

## The Propriety of a Lis Pendens in Constructive Trust Cases

*Florrie Young Roberts\**

### ABSTRACT

A constructive trust is a well-established remedy that allows a plaintiff to obtain title to real property from a defendant who has wrongfully or mistakenly obtained title. It is essential that a plaintiff suing to impose a constructive trust record a lis pendens on the property to preserve his claim. A lis pendens gives constructive notice that an action has been filed affecting title. Without such constructive notice, a purchaser of the property who purchased in good faith without notice would take the property free of plaintiff's interest. Therefore, a lis pendens is the vehicle that ensures that any person who subsequently acquires an interest in that property takes that interest subject to the outcome of the constructive trust litigation.

However, some courts have limited a plaintiff's ability to record a lis pendens in certain types of cases, specifically where the plaintiff's claim to the property is based on tracing of funds and where the plaintiff is also claiming damages. In these situations, these courts have restricted the recordation of a lis pendens even though the plaintiff has pleaded a proper constructive trust cause of action and is entitled under the law to obtain a constructive trust. This approach severely undermines the constructive trust remedy. If the plaintiff cannot record a lis pendens on property over which he seeks a constructive trust, the defendant can sell the property during the pendency of the lawsuit to a bona fide purchaser for value and thereby cut off the plaintiff's ability to obtain the property. This, of course, defeats any possible constructive trust remedy for the plaintiff.

This Article examines the remedy of a constructive trust and the mechanisms by which it is used to recover title to real property. Next, the Article analyzes the purposes of a lis pendens and the potential

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\* Professor of Law, Loyola Law School, Los Angeles, California. Professor Roberts wishes to thank her research assistant, Lior Kosovsky, for his valuable contribution to this article.

for abuse of the lis pendens process. The Article then examines different approaches taken by courts to a plaintiff's right to record a lis pendens in certain important types of constructive trust actions involving tracing of funds or when a constructive trust claim is coupled with a claim for damages.

The Article concludes that those courts that have restricted a plaintiff's ability to record a lis pendens in these types of cases have done so inappropriately. The lis pendens is necessary to protect the plaintiff's right to a viable constructive trust remedy. It is simply illogical to uphold the validity of a constructive trust claim while at the same time disallowing the procedure that prevents such a claim from being frustrated. A lis pendens is also necessary to protect innocent third-party purchasers by alerting them that a property in which they are interested is subject to a legal dispute. Additionally, the use of a lis pendens protects the integrity of the courts by allowing courts to retain jurisdiction over disputed property. The safeguards that are built into the lis pendens statutory scheme provide sufficient protection for the property owner from abuse of the procedure.

Moreover, the recordation of a lis pendens in a constructive trust action not only protects the effectiveness of a constructive trust as a remedy for the particular plaintiff, but essentially preserves the existence of the remedy itself. By disallowing a lis pendens where a constructive trust has been properly pleaded, courts are indirectly overruling constructive trust law by making it impossible for the remedy to be effectively obtained. Therefore, under the guise of ruling on a motion to expunge a lis pendens, these courts are severely undermining the constructive trust as a viable remedy.

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## I. INTRODUCTION

A constructive trust is an important remedy that allows a plaintiff to obtain title to real property. If a court finds that a defendant holds legal title to property that ought to belong to the plaintiff, the imposition of a constructive trust is a way the court accomplishes the transfer of title back to the plaintiff. It is essential that a plaintiff suing to

impose a constructive trust on real property record a *lis pendens* on the property to preserve his claim. A *lis pendens* gives constructive notice that an action has been filed affecting title. Without such constructive notice, a purchaser of the property who purchased in good faith without notice would take the property free of plaintiff's interest. Therefore, a *lis pendens* is the vehicle that ensures that any person who subsequently acquires an interest in that property takes that interest subject to the outcome of the constructive trust litigation.

However, some courts have limited a plaintiff's ability to record a *lis pendens* in certain types of cases, specifically where the plaintiff's claim to the property is based on tracing of funds and where the plaintiff is also claiming damages. These courts have restricted the recording of a *lis pendens* in these situations even though the plaintiff has pleaded a proper constructive trust cause of action and is entitled, under the law, to obtain a constructive trust. This approach severely undermines the constructive trust remedy. If a plaintiff cannot record a *lis pendens* on property over which he seeks a constructive trust, the defendant can sell the property during the pendency of the lawsuit to a bona fide purchaser for value and thereby cut off the plaintiff's ability to obtain the property. This, of course, defeats any possible constructive trust remedy for the plaintiff.

This Article examines the remedy of a constructive trust and the mechanisms by which it is used to recover title to real property. Next, the Article analyzes the purposes of a *lis pendens* and the potential for abuse of the *lis pendens* process. The Article then examines different approaches taken by courts to a plaintiff's right to record a *lis pendens* in certain important types of constructive trust actions involving tracing of funds or when a constructive trust claim is coupled with a claim for damages.

The Article concludes that those courts that have restricted a plaintiff's ability to record a *lis pendens* in these types of cases have done so inappropriately. The *lis pendens* is necessary to protect the plaintiff's right to a viable constructive trust remedy. It is simply illogical to uphold the validity of a constructive trust claim while at the same time disallowing the procedure that protects such claims from being frustrated. A *lis pendens* is also necessary to protect innocent third-party purchasers by alerting them that a property in which they are interested is subject to a legal dispute. Additionally, the use of a *lis pendens* protects the integrity of the courts by allowing courts to retain jurisdiction over disputed property. The safeguards that are built into the *lis pendens* statutory scheme provide sufficient protection for the property owner from abuse of the procedure.

Moreover, the recordation of a lis pendens in a constructive trust action not only protects the effectiveness of a constructive trust as a remedy for the particular plaintiff, but essentially preserves the existence of the remedy itself. A constructive trust is a long-established equitable remedy used to transfer legal title to property to a plaintiff. By disallowing a lis pendens where a constructive trust has been properly pleaded, courts are indirectly overruling constructive trust law by making it impossible for the remedy to be effectively obtained. Therefore, under the guise of ruling on a motion to expunge a lis pendens, these courts have emasculated the constructive trust as a viable remedy where tracing is concerned or when the constructive trust claim is coupled with a claim for damages.

## II. CONSTRUCTIVE TRUSTS

### A. *Nature of the Remedy*

A constructive trust is an equitable restitutionary remedy that courts impose in order to return title of real property to a plaintiff where the legal title to that property has been wrongfully placed in defendant's name.<sup>1</sup> A court will impose a constructive trust when it finds that it is inequitable for the defendant to hold title as against the plaintiff.<sup>2</sup> The court declares that the defendant is holding title to the property as an involuntary trustee whose only duty is to immediately turn the property over to the plaintiff.<sup>3</sup> In this way, a court effectuates a title transfer from the wrongful holder to the rightful one.<sup>4</sup> For example, when a person agrees to purchase property for the benefit of another, yet purchases the property for his own benefit, he holds it in constructive trust for the benefit of the other.<sup>5</sup> Similarly, a constructive trust is available in cases of mistake. In one case, an owner of land intended to make a gratuitous conveyance to a transferee, yet because of a mistake in the description transferred an additional tract that was not intended to be part of the gift. The court ruled that the transferee held the second tract in constructive trust

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<sup>1</sup> *Kraus v. Willow Park Pub. Golf Course*, 140 Cal. Rptr. 744, 756 (Cal. Ct. App. 1977); RESTATEMENT (FIRST) OF RESTITUTION § 166 (1937).

<sup>2</sup> *Kraus*, 140 Cal. Rptr. at 744.

<sup>3</sup> See *Calistoga Civic Club v. City of Calistoga*, 191 Cal. Rptr. 571, 576 (Cal. Ct. App. 1983).

<sup>4</sup> See *Communist Party of the United States v. 522 Valencia, Inc.*, 41 Cal. Rptr. 2d 618, 622 (Cal. Ct. App. 1995) (ordering defendants to transfer all property and assets where trial court found that plaintiffs were entitled to a constructive trust).

<sup>5</sup> RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 194(2).

for the benefit of the transferor.<sup>6</sup> Through the remedy of a constructive trust, a plaintiff is given the right to the property itself as opposed to a money judgment, even though the defendant's conduct could also typically render him liable for damages.<sup>7</sup> If a plaintiff is awarded a constructive trust, he cannot also be awarded money damages for the same property.<sup>8</sup>

*B. Prevention of Unjust Enrichment*

The primary purpose of a constructive trust is to prevent the unjust enrichment of the defendant.<sup>9</sup> It is imposed by a court on the basis that if the person holding the title to the property were permitted to keep it, he would profit from his wrongdoing or would be unjustly enriched.<sup>10</sup>

Generally, where the remedy is imposed, the result is the restoration to the plaintiff of the property of which plaintiff was unduly deprived, and the taking from defendant of the property that would result in a corresponding unjust enrichment if defendant were to retain it.<sup>11</sup> However, a defendant is also deprived of his unjust enrichment even if plaintiff's loss is not as great as defendant's benefit.<sup>12</sup> For example, when a defendant wrongfully obtains property and makes an additional profit from it, he will likely have to surrender such profit as well, although the profit was not at plaintiff's expense.<sup>13</sup> Thus, as opposed to an express trust, a constructive trust is created by operation of law as a remedy to prevent the defendant's unjust enrichment and not because of the parties' intent.<sup>14</sup>

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<sup>6</sup> *Id.* § 163 cmt. b, illus. 1.

<sup>7</sup> *Monica v. Pelicas*, 281 P.2d 269, 272 (Cal. Ct. App. 1955). The *Monica* court stated that "one whose property has been taken from him is not relegated to a personal claim against the wrongdoer which might have to be shared with other creditors; he is given the right to a restoration of the property itself." *Id.*

<sup>8</sup> See *Title Ins. & Trust Co. v. Ingersoll*, 111 P. 360, 363 (Cal. 1910).

<sup>9</sup> See *Kraus v. Willow Park Pub. Golf Course*, 140 Cal. Rptr. 744, 755 (Cal. Ct. App. 1977).

<sup>10</sup> *Monica*, 281 P.2d at 272; see also RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 160 ("[W]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.").

<sup>11</sup> RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 160 cmt. d.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* cmt. b.

### C. Basic Elements

A party is entitled to a constructive trust where it can show “(1) the existence of a *res* (property or some interest in the property); (2) the *right* of [that] party to that *res*; and (3) some *wrongful* acquisition or detention of the *res* by another party who is not entitled to it.”<sup>15</sup> For example, in *Cap Care Group, Inc. v. McDonalds*,<sup>16</sup> where the defendant wrongfully came into possession of the title to a commercial property, the *res* was the commercial property; plaintiffs had the legal *right* to that *res*; and defendant *wrongfully* appropriated the *res* when he purchased the property in his own name instead of on behalf of a purported partnership with the plaintiffs.<sup>17</sup>

### D. Defendant’s Conduct

The most common instances where a constructive trust is imposed are situations where the defendant has obtained property through fraud, mistake, undue influence, or other wrongful acts. It is in these types of circumstances that a defendant is thought to be unjustly enriched. Some jurisdictions set forth these requirements by statute. For example, Section 2224 of the California Civil Code expressly authorizes the remedy of a constructive trust. The section provides that “[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is . . . an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.”<sup>18</sup> Similarly, Section 2223 provides that “[o]ne who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.”<sup>19</sup> Likewise, the Restatement of Restitution states that “[w]here the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the property upon a constructive trust for the transferor.”<sup>20</sup>

Therefore, the types of conduct by the defendant giving rise to a constructive trust are many. *Strausburg v. Connor*<sup>21</sup> is an example of a situation where fraudulent conduct warranted the imposition of a

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<sup>15</sup> See *Communist Party of the United States v. 522 Valencia, Inc.*, 41 Cal. Rptr. 2d 618, 623–24 (Cal. Ct. App. 1995).

