

Lis Pendens¹

(Pending Suit)

What is Lis Pendens?

Historically designed to protect a plaintiff from transfer or loss of real property which is the subject of a dispute.

A lis pendens does not create a lien, but rather binds third parties to the outcome of the pending litigation in the form of an encumbrance. 51 Am Jur 2d Lis Pendens § 3.

Designed to effectuate the power of the court over property *sub judice*, and prevent endless litigation of property rights 51 Am Jur 2d Lis Pendens § 4.

The lis pendens concept has a long history in the region, with an early iteration appearing in Maryland as early as 1823².

The Common Law

The doctrine arose from the proposition that nothing should be changed during the pendency of an action. 51 Am Jur 2d Lis Pendens § 5.

Lis Pendens is derived from common law and equity jurisprudence rather than statute. It is therefore traditionally viewed as an equitable remedy at common law, subject to equitable principles.

Under the common law, the mere existence of a lawsuit involving real property creates notice to the world, and will bind subsequent purchasers of that property as to the outcome of the pending suit, regardless of their actual notice. Id.

-However, this rule is subject to the general requirement that the suit be filed in good faith, and be “addressed” to title or other interest in specific and identified property.

-The requirement of specificity is grounded in the notion that lis pendens is an action in equity and should not be used to create injustice. Id.

Courts have consistently held that the filing of a lis pendens action does not offend constitutional due process.³

General Principles

To institute a lis pendens a court must have: (1) jurisdiction over the property; (2) the action must sufficiently describe the property in question; and (3) the suit should involve an actual interest in the real property Brooks Street Associates, 546 A.2d 275, 209 Conn. 15 (1988).

¹ “*Pendent elite nihil innovetur*” translated “Nothing should be changed during the pendency of an action.” Isaacs Holding Corp. v. Premiere Prop. Group, LLC, 276 Wis. 2d 473, 483 (2004).

² Tongue v. Morton, 6 H. & J. 21, 23-24 (1823).

³ Williams v. Bartlett, 189 Conn. 471, 457 A.2d 290 (1983) (appeal dismissed 464 U.S. 801 (1983)).

Some, but not all courts believe that lis pendens should be narrowly constructed so as not to cloud title unduly, while others take a broader, more remedial view. 51 Am Jur Lis Pendens § 8.

A lien that might come from “an ultimate entry of judgment provides no basis for the filing of a lis pendens” 51 Am Jur Lis Pendens § 37⁴, but there is some contrary authority.

A lis pendens applies to an “in rem action in real estate” that affects title or the right to possession, including leaseholds.

Lis Pendens in the District of Columbia, Maryland, and Virginia

Both the District of Columbia and Virginia have enacted statutes to govern lis pendens actions;⁵ however, Maryland continues to follow the common law without a codifying statute⁶.

District of Columbia

- In the District, under § 42-1207, a lis pendens filing must comply with the requirements of the statute to provide notice to a purchaser. It is unknown whether actual notice could override this requirement. Trustee 1245 13th St. v. Anderson, 905 A.2d 181 (D.C. App. 2006).

- The Notice must include:

- (1) Name of the court in which the action is pending
- (2) Title of the action or proceeding
- (3) Docket Number
- (4) Date of filing
- (5) Object of filing
- (6) Amount of the claim asserted or the nature of any other relief sought
- (7) Name of the person whose estate is intended to be affected thereby
- (8) Description of the real property sought to be affected

- § 42-1207 provides an ambiguous definition of claims that support the filing of a lis pendens. A filing is permitted for “an action or proceeding... affecting the title to or *asserting* a mortgage, lien, security interest, or *other interest in real property.*” D.C. Code Ann. § 42-1207(a) (emphasis added).

Without appellate court guidance of this relatively new statute (2000) “other interest” seems to open the flood gates.

Virginia

- In Virginia, a lis pendens action may be filed to alert buyers of both real and personal property. In re: Hart, 24 B.R. 821 (E.D.Va. 1982).

- The Virginia code enumerates a very specific list of items that must be included in a memorandum of lis pendens. See Va. Code Ann. § 8.01-268(A). The memorandum must include:

- (1) The title of the cause of the action or attachment
- (2) The general object of the action

⁴ Blake v. Gilbert, 702 P.2d 631, 642-43 (Alaska 1985).

