CONSTITUTIONAL LAW—*LIS PENDENS*—NEW JERSEY'S *LIS PENDENS* STATUTE NOT VIOLATIVE OF DUE PROCESS—*Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982).

In New Jersey, when real property is the subject of an action that seeks in some way to affect its title, the plaintiff must file a *lis pendens* to impart notice of the forthcoming litigation.[1] One of the principal benefits derived from filing *lis pendens* is that the filing significantly reduces the likelihood that the defendant will alienate the property prior to adjudication.[2] The *lis pendens* procedure has recently undergone close constitutional scrutiny by the United States District Court for the District of New Jersey[3] and the United States Court of Appeals for the Third Circuit in *Chrysler Corp. v. Fedders Corp.*[4] The courts questioned whether the filing of *lis pendens* was used simply to notify the world of pending litigation or whether the procedure actually constituted a taking of property by state action, thus requiring procedural due process under the fourteenth amendment.[5] Furthermore, the court of appeals examined whether the statutes met these constitutional standards.[6] In reversing the district court's ruling that New Jersey's *lis pendens* statute was unconstitutional, the court of appeals held that although the filing of *lis pendens* effected a taking of property, the statute complied with the requisites of due process.[7]

Chrysler Corporation (Chrysler) and Fedders Corporation (Fedders) executed a contract for the sale of Chrysler's Airtemp division.[8] The agreement called for a transfer[9] of Airtemp to Fedders in return for eighteen million dollars in cash, a substantial promissory note, and

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[1] *Lis pendens* is now codified at N.J. STAT. ANN. §§ 2A:15-6 to -17 (West 1948) (amended 1960). *See generally infra* notes 19-43 and accompanying text.

[2] *See infra* notes 23, 25, 31, 36, 105 & 138 and accompanying text.

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

[4] 670 F.2d 1316 (3d Cir. 1982).

[5] *Id.* at 1325-27; 519 F. Supp. at 1261-63.

[6] 670 F.2d at 1327-31.

[7] *Id.* at 1331.

[8] *Id.* at 1317. The Airtemp Division was engaged in designing, manufacturing, marketing, and servicing nonautomotive air conditioning systems. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1231 (6th Cir.), *cert. denied*, 102 S. Ct. 388 (1981).

[9] The transfer was performed as follows: Fedders agreed to purchase the assets of Chrysler's Airtemp Division. To facilitate the transaction, Fedders created a wholly owned subsidiary, also called Airtemp, to which the assets were assigned. To provide continuity, Chrysler agreed to service the new Airtemp for nine months. Fedders received a "bill of sale and assignment" and received the old Airtemp's trademarks and patents. Chrysler Corp. v. Airtemp Corp., 426 A.2d 845, 847, 852 (Del. Super. Ct. 1980).

delivery of a class of Fedders's preferred stock.[10] Fedders also assumed certain liabilities of Airtemp.[11]

The controversy began when Fedders examined Airtemp's financial records,[12] leading Fedders to believe that Chrysler overstated Airtemp's assets and understated its losses.[13] When negotiations to cure the defects failed, Fedders discontinued making payments on the promissory note and ceased issuing stock dividends.[14] Chrysler then initiated a series of lawsuits alleging generally that Fedders fraudulently conspired not to pay the full consideration for Airtemp's assets.[15] In the instant case, Chrysler filed suit against Fedders in the United States District Court for the District of New Jersey on March 4, 1981, alleging that Airtemp's assets were liquidated by Fedders and then used to pay liens and mortgages on property Fedders owned in Edison, New Jersey.[16] The complaint further alleged securities violations.[17] As a remedy, Chrysler sought eighty-five million dollars

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[10] 670 F.2d at 1317. The note allegedly required prepayment of the principal in 1984 and 1985, but an accelerated prepayment clause provided for a total prepayment if Fedders sold "any of its operating divisions or subsidiaries for cash in excess of $10 million." *Chrysler*, 519 F. Supp. at 1258.

[11] 670 F.2d at 1317. Airtemp was valued at $93,000,000. The total amount paid by Fedders was $57,500,000. The difference was due to the fact that Airtemp annually lost $10,000,000. Brief for Respondent at 2, Chrysler Corp. v. Fedders Corp., 670 F.2d 1316 (3d Cir. 1982) [hereinafter cited as Brief for Respondent].

[12] *See* Brief for Respondent, *supra* note 11, at 2.

[13] 670 F.2d at 1317. The net deficiency was allegedly in excess of $28,000,000. Brief for Respondent, *supra* note 11, at 2.

[14] 670 F.2d at 1317.

[15] *Id.* Chrysler in fact initiated several lawsuits, this being the last. *See, e.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir.), *cert. denied*, 102 S. Ct. 388 (1981) (charging Fedders with antitrust violations); Chrysler Corp. v. Airtemp Corp., 426 A.2d 845 (Del. Super. Ct. 1980) (action for recovery of services performed by Chrysler for Airtemp); Chrysler Corp. v. Fedders Corp., 51 N.Y.2d 953, 416 N.E.2d 1036, 435 N.Y.S.2d 700 (1980) (New York Court of Appeals held Fedders must pay dividends on stock); Chrysler Corp. v. Fedders Corp., 76 A.D.2d 799, 429 N.Y.S.2d 340 (App. Div. 1980). Two other suits are still pending in the United States District Courts for the Eastern District of Michigan and Southern District of New York. Brief for Respondent, *supra* note 11, at 2.

[16] 519 F. Supp. at 1253. Jurisdiction was based on diversity of citizenship. Specifically, Fedders is a Spanish corporation with New Jersey property, while Chrysler is a Michigan corporation. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1229 (6th Cir.), *cert. denied*, 102 S. Ct. 388 (1981). The New Jersey federal district court pointed out that the alleged fraud was the result of a restructured deal involving the sale of Fedders' Norge Division. 519 F. Supp. at 1258. Chrysler alleged that the prepayment provision of the promissory note was avoided when the Norge sale was restructured. The United States Court of Appeals for the Third Circuit mistakenly assumed Fedders used Airtemp's assets to discharge the liens. *See* 670 F.2d at 1317. The contract provision did not specify from where the $10,000,000 came. 519 F. Supp. at 1258.

[17] 670 F.2d at 1317; *see* 15 U.S.C. § 78 (j)(b)(1976) (use of interstate commerce, mails, or facility of National Securities Exchange to deceive in connection with sale of any security is unlawful).

in compensatory damages and punitive damages, demanding that either an equitable lien or constructive trust be imposed on the property.[18]

Chrysler then filed a notice of *lis pendens* pursuant to New Jersey's *lis pendens* statute, which requires a plaintiff to file a public notice of litigation whenever real estate in New Jersey is the subject of a suit to enforce or affect a lien or encumbrance thereon or to affect the title to that property.[19] Before answering the complaint, Fedders moved to discharge the *lis pendens* on constitutional grounds and by dismissal, transfer, or stay of the action.[20] The district court denied all motions except the constitutional challenge and ordered a discharge of the *lis pendens*.[21] The Court of Appeals for the Third Circuit stayed the district court's order and granted an expedited appeal.[22]

In order to understand the constitutional issue of first impression in New Jersey addressed by the *Chrysler* courts one must examine the development of *lis pendens*. Before the advent of *lis pendens*, courts occasionally rendered unenforceable judgments in suits involving real property.[23] Property that was the subject of a lawsuit could be conveyed prior to judgment by the defendant to a bona fide purchaser, against whom the victorious plaintiff would have no satisfactory recourse.[24] His only alternative would be to prove in a subsequent action that the purchaser was not bona fide.[25]

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[18] 670 F.2d at 1317. Constructive trusts are generally used to remedy a breach of an express trust. However, when property is allegedly held or acquired wrongfully, courts may impose a constructive trust thereby compelling the surrender of that property to the plaintiff. Courts may also give the plaintiff a security interest by imposing an equitable lien. *See* D'Ippolito v. Castro, 51 N.J. 584, 242 A.2d 617 (1968); A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS 770 (1960).

