

LIS PENDENS: STILL A LAWYER'S LIABILITY

By William McGrane¹

Introduction

The *lis pendens* is an important weapon in any real estate litigator's arsenal.² This is because recording such an instrument in Official Records typically renders the affected landowner's title uninsurable, thus giving the recording party enormous leverage in settling any disputes. In recent decades, the perceived unfairness of *lis pendens* procedure has resulted in a number of legislative reforms, all of which have sought to protect landowners from being blackmailed by unmeritorious *lis pendens* recordings.

As this article is intended to demonstrate, the *lis pendens* pendulum has now swung too far in landowners' favor. Unless legislative changes are made to further amend the existent *lis pendens* law, no sensible lawyer should participate in recording such an instrument, lest both the lawyer and

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² "*Lis pendens*" is a Latin term meaning "a pending lawsuit." See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Merriam Webster 2000 ed.). California Code of Civil Procedure sections 405 *et. seq.* ("New Lis Pendens Law") does not employ the term "*lis pendens*" and instead adopts the phrase "notice of pendency of action" to refer to a *lis pendens*. See C.C.P. § 405.2. Because Civil Code section 47(b)(4) ("Jennings' Lis Pendens Law"), which this article discusses at length, continues the usage of "*lis pendens*" in its text, this article uses the term "*lis pendens*" rather than the more modern "notice of pendency of action" to describe its subject matter.

his or her client later incur slander of title liability to the affected landowner.

The Long and Winding Road

Approximately twenty years ago, I wrote a cautionary article discussing the exposure to the legal profession created by then-recent precedent limiting recovery of damages for an unmeritorious *lis pendens* to malicious prosecution actions.³ Relegating landowners harmed by an unmeritorious *lis pendens* solely to malicious prosecution remedies, I asserted, created a situation rife with the potential for litigation against the former opposing counsel who originally recorded the *lis pendens* in question.⁴

My article argued that the *lis pendens* law should not require that landowners bring malicious prosecution actions, which all too often included former opposing counsel as additional defendants. It suggested that the *lis pendens* law be changed to make any party responsible for recording an unmeritorious *lis pendens*—but not that party’s counsel—liable for all damages proximately caused thereby, all without the need for any second malicious prosecution action.⁵ Providing injured landowners with an easy alternative to bringing a malicious prosecution action was

³ See William McGrane, *Lis Pendens: A Lawyer’s Liability*, L.A. Law., March 1983, at 11 (“Lis Pendens I”) (citing *Woodcourt II, Ltd. v. McDonald Co.*, 119 Cal.App.3d 245 (1981)).

⁴ *Id.* at 14-16.

⁵ *Id.* at 16-17.

intended to shift liability away from counsel, and onto the parties who instructed such counsel to record what turned out to be an unmeritorious *lis pendens*.⁶

Approximately ten years ago, I served as a member of the Lis Pendens Committee of the Real Property Law Section of the State Bar of California (“Lis Pendens Committee”).⁷ Among the many changes to the *lis pendens* law that it drafted, the Lis Pendens Committee wrote what became Code of Civil Procedure section 405.34. This section allowed the court to require any party who had previously recorded a *lis pendens* to post an undertaking, in such amount as the court deemed just, as a condition of maintaining the *lis pendens* of record. Subsequent recovery by an injured landowner on the undertaking only required that the party recording the *lis pendens* have ultimately failed to prevail on the real property claim alleged

⁶ *Id.* at 17 (noting that, while this solution still leaves a recording party’s counsel at risk for any professional negligence in advising the recordation of the *lis pendens*, such malpractice risk can be insured against). In contrast, liability for malicious prosecution is uninsurable other than as respects cost of defense. *See Downey Venture v. LMI Ins. Co.*, 66 Cal.App.4th 478 (1998) (citing Insurance Code section 533); *see also* Steven R. Yee, *The Blame Game*, L. A. LAW., Dec. 2002, at 22.

