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Texas Statutory Notice of Lis Pendens: A Deprivation of Property Interest without Due Process Comment.

Herbert A. Janzen

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COMMENT

Texas Statutory Notice of Lis Pendens: A Deprivation of Property Interest Without Due Process?

Herbert A. Janzen

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I. INTRODUCTION

The doctrine of lis pendens refers to the jurisdictional control a court may exercise over property while an action involving that property is pending.¹

1. See *Intermediary Fin. Corp. v. McKay*, 111 So. 531, 531-32 (Fla. 1927)(defining lis pendens as control acquired by court over property during pendency of suit); *Dupee v. Salt Lake Val. Loan & Trust Co.*, 57 P. 845, 847 (Utah 1899)(object of lis pendens to keep res of suit within court's control until judgment); see also L. SIMES, *THE IMPROVEMENT OF CON-*

Lis pendens places the purchaser or transferee of property which is involved in litigation, referred to as a purchaser pendente lite,² in the same position as his transferor, subjecting the purchaser or transferee to any judgment regarding the property.³ The doctrine attempts to prevent parties to a suit from avoiding the effects of adjudication on their property rights by transferring the property prior to resolution of the suit.⁴ Unjust consequences arising from application of the common law lis pendens doctrine have prompted many states to enact statutory provisions limiting its effect.⁵ Unfortunately, while statutory provisions have adequately redressed the rights of purchasers of property, they have largely ignored the rights of the original property owner.

VEYANCING BY LEGISLATION 116 (1960)(lis pendens is power court has over property pending litigation). The doctrine of lis pendens retains the subject matter of pending litigation within the control and jurisdiction of the court until the controversy is resolved, and prevents parties from removing property from the judgment's reach. 51 AM. JUR. 2d *Lis Pendens* § 1 (1970); see also *Roberts v. Cardwell*, 157 S.W. 711, 713 (Ky. 1913)(lis pendens renders parties unable to place property beyond reach of judgment); *Merrill v. Wright*, 91 N.W. 697, 699 (Neb. 1902)(dealings pendente lite cannot interfere with power of court or with rights of litigants).

2. See *Union Trust Co. v. South Inland Nav. & Improvement Co.*, 130 U.S. 565, 570-71 (1889). Purchasers pendente lite take property at their peril. See *id.*; *Missouri State Life Ins. Co. v. Russ*, 214 S.W. 860, 864 (Mo. 1919)(pendente lite purchaser bound by judgment against vendor).

3. See *Lamb v. Cramer*, 285 U.S. 217, 219 (1932)(one not party to suit who acquires interest in property subject to pending litigation bound by judgment); *Shuck v. Quackenbush*, 227 P. 1041, 1047 (Colo. 1924)(purchasers pendente lite bound by judgment against grantors); *Evans v. Wellborne*, 74 Tex. 530, 534, 12 S.W. 230, 231 (1889)(purchaser pendente lite can use no defense not available to vendor). Lis pendens is an exception to the general rule that a judgment cannot bind a person who is not a party to the suit. See *Arrow Sand Gravel Inc. v. Superior Court*, 700 P.2d 1290, 1292 (Cal. 1985)(exception to general rule is that purchaser pendente lite bound by judgment affecting property even though not a party). Compare *Radio Corp. of Am. v. Radio Eng'g Laboratories, Inc.*, 293 U.S. 1, 7 (1934)(judgment not binding on stranger to suit) with *Shuck v. Quackenbush*, 227 P. 1041, 1047 (Colo. 1924)(purchasers pendente lite bound by judgment even though not parties to suit). See generally Note, *Connecticut's Lis Pendens Shapes Up*: *Williams v. Bartlett*, 16 CONN. L. REV. 413, 413-14 (1984) (discussing lis pendens principles).

4. See *Missouri State Life Ins. Co. v. Russ*, 214 S.W. 860, 864 (Mo. 1919)(common law doctrine based on public policy seeking to prevent exercise of court's jurisdiction from being aborted by transfer of subject matter pending litigation); *Merrill v. Wright*, 91 N.W. 697, 698 (Neb. 1902)(doctrine's purpose to prevent third parties from acquiring property interest that would preclude granting of relief). See generally H. TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND 858 (1940)(party to suit may not transfer his rights to prejudice his opponent).

5. See, e.g., *Federal Land Bank v. Ozark City Bank*, 142 So. 405, 408 (Ala. 1931)(Alabama lis pendens statute enacted to prevent hardship to innocent parties under common law doctrine); *Wood v. Price*, 81 A. 983, 984 (N.J. 1911)(state adopted statutory lis pendens notice to avoid inequities occasioned by common law doctrine); *Rardin v. Rardin*, 102 S.E. 295, 297 (W. Va. 1920)(statute seeks to limit severity of common law lis pendens).

This comment will discuss common law lis pendens and the effects of statutory lis pendens notice provisions which have been enacted in response to problems occasioned by the common law doctrine. Texas common law lis pendens will be discussed, as well as the present Texas lis pendens statute. The Texas statute will then be compared to analogous provisions in other states. Additionally, due process issues concerning the Texas statute will be examined in view of how other states have dealt with similar issues. Finally, a proposed Texas statute will be presented based upon similar statutes currently in force in other states which effectively deal with due process issues.

II. THE HISTORY OF LIS PENDENS

A. *Common Law Lis Pendens in General*

The doctrine of lis pendens is of ancient origin,⁶ evolving from the principle that a court's judgment is binding not only on parties to a suit, but also upon anyone acquiring an interest in property pending litigation.⁷ The common law rule is enforced in all fifty states;⁸ forty-seven states have formal statutory recording requirements which effectuate notice of lis pendens to prospective purchasers or transferees of real property.⁹

6. See *Bristow v. Thackston*, 86 S.W. 94, 98 (Mo. 1905); *Mabee v. Mabee*, 96 A. 495, 496-97 (N.J. Ch. 1915)(doctrine of ancient origin, common to courts of law and equity). See generally Note, *The Protection of Land Decrees: The Use of Lis Pendens in Interstate Litigation Affecting California Real Property*, 36 HASTINGS L.J. 255, 257 (1984)(discussing doctrine as ancient judicial principle).

7. See *Mabee*, 96 A. at 495, 496-97 (doctrine of lis pendens not derived from courts of equity).

8. See L. SIMES, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 114 (1960)(common law rule effective in all jurisdictions).