[19] N.J. STAT. ANN. § 2A:15-6 to -17 (West 1948) (amended 1960).

[20] Fedders nonconstitutional arguments were, first, the partial summary judgment achieved by Chrysler in the New York action was res judicata to this suit. 519 F.Supp. at 1254. Second, Chrysler was attempting to rescind an already affirmed contract. *Id.* Third, the action should be dismissed pending the outcome of litigation presently in the Southern District of New York. *Id.* Fourth, venue should be changed to the Southern District of New York. *Id.* Fifth, the action should be stayed pending the New York litigation. *Id.* Interestingly, the district court stated that while dismissal of the lawsuit would discharge the *lis pendens*, a stay or change of venue would not. *Id.* at 1255.

[21] *Id.* at 1254.

[22] 670 F.2d at 1319.

[23] *See generally* J. POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 633, at 1216-20 (1905) (parties could prejudice one another by conveying property); Note, *Abuses of the California* Lis Pendens: *An Appeal for Legislative Remedy*, 39 S. CAL. L. REV. 108 (1966).

[24] Turner v. Houpt, 53 N.J. Eq. 526, 33 A. 28 (Ch. 1895), *rev'd*, 55 N.J. Eq. 593, 39 A. 1114 (1897) (preadjudicatory alienation of property creates subsequent litigation); *see* Gray v. Case, 51 N.J. Eq. 426, 26 A. 805 (Ch. 1893) (policy of courts is prevention of needless litigation).

[25] A legitimate bona fide purchaser in good faith, for valuable consideration, and without notice, could defeat a rightful but subsequent purchaser. Eastwood v. Shedd, 166 Colo. 136, 442 P.2d 423 (1968); *see also* Strong v. Whybark, 204 Mo. 341, 102 S.W. 968 (1907) (examples of nonbona fide purchasers).

In response to the injustice resulting from the application of this rule, the judiciary created *lis pendens*.[26] Under this doctrine, the mere filing of a lawsuit served as constructive notice to all that the property was the subject of litigation.[27] Therefore, *lis pendens* eliminated the status of a bona fide purchaser since all buyers took the property subject to the outcome of the litigation. As a result, courts' judgments were fully enforceable.[28]

The application of *lis pendens* at common law was still fraught with problems. Since the litigation concerning the property was not clearly recorded, diligent searches rarely revealed the encumbrance.[29] Moreover, as society became increasingly urbanized and its members more isolated from one another, the filing of a lawsuit failed to notify many prospective purchasers.[30] Thus, common-law *lis pendens* facilitated fraudulent transfers of property to good faith purchasers unaware of the pending litigation. To ameliorate these difficulties, many state legislatures enacted *lis pendens* statutes.[31]

In 1868, the New Jersey Legislature passed the predecessor to the current *lis pendens* statute, which underwent many revisions until reaching its present form in 1960.[32] The current statute requires the

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[26] Three theories have been advanced as to the origin of *lis pendens:* One theory is "that it is derived from Roman law." Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 72, 18 S.E.2d 436 (1942). Another theory is that it was promulgated by Sir Francis Bacon as Lord Keeper of the Great Seal in 1618, as the 12th of his ordinances in chancery. " 'No decree bindeth any that cometh in bona fide, by conveyance from the defendant before the bill exhibited, and is made no party . . . but where he comes in pendente lite . . . there regularly decree bindeth.' " Mabee v. Mabee, 85 N.J. Eq. 353, 357, 96 A. 495, 497 (Ch. 1916) (quoting *id.*). Others maintain that it is a part of ancient law. Bristow v. Thackston, 187 Mo. 332, 86 S.W. 94 (1905); Haughwout v. Murphy, 22 N.J. Eq. 531 (1871).

[27] It was not entirely clear during the period when *lis pendens* was developed whether a final judgment without the *lis pendens* would serve as constructive notice. *Compare* Haughwout v. Murphy, 22 N.J. Eq. 531 (1871) *and* Turner v. Houpt, 53 N.J. Eq. 526, 33 A. 28 (Ch. 1895), *rev'd*, 55 N.J. Eq. 593, 39 A. 1114 (1897) *with* New Jersey Chancery Practice Act of 1868, ch. 494, 1868 N.J. Laws 114.

[28] *See* Haughwout v. Murphy, 22 N.J. Eq. 531, 544 (1871) ("[I]t is necessary to the administration of justice that the decision of the court in a suit should be binding" on all with interests in property).

[29] 3 J. CASNER, AMERICAN LAW OF PROPERTY § 1312 (1952). *See generally* Note, *Does California's Statutory* Lis Pendens *Violate Procedural Due Process?* 6 PAC. L. J. 62 (1975).

[30] *See infra* note 39 and accompanying text; *see also* Wood v. Price, 79 N.J. Eq. 620, 81 A. 983 (1911).

[31] 3 J. CASNER, *supra* note 29, § 1312; *cf.* Palisade Gardens, Inc. v. Grosch, 120 N.J. Eq. 294, 185 A. 27 (Ch. 1936) (plaintiff's conveyance of fraudulently received property set aside since no *lis pendens* filed). *See generally* Feld v. Kantrowitz, 99 N.J. Eq. 847, 132 A. 657 (1926) (because *lis pendens* was statutory provision, only compliance with statute could protect plaintiff from bona fide purchaser).

[32] New Jersey Chancery Practice Act of 1868, ch. 494, 1868 N.J. Laws 114. In 1930, the legislature eliminated the filing of *lis pendens* for mechanic's liens. Furthermore, a plaintiff could not file *lis pendens* if his cause of action was solely for monetary damages. Act of Apr. 3,

complainant to file a written notice of the pendency of the action in the county where the property is situated whenever the object of the suit is "to enforce a lien, other than a mechanic's lien upon real estate or to affect the title to real estate or a lien or encumbrance thereon."[33] Importantly, any person claiming an interest in property taken through any defendant is bound by the outcome of the litigation.[34] In contrast, under the common-law approach, the plaintiff by filing the lawsuit gave constructive notice of the litigation.[35] Under the statute, however, this notice could be afforded only by filing a notice of *lis pendens*.[36] Additionally, the statute expanded the scope of constructive notice by completely eliminating the bona fide purchaser. Under the old rule, a bona fide purchaser could defeat the plaintiff's claim to the property; whereas the statute, adopting the common-law approach provides the bona fide purchaser no such protection.[37]

Accordingly, the modern concept of *lis pendens* provides notice of pending suits and permits the court to maintain jurisdiction and power over the subject property.[38] New Jersey courts, however, have construed *lis pendens* more expansively.[39]

1929, ch. 119, 1930 N.J. Laws 374; *see* General Elec. Credit Corp. v. Winnebago, Inc., 149 N.J. Super. 81, 373 A.2d 402 (App. Div. 1977); Garfield v. Elmwood Stores, Inc., 17 N.J. Super. 513, 86 A.2d 308 (Ch. Div. 1952); *infra* note 34 and accompanying text.

