



by Jeffrey Huron

# The risks of recording an improper lis pendens are now greater than ever, obliging counsel to ensure they have a viable claim

As the real estate market continues to cool throughout California, the number of real estate disputes has increased dramatically. This trend is not surprising. In downward real estate markets, buyers find reasons to break purchase agreements, disgruntled investors find reasons to sue developers, speculators default on loans, and partners differ on how best to preserve diminishing equity. When these disputes ripen into lawsuits, one of the first shots across the bow from seasoned litigators is the filing and recording of a lis pendens. In these turbulent times, attorneys who handle real estate disputes must be closely familiar with recent changes in lis pendens law.

A party asserting a claim to real property may record a lis pendens, which is a notice of

the pendency of an action. The lis pendens serves as notice to prospective purchasers, encumbrancers, and transferees that litigation regarding the property at issue is being pursued.<sup>1</sup> It gives constructive notice of the pendency of the action and causes the rights and interests of the claimant in the property to relate back to the date of the recording of the lis pendens.<sup>2</sup> A lis pendens puts a cloud on title,<sup>3</sup> effectively preventing a sale or encumbrance of the property until the litigation is resolved or the lis pendens is expunged. Under former lis pendens law, if a party filed a lis pendens for a “proper purpose and in good faith,” it could only be removed from title if the party against whom it was filed ultimately prevailed in the litigation.<sup>4</sup> This standard

was easy to meet and difficult to overcome—and it gave rise to serious abuses. Property owners who were unable to sell or refinance their properties would instead settle the litigation, regardless of merit, just to remove the cloud on title to their properties.<sup>5</sup> To curb these abuses, in 1992 the California Legislature substantially revised the lis pendens law, and the revisions are still in effect today.<sup>6</sup>

In recent years, several court decisions have interpreted the legislature’s revisions to the lis pendens law. These decisions establish

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how courts should determine a real property claim. Also, they confirm that the improper recording of a lis pendens is no longer privileged and thus may give rise to liability for slander of title. In addition, attorneys are now responsible for insuring that the county recorder's office timely and properly records a lis pendens—a malpractice trap for the unwary. Moreover, once a motion to expunge is filed, a moving party has no incentive to voluntarily withdraw a lis pendens because a court may still award attorney's fees to the moving party.

Clearly the risks of recording an improper lis pendens are now greater than ever. Therefore, deciding whether or not to record a lis pendens requires knowledge and careful analysis of current lis pendens law.

### Real Property Claims

Under the 1992 revisions to the lis pendens law, a party must show more than lack of ulterior motive and good faith to maintain a lis pendens. Instead, a court must expunge a lis pendens if it determines that the action does not contain a “real property claim,” or if the claimant fails to prove the probable validity of the real property claim by a preponderance of evidence.<sup>7</sup> Unlike most other motions, the burden is on the party opposing the motion to expunge—that is, the real property claimant who recorded the lis pendens.<sup>8</sup>

A motion to expunge for want of a real property claim pursuant to Code of Civil Procedure Section 405.31 is treated like a demurrer. The court must review the pleading to determine whether it states a real property claim, without review of the evidence.<sup>9</sup> An evidentiary showing only comes into play if the property owner seeks to remove a lis pendens on the grounds that the claimant has not established the probable validity of a real property claim pursuant to Section 405.32. Under current law, even if a claimant shows the probable validity of a claim, courts must still order a lis pendens expunged if an undertaking would provide adequate relief for the claimant.<sup>10</sup>

A “real property claim” is one “which would, if meritorious, affect title to, or the right to possession of, specific real property.”<sup>11</sup> This seemingly clear language has given rise to differing interpretations. For example, prior to the 1992 revisions, courts disagreed over whether a claim for a constructive trust on real property affected title to or possession of real property. The majority of courts, concerned about the misuse of a lis pendens and the difficulty of its removal, held that a claim for constructive trust does not support a lis pendens “if, ultimately, those allegations act only as a collateral means to collect money damages.”<sup>12</sup> Therefore, courts would examine the pleadings to ascer-

tain the purpose of the party seeking to maintain the lis pendens.

