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Does California's Statutory Lis Pendens Violate Procedural Due Process?

Since 1969, numerous prejudgment creditor remedies have been found to violate the constitutional requirements of procedural due process. This comment examines the California lis pendens procedure in light of these decisions and finds the remedy susceptible to constitutional attack. The author also analyzes the statutory procedural safeguards and finds them insufficient to provide the requisite due process protection, even in light of a recent United States Supreme Court decision which arguably presents new guidelines for use in this area. Finally, the comment suggests that adoption of provisions similar to a recent California State Bar proposal would rectify the infirmity presently found in the lis pendens procedure.

In 1969 the United States Supreme Court struck down the historically accepted creditor's remedy of prejudgment garnishment of wages. The California Supreme Court responded in 1971 by declaring California's attachment statutes invalid as a taking of property without due process of law. Both courts have since utilized this principle of due process to invalidate other remedies traditionally available to a creditor against his debtor. These decisions have cast the validity of many time-honored prejudgment remedies into serious question. One such remedy is California's 124-year-old lis pendens law.

Lis pendens is a popular and extremely effective prejudgment remedy whereby a litigant whose lawsuit affects real property can effectively restrict the sale or encumbrance of the property until his suit is resolved. When a lawsuit concerns real property or affects the title or right to possession thereof, a lis pendens can be recorded in the county in which the real property lies. Recordation imparts constructive notice of the pending action and enables a court to enforce the recording party's claim...
against the land despite an intervening change of title. This recordation is effective until a judgment is rendered for either party and the period for appeal expires. The statute requires only recordation to impart constructive notice; there is no provision for bond or for actual notice to the owner. It is this ex parte nature of the remedy which renders it susceptible to constitutional attack.

**HISTORICAL DEVELOPMENT**

As with other code sections which incorporate common law principles, statutory lis pendens was developed to retain the primary purpose of the common law doctrine while relieving some of the hardship attendant upon its strict application to modern circumstances.

At early common law the principle that a judgment was binding only upon parties to an action was considered to be axiomatic. When this rule was applied to actions which concerned the title or right to possession of specific property, however, the courts often found themselves in the position of rendering hollow judgments, the subject matter of the litigation having been conveyed to a non-participating party prior to the judgment. It was in response to this somewhat embarrassing situation that the doctrine of *lis pendens* developed. The mere existence of litigation affecting property was said to impart constructive notice to all the world that any purchasers “pendente lite” would take the property subject to the outcome of the action.

This extremely broad scope of constructive notice required an extensive search of the records, which few prospective purchasers were able to accomplish, and thus facilitated the fraudulent transfer of apparent legal title to a person unaware that its validity was being contested in pending litigation. The present statutory scheme was adopted to remedy this situation; it limits the scope of the required search, yet retains the effect of constructive notice to the world. A purchaser or encumbrancer, no longer faced with a search of the courthouse records of every county for any pending suit concerning the property, must now examine only the notices of lis pendens in the recorder's office of the county where the real estate is situated. Thus the statutory scheme of

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11. Richardson v. White, 18 Cal. 102, 106-07 (1861).
lis pendens is actually a limitation on the rights of the recording party in that it imposes a duty of recording not present under the common law doctrine of lis pendens. It is designed to protect the public from the evils attendant on the transfer of apparent titles by making actual notice of any pending litigation more readily available.\(^{13}\)

**The Due Process Challenge**

*Sniadach v. Family Finance Corp.*,\(^ {14}\) invalidating ex parte garnishment of wages, and *Randone v. Appellate Department*,\(^ {15}\) invalidating ex parte attachment, reaffirmed the basic principle that an individual must be afforded notice and an opportunity for a hearing before he is deprived of any significant property interest, and that exceptions can be justified only in "extraordinary circumstances."\(^ {16}\) *Randone* also reaffirmed the applicability of this general principle to all summary prejudgment proceedings.\(^ {17}\)

In *Lake Tulloch Corp. v. Dingman*\(^ {18}\) a Los Angeles superior court interpreted these decisions as having "apparently sounded the death knell of all summary prejudgment remedies where prior notice and hearing were not provided," and found the recording of a lis pendens to be a taking of property rights sufficient to require due process protection. The court opined that the failure of the statute to provide for such protection violates procedural due process as guaranteed by the California and United States Constitutions.\(^ {19}\) Implicit in the court's opinion was a determination that lis pendens accomplishes a taking by the state, since the due process clause is cognizant only of state action.\(^ {20}\) This finding appears proper in light of the United States Supreme Court's decision in *Shelly v. Kraemer*,\(^ {21}\) which emphasized that any manifestation of state authority in the form of laws, customs, or executive or judicial

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13. Richardson v. White, 18 Cal. 102, 106-07 (1861).
15. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
16. Id. at 541, 488 P.2d at 15, 96 Cal. Rptr. at 711.
17. Id. at 547, 488 P.2d at 20, 96 Cal. Rptr. at 716.
18. WEC-27140 (Super. Ct., L.A. County, June 1, 1973), memorandum opinion at 5, aff'd without comment on constitutional issues sub nom. Dingman v. Superior Court, 2 Civ. 42127 (Cal. Ct. App. 2d dist., July 17, 1973). The superior court granted a motion to expunge the lis pendens as improperly recorded on a claim not affecting title or right to possession. Although the determination of the constitutional issue therefore appears to be dicta, the basic argument is one that will confront a recording party in the near future.
19. Id.
20. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. Const. amend. XIV, §1 (emphasis added).
proceedings is state action. The California Supreme Court has held that the recording of a lis pendens is part of a judicial proceeding and not a mere private act, and this decision appears to foreclose any objection to the application of due process safeguards to the lis pendens procedure.