⁷ The role of this body in the drafting of the New Lis Pendens Law is described by *Hunting World, Inc. v. Superior Court* as follows:
The Real Property Law Section of the State Bar of California proposed the new *lis pendens* law and submitted a report with it The Assembly Committee on Judiciary, the Senate Committee on Judiciary, and the Office of Senate Floor Analysis of the Senate Rules Committee relied heavily upon that report in their analyses of the proposed legislation.
22 Cal.App.4th 67, 71-72 (1994).

in the underlying case. The statute specifically did not require the injured landowner to bring any subsequent malicious prosecution action in order for that injured landowner to recover damages.⁸

Code of Civil Procedure section 405.34 tracked my earlier suggestion for reform by placing the burden of paying for the damages occasioned by an unmeritorious *lis pendens* squarely on the party recording the *lis pendens*. Consequently, it lessened the risk of that party's counsel becoming embroiled in a subsequent malicious prosecution action.⁹

⁸ C.C.P. § 405.34 reads, in pertinent part:

[T]he court may . . . require the claimant to give the moving party an undertaking as a condition of maintaining the notice in the record title An undertaking required pursuant to this section shall be of such nature and in such amount as the court may determine to be just

Recovery on an undertaking required pursuant to this section may be had in an amount not to exceed the undertaking, pursuant to Section 966.440, upon a showing (a) that the claimant did not prevail on the real property claim and (b) that the person seeking recovery suffered damages as a result of the maintenance of the notice. In assessing these damages, the court shall not consider the claimant's intent or the presence or absence of probable cause.

⁹ C.C.P. § 405.34, of course, does not purport on its face to eliminate the possibility of both client and counsel's subsequently being sued for malicious prosecution. For example, there would still be a need for subsequent malicious prosecution actions in those cases where no C.C.P. § 405.34 undertaking had ever been granted or where the C.C.P. § 405.34 undertaking in question turned out to be inadequate to fully compensate the injured landowner. Also, an injured landowner would need to bring a subsequent malicious prosecution action in order to obtain punitive damages arising from an unmeritorious *lis pendens* since C.C.P. § 405.34 does not contemplate recovery of anything other than actual *lis pendens* damages from any undertaking posted pursuant to that section.

Malicious prosecution is a disfavored tort. *See Yee, supra* note 6, at 20; Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right*

However, forces other than the Lis Pendens Committee were at work respecting *lis pendens* reform in the years prior to the New Lis Pendens Law's being enacted. Those forces wound up being at cross-purposes with what Code of Civil Procedure section 405.34 was aimed at accomplishing. Thus, sometime in 1990, an attorney named William H. Jennings wrote an article critical of *Albertson v. Raboff*¹⁰ and its core holding that recordation of a *lis pendens*, however unmeritorious, was always a privileged act.¹¹ In his article, Jennings pointed out that there was no apparent remedy against persons who recorded *lis pendens* that were unsupported by real estate claims or—in the most extreme cases—*lis pendens* that were unsupported by any underlying action at all. The ultimate point of the Jennings' Article

of Petition in California, 32 U.C. Davis L.R. 965, 990 (1999) (citing *Babb v. Superior Court*, 3 Cal.3d 841 (1971)); John C. Barker, *Common Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOYOLA L. A. L. REV. 395 (1993). Malicious prosecution actions are, moreover, subject to C.C.P. §425.16, the so-called Anti-SLAPP statute. *See Jarrow Formulas, Inc. v. Lamarche*, 31 Cal. 4th 728 (2003). Thus, an injured landowner bringing a subsequent malicious prosecution action faces considerable obstacles including the significant risk of early dismissal followed by an award of attorney's fees and costs in favor of the malicious prosecution defendant.

¹⁰ 46 Cal.2d 375 (1956).

¹¹ William H. Jennings, "There Oughta Be a Law—What Remedy Is There For the Wrongfully Recorded Lis Pendens?" ("Jennings' Article"). While references to the Jennings' Article in the "Legislative Bill File on Senate Bill 1804" of California State Senator Quentin Kopp date the Jennings' Article sometime in late 1990 (and the same source contains a photocopy of the article itself), there is no indication where the Jennings' Article was first published. Jennings, who formerly practiced law with the Los Angeles, California law firm of Chrystie & Berle, is now listed as deceased by the State Bar of California.

was that merely expunging such unmeritorious *lis pendens* was not a satisfactory way to punish those responsible for such behavior.¹²

To tackle the problem, Jennings proposed an amendment of the 1872 Field Code provision which defines the so-called “litigation privilege.” Jennings suggested that the litigation privilege, codified as Civil Code section 47, be amended to declare affirmatively that any *lis pendens* which failed to reference an action that properly involved a true real estate claim was outside the scope of the litigation privilege. The amendment would thus make anyone who recorded such an unmeritorious *lis pendens* potentially liable for slander of title.