9. See ALA. CODE § 35-4-131 (1977); ALASKA STAT. § 34.15.340 (1985); ARIZ. REV. STAT. ANN. § 12-1191 (1982); ARK. STAT. ANN. § 27-501 (1979); CAL. CIV. PROC. CODE § 409 (Deering 1972 & Supp. 1987); COLO. REV. STAT. § 38-35-110 (1982); CONN. GEN. STAT. ANN. § 52-325 (West Supp. 1987); DEL. CODE ANN. tit. 10, § 7104 (1975); FLA. STAT. ANN. § 48.23 (West Supp. 1987); GA. CODE ANN. § 44-14-610 (1982); HAW. REV. STAT. § 634-51 (1985); IDAHO CODE § 6-504 (1979); ILL. ANN. STAT. ch. 30, para. 121 (Smith-Hurd Supp. 1987); IND. CODE ANN. § 34-1-4-2 (Burns 1986); IOWA CODE ANN. § 617.11 (West 1950); KAN. STAT. ANN. § 60-2201 (1976); KY. REV. STAT. ANN. § 382-440 (Bobbs-Merrill 1972); LA. CODE CIV. PROC. ANN. art. 3751 (West 1961); MD. RULES CODE ANN. Vol. 2 Rule BD2 (1987); MASS. ANN. LAWS ch. 184, § 15 (Law. Co-op. 1987); MICH. STAT. ANN. § 27A.2701 (Callaghan 1980); MINN. STAT. ANN. § 557.02 (West Supp. 1987); MISS. CODE ANN. § 11-47-3 (1972); MO. ANN. STAT. § 527.260 (Vernon 1953); MONT. CODE ANN. § 70-19-102 (1986); NEB. REV. STAT. § 25-531 (1985); NEV. REV. STAT. § 14.010 (1985); N.J. STAT. ANN. § 2A:15-6 (West 1952); N.M. STAT. ANN. § 38-1-14 (1987); N.Y. CIV. PRAC. L. & R. § 6501 (McKinney 1980); N.C. GEN. STAT. § 1-116 (1983); N.D. CENT. CODE § 28-05-07 (Supp. 1987); OHIO REV. CODE ANN. § 2703.26 (Baldwin 1984); OKLA. STAT. ANN. tit. 12, § 2004.2 (West Supp. 1987); OR. REV. STAT. § 93.740 (1985); PA. STAT. ANN. tit. 12, § 103 (Pu-don 1984); R.I. GEN. LAWS § 9-4-9 (1985); S.C. CODE ANN. § 15-11-10 (Law. Co-

Application of *lis pendens* arises from a pending suit, the object of which involves an interest in property.¹⁰ Under the common law doctrine, a suit is "pending" upon the filing of the initial pleading or upon personal service of the defendant.¹¹ A transferee who acquires a real property interest in land which is the object of a pending suit is charged with constructive notice of the litigation regardless of whether he received actual notice.¹² Thus, when the transferee acquires an interest in disputed property, he is bound by a subsequent judgment to the extent that the rights of his transferor would be effected concerning the property.¹³ It is possible, then, under the common law doctrine, for a transferee who pays valuable consideration for property, even without actual notice that such property is the subject of pending litigation, to find that he has acquired substantially less interest than was intended, or even to have acquired no interest at all.¹⁴

A purchaser in good faith who pays valuable consideration for property without notice of another's adverse rights is commonly referred to as a *bona fide* purchaser.¹⁵ *Bona fide* purchasers are generally protected from any ad-

op. 1977); S.D. CODIFIED LAWS ANN. § 15-10-1 (1984); TENN. CODE ANN. § 20-3-101 (1980); TEX. PROP. CODE ANN. § 12.007 (Vernon 1984); UTAH CODE ANN. § 78-40-2 (1977); VA. CODE ANN. § 4.28.320 (1962); WASH. REV. CODE ANN. § 4.28.320 (1962); W. VA. CODE § 55-11-2 (1981); WIS. STAT. ANN. § 840.10 (West 1977); WYO. STAT. § 1-6-108 (1977).

10. See *State ex rel. Hamilton v. Guinotte*, 57 S.W. 281, 283 (Mo. 1900)(*lis pendens* is pending suit). *Lis pendens* literally means a suit that is pending. See *Marchand v. De Soto Mortgage Co.*, 149 So.2d 357, 359 (Fla. Dist. Ct. App. 1963). See generally L. SIMES, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION*, 117-18 (1960)(doctrine applies if judgment, order, or decree transfers, determines, cancels, or creates rights or interests in property); Note, *Lis Pendens: Its Effect On Prior Unrecorded Interests*, 15 U. FLA. L. REV. 580, 581-82 (1963)(discussing elements of *lis pendens* necessary for application of doctrine).

11. See *Farmers' Loan & Trust Co. v. Lake*, 177 U.S. 51, 61 (1899)(notice of *lis pendens* effective when defendant served, not when bill filed); *Fisher v. Shropshire*, 147 U.S. 133, 143 (1893)(filing of petition gives notice of *lis pendens* at law).

12. See *Goodson v. Lehmon*, 35 S.E.2d 623, 626 (N.C. 1945)(pendente lite purchaser conclusively charged with notice).

13. See *Wilkin v. Shell Oil Co.*, 197 F.2d 42, 49-50 (10th Cir. 1951)(purchaser pendente lite acquires property subject to transferor's rights as determined by judgment); *Hart v. Pharaoh*, 359 P.2d 1074, 1079 (Okla. 1961)(purchaser pendente lite acquires rights of grantor only).

14. See *Lacassagne v. Chapuis*, 144 U.S. 119, 124-26 (1892)(purchaser of property during litigation subsequently evicted based upon judgment concerning grantor's interest); *Powell v. Campbell*, 20 P. 156, 163-64 (Nev. 1889)(purchaser of land from husband during divorce suit in which wife was awarded real property acquired no interest).

15. See, e.g., *McAboy v. Packer*, 187 S.W.2d 207, 209 (Mo. 1945)(good faith, lack of notice, and valuable consideration essential elements of *bona fide* purchaser); *Croak v. Witteman*, 17 N.W.2d 542, 545-46 (N.D. 1945)(valuable consideration, good faith, and no notice necessary for *bona fide* purchase); *Barth v. Barth*, 143 P.2d 542, 549 (Wash. 1943)(purchaser in good faith, absent actual or constructive notice of claims or rights of others, who gives valuable consideration is *bona fide*).

verse claims against their purchases.¹⁶ Conversely, a purchaser who has notice of prior rights at the time of his purchase is not considered bona fide and consequently will not be shielded from adverse claims.¹⁷ However, common law lis pendens may prevent pendente lite purchasers from being considered bona fide because they are charged with constructive notice of pending litigation regardless of whether they had actual notice.¹⁸

B. *Common Law Lis Pendens in Texas*

A presumption existed in early Texas common law that every person had knowledge of actions pending and proceeding in the courts of local jurisdiction.¹⁹ One who purchased real property which was the subject of local litigation was therefore presumed to have purchased the property with notice of the pending proceedings.²⁰ Consequently, such a pendente lite purchaser was bound by the judgment affecting the suit.²¹

The doctrine in Texas has been applied to suits in law and equity involving

16. *See* *Townsend v. Little*, 109 U.S. 504, 511-12 (1883)(bona fide purchaser entitled to protection in equity and law); *Home Sav. & State Bank v. Peoria Agric. & Trotting Soc'y.*, 69 N.E. 17, 18-19 (Ill. 1903)(bona fide purchaser of land protected).

17. *See, e.g.*, *San Pedro & Canon del Agua Co. v. United States*, 146 U.S. 120, 139 (1892)(purchaser not bona fide where warned of adverse claims to land); *Wilson v. Pennington*, 474 P.2d 658, 660-61 (Okla. 1970)(notice of adverse rights precludes defense of bona fide purchase); *Barth v. Barth*, 143 P.2d 542, 549 (Wash. 1943)(purchaser of real property with actual notice of void deed not bona fide purchaser).