The legislature, aware of the conflict in the court decisions, noted that the definition of “real property claim” in the new law “neither includes nor excludes claims of constructive trust,” and left the law in this area for judicial development.<sup>13</sup> Nevertheless, the legislature observed that if courts continued to

and the imposition of a constructive trust.<sup>17</sup>

The holding in *BGJ* is questionable. First, the *BGJ* court did not explain why a claimant should be limited to seeking relief that exclusively affects title or possession to real property. The statute defining “real property claim” requires only that a claim affect title to or possession of real property and does not provide that the resolution of title or pos-

## Courts need not—nor has the legislature empowered them to—act as gatekeeper on expungement motions because the legislature has put in place other safeguards to protect property owners.

allow the use of lis pendens for constructive trust claims, any prior history of abuse should be mitigated by the new provisions requiring proof by the claimant of the probable validity of the claim and allowing the court to require a bond from the claimant.

In *BGJ Associates, LLC v. Superior Court*,<sup>14</sup> the court upheld the expungement of a lis pendens, finding that a claim for constructive trust is not a real property claim under the revised lis pendens law. The plaintiffs in *BGJ* alleged that their business partners wrongfully acquired real property for themselves that the partnership had sought to acquire. The complaint contained 11 causes of action and sought damages and a constructive trust. The court recognized that, unlike prior cases involving constructive trust claims, the plaintiffs did not solely seek a constructive trust as collateral for money damages but also sought title to the property.<sup>15</sup> The court even acknowledged that the plaintiffs had pleaded a claim that, if successful, would entitle them to the disputed real property.<sup>16</sup> The plaintiffs argued that they were not required to elect between inconsistent remedies of money damages and title to the property and thus had pleaded a real property claim. However, out of concern for lis pendens abuse, the court held that the plaintiffs were not entitled to maintain a lis pendens when the pleadings sought monetary relief

session is the only relief that a claimant may seek. Second, the court's concern for the misuse of a lis pendens ignored the other safeguards that the legislature enacted to protect against improper recordings, such as the ability of the courts to expunge a lis pendens when the claimant cannot establish its probable validity.<sup>18</sup> For these reasons, once the court in *BGJ* determined that the plaintiffs had pleaded a claim that affected title to real property, one might well argue that the appellate court should have reversed the trial court's order expunging the lis pendens.

In *Kirkeby v. Superior Court*,<sup>19</sup> the California Supreme Court—without deciding whether a constructive trust claim may support a lis pendens<sup>20</sup>—rejected the approach taken by the court in *BGJ* to determine whether a pleading states a real property claim. The plaintiff in *Kirkeby* sued the defendants for looting a closely held company. The complaint alleged 27 causes of action, including one for fraudulent conveyance, and sought declaratory and injunctive relief and a large amount of damages. The plaintiff recorded a lis pendens against real properties that the defendants had purchased with the allegedly ill-gotten money that they had transferred to place out of reach of creditors.

The trial court expunged the lis pendens because the complaint primarily sought money damages, and the plaintiff did not

# MCLE Test No. 167



The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. A lis pendens gives constructive notice of the pendency of an action asserting a claim to real property.
  - True.
  - False.
2. The purpose of a lis pendens is to:
  - A. Force a settlement.
  - B. Notify the court that the action concerns real property.
  - C. Notify prospective purchasers, encumbrancers, and transferees of litigation affecting title or possession of real property.
  - D. Remedy damage to real property.
3. The practical effect of a lis pendens is a cloud on title making the affected property unmarketable.
  - True.
  - False.
4. In 1992, the California Legislature substantially revised the lis pendens law because:
  - A. It was prone to abuse.
  - B. It was too difficult to expunge a lis pendens.
  - C. The existing law was due to expire.
  - D. A and B.
5. A real property claim:
  - A. Affects title to specific real property.
  - B. Affects possession to specific real property.
  - C. Neither includes or excludes claims of constructive trust.
  - D. All of the above.
6. A court must expunge a lis pendens if:
  - A. The moving party fails to prove the lack of probable validity of the real property claim.
  - B. The action does not contain a real property claim.
  - C. An undertaking would provide adequate relief even though the claimant establishes the probable validity of a real property claim.
  - D. B and C.
7. A motion to expunge for want of a real property claim is treated like a demurrer.
  - True.
  - False.
8. The purpose of the party seeking to maintain a lis pendens is relevant to determining a real property claim.
  - True.
  - False.
9. Even if a claimant shows the probable validity of a real property claim, a court must expunge the lis pendens if an undertaking would provide adequate relief for the claimant.
  - True.
  - False.
10. Pursuant to Code of Civil Procedure Section 405.31, courts must expunge a lis pendens if the claimant also seeks monetary relief.
  - True.
  - False.
11. A fraudulent conveyance action is not a real property claim because it seeks to make real property avail-