As the legislative history of what is now the Jennings Lis Pendens Law demonstrates, the Jennings’ Article eventually came to the attention of California State Senator Quentin Kopp. In early 1991, Senator Kopp’s office verbally asked the State Bar what it thought of Jennings’ concerns. The State Bar then wrote to the Lis Pendens Committee and asked for its input.¹³ The Chair of the Lis Pendens Committee, Barry Jablon, Esq., responded to the State Bar’s inquiry by stating that, while “[t]he issues raised in the Jennings article are certainly valid . . . Jennings’ approach . . .

¹² Implicit in the Jennings’ Article is the notion that even a malicious prosecution action does not necessarily avail a landowner in such circumstances where as the underlying action may be perfectly appropriate, there is just no proper basis for a *lis pendens*.

¹³ Letter from Larry Doyle, Director of the Office of Government Affairs, State Bar of California, to Barry Jablon, Chair of the Lis Pendens Committee (Jan. 29, 1991) (photocopy on file with author).

is piece-meal, and there appear to be less drastic cures than tackling Civil Code section 47.”¹⁴

A year later, on January 2, 1992, the State Bar requested that Senator Kopp carry the New Lis Pendens Law in the California State Senate.¹⁵ On February 21, 1992, Senator Kopp introduced the New Lis Pendens Law as part of Senate Bill 1804. On March 11, 1992, however, Jennings communicated his unhappiness with the New Lis Pendens Law to Senator Kopp’s office, complaining that the New Lis Pendens Law did not address the interim harm a landowner might suffer from an unmeritorious *lis pendens* prior to its expungement. Jennings advised Senator Kopp that only legislation creating an exception to the litigation privilege that would allow for slander of title actions in such situations would fully address his concerns.¹⁶

On March 25, 1992, and in apparent response to the force of Jennings’ argument, Senator Kopp dropped the New Lis Pendens Law from Senate Bill 1804. He then substituted what is now the Jennings’ Lis Pendens Law in the place and stead of the New Lis Pendens Law. The Jennings’ Lis Pendens Law provides:

¹⁴ Letter from Barry Jablon to Larry Doyle (Jan. 30, 1991) (photocopy on file with author).

¹⁵ Letter Larry Doyle to Dan Friedlander at the Office of Senator Quentin Kopp (Jan. 2, 1992) (photocopy on file with author).

¹⁶ Memorandum from William H. Jennings to Tuyen Ho at the Office of Senator Quentin Kopp (Mar. 11, 1992) (photocopy on file with author).

A recorded *lis pendens* is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects title or right of possession of real property, as authorized or required by law.¹⁷

Senate Bill 1804 became law on September 8, 1992. The New *Lis Pendens* Law was separately introduced by California State Assemblyman Bob Epple on February 21, 1992 as Assembly Bill 3620. Assembly Bill 3620 became law on September 22, 1992. SB 1804 and AB 3620 then became effective simultaneously on January 1, 1993.

Thus, the New *Lis Pendens* Law, a detailed piece of legislation which was intended by the *Lis Pendens* Committee to be a comprehensive measure for reform of *lis pendens* law, wound up passing into law in the same year as the Jennings' *Lis Pendens* Law. The latter was an isolated measure to which the Chairman of the *Lis Pendens* Committee had previously objected on the grounds it was both piece-meal and too extreme. By creating such a wholesale exception to the litigation privilege, the Jennings *Lis Pendens*' Law has always had a great potential for mischief. As discussed below, that potential has now been realized.

Impact of the Jennings' *Lis Pendens* Law

In *Palmer v. Zaklama*,¹⁸ two physicians, the Zaklamas, lost a residence in a sheriff's sale. The two doctors then filed an appeal from the

¹⁷ C.C. 47(b)(4).

¹⁸ 109 Cal.App.4th 1367 (2003), *review denied* by the California Supreme Court on October 22, 2003.

judgment which had resulted in the sheriff's sale as well as their filing for personal bankruptcy. They recorded *lis pendens* in Official Records referring to both of these proceedings.

