

# Commentary

## Understanding the Remedy of Lis Pendens

*by Fredric W. Kessler, Esq.*

**Lis Pendens** – the words bring angst to the seller of real estate, and peace of mind to the buyer. A lis pendens is a notice of pending litigation concerning ownership or possession of real property. Recorded in the official records for the county in which the property is located, the lis pendens is intended to provide notice of the litigation to prospective purchasers. If the lis pendens is properly recorded, the interest acquired by a purchaser of the property is subject to the outcome of the lawsuit. Practically, this means that any title insurance company will show the lis pendens as an exception to coverage, and the property will thus be unmarketable.

The lis pendens can be quite useful to a buyer of real property, particularly where the seller breaches the purchase agreement. The buyer can tie up the property indefinitely while seeking specific performance of the agreement. If successful in the action, the buyer may be awarded the right to purchase the property at the contract price – often significantly below market by the time judgment is entered.

However, recordation of a lis pendens could be a costly mistake for a party lacking the legal basis to do so. If the court finds that the underlying action was brought in bad faith, the property owner may be awarded damages under a theory of malicious prosecution. If the action does not clearly involve ownership or possession of real property, the owner may prevail against the recording party in an action for slander of title. And if the lis pendens is expunged for any reason, the owner may be entitled to collect attorneys' fees from the recording party.

Despite the availability of such remedies in certain situations, recordation of a lis pendens can cause serious hardship for a property owner attempting to sell his or her property. Occasionally, a seller of property subject to a lis pendens who has sufficient assets and a strong likelihood of prevailing on the merits in the underlying action can obtain title insurance by indemnifying the title company against losses it would suffer in the event of an adverse judgment. But more commonly, the seller must opt between litigating the action (for up to five years), settling the action, or attempting to expunge the lis pendens.

A lis pendens may be expunged by any of three methods, and following expungement may only be re-recorded by approval of the court. First, the seller may show that the claim in the underlying action does not affect title to or possession of real property. For example, one California court has held that in an action alleging breach of a contract concerning the financing of improvements on defendant's land, the plaintiff was not entitled to record a lis pendens against the land. Courts have also refused to permit the recordation of a lis pendens where the plaintiff sought to foreclose a chattel (personal property) mortgage, and where the plaintiff sought to impose a trust on personal property.

Second, a lis pendens may be expunged where the plaintiff has brought the underlying action in bad faith and for an improper purpose. In this context, establishing "bad faith" requires showing that the plaintiff did not believe his or her claim was valid at the time the complaint was filed. In order to establish that an action was brought for an improper purpose, the defendant must show one of the following: (a) the action was brought solely for the purpose of depriving the property owner of the beneficial use of the property; (b) the action was brought primarily out of ill will; or (c) the action was brought for the purpose of forcing a settlement which has no relation to the merits of the claims. If the defendant can establish both bad faith and an improper purpose, then the lis pendens should be expunged.

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

Finally, a lis pendens will be expunged where the property owner posts an undertaking (a bond) in an amount sufficient to indemnify the plaintiff against any loss resulting from removing the lis pendens. In such a case, the court will expunge the lis pendens if it finds that the payment of money will give the plaintiff adequate relief. Unless the property subject to the lis pendens is clearly unique, a court may find that money will give the plaintiff adequate relief. Thus, if the property is commercial or the plaintiff's interest is primarily monetary, the posting of an undertaking generally warrants expungement of the lis pendens.

*Written by Fredric Kessler, a partner with the law firm of Nossaman, Guthner, Knox & Elliott in Los Angeles specializing in real estate transactions.*

GUEST COMMENTARIES WELCOME, and may be printed at the sole discretion of **Korek Land Company**.

092090

\*\*\*\*\*

Previous commentaries available upon request:

*A LENDER'S GUIDE TO MELLO-ROOS & ASSESSMENT LIENS, By Lewis G. Feldman, Esq. & Kathryn M. Lyddan, Esq.*  
*CERCLA ENVIRONMENTAL LIABILITY FOR LENDERS - A LOOK AT THE NEW EPA RULE, By Dean Stackel*  
*THE BROKER AS YOUR AGENT AND THE BROKER'S FIDUCIARY RESPONSIBILITIES, By Arthur Mazirow*  
*DEALING WITH THE WILLIAMSON ACT, By David L. Preiss*  
*UNDERSTANDING THE REMEDY OF LIS PENDENS, By Fredric W. Kessler*  
*LET THE FILER BEWARE THE RISKS OF A LIS PENDENS FILING, By Theresa M. Marchlewski, Esq.*  
*DEVELOPMENT AGREEMENTS, By Robert Merritt & Geoffrey Robinson, McCutchen, Doyle, Brown & Enersen*  
*HOMEOWNER ASSOCIATION CONSTRUCTION DEFECT LITIGATION AGAINST DEVELOPERS, By Richard H. Levin*  
*FORECLOSURE BIDDING STRATEGIES & THE RISKS OF A FULL CREDIT BID, By John H. Kuhl & Douglas Snyder*