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NOTES

GEORGIA'S *LIS PENDENS* STATUTE: SUGGESTED LEGISLATIVE CHANGES TO COMPLY WITH DUE PROCESS

INTRODUCTION

Georgia's statutory *lis pendens*¹ is a valuable prejudgment remedy available to litigants with claims involving real property.² Under the statute, the filing of a notice of *lis pendens* serves as notice to "all the world" that an action involving realty is pending and binds persons outside the suit to the judgment rendered.³ If the litigant who has filed a valid notice of *lis pendens* prevails in

1. The term *lis pendens* literally means "a pending suit." BLACK'S LAW DICTIONARY 840 (5th ed. 1979).

2. O.C.G.A. §§ 44-14-610 to -613 (1982).

3. O.C.G.A. § 23-1-18 (1982) defines the effect of the doctrine of *lis pendens* as it was originally developed at common law. Under this statute, notice to nonparties is effective once the action is filed and docketed. This Code section provides:

Decrees ordinarily bind only parties and their privies; but a pending action shall be a general notice of an equity or claim to all the world from the time the action is filed and docketed. If the same is duly prosecuted and is not collusive, one who purchases pending the final outcome of the litigation shall be affected by the decree rendered therein.

Id.

O.C.G.A. § 44-14-610 (1982) limits the application of the *lis pendens* doctrine when real property is involved. This statute provides that notice of a pending action involving real property affects nonparties without actual notice of the suit only after notice is filed and docketed on the *lis pendens* docket with the clerk of the superior court. This Code section states:

No action, whether seeking legal or equitable relief or both, as to real property in this state shall operate as a *lis pendens* as to any such real property involved therein until there shall have been filed in the office of the clerk of the superior court of the county where the real property is located and shall have been recorded by the clerk in a book to be kept by him for the purpose a notice of the institution of the action containing the names of the parties, the time of the institution of the action, the name of the court in which it is pending, a description of the real property involved, and a statement of the relief sought regarding the property.

Id.

the suit, her interest in the property takes priority over a buyer or encumbrancer whose interest arose after the *lis pendens* notice was filed.⁴ The practical effect of this procedure is to cloud the property title and reduce a property owner's ability to sell or encumber the property while the suit is pending.⁵

Since 1939 no major changes have been made in Georgia's *lis pendens* statute⁶ even though, beginning in 1969, the United States Supreme Court has found various statutory prejudgment creditor remedies unconstitutional for failing to comply with the procedural due process requirements of the fourteenth amendment.⁷ In striking down these statutory prejudgment remedies, the Court emphasized that, generally, a debtor must receive notice and an opportunity to be heard prior to an action by a creditor that results in a significant property deprivation.⁸

The Supreme Court's concern with summary *ex parte* creditor remedies provides the background for this Note evaluating Georgia's *lis pendens* statute.⁹ After a broad overview of the doctrine of *lis pendens*, including its purpose and effect, this Note examines Georgia's *lis pendens* statute for compliance with the due process requirements of the fourteenth amendment. Within this constitutional framework, the analysis of Georgia's *lis pendens* statute is divided into three major areas: (1) whether a *lis pendens* notice effects a significant property deprivation; (2) whether there is sufficient state involvement in the statutory procedures to constitute state action; and (3) whether the statutory procedures comply with due process.

To conclude that the statute violates the fourteenth amendment due process clause requires a finding that the application of Georgia's *lis pendens* statute results in a significant property deprivation, under state action, with statutory procedures that are inadequate to comply with fourteenth amendment due process

4. *Wilson v. Blake Perry Realty Co.*, 219 Ga. 57, 58, 131 S.E.2d 555, 556 (1963).

5. See Comment, *Does California's Statutory Lis Pendens Violate Procedural Due Process?*, 6 PAC. L.J. 62, 62 (1975). See also *infra* notes 76-78 and accompanying text.

6. 1939 Ga. Laws 345 (previously codified at GA. CODE ANN. §§ 67-2801 to -2804 (Harrison 1967)). The current version, codified at O.C.G.A. §§ 44-14-610 to -613 (1982), is essentially the same.

7. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). But see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (*ex parte* sequestration statute upheld).

8. See cases cited *supra* note 7.

9. O.C.G.A. §§ 44-14-610 to -613 (1982).

requirements.¹⁰ This Note concludes that Georgia's *lis pendens* statute is constitutionally defective and suggests changes to remedy these defects.

I. BACKGROUND

The doctrine of *lis pendens* probably evolved from ancient Roman law to remedy situations encountered by courts.¹¹ Prior to development of this doctrine, judgments regarding specific property essentially were meaningless if the property had been conveyed to a party outside the suit before final judgment.¹² The *lis pendens* doctrine altered this result by providing that the mere existence of a suit involving real property constituted notice to all the world that a claim existed against the property.¹³ This broad constructive notice, however, severely affected innocent purchasers who were unable to discover that the property was the subject of a pending suit, even after a diligent search.¹⁴ Under this doctrine, these purchasers were bound by the subsequent judgment and forfeited their interest in the property if that interest derived from the losing party in the suit.¹⁵

Generally, two theories are asserted as providing the basis for the common law *lis pendens* doctrine. One theory concludes that *lis pendens* is based on the equitable doctrine of constructive notice. Under this theory, a nonparty is charged with notice of a pending suit if her interest derives from a party to the suit while litigation is pending.¹⁶ Because of this constructive notice, the nonparty purchaser is bound by the judgment in the suit.¹⁷

The second theory rejects the idea of constructive notice and emphasizes instead the public interest in maintaining the integrity

10. See *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1321 (3d Cir. 1982) (concerning constitutionality of New Jersey's *lis pendens* statute).

11. Note, *A Proposal for Reformation of the Iowa Lis Pendens Statute*, 67 IOWA L. REV. 289, 291 (1982).

12. Comment, *supra* note 5, at 63.

13. 1 A. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 519, at 1114-15 (5th ed. 1925). Under the original common law doctrine notice of a pending suit was effective once a bill was filed, but the notice was retroactive to the time when the subpoena was served on the opposing party, which occurred prior to the filing of the bill. *Id.*

14. 3 AMERICAN LAW OF PROPERTY § 13.12, at 521 (A. Casner ed. 1952); Note, *Connecticut's Lis Pendens Shapes Up: Williams v. Bartlett*, 16 CONN. L. REV. 413, 414 (1984).

15. 3 AMERICAN LAW OF PROPERTY, *supra* note 14, § 13.12, at 521.

16. 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 632, at 726-27 (5th ed. 1941); *Bridger v. Exchange Bank*, 126 Ga. 821, 826, 56 S.E. 97, 100 (1906).

17. See authorities cited *supra* note 16.

of the judicial system by ensuring that a final judgment is given full effect.¹⁸ According to this view, the judgment affects nonparties because the court maintains jurisdiction over the contested property. Maintenance of jurisdiction is necessary to prevent a litigant from conveying the property to the prejudice of the opposing party. Theoretically, the potential for endless litigation exists if parties are permitted to convey their property interests during a pending suit unless those outside the suit are bound by the subsequent judgment.¹⁹

Regardless of the original basis for the doctrine, the effect at common law was that interests in property originating while a suit was pending were forfeited if the interest derived from the losing party.²⁰ Simply put, persons outside the suit were bound by the judgment in the suit.²¹

Georgia originally codified the common law doctrine of *lis pendens* in the Civil Code of 1895.²² Under this codification, the mere filing and docketing of a suit was sufficient to bind persons outside the suit to the judgment rendered. Consequently, purchasers who bought property while a suit was pending were subject to forfeiting their interest in that property, even if they had no knowledge of the pending suit.²³

18. See authorities cited *supra* note 16.

19. See authorities cited *supra* note 16. In *Bridger*, the court cited *Bellamy v. Sabine*, 1 DE G. & J. 564, 44 Eng. Rep. 842 (1857), for an explanation of this theory:

[I]t is necessary to the administration of justice that the decision of the Court in a suit should be binding, not only on the litigant parties, but on those who derive title from them *pendente lite*

. . . .

[Otherwise] it would plainly be impossible that any action or suit could be brought to a successful termination

Bridger, 126 Ga. at 826, 56 S.E. at 100 (quoting *Bellamy*, 1 DE G. & J. at 564, 584, 44 Eng. Rep. at 842, 849).

In *Tinsley v. Rice*, 105 Ga. 285, 288, 31 S.E. 174, 176 (1898), the court defined *lis pendens* as the "jurisdiction, power, or control which the court acquires over the property involved in the suit pending the continuance of the action and until the final judgment therein." *Id.*

20. 2 J. POMEROY, *supra* note 16, § 632, at 730.

21. *Id.*

22. GA. CIVIL CODE § 3936 (1895).

23. *Bennett v. Stokey*, 164 Ga. 694, 139 S.E. 346 (1927). Plaintiff Bennett purchased realty from Mary Wise during a pending suit filed by A.J. Stokey against the seller, Mary Wise. Stokey's suit sought to cancel a warranty deed to certain real property Mary Wise had received from her husband, Milton Wise. Stokey prevailed in the suit to cancel and set aside the warranty deed. Stokey also won in a separate suit against Milton Wise and as a result of that judgment all of the property originally conveyed to Mary Wise by the warranty deed, including the real property later purchased by Bennett, was sold at a sheriff's sale for \$600. Bennett filed this action in response to

In 1939 the Georgia Legislature enacted a *lis pendens* statute that substantially modified the 1895 codification by restricting the effect of the constructive notice that the statute recognized.²⁴ Georgia's current *lis pendens* statute is essentially the same as the one adopted in 1939.²⁵ In order to bind nonparty purchasers to the judgment in a suit, the current statute requires that a person filing an action involving real property also file a notice of *lis pendens* with the clerk of the superior court in the county where the real property is located.²⁶ This notice of *lis pendens*, properly filed and indexed, serves as notice to those outside the suit that the property is the subject of litigation.²⁷ Once this notice is filed persons who buy the property while the suit is pending do so at their peril. By limiting the necessary property record search to the *lis pendens* docket of the superior court where the land is located,²⁸ the Georgia Legislature followed other states in ameliorating the harsh effects of the broad constructive notice that were incorporated into the common law doctrine.²⁹

The statutory *lis pendens* notice protects several important governmental and private interests. By providing an orderly notice and recording system, the statutory *lis pendens* helps ensure that suits are brought to a successful termination.³⁰ Additionally, inno-

Stokey's efforts to evict her from the property that she had purchased from Mary Wise without actual notice of the suit and on which she built a house that increased the property value to \$3000. The court denied plaintiff's petition to enjoin defendant Stokey from interfering with plaintiff's possession and title to real property, holding that the doctrine of *lis pendens* bound plaintiff to the result of the suit between Stokey and Mary Wise to cancel the deed. In reaching this conclusion, the court stated that a buyer who interferes with property in litigation does so at her peril. *Id.* at 694.