Despite the suggestion in Randone that an attachment of real estate is only a lien on the property and that this taking might involve different constitutional considerations, the superior court in Lake Tulloch found thatlis pendens deprives the property owner of the use of his property by restricting its marketability. "The owner is as much deprived of the use of his property where a lis pendens is recorded as the depositor whose bank account has been attached, or one who has been sued for claim and delivery . . . ." The accuracy of this analogy is not readily apparent from an examination of the cases in the due process area, as most of those decisions have invalidated summary prejudgment remedies which deprived the debtor of possession of his property. Although the nature of the interest deprived appears to distinguish those cases from the situation in which mere notice is imposed by lis pendens, this distinction becomes less meaningful upon closer examination. When personalty is involved, the most beneficial use of the property is realized through possession, and deprivation of possession is considered a taking. When real property has been acquired for subdivision and resale, and particularly when that property has already been developed, the most beneficial use of the property lies in its marketabil-

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22. Id. at 14.
23. Albertson v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956), expressly disapproving West Inv. Co. v. Moorhead, 120 Cal. App. 2d 321, 262 P.2d 322 (1953), which held that the recording of a lis pendens is a private act because no function of the court is involved.
24. Because the attachment of real estate does not generally 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.
25. 5 Cal. 3d at 544 n.4, 488 P.2d at 18 n.4, 96 Cal. Rptr. at 714 n.4.
indeed, the goal of most developers is to relinquish possession of the property—and free their capital—as soon as possible. Deprivation of the ability to alienate property should therefore be considered a taking.

Support for the contention that lis pendens is a taking comparable to that involved with a transfer of possession can be found in the *Sniadach* decision, which invalidated Wisconsin’s wage garnishment statute. The statute authorized freezing a debtor’s wages until a judicial determination was made on the validity of the debt. The Court found the taking “obvious,” but Mr. Justice Harlan felt the need to clarify the Court’s position: “The ‘property’ of which petitioner has been deprived is the use of the garnished portion of her wages . . . .” It is a fair inference that the use to which Mr. Justice Harlan referred was the ability to freely spend wages after they were earned. Wages have no value to the wage earner if they cannot be spent. The same can be said of real property acquired for subdivision and sale: the property has no value to its owner if he cannot transfer or encumber it.

Several federal district courts have come to this conclusion regarding the lien imposed by real property attachment statutes and have found the statutes lacking in the due process safeguards necessary to justify such a taking. However, a recent California appellate court decision upholding the constitutional validity of the mechanic’s lien laws did not find these cases persuasive. In holding that the mechanic’s lien pro-

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28. In a quiet title action between two individuals over a small, unique piece of property, it may be necessary to preserve the property pending the litigation in order to facilitate an equitable result. Similarly, in an action over real property which provides the sole source of livelihood to the plaintiff, e.g., a family farm or a unique parcel of agricultural property, preservation during litigation may be imperative. In both of these examples, the value of the property is inherent in its use and not in its sale. In the case of a commercial land subdivision, the land is ordinarily vacant, and in that state, it is of little or no use. Its value (or its "use") lies in its marketability. To place a cloud on the title is to destroy that marketability and consequently deprive the owner of the use of his property.


32. *Id.* at 338-39.

33. *Id.* at 342.


visions did not deprive the owner of possession or use of his property, the court relied on another federal district court case, *Cook v. Carlson.*

That case noted that real estate attachment statutes absolutely prevent the owner from transferring or further encumbering the property, but mechanic's lien statutes merely "curtail" the owner's ability to so use his property and do not expressly preclude such transactions.

Similarly, the lis pendens statutes do not expressly prohibit subsequent transactions involving the affected property. However, there are significant distinctions between the effect of a mechanic's lien and that of a lis pendens. Under the mechanic's lien law, the claim of lien must state the amount of the demand after deducting all just credits and offsets.

Since the amount of the claim is stated, the owner's ability to market the property is not substantially impaired, as a subsequent agreement concerning the property can reflect the possibility that the purchaser will have to pay off the lien to secure full rights to the property. Although the value of the affected property may be lessened by the amount of the lien, the labor and materials upon which the lien is based have, in the usual case, increased the value of the property by the amount of the lien or more. The hardship on the property owner is further minimized by the provisions allowing him to force an expeditious adjudication on the merits; the lienholder must commence foreclosure proceedings within ninety days after the property owner demands that the lien be foreclosed.

In contrast, there is no provision in the lis pendens procedure for an expeditious adjudication on the merits of the recording party's claim, and property owners often must wait several years before they can clear title by judicial process. Nor has the recording party necessarily invested his labor and materials in the affected property. Most importantly, the party recording a lis pendens is asserting a claim to the real property in specie and not as security for a money judgment. The traditional presumption of the uniqueness of real property dictates that a valid claim cannot be satisfied by a money judgment. Thus the prospective buyer, who obviously prefers the property to its money equivalent, will be more than hesitant to enter into any arrangement concerning property affected by a lis pendens, even if the seller agrees to indem-

36. *Id.* at 542, 116 Cal. Rptr. at 196.
38. *Id.* at 27.
nify the buyer in the event the land is lost in the ensuing contest of title or right to possession. For all intents and purposes, the property affected by a lis pendens becomes inalienable.\textsuperscript{43} It is submitted that any distinction drawn from the fact that the lis pendens procedure does not expressly prohibit alienation of the affected property is highly theoretical and does not reflect the practical realities of the real estate business.\textsuperscript{44}

**DUE PROCESS AFFORDED?**

After it is determined that there is a taking sufficient to warrant the constitutional protections of procedural due process, the next consideration is whether due process is in fact afforded by the particular procedure under scrutiny. Absent an overriding state or creditor interest, procedural due process requires, at a minimum, that there be a hearing before the deprivation becomes significant, and that the hearing be meaningful.\textsuperscript{45} It may be contended that such a hearing is provided, on the subsequent motion to expunge a lis pendens, by sections 409.1 and 409.2 of the Code of Civil Procedure. However, it is arguable that these hearings do not occur before the property owner is significantly deprived of the ability to alienate his property and that in any event they do not provide the property owner with a meaningful opportunity to be heard.