⁵ Va. Code Ann. § 8.01-268; D.C. Code § 42-1207

⁶ Weston Builders & Developers v. McBerry, LLC, 167 Md. App. 24; 891 A.2d 430 (2006)

- (3) The court where the action is pending
 - (4) The amount of the claim
 - (5) A description of the property
 - (6) The name of the person whose estate is intended to be affected
- The statute specifies “the action on which the lis pendens is based seeks to establish an interest by the filing party in the real property.” Va. Code Ann. § 8.01-268(B).

Maryland

- Although the Maryland code is silent on the subject, Maryland boasts a well-developed common law tradition. Courts in the District of Columbia had traditionally looked to Maryland cases for guidance on the subject of lis pendens⁷.
- In Maryland, unlike the other two jurisdictions, the **mere filing of a suit** is enough to give constructive notice, at least as to property within that county.
- The Maryland courts have restricted the application of lis pendens, limiting the attachment to “proceedings directly relating to the title to the property transferred or in which the ultimate interest and object is to subject the property in question to the disposal of a decree of the court.” DeShields v. Broadwater, 338 Md. 422, 432-42, 659 A.2d 300 (1995).⁸
- Additionally, Maryland courts continue to treat lis pendens as equitable relief and may refuse to enforce it for equitable reasons.
See Taylor v. Carroll, 89 Md 32, 42 A 920 (1899) (necessity for diligence, 20 year delay too long for filing of lis pendens).

Questions for Practitioners

- (1) Does the court have jurisdiction?
 - a. The property must be located and the lis pendens filed in a court with jurisdiction over the real property.
- (2) How to file a lis pendens notice?
 - a. District of Columbia: Under D.C. Code § 42-1207, a lis pendens action **must** comply with the requirements of the statute to provide notice to a purchaser. Trustee 1245 13th St. v. Anderson, 905 A.2d 181 (D.C. App. 2006).
 - b. Maryland: In Maryland, the filing of the lawsuit constitutes notice within the county. In a county other than the one where the lawsuit is pending, a certified copy of the complaint or a notice of lis pendens must be filed with the clerk of the county court where the property is located.⁹ Note that to be effective, a recorded lis pendens must also be properly **indexed** in order to give notice to a subsequent purchaser, and

⁷ Lewis v. Jordan Inv., Inc., 725 A.2d 495 (D.C. App. 1999).

⁸ See also the plain language of Maryland Rule §12-102(b) that filing a complaint is constructive notice of the pending suit as to all property located in that county.

⁹ Md. Rule 12-102(b) the party must file “either a certified copy of the complaint or a notice giving rise to the lis pendens, with the clerk in the other county”

that the one filing has the burden of ensuring the instrument is properly indexed¹⁰.

- c. Virginia: Va Code Ann. § 8.01-268 requires that suits be formally recorded in the county recorder's office where the property is located to bind subsequent purchasers¹¹. Similar to Maryland law, Virginia requires that the instrument be properly indexed to have effect.

(3) What property may be encumbered?

- a. Real property.
b. Traditionally, only real property is affected by a lis pendens.
i. Traditionally, a lis pendens does not apply to "articles of commerce sold in the usual way" County of Presidio v. Noel-Young Bond & Stock Co., 212 U.S. 58 (1909).
ii. But, in Virginia, the difference between real property and personal property has been viewed as a procedural, rather than a substantive distinction. As a result, at least one court has held that the lis pendens may affect both real and certain personal property. See In re: Hart, 24 B.R. 821 (E.D.Va. 1982).

(4) When is a lis pendens really a disguised attachment before judgment?

- a. What about a lis pendens filing in a suit for monetary damages that could result as a lien against the defendants real property?

(5) Defending and prosecuting a lis pendens issue.