[33] N.J. STAT. ANN. § 2A:15-6 (West 1948) (amended 1960). *Lis pendens* is filed after the complaint and it must identify the action and describe the affected real estate. *Id.* It must be filed in the office of the county clerk in the county where the land lays. *Id.* The clerk must index the filing and keep it updated. *Id.* § 2A:15-12. In practice, the *lis pendens* is filed with the complaint. Harvey v. Randall, 98 N.J. Eq. 104, 130 A. 470 (Ch. 1926); *see* Schwartz v. Grunwald, 174 N.J. Super. 164, 415 A.2d 1203 (Ch. Div. 1980) (*lis pendens* filed before counterclaim became ineffective). *See generally* Walker v. Hill's Ex'rs, 22 N.J. Eq. 513 (1871).

[34] N.J. STAT. ANN. § 2A:15-7 (West 1948) (amended 1960). The person "shall be deemed to have acquired the same with knowledge of the pendency of the action, and shall be bound by any judgment entered therein as though he had been made a party thereto." *Id.*; *cf.* Palisade Gardens, Inc. v. Grosch, 120 N.J. Eq. 294, 185 A. 22 (Ch. 1936).

[35] *See supra* note 22.

[36] N.J. STAT. ANN. § 2A:15-8 (West 1948) (amended 1960) provides:

> Unless and until a notice of lis pendens is filed as herein provided, no action, as to which such notice is required shall before final judgment entered therein, be taken to be constructive notice to a bona fide purchaser, or mortgager of, or a person acquiring a lien on the affected real estate.

Id.; *see* Wood v. Price, 79 N.J. Eq. 620, 622, 81 A. 983, 984 (1911); Wendy's, Inc. v. Blanchard Management Corp., 170 N.J. Super. 491, 406 A.2d 1337 (Ch. Div. 1979).

[37] Wendy's, Inc. v. Blanchard Management Corp., 170 N.J. Super. 491, 406 A.2d 1337 (Ch. Div. 1979).

[38] Wood v. Price, 79 N.J. Eq. 620, 623, 81 A. 983, 984-85 (1911); Turner v. Houpt, 53 N.J. Eq. 526, 555, 33 A. 28, 45 (Ch. 1895), *rev'd*, 55 N.J. Eq. 593, 39 A. 1114 (1897). *See generally* 3 J. CASNER, *supra* note 29, § 13.12.

[39] *Cf.* Jonnet v. Dollar Sav. Bank, 530 F.2d 1128, 1132 (3d Cir. 1976) (Gibbons, J., concurring). The modern statute lends itself to a more expansive interpretation than the earlier

In *General Electric Credit Corp. v. Winnebago, Inc.*,[40] the Appellate Division of the Superior Court of New Jersey recognized that *lis pendens* was applicable when a plaintiff sought to obtain title to or impose a new lien or restriction on real estate.[41] Furthermore, in a case similar to *Chrysler*, the appellate division, in *Polk v. Schwartz*,[42] held that since the plaintiffs had alleged that the defendants acquired real estate with assets fraudulently procured from plaintiffs and sought the imposition of a constructive trust on the property, *lis pendens* was appropriate.[43]

This trend toward an expansive interpretation of *lis pendens* was capsulized by the chancery division in *United Savings & Loan Association v. Scruggs*.[44] In *Scruggs*, the dispute focused on a mortgage foreclosure. In dicta, however, the court examined the *General Electric* holding, finding two distinct consequences resulting from the filing of *lis pendens*. First, when the plaintiff had an "existing lien or interest of record," *lis pendens* served as notice informing the world of pending litigation.[45] Second, in accordance with *General Electric*, the court stated that *lis pendens* had taken on a substantive aspect. This substantive aspect resulted because a plaintiff who asserted a new lien or interest and properly filed a notice of *lis pendens*, obtained an interest in the property superior to those who subsequently obtained an interest in the property.[46]

Despite the longevity of the *lis pendens* rule, its constitutionality had not been questioned until the statute was expansively interpreted.[47] The first constitutional scrutiny in New Jersey came in *Chrys-*

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ones. The 1880 statute, for example, affected only possession of or title to land, Act of Feb. 16, 1880, ch. 19, 1880 N.J. Laws 3175, while the 1929 statute additionally included actions concerning an encumbrance or lien on the real property. Act of Apr. 3, 1929, ch. 119, 1930 N.J. Laws 374.

[40] 149 N.J. Super. 81, 373 A.2d 402 (App. Div. 1977).

[41] *Id.* at 84-85, 373 A.2d at 404. In *General Electric*, the appellate division was faced with an action seeking specific performance of the defendant's promise to execute a mortgage. The court reversed the trial court's cancellation of the *lis pendens*, and held that the filing of *lis pendens* is permitted in two distinct situations: "where the object of the action is either to affect or enforce an existing lien upon real estate or to affect title to real estate." *Id.*; *see also* Debral Realty, Inc. v. DiChiara,—Mass.—, 420 N.E.2d 343 (1981) (holding *lis pendens* statute constitutional but not deciding whether *lis pendens* was properly used).

[42] 166 N.J. Super. 292, 399 A.2d 1001 (App. Div. 1979).

[43] *Id.* at 298, 399 A.2d at 1004. *Polk* held that an action to impose a constructive trust will have an effect on title to real estate. *Id.*; *see supra* note 18.

[44] 181 N.J. Super. 52, 436 A.2d 559 (Ch. Div. 1981).

[45] *Id.* at 56, 436 A.2d at 561.

[46] *Id.* at 58-59, 436 A.2d at 562.

[47] *See* Batey v. Digirolamo, 418 F. Supp. 695 (D. Hawaii 1976); Lake Tulloch v. Dingman, No. WE C-27140 (Cal. Super. Ct. June 1, 1973); Kukanskis v. Griffith, 180 Conn. 501, 430 A.2d 21 (1980); Debral Realty, Inc. v. DiChiara,—Mass.—, 420 N.E.2d 343 (1981); George v. Oakhurst Realty, Inc., 78 R.I. 212, 414 A.2d 471 (1980).

ler, when the United States District Court for the District of New Jersey held that the New Jersey *lis pendens* statute was unconstitutional.[48] To reach this conclusion, the court initially found that the filing of the *lis pendens* with the court clerk constituted state action,[49] thus triggering fourteenth amendment protections. Because the filing of *lis pendens* was an attempt to create a new interest in Fedder's property, the market value of the real estate decreased, thereby impairing the owner's ability to alienate it.[50] The district court concluded that this impairment resulted in a deprivation of property.[51] The court then found that the deprivation triggered the balancing test delineated by the United States Supreme Court in *Mathews v. Eldridge*.[52] The factors which the district court balanced were: the private interests, the risks of erroneous deprivation, and the government's interests in efficient administration.[53]

The district court found that the impact on the defendant's ability to alienate its property could result in substantial economic losses to the private party. Furthermore, it decided that there was a great risk that these losses would arise from an erroneous deprivation of the right to alienate because the statute required only that the plaintiff file a written notice of its action without evidence to support the claim.[54] Finally, the court noted that the government could readily provide a cost-effective procedure which would satisfy the due process hearing requirements, while accommodating both the state and individual interests.[55] Finding that the New Jersey statute neither provided for a post or prefiling hearing nor accommodated the defendant's interest,

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[48] 519 F. Supp. at 1264.