24. 1939 Ga. Laws 345 (previously codified at GA. CODE ANN. §§ 67-2801 to -2804 (Harrison 1967)). This statute provided:

No suit, whether seeking legal or equitable relief, or both, as to real property in this State, shall operate as a *lis pendens* as to any such real property involved therein until there shall have been filed in the office of the clerk of the superior court of the county where such real property is situated, and shall have been recorded by such clerk in a book to be kept by him for the purpose, a notice of the institution of such suit, containing the names of the parties, the time of the institution of the suit, the name of the court in which it is pending, a description of the real property involved and a statement of the relief sought as to such property.

GA. CODE ANN. § 67-2801 (Harrison 1967).

25. O.C.G.A. §§ 44-14-610 to -613 (1982). For the text of O.C.G.A. § 44-14-610, see *supra* note 3.

26. O.C.G.A. § 44-14-610 (1982).

27. *Id.*

28. *See id.*

29. *See* 1 A. FREEMAN, *supra* note 13, § 520, at 1117.

30. *See supra* text accompanying notes 18-19. Note, *supra* note 11, at 290.

cent third parties are protected because they can easily check the appropriate *lis pendens* docket to see whether property is the subject of a suit and thus guard against fraudulent conveyances while suits are pending.³¹ Finally, litigants claiming an interest in land can preserve any potential rights in the property during the pending suit by filing a notice of *lis pendens*. This notice protects the litigant's interest in real property.³²

The protection that the statute provides in preserving these important interests, however, conflicts with the property owner's interest in unrestricted use of her property.³³ This conflict is constitutionally significant because the statute lacks procedural safeguards to protect the owner from an improper deprivation of a property interest that could result from abuse of the *lis pendens* procedure.³⁴

II. DUE PROCESS CONSIDERATIONS

The Supreme Court has interpreted the fourteenth amendment to require that when a state acts to deprive a person of a protected property interest, the procedures creating this deprivation must be adequate to guard against arbitrary property deprivations.³⁵ These requirements are commonly referred to as procedural due process requirements.³⁶ Between 1969 and 1975, the Supreme Court applied these fourteenth amendment due process requirements in four significant cases involving *ex parte* prejudgment creditor remedies.³⁷ The standards that the Court articulated in these cases indicate that the *ex parte* prejudgment remedy available to creditors

31. See O.C.G.A. §§ 44-14-610 to -613 (1982).

32. See, e.g., *Wilson v. Blake Perry Realty Co.*, 219 Ga. 57, 131 S.E.2d 555 (1963) (*lis pendens* provides protection for plaintiff against conveyance of property once notice of *lis pendens* is filed).

33. See *infra* notes 75-96 and accompanying text.

34. See O.C.G.A. §§ 44-14-610 to -613 (1982). See generally Note, *supra* note 14; Note, *Lis Pendens—New Jersey's Lis Pendens Statute Not Violative of Due Process*, 13 SETON HALL L. REV. 115 (1982); Note, *supra* note 11; Comment, *supra* note 5, at 63.

35. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

36. See *id.* at 80.

37. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (debtor's wages frozen by creditor pending outcome of suit on the merits); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (household appliances seized by creditor pending outcome of suit on the merits); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (significant deprivation suffered by alleged debtor when household appliances seized by creditor pending outcome of suit, but statutory procedures complied with due process requirements); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (corporate checking account garnished by creditors pending outcome of suit on the merits of creditor's claim).

under Georgia's *lis pendens* statute may be constitutionally defective.³⁸

A. *Whether a Lis Pendens Notice Effects a Significant Property Deprivation*

1. *Due Process Standards*

In each of the four important prejudgment remedy cases that the Supreme Court decided since 1969, the Court concluded that the property deprivation resulting from the prejudgment seizure of personalty and money was a sufficient deprivation of a protected interest to warrant due process considerations.³⁹ These cases provide guidance in evaluating whether the application of Georgia's *lis pendens* statute also results in a significant property deprivation.

The first significant Supreme Court case to invalidate a prejudgment remedy was *Sniadach v. Family Finance Corp.*⁴⁰ In that case, the debtor allegedly owed the creditor \$420 on a promissory note. Pursuant to Wisconsin's garnishment statute, the creditor instituted a garnishment action against the debtor and her employer as garnishee, and the employer-garnishee withheld one-half of the debtor-employee's unpaid wages pending the outcome of the creditor's suit on the merits of his claim.⁴¹ The Supreme Court found this taking without notice and a prior hearing to be unconstitutional, even though the debtor would not be permanently deprived of her wages if she were to prevail on the merits of the claim.⁴² According to the Court, the wage earner was entitled to notice and a prior hearing even for this potentially temporary deprivation.⁴³

The holding in *Sniadach* was reaffirmed and further developed by the Court in *Fuentes v. Shevin*.⁴⁴ In *Fuentes*, the Court held that the due process requirements of notice and a prior hearing

38. See *North Georgia Finishing*, 419 U.S. 601 (1975); *Mitchell*, 416 U.S. 600 (1974); *Fuentes*, 407 U.S. 67 (1972); *Sniadach*, 395 U.S. 337 (1969).

39. See *supra* note 37.

40. 395 U.S. 337 (1969).

41. *Sniadach*, 395 U.S. at 338.

42. *Id.* at 342. Justice Harlan's concurring opinion emphasized that, even if the debtor were to prevail and not be permanently deprived of her money, the deprivation of the use of her money in the interim period between the garnishment and the final litigation could not be characterized as *de minimis*. *Id.* (Harlan, J., concurring).

43. *Sniadach*, 395 U.S. at 339. The Court expressed concern about the unfair leverage the creditor had over the debtor when the debtor's wages were frozen without notice or a prior hearing. With this leverage the creditor could coerce the debtor to accept additional fees in exchange for gaining access to the garnished wages. *Id.* at 341.

44. 407 U.S. 67 (1972).

were necessary before a debtor could be deprived, even temporarily, of nonessential consumer goods through a writ of replevin.⁴⁵

At issue in *Fuentes* were the replevin statutes of Florida and Pennsylvania. Pursuant to the Florida replevin statute, a creditor seized a stove and a stereo from an allegedly delinquent debtor. These items were purchased on a conditional sales contract, and about \$200 was outstanding on the balance when the items were seized.⁴⁶ Under the authority of a Pennsylvania statute, a deputy sheriff seized from his wife clothes, furnishings, and toys belonging to their son when a dispute arose over custody of the child.⁴⁷

Both states' replevin statutes permitted the individuals whose goods had been seized to post a bond double the value of the seized property within three days of the seizure to regain possession of the goods.⁴⁸ Theoretically, this bond provision reduced the impact of the deprivation because the debtor could regain possession of the goods within three days of the seizure. Despite the bond provision, however, the Supreme Court reaffirmed its position in *Sniadach* that even "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment"⁴⁹ and declared the Florida and Pennsylvania replevin statutes unconstitutional for failing to comply with due process requirements.⁵⁰

In addition to reaffirming the Court's position that even temporary property deprivations are constitutionally significant, the *Fuentes* decision is important because it expanded the reach of the due process clause to include property interests other than the wages at issue in *Sniadach*.⁵¹ The holding in *Fuentes* established that the need for procedural due process is not limited to situations effecting a deprivation of "absolute necessities," as a narrow

45. *Fuentes*, 407 U.S. at 96.

46. *Id.* at 70.

47. *Id.* at 72.

48. *Id.* at 84.

49. *Id.* at 85. The Court's language in *Fuentes* suggests that the need for procedural due process safeguards is not limited to situations effecting a total deprivation of property:

Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of a hearing, it is not decisive of the basic right to a prior hearing of some kind.

Id. at 86.

50. *Id.* at 96.

51. *Id.* at 88-90.

reading of *Sniadach* might imply.⁵²

The Court appeared to retreat from the strong due process stand previously articulated in *Fuentes* and *Sniadach* when it upheld Louisiana's sequestration statute in *Mitchell v. W.T. Grant Co.*⁵³ The statute at issue in *Mitchell* authorized seizure of a debtor's property without notice or a prior opportunity to be heard.⁵⁴ In reaching this decision, however, the Court determined that the statutory procedures were sufficient to reduce the risk of the debtor suffering an erroneous property deprivation.⁵⁵ The Court acknowledged that the debtor suffered a property deprivation, but the Court considered this initial deprivation "limited" because the procedure provided for initial judicial involvement to determine whether the property should be seized and a prompt opportunity for a hearing after the property was taken.⁵⁶ As a result, the Court concluded, "The system protects the debtor's interest in every conceivable way."⁵⁷

Concern that *Mitchell* had signaled the Court's retreat from the due process standards previously articulated⁵⁸ was diminished by the Court's holding in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*⁵⁹ In *North Georgia Finishing*, the Supreme Court declared Georgia's garnishment statute unconstitutional for failing to comply with due process.⁶⁰ The statute permitted the creditor, who alleged the debtor corporation owed \$51,279.17 for goods delivered, to obtain a process of garnishment simultaneously with the filing of a suit for the alleged debt.⁶¹ The clerk of the superior court issued the garnishment naming the debtor's bank as garnishee on the basis of the creditor's conclusory affidavit stating that the money claimed in the suit was owed by the debtor, and that the garnishment process was necessary to avoid loss of this money.⁶² The debtor subsequently posted a bond with the court sufficient to pay the amount claimed in the underlying suit and thus avoided

52. *Id.*

53. 416 U.S. 600 (1974).

54. *Mitchell*, 416 U.S. at 606.

55. *Id.* at 618. The sufficiency of these procedures is considered *infra* at notes 168-70 and accompanying text.

56. *Id.* at 618-19.

57. *Id.* at 618.

58. *Id.* at 629 (Stewart, J., dissenting, joined by Justices Douglas and Marshall).

59. 419 U.S. 601 (1975).

60. *North Georgia Finishing*, 419 U.S. at 608.

61. *Id.* at 603-04.

62. *Id.* at 604.

losing the use of the frozen funds during the pendency of the suit.⁶³ In spite of this bond provision, the debtor claimed that this impoundment resulted in a fourteenth amendment due process violation.⁶⁴

Contrary to the subsequent United States Supreme Court decision in the case, the Georgia Supreme Court considered the impoundment of the corporate debtor's funds insignificant because the deprivation would not be permanent until a judgment was rendered.⁶⁵ In reaching this conclusion, the Georgia Supreme Court compared the effect of the writ of garnishment to a *lis pendens* notice.