Section 409.1 authorizes a hearing on a motion to expunge a lis pendens as improperly recorded or recorded in bad faith. Notice must be served on the recording party not less than twenty days prior to the hearing. If the moving party is successful, the order expunging the lis pendens is not effective until the time for petition for writ of mandate has expired, which may occur after twenty days.\textsuperscript{46} Thus, if notice of the hearing on the motion to expunge is served on the recording party on the day the lis pendens is recorded, and if at the conclusion of the hearing the recording party is served with the notice of the expunging order and he fails to petition for a writ of mandate within the next twenty days, the lis pendens will be expunged forty days after its recordation. However, forty days is only a theoretical minimum. Repeated requests for extension of discovery time may delay the hearing substantially beyond the twenty-day minimum. After the hearing the recording party may be given up to sixty days to petition for a writ of mandate.\textsuperscript{47} Utilizing these avenues of delay, the recording party can effectively tie up

\textsuperscript{43} See authorities cited note 42 supra.

\textsuperscript{44} See State Bar of California, 1974 Conference Resolution 9-10b; authorities cited note 42 supra.


\textsuperscript{46} Cal. Code Civ. Proc. §§409.4, 409.5.

\textsuperscript{47} Cal. Code Civ. Proc. §409.4.
the owner's property for as long as two months after a judicial deter-
mination that his claim was brought in bad faith, and three months
or more from the day the lis pendens was recorded. Under section
409.2 a motion to expunge may be granted when the court determines
that adequate relief may be afforded by indemnification of the moving
party. The procedures for the hearing authorized by section 409.2 are
the same as those for section 409.1, except that the theoretical minimum
is reduced to twenty days, since the hearing may be held as soon as no-
tice is served on the recording party.

Assuming arguendo that a reasonable opportunity for a hearing is
afforded by sections 409.1 and 409.2, the question remains whether
the hearing is meaningful within the contemplation of the due process
clauses of the state and federal constitutions. A subsequent motion
to expunge a lis pendens may be granted under section 409.1 only
if the party seeking to expunge convinces the court that (a) the action
does not affect the title or right to possession of the property described
in the recorded instrument, or (b) the action affects title or posses-
sion, but has been commenced or prosecuted for an improper pur-
pose and not in good faith. Subdivision (a) affords little protection
against an accurately pleaded but nonmeritorious claim, since the
pleadings can easily be tailored and the facts slanted for purposes
of the complaint.48 For example, in Lake Tulloch v. Dingman49
the court was able to discern the sham of the recording party's claim
only because the second amended complaint contained a "smorgasbord"
of causes of action and differed substantially in factual and legal allega-
tions from the original and first amended complaints.50 From this ex-
ample it is easy to posit the success of a more subtle attorney whose first
complaint is accurately drafted.

Subdivision (b) of section 409.1 was recently interpreted in United
Professional Planning, Inc. v. Superior Court,51 which held that an "im-
proper purpose" exists when the proceedings are begun (1) primarily
out of hostility or ill will, (2) solely for the purpose of depriving the
person against whom they are initiated of a beneficial use of his property,
or (3) for the purpose of forcing a settlement having no relation to the
merits of the claim. A determination that the action is "not in good

50. It is apparent that these new causes of action, not appearing in the earlier
complaints and predicated upon new facts in conflict with the facts in the two
prior complaints, were obviously tailored to state causes of action concerning
real property . . . and thus justify the recordation of the lis pendens.
faith" was held to require a finding that the recording party does not really believe that his claim may be held valid. Both facets of subdivision (b) must be established by "clear and convincing proof" by the party seeking to have the lis pendens expunged. Such a burden of proof is difficult to carry, and this, together with the narrow judicial construction of the elements to be proved, leads to the conclusion that a motion to expunge under subdivision (b) would be successful only in cases of flagrant abuse of the judicial process.

A motion to expunge may also be brought under section 409.2 of the Code of Civil Procedure, which allows the court, in its discretion, to expunge the lis pendens if the moving party gives an undertaking to the effect that he will indemnify the recording party for all damages which may be incurred if the notice is expunged and the moving party does not prevail, and if adequate relief can be secured to the recording party by the giving of such undertaking. Since the amount of the undertaking required is discretionary with the court and may be less than the value of the property affected by the notice, this section suggests an avenue for alleviating the severity of the taking accomplished by a lis pendens when the owner is able to persuade the court that the real property is not necessary to provide the recording party with adequate relief should his claim prove meritorious. However, since real property is statutorily presumed to be unique, it is apparent that the motion to expunge is available, practically speaking, only in very limited circumstances.

In Randone the California Supreme Court made it clear that an individual cannot be deprived of the necessities of life before there has been a hearing establishing the validity of the creditor's claim. The court indicated that when necessities are not involved and there is no overriding state or creditor interest justifying a summary taking, due process would be satisfied by a prior hearing on the probable validity of the creditor's claim. The court did not declare that such a hearing

52. Id. at 388, 88 Cal. Rptr. at 557.
53. Id. at 386, 88 Cal. Rptr. at 556.
56. Only three cases have been reported which interpret the statute: Empfield v. Superior Court, 3 Cal. App. 3d 105, 108 Cal. Rptr. 375 (1973); Swanston v. Superior Court, 15 Cal. App. 3d 355, 92 Cal. Rptr. 572 (1971); Howden-Goetzl v. Superior Court, 7 Cal. App. 3d 135, 86 Cal. Rptr. 323 (1970).
57. CAL. CIV. CODE §§3387.
58. 5 Cal. 3d at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726.
59. "We do not doubt that a constitutionally valid prejudgment attachment statute, which exempts 'necessities' from its operation, can be drafted by the legislature to permit
was a minimal requirement for due process, but neither did it acknowledge that anything less than a hearing on the validity of the claim would suffice.\(^\text{60}\)