[49] *Id.* at 1260; *see infra* notes 75-95 and accompanying text. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18-1 to 18-7, at 1147-1174 (1978).

[50] 519 F. Supp. at 1260.

[51] *Id.* The court also maintained that property rights are not created by the Constitution. Instead they "stem from an independent source such as state law." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1971).

[52] 424 U.S. 319 (1976).The *Mathews* test requires a court to balance:

> First, the private interests[s] that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[53] 519 F. Supp. at 1262 (citing *Mathews*, 424 U.S. at 335).

[54] *Id.*

[55] *Id.* at 1264. *See generally* Note, Lis Pendens *and Procedural Due Process*, 1 PEPPERDINE L. REV. 433 (1974).

the court declared that the application of the statute in this case violated due process and therefore was unconstitutional.[56]

The United States Court of Appeals for the Third Circuit reversed. Judge Sloviter, writing for the court, initially declared that a reversal of the district court's decision was mandated if Chrysler prevailed on any one of three arguments. Chrysler argued, first, since *lis pendens* provided only notice of the litigation, there was no deprivation of property. Second, it was settled law that neither the existence of a statute authorizing the filing nor the acts of the participating clerk is state action. Finally, the *lis pendens* statute offered the procedures and protections necessary to satisfy due process.[57]

Noting that *lis pendens* was unarguably applicable, Judge Sloviter first addressed whether the filing deprived Fedders of a property interest.[58] The court analogized the deprivation resulting from *lis pendens* to that suffered by debtors in creditor attachment cases.[59] The appellate court distinguished these cases by finding that the debtor is totally precluded from "possession, use and enjoyment of property," [60] once attached, while the *lis pendens* procedure prevented only the alienation of property and allowed the owner to use and enjoy it.[61] The appellate court acknowledged, however, the detrimental effect *lis pendens* had on the marketability of the property.[62]

In its analysis of the deprivation issue, Judge Sloviter relied on the United States Supreme Court's prejudgment creditor attachment cases, which held that even when the taking is less than complete, procedural due process is necessary. In *Fuentes v. Shevin*,[63] the major-

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[56] 519 F. Supp. at 1263; *cf.* Cal. Civ. Code § 409.1 (West 1968) (amended 1980) (upon motion supported by affidavit, party may expunge *lis pendens* within 20 days of filing).

[57] 670 F.2d at 1319. Chrysler claimed *lis pendens* does not affect the owner's use, possession, or enjoyment of the property. Chrysler also maintained that Fedders had no constitutional right to alienate property to a bona fide purchaser. *Id.*

[58] *Id.* at 1321. The parties agreed that the holding in *Polk* that a suit seeking to impose a constructive trust is an action in which the notice of *lis pendens* is proper controlled here. *Id.*

[59] *Id.* at 1321. The creditor attachment cases are: North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (invalidating Georgia procedure of garnishment without prior hearing); Mitchell v. W. T. Grant Co., 415 U.S. 600 (1974) (holding sequestration statute constitutional, as it accommodates the interests of all parties); Fuentes v. Shevin, 407 U.S. 67 (1972) (holding replevin statutes without prior hearing unconstitutional); Sniadach v. Family Fin. Corp., 395 U.S. 1337 (1969) (holding prejudgment garnishment of wages without notice or prior hearing unconstitutional).

[60] 670 F.2d at 1321-22.

[61] *Id.*

[62] *Id.* at 1322. In an affidavit, a title expert stated that title insurance will not be issued once *lis pendens* is filed. Brief for Respondent, *supra* note 11, at 17. For a general analysis of the taking issue, see Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[63] 407 U.S. 67 (1972).

ity, faced with the constitutionality of a replevin statute, stated that "[a]ny significant taking of property" was within the ambit of procedural due process.[64] In *Sniadach v. Family Finance Corp.*,[65] Justice Harlan, in a concurrence, stated that those suffering "deprivation[s that] cannot be characterized as *de minimus*, must be accorded the usual requisite of due process."[66] Moreover, the appellate court acknowledged a series of cases holding that nonpossessory prejudgment real estate attachment situations amounted to a significant deprivation of property requiring fourteenth amendment protection.[67] The *Chrysler* court, however, did not view these cases as controlling. Rather, in upholding the *lis pendens* statute, the court of appeals emphasized *Spielman-Fond, Inc. v. Hanson's, Inc.*,[68] in which a three judge federal district court upheld the constitutionality of Arizona's mechanic's lien statute.[69] The district court found that although a mechanic's lien encumbers the owner's property, the right to alienate has not been foreclosed and therefore is not a taking that requires due process.[70] Judge Sloviter compared the effect of a mechanic's lien with the effect of *lis pendens*. She noted that in both procedures, even though the owners were deprived of the ability to alienate the property, they remained in possession and enjoyed use of the property. Accordingly, the deprivation was not as great as the deprivation in creditor attachment cases.[71]

Although acknowledging a series of district court cases upholding *Spielman-Fond*,[72] the *Chrysler* court was reluctant to apply it beyond its precise facts for two reasons: the significant distinction between a mechanic's lien and a *lis pendens*[73] and the summary affirmation of

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[64] *Id.* at 86.

[65] 395 U.S. 337 (1969).

[66] *Id.* at 342 (Harlan, J., concurring).

[67] 670 F.2d at 1322; *see, e.g.*, Terranova v. Avco Fin. Servs., Inc., 396 F. Supp. 1402 (D. Vt. 1975); Bay State Harness Racing & Breeding Ass'n v. PPG Indus., 365 F. Supp. 1299 (D. Mass. 1973); Clement v. Four N. State St. Corp., 360 F. Supp. 933 (D.N.H. 1973). *But see* Northwest Homes, Inc. v. Weyhaeuser Co., 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (no deprivation); *In re* The Oronoka, 393 F. Supp. 1311 (D. Me. 1975) (taking insignificant).

[68] 379 F. Supp. 997 (D. Ariz. 1973), *aff'd summarily*, 417 U.S. 901 (1974).

[69] *Id.* at 999-1000.

[70] *Id.* at 999. The district court stated that a willing buyer could be found, albeit with difficulty. *Id.*

[71] 670 F.2d at 1322-23.

[72] *See, e.g.*, B.P. Dev. v. Walker, 420 F. Supp. 704 (W.D. Pa. 1976) (Pennsylvania's mechanic's lien statute constitutional); *In re* Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. 1976), *aff'd without opinion*, 562 F.2d 48 (4th Cir. 1977) (Virginia's mechanic's lien statute not violative of fourteenth amendment). *But see* Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976) (Maryland's mechanic's lien statute unconstitutional).