The effect of the writ of garnishment is, therefore, to impound any asset or property of defendant which is found in the hands of the garnishee pending the resolution of the merits of the garnisher's claim. The writ itself constitutes, at most, a *lis pendens* notice that a right to perfect a lien on the garnisheed [sic] property exists, but such perfection must await judicial action.⁶⁶

The Georgia Supreme Court acknowledged *Sniadach* in the opinion,⁶⁷ but narrowly construed that case as an exception to the general constitutionality of *ex parte* prejudgment remedies. In essence, the Georgia court held that the holding in *Sniadach* was limited to prejudgment seizure of wages.⁶⁸

The United States Supreme Court found this narrow reading of *Sniadach* misplaced, especially in light of its decision in *Fuentes*.⁶⁹ The Court noted that the Georgia Supreme Court failed to consider *Fuentes* in deciding that the garnishment statute at issue in *North Georgia Finishing* was constitutional, even though *Fuentes* was decided more than a year before the Georgia court reached its decision.⁷⁰ *Fuentes*, therefore, made it clear that *Sniadach* was not a narrow decision applicable only when a debtor was deprived of her wages.⁷¹

63. *Id.*

64. *Id.* at 604-05.

65. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 231 Ga. 260, 263, 201 S.E.2d 321, 323 (1973), *rev'd*, 419 U.S. 601 (1975).

66. *Id.* at 263, 201 S.E.2d at 323 (quoting *Kuffel v. United States*, 103 Ariz. 321, 325, 441 P.2d 771, 775 (1968)).

67. *Id.* at 263, 201 S.E.2d at 323.

68. *Id.* at 263-64, 201 S.E.2d at 323-24.

69. *North Georgia Finishing*, 419 U.S. at 605-06.

70. *Id.*

71. *Fuentes*, 407 U.S. at 88-89 (Although *Sniadach* "emphasized the special impor-

In *North Georgia Finishing*, the United States Supreme Court declined to differentiate between different kinds of property when considering whether the due process clause was applicable to a potentially temporary deprivation.⁷² Instead, the Court emphasized that the probability of irreparable harm was sufficient to require initial procedural safeguards against the risk of an erroneous deprivation. According to the Court, these safeguards were necessary even though the deprivation of corporate funds was not potentially as significant as the deprivation suffered by a consumer dispossessed of household goods.⁷³ The Court reasoned that the severity of the deprivation was an appropriate factor to consider in determining the sufficiency of statutory procedures, but it should not be "determinative of the right to a hearing of some sort."⁷⁴

2. *Deprivation Resulting From a Notice of Lis Pendens*

By way of analogy, the risk of irreparable injury from a *lis pendens* notice also is significant, even if the property owner ultimately prevails in the litigation and the deprivation is only temporary.⁷⁵ A *lis pendens* notice clouds title to property, which impairs the owner's ability to market the property during the pendency of the suit.⁷⁶ If an owner's main objective is to transfer or encumber the property, and the *lis pendens* notice acts to restrict that use of the property, then this deprivation is significant.⁷⁷ The potential impact is most obvious when land is purchased for development and resale. If a developer is unable to market the property or obtain sufficient financing to develop the property because a notice

tance of wages . . . [it] did not convert that emphasis into a new and more limited constitutional doctrine."). See *supra* text accompanying notes 51-52.

72. *North Georgia Finishing*, 419 U.S. at 608.

73. *Id.*

74. *Id.* at 606.

75. See Comment, *supra* note 5, at 65-66.

76. See *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1321-24 (3d Cir. 1982) (evidence by title expert that a title insurance policy would not be issued during the pendency of a notice of *lis pendens*); *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 564, 420 N.E.2d 343, 347 (1981) (court acknowledged that memorandum of *lis pendens* temporarily restricts owner's ability to sell property because property owner is unable to convey clear title while suit is pending).

77. See *Chrysler*, 670 F.2d at 1321-24 (degree of deprivation from notice of *lis pendens* sufficient to warrant due process considerations, but New Jersey's statutory *lis pendens* procedure sufficient to comply with due process); *Debral Realty*, 383 Mass. at 565, 420 N.E.2d at 347-48 (although substantial economic effects result from *lis pendens* memorandum, due process requirements are satisfied by current procedures because deprivation not significant enough to require prior hearing before *lis pendens* memorandum is filed).

of *lis pendens* has been filed, then the developer is deprived of the intended, most beneficial use of the property. The litigation could take years to resolve, and the assets in the property would be unavailable for the developer's use and enjoyment during the pendency of the suit.⁷⁸

The resulting harm suffered by the property owner is similar to that suffered by the corporate debtor in *North Georgia Finishing*,⁷⁹ whose assets were tied up in a garnished bank account.⁸⁰ The most beneficial use of a bank account is free access to the use and possession of the money in the account. In *North Georgia Finishing*, the denial of access to the money was considered a significant deprivation.⁸¹ Although an owner whose property is subject to a *lis pendens* notice does not suffer a similar seizure of property, physical possession of vacant commercial land is of little value to the landowner. The landowner, like the corporate debtor in *North Georgia Finishing*, is deprived of the most beneficial use of the property because the notice of *lis pendens* restricts her ability to sell or develop the land—possibly the only beneficial use for the property.⁸²

Even though the property owner's interest in realty is not the same as the corporate debtor's liquid assets at issue in *North Georgia Finishing*, the Court's holding in that case indicates that, in applying the due process clause, the focus should be on the "probability of irreparable injury" and not on the type of property at issue.⁸³ If the property owner has all her assets tied up in the property, but is unable to sell the property because the *lis pendens* notice prevents conveyance of clear title, serious financial difficulties, or even bankruptcy, could result and cause potentially irreparable injury.⁸⁴ The potential for an irreparable injury exists, therefore, even though a *lis pendens* notice does not effect a physical

78. See Comment, *supra* note 5, at 65-66. The length of deprivation resulting from a *lis pendens* is potentially significant because notice of *lis pendens* is considered binding while the suit is in an appellate court. 1 A. FREEMAN, *supra* note 13, § 542, at 1157.

79. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).

80. See Comment, *supra* note 5, at 65-66 (discussing similarity of harm suffered by property owner and corporate debtor in *North Georgia Finishing*).

81. See *supra* notes 72-74 and accompanying text.

82. See Comment, *supra* note 5, at 65-66, 66 n.28.

83. *North Georgia Finishing*, 419 U.S. at 608.

84. See, e.g., Brief for Appellees at 1-2, *Jay Jenkins Co. v. Financial Planning Dynamics, Inc.*, 256 Ga. 39, 343 S.E.2d 487 (1986) ("The notice of *lis pendens* . . . created a serious financial emergency for appellees insofar as it constituted a cloud on the title of the properties which prevented critical refinancing and sales needed to generate operating capital.").

deprivation of property similar to that suffered by the debtors in *Sniadach, Fuentes, Mitchell, and North Georgia Finishing*.⁸⁵

Rather than focusing on the possibility of irreparable injury, the Georgia Supreme Court in *Aiken v. Citizens & Southern Bank*,⁸⁶ focused on the lack of physical property deprivation when a *lis pendens* notice is filed and concluded that a *lis pendens* notice does not effect a significant property deprivation.⁸⁷ In reaching this conclusion, the Georgia Supreme Court found it significant that a landowner is not legally prohibited from selling property after a *lis pendens* notice is filed.⁸⁸ The Georgia court stated that a *lis pendens* merely provides notice to potential buyers that the realty is the subject of a suit.⁸⁹

Although an owner is not deprived of physical possession, the owner who wishes to sell property generally is unable to do so because she cannot convey clear title, even if she is not legally prohibited from selling it.⁹⁰ By focusing on the owner's legal ability to sell property in concluding that there is not a significant property deprivation when a *lis pendens* notice is filed, the court in *Aiken* placed form over substance and ignored the "practical realities of the real estate business."⁹¹

The most recent federal court to review the constitutionality of a *lis pendens* statute acknowledged the realities of the real estate market and found that New Jersey's *lis pendens* notice restricted the owner's ability to alienate the property because that notice acted as a cloud over the title.⁹² In *Chrysler Corp. v. Fedders Corp.*,⁹³ the Third Circuit Court of Appeals found the deprivation resulting from the *lis pendens* notice sufficient to warrant further analysis to determine whether New Jersey's *lis pendens* proce-

85. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

86. 249 Ga. 481, 291 S.E.2d 717, cert. denied, 459 U.S. 973 (1982).

87. *Id.*

88. *Aiken*, 249 Ga. at 482, 291 S.E.2d at 719.

89. *Id.*

90. See *supra* notes 76-78 and accompanying text.

91. See Comment, *supra* note 5, at 68.

92. *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1322, 1324-25 (3d Cir. 1982). After concluding that a significant property deprivation resulted from the *lis pendens* notice, the court of appeals ultimately concluded that New Jersey's *lis pendens* statutory procedures were sufficient to comply with due process considerations and reversed the district court's holding that New Jersey's *lis pendens* statute was unconstitutional. *Id.* at 1331, vacating 519 F. Supp. 1252 (D.N.J. 1981).

93. 670 F.2d 1316 (3d Cir. 1982).

dures complied with due process considerations of fairness.⁹⁴

Some courts have agreed with the Third Circuit's conclusion that a *lis pendens* notice effects a significant property deprivation. In reaching this conclusion, courts have distinguished between situations in which an owner intends to alienate or encumber the property and is restricted or severely hampered from accomplishing this objective due to the cloud over the title created by the *lis pendens* notice and situations in which the property owner does not intend to alienate or encumber the property.⁹⁵ These courts have determined that a significant property deprivation results when the owner intends to alienate or encumber property because the restriction created by the *lis pendens* notice interferes with the owner's ability to sell or encumber the property, thus depriving the owner of free use and enjoyment of the property.⁹⁶

In contrast, other courts have considered it significant that the property owner remained in possession of the property and was not legally constrained from alienating or encumbering the property.⁹⁷ Consistent with the Georgia Supreme Court's decision in *Aiken v. Citizens & Southern Bank*,⁹⁸ courts focusing on possession and the legal right to sell property have concluded that a *lis pendens* does not create a significant property deprivation.⁹⁹ Under this analysis, a property owner who has no desire to sell or encumber property does not suffer a property deprivation when a *lis pendens* notice is filed because the owner is not deprived of possessory interest or the intended use of the property. Furthermore, even owners desiring to sell or encumber property do not suffer a significant deprivation because a *lis pendens* notice does not create a lien or legally prohibit alienation.¹⁰⁰

94. *Chrysler*, 670 F.2d at 1324-25.

95. *Id.* at 1325; *Kukanskis v. Griffith*, 180 Conn. 501, 509, 430 A.2d 21, 25 (1980) (*lis pendens* interferes with an owner's right to alienate real estate). See *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 565, 420 N.E.2d 343, 347-48 (1981) (substantial economic effects result from *lis pendens* memorandum; but due process requirements are satisfied by current procedures because deprivation not significant enough to require prior hearing before memorandum is filed).

96. See cases cited *supra* note 95.

97. *Batey v. Digirolamo*, 418 F. Supp. 695, 697 (D. Haw. 1976) (injury only speculative from the potential cloud on real property title when *lis pendens* notice is filed); *George v. Oakhurst Realty, Inc.*, 414 A.2d 471, 474 (R.I. 1980) (*lis pendens* merely creates notice of pending suit; no confiscation or lien results).

98. 249 Ga. 481, 291 S.E.2d 717, *cert. denied*, 459 U.S. 973 (1982).