Given either interpretation of the \textit{Randone} decision, it is important here to note the actual procedure which the court held insufficient to satisfy due process requirements. Under the prior California law, attachment was generally allowed in suits based on unsecured contracts for the direct payment of money.\(^\text{61}\) To obtain the writ of attachment the creditor had to file an affidavit with the clerk of the court in which the action was pending, showing that his cause of action came within those enumerated in Code of Civil Procedure Section 537.\(^\text{62}\) Once the writ was issued, the property was seized and held by the sheriff.\(^\text{63}\) The writ could be issued without notice to the debtor when so requested by the creditor.\(^\text{64}\) At any time, even before the attachment was levied, the debtor could apply to the court to have the attachment discharged as improperly or irregularly issued.\(^\text{65}\) However, the scope of this hearing was limited to whether there had been compliance with section 537, and the court did not concern itself with the validity of the creditor's claim.\(^\text{66}\) The debtor could also have his property released if he filed an undertaking of at least two sureties, approved by the court.\(^\text{67}\) There was no hearing or other opportunity provided for the debtor to contest the validity of the plaintiff's claim prior to the attachment.

The decision of the \textit{Randone} court actually invalidated only the provision which authorized attachment.\(^\text{68}\) However, implicit in the holding was a finding that the statutes authorizing subsequent release of the attachment did not alleviate the taking to a degree sufficient to eliminate the constitutional objections. It is apparent that the provisions for a motion to expunge a lis pendens are quite similar to the provisions for release of attachment. Both procedures authorize hearings with narrow...
grounds upon which relief may be granted, and neither one allows the party deprived to contest the merits of the other party's claim. Since the California Supreme Court did not find the release provisions sufficient to save the attachment statute struck down in Randone, it is probable that the court would also find the hearing on a motion to expunge inadequate to cure the constitutional infirmities of lis pendens.

The United States Supreme Court has recently provided more affirmative guidance as to what type of procedure satisfies the federal requirement for a meaningful hearing within a reasonable time. In Mitchell v. W.T. Grant Co. the Court upheld the constitutional validity of Louisiana's sequestration statutes, which are very similar to the replevin statutes previously invalidated in Fuentes v. Shevin. The creditor in Mitchell had filed a complaint against the debtor, alleging a sale and praying for a judgment in the amount of the overdue and unpaid balance. He also alleged a vendor's lien, which is provided statutorily to a Louisiana vendor under an installment sales contract. The required affidavit swore to the truth of the facts alleged in the complaint and asserted that a writ of sequestration was necessary because the creditor had reason to believe that the debtor would encumber, alienate, or otherwise dispose of the merchandise during the pendency of the proceeding. After the creditor furnished suitable bond, the judge issued a writ, based upon the affidavit and complaint, which directed the sheriff to seize the property. The debtor was also issued a citation which directed him to file a pleading or make an appearance within five days. The debtor chose to forego a motion made available by a Louisiana statute which entitled him to seek immediate dissolution of the writ. This statute provided that upon motion of the debtor the writ was to be dissolved unless the creditor proved the allegations upon which it was issued. The debtor also failed to avail himself of a statute which would have required the release of his property upon the furnishing of adequate security.

The Supreme Court found that the Louisiana procedure effected a "constitutional accommodation" of the conflicting interests of the parties involved and proceeded to point out the salient factors of the

69. The only major difference seems to be the additional ground of bad faith, upon which the lis pendens procedure authorizes relief if the moving party carries the burden of proof.
70. 5 Cal. 3d at 545, 488 P.2d at 18, 96 Cal. Rptr. at 714.
73. 94 S. Ct. at 1897-98. The relevant provisions of the Louisiana Code of Civil Procedure are set forth in 94 S. Ct. at 1906-08.
74. 94 S. Ct. at 1900.
Louisiana procedure which distinguished it, for constitutional purposes, from the procedure invalidated in *Fuentes.* The Court emphasized that the sequestration procedure provides for judicial participation and supervision from beginning to end. The writ of sequestration is authorized only when the nature of the claim and the grounds relied upon clearly appear from the specific facts contained in the verified petition or affidavit, and the requisite showing must be made to a judge. The Court indicated that this judicial control minimizes the risk that the ex parte procedure will lead to a wrongful taking. In addition, the facts relevant to obtaining a writ of sequestration (existence of a lien and default) were narrowly confined and particularly suited to documentary proof, thus minimizing the danger of a wrongful seizure. Finally, the debtor was not "left in limbo to await a hearing that might or might not 'eventually' occur, as he was under the statutory schemes before the Court in *Fuentes,*" since the sequestration procedure provided for an immediate adversary hearing with the burden on the creditor to prove the grounds of his case. The Court summarized the effect of the procedure as follows:

> [T]he Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits.

The lis pendens procedure does not provide such safeguards against a wrongful taking, nor, once the taking is accomplished, does it protect the interest of the party deprived. The recording party, who effectively attaches the property, is not required to prove his ability to respond in damages, nor is there any requirement that a party post a bond before recording a lis pendens. The recording party is not required to file any affidavit swearing to the truth of the facts alleged, and he is not required to allege facts supporting a belief that the owner will transfer or encumber the property pending litigation. Most im-

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75. The four dissenting Justices indicated that *Fuentes* should be considered overruled. *Id.* at 1910-11. However, Mr. Justice Powell declared that *Fuentes* was overruled only to the extent that it embodied the sweeping proposition that a full adversary hearing is required before a temporary deprivation of possession of personal property. *Id.* at 1908 (Powell, J., concurring).