18. *See* *Thompson v. Baker*, 141 U.S. 648, 655 (1891)(purchaser of land pendente lite charged with constructive notice of rights of parties to suit); *First Nat'l Bank v. McGraw*, 101 S.E. 474, 483 (W. Va. 1919)(allegations in suit regarding property bind purchaser pendente lite by putting him on inquiry as to whether property is subject of suit); *Stout v. Philippi Mfg. & Mercantile Co.*, 23 S.E. 571, 573 (W. Va. 1895)(pendente lite purchasers charged with constructive notice of allegations in suit and facts in record). A party who asserts the doctrine of lis pendens against a purchaser may prevent the purchaser from becoming bona fide. *See* *Stout*, 23 S.E. at 573.

19. *See* *Briscoe v. Bronaugh*, 1 Tex. 326, 333 (1846)(every person charged with constructive notice of actions in courts of domicile); *Reeves v. Houston Oil Co. of Texas*, 230 S.W.2d 255, 266 (Tex. Civ. App.—Beaumont 1950, writ ref'd n.r.e.)(common law charged one with notice of pendency of suit); *see also* *Fox v. Reeder*, 28 Ohio St. 181, 22 Am. Rep. 370, 375-76 (1875)(theory underlying lis pendens and supporting charge of constructive notice holds that all persons should be familiar with actions pending in local courts).

20. *See* *Hartel v. Dishman*, 135 Tex. 600, 606, 145 S.W.2d 865, 868 (1940)(prior to Texas lis pendens statute, purchaser pendente lite charged with constructive notice of suit regardless of actual notice); *Briscoe*, 1 Tex. at 333 (purchaser of property pendente lite without actual notice charged with constructive notice); *Hexter v. Pratt*, 283 S.W. 653, 656 (Tex. Civ. App.—Dallas 1926)(common law purchaser pendente lite bound by judgment regardless of knowledge of pending litigation), *aff'd*, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgment adopted).

21. *See* *Rio Bravo Oil Co. v. Herbert*, 130 Tex. 1, 106 S.W.2d 242, 247 (1937)(purchaser of property in litigation is pendente lite purchaser and bound by judgment against grantor); *Black v. Burd*, 255 S.W. 553, 555 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.)(purchaser of property involved in suit is pendente lite purchaser and bound by judgment).

title to land,²² suits brought to enforce a lien or encumbrance charged on land,²³ and suits to establish an interest, right, or equitable estate in land.²⁴ The doctrine has been applied not only to purchasers of real property, but also to transferees acquiring a similar interest.²⁵ A suit was not pending for purposes of pre-statutory *lis pendens* until the defendant had been served with citation or had made a voluntary appearance.²⁶ The purchaser or transferee who acquired an interest in the property before the defendant was served was not bound by the doctrine.²⁷ However, if the purchaser acquired the property at any time after service or voluntary appearance of the defendant, the doctrine applied and the transferee was charged with constructive notice and bound by the judgment.²⁸ Thus, the common law doctrine in Texas, like the traditional common law doctrine, could prevent a purchaser *pendente lite* from attaining the status of a bona fide purchaser irrespective of actual notice.

III. STATUTORY LIS PENDENS

Responding to potentially unjust effects of the common law doctrine, many states enacted statutes seeking to limit the imposition of constructive notice as it existed under the common law rule.²⁹ States which maintain

ment); *Lovenskoild v. Casas*, 229 S.W. 888, 891 (Tex. Civ. App.—San Antonio 1921, writ *dism'd*)(purchaser of real property subject of pending litigation purchases at own peril).

22. *See, e.g.*, *Edward v. Norton*, 55 Tex. 405, 408-11 (1881)(suit for specific performance of contract for sale of land subject to *lis pendens* notice).

23. *See, e.g.*, *Burford v. Rosenfield*, 37 Tex. 42, 42-43 (1872)(*lis pendens* applied to suit to foreclose vendor's lien).

24. *See, e.g.*, *Mansur & Tebbetts Implement Co. v. Beer*, 19 Tex. Civ. App. 311, 313, 45 S.W. 972, 973 (1898, writ *ref'd n.r.e.*).

25. *See Lee v. Salinas*, 15 Tex. 495, 497 (1855)(transfer of property pending litigation subservient to rights of party, binding transferee to judgment).

26. *See Sparks v. Taylor*, 99 Tex. 411, 421, 90 S.W. 485, 487 (1906)(where defendant not served with citation, doctrine of *lis pendens* inapplicable); *Humphrey v. Beaumont Irrigating Co.*, 41 Tex. Civ. App. 308, 314, 93 S.W. 180, 182, (1906, writ *ref'd*) (well-settled in Texas that *lis pendens* does not bind purchaser unless defendant served or voluntarily appears).

27. *See, e.g.*, *Wortham v. Boyd*, 66 Tex. 401, 1 S.W. 109, 110 (1886)(service of parties necessary to bind purchaser *pendente lite* to judgment); *O'Brien v. Perkins*, 276 S.W. 308, 315 (Tex. Civ. App.—Amarillo 1925)(*lis pendens* inapplicable where land sold before defendant served with citation), *aff'd*, 285 S.W. 260 (Tex. Comm'n App. 1926, judgment adopted).

28. *See Randall v. Snyder*, 64 Tex. 350, 353 (1885)(*pendente lite* purchaser charged with notice and bound by subsequent judgment).

29. *See, e.g.*, *First Ave. Coal & Lumber Co. v. Rimer*, 133 So. 589, 590-91 (Ala. 1931)(*lis pendens* statute lessened unjust effect of common law doctrine); *General Elec. Credit Corp. v. Winnebago of N.J.*, 373 A.2d 402, 403 (N.J. Super. Ct. App. Div. 1977)(New Jersey *lis pendens* statute adopted to dilute harshness of doctrine in good faith conveyances where notice of pending suit in public registry); *Allied E. Fin. v. Goheen*, 71 Cal. Rptr. 126, 127 (Ct. App. 1968)(to eliminate hardship of common law *lis pendens*, California enacted statute limiting constructive notice); *Kenner v. Fields*, 125 S.E.2d 44, 45-46 (Ga. 1962)(Georgia *lis pendens*

statutory lis pendens requirements do not entirely dispose of the common law doctrine, but tend only to limit it.³⁰ This has been accomplished by requiring a formal notice to prospective purchasers or transferees.³¹ If the statutory notice requirements are not met, courts have held that the transferee is not bound by the judgment unless he had actual notice by other means that the real property was involved in litigation.³² Texas is among those states imposing limits upon the common law lis pendens doctrine through statutory notice provisions.³³

A. *Statutory Lis Pendens in Texas*

The Texas statutory scheme of lis pendens is embodied within sections 12.007, 12.008, and 13.004 of the Texas Property Code.³⁴ Under section 12.007, notice of the pending litigation must be filed in the county where the property is located.³⁵ Formal notice of lis pendens may be filed upon the rendering of a statement by the plaintiff in an eminent domain proceeding, during the pendency of a suit involving the title to real estate or the establishment of a real property interest, or during the enforcement of encumbrances against real property.³⁶ Section 12.007 further specifies that the notice must include: (1) the style and number of the action, if any; (2) the court where the suit is pending; (3) the names of the parties to the suit; (4) the type of action; and (5) a description of the real property.³⁷ The lis pendens notice must be filed by the county clerk in a lis pendens record.³⁸

statute intended to provide notification for those not party to suit that any judgment rendered against property will be binding on subsequent purchaser).