[73] 670 F.2d at 1324. Mechanic's liens unlike *lis pendens* may be viewed as liens imposed with the debtor's consent since the property has been enhanced by labor and materials for which payment is required. *Id.*

Spielman-Fond by the Supreme Court of the United States without opinion.[74] The court of appeals reached no definitive opinion on whether the filing of the notice of *lis pendens* was a "taking." Instead, Judge Sloviter decided only that the procedure caused a deprivation of property sufficient to activate the due process clause.[75]

The court then addressed whether the filing of *lis pendens* represented state action. In *Flagg Brothers Inc. v. Brooks*,[76] the Supreme Court decided that the New York Commercial Code's[77] authorization of a sale of goods entrusted to a warehouseman for storage was not state action.[78] The court of appeals, however, found Chrysler's reliance on *Flagg Brothers* misplaced.[79] Instead of the position Chrysler advocated, in part that disputes between debtors and creditors were traditionally private functions,[80] the court focused on the level of "overt official involvement,"[81] to determine if state action was present. Because the procedure in *Flagg Brothers* contained no level of official involvement, in contradistinction to the filing of *lis pendens*, state action was not present.[82] The court of appeals next examined creditor attachment cases, in which the state took a more active role.[83] This more active state involvement was exemplified by *Fuentes v. Shevin*. In *Fuentes* the court issued a writ of replevin, and a sheriff seized the property and stored it for three days.[84] The Court noted that official involvement in the replevin procedure was clearly shown unlike the *lis pendens* procedure in which the official involvement of the state was slight.[85]

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[74] *Id.* Although summary affirmance on the merits is binding, the precedential value is limited to the exact facts of the case. *Id.* at 1323.

[75] *Id.* at 1324-25.

[76] 436 U.S. 149 (1978).

[77] N.Y. COM. LAW § 7-210 (McKinney 1963).

[78] 436 U.S. at 152-53. For a general discussion of state action, see L. TRIBE, *supra* note 49, § 18-1, at 1147-49.

[79] 670 F.2d at 1325-26.

[80] 436 U.S. at 160. Chrysler also argued that the field of commercial transactions is an inappropriate area for the expansion of state action. 670 F.2d at 1325.

[81] 670 F.2d at 1325 (citing *Flagg Brothers*, 436 U.S. at 157).

[82] *Id.* at 1325-26. The court of appeals, on grounds similar to those used to distinguish *Flagg Brothers*, also rejected Chrysler's reliance on Parks v. "Mr. Ford", 556 F.2d 132 (3d Cir. 1977), which held that a common-law garageman's possessing lien did not invoke state action. 670 F.2d at 1326-27.

[83] 670 F.2d at 1326.

[84] 407 U.S. at 71.

[85] 670 F.2d at 1326. *Lis pendens* gives the clerk a small part in the procedure. The statute, N.J. STAT. ANN. § 2A:15-6 (West 1948) (amended 1960), requires that the clerk receive the filing of the *lis pendens* with the complaint describing the real estate and the objective of the suit. Another provision directs the clerk to discharge the *lis pendens* when the court finds that the plaintiff is not prosecuting diligently. *Id.* § 2A:15-10. The clerk must maintain a record book of

The court then turned to *Sniadach v. Family Finance Corp.*, and *North Georgia Finishing v. Di-Chem, Inc.*,[86] both garnishment cases, in which clerks issued summonses of garnishment based solely on the plaintiffs' complaint or affidavit.[87] The circuit court noted that these acts, even if considered ministerial, may constitute state action and cannot be distinguished from the acts of the clerk in a *lis pendens* situation.[88] Although the court noted that the *lis pendens* procedure was indistinguishable from acts that may constitute state action, it was unable to reach a definite conclusion on whether the filing of *lis pendens* invoked state action.[89] Thus, the court relied on analagous Supreme Court decisions[90] to hold that a filing of *lis pendens* did activate state action.[91] Nevertheless, the court was "uncomfortable" in its conclusion that a seemingly ministerial function by a court clerk constituted state action.[92]

Having concluded that the filing of *lis pendens* met a minimal threshold requisite of a taking and state action, the court scrutinized the *lis pendens* procedure to determine if it violated the due process clause of the fourteenth amendment.[93] The court of appeals applied the *Mathews* balancing test to ascertain if due process was satisfied.[94] Accordingly, the circuit court first weighed the competing private and public interests at stake.[95] Judge Sloviter commenced her private interest analysis by focusing upon the defendant property owner's intended use of the real estate.[96] The court acknowledged that the filing of *lis pendens* would not have a detrimental impact on a defendant who had no intention of selling the property, since *lis pendens* only

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the *lis pendens* filed. *Id.* § 2A:15-12. Other provisions require the clerk to discharge the *lis pendens* by a variety of court ordered procedures. *See id.* §§ 2A:15-14, -15, -16, -17.

[86] 419 U.S. 601 (1975).

[87] In *Sniadach*, the clerk issued the summons upon request by the plaintiff's attorney. 395 U.S. at 338. In *North Georgia Finishing*, the clerk issued the plaintiff a summons of garnishment upon presentation of the complaint. 419 U.S. at 604.

[88] 670 F.2d at 1326-27. In *Flagg Brothers*, the Supreme Court noted that the issuance of the summons or writ could be considered state action because the plaintiff had invoked the authority of the court. Though a ministerial writ, it was because of this writ that the defendant was deprived of property. 436 U.S. at 149, 161 n.10; *see also supra* note 85 and accompanying text.

[89] *See* 670 F.2d at 1327.

[90] *See supra* notes 76-88 and accompanying text.

[91] *Id.* at 1327 & n.7.

[92] *Id.* at 1327; *see supra* notes 82-85 and accompanying text.

[93] 670 F.2d at 1327; *see, e.g.*, Morrisey v. Brewer, 408 U.S. 471 (1971) (due process is flexible and is used according to needs of particular circumstances).

[94] 670 F.2d at 1328.

[95] *Id.*

[96] *Id.*

lessened its marketability.[97] In contrast, however, a defendant who wanted to sell his property could be prevented from so doing because the filing of *lis pendens* effectively lowers the market price.[98] Thus, the court of appeals concluded that the deprivation to defendant property owners caused by *lis pendens* was less than total.[99]

In contrast, the plaintiff enjoyed a benefit from the filing of a *lis pendens* notice, for it "ensur[ed] that plaintiff's claim is not defeated by a prejudgment transfer of the property."[100] The court of appeals in its examination of the third prong of the *Mathews* test acknowledged that there were two public interests protected by *lis pendens*.[101] First, *lis pendens* bolstered the governmental concern in the integrity of the court system since *pendente lite* transfers of property which undermine litigants' rights are effectively curtailed.[102] Second, by allowing those desiring to purchase property to discover and verify that specific real estate is not the object of litigation, a general public interest is served.[103]

Having weighed the competing public and private interests affected by *lis pendens*, the court of appeals next examined "the risk of erroneous deprivation,"[104] and the value and burdens of additional safeguards. To apply this test, the court turned to a Supreme Court debtor-creditor case,[105] *Mitchell v W.T. Grant Co.*, which held that lack of a prefiling hearing does not necessarily render a statute uncon-

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[97] *Id.* The court of appeals did not acknowledge the effect the *lis pendens* specifically had on Fedders' property. *Id.*

[98] *Id.* As the district court noted, the amount of the encumbrance in the present case is over $10,000,000. 519 F. Supp. at 1258.

