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ARTICLES

LIS PENDENS IN THE DISTRICT OF COLUMBIA: A NEED FOR CODIFICATION

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The doctrine of lis pendens refers to the jurisdiction or control that a court acquires over property involved in a suit during the pendency of the action.[1] Under this doctrine, one who acquires an interest in property involved in pending litigation is charged with notice of the suit and thus takes that interest subject to the result of the litigation.[2] Approximately forty states have supplanted this common law doctrine with lis pendens statutes.[3] Lis pendens is one means of providing notice of a person's interest in property. Other statutory means, such as recording statutes, are also available. In the District of Columbia, there is no generally applicable lis pendens statute, and the relationship of the lis pendens doctrine to other statutory protections is

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1. The doctrine of lis pendens has its origins in early English law. *See* Bristow v. Thackston, 187 Mo. 332, 346, 86 S.W. 94, 98 (1905); Annotation, *Duration of Operation of Lis Pendens as Dependent upon Diligent Prosecution of Suit,* 8 A.L.R.2d 986, 988 (1949).

2. *See* Merillat v. Hensey, 34 App. D.C. 398, 404 (1910).

3. *See, e.g.,* ALA. CODE § 35-4-135 (1977); ARIZ. REV. STAT. ANN. § 12-1191 (1982); ARK. STAT. ANN. § 27-501 (1979); COLO. REV. STAT. § 38-35-110 (1982); CONN. GEN. STAT. §§ 52-325 to -326 (1986); DEL. CODE ANN. tit. 10, § 7104 (1974); FLA. STAT. ANN. § 48.23 (West 1986); GA. CODE ANN. §§ 44-14-610 to -612 (1982); HAW. REV. STAT. § 634-51 (1976); IDAHO CODE § 5-505 (1979); ILL. ANN. STAT. ch. 30, § 121 (Smith-Hurd 1969); IND. CODE ANN. §§ 34-1-4-1 to -9 (Burns 1986); LA. REV. STAT. ANN. art. 3751 (West 1961); MICH. COMP. LAWS ANN. §§ 600.2701 to .2731 (West 1968); MINN. STAT. ANN. § 557.02 (1987); MISS. CODE ANN. §§ 11-47-1 to -15 (1972); MO. REV. STAT. § 527.260 (1953); N.J. STAT. ANN. §§ 2A:15-6 to -17 (West 1986); N.M. STAT. ANN. § 38-1-14 (1978); N.C. GEN. STAT. §§ 1-116 to -120.1 (1983); N.D. CENT. CODE § 28-05-07 (1974); OR. REV. STAT. § 93.740 (1975); R.I. GEN. LAWS § 9-4-9 (1985); S.C. CODE ANN. §§ 15-11-10 to -50 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 15-10-1 to -11 (1984); TENN. CODE ANN. §§ 20-3-101 to -104 (1980); UTAH CODE ANN. § 78-40-2 (1953); WASH. REV. CODE § 4.28.320 (1962); W. VA. CODE §§ 55-11-1 to 55-11-3 (1981); WIS. STAT. § 840.10 (1977); MD. R. BD 2.

unclear.[4] This Article examines the evolution of the doctrine, discusses the constitutional and policy considerations pertinent to lis pendens, and provides a sample statute that would pass constitutional muster.

I. THE COMMON LAW DOCTRINE OF LIS PENDENS AND ITS APPLICATION IN THE DISTRICT OF COLUMBIA

The common law doctrine of lis pendens evolved in response to problems that arose when a party to litigation over rights in real property conveyed an interest in that property to a purchaser who did not suspect the existence of the litigation. The doctrine bound all those who purchased such land to the court's disposition of the suit.[5] Lis pendens, therefore, effectively prevented a person who feared losing a suit involving his property from conveying that property to a third party.