Despite the doctors' argument that their appeal from the judgment which had resulted in the sheriff's sale and their personal bankruptcy 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 the Jennings' Lis Pendens Law, *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.¹⁹

¹⁹ 109 Cal.App.4th at 1380. *Palmer* cites a series of three commentators in support of its holding: CALIFORNIA LIS PENDENS PRACTICE, §2.8, at 36-37 (C.E.B. 2001 ed.); 5 Miller & Starr, CALIFORNIA REAL ESTATE, §11:45 at 119 (3d ed. 2000); and GREENWALD & ASIMOW, CAL. PRACTICE GUIDE: REAL PROPERTY TRANSACTIONS, ¶11:608 at 11-99 (The Rutter Group 2002). 109 Cal.App.4th at 1380. Despite *Palmer's* implication to the contrary, none of these treatises cites any precedent or otherwise contains any analysis of the Jennings' Lis Pendens Law. It is obvious therefore that *Palmer's* holding was effectively written on a blank slate and is certainly not a reiteration of previously established law. Moreover, in the very limited descriptions of the Jennings' Lis Pendens Law that are contained in these three different treatises, there is no foreshadowing of *Palmer's* conclusion. That is, there is no suggestion in any of the three treatises that a properly pled real property claim still results in slander of title liability for a real property claimant and his or her counsel should the court later determine to expunge a *lis pendens* based on the court's determination that the underlying properly pled real property claim is simply unlikely to succeed on the merits at trial. See C.C.P. § 405.32 (authorizing expungement where "the court finds that the claimant has not

Thus, under *Palmer*, (i) anyone who records a *lis pendens* that fails to properly allege a “real property claim” —a term that was itself defined with deliberate ambiguity by the Lis Pendens Committee²⁰— or (ii) anyone who otherwise loses on the merits of a properly alleged real property claim, regardless of whether or not there was probable cause for filing the *lis pendens* in the first instance,²¹ can now be sued for slander of title.²²

established by a preponderance of the evidence the probable validity of the real property claim”).

²⁰ See Code Comment ¶5 to C.C.P. § 405.4 (noting that whether “cases claiming a constructive trust or equitable lien” are real property claims justifying a *lis pendens* was subject to conflicting precedent in 1992 and that the Lis Pendens Committee “neither includes nor excludes claims of constructive trust or equitable lien,” relying on “judicial development” to ultimately answer this important question as to the proper scope of the term “real property claim”).

As might be expected, such “judicial development” has been all over the map since 1992. For example, in *Hunting World, Inc. v. Superior Court*, the Court of Appeal held that an action seeking to set aside a fraudulent conveyance of real property affects title to real property. 22 Cal.App.4th 67, 72 (1994). In *Lewis v. Superior Court*, the Court of Appeal qualified the *Hunting World* rule with the proposition that the application of the rule is non-categorical and depends much on the specific nature of the fraudulent conveyance claim. 30 Cal.App.4th 1850, 1865 (1994). Recently, the California Supreme Court granted review for *Kirkeby v. Superior Court*. See 135 Cal.Rptr.2d 861(2003), reviewed granted, 77 P.3d 421 (CA. 2003). In *Kirkeby*, the Court of Appeal held that recordation of a *lis pendens* is inappropriate where a claim for fraudulent conveyance or imposition of a constructive trust is made while no ownership or possessory interest is claimed in the property. *Id.* at 868-69.

²¹ In *Gudger v. Manton*, the California Supreme Court adopted the definition of slander of title set forth in the Restatement of Torts section 624, which reads:

Consistent with a “the first thing we do, let's kill all the lawyers” attitude,²³ legislative indifference to the new liability the Jennings’ Lis Pendens Law and *Palmer* have created for the legal profession may seem inevitable. On the other hand, preservation of our adversary system of civil justice has a recognized social value.²⁴ As allowing parties to sue their

One who, without a privilege to do so, publishes matter which is untrue and disparaging to another’s property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.

