

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: CS/CS/SB 1552

INTRODUCER: Banking and Insurance Committee, Judiciary Committee and Senator Bennett

SUBJECT: Lis Pendens

DATE: April 1, 2009

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sumner	Maclure	JU	Fav/CS
2.	Emrich	Burgess	BI	Fav/CS
3.				
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill amends the law relating to a notice of lis pendens, which is a recorded notice that certain property interests may be affected by a lawsuit. Specifically, the bill amends the law to:

- Permit property to be sold to be exempt from all claims asserted in an action when the lis pendens has expired or been withdrawn or discharged;
- Extend the time for a holder of an unrecorded interest to intervene in the action;
- Simplify the information necessary for filing a valid lis pendens; and
- Provide for the control and discharge of a lis pendens that no longer affects the property.

This bill is a product of the Real Property, Probate, and Trust Law Section of the Florida Bar.

This bill substantially amends section 48.23 of the Florida Statutes.

## II. Present Situation:

### Lis Pendens

Lis pendens is a Latin term meaning “pending lawsuit.”<sup>1</sup> It dates back to a common-law equity rule that gave constructive notice to the world that a lawsuit had been filed.<sup>2</sup> It has been codified in Florida law in s. 48.23, F.S., and is used in actions involving real and personal property to notify prospective purchasers and encumbrances that their interests may be subject to a decree of the court.<sup>3</sup>

A notice of lis pendens must contain the names of the parties, the time of the action, the name of the court in which the lawsuit is pending, a description of the property involved or to be affected, and a statement of the relief sought.<sup>4</sup> If a notice fails to include any of these elements or if any of the information is incorrect, the lis pendens is ineffective.<sup>5</sup>

According to the Real Property, Probate, and Trust Law Section of the Florida Bar, it is a frequent occurrence for a lis pendens to be filed contemporaneously with the institution of a lawsuit.<sup>6</sup> When this happens, the precise time of institution of the action is an unknown, because it is impossible to know at what time the original complaint and lis pendens are sent for filing and recordation with the county clerk of court. The RPPTL reports that most court clerks stamp a receipt date on a lis pendens before recording it, which may happen to be the same date the clerk accepts the complaint for filing. Additionally, most court clerks also add the case number of the contemporaneously filed complaint to the lis pendens when the lis pendens is received for filing.<sup>7</sup>

Once the notice of lis pendens is filed with the clerk of court, it acts as a bar to the enforcement of all interests and liens that are unrecorded at the time of filing of the notice, unless the holder of the unrecorded interests intervenes in the proceedings within 20 days after the filing and recording of the notice.<sup>8</sup> The failure to intervene results in a permanent discharge of the lien and interests if the property is sold at a judicial sale.<sup>9</sup>

If a lis pendens is based on a recorded instrument (such as a mortgage) or a construction lien, it has no time limit and may not be discharged except upon dismissal of the lawsuit. Any other lis pendens is only in effect for one year, except when the court extends time on reasonable notice and for good cause.<sup>10</sup>

If an initial pleading is not based on a recorded instrument or on a construction lien, then the court can discharge the notice of lis pendens in the same manner that the court may grant or

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<sup>1</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>2</sup> *De Pass v. Chitty*, 90 Fla. 77 (Fla. 1925).

<sup>3</sup> *Procacci v. Zacco*, 402 So. 2d 425, 427 (Fla. 4th DCA 2007).

<sup>4</sup> Section 48.23(1)(a), F.S.

<sup>5</sup> *Oz v. Countrywide Home Loans, Inc.*, 953 So. 2d 619, 620 (Fla. 3d DCA 2007).

<sup>6</sup> Real Property Litigation Committee, Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposed Revisions to the Lis Pendens Statute* (2009) (on file with the Senate Committee on Judiciary).