The effects of common law lis pendens could be harsh because the doctrine required neither actual nor record notice to the purchaser. Under the doctrine, merely filing a lawsuit was constructive notice to all that the disposition of the property was subject to the outcome of the litigation.[6] Because all a litigant had to do in order to bind the land was to file suit concerning it, prospective purchasers often could not discover the encumbrance even after a diligent search.[7]

A number of states responded by enacting lis pendens statutes requiring the filing of a notice of the pendency of actions affecting real property with the appropriate land recordation office.[8] Because the District of Columbia has never enacted such a statute (except with respect to contracts entered into by a conservator involving real or personal property),[9] some important questions remain unresolved in this jurisdiction.[10] For example, to what extent is the common law doctrine still viable? What are the rights of the would-be purchaser who has an enforceable contract to buy land when the

4. *See infra* notes 9-10, 21-27 and accompanying text.

5. *See generally* A. FREEMAN, TREATISE OF THE LAW OF JUDGMENTS § 519 (5th ed. 1925); J. POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 632 (3d ed. 1905).

6. 3 AMERICAN LAW OF PROPERTY § 1312 (J. Casner ed. 1952).

7. *Id.*

8. *See supra* note 3.

9. *See* D.C. CODE ANN. § 21-1507 (1981). Section 21-1507, which is entitled "Lis Pendens," states that:

> [u]pon the filing of a petition under this chapter, a certified copy of the petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator is appointed on the petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before the termination of the conservatorship are void.

10. *See* Accurate Constr. Co. v. Washington, 378 A.2d 681, 683 (D.C. 1977); Carter v. Saxon, 358 A.2d 639, 642 n.4 (App. D.C. 1976).

vendor breaches that contract and subsequently conveys, or is about to convey, the property to a third party? Is the would-be purchaser's claim to the property protected by virtue of merely filing the lawsuit or must that person obtain temporary injunctive relief?

The common law doctrine of lis pendens was recognized in the District of Columbia in a number of older cases. For example, in *Wilkinson v. District of Columbia,*[11] the United States Court of Appeals for the District of Columbia held that once a petition for the condemnation of land has been filed, every person purchasing any land affected by the proceedings took title subject to any decree subsequently rendered. As the court stated:

> It is well-settled law, so well settled as that it must be regarded as elementary, that when a bill is filed in equity to enforce a claim against real estate, and summons is issued thereon to the then owner of the property, a lien is created, which no one who afterwards deals with the property is at liberty to disregard; and the party who seeks to enforce the lien is under no obligation whatever to take any notice of such dealing, or of any conveyances of the property subsequent to the attachment of his own lien. This is in accordance with the well-known doctrine of *lis pendens.*[12]

Based on this early precedent, the mere filing of a complaint by a purchaser against a breaching vendor constituted constructive notice to a third party purchaser. Therefore, the unsuspecting third party would take title to the property subject to the result in the pending litigation. But would this result still be true today? Can plaintiffs rely upon such case law to enforce their claims? Unfortunately, current case law fails to provide the answers.

There are statutes in the District of Columbia that address related issues and question the viability of the common-law lis pendens doctrine by implication. For instance, section 45-805 of the D.C. Code allows a purchaser to record his "contract in relation to land" with the Recorder of Deeds if the contract is certified and acknowledged.[13] This action provides the same notice as a recorded deed.[14] Third parties, thus, will have notice of the existing

11. 22 App. D.C. 289 (1903).

12. *Id.* at 295 (emphasis in original). *See also* Moses v. Boss, 72 F.2d 1005 (D.C. Cir. 1934) (recognizing the doctrine but limiting its application); Eggleston v. Wayland, 10 F.2d 642, 643 (D.C. Cir. 1925) (applying doctrine only to purchasers who purchase from a party to the litigation or one in privity); Merrillat v. Hensey, 34 App. D.C. 398, 404 (1910) (holding purchaser bound as if he were a party).

13. D.C. CODE ANN. § 45-805 (1981). Section 45-805 states that "[a]ny title bond or other written contract in relation to land may be acknowledged, certified, and recorded in the same manner and with like effect as to notice as deeds for the conveyance of land." The terms "certified" and "acknowledged" indicate that the contract must be signed and sealed by a certified notary public. *See id.* § 45-602 (1981).

