

# Commentary

## California Enacts Lis Pendens Reform

by Barry P. Jablon

A "lis pendens" or "notice of pending action" is a recorded document which gives constructive notice to potential buyers, lenders or transferees of real property of a pending claim concerning that property. The practical effect of a lis pendens is to make the property impossible to sell, refinance or transfer unless the lis pendens is "expunged" by a court. Former law made expungement extremely difficult. As a result, many owners entered into unfavorable settlements to rid their property of a lis pendens, and even owners who were able at trial to have a lis pendens expunged often had to bring subsequent malicious prosecution actions to try to recover their true damages.

In 1989, the State Bar established a Committee, chaired by the author, to review and revise the lis pendens statutes. The Reform Act, Assembly Bill 3620, was signed into law by Governor Wilson in September 1992, and took effect on January 1, 1993, as Code of Civil Procedure § 405, et seq. The Act makes a number of significant changes, which should dramatically simplify and streamline lis pendens litigation. In general, these changes make lis pendens law much more like attachment law, with a prompt test of the "probable validity" of the lis pendens.

### **New Requirements For Filing a Lis Pendens**

The new Act clarifies that a lis pendens may be filed only when the underlying action involves a "real property claim", a cause of action which, if meritorious, would affect title to, or the right to possession of, specific real property, or the use of an easement identified in the pleading, other than an easement obtained by any regulated public utility. The new Act deletes the old requirement that the lis pendens contain a statement of the "object" of the underlying action.

### **New Grounds for Getting Rid of a Lis Pendens**

The new Act substantially modifies the procedure for expunging a lis pendens. It begins by specifying four bases upon which expungement may be sought: (i) the lis pendens is void and invalid (i.e., improper in form); (ii) the underlying action does not contain a "real property claim"; (iii) the claimant failed to establish "probable validity of the real property claim"; or (iv) a bond is adequate protection for the person claiming the lis pendens. (Probable validity of the real property claim means the person claiming the lis pendens is "more likely than not" to obtain a judgement against the defendant.)

The claimant (the person requesting the lis pendens) bears the burden of proof when a expungement is sought on the basis that the lis pendens is void or invalid, the underlying action does not contain a "real property claim", or that the claimant failed to establish "probable validity" of the claim. Most importantly, a court may review the factual basis of a lis pendens claim in determining whether the underlying case involves a "real property claim" or if that claim has "probable validity." (This authority abrogates the contrary ruling by the California Supreme Court.) The court *must* expunge without an undertaking when the claimant cannot establish that the underlying case contains a real property claim or fails to establish the probable validity of the claim. The person seeking expungement has the burden of proving that an undertaking is sufficient to protect a claimant's interest.

### **KOREK LAND COMPANY, INC.**

15230 BURBANK BLVD., SUITE 101 • VAN NUYS, CA 91411 • (818) 787-3077 • FAX (818) 787-9677  
www.korekland.com • mail@korekland.com

## **New Bond, Damage, and Attorney Fee Provisions**

The court may now order the person claiming a lis pendens post a bond whether or not a motion to expunge has been filed. The court *must* order expungement whenever monetary damages will fully compensate the claimant. For the purpose of this provision, the general presumption that real property is unique does not apply except in the case of a single-family dwelling which the claimant intends to occupy. The amount of the bond is up to the discretion of the court, based upon damage suffered by the property owner as a result of the filing of the lis pendens; the new law additionally provides for the possibility of subsequent motions to seek an increase or diminution in the amount of the bond. Finally, the new law requires that the prevailing party on any motion "shall" be awarded reasonable attorneys' fees and costs unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of fees and costs unjust.

## **Effect of Expungement**

Once a lis pendens has been expunged it may not be re-recorded without leave of the court in which the underlying case is pending. However, an expungement may not be recorded until the time to file a petition for a writ of mandate expires (generally, 20 days after the order to expunge is served on the claimant) or, if a petition is filed, until the appellate court has ruled on the petition. The trial court may extend the time to file a writ of mandate seeking review of an expungement order for an additional 10-day period. (Existing law allowed an extension of 20 days, provided the entire period did not exceed 60 days.) As before, once a lis pendens has been expunged, the underlying property is again freely transferable, with no "imputed" knowledge of the prior lis pendens.

## **Retroactivity**

It is unknown whether the new law will be held to be retroactive. The test for retroactivity is whether the change in the law is "substantive" or procedural"; here, a case might be made for either position, and we will have to wait until the first appellate decision.

*Written by Barry P. Jablon at Cox, Castle & Nicholson, a nationally recognized Century City and Orange County based law firm that specializes in complex real estate transactions and litigation. For additional information please call (310) 277-4222.*

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