21 Cal.2d 537, 541 (1943). *See also* Seeley v. Seymour, 190 Cal.App.3d, 858-59 (1987) (citing to Second Restatement of Torts section 624); Truck Ins. Exchange v. Bennett, 53 Cal.App.4th 75, 84 (1997) (“The elements of the tort are (1) publication, (2) absence of justification, (3) falsity and (4) direct pecuniary loss”). It is clear from the above authorities that there is no probable cause defense associated with a cause of action for slander of title.

²² Research reveals no case law holding a lawyer who signs a *lis pendens* liable for slander of title under the Jennings Lis Pendens Law. Given that C.C.P § 405.21 provides that a *lis pendens* cannot be recorded in Official Records without the signature of the recording party’s attorney of record, it seems obvious that any lawyer who signs a *lis pendens* to enable its recordation has thereby “published” it for purposes of incurring personal liability under the Jennings Lis Pendens Law.

²³ WILLIAM SHAKESPEARE, HENRY VI, Part 2, act 4, sc. 2, l. 76-7.

²⁴ See Stephen A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L. J. 713, 714-17, 739 (1983). Landsman argued that “[a]n understanding of the development of the essential elements of the adversary system such as utilization of a neutral and passive fact finder, reliance on party presentation of evidence, and use of highly structured forensic procedure, placed in their historical context, reveals the values the adversary system vindicates.” *Id.* These values can be identified from “the rise of the modern industrial state, the acceptance of an expansive doctrine of individual liberty, and the demise of the static social tranquility.” *Id.* at 739. They include “freedom from restraint on economic and political action, tolerance of change in business and social

opponent's litigation counsel is inimical to the proper functioning of such an adversary system, it can and should be forcefully argued that creating new causes of action of this type is not in the public interest.²⁵

SUGGESTED REFORMS

The Jennings' Article focused primarily on the prosaic problem posed by "real estate broker[s] [who] . . . [with] no interest in the [real] property . . . record . . . a *lis pendens* [to collect their commissions]."²⁶ No data exists as to how often such *lis pendens* are recorded or how long they

relations, and willingness to adjudicate questions not previously considered by society." *Id.* See also David Barhnizer, *The Virtue of Ordered Conflict: a Defense of the Adversary System*, 79 NEB. L. REV. 657, 709 (2000) (stating that "[t]he adversary system is the primary mechanism for ensuring the authoritative mediation and resolution of disputes"); Martin E. P. Seligman, Paul R. Verkuil and Terry H. Kang, *Why Lawyers Are Unhappy?*, 23 CARDOZO L. REV. 33, 48 (2001) (claiming that the adversary system is a social good because, from the standpoint of the social psychologist, the adversary system of justice leaves control in the parties rather than in the judge and thus truly "reflects the deeper values of liberalism and even natural justice").

²⁵ See H. Robert Fiebach, *A Chilling of the Adversary System: an Attorney's Exposure to Liability from Opposing Parties or Counsel*, 61 TEMP. L. REV. 1301, 1302 (1988) (stating that the one essential aspect of the adversary system of justice is the system's "truth-seeking process," which calls for counsel to "fight vigorously for his or her client's position within the bounds of ethics and law"). An attorney's constant worry over "fighting too hard" on behalf of his or her client and thus instigating a countersuit against himself or herself by opposing counsel and the opposing party would simply restrain the attorney's advocacy ability and thus impede the proper functioning of the adversary system. *Id.* Furthermore, already existing and adequate safeguards such as applicable rules of professional conduct and the mechanism for ensuring their enforcement within the jurisdiction of the attorney make it practically unnecessary, and in fact, unfruitful, to permit new causes of action against attorneys. *Id.* at 1320.

²⁶ Jennings' Article, *supra* note 11, at 179.

survive in Official Records following recordation—particularly in light of the provisions in the New Lis Pendens Law specifically addressing expungement in such situations.²⁷ Absent strong empirical evidence that the Jennings’ Lis Pendens Law is needed, the most obvious reform would be to simply repeal it and thereby let the New Lis Pendens Law function as it was intended by the Lis Pendens Committee, without further interference from the Jennings’ Lis Pendens Law.

Even under the assumption that slander of title actions are an appropriate remedy for at least some types of unmeritorious *lis pendens*, the Jennings’ Lis Pendens Law—isolated as it is from the otherwise internally consistent provisions of the New Lis Pendens Law—should still be repealed and then replaced by proposed new Code of Civil Procedure section 405.62.