30. See Rimer, 133 So. at 590-91 (lis pendens statute requiring formal filing of notice limits harsh effect of constructive notice under common law doctrine); P.A. Stark Piano Co. v. Fannin, 279 S.W. 1080, 1081 (Ky. Ct. App. 1926)(Kentucky lis pendens statute limits effect of common law doctrine by charging purchaser pendent lite with constructive notice).

31. See, e.g., ARIZ. REV. STAT. ANN. § 12-1191 (1982)(constructive notice of lis pendens effective upon filing of formal notice); ARK. REV. STAT. ANN. § 27-501 (1979); NEB. REV. STAT. § 25-531 (1985).

32. See, e.g., Oil Fields Corp. v. Dashko, 294 S.W. 25, 31-32 (Ark. 1927)(purchaser acquiring real property prior to required filing of lis pendens not bound by judgment); Drummond v. Batson, 258 S.W. 616, 621 (Ark. 1924)(purchaser with actual knowledge of pending suit bound by judgment absent formal notice filing requirement under Arkansas statute).

33. See Hartel v. Dishman, 135 Tex. 600, 606-07, 145 S.W.2d 865, 868 (1940)(lis pendens statute did not change common law except toward transferees giving valuable consideration without actual or constructive notice of pending suit). See generally Olds, *Lis Pendens*, 4 HOUS. L. REV. 221, 222-24 (1966)(discussing effect of Texas statute on common law doctrine).

34. TEX. PROP. CODE ANN. §§ 12.007, 12.008, 13.004 (Vernon 1984)(filing, cancellation, and recording of lis pendens, respectively).

35. See *id.* § 12.007.

36. *Id.*

37. See *id.*

38. *Id.*

Once filed as prescribed by section 12.007, the lis pendens notice operates as constructive notice under section 13.004 of the Texas Property Code.³⁹ Section 13.004(b) provides that a purchaser pendente lite who has paid valuable consideration is not bound by the judgment unless a formal notice is filed in accordance with section 12.007.⁴⁰ The formal notice requirement is the primary distinguishing element between common law lis pendens and its statutory counterpart in Texas.⁴¹

Notice of lis pendens filed pursuant to section 12.007 deviates from the common law rule only as to the point in time when constructive notice becomes effective.⁴² Under the Texas common law doctrine, one acquiring an interest in real property was charged with constructive notice upon the service of the defendant; in contrast, the Texas statute does not charge the transferee with constructive notice until the lis pendens formal notice is filed.⁴³ Section 13.004 serves to limit the common law doctrine only when no notice under section 12.007 has been filed, and the transferee purchased the property for valuable consideration absent both actual or constructive notice of the litigation pending at the time of the transfer.⁴⁴ The statute effectively grants the purchaser bona fide status only prior to the filing of a

39. *See id.* § 13.004; *see also* Harris Realty Co. v. Austin, 134 Tex. 484, 486, 137 S.W.2d 19, 20 (1940)(filed lis pendens constitutes notice to world).

40. *See* TEX. PROP. CODE ANN. § 13.004 (Vernon 1984); *see also* City Nat'l Bank v. Craig, 113 Tex. 375, 380, 257 S.W. 210, 212 (1923)(statutory lis pendens must be filed to bind purchaser without actual notice).

41. *See* Craig, 113 Tex. at 380-81, 257 S.W. at 212 (statutory lis pendens only changes common law doctrine as to purchasers pendente lite in good faith for valuable consideration without notice); Hexter v. Pratt, 283 S.W. 653, 656 (Tex. Civ. App.—Dallas 1926)(once complied with, statutory lis pendens becomes operative as at common law), *aff'd*, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted).

42. *Compare* Humphrey v. Beaumont Irrigating Co., 41 Tex. Civ. App. 308, 314, 93 S.W. 180, 182 (1906, writ ref'd)(common law in Texas that charging purchaser with notice under doctrine of lis pendens ineffective prior to service or voluntary appearance of defendant) *with* Hexter, 283 S.W. at 656-57 (filing in compliance with statute necessary to charge purchaser with constructive notice of lis pendens), *aff'd*, 10 S.W.2d 692 (Tex. Comm'n App. 1928, judgm't adopted).

43. *Compare* TEX. PROP. CODE ANN. § 13.004 (Vernon 1984)(notice effective upon filing of lis pendens) *with* Crawford v. Ruby, 239 S.W. 1024, 1026 (Tex. Civ. App.—Beaumont 1922, no writ)(mere filing of suit against property operated as lis pendens notice).

44. *See* TEX. PROP. CODE ANN. § 13.004 (Vernon 1984). *Compare* Holford v. Patterson, 113 Tex. 410, 257 S.W. 213, 214 (1923)(compliance with statutory filing requirements unnecessary to bind purchaser pendente lite with constructive notice of pending litigation) *and* Waitz v. Uvalde Rock Asphalt Co., 58 S.W.2d 884, 886 (Tex. Civ. App.—Beaumont 1933, no writ)(filing pursuant to statutory lis pendens requirement unnecessary to bind purchaser pendente lite with actual knowledge of suit) *with* Jiles v. Citizens Nat'l Bank, 257 S.W. 945, 946 (Tex. Civ. App.—Texarkana 1923, writ dism'd)(mortgagee of land for valuable consideration without actual or constructive notice of pending litigation considered bona fide absent knowledge of lis pendens filing).

notice.⁴⁵ Consequently, a purchaser of land in Texas, which is the subject of pending litigation, loses his bona fide purchaser status once notice of lis pendens has been filed.⁴⁶

Notice can be filed by anyone claiming an interest in land which is the subject of a pending suit.⁴⁷ Filing of a notice may place a cloud on the title to the property,⁴⁸ making it difficult, if not impossible, for the property owner to sell his interest, since the pendente lite purchaser will be bound by the judgment.⁴⁹ Under the Texas statute, the only way a seller can remove the cloud on his title caused by a lis pendens notice is to post a bond or give an undertaking pursuant to the statute,⁵⁰ or proceed to trial on the underlying suit and obtain a favorable final judgment.⁵¹ Posting of a bond requires the deposit of money into the registry of the court by the person seeking to

45. See *Holford*, 113 Tex. at 413, 257 S.W. at 214 (statute affords no protection to purchasers pendente lite with actual or constructive notice).

46. See *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 769 (Tex. 1983). A purchaser who acquires property subsequent to a notice of lis pendens is entitled to no better title than his grantor. See *id.*; see also *Kress v. Soules*, 255 S.W.2d 244, 250 (Tex. Civ. App.—Austin 1953)(where notice of lis pendens filed, purchaser pendente lite held not innocent purchaser and bound by judgment), *aff'd in part, rev'd on other grounds*, 261 S.W.2d 703 (Tex. 1953); *Black v. Burd*, 255 S.W.2d 553, 554-56 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.)(purchaser pendente lite not bona fide where property purchased subsequent to filing of lis pendens notice).