99. See cases cited *supra* note 97.

100. See cases cited *supra* note 97. The Supreme Court's language, however, suggests that due process considerations are not limited to physical deprivations only. See *supra* note 49.

Contrary to the conclusion that reduced alienability is insufficient to constitute a significant property deprivation, several federal court decisions hold that the impairment of marketability and mortgageability resulting from a nonpossessory prejudgment real estate attachment constitutes a significant property deprivation requiring fourteenth amendment due process considerations.¹⁰¹ By analogy, these cases support the proposition that a *lis pendens* notice creates a property deprivation. Significantly, the resulting economic effects from these prejudgment attachments are similar to those felt by an owner attempting to sell property after a *lis pendens* notice has been filed. When a prejudgment real estate attachment or a *lis pendens* notice is filed, the owner's ability to sell or encumber the property is significantly diminished, even though the owner is not deprived of possession of the land nor prohibited from selling it.¹⁰² In concluding that the deprivation of unrestricted use of real property resulting from a prejudgment attachment is constitutionally significant, these courts recognized that this deprivation is qualitatively different from the deprivation resulting from garnishment or replevin, but found that constitu-

101. See *Terranova v. Avco Fin. Servs. of Barre, Inc.*, 396 F. Supp. 1402, 1406-07 (D. Vt. 1975) (prejudgment nonpossessory real estate attachment impairs market value of real estate, which causes significant property deprivation even though the owner is not deprived of possession); *Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus.*, 365 F. Supp. 1299, 1304-06 (D. Mass. 1973) (reduced alienability of real property resulting from nonpossessory real estate attachment interferes with owner's unrestricted use of real property and creates significant property deprivation); *Clement v. Four North State St. Corp.*, 360 F. Supp. 933, 935 (D.N.H. 1973) (significant property deprivation results from filing of nonpossessory real estate attachment because attachment impairs owner's right to unrestricted use of property). *But see Oakhurst Realty*, 414 A.2d at 474 (notice of *lis pendens* is not equivalent to a real estate attachment because it serves only as notice and does not constitute a lien).

102. Compare cases cited *supra* notes 92 & 95 with cases cited *supra* note 101.

A prejudgment real estate attachment differs from a *lis pendens* because the attachment actually constitutes a lien, a legal interest in the property. See O.C.G.A. § 18-3-74 (Supp. 1987) (lien arises after levy); O.C.G.A. § 18-3-31 (1982) (levy on real property requires recording in appropriate docket); O.C.G.A. § 18-3-14 (1982) (notice of attachment to defendant required). Legally, a *lis pendens* constitutes only notice of a potentially superior property interest. However, the effect of these prejudgment remedies are similar: if the *lis pendens* claimant is successful, a superior property interest will be created, and this interest takes priority over other interests that arose after the notice was filed. Importantly, prejudgment attachment is appropriate only in limited circumstances (O.C.G.A. § 18-3-1 (1982)) and requires judicial participation, affidavit by claimant with specific facts to support alleged interest (O.C.G.A. § 18-3-9 (1982)), and bond sufficient to cover any damages suffered by the defendant as a result of improper attachment (O.C.G.A. § 18-3-10 (1982)).

tional protection is not limited to physical deprivation.¹⁰³

Similarities between the effect of a *lis pendens* notice and the filing of a mechanic's and materialmen's lien also should be considered in determining whether a significant property deprivation results from a notice of *lis pendens*. Georgia's mechanic's and materialmen's lien statute permits the filing of a lien without notice or opportunity for a hearing.¹⁰⁴ When this statutory procedure was challenged on constitutional grounds in *Tucker Door & Trim Corp. v. Fifteenth Street Co.*,¹⁰⁵ the Georgia Supreme Court acknowledged the relevance of the due process standards articulated in *North Georgia Finishing, Mitchell, Fuentes, and Sniadach*. The court distinguished those cases, however, primarily on the basis that a mechanic's or materialmen's lien does not disturb an owner's possessory interest in property, nor does it prevent the property's sale or encumbrance, even though it might make such sale or encumbrance more difficult to accomplish.¹⁰⁶ The Georgia Supreme Court compared the effect of the lien to that of a notice of *lis pendens*, and held that the lien merely gives notice to potential purchasers or encumbrancers of a superior interest in the property.¹⁰⁷ In concluding that the statute is constitutional, the Georgia Supreme Court considered it significant that the statute permitted an owner to discharge a lien by filing a bond.¹⁰⁸ The court also perceived that an important public benefit was derived from the lien in protecting the construction industry, which the court found to be vulnerable and in need of special protection.¹⁰⁹

Although there are similarities between the effects of a mechanic's or materialmen's lien and a *lis pendens* notice, significant differences exist between the situations in which each of them is filed.¹¹⁰ For example, in analyzing these differences the Third

103. See cases cited *supra* note 101.

104. O.C.G.A. §§ 44-14-360 to -364 (Supp. 1987). A mechanic's lien is "[a] claim created by state statutes for the purpose of securing priority of payment of the price or value of work performed and materials furnished in erecting or repairing a building" BLACK'S LAW DICTIONARY 885 (5th ed. 1979).

105. 235 Ga. 727, 221 S.E.2d 433 (1975).

106. *Tucker Door & Trim*, 235 Ga. at 728-29, 221 S.E.2d at 434 (1975); *accord Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974).

107. *Tucker Door & Trim*, 235 Ga. at 729, 221 S.E.2d at 434.

108. *Id.*

109. *Id.*

110. Compare O.C.G.A. §§ 44-14-360 to -364 (Supp. 1987) with O.C.G.A. §§ 44-14-610 to -613 (1982).

Circuit in *Chrysler* reasoned that the restriction on alienability resulting from a mechanic's lien could be viewed as a restriction for which the parties bargained. As a result, in entering into the contract for services and materials, the property owner realized that if she did not pay for the services or material provided by the contractor, a lien might be filed.¹¹¹ Also, the public's interest in protecting the construction industry, which the Georgia Supreme Court found persuasive in upholding the mechanic's or materialmen's lien statute,¹¹² is not necessarily present when a *lis pendens* notice is filed.

Additionally, significant procedural differences exist between the two statutes. Under Georgia's mechanic's and materialmen's lien statute, the contractor's claim of lien must be filed within three months of completing the work, an action must be commenced within twelve months of the time when the amount claimed became due, and it must specify the amount allegedly owed by the debtor.¹¹³ Under Georgia's *lis pendens* statute, the person filing the notice of *lis pendens* need allege only that the claim "involves" real property.¹¹⁴ Because Georgia's *lis pendens* statute does not require that an amount be specified or even limit the time in which the notice must be filed, the resulting deprivation is potentially greater with a *lis pendens* notice than with a specified lien because the owner and potential purchasers are unsure of the extent of the property interest that may be in jeopardy.¹¹⁵ Furthermore, Georgia's mechanic's and materialmen's lien statute allows the alleged debtor to discharge the lien by filing a bond, which potentially reduces the length and consequent severity of the deprivation.¹¹⁶ No bond provision is included in Georgia's *lis pendens* statute.¹¹⁷

The standards articulated by the Court in *North Georgia Finishing*,¹¹⁸ *Fuentes*,¹¹⁹ and *Sniadach*¹²⁰ indicate that even a tempo-

111. *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1324 (3d Cir. 1982).

112. See *supra* text accompanying note 109.

113. O.C.G.A. § 44-14-361.1(a)(2), (3) (Supp. 1987).

114. O.C.G.A. § 44-14-610 (1982). See *infra* note 178 for cases defining "involved."

115. See Note, *supra* note 11, at 297; Comment, *supra* note 5, at 67.

116. See O.C.G.A. § 44-14-364(a) (Supp. 1987) (owner of residential real estate may discharge lien by posting bond for the amount claimed in the lien; owner of nonresidential real property may release lien by filing bond double the amount claimed in the lien).

117. O.C.G.A. §§ 44-14-610 to -613 (1982).

118. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (potentially temporary deprivation of corporate funds warrants due process considerations).

119. *Fuentes v. Shevin*, 407 U.S. 67 (1972) (notice and prior hearing necessary before debtor could be deprived even temporarily of nonessential consumer goods).

120. *Sniadach v. Family Fin. Corp.*, 375 U.S. 337 (1969) (wage earner entitled to

rary deprivation of property requires procedures that comply with due process. The concern expressed by the Court in these cases further suggests that procedural due process requirements are not limited to situations effecting a deprivation of all uses of property.¹²¹ Accordingly, a strong argument exists that a constitutionally significant property deprivation results when a *lis pendens* notice is filed because an owner's ability to encumber or transfer the property is severely restricted.¹²² Although the owner is not legally prohibited from selling or encumbering the property, the realities of the real estate world may render this legal right virtually worthless.¹²³ Because clear title generally is considered essential to obtain market value for property, and a *lis pendens* notice clouds title to real property, a significant property deprivation results from the filing of a *lis pendens* notice.¹²⁴

B. *Whether State Action Exists in Filing a Notice of Lis Pendens*

Once the risk of irreparable harm from a property deprivation is established, fourteenth amendment procedural due process constraints require that the analysis continue to determine whether the state acted to help accomplish this deprivation, and whether the current procedures are sufficient to minimize the initial risk of an erroneous property deprivation.

The due process clause of the fourteenth amendment is implicated only when the state acts to accomplish a significant property deprivation.¹²⁵ The question whether state action exists in statutory *lis pendens* procedures has not generated as much controversy as the question whether a *lis pendens* notice creates a significant property deprivation. In fact, implicit in most decisions analyzing the constitutionality of *lis pendens* statutes is a finding of state

notice and prior hearing for potentially temporary deprivation).

121. See, e.g., *North Georgia Finishing*, 419 U.S. at 606 (severity of deprivation should be considered when determining sufficiency of statutory procedures, but is not "determinative of the right to a hearing of some sort").

122. See *supra* notes 75-82 and accompanying text.

123. See *supra* notes 76-77 and accompanying text.

124. *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1322 (3d Cir. 1982). See *supra* notes 75-78 and accompanying text.