- able for the collection of a judgment.
  - True.
  - False.
12. In *Kirkeby v. Superior Court*, the California Supreme Court ruled that a claim for a constructive trust on real property may never support a lis pendens.
  - True.
  - False.
13. One court summarized the law by noting, "If you properly plead a real property claim, you can file a notice of lis pendens; if you don't, you can't."
  - True.
  - False.
14. The recordation of a lis pendens is absolutely privileged.
  - True.
  - False.
15. A property owner may sue for slander of title:
  - A. Whenever a claimant records a lis pendens.
  - B. After obtaining leave from court.
  - C. After a lis pendens is expunged for lack of a property claim or probable validity.
  - D. Under no circumstances.
16. A lis pendens is effective from the time it is:
  - A. Filed with the court.
  - B. Approved by the property owner.
  - C. Recorded.
  - D. Recorded and properly indexed by the recorder's office.
17. A court may not award attorney's fees on a motion to expunge if the claimant withdraws the lis pendens before the hearing.
  - True.
  - False.
18. Under the practical approach, the prevailing party on a motion to expunge is the party that did not realize its litigation objectives.
  - True.
  - False.
19. The practical approach to determining the prevailing party on motions to expunge is contrary to the legislative purpose behind the mandatory fee provision of Code of Civil Procedure Section 405.38.
  - True.
  - False.
20. If a claimant withdraws a lis pendens prior to a ruling on a motion to expunge, what must courts consider before awarding attorney's fees?
  - A. Whether the moving party would have prevailed on the motion.
  - B. Whether the claimant withdrew the lis pendens for reasons unrelated to the merits of the motion.
  - C. Whether it would be unjust to impose attorney's fees.
  - D. All of the above.

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16.  A  B  C  D
17.  True  False
18.  True  False
19.  True  False
20.  A  B  C  D

claim an ownership in the subject properties. The court of appeal thereafter denied the plaintiff's writ petition because the complaint did not contain a real property claim: "[T]he goal of the fraudulent conveyance action is to make the property available for the collection of a judgment, not to further a claim by [the plaintiff] to title of possession."<sup>21</sup>

The supreme court reversed the court of appeal's decision. The defendants contended that courts must ascertain the purpose of the party seeking to maintain a lis pendens, citing *BGJ* and similar decisions. But the supreme court rejected this argument, noting that neither Section 405.31 nor its legislative history directs the court to conduct this type of examination. Citing the legislative history, the supreme court noted that determining whether a claim is a real property claim involves a judicial examination solely of the pleadings. The court reasoned that a fraudulent conveyance action, if successful, might result in the voiding of a transfer of title to real property—and this necessarily affects title to or possession of real property. The plaintiff's fraudulent conveyance action thus fell within the "clear wording of the real property prong" of the lis pendens law.<sup>22</sup>

The court refused to ignore the plain language of Section 405.31 even though it recognized that parties might abuse the availability of a lis pendens.<sup>23</sup> However, the court noted that the new lis pendens law provides other grounds for expungement as well as protections to real property owners—such as the ability to expunge a lis pendens when the claimant cannot establish the probable validity of the real property claim.

Even after *Kirkeby*, courts continue to struggle with the definition of a real property claim. In *Campbell II v. Superior Court*,<sup>24</sup> the plaintiff alleged that the defendant took advantage of the plaintiff's elderly and ill father, who gave the defendant \$200,000 to remodel the defendant's home. The complaint sought compensatory damages as well as the imposition of a constructive trust and equitable lien on the defendant's home. The plaintiff recorded a lis pendens, which the trial court ordered expunged.