47. TEX. PROP. CODE ANN. § 12.007 (Vernon 1984).

48. See, e.g., *Griffin v. Rowden*, 702 S.W.2d 692, 694 (Tex. App.—Dallas 1985, no writ)(notice of lis pendens filed under section 12.007 claimed by defendants to effectively cloud title, prevented defendants from offering unencumbered property); *Helmsley-Spear, Inc. v. Blanton*, 699 S.W.2d 643, 644-45 (Tex. App.—Houston [14th Dist.] 1985, no writ)(property owner claiming void notice of lis pendens was cloud on title that could interfere with sale of property); *Ransopher v. Deer Trails, Ltd.*, 647 S.W.2d 106, 108 (Tex. App.—Houston [1st Dist.] 1983, no writ)(notice of lis pendens is encumbrance which may prevent party from selling real property while litigation pending).

49. See, e.g., *Bainbridge v. Bainbridge*, 662 S.W.2d 655, 658 (Tex. App.—Dallas 1983, no writ)(filing of lis pendens by husband caused wife to incur premium of \$1,254.00 on indemnity bond to sell house); *Builder's Sand, Inc. v. Dalehite*, 654 S.W.2d 858, 859 (Tex. App.—Houston [14th Dist.] 1983, no writ)(landowner claiming inability to convey good title where lis pendens filed); *Ransopher*, 647 S.W.2d at 108 (lis pendens may prevent party from using or selling property pending litigation); *Hughes v. Houston N.W. Med. Center*, 647 S.W.2d 5, 6-7 (Tex. App.—Houston [1st Dist.] 1982, no writ)(defendants claiming filed lis pendens rendered it impossible to consummate pending sale).

50. TEX. PROP. CODE ANN. § 12.008 (Vernon 1984)(cancellation of lis pendens upon deposit of money into court or giving of undertaking).

51. See, e.g., *Group Purchases, Inc. v. Lance Invs., Inc.*, 685 S.W.2d 729, 731-32 (Tex. App.—Dallas 1985, no writ)(lis pendens remains effective through final judgment and appeal); *Dalehite*, 678 S.W.2d at 118 (lis pendens notice voided only after non-jury trial judgment); *Hughes*, 647 S.W.2d at 7 (during suit court may not cancel properly filed notice of lis pendens except as prescribed by statute).

remove the encumbrance.⁵² An undertaking, for purposes of removing the *lis pendens*, is a guarantee to the party who filed the notice of twice the amount of the judgment sought.⁵³ These two provisions are the exclusive statutory removal procedures, available only at the discretion of the trial court.⁵⁴ Any one of these options is time consuming and expensive.⁵⁵ Further, the Texas statute fails to provide the property owner with an opportunity to determine whether the notice was filed in good faith.⁵⁶ In fact, Texas courts have held that filing of *lis pendens* is a privileged judicial act and thus the property owner is precluded from questioning the motives of the *lis pendens* filer.⁵⁷

The statutory provisions which allow cancellation of a *lis pendens* upon the filing of a bond or the giving of an undertaking are protective of the interests of the person filing the *lis pendens*, rather than the interests of the property owner. The filing party is initially protected by a filed notice; and should the notice be cancelled, he remains protected by the required filing of a bond or giving of an undertaking.⁵⁸ Conversely, the property owner is burdened with the effect of the notice until final judgement by either a cloud on his title arising from the filed notice, or by the substantial expense of removing the notice as prescribed by statute.⁵⁹

B. *Statutory Lis Pendens Provisions in Other Jurisdictions*

A majority of states have *lis pendens* statutes which typically provide that

52. TEX. PROP. CODE ANN. § 12.008 (Vernon 1984).

53. *Id.*

54. *See id.*; *see also* Ransopher v. Deer Trails, Ltd., 647 S.W.2d 106, 109 (statute gives court discretion to cancel whether filing right, wrong, privileged, or unprivileged); Hughes, 647 S.W.2d at 8 (court has discretion to cancel *lis pendens* if bond posted or money deposited).

55. *See* Ransopher, 647 S.W.2d at 108-09 (notice of *lis pendens* may unreasonably affect large portions of land for long periods of time, removable at great expense).

56. *See* TEX. PROP. CODE ANN. §§ 12.007, 12.008, 13.004 (Vernon 1984)(no hearing available for determination of good faith filing).

57. *See, e.g.*, Griffin v. Rowden, 702 S.W.2d 692, 694-95 (Tex. App.—Dallas 1985, no writ)(notice of *lis pendens* absolutely privileged and cannot give rise to action in libel or slander); Ransopher, 647 S.W.2d at 109 (filing notice of *lis pendens* privileged); Kropp v. Prather, 526 S.W.2d 283, 286-87 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.)(notice of *lis pendens* constitutes publication which is part of judicial proceeding).

58. TEX. PROP. CODE ANN. § 12.008 (Vernon 1984). The court may cancel the *lis pendens* only if it determines that the party seeking affirmative relief will be adequately protected. *Id.*

59. *See* Group Purchases, Inc. v. Lance Invs., Inc., 685 S.W.2d 729, 731-32 (Tex. App.—Dallas 1985, no writ)(*lis pendens* effective until judgment and appeal). Where a filed notice of *lis pendens* is void, for example, because the party filing the notice is not a real party in interest, but the trial court fails to cancel it, the affected party has the option of awaiting final judgment or proceeding by writ of mandamus directing the trial court to cancel the notice. *See* Moss v. Tennant, 722 S.W.2d 762, 763-64 (Tex. App.—Houston [14th Dist.] 1986, no writ).

constructive notice of lis pendens arises upon filing of formal notice.⁶⁰ Several states have recognized that a notice of lis pendens which is not promptly prosecuted can alienate the property indefinitely, and have accordingly enacted statutory removal provisions preventing that effect.⁶¹ Furthermore, states which have addressed the effect of a wrongly filed notice of lis pendens statutorily require some type of hearing for an initial determination of the legitimacy of the notice.⁶²

The lis pendens statute in California, for example, provides for an expungement of a filed notice unless the party filing the lis pendens shows the court by a preponderance of the evidence that the pending litigation affects the land subject to the notice and that the action was brought in good faith.⁶³ Thus, under the California statute, notice of lis pendens filed in bad faith or against the wrong property may be promptly removed.⁶⁴

Similarly, in a 1985 amendment to its lis pendens notice statute, the Massachusetts legislature added a provision requiring the court, upon motion by any party to the pending suit, to make a determination of whether the action genuinely affects a right to the real property, such a determination being a prerequisite to a filing of lis pendens.⁶⁵ Furthermore, the Massachusetts statute provides a party, against whom a meritless suit affecting his real property interest has been filed, with the opportunity to remove the notice of lis pendens through a pre-trial hearing.⁶⁶ The California and Massachusetts

60. See, e.g., CAL. CIV. PROC. CODE § 409 (Deering Supp. 1987)(purchaser of encumbered property charged with constructive notice from time of filing); CONN. GEN. STAT. ANN. § 52-325 (West Supp. 1986)(notice effective after filing against any person acquiring any interest in property subject of the pending action); IOWA CODE ANN. §§ 617.10, 617.11 (West 1950)(upon filing of petition and indexing, third parties charged with notice of action); TEX. PROP. CODE ANN. § 13.004 (Vernon 1987)(upon filing of formal lis pendens notice, third parties charged with notice).