125. *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

action.¹²⁶ It is unclear whether the Georgia Supreme Court made a similar implicit finding of state action in *Aiken v. Citizens & Southern Bank* when it considered the constitutionality of Georgia's *lis pendens* statute.¹²⁷ Although the court in *Aiken* discussed state action, the discussion apparently addressed state action regarding the appellant's 42 U.S.C. § 1983 claim and did not address the question of state action in *lis pendens* procedures.¹²⁸

Even though the Georgia Supreme Court has not explicitly addressed the question of state action in the context of a *lis pendens* notice, persuasive support for finding state action can be drawn from the similarities in the government clerk's involvement in the *lis pendens* proceedings and the government clerk's involvement in other prejudgment remedy cases in which state action was implicitly found.¹²⁹ Under Georgia's *lis pendens* statute, the *lis pendens* notice is filed with the clerk of the superior court in the county where the property is located.¹³⁰ The clerk is required to record all notices of *lis pendens* on the *lis pendens* docket and to index the docket.¹³¹ The clerk receives a fee for recording the notice of *lis pendens*¹³² and must also record the final order or judgment re-

126. See *Batey v. Digirolamo*, 418 F. Supp. 695 (D. Haw. 1976); *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 420 N.E.2d 343 (1981); *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980). These cases did not discuss state action. If the courts had thought state action was lacking, a due process analysis would have been unnecessary because the fourteenth amendment is concerned only when a state acts to effect a significant property deprivation. *But see Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982). The court in *Chrysler* expressly discussed the state action issue when it analyzed New Jersey's *lis pendens* procedures, but there was no conclusive decision by the three judge panel. In writing for the court, Judge Slovitor found that state action existed, a second judge in a separate concurring opinion found state action did not exist, and the third judge did not reach the state action issue because he did not believe the *lis pendens* notice resulted in a significant property deprivation. *Id.* at 1327.

127. *Aiken v. Citizens & Southern Bank*, 249 Ga. 481, 482, 291 S.E.2d 717, 719, *cert. denied*, 459 U.S. 973 (1982).

128. See *id.* In response to the plaintiff-appellee's suit to set aside a deed conveyed to defendant-appellant, on the grounds that the deed was conveyed "to hinder, delay, or defraud creditors," the defendant filed a counterclaim alleging that the plaintiff had violated defendant's constitutional rights, under color of law. *Id.* at 481, 291 S.E.2d at 718. In addressing this concern, the court stated: "State action is a prerequisite to maintenance of a suit under 42 U.S.C. § 1983. No state action has been demonstrated in this case." *Id.* at 482, 291 S.E.2d at 719 (citations omitted).

129. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

130. O.C.G.A. § 44-14-610 (1982).

131. O.C.G.A. § 44-14-611 (1982).

132. *Id.*

garding the disposition of the *lis pendens* notice.¹³³

These acts performed by the clerk of the court are similar to the acts performed by the state officials in *Sniadach*¹³⁴ and *North Georgia Finishing*,¹³⁵ in which state action was conceded. In *Sniadach*, the clerk of the court issued the summons of garnishment at the request of the creditor's attorney. The creditor's attorney then served the summons on the garnishee.¹³⁶ In *North Georgia Finishing*, the clerk of the court issued a summons of garnishment to the garnishee-bank based on the creditor's affidavit.¹³⁷ These ministerial actions by the clerks in *Sniadach* and *North Georgia Finishing*, in response to a form submitted by the creditor stating conclusory allegations of debt, began the process that eventually deprived the alleged debtors of possessory interest in personal property.¹³⁸ Similarly, the judicial clerk's actions of recording and docketing the *lis pendens* notice are an essential part of the process that creates a superior interest in the property for the claimant and deprives the landowner of unrestricted use of land.¹³⁹

While *Sniadach* and *North Georgia Finishing* lend support to finding state action in Georgia's *lis pendens* procedure due to the similar actions performed by the court clerks in each situation, the Supreme Court's decision in *Flagg Bros. v. Brooks*¹⁴⁰ possibly suggests a contrary result and should be considered. In *Flagg Brothers*, the Court held that state action did not exist when a creditor exercised his right under New York's Uniform Commercial Code to sell the debtor's property for allegedly failing to pay storage fees.¹⁴¹ The creditor had been given the debtor's property to store after the debtor was evicted from her apartment. The city marshal arranged for the storage of the debtor's property in the creditor's warehouse with the debtor's knowledge.¹⁴²

In distinguishing these facts from the situations considered in *North Georgia Finishing*, *Fuentes*, and *Sniadach*, the Supreme

133. O.C.G.A. § 44-14-612 (1982).

134. 395 U.S. 337, 338 (1969).

135. 419 U.S. 601, 604 (1975).

136. *Sniadach*, 395 U.S. at 338.

137. *North Georgia Finishing*, 419 U.S. at 604.

138. See *id.*; *Sniadach*, 395 U.S. at 338. See also *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1326 (3d Cir. 1982).

139. See *Chrysler*, 670 F.2d at 1326. See also O.C.G.A. § 44-14-610 (1982).

140. 436 U.S. 149 (1978).

141. *Flagg Bros.*, 436 U.S. at 151, 166.

142. *Id.* at 153.

Court found it significant that in *Flagg Brothers* there was a "total absence of overt official involvement" in the proceedings that led to the property deprivation suffered by the alleged debtor.¹⁴³ Referring to *North Georgia Finishing*, *Fuentes*, and *Sniadach*, the Court in *Flagg Brothers* stated: "In each of those cases a government official participated in the physical deprivation of what had concededly been the . . . plaintiff's property under state law before the deprivation occurred."¹⁴⁴ Because state officials did not participate in the physical deprivation of the debtor's property or in any overt acts to accomplish this deprivation, the Court found that the procedures at issue in *Flagg Brothers* did not involve state action.¹⁴⁵

Even though, as in *Flagg Brothers*, government officials do not participate in a physical deprivation of property when a *lis pendens* notice is filed, there is overt state involvement in the clerk's actions in docketing and indexing the *lis pendens* notice.¹⁴⁶ This overt state involvement in the *lis pendens* procedures seems sufficient to distinguish the state's involvement in Georgia's statutory *lis pendens* procedures from the situation in *Flagg Brothers*, in which the Court found no overt official involvement in the challenged procedures. Rather, the clerk's actions are similar to the ministerial actions performed by the clerks in *Sniadach* and *North Georgia Finishing*.¹⁴⁷

This direct state involvement in the ministerial aspects of Georgia's *lis pendens* procedures, however, does not rise to the level of state involvement that occurred in either *Fuentes v. Shevin*¹⁴⁸ or *Mitchell v. W.T. Grant Co.*,¹⁴⁹ situations in which state action was conceded. In both *Fuentes* and *Mitchell* the sheriff physically seized the debtors' property. This physical seizure of personalty by a government employee constitutes more significant state involvement than the judicial clerk's participation in the ministerial functions required under Georgia's *lis pendens* procedure.

This distinction is not necessarily significant, however, because

143. *Id.* at 157.

144. *Id.* at 161 n.10.

145. *Id.* at 157, 160 n.10.

146. See O.C.G.A. §§ 44-14-610 to -613 (1982).

147. See *supra* text accompanying notes 134-39.

148. 407 U.S. 67, 71-72 (1972) (sheriff seized debtors' household goods pursuant to state replevin statutes).

149. 416 U.S. 600, 602 (1974) (sheriff seized home appliances from debtor after judge issued writ of sequestration).

the ministerial actions performed by the state official, the actual recording and indexing of the *lis pendens* notice and the state's recognition that this recording creates a superior interest in the property, are necessary actions leading to the landowner's property deprivation. This property deprivation occurs even without state officials seizing the property. The state's involvement in physically depriving the debtor of property through the procedures at issue in *Fuentes* and *Mitchell*, therefore, is sufficiently similar to the state's participation in Georgia's *lis pendens* procedures. In each situation the actions by the government employee create the resulting deprivation suffered by the debtor or property owner.¹⁵⁰

In the only recent opinion expressly addressing the state action issue in statutory *lis pendens* proceedings, the Third Circuit in *Chrysler Corp. v. Fedders Corp.*¹⁵¹ divided on the issue whether state action exists in New Jersey's *lis pendens* proceedings. The court stated that the Supreme Court's decisions "compelled" a finding of state action, even though it was "uncomfortable" with basing this decision on the relatively minor involvement of a court clerk.¹⁵²

Because of the similar state involvement in the prejudgment remedy procedures at issue in *North Georgia Finishing, Mitchell, Fuentes*, and *Sniadach*, those cases support the conclusion that the state's involvement in Georgia's *lis pendens* proceedings is sufficient to constitute state action.¹⁵³ In addition, the implicit findings in other jurisdictions of state action in similar *lis pendens* proceedings suggest the validity of this conclusion.¹⁵⁴

150. See *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1326 (3d Cir. 1982).

151. 670 F.2d 1316 (3d Cir. 1982).

152. *Chrysler*, 670 F.2d at 1327. See *supra* note 126.

153. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

154. See *Batey v. Digirolamo*, 418 F. Supp. 695 (D. Haw. 1976); *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 420 N.E.2d 343 (1981); *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980); *George v. Oakhurst Realty, Inc.*, 414 A.2d 471 (R.I. 1980). *But see Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982) (three judge panel expressly discussed state action but did not reach conclusive decision). See *supra* note 126.

C. *Whether the Administrative Procedures in Georgia's Lis Pendens Statute Comply with Due Process*

Assuming that the filing of a notice of *lis pendens* effects a significant property deprivation by the state, the next constitutional issue that must be addressed is whether the procedural mechanisms afforded by Georgia's *lis pendens* statute comply with the due process requirements of the fourteenth amendment. The pre-judgment creditor remedy cases previously discussed establish that a debtor subjected to a significant property deprivation must be provided a meaningful hearing at a meaningful time to reduce the risk of an improper deprivation.¹⁵⁵ In *Fuentes*, for example, the Court explained that the hearing was necessary to prevent unfair and erroneous property deprivations.¹⁵⁶ The Court in *Fuentes* adopted language from Justice Harlan's concurring opinion in *Sniadach* to explain that the hearing must establish the probable validity of the creditor's claim to satisfy the due process requirements of fairness and to ensure that the risk of a mistaken property deprivation is minimized. "[D]ue process is afforded only by the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property."¹⁵⁷

In acknowledging the constitutional right to a hearing, the Court in *Fuentes* emphasized that this right outweighs concerns about the possible inefficiency of holding a hearing. As the Court explained: "Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken."¹⁵⁸ The Court made it clear, however, that the state may exercise discretion in developing the necessary format to

155. See cases cited *supra* note 153. In *North Georgia Finishing, Fuentes*, and *Sniadach*, the Court held that notice and an opportunity for a prior hearing were essential before the debtors could be deprived of their property. *But see Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (Court held that notice and prior hearing are not essential before a debtor is deprived of household goods when the creditor has a pre-existing lien and there is initial judicial involvement before property deprivation occurs).

156. *Fuentes*, 407 U.S. at 97.

157. *Id.* (quoting *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring)).