In upholding the expungement of the lis pendens, the *Campbell II* court concluded that the plaintiff's claims for an equitable lien and constructive trust were not real property claims sufficient to maintain a lis pendens.<sup>25</sup> First observing that *Kirkeby* did not decide whether a real property claim includes a claim for an equitable lien or constructive trust, the court then employed the approach rejected by *Kirkeby* to determine whether the plaintiff's claims affected title to or possession of real property. Relying on the reasoning of cases rejected by *Kirkeby*, the court held that a party may not record a lis pendens

"to freeze the real property as a res from which to satisfy a money judgment." The court also concluded that the plaintiff had not pleaded facts affecting title to the defendant's home—even though the complaint requested an equitable lien against the defendant's home, and the court acknowledged that the plaintiff is entitled to record an equitable lien "[when] a person wrongfully uses property of another in making improvements upon property already owned by the wrongdoer."<sup>26</sup>

As in *BGJ*, *Campbell II* did not limit its analysis to the pleadings and whether, if the plaintiff proved his allegations that the defendant obtained money from the plaintiff's father to improve the property through undue influence, the plaintiff would be entitled to an equitable lien or constructive trust. Instead, like *BGJ*, the *Campbell II* court examined the pleadings to ascertain the purpose behind the lis pendens and concluded that the plaintiff's claims were for the purposes of securing a money judgment.<sup>27</sup>

However, the plaintiff's allegations were assumed to be true for the demurrer-like review under Section 405.31.<sup>28</sup> If proven, the allegations would affect title to the property to the extent they supported an equitable lien against the defendant's property. Therefore, given the clear language of Section 405.31 and the *Kirkeby* decision, the *Campbell II* court should have reversed the expungement of the lis pendens. This result follows from the fact that the plaintiff's purpose in recording the lis pendens is legally irrelevant, as is whether the complaint seeks damages.

The test that a court applies when ruling on a motion to expunge pursuant to Section 405.31 is whether the pleading contains a real property claim. As one court noted, "[I]f you properly plead a real property claim, you can file a notice of lis pendens; if you don't, you can't."<sup>29</sup> Courts need not—nor has the legislature empowered them to—act as gatekeeper on expungement motions because the legislature has put in place other safeguards to protect property owners.

### Liability Risks

In addition to enacting new procedures making it easier for property owners to remove a lis pendens, the legislature amended Civil Code Section 47 in 1992 to add subdivision (b)(4), which limits the absolute privilege previously accorded to the recording of a lis pendens.<sup>30</sup> Prior to this amendment, claimants and their attorneys had been immune from claims for slander of title.<sup>31</sup> However, the court in *Palmer v. Zaklama*,<sup>32</sup> relying on Section 47(b)(4), held that a lis pendens that is expunged either because the pleading does not allege a real property claim or because the

claim does not have probable validity may support an action for slander of title.<sup>33</sup> Thus, the *Palmer* court made it clear that under Section 47(b)(4), anyone who either 1) records a lis pendens that fails to allege a proper real property claim or 2) loses on the merits of a real property claim may be sued for slander of title.<sup>34</sup>

In light of the legislature's overhaul of the lis pendens procedures to limit abuses, and the courts' continuing concern for this issue, the enactment of Civil Code Section 47(b)(4), together with *Palmer*, may be too much of a deterrent to real property claimants and their attorneys. Claimants with probable cause to record a lis pendens may choose not to do so or may be unable to retain an attorney willing to accept the risk of a slander of title lawsuit if the lis pendens is expunged.

It is unknown whether *Palmer* is having a chilling effect on claimants with real property claims. However, *Palmer* invites subsequent litigation every time a court expunges a lis pendens, regardless of the circumstances. To avoid these consequences, the legislature should amend Civil Code Section 47(b)(4) to limit the privilege only to circumstances in which the claimant lacked probable cause<sup>35</sup> or substantial justification to record a lis pendens.