14. *See supra* note 13.

contract and will take subject to it, and the original purchaser will be protected against a breaching vendor.[15] Moreover, D.C. Code sections 15-102 and 15-105 provide that final judgments confirming the sale of real property pursuant to a decree also can be filed with the Recorder of Deeds.[16] These statutes, however, do not address what rights apply during the time property is merely the subject of a proceeding. Because of the virtual lack of case law on the issue, the question remains whether the doctrine of lis pendens applies in the District of Columbia.

A solution to this uncertainty would be the enactment of a lis pendens statute that defines specifically the rights of persons who are disputing the ownership or control of property subject to litigation. Such a statute would permit litigants to file a notice of the pendency of lawsuits affecting title to real property and, in essence, would give plaintiffs a second chance to protect themselves if they had not already taken the unusual step of recording their contract. Another solution would be to enact a statute repealing the common law lis pendens doctrine and to leave the burden on the purchaser to record the "contract in relation to land" in order to protect against a subsequent conveyance.

Of course, competing policy considerations bear on any decision to enact such statutes. For instance, contracts for the sale of land are traditionally specifically enforceable. Arguably, a breaching vendor should not be allowed to sell property under litigation and a third party should not be able to take such property free of a judgment. On the other hand, society should encourage the free alienation of land. The ability to cloud title discourages alienation and causes potential purchasers to refrain from entering into contracts on property even if the encumbrance later may be extinguished. Based on these considerations, the District of Columbia should carefully consider what course of action to take to clarify the lis pendens issue. Admittedly,

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15. *See* Smart v. Nevins, 298 A.2d 217, 219 (D.C. 1972) (the purpose of recordation is to protect the rights of bona fide purchasers and others relying upon record ownership).

16. D.C. CODE ANN. §§ 15-102, 15-105 (1981). Section 15-102(a) states in relevant part that:

> Each . . . final judgment or decree for the payment of money rendered in the United States District Court for the District of Columbia or the Superior Court of the District of Columbia, from the date such judgment or decree is filed and recorded in the office of the Recorder of Deed of the District of Columbia . . . shall constitute a lien on all the freehold and leasehold estates . . . of the defendants . . . .

Section 15-105 states in relevant part that:

> A decree confirming the sale of real or personal property sold pursuant to a decree, divests the right, title, or interest sold out of the former owner, party to the action, and vests it in the purchaser, without any conveyance by the officer or agent of the court conducting the sale. The decree constitutes notice to all persons of the transfer of title when a copy thereof is registered among the land records of the District.

none of the alternatives satisfy all policy concerns. However, irrespective of the ultimate disposition, some clarification of the law is needed.

II. Issues for Consideration in Drafting a Lis Pendens Statute

A. When and Where to File Notice

A number of jurisdictions with lis pendens statutes authorize the filing of notice of lis pendens either when the complaint is filed or at any time thereafter.[17] The New Jersey statute goes further; it provides that "until a notice of lis pendens is filed . . . no action [will] be taken to be constructive notice to a bona fide purchaser. . . ."[18] In essence, the New Jersey legislation stresses that the doctrine of lis pendens will have no effect until the proper filing of notice of lis pendens. However, because lis pendens statutes equate filing with constructive notice, it appears that a purchaser with actual notice would still be bound by the pending litigation.[19]

Many jurisdictions also require that notice of lis pendens be filed in the county where the property is located. In the District of Columbia, there is only one Recorder of Deeds. Creating a separate lis pendens index[20] in that office would provide a simple means for prospective purchasers to discover pending litigation.

B. What Property is Affected

The courts sometimes have interpreted common law lis pendens as applying to actions for specific kinds of personal property as well as real property.[21] However, the majority of jurisdictions that have enacted lis pendens statutes now limit their scope to actions concerning real property.[22] Moreover, states differ as to what real property interests are encompassed within

17. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-1191(A) (1982); Conn. Gen. Stat. § 52-325(a) (1986); Iowa Code Ann. § 617.10 (West 1950); N.J. Stat. Ann. § 2A:15-6 (West 1986); N.D. Cent. Code § 28-05-07 (1974).