158. *Id.* at 90 n.22.

ensure the effectiveness of this hearing.¹⁵⁹ Furthermore, once a "fair prior hearing" has been held, the state has power to seize goods pending the outcome of the suit.¹⁶⁰ Generally, absent an overriding state interest, the hearing must occur prior to the property deprivation.¹⁶¹

The Court in *Fuentes* acknowledged that in "extraordinary situations" seizure of an alleged debtor's property could occur before a hearing was held.¹⁶² Such a seizure is appropriate, however, only when: (1) the seizure is necessary to further an important governmental or public interest; (2) prompt action is necessitated by a special need; and (3) the statute articulates narrowly drawn standards for initiating the seizure, and the seizure is justified based on the specific facts at issue, as determined by the government official initiating the action.¹⁶³

Almost two years after *Fuentes* articulated the standards that justify a seizure of a debtor's property without notice or a prior opportunity to be heard, the Supreme Court upheld a statute that authorized such a property deprivation. In *Mitchell v. W.T. Grant Co.*,¹⁶⁴ the Court upheld the constitutionality of Louisiana's sequestration statute, which authorized seizure of a debtor's household appliances through an *ex parte* application without notice to the allegedly delinquent debtor or a prior opportunity to be heard.¹⁶⁵ That decision appeared to retreat from the Supreme Court's previous decisions requiring an opportunity for a hearing prior to the deprivation of a property interest.¹⁶⁶ In reaching its decision, however, the Court emphasized that the creditor in *Mitchell* held a vendor's lien and, therefore, had a pre-existing interest in the seized property.¹⁶⁷ The Court also considered it significant that procedural safeguards in the narrowly drawn statute re-

159. *Id.* at 97 & n.33. "Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute." *Id.* at 97 n.33.

160. *Id.* at 96.

161. See cases cited *supra* note 153.

162. *Fuentes*, 407 U.S. at 90-91.

163. *Id.*

164. 416 U.S. 600 (1974).

165. *Id.*

166. Justice Stewart expressed strong disagreement with the majority's holding in *Mitchell*, calling the decision a "total disregard of *stare decisis*." *Mitchell*, 416 U.S. at 635 (Stewart, J., dissenting).

167. *Mitchell*, 416 U.S. at 604.

duced the risk of an erroneous property deprivation.¹⁶⁸ The Court concluded that these procedures fairly accommodated the parties' conflicting interests,¹⁶⁹ primarily because of the judicial involvement in issuing the writ of sequestration and the opportunity for the debtor to seek immediate review and dissolution of the writ.¹⁷⁰

In assessing the constitutional sufficiency of Georgia's *lis pendens* statute, the Georgia Supreme Court concluded in *Aiken v. Citizens & Southern Bank*¹⁷¹ that Georgia's *lis pendens* statute is not unconstitutional for failing to provide prior notice.¹⁷² The Georgia Supreme Court reached this conclusion without any discussion of the appropriate due process standards established by the Supreme Court.¹⁷³ As discussed, prior notice is not always constitutionally mandated before a property deprivation occurs,¹⁷⁴ and there are sound reasons for not requiring prior notice of a filing of *lis pendens*. The most important reason is to ensure that a claimant's legitimate interest in property is not defeated by an owner's

168. *Id.* at 605-07. These procedures required the creditor to present to a judge a verified petition containing specific facts, not conclusory allegations, supporting the issuance of the writ. The creditor also was required to file a bond, and the debtor could seek an immediate hearing and dissolution of the writ if the creditor failed to establish valid grounds for issuing the writ.

169. *Id.* at 607. The creditor had an interest in ensuring that the property was not destroyed or conveyed while the underlying claim on the merits was pending. The debtor sought to protect his interest in the full use and possession of the property, for which the debtor had partially paid.

170. *Id.* at 604-07.

171. 249 Ga. 481, 291 S.E.2d 717, *cert. denied*, 459 U.S. 973 (1982). Denial of certiorari does not go to the merits of the case. *E.g.*, *Brown v. Allen*, 344 U.S. 443, 492 (1953) ("We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits . . ."). See generally Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979).

172. *Aiken*, 249 Ga. at 482, 291 S.E.2d at 719.

173. *Id.* In reaching this conclusion the Georgia Supreme Court cited *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 420 N.E.2d 343 (1981), for the proposition that a notice or prior hearing is not constitutionally mandated before filing a *lis pendens* notice. Interestingly, in 1986 the Massachusetts Legislature amended the *lis pendens* statute that the Supreme Judicial Court of Massachusetts held constitutional five years earlier in *Debral Realty*. The 1986 amendment provides for judicial determination that a claim of a right to real property is actually the subject matter of the suit prior to the filing of the *lis pendens* memorandum. The statute also requires notice to all parties that this judicial determination was made and allows an aggrieved party a prompt hearing, if so desired, when the judicial determination was held *ex parte*. MASS. GEN. LAWS ANN. ch. 184, § 15 (West Supp. 1988). These procedures greatly reduce the potential abuse of improperly using a *lis pendens* notice. Georgia's statute does not provide these additional procedural safeguards.

174. See *supra* notes 162-70 and accompanying text.

conveyance before the notice of *lis pendens* is filed—a possible outcome if prior notice were required.

Prior notice, however, is not the only factor in assuring due process. The Georgia Supreme Court's narrow focus in considering only the necessity of prior notice failed to address adequately the due process standards established by the United States Supreme Court.¹⁷⁵ Even when notice or an opportunity to be heard is not required prior to a deprivation, due process mandates that the initial proceedings authorizing the deprivation reduce the risk of an erroneous property deprivation.¹⁷⁶

For example, in *Mitchell*, the risk of an erroneous property deprivation was minimized in part by requiring the creditor to present a petition to a judge with specific facts supporting the validity of the requested writ of sequestration.¹⁷⁷ In contrast, under Georgia's *lis pendens* statute there is no initial judicial involvement. A litigant need only file a claim or action "involving"¹⁷⁸ real property to be entitled to a *lis pendens* notice.¹⁷⁹ The actual notice provided to the clerk contains only the names of the parties, the time when the action was instituted, the court in which the action is pending, a statement describing the real property involved, and a statement of the relief requested concerning the property.¹⁸⁰

Consequently, the procedures in Georgia's *lis pendens* statute fail to minimize the risk of an erroneous deprivation based on a

175. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

176. See *Mitchell*, 416 U.S. 600 (1974).

177. *Id.* at 605-06.

178. O.C.G.A. § 44-14-610 (1982); see *Kenner v. Fields*, 217 Ga. 745, 747, 125 S.E.2d 44, 45 (1962) (The word "involved" as used in Georgia's *lis pendens* statute "refers only to the realty actually and directly brought into litigation by the pleadings in a pending suit and as to which some relief is sought respecting that particular property."), *overruled on other grounds*, *Scroggins v. Edmondson*, 250 Ga. 430, 297 S.E.2d 469 (1982). See, e.g., *Griggs v. Gwinco Dev. Corp.*, 240 Ga. 487, 241 S.E.2d 244 (1978) (land was "involved" in suit requesting a permanent injunction forbidding defendant from violating the Soil Erosion and Sedimentation Control Ordinance of Gwinnett County and requiring defendant to remove obstructions, which had caused flooding on plaintiff's land); *Hill v. L/A Management Corp.*, 234 Ga. 341, 216 S.E.2d 97 (1975) (because a limited partnership is personalty under Georgia law, land was not "involved" in suit by employee when the employee, if he ultimately prevailed, would be entitled only to damages and an interest in the limited partnership, even though the limited partnership had title to real property). For additional examples of cases in which real property was "involved," see *infra* notes 208-10 and accompanying text.

179. O.C.G.A. § 44-14-610 (1982).

180. *Id.*

nonmeritorious claim because the clerk automatically files the *lis pendens* notice once the litigant provides the required information.¹⁸¹ The information that the *lis pendens* claimant gives the judicial clerk is similar to the conclusory information provided by the creditors in *North Georgia Finishing*,¹⁸² *Fuentes*,¹⁸³ and *Sniadach*.¹⁸⁴ In these cases, the United States Supreme Court found the creditors' conclusory allegations insufficient to support the debtors' resulting property deprivations. Additionally, in concluding that these procedures were deficient, the Supreme Court found it significant that there was no judicial involvement in the initial proceedings to determine the probable validity of the creditors' claims.¹⁸⁵ Significantly, Georgia's *lis pendens* statute contains no guidelines to inform the clerk when real property is "involved." Additionally, the statute fails to authorize judicial participation to determine the "probable validity" of the creditor's claims before the property deprivation occurs,¹⁸⁶ as required in *Mitchell*.¹⁸⁷

A possible safeguard for due process might be an opportunity for a prompt, meaningful postfiling hearing to determine the probable validity of the alleged claim and to provide for removal of the *lis pendens* notice. This hearing could possibly satisfy the due process requirement of providing a meaningful hearing at a meaningful time.¹⁸⁸ Georgia's *lis pendens* statute, however, contains no provision for such a postfiling hearing.¹⁸⁹ In fact, even though Georgia courts have entertained motions to dismiss *lis pendens* notices,¹⁹⁰

181. *Id.*

182. *North Georgia Finishing, Inc. v. Di-Chem*, 419 U.S. 601, 602-03 (1975) (party wishing to invoke garnishment procedure must file with court clerk an affidavit stating the amount claimed due and that he fears loss of the claimed money unless garnishment is issued; claimant also required to post a bond double the claimed amount).

183. *Fuentes v. Shevin*, 407 U.S. 67, 74, 78 (1972) (Florida statute required claimant to initiate court action by filing a complaint for repossession, posting a security bond, and completing form documents submitted to the court clerk "reciting in conclusory fashion that he is 'lawfully entitled to the possession'" of the property; Pennsylvania statute required only that claimant "file an 'affidavit of the value of the property to be replevied'").

184. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338 (1969) (court clerk issued garnishment summons on garnishee at request of creditor's attorney).

185. *See supra* notes 62-63, 136-37 & 157 and accompanying text.

186. O.C.G.A. §§ 44-14-610 to -613 (1982).

187. *See Mitchell*, 416 U.S. at 605-06.

188. *See Fuentes*, 407 U.S. at 80.

189. O.C.G.A. §§ 44-14-610 to -613 (1982).

190. *E.g.*, *Jay Jenkins Co. v. Financial Planning Dynamics, Inc.*, 256 Ga. 39, 41-42, 343 S.E.2d 487, 489 (1986); *Scroggins v. Edmondson*, 250 Ga. 430, 297 S.E.2d 469 (1982).

the *lis pendens* statute contains no express provision for an involuntary dismissal of a *lis pendens* notice.¹⁹¹ In addition, when a Georgia court entertains a motion to dismiss a notice of *lis pendens*, the court may consider only whether property is "involved" in the suit.¹⁹²

Assuming that Georgia courts continue to entertain "motions to dismiss a *lis pendens* notice," even without statutory authority,¹⁹³ it is only necessary for the court to find that the claimant alleged facts sufficient to show that if she ultimately prevails in the cause of action, the real property described in the *lis pendens* notice will be affected in some manner, or she will be entitled to an interest in real property, no matter how small.¹⁹⁴ Facts sufficient to support a claim "involving" real property are not difficult to allege. For example, alleging the necessity of a constructive trust¹⁹⁵ or asserting that an oral joint venture agreement to develop real estate exists between the parties generally is sufficient to survive this motion.¹⁹⁶

191. O.C.G.A. §§ 44-14-610 to -613 (1982).

192. *Jay Jenkins*, 256 Ga. at 42, 343 S.E.2d at 489-90; *Scroggins*, 250 Ga. at 432-33, 297 S.E.2d at 471.