<sup>16</sup> 561 S.E.2d 578 (N.C. Ct. App. 2002).

<sup>17</sup> See *id.* The court went on to decide that a *lis pendens* was appropriate in that case. *Id.*

<sup>18</sup> CAL. CIV. PROC. CODE § 2224 (West 2006).

<sup>19</sup> *Id.* § 2223.

<sup>20</sup> RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 166.

<sup>21</sup> 215 P.2d 509 (Cal. Ct. App. 1950).

constructive trust. There, plaintiff conveyed her interest in real property to the defendant, based on the defendant's oral promise to pay her.<sup>22</sup> When he failed to do so, plaintiff sued.<sup>23</sup> The court found the defendant's conduct fraudulent and imposed a constructive trust on the property for the benefit of the plaintiff.<sup>24</sup> Similarly, in *Kingrey v. Wilson*,<sup>25</sup> plaintiff was in the process of divorcing her husband.<sup>26</sup> She agreed to transfer a tract of land to defendants in order to prevent her husband from getting it in the divorce proceedings, and defendants promised to reconvey the land to her as soon as the divorce was settled.<sup>27</sup> When the defendants refused to return the land,<sup>28</sup> plaintiff sued for a constructive trust, and the Arkansas Supreme Court affirmed the lower court's finding that a constructive trust was an appropriate remedy.<sup>29</sup> A constructive trust is even enforceable against bankruptcy trustees in actions premised on fraud. If one fraudulently induces another to convey title to a chattel, and the person making the fraudulent inducement is bankrupt, the defrauded person is entitled to a constructive trust upon the chattel, and the bankruptcy trustee will be compelled to restore the chattel to him.<sup>30</sup>

Constructive trusts are also granted where mistake is involved. For example in *Beasley v. Mellon Financial Services Corp.*,<sup>31</sup> the Alabama Supreme Court affirmed a constructive trust imposed on the basis of a mistake. There, landowners obtained a construction loan which they secured with a mortgage.<sup>32</sup> The house, however, was mistakenly constructed on an adjacent parcel.<sup>33</sup> Subsequent to the owners' default, the secured party (through assignment) sought a constructive trust.<sup>34</sup> The Court affirmed the trial court's grant of the remedy finding that it would be unjust for defendant to retain the property who paid nothing for the home and who was aware of the mistaken construction.<sup>35</sup> A Missouri court of appeals reached a similar conclusion

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<sup>22</sup> *Id.* at 510.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 511.

<sup>25</sup> 301 S.W.2d 23 (Ark. 1957).

<sup>26</sup> *Id.* at 25

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 26.

<sup>30</sup> RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 166 cmt. b.

<sup>31</sup> 569 So. 2d 389 (Ala. 1990).

<sup>32</sup> *Id.* at 391.

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

<sup>34</sup> *Id.* Plaintiff also sought reformation of the mortgage agreement. *Id.*

<sup>35</sup> *Id.* at 394-95.



in *Brown v. Brown*,<sup>36</sup> where it held that a mistake is a sufficient basis for the imposition of constructive trust.<sup>37</sup> There, a mother purchased a property, intending herself and plaintiffs to be joint tenants.<sup>38</sup> Mistakenly, the mother ended up holding the property in fee simple absolute.<sup>39</sup> The court held that a constructive trust can be an appropriate remedy based on those facts.<sup>40</sup> Similarly, in *Kraus v. Willow Park Public Golf Course*,<sup>41</sup> a constructive trust remedy was proper where defendants came to wrongfully possess the title to a golf course lease following the mistaken belief that they had the unrestricted right to convey plaintiff's interest to themselves.<sup>42</sup>

Other cases have used the defendant's undue influence as the basis for the remedy. In *Clark v. Pullins*,<sup>43</sup> where the defendant influenced the plaintiff to sign a deed in his favor through the use of physical violence and threats,<sup>44</sup> the court found the plaintiff entitled to a constructive trust.<sup>45</sup> Undue influence can also take place during a marriage. In *Bohn v. Bohn*,<sup>46</sup> a wife claimed that her husband unduly influenced her to transfer stocks to him prior to their divorce proceedings.<sup>47</sup> A Texas court of appeals held that when a person is unjustly enriched by a gift from a spouse, a constructive trust for the benefit of the donor spouse arises.<sup>48</sup>

Additionally, a constructive trust is available upon breach of fiduciary relationship or "confidential relationship." For example, an Illinois court of appeal imposed a constructive trust where the defendant breached his "confidential" duty to his brother when he misappropriated funds belonging to the brother while handling their mother's affairs after their father passed away.<sup>49</sup> Similarly, where a person has the power to sell a property owned by another, and he

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<sup>36</sup> 152 S.W.3d 911 (Mo. Ct. App. 2005).

<sup>37</sup> *Id.* at 919.

<sup>38</sup> *Id.* at 914–15.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 922.

<sup>41</sup> 140 Cal. Rptr. 744 (Cal. Ct. App. 1977).

<sup>42</sup> *Id.* at 756.

<sup>43</sup> 341 P.2d 73 (Cal. Ct. App. 1959).

<sup>44</sup> *Id.* at 74–75.

<sup>45</sup> *Id.* at 76–77.

<sup>46</sup> 455 S.W.2d 401 (Tex. App. 1970).

<sup>47</sup> *Id.* at 404.

<sup>48</sup> *Id.* at 408. The court of appeals did affirm, however, the trial court's determination that defendant carried his burden of proof that the transfer was fair. *Id.* at 410–12.

<sup>49</sup> See *LaBarbera v. LaBarbera*, 452 N.E.2d 684, 688–89 (Ill. App. Ct. 1983).

sells it to himself in violation of their fiduciary relationship, he holds the property as a constructive trustee in favor of the other.<sup>50</sup>

Moreover, a defendant's wrongdoing leading to a constructive trust can sometimes be much more extreme than fraud or duress. For example, in *Riggs v. Palmer*,<sup>51</sup> the New York Court of Appeals imposed a constructive trust after the defendant murdered his grandfather so as to hasten his inheritance.<sup>52</sup>

*E. The Res—What Property is Reachable by a Constructive Trust*

1. Necessity of a Res

Before a constructive trust can be imposed on a piece of property held by a defendant, the plaintiff must show he has an equitable interest in that particular piece of property. For example, if defendant owns Blackacre and happens to owe plaintiff some money, the plaintiff cannot obtain a constructive trust over Blackacre—the plaintiff has no right to Blackacre superior to the defendant or to any other creditor of the defendant.<sup>53</sup>

Similarly, if the defendant wrongfully acquires an asset belonging to the plaintiff, sells the asset and dissipates the money, there is no longer any res in the hands of the defendant over which the plaintiff can obtain a constructive trust.

2. The Same Property that was Wrongfully Obtained

In a basic constructive trust scenario, the res is the very property obtained from the plaintiff. For example, if the plaintiff owns Blackacre and the defendant obtains title to Blackacre by fraud, mistake, or other conduct warranting a constructive trust, the plaintiff can get a constructive trust over Blackacre. In this situation, the plaintiff is thought to have an equitable right to Blackacre superior to the defendant or any other creditor of the defendant. Thus, where a defendant breached his duty to his brother by misappropriating funds belonging to the brother while managing their mother's affairs,<sup>54</sup> the

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<sup>50</sup> RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 192.

<sup>51</sup> 22 N.E. 188 (N.Y. 1889).

<sup>52</sup> *Id.* at 190–91.

<sup>53</sup> *Dean v. Super. Ct.*, 210 Cal. Rptr. 406, 409 (Cal. Ct. App. 1985) (stating that prior case law did not support the notion “that a constructive trust may be imposed . . . to secure an ordinary business debt.”).

<sup>54</sup> *LaBarbera v. LaBarbera*, 452 N.E.2d 684, 688–89 (Ill. App. Ct. 1983).

court imposed a constructive trust for the benefit of plaintiff over the very same property that was wrongfully acquired from him.<sup>55</sup>

### 3. Tracing Property into its Product

A plaintiff is also entitled to a constructive trust on a defendant's property when that property was never owned by the plaintiff but was instead acquired with the plaintiff's property. This is the concept of "tracing." For example, if the plaintiff owns Whiteacre, and the defendant obtains title to Whiteacre by fraud, mistake, or other conduct warranting a constructive trust, and the defendant thereafter sells Whiteacre and buys Blackacre, the plaintiff can get a constructive trust over Blackacre. Thus, where a defendant wrongfully acquires one property from the plaintiff and later sells it and uses the funds to purchase a new property, or trades the plaintiff's property for the new property, the plaintiff would be entitled to a constructive trust on the new property. For example, in *Marshall v. Marshall*,<sup>56</sup> where a mother wrongfully obtained from her son a residential apartment property and traded it for a different piece of real property,<sup>57</sup> a constructive trust was imposed in favor of the son over the new property.<sup>58</sup>

A constructive trust is similarly appropriate where the defendant wrongfully obtains *money* from the plaintiff and uses it to purchase a new property. For example, in *Monica v. Pelicas*,<sup>59</sup> the defendant wrongfully withdrew money from the plaintiff's bank account and used that money to purchase a house.<sup>60</sup> The court of appeals affirmed the trial court's imposition of a constructive trust on the house.<sup>61</sup>

Thus, the tracing principle as applied to constructive trusts is well established. A plaintiff can obtain a constructive trust not only on property wrongfully taken from him, but also on property that can be traced to the property wrongfully acquired.<sup>62</sup>

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<sup>55</sup> *Id.*; see also *Kraus v. Willow Park Pub. Golf Course*, 140 Cal. Rptr. 744 (Cal. Ct. App. 1977).

<sup>56</sup> 42 Cal. Rptr. 686 (Cal. Ct. App. 1965).

<sup>57</sup> *Id.* at 692-94.

<sup>58</sup> *Id.* at 703.

<sup>59</sup> *Monica v. Pelicas*, 281 P.2d 269 (Cal. Ct. App. 1955).

<sup>60</sup> *Id.* at 270. The bank account was in both plaintiff's and defendant's "names for purposes of convenience." *Id.* At no time did plaintiff give defendant permission to withdraw the money and use it to purchase the house. *Id.*

<sup>61</sup> *Id.* at 272.

<sup>62</sup> Tracing can sometimes be difficult to prove, especially in the situation where wrongfully obtained funds are commingled with the wrongdoer's own funds. A strict

*F. Bona Fide Purchasers—Tracing Property to a Transferee*

In certain situations, a constructive trust can be imposed on a plaintiff's property that is traced into the hands of a third party transferee. The transferee becomes the constructive trustee and is ordered to convey the property to the plaintiff.

The determining factor is whether the transferee is a bona fide purchaser. The remedy of a constructive trust is not available where the property is transferred to a third-party bona fide purchaser, even if the original wrongdoer acquired the property under circumstances that would have allowed the plaintiff to impose a constructive trust on the property.<sup>63</sup> Since someone needs to bear the loss, courts choose to protect innocent third-party purchasers and not the innocent plaintiffs whose interests are not recorded.<sup>64</sup>

For example, in *Istel v. Istel*,<sup>65</sup> plaintiff's wife sold two acres of undeveloped land to the defendant, plaintiff's brother.<sup>66</sup> Thirty years later, defendant sought to sell the properties, and plaintiff com-

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application of the tracing requirement can have adverse effects on plaintiffs, which has led courts to relax the requirement in certain situations. For example, where a plaintiff wrongfully deposited plaintiff's money in her bank account, subsequently purchased real property with funds drawn from that account, and later replaced the sum taken, the California Supreme Court rejected the ordinary presumption that defendant withdrew her own money first, and instead granted the plaintiff a constructive trust on the property. See *Mitchell v. Dunn*, 294 P. 386 (Cal. 1930). Other courts apply the rule of *Hallett's Estate* that the wrongdoer is presumed to use his own funds until those funds are exhausted. [1880] 13 Ch.D. 696 (A.C.) (U.K.). Similarly, in California, if a defendant deposits wrongfully obtained funds in an account, withdraws some funds from it, and later deposits her own money into the account, courts will presume that defendant intended to restore the funds that she wrongfully obtained, and will allow a constructive trust on property purchased by defendants with those funds. See, e.g., *Church v. Bailey*, 203 P.2d 547 (Cal. Ct. App. 1949). Other courts reach the opposite result and hold that subsequent deposits should not be viewed as restorations of the trust monies. See *Republic Supply Co. v. Richfield Oil Co.*, 79 F.2d 375 (9th Cir. 1935). Where plaintiff's funds are commingled with those of other claimants, courts are more strict with regard to the tracing requirement. In those situations, the general rule is that the petitioner whose funds were deposited last gets "first shot" at the commingled account and so on in inverse order. See *Empire State Surety Co. v. Carroll County*, 194 F. 593 (8th Cir. 1912).