76. *Id.* at 1904-05.

77. The Court contrasted *Fuentes* in which the law was characterized as requiring only a bare assertion that the party was entitled to the writ. *Id.*

78. *Id.* at 1905.

79. *Id.*

80. *Id.*

81. *Id.*
portantly, there is no provision for an immediate judicial hearing at which the party recording the lis pendens must prove the probable validity of his claim. To the extent that these factors constitute essential elements in the "constitutional accommodation" between the interests of creditor and debtor, the lis pendens procedure fails to satisfy the procedural due process mandates of the United States Constitution.

OVERRIDING STATE INTEREST

The lis pendens procedure is not necessarily invalidated by a determination that it deprives an individual of his property without adequate procedural safeguards. Both the Sniadach\textsuperscript{82} and Randone\textsuperscript{83} courts recognized that in "extraordinary circumstances" summary action may be permitted. To support an exception there must be some "state or creditor interest . . . of overriding significance . . . ." which justifies the use of a summary procedure.\textsuperscript{84} Most attempts to establish an overriding state or creditor interest have been rejected, and the courts have made it clear that they will jealously guard against erosion of the principles of due process.\textsuperscript{85} The risk that the debtor may abscond with or hide his property, absent a showing of special facts indicating that he will do so, has not justified taking it without notice and hearing,\textsuperscript{86} nor have the courts accepted the argument that seizure of a debtor's property is necessary to obtain security for a possible future judgment.\textsuperscript{87}

Each of the extraordinary cases in which a summary taking has been permitted involved a situation in which there was a danger of immediate, serious, and general harm to the public. For example, the Federal Drug Administration was allowed to seize products which were dangerous to health or fraudulently labeled,\textsuperscript{88} bank management was replaced summarily when there was an immediate threat of bank failure,\textsuperscript{89} and attachment of a nonresident's property was permitted as the only means available to the court to obtain jurisdiction over the defendant.\textsuperscript{90} In the first two examples, several factors coalesced to jus-

\begin{thebibliography}{99}
\bibitem{83} Randone v. Appellate Dep't, 5 Cal. 3d 536, 552-53, 488 P.2d 13, 24, 96 Cal. Rptr. 709, 720 (1971).
\bibitem{84} Id. at 557, 488 P.2d at 27, 96 Cal. Rptr. at 723; accord, Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969).
\bibitem{86} Blair v. Pitchess, 5 Cal. 3d 258, 278, 486 P.2d 1242, 1256, 96 Cal. Rptr. 42, 56 (1971).
\bibitem{87} Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).
\bibitem{89} Fahey v. Mallonee, 332 U.S. 245 (1947); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).
\bibitem{90} Ownbey v. Morgan, 256 U.S. 94 (1921); Banks v. Superior Court, 26 Cal.
tify the resort to summary procedures: (1) the seizure was undertaken to benefit the general public rather than to serve the interests of a private individual or a single class of individuals; (2) the procedures were initiated by an authorized government official; (3) immediate action was required to avoid serious harm to the public; (4) the property taken did not "vitaliy touch" an individual's life or livelihood; and (5) the taking was conducted under a narrowly drawn statute which sanctioned the summary procedure only in circumstances of great necessity. 91

However, the cases permitting the attachment of a nonresident's property did not involve the extreme public emergency or the built-in governmental protections outlined above. The Randone court commented on one of these cases as follows:

Although the "public interest" served by such "quasi-in-rem" attachment does not appear as strong as that involved in the cases discussed above, the prejudgment attachment of a nonresident's assets, under the notions of jurisdictional authority controlling at the time . . . , frequently provided the only basis by which a state could afford its citizens an effective remedy for injuries inflicted by nonresidents. 92

This "effective remedy" rationale has been adopted by appellate courts in upholding the validity of California's nonresident attachment statutes 93 and the procedure for ex parte issuance of a temporary restraining order, 94 and may be adopted to uphold the validity of lis pendens.

An analysis of possible state interests underlying a statute necessarily involves an inquiry into the origins and development of the law embodied in the statute. As discussed previously, California's statutory lis pendens procedure was developed to relieve some of the harshness and unfairness resulting from the strict application of the common law doctrine to modern circumstances. 95 It is apparent that the statutory modification requiring recordation benefits the public in general by providing a means by which third parties may become informed of
pending litigation. However, it is not the requirement of recordation, but the statutory incorporation of the common law doctrine of constructive notice, which restricts the owner's ability to transfer his property and thus invites constitutional scrutiny. It is this doctrine which must be examined to determine whether it protects a state interest sufficient to override the requirements of due process.

The authorities are not in agreement as to whether lis pendens was founded on the concept of notice or developed as a separate principle designed to promote the efficient administration of justice. Practically speaking, the effect of the doctrine is the same regardless of the theory upon which it is based, and it is generally accepted that its primary effect is to maintain the practical ability of the courts to enforce judgments concerning affected property, thereby insuring the effectiveness of the judicial process. At the heart of this rationale for the existence of lis pendens is the time-honored presumption that real property is unique and its loss not compensable in money damages. Where this presumption is valid a court unable to award specific performance is unable to provide the injured party with the only remedy historically recognized as adequate to compensate him for his loss.

Without lis pendens, the power of the court to determine who owns a given piece of realty could be effectively defeated by a simple transfer of the property, pendente lite, to a purchaser without notice. Litigation would be endless, as a sale made before a final decree would always render a decree of specific performance practically meaningless and necessitate a new suit. The resulting uncertainty in real estate transactions would seriously impair the efficiency of business activities in the state while undermining public confidence in the judicial process.