- a. Equity- Since the common law rules of equity undergird the notion of lis pendens, equitable defenses may be successful.
i. Virginia- See Kian v. Kefalogiannis, 158 Va. 129, 163 S.E. 535 (1932) (holding that the doctrine of equity may allow a purchaser to recover the value of his improvements even when a technical lis pendens filing gave him constructive notice)
ii. Maryland- Limiting the time for filing of a lis pendens (laches) when parties wait too long for equitable reasons. Taylor v. Carroll, 89 Md 32, 42 A 920 (1899).
iii. District of Columbia-No appellate cases were found regarding the new statute. However, the statute is ripe for argument on either side of the proposition that any suit that could affect any "other interest in real property" qualifies for a lis pendens filing.
b. Slander of Title- If a lis pendens issue is improperly instituted, a "slander of title" claim may be raised. But See 51 Am. Jur. 2d Lis Pendens § 44.
i. Virginia- A slander of title action may be brought for the filing of a lis pendens action, but generally the contents of a lis pendens are considered privileged. Bison Building Co. v. Brown, 70 Va. Cir. 348 (2006).
ii. Maryland- See Rustic Ridge, L.L.C. v. Washington Homes, 814 A.2d 116 (Md. App. 2002) (dismissing the slander of title

¹⁰ Greenpoint Mortgage Funding, Inc. v. Schlossberg, 888 A.2d 297 (Md. App. 2005).

¹¹ Va. Code Ann. § 8.01-268(A)

claim as an improper interlocutory appeal, but not ruling the claim improper.)

- iii. District of Columbia- Slander of title actions in the District of Columbia require a showing that (1) the words or instrument are false and were malicious, and (2) that damage naturally resulted from these words. Herzog v. Kronman, 65 App. D.C. 253, 82 F.2d 859 (D.C. App. 1936).

Various Uses of Lis Pendens

- (1) Domestic relations suits involving equitable distribution of spousal property.
- (2) Partition actions by joint tenants.
- (3) Quiet Title.
- (4) Purchases at executions, judicial sales, and tax sales.
- (5) Avoidance actions involving fraudulent transfers, actual fraud, etc.
- (6) Complaints involving TROs and permanent injunctions.
- (7) Suit to enforce a lien.
- (8) Mechanics lien filing and its litigation.
- (9) Adversary proceedings in bankruptcy.
- (10) Intervention proceedings.
- (11) Estate litigation.
- (12) Arbitration (and possibly mediation.)
- (13) Landlord and Tenant Actions.
- (14) Constructive Trust Litigation.
- (15) Easements.
- (16) Eminent Domain and Condemnation.
- (17) Foreclosure.
- (18) Specific Performance.
- (19) Forfeiture.
- (20) Adverse Possession.

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Statutes

D.C. Code Ann. § 42-1207 (2007)

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Md. Rule 12-102 (2007) Lis Pendens

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Right to secure new or successive notice of lis pendens in same or new action after loss or cancellation of original notice, 52 A.L.R. 2d 1308.

Recording of instrument purporting to affect title as slander of title, 39 A.L.R. 2d 840.

Virginia, D.C. and Maryland Statutes

Virginia

§ 8.01-268. When and how docketed and indexed

A. No lis pendens or attachment shall bind or affect a subsequent bona fide purchaser of real or personal estate for valuable consideration and without actual notice of such lis pendens or attachment, until and except from the time a memorandum setting forth the title of the cause or attachment, the general object thereof, the court wherein it is pending, the amount of the claim asserted by the plaintiff, a description of the property, and the name of the person whose estate is intended to be affected thereby, shall be admitted to record in the clerk's office of the circuit court of the county or the city wherein the property is located; or if it be in that part of the City of Richmond lying north of the south bank of the James River and including the islands in such river, in the clerk's office of the Circuit Court, Division I, of such city, or if it be in the part of the City of Richmond lying south of the south bank of the James River, in the clerk's office of the Circuit Court, Division II, of such city. Clerks of circuit courts are authorized and directed to admit to record memoranda of lis pendens or attachment for actions pending in any court of this Commonwealth, or in any other state, federal, or territorial court. The provisions of this section shall not be construed to mean that any such memoranda heretofore recorded are not properly of record. Such memorandum shall not be deemed to have been recorded unless and until indexed as required by law.