<sup>63</sup> *Church*, 203 P.2d at 549 (holding that "one who wrongfully detains funds of another is an involuntary trustee thereof . . . and a trust will be impressed upon property acquired with such funds unless the same is held by a bona fide purchaser"); see also RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 172(1) ("Where a person acquires title to property under such circumstances that otherwise he would hold it upon a constructive trust or subject to an equitable lien, he does not so hold if he gives value for the property without notice of such circumstances.").

<sup>64</sup> See RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 172 cmt. a.

<sup>65</sup> 684 N.Y.S.2d 620 (App. Div. 1999).

<sup>66</sup> *Id.*

menced a constructive trust action.<sup>67</sup> The court determined that since defendant was a bona fide purchaser as a matter of law, he was entitled to summary judgment.<sup>68</sup> Similarly, in *Everhard v. Morrow*,<sup>69</sup> husband converted some of plaintiff's securities, sold them, and deposited the proceeds into various bank accounts.<sup>70</sup> Subsequently, he gave some of the funds to his mother who used them to purchase real property for defendant, his ex-wife, pursuant to a property settlement agreement regarding defendant's divorce from the husband.<sup>71</sup> Upon discovery, plaintiff sought to assert a constructive trust over the purchased property.<sup>72</sup> The trial court refused,<sup>73</sup> and the Ohio court of appeals affirmed,<sup>74</sup> holding that defendant ex-wife had waived certain marital rights arising from the divorce and, therefore, had given substantial value in exchange for the property.<sup>75</sup> Because she acted without notice, defendant was a bona fide purchaser, who was thus entitled to defeat plaintiff's constructive trust claim.<sup>76</sup>

On the other hand, if a transferee has actual or constructive notice of the wrongful acquisition of the property or the pendency of a legal action concerning the property, or the transferee is a donee, such transferee would not meet the requirements of a bona fide purchaser, and therefore, a constructive trust on the property would be appropriate. For example, in *McGuinness v. Lester*,<sup>77</sup> a purchaser bought land from a seller knowing that the seller's title to a portion of it was wrongfully obtained.<sup>78</sup> The court held that since the purchaser had at least constructive notice of the property's rightful owner, he was not a bona fide purchaser, but rather a constructive trustee of the wrongfully obtained property.<sup>79</sup> Similarly, a constructive trust can be imposed if the transferee is a donee. For example, in *Glens Falls Indemnity Co. v. Golden*,<sup>80</sup> the court held that where a husband used funds, wrongfully obtained, to purchase real estate, the

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<sup>67</sup> *Id.* at 621.

<sup>68</sup> *Id.*

<sup>69</sup> No. 75415, 1999 Ohio App. LEXIS 5705 (Dec. 2, 1999).

<sup>70</sup> *Id.* at \*2-6.

<sup>71</sup> *Id.* at \*6.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at \*11.

<sup>75</sup> *Everhard*, 1999 Ohio App. LEXIS 5705, at \*12.

<sup>76</sup> *Id.* at \*12.

<sup>77</sup> *McGuinness v. Lester*, 260 P. 925 (Cal. Ct. App. 1927).

<sup>78</sup> *Id.* at 926-27.

<sup>79</sup> *Id.* at 927.

<sup>80</sup> 148 F. Supp. 41 (D.D.C. 1957).

funds could be traced to, and a lien placed on, the real estate held by the wife when she obtained it as a surviving tenant by the entirety.<sup>81</sup>

Because courts allow bona fide purchasers to keep the property free of trust and personal liability, there is a need for a procedure that would enable a plaintiff to protect his interest against such transfer. A notice of lis pendens, which provides constructive notice, and therefore negates the possibility of a bona-fide purchase, is such a procedure.

### III. LIS PENDENS

A lis pendens<sup>82</sup> is a recorded document that gives constructive notice about a pending action that may affect title or the right of possession to real property. A lis pendens is recorded so that any person who subsequently acquires an interest in that property takes it subject to the outcome of the litigation.<sup>83</sup>

At common law the mere filing of a lawsuit affecting real property was deemed sufficient to provide constructive notice to subsequent purchasers.<sup>84</sup> Gradually, however, states enacted statutes that limited constructive notice only to those instances where a formal notice of lis pendens was recorded.<sup>85</sup>

#### A. *The "Real Property" Requirement*

Under many state statutes, a lis pendens is only proper when it is recorded in conjunction with a "real property claim."<sup>86</sup> For example, California Code of Civil Procedure section 405.4 defines a "real property claim" as one that would, if meritorious, affect "title to, or the right to possession of, specific real property."<sup>87</sup> A similar requirement can be found in many other jurisdictions including New Jer-

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<sup>81</sup> *Id.* at 43; *see also* Hirsch v. Travelers Ins. Co., 341 A.2d 691, 694 (N.J. Super. Ct. App. Div. 1975) (holding that "[w]here a wrongdoer obtains funds at the expense of another and acquires other property with those funds, and then transfers the other property gratuitously to a third person, if the wronged party can 'trace' the funds, he is entitled to reach the property and impose a constructive trust or an equitable lien on the property.").

<sup>82</sup> A "lis pendens" is the same as a "notice of pendency of action." These terms are used interchangeably. In Latin, the term "lis pendens" means that an action is pending.

<sup>83</sup> La Paglia v. Super. Ct., 264 Cal. Rptr. 63, 66 (Cal. Ct. App. 1989).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See* CAL. CIV. PROC. CODE § 405.20 (West 2006) (stating that "[a] party to an action asserting a real property claim may record a notice of pendency of action in which that real property claim is alleged").

<sup>87</sup> *Id.* § 405.4.

sey,<sup>88</sup> Wisconsin,<sup>89</sup> Connecticut,<sup>90</sup> the Eastern District of Pennsylvania,<sup>91</sup> Louisiana,<sup>92</sup> and Texas.<sup>93</sup> Examples of types of actions where a lis pendens is appropriate include (a) foreclosure of liens;<sup>94</sup> (b) specific performance of a contract to convey real property;<sup>95</sup> and (c) rescission of contracts for the sale of real property.<sup>96</sup> Most importantly for purposes of this discussion, a lis pendens is also appropriate in constructive trust actions.<sup>97</sup>

### B. Purposes of A Lis Pendens

A lis pendens serves three purposes: it protects plaintiffs involved in real property disputes by providing constructive notice of the dispute, it protects third-party purchasers by alerting them that the property they are about to purchase is subject to litigation, and it protects the judicial system by allowing courts to retain jurisdiction over disputes.

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<sup>88</sup> N.J. STAT. ANN. § 2A:15-6 (West 2006). “[I]n every action . . . to enforce lien upon real property or to affect title to real estate . . . plaintiff or his attorney shall . . . file . . . a written notice of the pendency of the action.” *Id.*

<sup>89</sup> WIS. STAT. ANN. § 840.10 (1)(a) (West 2006). “In an action where relief is demanded affecting described real property which relief might confirm or change interest in the real property . . . the plaintiff shall present for filing or recording . . . a lis pendens . . .” *Id.*

<sup>90</sup> CONN. GEN. STAT. § 52-325 (2004). “In any action . . . the plaintiff or his attorney . . . if the action is intended to affect real property, may cause to be recorded . . . a notice of lis pendens.” *Id.*

<sup>91</sup> E.D. PA. CIV. P.R. 4.1.1 (2006). “Whenever any proceeding involving title to real property shall be commenced . . . and a party desires to give notice thereof by way of lis pendens, counsel for said party . . . shall file with clerk a written order . . .” *Id.*

<sup>92</sup> LA. CODE CIV. PROC. ANN. art. 3751 (2006). “The pendency of an action or proceeding in any court . . . affecting the title to . . . immovable property does not constitute notice to a third person not a party thereto unless a notice of the pendency of the action or proceeding is made.” *Id.*

<sup>93</sup> TEX. PROP. CODE ANN. § 12.007(a) (Vernon 2005). “[D]uring the pendency of an action involving title to real property, the establishment of an interest in a real property . . . a party to the action who is seeking affirmative relief may file . . . a notice that the action is pending.” *Id.*

<sup>94</sup> See, e.g., *Page v. W.W. Chase Co.*, 79 P. 278, 279 (Cal. 1904) (holding that “[t]he proposition of the respondent that [lis pendens] is not applicable to an action for the foreclosure of the lien . . . must be overruled”).

<sup>95</sup> See, e.g., *Abbott v. The 76 Land & Water Co.*, 118 P. 425, 429 (Cal. 1911) (The lis pendens was recorded in conjunction with a suit to compel transfer of property pursuant to a sale.).

<sup>96</sup> See, e.g., *Wilkins v. Oken*, 321 P.2d 876, 878 (Cal. Ct. App. 1958) (stating that “[b]y giving constructive notice to the world of the claims which are asserted to certain land, lis pendens is generally regarded as an adequate remedy to protect the rights of the parties in an action for rescission of a sale of land”).

<sup>97</sup> See, e.g., *Am. Motor Club v. Neu*, 109 B.R. 595, 595 (Bankr. E.D.N.Y. 1990).

### 1. Protecting Plaintiffs

A title transfer of a disputed property to a third party, acting without actual or constructive notice of the dispute, would be deemed a clear transfer of title, thus extinguishing a plaintiff's unrecorded interest in that property.<sup>98</sup> A formal lis pendens is required to prevent the frustration of a plaintiff's suit by the transfer of a property during the pendency of an action concerning it.<sup>99</sup> Absent this mechanism of constructive notice, the only other way for a plaintiff to defeat the rights of a purchaser for value is if the purchaser had *actual* knowledge of the dispute, which may be difficult to prove. For example, in the case of *McGuinness v. Leste*,<sup>100</sup> plaintiff was able to defeat the competing interests of a buyer for value because the buyer had actual knowledge of the alleged wrongful acquisition of the land<sup>101</sup> and thus did not qualify as a bona fide purchaser. If a lis pendens would have been recorded in that case, it would have provided constructive notice, i.e., knowledge would have been imputed to the buyer, thus negating the need to prove actual notice. Moreover, since a lis pendens was not recorded, had plaintiff failed to carry his burden of proof that defendant possessed actual knowledge, he would have lost his constructive trust claim.

### 2. Protecting Innocent Third-party Transferees

By providing constructive notice, a lis pendens alerts third-party transferees that the property they are acquiring is subject to litigation, and that their ownership of that property depends on the outcome of that litigation.<sup>102</sup> Without the necessity of a plaintiff having to record a lis pendens to protect his interest, subsequent purchasers could end up purchasing property unaware that it was subject to litigation. Then they would themselves face litigation over whether they qualified as bona fide purchasers. Therefore, the lis pendens statutes were passed to protect a purchaser from these unanticipated disputes.<sup>103</sup>

The lis pendens works to the benefit of a potential purchaser by allowing him to learn of a lawsuit concerning the property by search-

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<sup>98</sup> See *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 n.1 (Fla. 1993).