61. See, e.g., CAL. CIV. PROC. CODE § 409.1-409.2 (Deering Supp. 1987)(right of adversely affected party to seek expungement); CONN. GEN. STAT. ANN. § 52-525a (West Supp. 1987)(providing for hearing for discharge of lis pendens); MASS. ANN. LAWS ch. 184, § 15 (Law. Co-op. 1987)(validity of lis pendens may be challenged if pled in ex parte proceeding and any party aggrieved may appeal any ruling on notice).

62. See CAL. CIV. PROC. CODE § 409.1 (Deering Supp. 1987); CONN. GEN. STAT. ANN. § 52-325a (West Supp. 1987); MASS. ANN. LAWS ch. 184, § 15 (Law. Co-op. Supp. 1987).

63. See CAL. CIV. PROC. CODE § 409.1 (Deering Supp. 1987).

64. See *id.*; see also *Ranchito Ownership Co. v. Superior Court*, 182 Cal. Rptr. 54, 59 (Ct. App. 1982). In *Ranchito*, at a hearing on a motion for an order of expungement the filing party failed to show that the action was prosecuted in good faith and for a proper purpose. See *id.* The notice of lis pendens was expunged and the parties were prevented from clouding title by filing a second notice of lis pendens. See *id.*

65. See MASS. ANN. LAWS ch. 184, § 15 (Law. Co-op. Supp. 1987). The Massachusetts statute further provides that if the court's finding is made by a motion in an ex parte proceeding, any party affected can motion for a hearing for dissolution of the filed motion. See *id.*

66. See *id.*

provisions directly address due process concerns by ensuring that individuals have an opportunity to be heard before they may be deprived of a significant property right.

IV. CONSTITUTIONAL ISSUES SURROUNDING LIS PENDENS

A. *Due Process Protections Under Federal and State Constitutions*

The fourteenth amendment to the United States Constitution prohibits the government from depriving a person of property without due process of law.⁶⁷ At a constitutional minimum, due process requires notice and an opportunity to be heard before significant property interests may be taken by the state.⁶⁸ Enforcement of a statute which assists a person in depriving another of a such a property interest constitutes state action for purposes of due process.⁶⁹ For example, a statutory prejudgment remedy which deprives one of a property interest without sufficient hearing has been found to violate due process.⁷⁰ Due process protection of a property interest additionally requires a legitimate claim of entitlement to that interest,⁷¹ and is then applied indiscriminately regardless of the type of property interest involved.⁷²

Property for due process purposes encompasses all valuable interests one possesses apart from oneself.⁷³ Due process protects a number of rights arising from one's ownership in land, including the right to lease, use, and dispose of the land;⁷⁴ the right of the property owner to set the price for which

67. U.S. CONST. amend XIV, § 1.

68. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)(fundamental to due process are rights to be heard and receive notice). Upon a governmental deprivation or a taking of a significant property interest, procedural due process is necessitated. *See Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1321 (3rd Cir. 1982).

69. *Fuentes*, 407 U.S. at 92-93 (statute allowing summary seizure of property was state action for due process purposes); *Bonner v. B-W Utils., Inc.*, 452 F. Supp. 1295, 1300-01 (W.D. La. 1978)(statutory executory procedure enforcing real mortgages involved state action necessitating due process).

70. *See North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-07 (1975)(writ of garnishment issued upon mere conclusory allegations violates due process).

71. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)(property interest must be more than abstract need or desire to give rise to legitimate claim for due process protection).

72. *Di-Chem*, 419 U.S. at 608 (applying due process, Court will not distinguish between types of property).

73. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917)(property more than mere object of ownership, includes right to use, acquire, dispose of property); *Campbell v. Holt*, 115 U.S. 620, 630 (1885)(Bradley, J., dissenting)(property includes all valuable interests one possesses apart from self).

74. *Terrace v. Thompson*, 263 U.S. 197, 215 (1923)(property rights include ability to use, lease, and dispose of property).

his land will be used or sold;⁷⁵ and the right to put one's property to any lawful use one chooses.⁷⁶

The Texas Constitution, similarly to its federal counterpart, prohibits the deprivation of property without "due course of the law. . . ."⁷⁷ Texas courts have held that the restrictions imposed upon the states by the due process clause of the fourteenth amendment of the Federal Constitution are closely paralleled by the protection afforded by the due process clause of the Texas Constitution.⁷⁸ A statute, such as the Texas lis pendens provision, which assists a party in depriving another of his property interest must comport with due process under the State Constitution.⁷⁹ Once lis pendens is filed, although not precluding the aggrieved party from possession, it can significantly impair the alienability of the property,⁸⁰ and may obstruct the owner from unimpaired use and enjoyment of his property.⁸¹ While the effect of the statute does not amount to a complete taking of property, all that is required to trigger application of due process is that a significant property interest be deprived.⁸² Accordingly, the owner of real property in Texas,

75. *Tyson & Bros.-United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 429 (1927)(due process protects property owner's right to set selling price for property); *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 192 (1936)(fourteenth amendment encompasses property owner's right to set price for sale of property).

76. *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928)(constitution protects right to use property for any lawful purpose).

77. TEX. CONST. art. 1, § 19. The Texas Constitution provides that "[n]o citizen of this state shall be deprived of . . . property . . . except by the due course of the law of the land." *Id.*

78. *See Mellinger v. City of Houston*, 68 Tex. 37, 44-45, 3 S.W. 249, 252 (1887)(rights guaranteed by fourteenth amendment to United States Constitution equally protected by article 1, section 19 of Texas Constitution).

79. *See Bonner v. B-W Utils., Inc.*, 452 F. Supp. 1295, 1300-01 (W.D. La. 1978)(minimum due process requires notice and hearing before depriving owner of property). In *Bonner*, the court held that the Louisiana statutory procedure for enforcing mortgage obligations on real property violated due process. *See id.* at 1303.

80. *See Ryan Mortgage Investors v. Fleming-Wood*, 650 S.W.2d 928, 932 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.)(upon filing of lis pendens notice, sellers of property unable to offer marketable title); *see also Ransopher v. Deer Trails, Ltd.*, 647 S.W.2d 106, 108 (Tex. App.—Houston [1st Dist.] 1983, no writ)(while suit pending, notice of lis pendens may prevent sale or use of property); *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1324-25 (3rd Cir. 1982)(alienation of property occasioned by filing lis pendens merits consideration of due process issues).