97. See G. Bispham, Principles of Equity §274 (10th ed. 1923); M. Merrill, Merrill on Notice §1141 (1952); 2 J. Pomeroy, Equity Jurisprudence §632 (3d ed. 1905); 5 H. Tiffany, Real Property §1294 (3d ed. 1939).
98. See authorities cited note 97 supra.
99. The modern codification of this principle is contained in California Civil Code Section 3387. The uniqueness of real property forms the basis of the state interest in providing adequate judicial relief. It serves to distinguish lis pendens, in terms of a state interest, from the land attachment schemes invalidated in the federal cases cited in note 34 supra, in which the attaching party's interest was not based on the unique value of land, and adequate relief could be obtained by an award of money damages.
100. See text accompanying note 10 supra.
101. 2 J. Pomeroy, Equity Jurisprudence §591, at 964 (3d ed. 1905). The doctrine of notice might be distinguished from the doctrine of lis pendens by contending that the former was developed to do equity as between the claimant and third parties, while the latter was developed to assure equity as between the claimant and the holder of legal title.
It is submitted, therefore, that maintenance of a secure legal basis for real estate transactions, which benefits the public in general as opposed to a single class of individuals, is an interest of the state. Lis pendens protects this interest by assuring the courts of control over the subject matter of real property litigation. Prior notice and hearing would defeat this state interest by allowing a period of time during which the property could be conveyed to a person who would be unaffected by the court’s decision. In view of the consequences attendant upon invalidating lis pendens, this state interest should be considered overriding.

Properly Limited Application

Assuming that an overriding state interest is found to be promoted by lis pendens, it must also be established that the doctrine is properly limited in its application to those extraordinary situations in which a state interest requires protection. In light of this limitation, lis pendens is subject to two challenges: the procedure may be utilized when (1) the state interest needs no protection and (2) there is no overriding state interest to be protected.

For purposes of providing the clearest illustration, discussion of the first objection will assume that the property involved is truly unique to the recording party and therefore that control of that particular property is necessary for the just resolution of the lawsuit. The objection is based on the fact that the statute does not require the claimant to allege any special circumstances indicating a danger that the property owner, upon notice of the claim, will deed the property to a third party to prevent satisfaction of a possible future judgment. Support for this objection can be found in Randone, in which the attachment procedure at issue was invalidated because it did not require a creditor to “point to special facts which demonstrate an actual and significant danger that the debtor . . . will flee from the jurisdiction with his assets or will conceal his property to prevent future execution.” However, the interest asserted in Randone was that of providing security for any judgment the creditor might recover, whereas a state interest in preserving the particular property necessary for a just resolution of the lawsuit might demand greater precautions. It may be contended that, ab-

103. “It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation.” CAL. CIV. CODE §3387.
104. 5 Cal. 3d at 557, 488 P.2d at 27, 96 Cal. Rptr. at 723.
105. That different considerations would be involved is suggested by the Randone opinion:
sent lis pendens, the tempting ease with which an owner of realty could deprive a claimant of his only adequate remedy, coincident with depriving the court of its ability to enforce its judgment on the subject matter of the litigation, presents a danger to the interests of both state and creditor sufficient to justify dispensing with the requirement of a showing of special circumstances.\textsuperscript{106}

The second objection presents a more legitimate challenge to the lis pendens doctrine. It is based on the contention that lis pendens may be utilized when money damages are an adequate remedy for the claimant and there is therefore no need to restrict alienation of the realty to preserve the effective jurisdiction of the court. When the recording party’s interest is not in the property itself, but only in its monetary value, then, as to that individual, the property is not unique,\textsuperscript{107} and there is no overriding state interest in preventing the transfer of the property. Effective jurisdiction may be maintained by an award of monetary damages, so long as other assets are available for execution.\textsuperscript{108}

When the recording party’s true interest is in securing his share of the proceeds from the sale of the property, and not in the property itself, the practical effect of a lis pendens is to ensure the collection of an ultimate money award. The statutory scheme itself provides for the granting of a motion to expunge the lis pendens when the court determines that adequate relief can be provided to the recording party through the securing of an acceptable undertaking.\textsuperscript{109} Such a pro-

\textsuperscript{5} Cal. 3d at 577 n.20, 488 P.2d at 27 n.20, 96 Cal. Rptr. at 723 n.20.

\textsuperscript{106} See Property Research Financial Corp. v. Superior Court, 23 Cal. App. 3d 413, 419, 100 Cal. Rptr. 233, 237 (1972), where the court upheld the procedure for summary attachment against nonresidents, noting that it is likely that a nonresident would be able to transfer himself and his assets out of the state and defeat the creditor’s claim. The court also stated, “The principle is much the same as that embodied in the statutes allowing summary filing of a \textit{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.”

\textit{Id.} See also cases cited note 90 supra.

\textsuperscript{107} In \textit{Empfield v. Superior Court} the court granted a motion to expunge the lis pendens under section 409.2 of the Code of Civil Procedure, stating, “Real property ordinarily is presumed to be unique. . . . Here, however, the [petitioners] claim the property only for its value as a source of future income and support. Pecuniary relief would equally serve as a source of future income and support.” 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375, 377 (1973).


\textsuperscript{109} CAL. CODE CIV. PROC. §409.2. See note 107 supra.
vision seems to declare openly that lis pendens may be utilized when there is no overriding state interest because control of the specific realty is not necessary for effective adjudication of the lawsuit. Further, the fact that a recording party may pray for money damages in the alternative while maintaining the right to record a lis pendens invites the claimant to seek the practical benefits of an attachment of real property when only a monetary award is desired. In this situation lis pendens would result in an unnecessary deprivation of property, as in Randone, since there is no state interest sufficient to override the taking involved.

In Randone the attachment of the debtor's bank account was not deemed necessary to assure the creditor of adequate relief, absent a showing of special circumstances. The Randone rationale appears to leave little support for the utilization of lis pendens when the affected real property is not considered unique and other assets are available for execution.