<sup>99</sup> See *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1328 (3d Cir. 1982) (holding that "filing of the notice of lis pendens ensures that plaintiff's claim is not defeated by a prejudgment transfer of the property").

<sup>100</sup> 260 P. 925 (Cal. Ct. App. 1927).

<sup>101</sup> *Id.* at 926-27.

<sup>102</sup> *La Paglia v. Super. Ct.*, 264 Cal. Rptr. 63, 66 (Cal. Ct. App. 1989).

<sup>103</sup> *Von Mitschke-Collande v. Kramer*, 869 So. 2d 1246, 1249 (Fla. Dist. Ct. App. 2004).



ing the records. If he has no actual notice, and a lis pendens has not been filed, a purchaser can be secure in his purchase. However, if a lis pendens has been filed, it warns the purchaser that he is acquiring disputed property and a potential lawsuit. The lis pendens, therefore, allows purchasers to make informed decisions as to whether to purchase property.<sup>104</sup>

### 3. Protecting the Judicial System

A lis pendens not only prevents frustration of a plaintiff's lawsuit by a transfer of a disputed property during the pendency of the action, but also preserves a court's jurisdiction over such property.<sup>105</sup> Without a mechanism to confer constructive notice on transferees, a title transfer during the pendency of a suit would prevent a court from rendering an effective judgment concerning real property.<sup>106</sup>

#### C. Potential Abuse of the Lis Pendens

Some courts and commentators have advocated a restricted application of a lis pendens, arguing that its effect on the marketability of property invites abuse by plaintiffs.

##### 1. Can be Used to Coerce Settlements

The recordation of a lis pendens taints the title to real property until the pending action is resolved.<sup>107</sup> Thus, a lis pendens renders a defendant's property unmarketable, less valuable, and unsuitable as security for a loan.<sup>108</sup> As such, a lis pendens allows a plaintiff to force a defendant to settle a suit, not because of the suit's merits, but in order to clear the property's title.<sup>109</sup> It can be argued that the lis pendens operates as a de facto prejudgment attachment without the protections that the attachment statutes offer.<sup>110</sup>

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<sup>104</sup> See *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 n.1 (Fla. 1993).

<sup>105</sup> *Lewis v. Super. Ct.*, 37 Cal. Rptr. 2d 63, 70 (Cal. Ct. App. 1994).

<sup>106</sup> See *id.*; see also *Allied E. Fin. v. Goheen Enter.*, 71 Cal. Rptr. 126, 127 (Cal. Ct. App. 1968) (stating that "[i]n England, the common law developed the doctrine that transferees and encumbrances took with constructive notice of title defects asserted in any pending action. The purpose was to prevent frustration of jurisdiction by transfers pendent lite.").

<sup>107</sup> See *supra* notes 82–83 and accompanying text.

<sup>108</sup> *La Paglia v. Super. Ct.*, 264 Cal. Rptr. 63, 66 (Cal. Ct. App. 1989).

<sup>109</sup> *Hilberg v. Super. Ct.*, 263 Cal. Rptr. 675 (Cal. Ct. App. 1989).

<sup>110</sup> See *Lewis*, 37 Cal. Rptr. 2d at 73 ("[a]llowing a lis pendens to be used . . . [in this case] transforms it into a money-collection remedy without any of the protections of the attachment statutes"); see also *Burger v. Super. Ct.*, 199 Cal. Rptr. 227, 230 (Cal. Ct. App. 1984) (holding that an "overbroad definition of [the California lis pendens statute] would invite abuse of lis pendens").

## 2. Constitutes Taking of Property

The interference with a property owner's ability to alienate his property or use it as security for a loan has also led at least one court to hold that while a recordation of a lis pendens does not amount to the de jure taking of property, it is nevertheless a de facto one that should trigger the protection offered by the due process clause.<sup>111</sup> While this case presents an interesting analysis, it has not been followed. Such a view was flatly rejected in a concurring opinion by Chief Justice Rehnquist who stated that the lis pendens itself "creates no additional right in the property . . . but simply allows third parties to know that a lawsuit is pending in which [a] plaintiff is seeking to establish such a right."<sup>112</sup> Thus a lis pendens is not a taking mechanism, but merely a mechanism for notice.<sup>113</sup>

#### IV. APPROPRIATENESS OF A LIS PENDENS IN ACTIONS FOR A CONSTRUCTIVE TRUST PREMISED ON TRACING IN CONJUNCTION WITH A CLAIM FOR DAMAGES

In recent years, the appellate courts across the country, and particularly in California, have reached contradictory conclusions as to the appropriateness of a lis pendens in cases where a plaintiff is seeking damages in addition to a constructive trust based on tracing of funds.

As discussed in Part III, when a defendant wrongfully uses funds belonging to the plaintiff to purchase real property, the plaintiff can trace his funds and impose a constructive trust on that property. However, the constructive trust is not the plaintiff's exclusive remedy. The plaintiff also has a cause of action for damages. Therefore, as is quite common, the plaintiff will seek damages in addition to a constructive trust on the property to which he can directly trace his funds. Furthermore, because the plaintiff is asserting an interest in the property, the plaintiff files a lis pendens on the property to put subsequent purchasers on notice of his claim.

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<sup>111</sup> See, e.g., *Hercules Chem. Co. v. VCI, Inc.*, 462 N.Y.S.2d 129, 135 (1983).

<sup>112</sup> *Connecticut v. Doe*, 501 U.S. 1, 29 (1991) (Rehnquist, J., concurring). The case revolved around Connecticut's prejudgment statute. *Id.* at 4. The issue presented was whether the statute, which authorized a judge to allow prejudgment attachment of real estate without a formal notice or hearing, and without a bond requirement, violated the due process clause. *Id.* The majority determined that it did not. *Id.* In his concurring opinion, Chief Justice Rehnquist discussed a lis pendens in the context of a notice tool, which can only be challenged post-filing. *Id.* at 29.

<sup>113</sup> *Id.* at 29.

These types of cases have been problematic for courts, which have reached differing conclusions as to whether a lis pendens is proper. The scope of inquiry usually involves whether plaintiff's claim is a "real property claim" as required by the state's lis pendens statutes.<sup>114</sup>

A. *Cases Finding a Lis Pendens Proper in Actions Seeking Damages and a Constructive Trust Where Tracing of Funds is Involved*

Courts in many jurisdictions have found the recordation of a lis pendens proper in actions for a constructive trust based on tracing of funds coupled with a claim for damages. A leading case is *Coppinger v. Superior Court*.<sup>115</sup> In *Coppinger*, plaintiffs sued defendants over misrepresentation in the sale of a home they purchased from defendants.<sup>116</sup> Plaintiffs sought compensatory and punitive damages.<sup>117</sup> In addition, because defendants used the funds acquired from plaintiffs in the sale to buy a new residence, the plaintiffs traced their funds into the new property and sought to impose a constructive trust on defendants' new residence.<sup>118</sup> Plaintiffs recorded a lis pendens in conjunction with the suit.<sup>119</sup> Defendants motion to expunge the lis pendens was denied,<sup>120</sup> and in their appeal, defendants alleged that the trial court was required to expunge the lis pendens because plaintiffs failed to prove that their action "affected title to or the right to possession of real property."<sup>121</sup> The court of appeal affirmed the trial court and stated that since an action for a constructive trust has been held to be an action for the recovery of real estate,<sup>122</sup> all actions for constructive trust are actions "affecting title to or possession of real property,"<sup>123</sup> and therefore appropriate for the filing of a lis

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<sup>114</sup> See CAL. CIV. PROC. CODE § 405.20 (West 2006) (providing that "[a] party to an action who asserts a real property claim may record a notice of pendency of action in which that real property claim is alleged").

<sup>115</sup> 185 Cal. Rptr. 24 (Cal. Ct. App. 1982).

<sup>116</sup> Plaintiffs claimed there was a termite problem in the residence they purchased from defendants, that defendants had previously treated the termite problem and therefore knew it was likely to recur yet withheld information until shortly before the escrow closing, and then misrepresented that the problem was completely remedied. *Id.* at 26.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 27.

<sup>121</sup> *Coppinger*, 185 Cal. Rptr. at 27.

<sup>122</sup> *Id.* at 29; see also *Marshall v. Marshall*, 42 Cal. Rptr. 686 (Cal. Ct. App. 1965).

<sup>123</sup> *Coppinger*, 185 Cal. Rptr. at 29. The court did not make any distinction between different grounds for a constructive trust. Moreover, the court affirmed the

pendens.<sup>124</sup> It was irrelevant to the court that plaintiffs also alternatively sought damages.<sup>125</sup>

Similarly, the court in *Okuda v. Superior Court*<sup>126</sup> held that a prayer for equitable relief in the form of either a constructive trust or an equitable lien entitles a plaintiff to record a lis pendens, even when coupled with a prayer for damages.<sup>127</sup> There, plaintiffs entered into a contract with defendants to purchase defendants' house.<sup>128</sup> Believing that title was properly transferred, plaintiffs added certain improvements to the property.<sup>129</sup> Upon discovery that they in fact did not hold a proper title, plaintiffs surrendered possession and instituted the suit.<sup>130</sup> They sought damages equal in amount to the cost of the improvements and an equitable lien imposed on the property to secure that payment.<sup>131</sup> In conjunction with their suit, plaintiffs recorded a lis pendens on the property.<sup>132</sup> The California court of appeal found that a real property claim existed because the "good faith improvers" statute upon which plaintiffs based their claim<sup>133</sup> vests a court with a broad equitable jurisdiction to adjust the rights of good faith improvers and property owners.<sup>134</sup> Accordingly, the court found that the statute empowered it to grant an equitable remedy which would "affect the title or the right of possession of an improved property."<sup>135</sup> Hence, plaintiffs' claim was a "real property claim" as required by the lis pendens statutes.<sup>136</sup> As the court noted, "[t]he fact

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tracing principle by stating that "one who wrongfully acquires property of another holds it . . . as a constructive trustee, and the trust extends to property acquired in exchange for that wrongfully taken." *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 26.

<sup>126</sup> 192 Cal. Rptr. 388 (Cal. Ct. App. 1983).

<sup>127</sup> *Id.* at 391.

<sup>128</sup> *Id.* at 390.

<sup>129</sup> *Id.* The added improvements included a patio, a fence, and landscaping. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Okuda*, 192 Cal. Rptr. at 389.

<sup>133</sup> According to California Code of Civil Procedure section 871.1, "good faith improvers" are those who, under the erroneous belief that they own a piece of land, make certain improvements to it. *See Okuda*, 192 Cal. Rptr. at 389.

<sup>134</sup> Section 871.5 allows a court to "effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties . . . as is consistent with substantial justice." CAL. CIV. CODE PROC. § 871.50 (West 2006).

<sup>135</sup> *Okuda*, 192 Cal. Rptr. at 390-91.