81. *See Manges v. Guerra*, 673 S.W.2d 180, 182 (Tex. 1984)(filing of notice of lis pendens prevented leasing of mineral interests of property); *Rural Dev., Inc. v. Stone*, 700 S.W.2d 661, 664 (Tex. App.—Corpus Christi 1985, no writ). In *Stone*, a notice of lis pendens created difficulties in converting a construction loan to a permanent loan. *See Stone*, 700 S.W.2d at 644. The property owner was unable to post a \$30,000 bond to lift the lis pendens notice and the lender foreclosed on the property. *See id.*

82. *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972)(significant taking of property within purview of due process clause). The fourteenth amendment applies to non-final and temporary deprivations. *Id.* at 84-85. Even if lis pendens does not deprive a property owner of posses-

affected by a statutory notice of lis pendens, should have the benefit of the minimal due process protection of hearing and notice.⁸³ While the Texas lis pendens statute satisfies the due process notice requirement by providing for the filing of a formal lis pendens notice, the statute fails to fully meet due process requirements in that it affords a property owner no opportunity to be heard.⁸⁴ Since a notice of lis pendens deprives the property owner of unburdened use of his land without the opportunity to secure a judicial determination regarding the merits of the lis pendens, the Texas lis pendens statute violates due process under both the Texas and United States Constitutions.⁸⁵

C. *The Texas Lis Pendens Statute: Unconstitutional Prejudgment Remedy*

A notice of lis pendens is a prejudgment remedy which effectuates the taking of a property interest; therefore, the same protection afforded to property owners when other prejudgment remedies are invoked should apply as well to lis pendens filing.⁸⁶ The United States Supreme Court in *North Geor-*

sion, enjoyment, or use of real estate, the notice of lis pendens interferes with the owner's right to mortgage or sell his property, which may be a sufficient deprivation to invoke due process protection. *Williams v. Bartlett*, 457 A.2d 290, 293 n.5, 294 (Conn. 1983).

83. *See Fuentes*, 407 U.S. at 80-86. It is a fundamental due process mandate that where one's rights are to be affected he must be given notice and an opportunity to be heard. *See id.* at 80.

84. *See TEX. PROP. CODE ANN.* § 13.004 (Vernon 1984) (filing under Section 12.007 is notice to world); *see also id.* §§ 12.007, 12.008, 13.004 (no provision for hearing in sections 12.007, 12.008 and 13.004 of Texas Property Code). A New Jersey lis pendens statute which failed to provide for either a pre- or post-filing hearing was unconstitutional as it did not satisfy due process. *See Chrysler Corp. v. Fedders Corp.*, 519 F. Supp. 1252, 1264 (D. N.J. 1981), *rev'd*, 670 F.2d 1316 (3rd Cir. 1982); *see also Kukanskis v. Griffith*, 430 A.2d 21, 24-25 (Conn. 1980). The court in *Griffith* stated that a *prior* hearing was not constitutionally mandated in every case to satisfy due process. *Id.* at 25. However, the Connecticut lis pendens statute, in failing to providing for any timely hearing, deprived the defendant property owner of due process. *See id.*

85. *See, e.g., Parker v. El Paso Water Imp. Dist.*, 116 Tex. 631, 641-42, 297 S.W. 737, 742 (1927)(cannot deprive owner of possession of property without due process under United States and Texas Constitutions); *Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W. 513, 514 (1921)(property rights to possession, ownership, and unrestricted right of enjoyment, use and disposal protected by due process limitations); *Bielecki v. City of Port Arthur*, 12 S.W.2d 976, 978 (Tex. Comm. App. 1929, opinion adopted)(denial of right to use property as one sees fit is deprivation of property and within protection of due process under both Texas and United States Constitutions); *Houston & N. Tex. Motor Freight Lines, Inc. v. Johnson*, 159 S.W.2d 905, 907 (Tex. Civ. App.—Galveston 1941)(due process clause of Texas Constitution protects not only ownership and possession but unrestricted right to enjoyment, use, and disposal of property), *rev'd on other grounds*, 140 Tex. 131, 166 S.W.2d 78 (1942).

86. *See Fuentes*, 407 U.S. at 85-87 (pre-judgment, temporary seizing is a "deprivation" invoking due process). In *Fuentes*, the Court held that Pennsylvania and Florida prejudgment replevin provisions resulted in the deprivation of property without due process by denying the

gia Finishing, Inc. v. Di-Chem, Inc.,⁸⁷ held that a Georgia statute allowing a writ of garnishment in a pending suit deprived the owner of his property rights without a hearing, thus violating due process under the fourteenth amendment.⁸⁸ The Court held that because the writ was issued pursuant to an affidavit which contained only conclusory allegations, the garnishment constituted a taking for fourteenth amendment purposes, and, as such, required notice and a hearing.⁸⁹ These due process requirements have been held applicable to attachment, another prejudgment remedy.⁹⁰

The Texas lis pendens statute is substantially similar to the Georgia garnishment statute.⁹¹ The Texas statute, like the Georgia statute, requires no more than a conclusory allegation that the pending suit affects an interest in real property which is the subject of pending litigation.⁹² The statute lacks a provision for a hearing to prevent the taking of a property interest prior to the granting of the prejudgment remedy of filing a formal notice of lis pendens.⁹³ Although the Texas lis pendens statutes allow for the removal of the prejudgment remedy by the posting of a bond,⁹⁴ the presence of a procedure for suspension of the notice by posting of a bond does not cure the statutes' failure to provide a hearing to the affected property owner.⁹⁵ The Supreme Court in *Di-Chem* held that the absence of a hearing and the fact that the prejudgment remedy was granted without participation of a judicial officer mandated a finding that the statute was repugnant to the due process

owners of their right to a hearing. *See id.* at 96. *See generally* Comment, *Are Present Texas Prejudgment Remedies Constitutional?*, 17 S. TEX. L.J. 81, 84 (1975)(arguing prejudgment statutes with no hearing and notice provisions unconstitutional).

87. 419 U.S. 601 (1975).

88. *See id.* at 606-07.

89. *See id.* The Court found that in the absence of a hearing, a writ of garnishment issued upon mere conclusory allegations was in violation of due process. *See id.*

90. *See Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969)(procedural rule may satisfy due process for attachments).

91. *Compare* GA. CODE ANN. §§ 46-101, 46-102 (Michie)(now repealed and recodified at §§ 18-4-40 - 18-4-48 (Michie 1982 & Supp. 1987)) *with* Tex. Prop. Code Ann. §§ 12.007, 12.008, 13.004 (Vernon 1984).

92. *See* TEX. PROP. CODE ANN. § 12.007 (Vernon 1984)(notice of lis pendens may be filed during pending suits involving title to, establishment of an interest in, or enforcement of an encumbrance against real property); *see also* *Werneke v. Seabury*, 720 S.W.2d 886, 887 (Tex. App.—Fort Worth 1986, no writ)(county clerk required to file notice without inquiry to court).

93. *See* TEX. PROP. CODE ANN. §§ 12.007, 12.008, 13.004 (Vernon 1984).

94. *See id.* § 12.008 (notice may be cancelled if court determines that deposit of money will protect party seeking affirmative relief); *see also* *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975)(statute's only method to remove garnishment is bond filed to protect creditor).