[99] 670 F.2d at 1328. For cases in which courts found a total deprivation of property, see *North Georgia Finishing*, 419 U.S. at 601 (freeze of corporation's bank account); *Fuentes*, 407 U.S. at 67 (loss of household goods); Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) (deprivation of money for living expenses).

[100] 670 F.2d at 1328-29. If the property is unique and the plaintiff demands specific performance, *lis pendens* is important because it prevents a transfer of the land and hence protects the only remedy available to the plaintiff. *Id.*

[101] *Id.* at 1329. For a general discussion of the policy of *lis pendens*, see Comment, *Appeals and Reversals: A Vast Wasteland*, 49 NOTRE DAME LAW. 844, 851 (1973).

[102] 670 F.2d at 1329. The court of appeals noted that *lis pendens* is merely one method to protect the integrity of land transactions. *Id.* Another method is to require an affidavit of title to be filed by sellers of property. *Id.*; *see* H. ACKERSON & E. FULOP, 21 NEW JERSEY PRACTICE: SKILLS AND METHODS § 2068, at 80 (2d ed. 1973).

[103] 670 F.2d at 1329; *see* Wendy's, Inc. v. Blanchard Management Corp., 170 N.J. Super. 491, 406 A.2d 1337 (Ch. Div. 1979).

[104] 670 F.2d at 1329 (quoting *Mathews*, 424 U.S. at 335).

[105] *Id.* at 1328. In Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980), the Third Circuit Court of Appeals capsulized these decisions as holding that protection must be afforded the debtor to avoid erroneous deprivations or arbitrary seizures, although not necessarily by notice and opportunity to be heard prior to attachment. *See id.* at 58.

stitutional.[106] Instead, under a balancing test, procedural due process is satisfied if the interests of the creditor and debtor are fairly accommodated.[107]

Because the *lis pendens* statute incorporated no prefiling hearing, Judge Sloviter examined the statute to determine if there was a fair accommodation of debtor and creditor interests.[108] The statute by its own terms was available only to a plaintiff who brought an action affecting the real property's title.[109] Furthermore, the court of appeals pointed out that the statute allowed a defendant to relieve the property of the notice of *lis pendens* by posting sufficient security with the court.[110] The court also noted that another section of the statute provided that a court may directly remove the notice of *lis pendens* if the plaintiff failed to prosecute the action diligently.[111]

In addition to examining the statute, the court of appeals also maintained that three nonstatutory protections further accommodated a defendant's interest. First, in *Wendy's, Inc. v. Blanchard Management Corp.*,[112] Judge Sloviter noted that it was stated in dicta that the victim of the filing of a wrongful *lis pendens* may have a cause of action for malicious prosecution.[113] Second, Judge Sloviter noted that a defendant may, prior to trial, make either a motion to discharge the *lis pendens*, or third, make a motion for summary judgment or dismissal for failure to state a claim.[114] The motion to discharge *lis pendens* should be granted only in the absence of a "necessary relationship" between the real estate and the plaintiff's cause of action.[115] In contrast, the court stated that the summary judgment and dismissal motions went to the merits of the claim.[116]

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[106] 416 U.S. 600, 605 (1974).

[107] *Id.* at 607.

[108] 670 F.2d at 1329.

[109] *Id.* (citing N.J. STAT. ANN. § 2A:15-6 (West 1948) (amended 1960)).

[110] *Id.* The court noted that Fedders was required to file a bond in the sum of $11,900,000 to erase a *lis pendens* filed in Kentucky. *Id.* at 1330.

[111] *Id.* at 1320-21; N.J. STAT. ANN. § 2A:15-10 (West 1948) (amended 1960); *see* Boice v. Conover, 59 N.J. Eq. 580, 61 A. 159 (Ch. 1905), *aff'd*, 71 N.J. Eq. 269, 65 A. 191 (1906); *see also* Grabowski v. S. & E. Constr. Co., 72 N.J. Super. 1, 177 A.2d 576 (Ch. Div. 1962) (property against which *lis pendens* is filed must be subject of suit).

[112] 170 N.J. Super. 491, 406 A.2d 1337 (Ch. Div. 1979).

[113] 670 F.2d at 1330 (construing *Wendy's*, 170 N.J. Super. at 498, 406 A.2d at 1340); *see also* Albertson v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956) (malicious prosecution cause of action lies for wrongful suit against property). The court of appeals also noted a possible suit for abuse of process. 670 F.2d at 1330.

[114] 670 F.2d at 1330. In both O'Boyle v. Fairway Prod., Inc., 169 N.J. Super. 165, 167, 404 A.2d 365, 366 (App. Div. 1979) (per curiam), and Polk v. Schwartz, 166 N.J. Super. 292, 299-300, 399 A.2d 1001, 1005 (App. Div. 1979), the New Jersey courts likened a motion of summary judgment (or failure to state a claim) to a motion to discharge a notice of *lis pendens*.

[115] 670 F.2d at 1330.

[116] *Id.*

Although conceding that a plaintiff can easily overcome the low thresholds of motions for summary judgment and dismissal, Judge Sloviter rejected a contention by Fedders that a postfiling hearing would render needed assistance to a defendant whose property had been saddled with a *lis pendens* notice. The court reasoned that the deficiencies of the summary judgment and dismissal motions would also be attendant in such a new proceeding.[117]

After employing the *Mathews* balancing test the court of appeals vacated the district court's holding and remanded, concluding that New Jersey's *lis pendens* statute was fundamentally fair and thus constitutional.[118]

In a concurring opinion, Judge Hunter agreed with the court's holding and acknowledged that *lis pendens* comported with the due process guarantees of the fourteenth amendment.[119] He disagreed, however, with the court's holding on the taking and state action issues. Concluding that state action during the *lis pendens* procedure is nonexistent, he found that the purely ministerial function of the clerk does not transform the filing of *lis pendens* into state action.[120] Judge Hunter further stated that the filing of *lis pendens* did not deprive the defendant of a constitutionally protected right because the defendant maintained use, possession, enjoyment, and alienability of the property throughout the litigation process.[121] Judge Adams also agreed that the statute was constitutional. In a concurring opinion, he contended, however, that the clearest reason for reversal was based on due process grounds.[122]

The court of appeals concentrated on the procedural due process concerns in upholding the constitutionality of the *lis pendens* statute. In so doing, it failed to reach a conclusive determination of the taking and state action issues,[123] thereby facilitating achievement of a consen-

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[117] *Id; see also* 519 F. Supp. at 1263.

[118] 670 F.2d at 1331.

[119] *Id.* at 1334 (Hunter, J., concurring).

[120] *Id.* at 1337-38 (Hunter, J., concurring). Judge Hunter focused on the amount of official involvement, contending that state action cannot be found through the state's mere acquiescence. *Id.*

[121] *Id.* at 1335 (Hunter, J., concurring).

[122] *Id.* at 1333-34 (Adams, J., concurring).