In addition to the threat of claims for slander of title, attorneys who record a lis pendens also face the threat of malpractice claims after *Dyer v. Martinez*.<sup>36</sup> In *Dyer*, which involved a real estate purchase agreement, the plaintiff buyer sued the sellers for specific performance. The plaintiff recorded a lis pendens the day before the sellers sold the property to other buyers. However, the recorder's office did not index the lis pendens in the official land records until four days after the sale. The buyers did not discover the lis pendens through a title search because it was not indexed, and they did not have actual notice of it. The trial court granted the buyers' motion to expunge the lis pendens because it was ineffectual and thus did not provide constructive notice.

On appeal, the plaintiff observed that Section 405.24 makes a lis pendens effective "from the time of recording." The plaintiff therefore argued that, despite recording laws to the contrary, the indexing of a lis pendens is not a prerequisite for constructive notice.

The *Dyer* court refused to read Section 405.24 literally and concluded that the legislature did not intend to change well-established law making the indexing of recorded documents a prerequisite for constructive notice. In support of this conclusion, the *Dyer* court noted that the buyers could not discover the lis pendens before it was indexed and thus did not receive constructive notice. The court reasoned that placing the risk of

loss due to a recorder's delay or mistake in indexing a lis pendens on claimants provides an incentive for them to ensure prompt and accurate indexing. Indeed, placing the risk of loss on innocent purchasers does nothing to ensure the timely or proper indexing of a lis pendens. The court held that because the recorder's office had not indexed the plaintiff's lis pendens, the lis pendens could not be located by a title search and thus did not provide constructive notice—even though the plaintiff recorded it prior to the sale of the property.<sup>37</sup>

After *Dyer*, claimants filing a lis pendens and their attorneys must ensure that the recorder's office promptly and accurately indexes the recorded lis pendens. Furthermore, to avoid possible malpractice claims, attorneys should also make every effort to identify and provide actual and verifiable notice to prospective buyers as well as escrow and title companies.

Aside from the potential exposure for slander of title, claimants are at risk for attorney's fees if the court expunges their lis pendens.<sup>38</sup> After *Castro v. Superior Court*,<sup>39</sup> claimants cannot even avoid incurring any obligation for attorney's fees by withdrawing a lis pendens while a motion to expunge is pending.

In *Castro*, the trial court denied the property owners' first motion to expunge the lis pendens. The owners then brought a second motion to expunge. Before the hearing on the second motion, the claimants voluntarily withdrew the lis pendens because they were unable to complete meaningful discovery to oppose the second motion. The owners nevertheless sought attorney's fees pursuant to Section 405.38 as the prevailing parties on the second motion. The trial court decided it could not find that the owners were the prevailing parties for purposes of Section 405.38 because the claimants withdrew the lis pendens prior to the hearing on the motion.

However, the court of appeal disagreed with the trial court and held that the withdrawal of a lis pendens while a motion to expunge is pending does not preclude recovery of attorney's fees to the moving party.<sup>40</sup> In support of its holding, the *Castro* court recognized that the legislature, as part of its 1992 effort to curb lis pendens misuse, made an award of attorney's fees mandatory unless the nonprevailing party acted with substantial justification or the awarding of fees would be unjust. However, Section 405.38—which provides for mandatory attorney's fees—does not define "prevailing party." Therefore, the *Castro* court adopted what it termed the "practical approach" to determine the prevailing party on a motion to expunge.

According to *Castro*, the prevailing party is the one that realized its litigation objec-

tives.<sup>41</sup> The court recognized that a party filing a motion to expunge a lis pendens achieves its objective if the other party withdraws the lis pendens while the motion is pending. However, the court held that a trial court must consider more than the mere withdrawal of a lis pendens to determine whether the moving party met its litigation objectives.

Notwithstanding the withdrawal of the lis pendens, the trial court must still determine whether the moving party would have prevailed on the motion. Even if the court decides it would have granted the motion, it must also determine whether the claimant withdrew the lis pendens for reasons unrelated to the merits of the motion—for example, a settlement—and whether in light of all the circumstances, it would be unjust to impose attorney's fees. The moving party is not entitled to attorney's fees under Section 405.38 until the court considers all of these factors.<sup>42</sup>

The *Castro* court reasoned that the practical approach is consistent with the legislative purpose behind the mandatory fee provision—to curb lis pendens abuse.<sup>43</sup> Conversely, a rule that precludes attorney's fees whenever a claimant withdraws a lis pendens before a ruling on a motion to expunge would condone lis pendens misuse and deprive a moving party likely to succeed of the opportunity to recover its attorney's fees. Therefore, withdrawing a lis pendens before the court can decide its merits does not automatically absolve the claimant of responsibility for the moving party's attorney's fees.