However, it is apparent that the provision for a motion to expunge upon the filing of an undertaking was enacted to apply specifically to the situation in which the property is not considered unique. As the lis pendens may be expunged twenty days after recordation, it may be contended that a twenty-day "lien" imposed by lis pendens is not a deprivation sufficient to require the safeguards of procedural due process and that there is therefore no need for an overriding state interest in that situation. To rebut this contention it may be argued that section 409.2 does not provide adequate assurance that the taking will be relieved in the above situation. There are no statutory guidelines to help the court determine when monetary relief is adequate. And even if such a determination is made, the motion is still discretionary with the court and may be denied. If the motion is granted, the title holder is required to give an undertaking, potentially of substantial amount, as security for the recording party. No such undertaking is required of the recording party. More importantly, the burden of going forward is on the property owner, and he must overcome the statutory presumption that real property is unique. Even if he is successful, his property will be effectively attached for at least twenty days and probably longer. Such burdens are similar to those that were imposed on the debtor by the release provisions which the Randone court found insufficient to cure the constitutional infirmities of the attachment stat-

111. 5 Cal. 3d at 557, 488 P.2d at 27, 96 Cal. Rptr. at 723.
112. See pp. 68-69 supra.
utes, and they were not present in the procedures upheld in *Mitchell*. It is therefore likely that, in the circumstances which present no overriding state interest to justify the summary taking, the provision for an undertaking, like the provisions of the attachment statutes, will be found ineffective to eliminate the taking occasioned by a lis pendens.

**UNWARRANTED LEVERAGE**

Most of the summary prejudgment remedies declared unconstitutional by the United States and California Supreme Courts allowed one party, prior to a determination of the merits of his claim, to obtain a coercive tool with which to pressure the other party into a premature and inequitable settlement. These remedies allowed a creditor to deprive the debtor of property essential for ordinary day-to-day living, and thus to gain enormous leverage with which to force a settlement on his own terms. The vice of the statutes was their failure to exempt "necessities of life" from the prejudgment attachment procedure.

The *Randone* court made it clear that this infirmity constitutes a separate and distinct violation of due process which requires "overwhelming consideration" to justify its "brutal" dimensions. However, it is uncertain whether this requirement is based on a principle that due process forbids a taking of such dire consequence before establishing the validity of the taker's claim or whether it is based on the practical reality that such a taking usually results in a denial of any judicial process establishing the taker's claim. The *Randone* rationale was limited in application to those items of property found to be "necessities of life," yet reference to the taking of such necessities was almost always accompanied by an explanation of the resulting pressure and unfair settlement advantage. For example, the court stated that

"because of the extreme hardships imposed by such deprivation [of necessities], a debtor is under severe pressure to settle the creditor's claim quickly, whether or not the claim is valid. Thus

113. 5 Cal. 3d at 545, 488 P.2d at 19, 96 Cal. Rptr. at 715.
116. Although we have recognized above that in certain limited circumstances a creditor's interest in a summary attachment procedure may generally justify such attachment, the hardship imposed on a debtor by the attachment of his "necessities of life" is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and a hearing on the validity of the creditor's claim. . . . This overbreadth constitutes a further constitutional deficiency.

117. Id. at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726.
sanction of such pre-notice and pre-hearing attachments of necessities will in many cases effectively deprive the debtor of any hearing on the merits of the creditor's claim.\textsuperscript{110}

Such statements, together with repeated references to supporting statements by Congressman Leonor K. Sullivan, Chairman of the House Subcommittee on Consumer Affairs,\textsuperscript{120} lead to the conclusion that the constitutional defects adhere not to the hardship factor, but to the resulting unjust out-of-court settlement.

If the constitutional defect in prejudgment attachment of necessities of life derives from the fact that such a procedure spawns unjust out-of-court settlements, it is arguable that the notice imposed by lis pendens violates procedural due process mandates by exhibiting the same deficiency.\textsuperscript{121} In Randone the attachment of television sets and other furniture of all kinds was held to impose unconstitutional pressure and leverage on the debtor.\textsuperscript{122} It is precisely this form of pressure and unwarranted leverage which has come to be identified with the lis pendens procedure and has caused the remedy to be characterized by many as a form of "legal blackmail."\textsuperscript{123} One commentator has described the situation as follows:

Used by those with little regard for the high ethical standards which the legal profession demands, it has become an effective means of creating an unwarranted, yet all-pervasive, cloud upon the title of real property. The procedural requirements necessary to effect such a result are relatively simple. The only prerequisite to recording a \textit{lis pendens} is the filing of a claim purporting to affect the title or the right to possession of real property. Once the \textit{lis pendens} appears on the record, regardless of the merits of the action which warranted it, the landowner will be hard pressed to find either prospective purchasers or respectable lending institutions willing to deal with the property. For all intents and purposes, the

\textsuperscript{120} What we know from our study of this problem [prejudgment wage garnishment] is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for, and then hounded into giving up his pound of flesh, and being fired besides.\textsuperscript{114} Cong. Rec. 1832 (1968).
\textsuperscript{121} Differences in degree are always relevant to constitutional considerations, and therefore it should be noted that the deprivation of "necessities" is more certain to result in pressure and consequent leverage than is the lien imposed by lis pendens. However, it is submitted that such abuse of the \textit{lis pendens} procedure is sufficiently widespread to require constitutional safeguards against the use of the remedy to obtain unwarranted leverage. See authorities cited note 127 infra.
\textsuperscript{122} 5 Cal. 3d at 560, 488 P.2d at 29, 96 Cal. Rptr. at 725. The court mentioned with approval the designation of these items as necessities in Blair v. Pitchess, 5 Cal. 3d 258, 279, 486 P.2d 1242, 1257, 96 Cal. Rptr. 42, 57 (1971).
\textsuperscript{123} Alexander, \textit{Lis Pendens Reform By Land Attachment}, 43 L.A. Bar Bull. 419 (1968).
land will have become inalienable. Faced with the prospect of overcrowded court calendars and prolonged litigation on one hand, and the threat of lost profits or willing purchasers on the other, the pressure will be great to settle and to settle quickly.\textsuperscript{124}