<sup>7</sup> *Id.*

<sup>8</sup> Section 48.23(1)(b), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> Section 48.23(2), F.S.

dissolve an injunction.<sup>11</sup> The injunction language has been interpreted to mean that a party filing a notice of lis pendens can be required to post a bond, if a recorded instrument or mechanic's liens is not involved.<sup>12</sup>

### **Actions for Specific Performance**

Specific performance is an equitable remedy usually involving real property that requires "fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate...."<sup>13</sup>

### **III. Effect of Proposed Changes:**

The bill amends s. 48.23, F.S., to provide that an action operates as a lis pendens on any real or personal property only if a notice of lis pendens is recorded in the official records office of the clerk of the circuit court of the county where the property is located and such notice has not expired or been withdrawn or discharged.

The bill provides that actions for specific performance or actions based on unrecorded instruments have no effect on the title to, or any lien upon, real or personal property unless a notice of lis pendens has been recorded and has not expired or been withdrawn or discharged. It provides that only the parties to the lawsuit (and their lawful heirs and assigns) are subject to being forced to convey the property, thereby protecting a third purchaser from any claims and judgments that were filed during such actions.

The Real Property, Probate, and Trust Law (RPPTL) Section of the Florida Bar proposed this language to prevent the problems, described in a 1998 Florida Bar Journal article, associated with legal battles over trying to dissolve a lis pendens or forcing parties to post a substantial bond when the lis pendens places a cloud on title that did not previously exist.<sup>14</sup>

The bill amends the required information on the face of the notice of lis pendens by replacing the time the action was filed with the date the underlying lawsuit is filed or the case number of the underlying action. It also provides that in the case where a notice of lis pendens is filed on the same date as the pleading, the clerk's notation of the date of receipt on the notice shall satisfy the requirement that the notice contain the date of the institution of the action. According to the RPPTL section, this amendment will prevent the practical problems of requiring that the time of the institution of the action be included in the lis pendens, but still fulfill the purpose of the lis pendens statute, which is to give third parties constructive notice of the pendency of an action.

The bill extends the time a party with an unrecorded interest may intervene in the action to 30 days from 20 days. The RPPTL section states that holders of unrecorded interests may not be checking the property records frequently and thus may be unaware that a lis pendens has been

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<sup>11</sup> Section 48.23(3), F.S.

<sup>12</sup> *Sparks v. Charles Wayne Group*, 568 So. 2d 512, 517 (Fla. 5th DCA 1990) (citing *Mohican Valley Ins. V. MacDonald*, 443 So. 2d 479 (Fla. 5th DCA 1984)).

<sup>13</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>14</sup> Gerald F. Richman and Mark A. Romance, *Specific Performance of Real Estate Contracts: Legal Blackmail*, Florida Bar Journal (November 1998).

filed. An extension in the time limits to intervene in the action will add some additional protection to their interests.

The bill makes it mandatory for a court to control and discharge a lis pendens based on an unrecorded instrument as it would grant and dissolve injunctions. As the statute currently reads, the court “may” control a notice of lis pendens in these situations. The RPPTL section states this change is necessary because the language of the statute allows anyone filing a lawsuit to file a lis pendens without prior court approval, which has the immediate effect of clouding a party’s title to the property. Because of this result, the RPPTL section states that a party against whose property the lis pendens is filed should have an absolute right for the court to review the claim whenever the action is not founded on a recorded instrument.

The bill provides an effective date of July 1, 2009.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may reduce costs of litigation involving real property by reducing unnecessary delays and unwarranted lawsuits involving lis pendens.

C. Government Sector Impact:

None.

#### **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Banking and Insurance on April 1, 2009:**

Provides that a notice of lis pendens is recorded in the official records, rather than with the office of the clerk of the court, in the county where the property is located.

Provides that the date of the clerk's electronic receipt may also satisfy the requirement that the date or case number be placed on the notice of lis pendens.

**CS by Judiciary on March 18, 2009:**

Clarifies that a notice of lis pendens must be filed in the "official records" office of the clerk of the circuit court.

- B. **Amendments:**

None.