18. N.J. Stat. Ann. § 2A:15-8 (West 1986). *See* Wendy's, Inc. v. Blanchard Management Corp., 170 N.J. Super. 491, 496, 406 A.2d 1337, 1339 (N.J. Ch. 1979) (stating the advantages of the New Jersey lis pendens statute over the common law). *Cf.* Fla. Stat. Ann. § 48.23(1)(a) (West 1986).

19. *See* Laurence, *Lis Pendens*, 56 N.D. L. Rev. 327, 341 (1980).

20. *See, e.g.*, Iowa Code Ann. § 617.10 (West 1950) (use of lis pendens index).

21. *See* Carr v. Lewis Coal Co., 96 Mo. 149, 150, 8 S.W. 907, 907 (1888) ("the doctrine of *lis pendens* applies to every description of property, whether real or personal").

22. *See, e.g.*, Ga. Code Ann. § 44-14-610 (1982); Iowa Code Ann. § 617.10 (1981); N.J. Stat. Ann. § 2A:15-6 (West 1986); N.D. Cent. Code § 28-05-07 (1974). *See also* Patton v. Darden, 227 Ala. 129, 148 So. 806 (1933) (Alabama statute limited only to real estate). *But see* Ark. Stat. Ann. § 27-501 (1979) (real or personal property).

their statutes. For example, New Jersey and North Dakota require that the action "affect the title to real property."[23] Other jurisdictions provide that the action need only "affect the real estate" rather than the title to the real estate.[24] California's statute is even broader, allowing lis pendens in "an action concerning real property or affecting title or the right of possession of real property."[25] This issue becomes important in actions affecting interests such as leaseholds. Under the common law, the doctrine of lis pendens applied to leasehold interests.[26] However, in jurisdictions that limit the statute to actions affecting the "title" to real property, an action affecting a leasehold arguably would not be within the scope of the statute. Although the District of Columbia has recognized that a leasehold interest is real property, a proposed lis pendens statute should address specifically whether leaseholds and other real property matters not affecting title to real estate would be covered.[27]

C. How to Nullify the Notice

Several jurisdictions provide for two ways in which notice of lis pendens can be cancelled: (1) by entry of a final judgment or (2) by request of an interested party.[28] Jurisdictions differ, however, on who is an interested party and on how the burden of proof is allocated. For example, California allows "a party to the action" to file a motion to expunge the notice.[29] Upon filing this motion, the burden shifts to the party filing the notice of lis pendens to prove by a preponderance of the evidence that the action affects the title or the right of possession of the real property and that the notice was filed in good faith.[30] North Dakota allows "any aggrieved person" to file a motion to expunge, and places the burden of proof on that party to prove that the notice of lis pendens was not made in good faith.[31] Yet again, New York leaves the issue to the court's discretion to decide whether the

23. *See, e.g.*, N.J. STAT. ANN. § 2A:15-6 (West 1986); N.D. CENT. CODE § 28-05-07 (1974); *see also* ARIZ. REV. STAT. ANN. § 12-1191(A) (1982); WASH. REV. CODE § 4.28.320 (1962).

24. *See, e.g.*, IOWA CODE ANN. § 617.10 (West 1950).

25. CAL. CIV. PROC. CODE § 409 (West 1987). *See* HAW. REV. STAT. § 634-51 (1976); IDAHO CODE § 5-505 (1979).

26. *See* Snyder v. Wilder, 146 La. 811, 84 So. 104 (1919); Ginsburg v. Sherlock Realty Corp., 221 App. Div. 586, 224 N.Y.S. 532 (1927).

27. In North Slope Borough v. Andrus, 486 F. Supp. 326, 331 (D.D.C. 1979), the court ruled that a lis pendens filing was effective in a suit involving a leasehold in Alaska.