The court in *Jay Jenkins* acknowledged that some state statutes grant the trial court discretion to cancel a *lis pendens* notice when it does not appear that the plaintiff will succeed on the merits of her claim or allow the plaintiff to continue the notice only after providing security to the court to indemnify defendant for possible damages. The court, however, determined that this procedure was not available in Georgia because the *lis pendens* statute does not authorize it.

193. In discussing the appropriateness of entertaining a motion to dismiss a *lis pendens* notice, the Georgia Supreme Court acknowledged that Georgia courts have considered these motions even though "[i]t has been said that, generally, cancellation of notices of *lis pendens* may be obtained only pursuant to statutory provisions." *Jay Jenkins*, 256 Ga. at 41-42, 343 S.E.2d at 489 (citing 54 C.J.S. *Lis Pendens* § 37(f) presently found at 54 C.J.S. *Lis Pendens* § 24 (1987)).

194. See cases cited *supra* at note 190.

195. See, e.g., *Scroggins*, 250 Ga. at 433, 297 S.E.2d at 472.

In *Scroggins*, the defendant used real property that she owned individually to secure the debt of a corporation in which she was an officer. Plaintiff, bankruptcy trustee of the corporation, claimed that the defendant had "fraudulently used her corporate position" to get the corporation to repay this secured debt after the corporation was insolvent, "in preference to other corporate debts." Plaintiff claimed that, as a result of cancelling the security deed the defendant had benefited personally. Therefore, plaintiff filed suit to get a trust or lien imposed on the property and filed a *lis pendens* notice based on the requested trust.

The court concluded that real property was "involved" because a trust or lien would be imposed if plaintiff were successful. Accordingly, the *lis pendens* notice was found appropriate under these circumstances, and the court refused to consider the merits of the claim in considering whether to dismiss the *lis pendens* notice. *Id.* at 430, 433, 297 S.E.2d at 470, 472.

196. See, e.g., *Jay Jenkins*, 256 Ga. 39, 343 S.E.2d 487 (1986).

The *lis pendens* claimant in *Jay Jenkins* sought to set aside the trial court's dismiss-

In reviewing motions to dismiss *lis pendens* notices, the Georgia Supreme Court has made it clear that under Georgia's *lis pendens* statute it is premature to evaluate the merits of the underlying claim when this motion is filed.¹⁹⁷ Because of its limited scope, a motion to dismiss a *lis pendens* notice does not provide a sufficient procedural safeguard for the landowner against an improper notice of *lis pendens*.

In order to remove an improper notice of *lis pendens* the Georgia Supreme Court has suggested that a property owner should file a summary judgment motion, rather than a motion to dismiss a *lis pendens*, to enable a court to assess the merits of the underlying claim.¹⁹⁸ Given the heavy burden of proof placed on the party moving for a summary judgment to establish that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law,¹⁹⁹ the opposing party generally should be able to defeat this motion. This motion, therefore, also seems insufficient to protect the landowner from an erroneous interference with the free use of her land. Thus, the current procedures do not provide effective means to eliminate an improper *lis pendens* notice while a suit is pending.

A possible remedy for a landowner who has been unjustly deprived of the use of real property is a suit for damages following a favorable judgment in the underlying suit. A suit for damages, however, does not adequately protect the landowner's interest in the free use of the land. Postjudgment damage remedies are potentially inadequate because they fail to provide deterrence against a litigant's improper use of a *lis pendens* notice due to the difficul-

sal of a *lis pendens* notice, claiming that certain properties that claimant had transferred to defendant-appellees were transferred to appellees as part of a joint venture agreement so that they could obtain financing on the properties. The appellant claimed he was entitled to profits on the joint venture agreement and that the appellees had breached these agreements. As a result, the appellant filed suit to impress a trust on the properties and filed a *lis pendens* notice to protect that asserted interest.

After reviewing the record, the Georgia Supreme Court reinstated the *lis pendens* notice on these properties and held "[i]t cannot be said that, as a matter of law, appellants would not be entitled to have trusts imposed on these properties. . . . Therefore, at this stage in the litigation, it cannot be said that [the properties] are not 'involved' in the . . . litigation." *Id.* at 43, 343 S.E.2d at 490.

197. *Id.* at 42, 343 S.E.2d at 490. *Scroggins*, 250 Ga. at 431, 297 S.E.2d at 471 ("motion to cancel a notice of *lis pendens* does not in and of itself constitute a motion for summary judgment, because it does not go to the merits of the case").

198. *Jenkins*, 256 Ga. at 42, 343 S.E.2d at 490; *Scroggins*, 250 Ga. at 433, 297 S.E.2d at 472.

199. O.C.G.A. § 9-11-56(c) (1982).

ties in proving the necessary elements of the specific cause of action and the limited scope of the remedies. For example, Georgia litigants have attempted to use, with little success, the tort remedies of disparagement of title,²⁰⁰ malicious abuse of process,²⁰¹ and malicious use of process²⁰² to obtain damages for allegedly improper *lis pendens* notices.²⁰³ Rather than postjudgment damages, prejudgment procedural safeguards provide a more efficient and adequate method of protecting each party's interests. The merits of the claim can be evaluated before the property owner's interest is seriously affected, rather than relying on postjudgment remedies, which are less efficient and more doubtful. Also, the party using the *lis pendens* notice can have her claim evaluated at this initial stage, thereby providing the necessary deterrent to a merit-

200. In *Berger v. Shea*, 150 Ga. App. 812, 258 S.E.2d 621 (1979), the court held that a *lis pendens* notice is essentially a republication of the pleadings and, therefore, the defense of privilege bars a disparagement of title action arising from filing a *lis pendens* notice.

201. The tort of malicious abuse of process requires that the claimant establish the process was maliciously issued for a purpose not intended by the law. *Ferguson v. Atlantic Land & Dev. Corp.*, 248 Ga. 69, 71, 281 S.E.2d 545, 547 (1981). In *Ferguson*, the property owner was suing in tort to recover damages allegedly suffered from the owner's inability to develop his property while a *lis pendens* notice was filed on the property. The court held that the landowner's claim for damages based on malicious abuse of process was improperly brought by the landowner after a *lis pendens* notice was filed because the original suit to quiet title on the realty in question was initiated for a proper purpose and was a lawful use of a civil complaint, even though the plaintiff may have lacked probable cause for initiating the quiet title action. *Id.*

202. Malicious use of process requires: (1) malice, (2) lack of probable cause, and (3) termination of the process complained of in the defendant's favor. *Ferguson*, 248 Ga. at 72, 281 S.E.2d at 547-48. The Georgia Supreme Court reversed the court of appeals' affirmance of summary judgment on the property owner's malicious use of process claim originally granted on the trial court's finding that a *lis pendens* notice had been improperly and maliciously filed. The supreme court held that lack of probable cause and malice were questions of fact for the jury to determine. The property owner's efforts to get damages from an allegedly maliciously filed *lis pendens* notice was tied up in the court system for more than three years. *Id.*

203. In *Yost v. Torok*, 256 Ga. 92, 344 S.E.2d 414 (1986), the Georgia Supreme Court addressed some of the difficulties previously encountered by litigants who claimed they were subjected to abusive litigation, but were unable to establish the elements required for malicious use of process or malicious abuse of process. To minimize these difficulties, the court merged the common law tort claims of malicious abuse of process and malicious use of process. The court also permitted awarding attorney fees under this new action if the litigant bringing the *Yost* action proves the original action or defense lacked substantial justification. A property owner challenging an abusive use of a *lis pendens* notice may be successful in proceeding under this newly created tort if the property owner can prove the use of the *lis pendens* notice was "substantially frivolous, substantially groundless, or substantially vexatious." *Id.* at 95, 344 S.E.2d at 417. See generally Note, *Abusive Litigation in Georgia: Deterrence and Compensation*, 3 GA. ST. U.L. REV. 303 (1987).

less claim.

The current procedural mechanisms and damage remedies are inadequate to deter the improper use of a *lis pendens* notice. As a result, these procedures fail to protect the property owner's legitimate interest in the free use of land. The likelihood of an improper or abusive notice of *lis pendens* is substantial under Georgia's *lis pendens* statute because there is no initial judicial participation to ensure either the probable validity of the claim or that real property actually is involved in the claim.²⁰⁴ Nor is sufficient postfiling relief from an erroneous deprivation available to the property owner because the statute contains no provisions for a prompt, meaningful hearing to determine the probable validity of the underlying claim.²⁰⁵ Furthermore, the statute does not allow the landowner to release the *lis pendens* notice by posting a bond;²⁰⁶ therefore, the length of the property deprivation and resulting severity is likely to be great. Because the statute lacks sufficient procedural safeguards required by the fourteenth amendment to reduce the risk of an erroneous property deprivation, Georgia's *lis pendens* statute appears susceptible to constitutional attack.

III. SUGGESTED LEGISLATIVE CHANGES

Currently, the only limitation on when a *lis pendens* notice may be filed is the requirement that the claimant file an action "involving" real property.²⁰⁷ Under this broad standard, property is involved, for example, when title to real property may be affected²⁰⁸ (a narrow use of the *lis pendens* procedures), when the claimant is seeking an injunction for alleged violations of a county ordinance²⁰⁹ (an expansive use), or when the claimant is seeking to impose a constructive trust against real property²¹⁰ (an expansive use).

204. O.C.G.A. §§ 44-14-610 to -613 (1982).

205. *Id.* See *supra* notes 189-97 and accompanying text.

206. O.C.G.A. §§ 44-14-610 to -613 (1982).

207. O.C.G.A. § 44-14-610 (1982).

208. *E.g.*, *Bennett v. Stokey*, 164 Ga. 694, 139 S.E. 346 (1927) (suit to cancel warranty deed to real property); *Tinsley v. Rice*, 105 Ga. 285, 31 S.E. 174 (1898) (doctrine of *lis pendens* applies when title to land is contested).

209. *E.g.*, *Griggs v. Gwinco Dev. Corp.*, 240 Ga. 487, 241 S.E.2d 244 (1978) (land was "involved" in suit requesting a permanent injunction forbidding defendant from violating the Soil Erosion and Sedimentation Control Ordinance of Gwinnett County and requiring defendant to remove obstructions that had caused flooding on plaintiff's land).