B. No memorandum of lis pendens shall be filed unless the action on which the lis pendens is based seeks to establish an interest by the filing party in the real property described in the memorandum.

District of Columbia

42-1207. Notice of pendency of action (lis pendens) [Formerly § 45-906.1]

(a) The pendency of an action or proceeding in either state or federal court in the District of Columbia, or in any other state, federal, or territorial court, affecting the title to or asserting a mortgage, lien, security interest, or other interest in real property situated in the District of Columbia, does not constitute notice to, and shall not affect a party not a party thereto, unless a notice of the pendency of the action or proceeding is filed for recordation, as required by subsection (b) of this section.

(b) The notice referred to in subsection (a) of this section shall be in writing, signed by the plaintiff, defendant, other party to the action or proceeding, or by a counsel of record for such party, desiring to have the notice filed for recordation, and notarized, stating the:

- (1) Name of the court in which the action or proceeding has been filed;
- (2) Title of the action or proceeding;
- (3) Docket number;
- (4) Date of filing;
- (5) Object of the filing;
- (6) Amount of the claim asserted or the nature of any other relief sought;
- (7) Name of the person whose estate is intended to be affected thereby; and
- (8) Description of the real property sought to be affected.

(c) The Recorder of Deeds shall admit for filing and recordation all notices that meet the requirements of subsection (b) of this section. Such notices shall have effect from the time of the filing for recordation.

(d) If judgment is rendered in the action or proceeding against the party who filed the notice of the pendency, the judgment shall order the cancellation and release of the notice at the expense of the filing party as part of the costs of the action or proceeding. When appropriate, the court may also impose sanctions for the filing. In a case in which an appeal from such judgment would lie, the prevailing party shall not record the judgment until after the expiration of the latest of the following:

- (1) The time in which an appeal may be filed;
- (2) The time in which an appeal, which has been applied for, has been refused; or
- (3) Final judgment has been entered by the appellate court from an appeal which was granted.

(e) If a notice of the pendency of an action or proceeding is filed for recordation and the debt or other relief for which the action or proceeding was brought is satisfied, it shall be the duty of the prevailing party to file for recordation a release of the notice of pendency of the action or proceeding within 30 days after the satisfaction.

(f) The Mayor shall promulgate regulations to implement the provisions of this section. The Mayor may, by regulation, establish reasonable fees for recordation of notices of lis pendens and may, by regulation, establish reasonable fees for releases of notices of lis pendens.

Maryland

Rule 12-102. Lis pendens.

(a) Scope. This Rule applies to an action filed in a circuit court or in the United States District Court for the District of Maryland that affects title to or a leasehold interest in real property located in this State.

(b) Creation -- Constructive notice. In an action to which the doctrine of lis pendens applies, the filing of the complaint is constructive notice of the lis pendens as to real property in the county in which the complaint is filed. In any other county, there is constructive notice only after the party seeking the lis pendens files either a certified copy of the complaint or a notice giving rise to the lis pendens, with the clerk in the other county.

(c) Termination. (1) While action is pending. On motion of a person in interest and for good cause, the court in the county in which the action is pending may enter an order terminating the lis pendens in that county or any other county in which the lis pendens has been created.

(2) Upon conclusion of action. If (A) the action is dismissed, or (B) judgment is entered in favor of the defendant and a timely appeal is not taken or the judgment is affirmed on appeal, or (C) judgment in favor of the plaintiff is reversed on appeal, vacated, or satisfied, the plaintiff shall file a certified copy of the appropriate docket entry with the clerk in each county in which a certified copy of the complaint or notice was filed pursuant to section (b) of this Rule. If the plaintiff fails to comply with this subsection,

the court with jurisdiction over the action, on motion of any person in interest and upon such notice as the court deems appropriate in the circumstances, may enter an order terminating the lis pendens. In the order terminating the lis pendens, the court shall direct the plaintiff to pay the costs and expenses incurred by the person obtaining the order, including reasonable attorney's fees, unless the court finds that the plaintiff had a reason justifying the failure to comply.

(3) Duty of clerk. Upon entry of an order terminating a lis pendens, the clerk of the court of entry shall transmit a certified copy of the order to the clerk in any other county specified in the order.