Despite the occurrence of such circumstances, there is no legal means readily available to terminate or prevent such improper use of the procedure. Slander of title is not an available remedy, as the recordation is part of a judicial proceeding which is absolutely privileged.\textsuperscript{125} Other postjudgment remedies, such as actions for malicious prosecution or abuse of process, are generally regarded as equally ineffective.\textsuperscript{126} As discussed previously, there is no meaningful prejudgment relief provided by the motions to expunge under sections 409.1 and 409.2 of the Code of Civil Procedure,\textsuperscript{127} and there is no means by which the validity or probable validity of the recording party's claim may be tested before the taking occurs. As a result, the deprived party is left to fend for himself and "[c]laims are frequently settled far beyond their worth, merely because a \textit{lis pendens} has been filed."\textsuperscript{128}

Although \textit{lis pendens} may be found to exhibit the same constitutional infirmities as does the attachment of "necessities," it presents different problems in regard to efforts aimed at curing those infirmities. \textit{Randone} dictates that a person may not be deprived of necessities of life before the validity of the creditor's claim is established.\textsuperscript{129} The infirmity is thus identified with a particular category of property, enabling the legislature to cure the defect by creating rather easily definable exemption statutes.\textsuperscript{130} However, with \textit{lis pendens} the probability of unwarranted leverage is not associated with any particular use of the property, but rather with the scruples of the particular individual employing the remedy. Under such circumstances it would appear to be an impossible task to draft a statute which exempts only those situations in which the use of \textit{lis pendens} is likely to be abused.\textsuperscript{131} However, it would not be so difficult to require some form of hearing directed


\textsuperscript{125} Albertson v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956).


\textsuperscript{127} See text accompanying notes 45-81 supra.

\textsuperscript{128} Alexander, \textit{Lis Pendens Reform By Land Attachment}, 43 L.A. BAR BULL. 419 (1968).

\textsuperscript{129} 5 Cal. 3d 536, 562, 488 P.2d 13, 30, 96 Cal. Rptr. 709, 726 (1971).

\textsuperscript{130} See, e.g., \textit{CAL. CODE CIV. PROC. §§690.1-690.29.}

\textsuperscript{131} An absolute requirement of establishing the validity of any claim before recording a \textit{lis pendens} would, of course, make the procedure meaningless.
toward making the recording party establish that his claim is at least substantial and properly motivated.

A proposal aimed at minimizing the possibility of misuse of the lis pendens procedure was recently adopted at the California State Bar Convention. This proposal, in the form of an amendment to section 409.1 of the Code of Civil Procedure, would shift to the recording party the burden of going forward and proving the probable validity of his claim. The hearing would be set by the recording party and held within fifteen days, or the constructive notice would lapse. At the hearing the recording party, after submitting a supporting affidavit, would be required to prove the following by clear and convincing evidence: (1) that the action affects title or right to possession of real property; (2) that the action was not commenced in bad faith or for an improper motive; (3) that probable cause exists to believe that the recording party will prevail and be entitled to the relief sought, insofar as it affects title or possession; (4) that he will be able to perform any conditions precedent to compelling a conveyance; and (5) that he will be irreparably injured by a transfer pendente lite. Notice would be personally served ten days prior to the hearing, and the opposing party could submit counter affidavits and such other competent evidence as the court would permit. It is submitted that such an amendment to the lis pendens statute would eliminate constitutional objections and minimize the possibility of unwarranted leverage while maintaining the viability of the lis pendens doctrine.

CONCLUSION

Sniadach v. Family Finance Corp. and its progeny presently cast doubt on the constitutionality of any ex parte prejudgment remedy by which an individual is deprived of a significant property interest. Although lis pendens does not deprive the owner of possession of his property, the remedy creates a cloud on his title which has the practical effect of preventing the owner from finding a willing buyer until resolution of the lawsuit, a process which may take several years. In situations where property is acquired for the purpose of development or resale, state action which prevents alienation of that property free of restrictions is a taking sufficient to require due process protections.

The present statutory procedure for lis pendens was enacted to mitigate the harshness of the common law doctrine of constructive notice.

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by providing for recordation of lis pendens. However, this statutory scheme is devoid of adequate due process protection since it fails to provide an opportunity to contest the validity of the claim upon which the lis pendens is recorded and it fails to accommodate the interests of the debtor either by minimizing the danger of a wrongful taking or by placing the property within the control of a responsible party. Without these limitations, the presence of a due process violation is accentuated by the absence of assurance that the party who avails himself of the lis pendens remedy will not utilize the remedy as a leverage device to pressure his adversary into an unfair settlement of the claim.

Despite the due process infirmities which may exist in lis pendens, there is sufficient justification for the remedy where it serves to promote the very important state interest of maintaining public confidence in the judicial system’s ability to render effective relief in real property litigation. However, this state interest appears to justify the hardship to the property owner caused by lis pendens only when the property is truly unique. As the application of the statutory procedure for lis pendens is not limited to such situations, the procedure may be constitutionally defective since there is no state interest to justify the taking where the interest in the property is monetary or where the property itself is unnecessary for resolution of the claim.

Adoption of a proposal similar to that of the State Bar seems necessary to cure the constitutional deficiencies of California’s present statutory scheme. By providing for a prompt hearing which would require the claimant to prove that the affected property is unique to him, the resolution would eliminate the unconstitutional aspects of lis pendens; where constitutionality is not in question, it would, without jeopardizing the state interest which lis pendens advances, remove the harshness which lis pendens creates for property owners.

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