

By William McGrane

The Increased Risk of Slander of Title

A recent appellate decision makes recording a lis pendens a malpractice hazard

There was a time when recording a lis pendens in California was absolutely privileged.¹ That changed in 1993, when the state legislature enacted a new statute that explicitly stripped away this protection.² A second piece of legislation passed in 1993 further required the attorney of record in the underlying action to sign any lis pendens before it could be recorded.³ The combined effect of these two statutory provisions was to impose potential liability for slander of title on any attorney prosecuting a lis pendens case.

That risk of liability changed from theoretical to deadly serious last year with the decision of an appellate court in *Palmer v. Zaklama*.⁴ In *Palmer*, two physicians, the Zaklamas, lost a residence in a sheriff's sale. The two doctors then filed an appeal from the judgment that had resulted in the sheriff's sale and filed for personal bankruptcy as well. Lis pendens that referred to both proceedings were later recorded in official records. In an ensuing lawsuit, the doctors argued that their appeal from the judgment that had resulted in the sheriff's sale and their personal bankruptcy, each individually, had the potential to reverse the effect of the sheriff's sale. The court of appeal nonetheless affirmed a jury verdict against them, *inter alia*, for slander of title based on these two lis pendens. Relying on Civil Code Section 47(b)(4), *Palmer* held:

[I]f the pleading filed by the claimant in the underlying action does not allege a real property claim, or the alleged claim lacks evidentiary merit, the *lis pendens*, in addition to being subject to expungement, is not privileged. It follows the *lis pendens* in that situation may be the basis for an action for slander of title [citations omitted].

Thus, under *Palmer*, anyone who either records a lis pendens that fails to properly allege a real property claim or who otherwise loses on the merits of a properly alleged real property claim can be sued for slander of title. While many individuals, particularly members of the defense bar, have long argued that the lis pendens is too often used as legal blackmail, under *Palmer* the erosion of the lis pendens has gone too far. A perfectly plausible lis pendens may eventually be expunged under the preponderance of the evidence standard that is applicable in such matters.⁵

In most situations, the only way a lawyer can be held liable to an adverse party is through the mechanism of a malicious prosecution

Los Angeles Lawyer invites its readers to submit articles for the Closing Argument column. Topics should be of immediate interest to members of the legal profession and should not exceed 850 words in length. Please send submissions to: Closing Argument Editor, Los Angeles Lawyer, 261 South Figueroa Street, Los Angeles, CA 90012-2503.

action. Not only are such malicious prosecution cases disfavored generally, the California Supreme Court has recently confirmed they are also subject to the anti-SLAPP statute.⁶ But just when the legal profession received some relief from malicious prosecution exposure, along came *Palmer*, with its expansive notion of when an attorney's slander of title liability attaches in lis pendens cases.

After *Palmer*, why would any sensible lawyer sign a lis pendens and thereby expose himself or herself to slander of title liability to a litigation adversary? With malpractice rates now at historic highs, the last thing any attorney would want to do is something that creates a direct cause of action for an adverse party. Once members of the bar appreciate the impact of *Palmer*, the use of lis pendens, even in the most meritorious cases, will largely become a thing of the past.

The only solution to this problem is new legislation sharply limiting the holding in *Palmer*. At a minimum, the provisions of the 1993 law stripping away the absolute privilege must be limited to cases in which the lis pendens in question was published without probable cause—that is, only lis pendens that refer to underlying actions that cannot even arguably be construed as containing a real property claim or real property claims that lack any possible merit would result in liability for the attorney who signed the lis pendens.

When the lis pendens law was revised in 1993, the Real Property Section of the California State Bar did much of the behind-the-scenes work. That law was aimed at carefully reigning in perceived abuses of the lis pendens but not eliminating entirely the lis pendens remedy.⁷ In contrast, the 1993 law that stripped away the absolute privilege to file a lis pendens was sponsored by State Senator Quentin Kopp, who consulted with nobody. With the holding in *Palmer* now part of state law, the Kopp bill must be viewed as having fully undermined the State Bar's bill. In the post-*Palmer* world, no sensible lawyer is ever likely to record a lis pendens again. This extreme result must not be allowed to stand unchallenged. ■

¹ See *Woodcourt II, Ltd. v. McDonald Co.*, 119 Cal. App. 3d 245 (1981).

² CIV. CODE §47(b)(4).

³ CODE CIV. PROC. §405.21.

⁴ *Palmer v. Zaklama*, 109 Cal. App. 4th 1367 (2003), *rev. denied*, Oct. 22, 2003.

⁵ CODE CIV. PROC. §405.32.

⁶ *Jarrow Formulas, Inc. v. Lamarche*, 31 Cal. 4th 728 (2003) (applying CODE CIV. PROC. §425.16 to allegations of malicious prosecution).

⁷ CODE CIV. PROC. §§405 *et seq.*



William McGrane is a partner in the San Francisco office of McGrane, Greenfield, Hannon & Harrington LLP.