<sup>136</sup> *Id.* at 391.

that petitioners [sought] damages as well as equitable relief [did] not dilute the court's broad equitable jurisdiction."<sup>137</sup>

The equitable remedy sought in *Okuda* was an equitable lien and not a constructive trust.<sup>138</sup> Like a constructive trust, an equitable lien is an equitable restitutionary remedy that allows the lienholder to utilize the subject property as payment for an amount owed by the defendant.<sup>139</sup> Both the remedies of an equitable lien and a constructive trust adjust parties' rights of ownership and enjoyment of real property.<sup>140</sup> Therefore, "[f]or purposes of determining the propriety of a lis pendens, [a] constructive trust and [an] equitable lien are indistinguishable."<sup>141</sup>

Many jurisdictions agree with the *Coppinger* approach, and find a lis pendens to be proper in constructive trust cases where tracing of funds is involved, regardless of whether a plaintiff seeks damages as well. For example, in *Keen v. Keen*,<sup>142</sup> a shareholders' derivative suit, plaintiff sought to impose a constructive trust on real property allegedly bought with fraudulently removed funds.<sup>143</sup> The New York Supreme Court, appellate division, held that the suit justified the recording of a lis pendens because it "clearly demand[ed] a judgment which would affect the title to, or the possession, use or enjoyment of real property" as required by the New York lis pendens statute.<sup>144</sup>

Similarly, in *American Motor Club, Inc. v. Neu*,<sup>145</sup> a debtor filed suit alleging that a former director of one of its corporate debtors stole funds loaned to the corporation and used them as down payment for a new residence.<sup>146</sup> In addition to damages, plaintiff alternatively sought a constructive trust on the property, and recorded a lis pendens against it.<sup>147</sup> The United States Bankruptcy Court for the Eastern District of New York held that plaintiff's claim for money damages did not "serve as a waiver of its claim to the property."<sup>148</sup> The court further held that since "it is well settled" that a suit for constructive trust affects "title to, or the possession, use or enjoyment of

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 390.

<sup>139</sup> See *Farmers Ins. Exch. v. Zerin*, 61 Cal. Rptr. 2d 707, 711 (Cal. Ct. App. 1997).

<sup>140</sup> Compare *id.*, with *Okuda*, 192 Cal. Rptr. at 392.

<sup>141</sup> *Okuda*, 192 Cal. Rptr. at 392.

<sup>142</sup> 527 N.Y.S.2d 817 (N.Y. App. Div. 1988).

<sup>143</sup> *Id.* at 817. The plaintiffs also requested a reconveyance of other property. *Id.*

<sup>144</sup> *Id.* at 817-18; see *supra* note 109.

<sup>145</sup> 109 B.R. 595 (Bankr. E.D.N.Y. 1990).

<sup>146</sup> *Id.* at 596-97.

<sup>147</sup> *Id.* at 597.

<sup>148</sup> *Id.* at 599.

real property” as required by the New York lis pendens statute,<sup>149</sup> plaintiff’s suit entitled it to an “absolute” right to record a lis pendens.<sup>150</sup>

The Florida Supreme Court also upheld the propriety of lis pendens in actions for a constructive trust based on tracing of funds. In *Chiusolo v. Kennedy*,<sup>151</sup> plaintiff advanced funds to defendant, which were used to purchase a property, and in return plaintiff was to receive stock.<sup>152</sup> After he did not receive the stock, plaintiff sought to impose a constructive trust on the property.<sup>153</sup> The court held that where there is a “fair nexus” between “the apparent legal or equitable ownership of [the] property and the dispute embodied in the lawsuit,” a lis pendens is proper.<sup>154</sup> A “fair nexus” exists where alienation of the property or the imposition of intervening liens can disserve the lis pendens’ purposes of protecting plaintiffs and warning potential third parties.<sup>155</sup> Since such risk existed in *Chiusolo*, the court held that the lis pendens was proper in that action.<sup>156</sup>

Likewise, an action seeking a constructive trust based on tracing of funds is a proper ground for a lis pendens in Minnesota. In *Miller Johnson Steichen Kinnard, Inc. v. Smith*,<sup>157</sup> an employee allegedly embezzled funds from the investment accounts of several of her employer’s customers and used the money to purchase a townhouse.<sup>158</sup> Plaintiff filed suit and recorded a lis pendens.<sup>159</sup> The court acknowledged that an action, the sole purpose of which is to recover money, is inappro-

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<sup>149</sup> *Id.* The New York lis pendens statute is almost identical to California’s. The statute allows for the recording of a lis pendens “in any action in a court of the state or the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.” N.Y. C.P.L.R. § 6501 (McKinney 2006).

<sup>150</sup> *Neu*, 109 B.R. at 599.

<sup>151</sup> 614 So. 2d 491 (Fla. 1993).

<sup>152</sup> *Id.* at 492.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* at 492–93; *see also* *Mitschke-Collande v. Kramer*, 869 So. 2d 1246 (Fla. Dist. Ct. App. 2004). There, heirs alleged that defendant used funds, advanced to him for investment purposes, to purchase personal property. *Id.* at 1248–49. Plaintiffs sought a constructive trust and recorded a lis pendens in conjunction with their suit. *Id.* at 1249. The court determined that the “fair nexus” test was satisfied because “[an] order discharging the lis pendens could [have] jeopardize[d] the [h]eirs’ unrecorded interest in the property at issue.” *Id.* at 1249–50.

<sup>157</sup> No. C3-02-2270, 2003 Minn. App. LEXIS 960 (Aug. 12, 2003).

<sup>158</sup> *Id.* at \*2.

<sup>159</sup> *Id.* at \*4.

priate for a lis pendens.<sup>160</sup> However, since plaintiff sought a constructive trust in addition to damages,<sup>161</sup> the action involved “title to, or any interest in or lien upon, real property,” as required by the Minnesota lis pendens statute.<sup>162</sup>

The law in North Carolina is similar. For example, in *Cap Care Group, Inc. v. McDonald*<sup>163</sup> two real estate companies sued a purported business partner who purchased a commercial property in his own name which was to be purchased on behalf of the partnership.<sup>164</sup> Defendant funded some of the purchase price with money given to him by the plaintiffs.<sup>165</sup> In their suit, plaintiffs sought a constructive trust and damages.<sup>166</sup> They also recorded a lis pendens against the property at issue.<sup>167</sup> Defendants appealed after the trial court refused to expunge the lis pendens<sup>168</sup> and the North Carolina Court of Appeals affirmed the trial court’s refusal.<sup>169</sup> The court reasoned that in North Carolina, a lis pendens is appropriate where a plaintiff can trace his funds to a property.<sup>170</sup> Because plaintiffs were able to show that their money was used as part of the property’s purchase price, the lis pendens was appropriate.<sup>171</sup>

In New Jersey as well, a lis pendens is properly recorded in actions for a constructive trust based on tracing of funds. In *Polk v. Schwartz*,<sup>172</sup> plaintiffs alleged that the defendants fraudulently obtained over \$632,000 from them and used it to purchase certain properties in Atlantic City.<sup>173</sup> They sought damages and a constructive trust on those properties and recorded a lis pendens.<sup>174</sup> The trial

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<sup>160</sup> *Id.* at \*7.

<sup>161</sup> Plaintiffs were granted permission to amend their complaint to include a constructive trust claim. *Id.* at \*4–5.

<sup>162</sup> See MINN. STAT. ANN. § 557.02 (West 2006) (providing that “in all actions in which the title to, or any interest in or lien upon, real property is involved or affected, or is brought in question by either party, any party thereto . . . may file . . . a notice of the pendency of the action”); *Miller*, 2003 Minn. App. LEXIS 960, at \*8–9.

<sup>163</sup> 561 S.E.2d 578 (N.C. Ct. App. 2002).

<sup>164</sup> See *id.* at 580–81.

<sup>165</sup> See *id.*

<sup>166</sup> *Id.* at 581.

<sup>167</sup> *Id.* at 583.

<sup>168</sup> *Id.* In their appeal, the defendants alleged various other errors committed by the trial court, all of which were rejected by the appellate court. See *id.* at 581–83.

<sup>169</sup> *Cap Care*, 561 S.E.2d at 583.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> 399 A.2d 1001 (N.J. Super. Ct. App. Div. 1979).

<sup>173</sup> *Id.* at 1002–03.

<sup>174</sup> *Id.* at 1003.

court ordered expungement of the lis pendens.<sup>175</sup> In reversing, the appeals court first noted that the New Jersey lis pendens statute, which is similar to statutes in other jurisdictions, allows a lis pendens in any action “the object of which is to enforce a lien . . . or to affect the title to real estate.”<sup>176</sup> The court held that because any action “to impress a constructive trust on realty affects title to that property,” such action falls within the purview of the lis pendens statute.<sup>177</sup> Accordingly, the Appellate Division reversed the trial court’s expungement order.<sup>178</sup>

*B. Cases Finding a Lis Pendens Proper when Plaintiffs Allege a Fraudulent Conveyance*

In a situation that could have precedential value for constructive trust suits, courts have found actions to set aside a fraudulent conveyance to be the type of lawsuit where the recordation of a lis pendens is proper. Courts have based their decisions solely on the pleadings filed by the plaintiffs; they did not inquire into plaintiffs’ motives for the lawsuit. For example, in *Hunting World, Inc. v. Superior Court*,<sup>179</sup> the plaintiff initially filed a federal suit against defendant husband, alleging trademark infringement and counterfeiting of plaintiff’s merchandise.<sup>180</sup> Among its claims,<sup>181</sup> plaintiff sought damages and the imposition of a constructive trust against profits derived from the infringement.<sup>182</sup> After the defendant quitclaimed his interest in their residence to his wife, plaintiff filed a state action against both to set aside the conveyance.<sup>183</sup> The plaintiff recorded a lis pendens against the property, which the trial court expunged.<sup>184</sup> The California Court of Appeal reversed.<sup>185</sup> It acknowledged the split among California courts over the appropriateness of a lis pendens in actions where plaintiffs seek damages and also a constructive trust or an equitable lien.<sup>186</sup> Nevertheless, the court concluded that the definition of a

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<sup>175</sup> *Id.* at 1004.

<sup>176</sup> N.J. STAT. ANN. § 2A:15-6 (West 2006).

<sup>177</sup> *Polk*, 399 A.2d at 1004.

<sup>178</sup> *Id.* at 1005.

<sup>179</sup> 26 Cal. Rptr. 2d 923 (Cal. Ct. App. 1994).

<sup>180</sup> *Id.* at 924.

<sup>181</sup> Plaintiff also sought an injunction and destruction of all counterfeit merchandise. *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 924–25.

<sup>185</sup> *Hunting World*, 26 Cal. Rptr. 2d at 925, 928.

<sup>186</sup> *See id.* at 925–27.



“real property claim,” i.e., one that “affects title to or the right to possession of specific real property,”<sup>187</sup> clearly covers actions, such as the one before the court, where plaintiff sought to set aside a fraudulent conveyance of real property.<sup>188</sup>

Recently, in *Kirkeby v. Superior Court*,<sup>189</sup> the California Supreme Court approved of the *Hunting World* decision by affirming that an action to set aside an allegedly fraudulent transfer of real property entitles a plaintiff to record a lis pendens.<sup>190</sup> Following a business dispute, the plaintiff in that case filed suit alleging twenty-seven causes of action, including one for fraudulent conveyance.<sup>191</sup> In her fraudulent conveyance claim, plaintiff alleged that the defendant borrowed \$50,000 from her company, representing that he would use the funds to construct a building for the company’s operations.<sup>192</sup> Instead, defendant allegedly used the funds to construct a residential property for his wife and himself.<sup>193</sup> In order to defraud creditors, he subsequently transferred his interest in the property to a limited partnership to which he had previously transferred his interest in another home.<sup>194</sup> After plaintiff recorded a lis pendens on the properties, the trial court ordered its expungement, and the appeals court affirmed.<sup>195</sup> The California Supreme Court reversed.<sup>196</sup> The supreme court held that when analyzing whether a claim is a “real property claim,” all a court needs to consider is the pleading itself.<sup>197</sup> It should not look beyond the pleading to ascertain the purpose of the party seeking the lis pendens.<sup>198</sup> Therefore, since plaintiff alleged fraudulent conveyances and asked the court to void the transfers to the extent necessary to satisfy her claim, the claim, “if successful, will affect title to specific real property” as required by the lis pendens stat-

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<sup>187</sup> See CAL. CIV. PROC. CODE § 405.4 (West 2006).