95. *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972)(deprivation of property occurs despite ability to recover property by posting of bond).

clause.⁹⁶ Thus, the Texas lis pendens statute, which permits filing on the basis of mere conclusory allegations, without providing any opportunity for the property owner to be heard is constitutionally inadequate.⁹⁷

V. PROPOSED LIS PENDENS STATUTE FOR TEXAS

For minimal constitutional satisfaction, the Texas lis pendens statute should include the due process protections of notice and hearing.⁹⁸ Since the present statute satisfies notice by providing for filing of the formal notice of lis pendens, the following proposal will deal solely with the hearing requirement. The purpose of the proposed amendment is to prevent an undue encumbrance of a real property interest resulting from a meritless filing of a lis pendens notice. In its present form, the Texas statute provides that notice of lis pendens is absolutely privileged and can only be removed upon posting of a bond, giving of an undertaking, or by proceeding to trial on the merits.⁹⁹ These procedures are time-consuming, expensive, and place the burden upon the aggrieved party to establish that the notice is not legitimate. A pre- or post-filing hearing on the merits would save both time and money, make for more efficient use of the judicial system, and most importantly, protect the property owner's property interests in accordance with due process of law.¹⁰⁰

The Massachusetts provision, as recently amended,¹⁰¹ protects both the interests of the plaintiff by the filed lis pendens notice, as well as the rights of the property owner by providing a pre-filing determination.¹⁰² If Texas were

96. See *Di-Chem*, 419 U.S. at 606-07 (statute providing for issuance of writ upon conclusory allegations and failing to provide for hearing violated due process).

97. See *Werneke v. Seabury*, 720 S.W.2d 886, 887 (Tex. App.—Fort Worth 1986, no writ)(court not involved in filing or issuance of lis pendens filed under Texas statute and clerk must file without further inquiry).

98. See *Williams v. Bartlett*, 457 A.2d 290, 294 (Conn. 1983)(where lis pendens statute provided for post-filing hearing, due process satisfied).

99. See TEX. PROP. CODE ANN. § 12.008 (Vernon 1984)(notice may be cancelled by posting of bond or undertaking). Where a suit affects the property collaterally, the notice of lis pendens is void and the property owner may obtain a writ of mandamus directing the trial court to cancel the notice. *Helmsley-Spear, Inc. v. Blanton*, 699 S.W.2d 643, 644-45 (Tex. App.—Houston [14th Dist.] 1985, no writ)(writ of mandamus conditionally granted if trial court fails to cancel void lis pendens); see also *Lane v. Fritz*, 404 S.W.2d 110, 111-12 (Tex. Civ. App.—Corpus Christi 1966, no writ)(affirming summary judgment of trial court declaring notice of lis pendens void because pending suit affected land collaterally not directly).

100. Compare *Kukanskis v. Griffith*, 430 A.2d 21, 25 (Conn. 1980)(Connecticut lis pendens statute requiring hearing neither before nor after lis pendens recorded failed to provide minimum due process protection) with *Williams v. Bartlett*, 457 A.2d 290, 294 (Conn. 1983)(amendment to lis pendens statute, providing for post-filing hearing, met minimum due process requirements).

101. See MASS. ANN. LAWS ch. 184, § 15 (Law. Co-op. 1987).

102. See *id.*

to adopt such a provision, the aggrieved party would be protected by the due process requirements of hearing and notice while the rights of the filing party, already preserved under the existing statute, would remain unaffected. Additionally, the amendment would dispense with needless filings, litigation, and expenses, which presently burden a party seeking to remove a meritless lis pendens under the present provision. The proposed amendment is illustrated as Proposal A in the appendix.

Alternatively, Texas could adopt a system similar to California's expungement of a lis pendens, following a filing.¹⁰³ Such an amendment would also protect the interests of one against whom a meritless notice of lis pendens has been filed by providing for removal of the notice if the party filing did not file in good faith or the pending suit did not affect the real property interest.¹⁰⁴ This amendment is illustrated as Proposal B in the appendix.

VI. CONCLUSION

The common law doctrine of lis pendens charged the pendente lite purchaser with constructive notice of a pending suit regardless of whether he had actual notice. In response to the inequitable results occasioned by the common law doctrine, most states enacted statutes providing for formal recording requirements to be met prior to charging a purchaser with constructive notice. Unfortunately, many provisions, including the Texas statute, fail to provide for any type of hearing to determine whether the filed notice of lis pendens has merit. As a result, the property owner may be deprived of full use and enjoyment of his property interest absent the minimal due process protection of hearing.

A pre- or post-notice hearing on the merits of the notice of lis pendens would assure the affected party of the minimum due process mandates of hearing and notice. Such a hearing would not adversely affect the state's interest in retaining control over the res of the suit, would not harm the claimant with a genuine claim, and would avoid needless expenditures of time and money on an ultimately meritless notice of lis pendens. The addition of a hearing provision to the present Texas statute would bring its statutory lis pendens in line with provisions in other states which afford a property owner a hearing on the merits of a lis pendens filed against their property. Such a provision would satisfy the constitutional requirements of due process presently lacking in the existing statute.

103. See CAL. CIV. PROC. CODE § 409.1 (Deering Supp. 1987).

104. Compare TEX. PROP. CODE ANN. § 12.008 (Vernon 1984)(notice of lis pendens only cancelled if interests of party filing notice protected) with *Perry v. Superior Court*, 633 P.2d 198, 202 (Cal. 1981)(lis pendens scheme not adequately protecting landowners amended to place burden on person filing to prove at expungement hearing that suit was brought in good faith).

VII. APPENDICES

A. *Proposal A for Amendment to Texas Property Code*

The following proposal is adapted from chapter 184, section 15 of the Annotated Laws of Massachusetts. See Mass. Ann. Laws ch. 184, § 15 (Law Co-op 1987).

Section 12.007(d): Upon the motion of any party to a lawsuit, the subject matter of which involves title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property, a judge of the court where the suit is pending shall make a determination to the effect that such action does involve title to, the establishment of an interest in, or the enforcement of an encumbrance against real property. The judge shall then record such determination upon the notice of *lis pendens*.

Unless a notice of *lis pendens* contains such a determination along with an affidavit stating that the moving party has served notice of the allowance of such motion by certified mail to all parties prior to recording of the notice, no clerk of any county where a part of the property is located shall accept such a notice for recording. If such a determination is made pursuant to an *ex-parte* proceeding any party to the suit may move for dissolution of the determination and the court will hear the motion. At the hearing for dissolution the party whose motion was allowed *ex-parte* will have the burden of justifying the determination which is challenged by the party moving for dissolution.

B. *Proposal B for Amendment to Texas Property Code*

The following proposal is adapted from section 409.1 of the California Code of Civil Procedure. See Cal. Civ. Proc. Code § 409.1 (Deering 1972 & Supp. 1987).

Section 12.007(d): Anytime after the notice of *lis pendens* has been recorded pursuant to section 12.007 the court where the suit is pending shall, upon the motion of a party to the action supported by affidavit, order that the *lis pendens* be expunged, unless the party that filed the notice proves to the court by a preponderance of the evidence that:

(1) the suit affects title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property described in the notice; and (2) that the person filing such notice commenced or prosecuted the suit for a proper purpose and in good faith.

Notice of the motion to expunge shall be served not less than 20 days prior to the hearing. The court shall rule on the motion for expungement based on the affidavits and counteraffidavits on file and upon any other proof as the

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court shall allow. Once a certified copy of the order expunging the notice of lis pendens has been recorded, neither the notice of lis pendens nor any information derived therefrom, prior to the recording of a certified copy of the judgment or order, shall constitute constructive or actual notice of any of the matters contained therein, or of any of the matters relating to such action, or create any duty of inquiry in any person thereafter dealing with the property described in the notice. The court in its discretion may require that the party prevailing in the expungement tender to the court an undertaking, which amount will be determined by the court.