 592 (1972); *Chrysler Credit Corp. v. Waegle*, 29 Cal. App. 3d 681, 685, 105 Cal. Rptr. 914, 916 (1972).

31. 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972).

32. *Id.*, at 416-20, 100 Cal. Rptr. at 237-38.



tion of the property during the course of the lawsuit. The subject matter of the litigation, *i.e.* rights and interests in the real property and the profits therefrom, should be preserved until a hearing is held on the merits in order to make the judgment of the court practically enforceable. This effectively protects the party who claims an interest in the real property against willful or negligent dissipation or sales to innocent purchasers. It also protects the state's interest in making its process effective and insures collectibility of the judgment.

In balancing the claim of the state and the creditor to *effective* process against the property owner's claim to due process, it is noteworthy that a recordation of a *lis pendens* does not involve necessities for day-to-day living. In this respect it contrasts with the garnishment of wages in *Sniadach* and the attachment of a bank account in *Randone*. The creditor's need for security is great, particularly when the dispute involves land. An action for specific performance for the sale of real property by one claiming ownership would be of little importance if a bona fide purchaser for value and without notice of the pending action acquired the property during the pendency of the lawsuit. Thus, the creditor has a substantial and legitimate claim to due process of law in the protection and collection of what is owed him, and, in this sense, the creditor's interest presents a competing claim to due process of law. Furthermore, to facilitate the countervailing state interest in an orderly recording and notice system for real estate transactions, it is imperative that there be a method for notifying prospective buyers of pending litigation concerning the property.<sup>33</sup>

#### CONCLUSION

In *Lake Tulloch* the Court first held that the cross-complainant who recorded the *lis pendens* did not possess an interest in real property or present any claim affecting title or right of possession thereto which would warrant the recordation of a *lis pendens*. The Court then expunged the filing of the notice of *lis pendens* as provided by the statutory scheme<sup>34</sup> to protect the owner of the property from false claims to the property. The Court then, however, proceeded to decide a constitutional issue not necessary to the case. It is an accepted rule of constitutional law that the Court will not pass upon a constitutional question in advance of the necessity of deciding it. Thus, if a case can be decided on either of two

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33. *Empfield v. Superior Court*, 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375, 377 (1973).

34. CAL. CODE OF CIVIL PROC. § 409.1 (West 1973).

grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.<sup>35</sup>

The Court in *Lake Tulloch* failed to adequately balance: the state's interest in insuring that its process is locally effective and practically enforceable, the interest of the state in an orderly recording and notice system for transactions in real property, and the creditor's interest in effective process against the property owner's claim to due process. The *lis pendens* procedure presents a "countervailing state and creditor interest of overriding significance"<sup>36</sup> which distinguishes it from the summary prejudgment procedures already held to violate procedural due process. Adequate protection against false claims is provided by a motion to expunge the *lis pendens*.<sup>37</sup> As was stated in *Randone*, "what is due process depends on circumstances and varies with the subject matter and necessities of the situation."<sup>38</sup> The subject matter, *i.e.* real property and necessities of the situation, *i.e.* protection of state and creditor interests, sustains the *lis pendens* against procedural due process claims.

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35. *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936).

36. *Supra*, note 29.

37. CAL. CODE OF CIVIL PROC. § 409.1 (West 1973).

38. 5 Cal. 3d 536, 558, 488 P.2d 13, 28, 96 Cal. Rptr. 709, 724 (1971).