<sup>188</sup> *Hunting World*, 26 Cal. Rptr. 2d at 927. The court also noted that “permitting notice of lis pendens here does not impose an intolerable burden” on the defendant. *Id.* If the transfer was legitimate, the defendant “should be able to defeat the lawsuit by demurrer.” *Id.*

<sup>189</sup> 93 P.3d 395 (Cal. 2004).

<sup>190</sup> *Id.* at 400.

<sup>191</sup> *Id.* at 397.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 397–98.

<sup>195</sup> *Kirkeby*, 93 P.3d at 397–98.

<sup>196</sup> *Id.* at 402.

<sup>197</sup> Thus, the court would perform the same type of analysis as with a demurrer.

See *id.*

<sup>198</sup> *Id.* at 400.

utes.<sup>199</sup> Thus, a lis pendens was proper regardless of plaintiff's monetary motive.<sup>200</sup> In reaching its decision, the court acknowledged the financial pressure that a lis pendens may exert over a property owner.<sup>201</sup> Nevertheless, the court was unable to ignore "the plain language of the statute, which clearly establishes that fraudulent conveyance claims may support a lis pendens."<sup>202</sup> While the court acknowledged the dispute regarding the propriety of a lis pendens in constructive trust cases, it refrained from settling the dispute, opting instead to limit its holding to fraudulent conveyance cases.<sup>203</sup>

C. *Cases Finding a Lis Pendens Improper in Actions Seeking Damages and a Constructive Trust Where Tracing of Funds is Involved*

In contrast, certain courts of appeal, especially in California, have expunged a lis pendens in actions for constructive trusts and equitable liens that involved tracing of funds and alternative claims for damages. These courts reason that these claims are filed primarily for the purpose of securing money damages, and therefore are not "real property claims" as required by the lis pendens statutes.

*La Paglia v. Superior Court*<sup>204</sup> is one of the leading cases disallowing a lis pendens where funds are traced to property and the plaintiff is seeking his constructive trust remedy as an alternative to damages. The court expunged the lis pendens because it thought that the claim for a constructive trust was used "as a collateral means to collect money damages."<sup>205</sup> In that case, plaintiff alleged that defendant wrongfully withheld \$1.5 million from the owners of a property he leased and used that money to purchase another piece of real property.<sup>206</sup> Plaintiff, who could trace his funds into the acquired property, sought money damages and a constructive trust on that property, and recorded a lis pendens against it.<sup>207</sup> The *La Paglia* court ordered expungement of the lis pendens. It stated that "[w]here, as here, the purpose of the constructive trust is only to secure payment of a debt, the plaintiff, like other creditors must rely upon prejudg-

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<sup>199</sup> *Id.* at 401.

<sup>200</sup> *Id.*

<sup>201</sup> *Kirkeby*, 93 P.3d at 401.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.*

<sup>204</sup> 264 Cal. Rptr. 63 (Cal. Ct. App. 1989).

<sup>205</sup> *Id.* at 68 (quoting *Urez Corp. v. Super. Ct.*, 235 Cal. Rptr. 837, 843 (Cal. Ct. App. 1987)).

<sup>206</sup> *Id.* at 65. Plaintiff succeeded to the original owners' interest. *Id.*

<sup>207</sup> *Id.*

ment attachment procedures.”<sup>208</sup> The court rejected plaintiff’s contention that “it is illogical to allow a plaintiff to assert an action for constructive trust and then defeat the plaintiff’s recovery by allowing the defendant to transfer the property away to a bona fide purchaser.”<sup>209</sup>

Similar reasoning was used in *Urez Corp. v. Superior Court*,<sup>210</sup> where the court found the lis pendens inappropriate because it thought plaintiff’s constructive trust claim served only as means to secure monetary damages.<sup>211</sup> There, partners formed a joint venture for the purpose of purchasing and developing a parcel of land.<sup>212</sup> After they failed to pay amounts owed on the trust deed and foreclosure proceedings began, one of the partners formed a corporation that successfully acquired the property for itself in the foreclosure sale.<sup>213</sup> The remaining partner filed suit against the departing partner and the corporation.<sup>214</sup> In addition to a cause of action for fraud, the plaintiffs sought imposition of a constructive trust on the property for “the purpose of securing payment of amounts” owed to him for his investment in the joint venture.<sup>215</sup> Plaintiff recorded a notice of lis pendens.<sup>216</sup> The trial court denied defendant’s motion to expunge but the court of appeals reversed.<sup>217</sup> The appeals court reasoned that plaintiff did not claim any ownership or possessory interest.<sup>218</sup> Instead, he sought “the creation of a ‘beneficial’ interest in the property for the purpose of securing payment of money owed him under his defunct second trust deed.”<sup>219</sup> Therefore, the action did not affect “title to or right of possession of real property” as required by the California lis pendens statute.<sup>220</sup> The court stated that “allegations of equitable remedies, even if colorable, will not support a lis pendens

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<sup>208</sup> *Id.* at 68.

<sup>209</sup> *Id.*; see also *Lewis v. Super. Ct.*, 37 Cal. Rptr. 2d 63, 72 (Cal. Ct. App. 1994) (quoting *La Paglia*, 264 Cal. Rptr. 3d at 67) (The court held improper a cause of action for a constructive trust as a basis for a lis pendens because plaintiff claimed an interest in the property “only to the extent the monies [it] allege[d] were wrongfully obtained have been invested therein.”).

<sup>210</sup> 235 Cal. Rptr. 837 (Cal. Ct. App. 1987).

<sup>211</sup> See *id.* at 843.

<sup>212</sup> *Id.* at 838–39.

<sup>213</sup> *Id.* at 839.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Urez*, 235 Cal. Rptr. at 839.

<sup>217</sup> *Id.* at 843.

<sup>218</sup> *Id.* at 842.

<sup>219</sup> *Id.*

<sup>220</sup> See *id.* at 840, 843.

if, ultimately, those allegations act only as a collateral means to collect money damages.”<sup>221</sup> The court added that the true purpose of a *lis pendens* is to provide notice of a pending litigation and not to provide plaintiffs with additional leverage for negotiating purposes.<sup>222</sup>

Factually similar is the case of *BGJ Associates v. Superior Court*,<sup>223</sup> where the court based its conclusion that the constructive trust claim was merely collateral for a damages claim on the fact that only two out of eleven causes of action focused on the imposition of a constructive trust.<sup>224</sup> That case also dealt with a failed joint venture.<sup>225</sup> Plaintiffs alleged that they formed a joint venture in order to buy certain real properties with another company, but the other company, together with one of the original partners, wrongfully acquired the properties for themselves, to the exclusion of plaintiffs.<sup>226</sup> Plaintiffs also alleged that defendants benefited from the plaintiffs’ deposit of \$104,693 against the purchase price for two of the properties, which were credited to the defendants.<sup>227</sup> Two of plaintiffs’ causes of action focused on the imposition of a constructive trust, while the remaining nine sought various kinds of damages based on fraud and tort theories.<sup>228</sup> In conjunction with their suit, plaintiffs recorded a *lis pendens* against the properties.<sup>229</sup> The court narrowly focused on the fact that only two of plaintiffs’ eleven causes of action sought a constructive trust, and determined that the suit was essentially an action for money damages with “appended” constructive trust allegations.<sup>230</sup> Allowing a *lis pendens* in such action, the court held, would have been contrary to the caution with which courts have approached the *lis pendens* in light of the well-known dangers that the *lis pendens* procedure can be abused to coerce a defendant to settle a claim.<sup>231</sup> Therefore, the court concluded that plaintiffs were not entitled to maintain a *lis pendens*.<sup>232</sup>

Other California courts of appeal have advanced the same theory of “looking for the intent behind the pleadings” mechanism in

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<sup>221</sup> *Id.* at 843.

<sup>222</sup> *Urez*, 235 Cal. Rptr. at 843.

<sup>223</sup> 89 Cal. Rptr. 2d. 693 (Cal. Ct. App. 1999).

<sup>224</sup> *See id.* at 705–06.

<sup>225</sup> *See id.* at 697.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 700.

<sup>228</sup> *Id.* at 705–06.

<sup>229</sup> *BGJ*, 89 Cal. Rptr. 2d. at 700.

<sup>230</sup> *See id.* at 705–06.

<sup>231</sup> *Id.* at 706.

<sup>232</sup> *Id.*

actions for equitable liens, a similar remedy to a constructive trust. For example, in *Campbell v. Superior Court*,<sup>233</sup> plaintiff alleged that defendant exercised undue influence against his deceased father, persuading him to spend \$200,000 in trust funds to pay for the remodeling of defendant's house.<sup>234</sup> Plaintiff traced his funds to the property and sought the imposition of a constructive trust and an equitable lien on defendant's house, and recorded a lis pendens in conjunction with the suit.<sup>235</sup> The court held that plaintiff's prayer for the imposition of an equitable lien on defendant's property did not support the recordation of a lis pendens because plaintiff sought an interest in the property solely "for the purpose of securing a claim for money damages"<sup>236</sup> and therefore the action did not affect title to specific real property.<sup>237</sup> Moreover, plaintiff's suit was not dependent upon the uniqueness of the property in the underlying suit and a monetary judgment would have fully compensated plaintiff for any damages he suffered.<sup>238</sup> The court did not address the propriety of the lis pendens in conjunction with the constructive trust claim, because plaintiff's allegations of improvements to defendant's house did not support the remedy of constructive trust.<sup>239</sup> Yet the extensive reliance of the *Campbell* court on *Urez* when finding the equitable lien claim improper for lis pendens seems to suggest that even had the allegations supported the remedy of constructive trust, the outcome would not have been different.<sup>240</sup>

The *Campbell* case is almost identical to the earlier case of *Burger v. Superior Court*.<sup>241</sup> Not only did the court in *Burger* hold that the pleading did not support a claim for a constructive trust, but also held that the equitable lien claim did not support the recordation of lis pendens because plaintiff's suit was mainly for damages.<sup>242</sup> There,

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<sup>233</sup> 34 Cal. Rptr. 3d 68 (Cal. Ct. App. 2005).

<sup>234</sup> *Id.* at 70–71.

<sup>235</sup> *Id.* at 71.

<sup>236</sup> *Id.* at 78 (quoting *Urez Corp. v. Super. Ct.*, 235 Cal. Rptr. 837, 843 (Cal. Ct. App. 1987)).

<sup>237</sup> *Campbell*, 34 Cal. Rptr. 3d at 78–79 (quoting CAL. CIV. PROC. CODE § 405.4 (West 2004)).

<sup>238</sup> *Id.* at 78.

<sup>239</sup> *Campbell*, 34 Cal. Rptr. 3d at 80–81 (citing RESTATEMENT (FIRST) OF RESTITUTION, *supra* note 1, § 206 (providing that "[w]here a person wrongfully uses property of another in making improvements upon property already owned by the wrongdoer, the other is entitled to an equitable lien but is not entitled to enforce a constructive trust")).

<sup>240</sup> *See Id.*, 34 Cal. Rptr. 3d at 76 ("[W]e continue to follow the holding of *Urez*.").

<sup>241</sup> 199 Cal. Rptr. 227 (Cal. Ct. App. 1984).