28. *See, e.g.*, N.J. STAT. ANN. § 2A:15-17 (West 1986); N.Y. CIV. PRAC. L. & R. § 6514(e) (McKinney 1980).

29. *See* CAL. CIV. PROC. CODE § 409.1 (West 1987).

30. *Id.* § 409.1(a)-(b).

31. *See, e.g.*, N.D. CENT. CODE § 28-05-08 (1974).

notice of lis pendens was made in good faith.[32]

Moreover, New Jersey permits discharge of the notice of lis pendens where the aggrieved party "gives such sufficient security as the court shall direct" pending a final determination of the action.[33] This approach, which is closely akin to a bond requirement, has been adopted by a number of other jurisdictions.[34] A bond requirement for the party filing the notice of lis pendens could be used to indemnify the original owner of the land for any damages suffered while litigation is pending, which arguably would deter groundless claims.[35] Such provisions also have been criticized, however, because they make a lis pendens filing available only to those parties with sufficient resources to meet the bond requirement.[36]

III. Constitutional Challenges to Prejudgment Remedies Such as Lis Pendens

Lis pendens is a form of prejudgment remedy. In light of the United States Supreme Court decisions concerning procedural due process requirements for other types of prejudgment remedies, lis pendens statutes have been the subject of numerous constitutional challenges. In *Sniadach v. Family Finance Corp.*,[37] the Court struck down a Wisconsin garnishment procedure whereby a creditor was able to freeze a debtor's wages by serving a summons on the garnishee and subsequently serving notice on the debtor.[38] The Court held that this prejudgment procedure constituted the taking of a significant property interest without providing notice and a hearing to the property owner.[39] Justice Harlan, in a concurring opinion, stated that the deprivation of the use of garnished wages "cannot be considered as de minimus, [and] must be accorded the usual requisite of due process."[40] In *Fuen-*

32. *See* N.Y. Civ. Prac. L. & R. § 6514(b) (McKinney 1980).

33. *See* N.J. Stat. Ann. § 2A:15-15 (West 1986).

34. *See, e.g.*, Cal. Civ. Proc. Code § 409.2 (West 1987); N.Y. Civ. Prac. L. & R. § 6515 (McKinney 1980); *see also* Stewart Dev. Co. IV v. Superior Court, 108 Cal. App. 3d 266, 166 Cal. Rptr. 450 (1980) (trial court ordered to determine whether plaintiff's interest could be secured adequately by defendant's posting bond and what the appropriate amount of bond would be). *Cf.* D.C. Code Ann. § 16-509 (1981) (attached property may be released upon posting appropriate security).

35. *Cf.* D.C. Code Ann. § 16-501(e) (1981) (plaintiff in an attachment proceeding must first give "security to be approved by the clerk in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment").

36. *See* Note, *Connecticut's Lis Pendens Shapes Up:* Williams v. Bartlett, 16 Conn. L. Rev. 413, 428 (1984).

37. 395 U.S. 337 (1969).

38. *Id.* at 338-39.

39. *Id.* at 342.

40. *Id.* (Harlan, J., concurring).

tes v. Shevin,[41] the Court expanded the due process protections for prejudgment remedies by holding the Florida and Pennsylvania replevin statutes unconstitutional because they permitted the seizure of furniture and appliances prior to a hearing.[42] The *Fuentes* Court reasoned that an interest in property, besides wages and necessities, is entitled to procedural due process protection, even though the deprivation of that property was only temporary.[43]

Other courts have applied this due process rationale to lis pendens statutes, holding that, although the property owner is not actually ousted from possession of property during the pendency period, he is deprived of his ability to alienate it freely.[44] Furthermore, because the property becomes significantly inalienable, its value diminishes. Thus, as in a garnishment proceeding, the owner is deprived of the use of the property.[45]