[123] *See id.* at 1324-25, 27; *supra* notes 76-91 and accompanying text. A regulation of property through, for example, zoning, may trigger two different due process claims. The first, procedural due process, is that the law deprived the owner of the use or possession of the property without adequate procedural safeguards. The second, substantive due process, is that the law deprived the owner of a reasonable return on the property. The substantive argument, if it prevails, may either invalidate the statute or require the state to reimburse the owner. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978). *See generally* State v. New Jersey Zinc Co., 40 N.J. 560, 193 A.2d 244 (1963); L. TRIBE, *supra* note 49, §§ 9-3, 9-4, at 459-65.

sus among clearly divided judges. It was unessential to reach a definite conclusion if the statute were procedurally firm,[124] however, since these issues will undoubtedly arise in subsequent litigation, more guidance would have been preferable.

By considering the constitutionality of *lis pendens* solely on procedural due process grounds, the appellate and district courts failed to differentiate between the narrow and expansive situations in which *lis pendens* has been used.[125] These two situations were outlined in *Scruggs*,[126] in which the Chancery Division of the New Jersey Superior Court separated the notice aspects from the substantive consequences of the *lis pendens* statute.[127] *Scruggs* demonstrates the typical use the notice aspect provided by the filing of a *lis pendens*. During a mortgage foreclosure, the plaintiff filed a *lis pendens* concomitantly with the complaint. The filing, the court noted, was nothing more than notice that a previously established interest that had been voluntarily created was being activated.[128] By not creating a new interest in the real property and serving only as notice, the filing of a *lis pendens* did not create the constitutional infirmities found by the district court under the *Mathews* test.[129]

The use of *lis pendens* in the more expansive situation typically involves a plaintiff's attempt to create an interest in the real estate either by obtaining title or by seeking to impose a lien thereon.[130] This newly created interest will be deemed superior to all subsequently acquired interests in the property.[131] The creation of this interest, as the district court pointed out, invalidated the statute because it created a priority "with insufficient [due] process."[132]

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[124] 670 F.2d at 1331.

[125] The district court acknowledged the two situations, nevertheless invalidated the statute. 519 F. Supp. at 1236. The court of appeals did not mention this distinction.

[126] See *supra* notes 44-46 and accompanying text.

[127] *Scruggs*, 181 N.J. Super. at 56, 436 A.2d at 561.

[128] *Id.* at 54, 436 A.2d at 563. For examples of *lis pendens* used validly, see Feld v. Kantrowitz, 99 N.J. Eq. 847, 137 A. 657 (1926) (suit for breach of contract in property sale); Dunning v. Crane, 61 N.J. Eq. 634, 47 A. 420 (1900) (mortgagee who acquired lien subsequent to filing of bill construing will); Finley v. Keene, 136 N.J. Eq. 347, 42 A.2d 208 (Ch. 1945) (suit to establish trust on mortgaged property); Mabee v. Mabee, 85 N.J. Eq. 353, 96 A. 495 (Ch. 1916) (creditor attached property during divorce settlement).

[129] *See* 519 F. Supp. at 1262; *see also* Kukanskis v. Griffith, 180 Conn. 501, 430 A.2d 21 (1980).

[130] 181 N.J. Super. at 56, 436 A.2d at 561; *see also* Polk v. Schwartz, 166 N.J. Super. 292, 399 A.2d 1001 (App. Div. 1974).

[131] 181 N.J. Super. at 56, 436 A.2d at 561.

[132] 519 F. Supp. at 1263. *See generally* Note, *A Proposal for Reformation of the Iowa* Lis Pendens *Statute*, 67 IOWA L. REV. 289 (1982).

It appears that the court of appeals decided that the statute was constitutional without examining the critical situation resulting when the filing of a *lis pendens* creates such an interest. A closer examination of *Chrysler* displays the inequities of expansively using the statute. Chrysler brought suit based on an allegedly fraudulent attempt by Fedders to avoid payment on a promissory note.[133] The money Chrysler demanded was allegedly then used by Fedders to discharge liens on Fedders' property in Edison, New Jersey.[134] Chrysler's proposed remedies included monetary damages and to facilitate their recovery, the imposition of a constructive trust on the property.[135] Chrysler's filing of *lis pendens* appeared to be an attempt to secure the property and effectuate the payment due under the promissory note.[136] It can hardly be controverted that Chrysler was not concerned with the Edison real estate but rather with its eventual ability to recover a money judgment from a company that it believed to be failing.[137]

These facts illustrate a misuse of the *lis pendens* statute which the New Jersey Legislature did not intend.[138] To secure its monetary claim, Chrysler was able to encumber the Edison property and prevent Fedders from exercising its most beneficial use of the property—its sale.[139] By filing the *lis pendens*, Chrysler gained an unfair advantage. Fedders, faced with the likelihood of long and drawn out litigation, could be willing to settle the claim rather than lose the opportunity to execute a profitable contract for a sale of the property.[140] Consequently, a plaintiff could use a *lis pendens* filing more as a lever to induce settlement than as a vehicle for preventing a surreptitious disposition of property.[141]

These vicissitudes were overlooked by the *Chrysler* court. If the court had recognized this problematic application of the statute and

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[133] *See supra* note 10 and accompanying text.

[134] *See supra* note 16 and accompanying text.

[135] *See supra* note 18 and accompanying text.

[136] 519 F. Supp. at 1262.

[137] *Id. See generally* Coral Isle West Ass'n v. Cindy Realty, Inc., 430 F. Supp. 396 (S.D. Fla. 1977) (*lis pendens* available only when relief specifically affects property involved).

[138] The legislature intended only that the statute eradicate the injustices resulting from the preadjudicatory alienation of the property. *See, e.g.*, Wood v. Price, 79 N.J. Eq. 620, 81 A. 982 (1912); *cf.* CAL. CIV. CODE § 409.1 (West 1968) (amended 1980)(*lis pendens* statute amended to prevent misuse). *See generally* Note, *supra* note 23.

[139] 670 F.2d at 1322. It should be noted that the property, although encumbered, is still alienable, however, as the district court pointed out, the lawsuit exceeds the value of the property by $60,000,000. 519 F. Supp. at 1262.

[140] *See* Note, *supra* note 29, at 80.

[141] *See supra* note 138 and accompanying text; *see, e.g.*, Lake Tulloch Corp. v. Dingman, No. WE C-27140 (Cal. Super. Ct. 1973).

tested it under the *Mathews* balancing standard,[142] it would have declared the statute unconstitutional. The state's interest in maintaining its jurisdiction and power over the disputed real estate and the defendant's interest in preventing an erroneous deprivation remain the same in both the narrow and expansive *lis pendens* factual situations.[143] In contrast, it is the plaintiff's interests balanced against the state's interests and the defendant's interests that causes the expansive use of *lis pendens* to fail the *Mathews* tripartite balancing test.[144] Even if Fedders were liable for a breach of contract, Chrysler's interest is still preserved because an enforceable judgment will allow Chrysler to pursue any profit realized on the sale of the property.[145] Therefore, there is little reason to keep the property encumbered when a plaintiff's only interest in the land is the property's relationship to preservation of a monetary claim. Although *lis pendens* when used expansively represents an unconstitutional "taking" of property under the due process clause, it is necessary to examine whether the procedures of the statute comport with procedural due process thereby affording property owners a forum in which to litigate these claims.[146]

The court of appeals outlined the statutory and nonstatutory protections available to defendants and concluded that these protections afforded sufficient constitutional protection.[147] Excepting the statutory section permitting a defendant to post security to discharge the *lis pendens*, these provisions do not expeditiously help a defendant. Posting of a security, though immediate, is unduly burdensome.[148] Furthermore, the *lis pendens* procedures offer a defendant little protection against the filing of meritless complaints, especially complaints filed by *pro se* litigants not subject to court sanctions.[149]

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[142] See *supra* note 52 and accompanying text.