<sup>242</sup> *Id.* at 230–31.

the complaint alleged that plaintiff delivered funds to defendant for remodeling and repair work on the property.<sup>243</sup> Instead, defendant diverted most of the money for construction of another property he owned.<sup>244</sup> Plaintiff sued defendant for damages, sought a constructive trust, and recorded a lis pendens against both properties.<sup>245</sup> The court held that the claim for a constructive trust could not justify the filing of a lis pendens, because plaintiff's allegations of improvements did not support the remedy of a constructive trust.<sup>246</sup> The court further held that even if plaintiff sought the remedy of an equitable lien, a lis pendens would not have been proper because defining plaintiff's claim, which was primarily for damages, as a "real property" claim, would have invited abuse of the lis pendens procedure. The court stated, "in essence [plaintiff] has brought an action for money. Indeed, [plaintiff's] claim is similar to that of almost any lender of money to a defaulting debtor who happens to own real property."<sup>247</sup>

Likewise, other jurisdictions disallow recordation of a lis pendens in constructive trust cases involving tracing of funds. For example, in *Flores v. Haberman*,<sup>248</sup> a case from Texas, the court expunged a lis pendens on the theory that the plaintiffs sought the constructive trust to satisfy a money judgment.<sup>249</sup> In that case, the plaintiffs alleged that defendant converted properties and used the proceeds to buy other properties.<sup>250</sup> Plaintiffs sought the imposition of a constructive trust and filed lis pendens against the purchased properties.<sup>251</sup> In Texas, a party may record a lis pendens in actions "involving title to real property" or "the establishment of an interest in real property."<sup>252</sup> The Texas Supreme Court held that the constructive trust claim was not a sufficient basis for the lis pendens because plaintiffs only sought the constructive trust in order to satisfy the judgment they sought against the defendant.<sup>253</sup> Therefore, their interest, the court determined, was "no more than a collateral interest in the property."<sup>254</sup>

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<sup>243</sup> *Id.* at 229.

<sup>244</sup> *Id.*

<sup>245</sup> *See id.* The notice was amended twice. *Id.*

<sup>246</sup> *Id.* at 230.

<sup>247</sup> *Burger*, 199 Cal. Rptr at 230–31.

<sup>248</sup> 915 S.W.2d 477 (Tex. 1995).

<sup>249</sup> *Id.* at 478.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> TEX. PROP. CODE ANN. § 12.007 (Vernon 2004).

<sup>253</sup> *Flores*, 915 S.W.2d at 478.

<sup>254</sup> *Id.*

Similarly, in *Moss v. Tennant*,<sup>255</sup> homebuyers sued the sellers of their house seeking damages based upon breach of warranty and negligence.<sup>256</sup> Plaintiffs also alleged that the sellers purchased a new property using the sale proceeds, and consequently sought a constructive trust on that property and recorded a lis pendens.<sup>257</sup> In declaring the lis pendens improper, the Texas court of appeals held that plaintiffs never sought to recover title to the property or to establish an interest therein, “except as security for the recovery of any damages.”<sup>258</sup>

The Ohio court of appeals reached a similar conclusion, advancing the same rationale. In *Katz v. Banning*,<sup>259</sup> plaintiffs alleged that the defendants wrongfully deprived them of their interest in a joint venture.<sup>260</sup> Plaintiffs sought damages and the imposition of a constructive trust on the joint venture property and recorded a lis pendens.<sup>261</sup> The court held that the subject property constituted a mere business opportunity and was not itself the essence of plaintiffs’ complaint, as evidenced by the fact that plaintiffs only sought damages in eight of their nine claims.<sup>262</sup> Therefore, the court concluded, plaintiffs’ suit was insufficient to allow the recordation of a lis pendens.<sup>263</sup>

#### V. COURTS SHOULD ALLOW A LIS PENDENS IN ALL CASES WHERE A CONSTRUCTIVE TRUST IS APPROPRIATE

The courts that refuse to allow a lis pendens where a constructive trust is properly sought have reached an improper conclusion. There are several reasons why courts should uphold the use of the lis pendens procedure in constructive trust cases based on tracing of funds and in cases where plaintiff is also seeking a damages remedy.

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<sup>255</sup> 722 S.W.2d 762 (Tex. App. 1987).

<sup>256</sup> *Id.* at 762.

<sup>257</sup> *Id.* at 763.

<sup>258</sup> *Id.*

<sup>259</sup> 617 N.E.2d 729 (Ohio Ct. App. 1992).

<sup>260</sup> *Id.* at 731.

<sup>261</sup> *Id.* at 731–32.

<sup>262</sup> *Id.* at 733.

<sup>263</sup> *Id.* at 734.

A. *Allowing a Lis Pendens Effectuates the Purposes of both a Constructive Trust and a Lis Pendens*

1. Protection of Plaintiff's Right to Obtain a Constructive Trust

The constructive trust is an established remedy that is available when courts find that it is inequitable for defendants to hold title as against the plaintiffs.<sup>264</sup> It is "the formula through which the conscience of equity finds expression."<sup>265</sup>

In the context of constructive trust cases involving tracing of funds, it is well established that a plaintiff is entitled to a constructive trust over the property that a defendant acquired through funds wrongfully obtained from the plaintiff.<sup>266</sup>

Additionally, a plaintiff has the right to this remedy as an alternative to a damages award.<sup>267</sup> The plaintiff's alleged motives in seeking a constructive trust have never been a relevant concern under constructive trust law.<sup>268</sup>

The constructive trust remedy, however, becomes unavailable where the property is transferred to a third-party bona fide purchaser, even if the property was initially acquired under circumstances that would have warranted the remedy.<sup>269</sup> Courts are unwilling to deflect the loss to an innocent purchaser.<sup>270</sup> But a transferee will not qualify as a bona fide purchaser, i.e., the remedy of constructive trust would still be available, if the transferee has actual or constructive notice of either the circumstances giving rise to the wrongful acquisition or of the pendency of a legal action concerning the property.<sup>271</sup> The lis pendens statutes have made a formal recordation of a lis pendens the means to impart constructive notice of the lawsuit to a transferee.<sup>272</sup> Thus, the lis pendens has become the procedural tool

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<sup>264</sup> See *supra* note 1 and accompanying text.

<sup>265</sup> *United States v. Riviaccio*, 661 F. Supp. 281, 291 (E.D.N.Y. 1987) (quoting *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919)).

<sup>266</sup> See *supra* notes 56–62 and accompanying text.

<sup>267</sup> See *supra* notes 7–8 and accompanying text.

<sup>268</sup> See, e.g., *Urez Corp. v. Super. Ct.*, 235 Cal. Rptr. 837, 843 (Cal. Ct. App. 1987). The court wrote that the constructive trust allegations were only being made for the purpose of securing a money judgment, and therefore expunged a lis pendens. *Id.* In so doing, it misinterpreted constructive trust law. *Id.*

<sup>269</sup> See *supra* Part II.F.

<sup>270</sup> See *supra* note 64 and accompanying text.

<sup>271</sup> See *supra* notes 77–81 and accompanying text.

<sup>272</sup> See *supra* notes 86–93 and accompanying text.



necessary to protect a plaintiff's interest in the property he is suing to obtain in his constructive trust action.

Courts expunging the lis pendens in cases where a constructive trust has been properly pleaded not only ignore this clear necessity and thus fail to protect the plaintiff, but also act irrationally. Simply put, it is illogical to allow a plaintiff's claim for a constructive trust to proceed and then defeat it by allowing the defendant to transfer the property away to a bona fide purchaser.

This anomaly becomes all the more clear because in each of the aforementioned cases where the courts expunged the lis pendens, the constructive trust claims, or in the alternative, the equitable lien claims, were allowed to proceed. For example, the court in *La Paglia v. Superior Court*<sup>273</sup> never disputed the constructive trust claim itself. Similarly, the court in *Urez Corp. v. Superior Court*, allowed the claim for constructive trust to go forward.<sup>274</sup> Likewise, the court in *BGJ Associates v. Superior Court* only focused on the number of constructive trust causes of action versus the number of the damages causes of action, without ever disputing the validity of the constructive trust allegations.<sup>275</sup>

In cases where the remedy of constructive trust itself was improper, courts were not hesitant to so hold. For example, the court in *Burger v. Superior Court* held that the remedy of constructive trust was improper because plaintiff only alleged that wrongfully obtained funds were used for improvements of the subject property.<sup>276</sup> While these facts gave rise to a valid equitable lien claim, they did not support a claim for a constructive trust.<sup>277</sup> Similarly, the court in *Campbell v. Superior Court* held that plaintiff's claim alleging that wrongfully obtained funds were used for remodeling,<sup>278</sup> did not support the imposition of a constructive trust.<sup>279</sup>

It is quite proper for a court to expunge a lis pendens in connection with an invalid claim for a constructive trust. Unfortunately, the courts in the above cited cases have also ordered expungement where the constructive trust claim was valid. They have taken the incongruous position of acknowledging the propriety of plaintiff's constructive

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<sup>273</sup> 264 Cal. Rptr. 63 (Cal. Ct. App. 1989).

<sup>274</sup> See 235 Cal. Rptr. 837 (Cal. Ct. App. 1987).

<sup>275</sup> See 89 Cal. Rptr. 2d. 693, 705–06 (Cal. Ct. App. 1999).

<sup>276</sup> *Burger v. Super. Ct.*, 109 Cal. Rptr. 227, 230 (Cal. Ct. App. 1984).

<sup>277</sup> *Id.*

<sup>278</sup> *Campbell v. Super. Ct.*, 34 Cal. Rptr. 3d 68, 69 (Cal. Ct. App. 2005).

<sup>279</sup> *Id.* at 80–81.

trust claim, while at the same time refusing to allow the filing of a lis pendens to protect it.

## 2. Protection of Third-Party Transferees

The recordation of a lis pendens in constructive trust cases does not only protect plaintiffs. It also alerts potential third-party transferees that a property which they are about to purchase is subject to litigation, and that any ownership rights of that property depend on the outcome of that litigation.<sup>280</sup> Because of the lis pendens, the third-party purchasers are able to make informed decisions of whether to take such risks. This important function, however, has been ignored by courts expunging notices of lis pendens in constructive trust cases involving tracing of funds or when damages were also claimed. By focusing on incorrect factors, such as the plaintiff's alleged motives,<sup>281</sup> the courts neglected the need to warn innocent purchasers, who have the right to be fully informed.

It is true that if a purchaser is a bona fide purchaser without notice, he will prevail over the party seeking a constructive trust. However, the purchaser could still face a lawsuit over whether he had actual notice or was otherwise entitled to protection of the recording acts. A recorded lis pendens will give the third-party constructive notice so he will not be surprised later to find out about the underlying dispute concerning the property he has bought.

## 3. Protecting the Integrity of the Legal System

By preserving the *res* of a plaintiff's claim, a lis pendens also safeguards the court's jurisdiction and protects the integrity of the legal system. Without a lis pendens recorded in constructive trust cases, a title transfer to a bona fide purchaser during the pendency of a suit could be accomplished because of the lack of constructive notice, and a court will be left powerless to render an effective and meaningful constructive trust remedy.<sup>282</sup>

In addition, a transfer to a bona fide purchaser could result in a waste of valuable resources. For example, if a defendant sells the property to a bona fide purchaser just before a trial date, judicial resources will have been wasted to the extent that the court has been involved in the pre-trial proceedings in the case, and plaintiff's re-

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<sup>280</sup> See *supra* notes 82–83 and accompanying text.

<sup>281</sup> See, e.g., *Urez Corp. v. Super. Ct.*, 235 Cal. Rptr. 837, 843 (Cal. Ct. App. 1987) (noting that the constructive trust allegations were only being made for the purpose of securing a money judgment).

<sup>282</sup> See *supra* Part III.B.3.

sources will have been wasted in the form of attorneys fees expended before the trial. This could be avoided by the filing of a lis pendens, which prevents a valid last-minute transfer to a bona fide purchaser.

Moreover, courts have an interest in preserving the constructive trust remedy itself. The constructive trust is a well-established method to convey property back to a plaintiff when a court determines it is inequitable for a defendant to hold it.<sup>283</sup> Thus, the constructive trust remedy is an effective equitable tool and carries a long precedential tradition.<sup>284</sup> Accordingly, courts have an interest not only in being able to render an effective constructive trust for a particular plaintiff, but also in the continued viability of the remedy.