Lis pendens law has continued to evolve since the legislature substantially revised it in 1992. However, despite the California Supreme Court's recent decision in *Kirkeby*, courts still grapple with what is and is not a real property claim. Rather than following *Kirkeby*'s approach for determining a real property claim, many courts apparently continue to examine the claimant's purpose in recording the lis pendens as well as the other relief sought in the complaint. Consequently, many courts continue to expunge a lis pendens based on claims such as those for constructive trusts and equitable liens, regardless of whether they affect title to real property.

The continuing expungement of proper real property claims notwithstanding *Kirkeby* poses a dilemma for attorneys: risk malpractice by not filing a lis pendens, or risk a lawsuit by the property owner for slander of title if the court expunges the lis pendens for lack of a real property claim. Attorneys should not have to second guess what a court will or will not consider to be a real property claim, especially after *Kirkeby*.

Additionally, courts no longer need to overprotect property owners by expunging a lis pendens based on a complaint that seeks

damages and affects title to property. In these cases, the courts retain the ability to expunge the lis pendens if it lacks merit or if an undertaking will provide adequate relief. Moreover, claimants who record a lis pendens based on a claim that is without merit risk both imposition of attorney's fees and potential liability for slander of title. Therefore, if a proven claim would affect title to real property, the court should not expunge the lis pendens regardless of the claimant's purpose or desire to obtain other relief.

Clients and their counsel face many risks when recording a lis pendens. The greatest is the potential exposure for slander of title if the lis pendens is expunged. Because of the need to record a lis pendens quickly after filing a complaint to prevent a transfer of real property to a bona fide transferee or encumbrancer, attorneys have not conducted discovery and must rely on evidence provided by their clients or forfeit their clients' interests to specific real property. To protect attorneys in these situations, legislative change is needed to remove the risk of slander of title when attorneys record a lis pendens with probable cause or substantial justification.

Finally, when attorneys record a lis pendens and accept the risk of slander of title, they must now ensure that the recorder's office promptly and correctly indexes it. At a minimum, attorneys should search title records to verify that the lis pendens appears on title to the property. They also should make every effort to give actual notice to any known buyers or encumbrancers. ■

<sup>1</sup> CODE CIV. PROC. §405.20; 5 MILLER & STARR, CALIFORNIA REAL ESTATE §11:134, at 337 (3d ed. 2000), *Amalgamated Bank v. Superior Court*, 149 Cal. App. 4th 1003, 1011 (2007)

<sup>2</sup> CODE CIV. PROC. §405.24.

<sup>3</sup> *Amalgamated Bank*, 149 Cal. App. 4th at 1011 ("[T]he practical effect of filing a lis pendens is to make the affected property unmarketable as long as the lis pendens remains of record.") See also MILLER & STARR, *supra* note 1.

<sup>4</sup> See *Malcolm v. Superior Court*, 29 Cal. 3d 518, 523-24 (1981).

<sup>5</sup> See *Amalgamated Bank*, 149 Cal. App. 4th at 1012 ("The financial pressure created by a recorded lis pendens provided the opportunity for abuse, permitting parties with meritless cases to use it as a bullying tactic to extract unfair settlements.")

<sup>6</sup> See *Huntington World Inc. v. Superior Court*, 22 Cal. App. 4th 67, 73 (1994).

<sup>7</sup> CODE CIV. PROC. §§405.31, 405.32. A motion to expunge may also be brought on grounds that 1) the recording, service, or filing requirements are improper (see CODE CIV. PROC. §405.23), 2) "adequate relief can be secured to the claimant by the giving of an undertaking" (see CODE CIV. PROC. §405.33), and 3) the claimant's failure to file an undertaking ordered by the court as a condition to maintaining a lis pendens (see CODE CIV. PROC. §405.34).

<sup>8</sup> CODE CIV. PROC. §405.30.