[143] *See supra* notes 24 & 28 and accompanying text.

[144] *See generally* Biere v. Agway, 425 F. Supp. 654 (D. Vt. 1977) (pre-existing interest in property sufficient to constitutionally validate prejudgment attachment statute).

[145] *See* N.J. CT. R. 4:59 (judgment awards collectible through writ of execution); N.J. CT. R. 6:7-2 (judgment creditor permitted to discover debtor's assets to enforce judgment).

[146] *See* Note, *supra* note 55, at 437-40.

[147] 670 F.2d at 1320-21; *see supra* notes 107-17 and accompanying text. Further protections of no immediate assistance to a defendant require the discharge of the *lis pendens* three years after its filing, N.J. STAT. ANN. § 2A:15-11 (West 1948) (amended 1960), and discharge after the action has been settled. *Id.* § 2A:15-17.

[148] The posting of security section of the New Jersey *lis pendens* statute is found at N.J. STAT. ANN. § 2A:15-15 (West 1948) (amended 1960). The severe burden on a defendant is exemplified by another action involving Fedders in which the company filed an $11,900,000 bond to lift a *lis pendens* in Kentucky. *See* 670 F.2d at 1330.

[149] The court of appeals did not consider this to be a weighty consideration. *See* 670 F.2d at 1329. The statute itself only requires the filing of a complaint. N.J. STAT. ANN. § 2A:15-6 (West 1948) (amended 1960).

The nonstatutory protections delineated in *Blanchard Management*,[150] provided that if a complaint does not arguably recite a cause of action within the ambit of the *lis pendens* statute, the court may grant a motion to discharge the notice of *lis pendens*,[151] or a motion for summary judgment.[152]

Although these procedures may give some property owners protection, they do not adequately shield a defendant like Fedders. Insofar as the plaintiff's complaint need only allege a minimal nexus between his cause of action and the defendant's real property, the motion to discharge a notice of *lis pendens* may easily be overcome.[153] Furthermore, the motion for summary judgment is not helpful in a suit involving complex legal issues.[154]

As *Chrysler* demonstrates, these protections currently available to the defendant still do not protect him from erroneous deprivation. Although the court of appeals maintained that it would be ineffective, an expeditious postfiling hearing for probable cause is needed to prevent erroneous deprivation.[155] Objections that the hearing would not offer guidance on the merits in a complex factual situation are irrelevant, inasmuch as the hearing would determine only if the *lis pendens* were properly used by the plaintiff.[156]

One possible solution is requiring the defendant to request the hearing after the filing of the *lis pendens* to determine if the plaintiff has any specific interest in the property. After the parties have filed affidavits[157] to narrow the issues, the judge conducts a hearing to ascertain if the plaintiff was using the *lis pendens* expansively or narrowly,[158] focusing on the plaintiff's interest in the real property,

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[150] See *supra* notes 112-14 and accompanying text.

[151] *Blanchard Management*, 170 N.J. Super. at 497-98, 406 A.2d at 1340.

[152] *Id.*; *accord* Garfield v. Elmwood Stores, 17 N.J. Super. 513, 86 A.2d 308 (Ch. Div. 1952) (defendants granted summary judgment when cause of action was not within statute); *cf.* Grabowski v. S. & E. Constr. Co., 72 N.J. Super. 1, 177 A.2d 576 (Ch. Div. 1962) (*lis pendens* not applicable in suits for money judgment).

[153] 670 F.2d at 1330 (citing 519 F. Supp. at 1263).

[154] *Id.*

[155] *See Scruggs*, 181 N.J. Super. at 60, 436 A.2d at 563-64 (proposing adoption of hearing analogous to one required by New Jersey attachment and sequestration statutes); *cf.* CAL. CIV. CODE § 409-1 (West 1968) (amended 1980) (expungement hearing required 20 days after filing).

[156] *See supra* note 155 and accompanying text.

[157] *Scruggs*, 181 N.J. Super. at 60, 436 A.2d at 563-64; *cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (need for verified affidavit to obtain *ex parte* writ of sequestration).

[158] *See supra* notes 127 & 128 and accompanying text. Under this suggested procedure, a judge could find that a plaintiff desiring to impose a constructive trust merely to protect a monetary remedy as in *Chrysler*, may not be entitled to a *lis pendens*. This ruling will contradict established New Jersey law granting a *lis pendens* upon filing a complaint for a constructive trust. *See* Polk v. Schwartz, 166 N.J. Super. 292, 399 A.2d 1001 (App. Div. 1979).

i.e. whether the plaintiff was mainly interested in obtaining money or was truly concerned with recovery of the property.[159]

If the judge determines that the *lis pendens* has been used narrowly, the motion to discharge the *lis pendens* should be denied. If he determines, however, that the *lis pendens* has been used expansively, then the judge must pursue a second level of analysis, balancing the interests of the plaintiff with those of the defendant. The basic interests to be balanced are the degree of deprivation sustained by the defendant and the risk to the plaintiff that the defendant will convey the property to a bona fide purchaser.[160] The level of deprivation is ascertained by analyzing the defendant's remaining uses of the real estate, noting whether the *lis pendens* prevents the defendant from completely using the property beneficially. Furthermore, the plaintiff should have the burden of showing that it has been properly used.[161]

This model makes *lis pendens* less accessible and prevents a plaintiff who can demonstrate only a remote interest in the property from maintaining an encumbrance thereby inducing an unfair settlement. Although the narrow use of the current *lis pendens* statute is constitutionally sound, there is a need to establish procedures which will protect a property owner when *lis pendens* is used expansively.[162]

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[159] See *supra* notes 44 & 137 and accompanying text.

[160] State *lis pendens* statutes protect different plaintiff's interests. *See, e.g.*, CAL. CIV. CODE § 409.1 (West 1968) (amended 1980) (*lis pendens* valid in suits to affect right of possession); N.J. STAT. ANN. § 2A:15-6 (West 1948) (amended 1960) (*lis pendens* valid in suits to affect title).

[161] *But see* 519 F. Supp. at 1262 (in context of motion to dismiss or summary judgment, burden of proof placed on defendant).

[162] *See, e.g.*, N.J.S. 918, 200th Leg., 1st Sess. (1982); *cf. The Growing Mis-use of* Lis Pendens, 29 R.I.B.J. 3 (1981) (advocating change in law barring expansive use of *lis pendens*). *But see* George v. Oakhurst Realty, Inc., 78 R.I. 212, 414 A.2d 471 (1980) (statute permitting one to file *lis pendens* although filer has no legal or equitable interest in property held constitutional).