Courts that disallow the recordation of a lis pendens in constructive trust cases where tracing of funds is involved, or an alternative damages remedy is sought, seem to dislike the constructive trust law itself. For example, the court in *Lewis v. Superior Court*<sup>285</sup> held that a cause of action for a constructive trust did not support the recordation of a lis pendens because plaintiff claimed an interest in the property “only to the extent the monies it allege[d] were wrongfully obtained have been invested therein.”<sup>286</sup> Yet this type of tracing is exactly what the constructive trust remedy allows.<sup>287</sup> By denying the availability of a lis pendens to protect the remedy, these courts are effectively overruling unanimous precedent holding that a constructive trust is available in cases involving tracing of funds. If judges think the traditional law should be changed and a constructive trust should not be available in these cases, they should explicitly consider and overrule the prior constructive trust precedent. They should not pay lip service to the remedy while at the same time making it ineffective by denying the plaintiff the ability to impart constructive notice to a subsequent purchaser.

#### B. Safeguards Against Abuse Exist

Adequate safeguards against abuse of the lis pendens process are provided by lis pendens statutes and other court procedures. The availability of these protections makes court decisions limiting lis pendens in constructive trust cases unnecessary. The following are illustrative of the safeguards already in place to prevent abuse.

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<sup>283</sup> See *supra* note 2 and accompanying text.

<sup>284</sup> See *supra* Part I.

<sup>285</sup> 37 Cal. Rptr. 2d 63, 72 (Cal. Ct. App. 1994).

<sup>286</sup> *Id.* at 72 (quoting *La Paglia v. Super. Ct.*, 264 Cal. Rptr. 63, 67 (Cal. Ct. App. 1989)).

<sup>287</sup> See *supra* Part III.E.3.

### 1. Undertaking by Property Owner

State statutes may give a court discretion to expunge a lis pendens if the defendant in the underlying case deposits a bond sufficient in amount to secure the plaintiff's interest. For example, California<sup>288</sup> and Texas<sup>289</sup> have statutes allowing a court to expunge the lis pendens if it determines that a plaintiff can be adequately protected by the giving of an undertaking by the defendant. Similarly, in New Jersey, a court may discharge a lis pendens if a defendant deposits sufficient monetary security to protect the plaintiff in the event that he later prevails on the merits.<sup>290</sup> Indeed, the *Coppinger* court, while finding plaintiff's constructive claim appropriate for a lis pendens, nevertheless applied this safeguard and expunged the lis pendens.<sup>291</sup> Thus, courts can relieve a defendant from a lis pendens using the *Coppinger* approach of requiring the defendant to post a bond to protect the plaintiff. This is far superior to removing plaintiff's protection entirely by holding that a lis pendens is improper.

### 2. Sanctions

The *Hunting World* court noted that California sanctions statutes also protect against abuse of the lis pendens procedure by authorizing a court to impose sanctions against parties and attorneys who file meritless actions designed to harass an opposing party.<sup>292</sup> Likewise, in *Williams v. Dowdle Sheet Metal Co.*,<sup>293</sup> following a plaintiff's misuse of a lis pendens, a Colorado trial court prohibited the plaintiff from filing any lis pendens that had not been reviewed and signed by licensed attorneys.<sup>294</sup> The Colorado court of appeals affirmed, finding the sanction appropriate in light of plaintiff's abuse of the lis pendens procedure.<sup>295</sup> Similarly, in *Hyman v. Perillie*,<sup>296</sup> a case from Connecticut where plaintiff repeatedly filed a lis pendens even though his

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<sup>288</sup> See CAL. CIV. PROC. CODE § 405.33 (West 2004) (providing that "the court shall order that the notice be expunged if the court finds that . . . adequate relief can be secured to the claimant by the giving of an undertaking").

<sup>289</sup> TEX. PROP. CODE ANN. § 12.008 (Vernon 2004).

<sup>290</sup> See N.J. STAT. ANN. § 2A:15-15 (West 2000).

<sup>291</sup> *Coppinger v. Super. Ct.*, 185 Cal. Rptr. 24, 29-30 (Cal. Ct. App. 1982). The *Coppinger* court dealt with an older version of the section; at the time, this safeguard was codified under section 409.2. See *id.* at 29.

<sup>292</sup> *Hunting World, Inc. v. Super. Ct.*, 26 Cal. Rptr. 2d 923, 927-28 (Cal. Ct. App. 1994); see also, e.g., CAL. CIV. PROC. CODE § 128.5 (West 2007).

<sup>293</sup> 867 P.2d 208 (Colo. Ct. App. 1993).

<sup>294</sup> *Id.* at 209.

<sup>295</sup> *Id.* at 209-10.

<sup>296</sup> No. CV97045539, 2000 LEXIS 2886 (Conn. Super. Ct. Nov. 2, 2000).

claim did not relate in any way to real property,<sup>297</sup> defendant was awarded attorneys' fees, and plaintiff was ordered not to file any further lis pendens without the court's permission.<sup>298</sup>

As these cases demonstrate, plaintiffs can be punished for recording a meritless lis pendens, and such sanctions serve as deterrence to potential plaintiffs attempting to abuse the lis pendens procedure. It is unnecessary for a court to take the radical approach of disallowing a lis pendens in constructive trust cases.

### 3. Other Statutory Safeguards

Some statutes offer protection in the form of the standard of proof. For example, in California, a court must expunge a lis pendens if a claimant cannot demonstrate the validity of his real property claim by a preponderance of the evidence.<sup>299</sup> The Connecticut statute has a similar burden of proof and provides that if a lis pendens is challenged, a plaintiff will carry the initial burden of proof that there is probable cause to sustain the validity of his underlying claim.<sup>300</sup>

Other statutory provisions prevent abuse by requiring the posting of an undertaking by the plaintiff. In California, a court may require a party who records a lis pendens to post a bond "as a condition of maintaining the notice."<sup>301</sup> This bond would protect the owner if the plaintiff did not prevail on the underlying suit and the owner suffered damages as a result of the lis pendens. Therefore, the court could order such an undertaking as opposed to expunging the lis pendens entirely, which would leave the plaintiff unable to protect the property against a sale to a subsequent purchaser.

Moreover, upon any expungement motion, a court may award attorneys' fees and costs to a prevailing party.<sup>302</sup> Additionally, if a court properly expunges a lis pendens, a claimant cannot record another notice against the subject property without a court's permission.<sup>303</sup>

Other statutory safeguards exist, although the protection provided to defendants is not immediate. For example, in Connecticut,

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<sup>297</sup> *Id.* at \*1–4. Plaintiff's claim was for money damages based on an alleged failure to repay a loan, breach of an equipment lease, and other business disputes. *Id.*

<sup>298</sup> *Id.* at \*6.

<sup>299</sup> CAL. CIV. PROC. CODE § 405.32 (West 2004).

<sup>300</sup> CONN. GEN. STAT. § 52-325b (2004).

<sup>301</sup> CAL. CIV. PROC. CODE § 405.34.

<sup>302</sup> *Id.* § 405.38.

<sup>303</sup> *Id.* § 405.36.

a lis pendens is only valid for fifteen years, unless there is re-recording within five years of its expiration.<sup>304</sup> Wisconsin provides protection in the form of service; the lis pendens statute requires a plaintiff to serve a complaint within one year of the recordation of the lis pendens, or the lis pendens will be voided.<sup>305</sup>

C. *A Constructive Trust is a "Real Property Claim"*

In addition to ignoring the valuable purposes that the lis pendens serves and the various alternatives to expungement, courts expunging lis pendens in cases where tracing is involved or where damages are sought seem to be ignoring the clear mandate imposed by the various lis pendens statutes.

All of the aforementioned lis pendens statutes allow plaintiffs whose claims affect or involve real property to record a notice of lis pendens.<sup>306</sup> Thus, as was held by the *Coppinger* court, all actions for constructive trust, which by the nature of the remedy "affect title to or possession of real property,"<sup>307</sup> should entitle plaintiffs to record a lis pendens as a matter of right. Any other conclusion ignores the clear directive of the statutes and necessarily circumvents the legislative intent behind them. Even when a plaintiff seeks damages in addition to a constructive trust, the fact still remains that the claim, if meritorious, would affect the title to or the right of possession of real property.

Moreover, as was demonstrated by the *Kirkeby*<sup>308</sup> decision, a determination of whether a claim constitutes a real property claim should only be based on the *pleadings*. As that court said, "[a] court shall order the notice [of pendency of action] expunged if the court finds that the pleading on which the notice is based does not contain a real property claim."<sup>309</sup> Thus, expunging a lis pendens based on plaintiffs' alleged motives is improper and contrary to statutory mandate.

## V. CONCLUSION

The equitable remedy of a constructive trust allows courts to effectuate a title transfer from a wrongful holder of real property to the plaintiff. The primary purpose of the remedy is to prevent unjust en-

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<sup>304</sup> CONN. GEN. STAT. § 52-325e (2004).

<sup>305</sup> WIS. STAT. ANN. § 840.10(1)(a) (West 2007).

<sup>306</sup> See *supra* notes 86-93 and accompanying text.

<sup>307</sup> *Coppinger v. Super. Ct.*, 185 Cal. Rptr. 24, 27 (Cal. Ct. App. 1982).

<sup>308</sup> 93 P.3d 395 (Cal. 2004).

<sup>309</sup> *Id.* at 398 (citing CAL. CIV. PROC. CODE § 405.31 (West 2004)).

richment—if the wrongfully acquiring party were allowed to keep the property, he would benefit from his wrongdoing and would be unjustly enriched. In a basic constructive trust case, a court will impose the remedy over the exact same property that was wrongfully acquired. However, under the well-established tracing principle, the remedy is also available over a defendant's property that has been acquired with plaintiff's property. Thus, where a plaintiff can trace his property or funds into the newly acquired property, he would be entitled to a constructive trust over that property as well.

Plaintiff's ability to obtain a constructive trust is not available where the subject property is transferred to a third-party bona fide purchaser, i.e., a purchaser without actual or constructive notice of the wrongful acquisition or the pendency of a lawsuit. Thus, a lis pendens, which is a recorded document that gives constructive notice about a pending action, is a crucial procedural tool allowing plaintiffs in a pending constructive trust suit to preserve the remedy that they are seeking.

Nevertheless, some courts have expunged lis pendens in actions for a constructive trust where tracing of funds is involved or where plaintiffs have also sought damages. These courts have concluded that the constructive trust claims are filed "as a collateral means to collect money damages"<sup>310</sup> or primarily for the purpose of securing money damages, and therefore, are not real property claims required by the lis pendens statutes.<sup>311</sup>

These courts ignore the clear language of the statutes authorizing the recordation of a lis pendens in actions involving real property. Additionally, the statutory safeguards that already exist are sufficient to prevent abuse of the lis pendens process.

Most importantly, by disallowing the plaintiff's lis pendens, these courts are undermining the remedy of a constructive trust. The courts do not challenge the undisputed precedent that a constructive trust is an appropriate remedy if plaintiff can trace his wrongfully or mistakenly appropriated funds into the property. Yet, by refusing to allow a lis pendens to be recorded, these courts are unwilling to preserve a plaintiff's constructive trust remedy.

If courts want to change the law that a constructive trust should be imposed where funds are being traced to real property, or where the plaintiff is also seeking a damages remedy, the courts should address that issue and decide whether to overrule the undisputed prior

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<sup>310</sup> La Paglia v. Super. Ct., 264 Cal. Rptr. 63, 68 (Cal. Ct. App. 1989).

<sup>311</sup> See *supra* Part IV.C.

precedent allowing constructive trusts in those types of cases. They should not take the incongruous approach of acknowledging a plaintiff's right to a constructive trust while at the same time denying a lis pendens, which is the only method available to a plaintiff to make his constructive trust remedy viable. Courts should not use the guise of the "real property claim" requirement of the lis pendens statutes to render the equitable remedy of a constructive trust meaningless.