Challenges to state lis pendens statutes have developed from a broad reading of Supreme Court precedent dealing with prejudgment remedies such as *Fuentes* and *Sniadach.*[46] For example, in *Kukanskis v. Griffith,*[47] the Connecticut Supreme Court concluded that the state's lis pendens statute deprived the defendant property owner of due process because it failed to provide an opportunity for a hearing at a meaningful time and in a meaningful manner. The Connecticut statute provided that a party to an action affecting real property could simply file a notice of lis pendens, which would, from the time of the filing, bind any subsequent purchaser or encumbrancer to the same extent as if that purchaser or encumbrancer were a party to the action. However, the filing of the lis pendens required no judicial action, no showing of probable cause, and no notice to the defendant property owner. The statute also did not require the party filing the notice to post a bond or

41. 407 U.S. 67 (1972).

42. *Id.* at 84-86, 89-90. *See* Catz & Robinson, *Due Process and Creditor's Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond,* 28 RUTGERS L. REV. 541 (1975); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process,* 61 VA. L. REV. 807 (1975).

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

44. *See, e.g.,* Kukanskis v. Griffith, 180 Conn. 501, 430 A.2d 21 (1980). *Compare id. with* Batey v. Digirolamo, 418 F. Supp. 695, 697 (D. Haw. 1976) (lis pendens not sufficient deprivation of property to warrant due process protections) *and* George v. Oakhurst Realty, Inc., 414 A.2d 471, 474 (R.I. 1980) (same).

45. *See* Chrysler Corp. v. Fedders Corp., 519 F. Supp. 1252, 1262 (D.N.J. 1981) (invalidating a New Jersey statute), *rev'd,* 670 F.2d 1316 (3d Cir. 1982); Kukanskis v. Griffith, 180 Conn. 501, 430 A.2d 21 (1980) (invalidating a Connecticut statute); *see also* Comment, *Does California's Statutory Lis Pendens Violate Procedural Due Process?,* 6 PAC. L.J. 62, 65-66 (1975).

46. *See* Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., 365 F. Supp. 1299 (D. Mass. 1973); Clement v. Four N. State St. Corp., 360 F. Supp. 933 (D.N.H. 1973).

47. 180 Conn. 501, 430 A.2d 21 (1980).

to provide any security to indemnify the owner against damages from an unsupportable claim, nor did it provide any opportunity for the owner to challenge the propriety of the notice either before or after its recording. In striking down the lis pendens provision, the court reasoned:

> While it is true that a flexible test for determining the existence of due process is used, and that a prior hearing is not constitutionally mandated in every case, the Connecticut lis pendens statutes fail to provide even the barest minimum of due process protection. Most conspicuously absent is any provision whatsoever for any sort of timely hearing, either before or after the recording of the notice of lis pendens, which would give the property owner an opportunity to be heard or require the party recording the notice to demonstrate in any way the probability of prevailing on the underlying action. The statutes allow the notice of lis pendens to continue indefinitely without any further action on the part of the party recording it, during which time the property owner is without recourse to the courts to contest the merits of the underlying claim.[48]

Connecticut subsequently amended its lis pendens statute, but that version was also challenged in *Williams v. Bartlett.*[49] The amended statute allowed the property owner to request a hearing and required the plaintiff at the hearing to establish that probable cause existed to sustain the validity of the underlying claim. Upon a finding of no probable cause, the statute empowered the court to discharge the notice of lis pendens. The *Williams* court upheld the amended statute, even though it provided only for a post-filing hearing and did not permit the posting of a bond or other security to obtain a release of the notice of lis pendens. In doing so, the court relied upon the balancing test set forth by the Supreme Court in *Mathews v. Eldridge,*[50] and specifically noted that the deprivation was less than a total deprivation of the property interest and did not affect the property owner's basic needs.[51] Unless the property owner intended to sell or mortgage the real estate, the effect of the lis pendens procedure was minimal.

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48. *Id.* at 510, 430 A.2d at 25.

49. 189 Conn. 471, 457 A.2d 290 (1983).