210. *E.g.*, *Jay Jenkins Co. v. Financial Planning Dynamics, Inc.*, 256 Ga. 39, 343

In evaluating the sufficiency of statutory *lis pendens* procedures and developing legislation to balance more adequately the parties' interests, the alleged interest in the realty asserted by the *lis pendens* claimant should be considered. As a result, commentators have suggested that courts distinguish between situations involving an expansive use of a *lis pendens* notice and those involving a narrow use.²¹¹ For example, when title to real property may be affected, such as with a mortgage foreclosure, the plaintiff is usually seeking to protect an existing interest in property. The potential for abuse of the *lis pendens* procedures is reduced with this narrow use because the plaintiff presently has an interest in the property.²¹²

In other circumstances, the *lis pendens* claimant may be seeking to establish a new interest in property by asserting a claim for a constructive trust or a lien against the property. For example, in *Scroggins v. Edmondson*,²¹³ the *lis pendens* claimant, the trustee in bankruptcy of a corporation in which the defendant was an officer, filed a claim seeking to impose a constructive trust against real property personally owned by the defendant corporate officer. In the complaint the trustee alleged that while the corporation was insolvent, the corporate officer had fraudulently caused the corporation to pay a corporate debt secured by the defendant's real property. The trustee claimed that this debt was paid in preference to other corporate debts, and thus the corporate officer personally benefited from the transaction.²¹⁴ Because real property was "involved," the court refused to dismiss the *lis pendens* notice, holding that Georgia's *lis pendens* statute was satisfied. In reaching this conclusion, the court reasoned that if the claimant eventually succeeded on the merits of the claim, real property would be affected. Therefore, the *lis pendens* notice was proper under the statutory guidelines.²¹⁵

Scroggins illustrates an expansive use of Georgia's *lis pendens* procedures. Because real property was "involved" by the allegation

S.E.2d 487 (1987) (plaintiff alleged necessity of constructive trust based on breached oral joint venture agreements to develop real property); *Scroggins v. Edmondson*, 250 Ga. 430, 297 S.E.2d 469 (1982) (corporate bankruptcy trustee alleged right to establish constructive trust against real property personally owned by corporate officer).

211. Note, *supra* note 14, at 427; Note, *supra* note 11, at 299.

212. See Note, *supra* note 14, at 427.

213. 250 Ga. 430, 297 S.E.2d 469 (1982).

214. *Scroggins*, 250 Ga. at 430, 297 S.E.2d at 469.

215. *Id.* at 433, 297 S.E.2d at 472.

in the complaint, the bankruptcy trustee was permitted to file a *lis pendens* notice on real property personally owned by a corporate officer. In this instance, rather than restricting the defendant's use of real property, the claim could have been secured during the pending suit by allowing the defendant to post a bond sufficient to satisfy the creditor's alleged claim and to discharge the *lis pendens* notice. Georgia's statute, however, does not provide the court with discretion to discharge the notice even when the creditor's alleged claim could be satisfied in other ways. Nor does the statute permit the defendant to file a bond and then discharge the *lis pendens* notice.²¹⁶

In similar situations involving an expansive use of a *lis pendens* notice, additional statutory procedures could ensure that the claimant's interest is secured, but also allow the property owner some flexibility without unnecessarily preventing her from transferring or encumbering real property. Because, under these circumstances, the creditor is not really concerned with establishing an ongoing interest in the property, the unique aspect of property is not as important.²¹⁷ Consequently, if other assets are available, other less restrictive means may provide the creditor sufficient security for the amount of the alleged interest without tying up the debtor's land.

Keeping in mind these different uses for a *lis pendens* notice, several procedural safeguards suggested by commentators reviewing other states' *lis pendens* proceedings could help remedy the possible constitutional defects in Georgia's *lis pendens* statute and still promote the policies of the *lis pendens* procedures. These safeguards include: (1) limiting the scope of the statute, by requiring the claimant to specify the monetary value of the interest asserted when the claimant is seeking to impose a constructive trust or equitable lien against the property; (2) providing the property owner the option of posting a bond to discharge the *lis pendens* notice when the object of the suit is to impose an equitable lien or constructive trust against real property; (3) requiring the claimant to post a bond sufficient to cover the alleged claim; (4) allowing for initial judicial participation in determining that the claim involves real property; and (5) providing for a prompt postfiling hearing at

216. See O.C.G.A. §§ 44-14-610 to -613 (1982).

217. See Note, *supra* note 14, at 427. See, e.g., *Jay Jenkins Co. v. Financial Planning Dynamics, Inc.*, 256 Ga. 39, 343 S.E.2d 487 (1986); *Scroggins v. Edmondson*, 250 Ga. 430, 297 S.E.2d 469 (1982).

which the claimant would need to establish the probable validity of the claim.²¹⁸

Recognizing the value of the first two procedures, the Georgia Legislature amended Georgia's mechanic's and materialmen's lien statute to require the lien claimant to specify the amount of the claimed interest in the real property.²¹⁹ The property owner may then discharge the lien by posting a bond double the amount of the claimed interest, or when residential property is involved, by posting a bond equal to the claimed interest.²²⁰ Procedural benefits would result if these procedures were adopted to protect landowners whose property is subjected to a *lis pendens* notice. Limiting the scope of the *lis pendens* notice by requiring the claimant to specify a monetary amount of the claim would be appropriate when the object of the suit is to obtain a constructive trust or lien against the property.²²¹ This procedure would allow the property owner and potential purchasers to evaluate the potential scope of the alleged claim and, therefore, could reduce the resulting property deprivation. Even though this limitation would not be as appropriate when the claimant is seeking to establish a continuing interest in the property, it would be helpful, for example, when a claimant is seeking to establish a lien against the property in a specified amount.²²²

Allowing the property owner to release the notice of *lis pendens* by posting a bond sufficient to secure the claimant's alleged interest would also help reduce the resulting property deprivation. This procedure provides a less restrictive method for the *lis pendens* claimant to ensure that an alleged interest is satisfied when a claim of an ongoing interest in land is not the object of the suit. Additionally, requiring a claimant to post a bond twice the value of the alleged claim would help ensure the validity of the claim and provide adequate security for a monetary award for an improper *lis*

218. Note, *supra* note 11, at 302-06.

219. O.C.G.A. § 44-14-361.1(a)(2) (Supp. 1987) requires the claimant to specify the amount of the claimed interest. Furthermore, under O.C.G.A. § 44-14-361.1(e) (Supp. 1987) the "contract price of the improvements made or services performed" establishes the outer limit on the allowable amount for liens against the property. *Id.*

220. O.C.G.A. § 44-14-364 (Supp. 1987) allows the real property owner to discharge a mechanic's or materialmen's lien by filing a bond with the clerk of the court in the county where the lien is filed.

221. See Note, *supra* note 11, at 302-03.

222. *Id.*

pendens.²²³

Initial judicial participation to determine whether property is "involved" in the claim also would help reduce nonmeritorious claims.²²⁴ By requiring the claimant to specify facts supporting the claim, a judge could determine whether real property actually is involved prior to the filing of the notice of *lis pendens*.²²⁵ This judicial participation would likely have a significant deterrent effect in reducing improperly filed *lis pendens* notices.

A statutory mechanism providing for a prompt postfiling hearing at the request of the property owner also would reduce the possibility of unjust deprivation if the court were permitted to inquire into the validity of the underlying claim, rather than merely making a determination if real property is involved, as is currently done by Georgia courts.²²⁶ In light of the standards articulated by the United States Supreme Court in *North Georgia Finishing, Mitchell, Fuentes, and Sniadach*, it seems appropriate that the *lis pendens* claimant should be required to prove at this postfiling hearing the probable validity of her claim entitling her to maintain the *lis pendens* notice.²²⁷ This hearing would accomplish more than the current procedure used by Georgia courts to review a motion to dismiss a *lis pendens* notice, but would not be as easy to defeat as a summary judgment motion.²²⁸

Other jurisdictions have included more adequate procedural safeguards, similar to those discussed above, in their *lis pendens* statutes.²²⁹ These additional safeguards come closer to creating "a

223. *Id.* at 303-04.

224. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 184, § 15 (West Supp. 1988).

225. *See cf. Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (writ of sequestration proceedings requires judicial participation prior to seizure of the property to determine whether writ should issue).

226. *See supra* notes 189-97 and accompanying text.

227. *See supra* note 157 and accompanying text.

228. *See supra* notes 189-99 and accompanying text.

229. N.J. STAT. ANN. §§ 2A:15-6 to -7 (West 1987) (party affected by *lis pendens* notice may request hearing to determine probability of claimant's success on the merits; if claimant fails to establish probability of success, court must discharge *lis pendens* notice"); MASS. GEN. LAWS ANN. ch. 184, § 15 (West Supp. 1988) (statute requires finding by judge that the action "constitutes a claim of a right to title to real property or the use and occupation thereof or the buildings thereon prior to the filing of *lis pendens*"; requires affidavit as proof of notice to the landowner that a *lis pendens* has been filed; if the finding that the claimant is entitled to a *lis pendens* is made *ex parte*, the aggrieved party is entitled to a hearing, with the burden of proof on the *lis pendens* claimant to support the findings in the order); CONN. GEN. STAT. ANN. §§ 52-325 to -325c (West Supp. 1988) (requires proper service of notice that *lis pendens* has been recorded; provides opportunity for postfiling hearing with plaintiff

constitutional accommodation of the conflicting interests of the parties," as directed by the Court in *Mitchell*.²³⁰ By incorporating similar procedural safeguards to protect a landowner's legitimate interest in the unrestricted use of land, the Georgia Legislature could cure possible constitutional infirmities and still ensure that the traditional interests protected by a *lis pendens* notice are advanced by the statute.

CONCLUSION

Georgia's *lis pendens* statute provides a valuable prejudgment creditor remedy that advances essential government and private interests. It helps preserve the integrity of the judicial system by ensuring that real property at issue in a suit is not conveyed to a third party to the prejudice of the *lis pendens* claimant before termination of the suit. The statute also provides notice to persons outside the suit that real property is the subject of litigation and that a superior interest may exist in the property. Additionally, it is an effective prejudgment remedy allowing litigants to protect claims to real property.

Despite the valuable interests advanced by the statute, the Georgia *lis pendens* statute appears constitutionally deficient. By severely restricting a landowner's ability to sell or encumber property, the statute creates a significant property deprivation for the landowner. The state's involvement in the statutory proceedings appears sufficient to conclude that this property deprivation is accomplished with state action. Most importantly, the statutory proceedings accomplishing this deprivation do not appear to comply with the standards articulated by the Supreme Court in the major prejudgment remedy cases decided between 1969 and 1975. In those cases, the Supreme Court established that a debtor who is subjected to a significant property deprivation must be provided a meaningful hearing at a meaningful time to reduce the risk of an improper property deprivation.

To satisfy the due process requirements of fairness and ensure that the risk of a mistaken property deprivation is minimized, this hearing should establish the probable validity of the creditor's claim. Georgia's *lis pendens* statute lacks the procedural safe-

required to prove "probable cause to sustain the validity of his claim").

230. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 607 (1974).

guards to protect against an erroneous property deprivation because there is no initial judicial involvement to ensure that real property actually is involved in the claim, nor prompt judicial participation after the *lis pendens* notice is filed to determine the probable validity of the litigant's claim to real property.

Several legislative changes, designed to protect more adequately an owner's interest in land, would reduce the risk of an erroneous property deprivation and eliminate any constitutional infirmities in the statute. These provisions would allow for earlier and more effective judicial participation without unnecessarily burdening the judicial process or the claimant's rights to the property.

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