<sup>9</sup> However, courts may consider evidence that may be judicially noticed on demurrer. See *Kirkeby v. Superior Court*, 33 Cal. 4th 642, 648 (2004).

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<sup>10</sup> CODE CIV. PROC. §405.33 (“For purposes only of determining under this section whether the giving of an undertaking will secure adequate relief to the claimant, the presumption of Section 3387 of the Civil Code that real property is unique shall not apply, except in the case of real property improved with a single-family dwelling which the claimant intends to occupy.”).

<sup>11</sup> CODE CIV. PROC. §405.4 (A real property claim also is one that would affect the use of an easement.).

<sup>12</sup> Urez Corp. v. Superior Court, 190 Cal. App. 2d 1141, 1149 (1987).

<sup>13</sup> California Law Revision Commission cmt., 14 WEST’S ANNOTATED CODE OF CIVIL PROCEDURE (2004 supp.).

<sup>14</sup> BGJ Assocs., LLC v. Superior Court, 75 Cal. App. 4th 952 (1999).

<sup>15</sup> *Id.* at 970-71.

<sup>16</sup> *Id.* at 970.

<sup>17</sup> *Id.* at 972.

<sup>18</sup> Although the moving parties in *BGJ* did not seek to expunge the lis pendens for lack of probable validity of the real property claim, they could have done so even if the court denied their motion to expunge for lack of a real property claim. *Castro v. Superior Court*, 116 Cal. App. 4th 1010, 1016, n.10 (2004) (“Section 405.30 does not preclude a subsequent motion to expunge.”).

<sup>19</sup> *Kirkeby v. Superior Court*, 33 Cal. 4th 642 (2004).

<sup>20</sup> *Id.* at 650.

<sup>21</sup> *Id.* at 647.

<sup>22</sup> *Id.* at 649 (citing *Hunting World, Inc. v. Superior Court*, 22 Cal. App. 4th 67 (1994)).

<sup>23</sup> *Id.* at 651 (“If this is problematic, it is up to the Legislature—and not this court—to change the law.”).

<sup>24</sup> *Campbell II v. Superior Court*, 132 Cal. App. 4th 904 (2005).

<sup>25</sup> *Id.* at 908.

<sup>26</sup> *Id.* at 921 (citing RESTATEMENT OF RESTITUTION §206).

<sup>27</sup> *Id.* at 918.

<sup>28</sup> BGJ Assocs., LLC v. Superior Court, 75 Cal. App. 4th 952, 958 (1999).

<sup>29</sup> *Gale v. Superior Court*, 122 Cal. App. 4th 1388, 1395 (2004).

<sup>30</sup> According to Civil Code §47(b)(4), “A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.” (Emphasis added.)

<sup>31</sup> *Albertson v. Raboff*, 46 Cal. 2d 375, 380-81 (1956) (recording of a lis pendens is absolutely privileged even if made with actual malice).

<sup>32</sup> *Palmer v. Zaklama*, 109 Cal. App. 4th 1367 (2003).

<sup>33</sup> *Id.* at 1380.

<sup>34</sup> A lis pendens will not support an abuse of process claim. *Woodcourt II Ltd. v. McDonald Co.*, 119 Cal. App. 3d 245, 250 (1981). However, it may support a claim for malicious prosecution. *Albertson*, 46 Cal. 2d at 381.

<sup>35</sup> See William McGrane, *The Increased Risk of Slander of Title*, LOS ANGELES LAWYER, Jan. 2004, at 60.

<sup>36</sup> *Dyer v. Martinez*, 147 Cal. App. 4th 1240 (2007).

<sup>37</sup> *Id.* at 1242.

<sup>38</sup> According to Code of Civil Procedure §405.38, “The court shall direct that the party prevailing on [a motion to expunge] be awarded the reasonable attorney’s fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney’s fees and costs unjust.”

<sup>39</sup> *Castro v. Superior Court*, 116 Cal. App. 4th 1010 (2004).

<sup>40</sup> *Id.* at 1014.

<sup>41</sup> *Id.* at 1019.

<sup>42</sup> *Id.* at 1023.

<sup>43</sup> *Id.* at 1024.

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