50. 424 U.S. 319 (1976). *Mathews* involved the discontinuance of Social Security disability payments. The Court held permissible the discontinuance despite a procedure that permitted delay of any hearing for as much as a year after termination. The Court delineated a balancing test to determine what procedural due process is due an individual. This three-prong test consisted of balancing the following issues: first, the private interests that will be affected by the action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the cost to the government that the additional or substitute procedural requirement would entail. *Id.* at 339-49. *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970) (deprivation of welfare benefits without prior hearing held unconstitutional).

51. *Williams,* 189 Conn. at 479-80, 457 A.2d at 94.

In 1981, the United States District Court for the District of New Jersey invalidated that state's lis pendens statute,[52] finding that the filing of lis pendens with the court clerk constituted state action, requiring procedural due process protections.[53] The court reasoned that the filing of a lis pendens notice decreased the marketability of real estate and significantly impaired the owner's ability to sell the property.[54] Applying the *Mathews v. Eldridge* test, it concluded that the impact on the defendant's ability to convey the property was so great that it outweighed the state's interest in providing the statutory protections.[55]

The United States Court of Appeals for the Third Circuit, however, reversed this decision.[56] The Third Circuit held that, although the statute effected a taking of property, it complied with the requisites of due process.[57] The court reasoned that the deprivation of the defendant's property caused by lis pendens was less than total and that the plaintiff actually received a benefit because the notice ensured that his claim would not be defeated by a transfer during the pendency of the suit.[58] The court concluded that the benefit to the plaintiff and the state's interest in discouraging transfers that undermine the litigants' rights were sufficient to uphold the statute as constitutional.[59]

IV. The District of Columbia's View of Procedural Due Process for Prejudgment Remedies

District of Columbia law on due process protections for prejudgment remedies reflects the principles articulated in *Fuentes* and *Sniadach*.[60] For example, in *Jack Development, Inc. v. Howard Eales, Inc.*,[61] the question of what constituted effective notice arose when an unsuspecting purchaser of property claimed he should take the property free of a writ of attachment because sufficient notice of the encumbrance had not been provided.[62] The purchaser argued that the seller of the property had transferred the interest

52. *See* Chrysler Corp. v. Fedders Corp., 519 F. Supp. 1252 (D. N.J. 1981), *rev'd*, 670 F.2d 1316 (3d Cir. 1982).

53. *Id.* at 1260.

54. *Id.*

55. *Id.* at 1262-64.

56. 670 F.2d 1316 (3d Cir. 1982).

57. *Id.* at 1331.

58. *Id.* at 1328.

59. *Id.* at 1329.

60. *See* Tucker v. Burton, 319 F. Supp. 567 (D.D.C. 1970) (upholding the District of Columbia'a attachment statute as meeting the due process requirements set out in *Sniadach*).

61. 388 A.2d 466 (D.C. 1978).

62. *Id.* at 467-68.

before service of the writ of attachment upon the seller and the endorsement and notice, as required by sections 16-502 and 16-508 of the D.C. Code.[63] The plaintiff, who sought to enforce the writ, contended that because a copy of the endorsement of the writ was delivered to the marshal and posted before the transfer of the property, the transferees took the property subject to the attachment.[64] The court emphasized that "because a writ of attachment before judgment is a harsh and drastic remedy, strict compliance with the procedures established by the statute is required."[65] Thus, the court avoided the constitutional question and concluded that the mere delivery of a copy of the writ of attachment to the marshal without actual receipt by the purchaser did not satisfy the notice procedures mandated by the statute.

In *Franklin Investment Co. v. District of Columbia,*[66] the plaintiff, a finance company, began efforts to repossess a vehicle after the chattel mortgagor defaulted on the monthly payments.[67] The vehicle, however, had been impounded previously by the District of Columbia Department of Transportation. After its possession efforts had already begun, the plaintiff received notice from the Department of Transportation that the car had been impounded and that unless the plaintiff paid towing, storage, and notice costs, the car would be disposed of as provided by law.[68] Rather than paying those costs, the plaintiff brought a replevin action for immediate possession of the vehicle. The District of Columbia argued that the lienholder should be required to pay all charges before obtaining possession of the car even though the lienholder did not receive notice until well after those charges accrued.[69] The court, citing the *Fuentes* and *Sniadach* cases, stated that "we question seriously whether due process would be afforded . . . in the absence of any provision for 'reasonable' notice to a chattel mortgagee,"[70] and ruled in favor of the finance company.

V. A Proposed Lis Pendens Statute for the District of Columbia

The following hypothetical statutory provision sets forth language that addresses the rights of purchasers and sellers of property during the pen-

63. *Id.* at 468.

64. *Id.* at 468. Section 16-502 provides that "the order shall be published at least once a week for three successive weeks, or oftener, or for such further time and in such manner as the court orders." D.C. Code Ann. § 16-502 (1981).

65. *Jack Dev.*, 388 A.2d at 468.

66. 462 A.2d 447 (D.C. 1983).

67. *Id.* at 448.

68. *Id.*

69. *Id.* at 449.

70. *Id.* at 450.

dency of a lawsuit. Section (a) addresses the content of the notice and the type of property affected by the legislation. Section (b) covers the effect of filing a notice of lis pendens on subsequent purchasers of the property. Section (c) refers to the place of filing. Section (d) explains how the notice can be cancelled. Finally, section (e) addresses certain procedural safeguards for this prejudgment remedy.

NOTICE OF LIS PENDENS

(a) *Filing Notice:* In an action concerning real property or affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint or at any time afterward, or a defendant upon setting up an affirmative cause of action in the answer and demanding substantial relief at the time the answer is filed, may file for record with the Recorder of Deeds a notice of pendency of the action, containing the names of the parties, the object of the action, and a description of the real property affected.
(b) *Effect of Notice:* The pendency of any action shall constitute constructive notice to a purchaser or encumbrancer of property thereby affected only from the time of filing a notice pursuant to this statute. Once such notice has been properly filed, any subsequent purchaser or encumbrancer shall be bound by all proceedings after the filing of such notice to the same extent as if they were a party to the action.
(c) *Indexing:* A separate index shall be maintained by the Recorder of Deeds for filing notices of lis pendens. Notices shall be indexed by the location of the property and under the name of each party to the proceeding.
(d) *Expunging Lis Pendens Filing:* the notice of lis pendens may be cancelled:

(1) upon entry of judgment after the time for appeal therefrom has run,

(2) upon written request by the party filing the notice,

(3) upon motion by any aggrieved person after a showing of good cause, or

(4) upon posting by the defendant of such security as the court having jurisdiction of the action shall direct until a final judgment has been entered.

(e) *Hearing:* Whenever a notice of lis pendens is filed against any real property pursuant to subsection (a), the person filing the notice shall, within five days after filing such notice, serve upon all parties to the litigation and any person having an interest in the property a copy of the notice and of the complaint. An aggrieved party may then request a hearing to determine the allegations.

> Such a request must be invoked within ten days of service of notice of lis pendens or be waived. A hearing on the matter will be held no later than thirty days after the request for a hearing.
>
> At such a hearing, the person filing the notice first shall be required to establish that there is probable cause to sustain the validity of the claim. Any affected property owners may appear and be heard on the issue.

VI. CONCLUSION

Litigation over lis pendens issues has not been prevalent in the District of Columbia perhaps because, as a practical matter, purchasers of real property have been able to rely upon extensive title searches of the land records and examinations of the plaintiff-defendant tables. If litigation over the property exists, it likely will be discovered in the course of this review. However, a party's knowledge should not have to depend solely upon such searches, and the law should define more clearly the effect that such litigation will have upon the rights of those with an interest in the property. The Council of the District of Columbia should consider specific statutory alternatives for removing the uncertainties attendant to the application of the doctrine of lis pendens. The statute proposed in this article is free from the constitutional infirmities that litigation in jurisdictions has shown can be present in lis pendens statutes.