This new section would read as follows:

§405.62 Liability for Injuries to Title from Notices of Pendency of Action Lacking Probable Cause

Following withdrawal of a notice of pendency of action or upon recordation of a certified copy of an order expunging a notice of pendency of action, the owner(s) of the affected property have standing to bring an action on account of any injuries to title if it is determined that the claimant(s) had no probable cause for asserting a real property claim at the time the notice of pendency of action was first recorded. Nothing

²⁷ See, e.g., C.C.P. §405.31 (requiring expungement without undertaking where action does not contain real property claim); C.C.P. §405.32 (requiring expungement without undertaking where claimant has not established by a preponderance of the evidence the probable validity of the real property claim).

in this section is intended to limit any other rights or remedies provided by law.

The proposed new provision does several things. First, by moving the provision for a slander of title remedy out of the Civil Code and into the Code of Civil Procedure—where the rest of the New Lis Pendens Law is codified—the legislation eliminates all inconsistent uses of terminology. Some of the inconsistencies, as between the New Lis Pendens Law and the Jennings’ Lis Pendens Law, include the adoption of the term “*lis pendens*” by the former and the adoption of “notice of pendency of action,” by the latter, and the confusion over whether the phrases “action . . . which affects title or right of possession” and “real property claim” refer to the same type of action.

More substantively, rather than imposing a strict liability standard for recording a *lis pendens* that winds up being expunged on the merits, proposed new Code of Civil Procedure section 405.62 requires that injured landowners must show there was no probable cause for recording the *lis pendens* in question. This requirement holds the real estate broker who records a *lis pendens* to collect his commission on a home sale liable for slander of title, while, at the same time, it exonerates any parties, and their

counsel, who record *lis pendens*, from such liability in cases where the availability of a *lis pendens* is at least somewhat arguable.²⁸

The intended result is to limit the holding in *Palmer* substantially, while still providing a slander of title remedy in the most extreme cases of *lis pendens* abuse. On the one hand, the New Lis Pendens Law provides for no slander of title remedy, regardless of how unmeritorious the *lis pendens* in question is. On the other hand, the Jennings' Lis Pendens Law, according to *Palmer*, provides for blanket slander of title liability on account of any *lis pendens* that winds up being expunged on the merits.

²⁸ It is important to note that proposed new Code of Civil Procedure section 405.62 is not seeking to require proof of malicious prosecution, with its additional requirement of actual malice, for landowners to prevail in subsequent slander of title actions. All that is required is that landowners show that there was no plausible legal or factual argument that supported recording a particular *lis pendens*—an issue that would be measured by the court on an objective standard parallel to the probable cause prong of any malicious prosecution action. *See, e.g., Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 868 (1989) (holding that the question of probable cause in a malicious prosecution claim “is purely a legal question, to be determined by the trial court on the basis of whether, as an objective matter, the prior action was legally tenable or not”); *Hufstedler, Kaus & Ettinger v. Superior Court*, 42 Cal.App.4th 55, 63 (1996) (“If a court finds that the initial lawsuit was in fact objectively tenable, the court has determined that the fundamental interest which the malicious prosecution tort is designed to protect—the interest in freedom from unjustifiable and unreasonable litigation—has not been infringed by the initial action”) (citations and internal quotation marks omitted); *Swat-Fame, Inc. v. Goldstein*, 101 Cal.App.4th 613, 624 (2002) (following *Sheldon Appel*'s position that the standard for determining probable cause is objective). *See also Braun, supra* note 8, at 990 (recognizing that the “probable cause” element of a malicious prosecution claim is determined by the court under an entirely objective standard).

Proposed new Code of Civil Procedure section 405.62 thus represents a workable compromise between these two statutory provisions.

Conclusion

Post-9/11, there has been tremendous pressure on legal malpractice insurance rates and availability.²⁹ Thus, *Palmer's* opening up the specter of slander of title liability for every lawyer 'guilty' of recording a *lis pendens* that later winds up being expunged could not come at a worse time for a legal profession already struggling with a serious insurance crisis. Given the legal profession's instinct for self-preservation, the predictable result of all this will be an absolute refusal by many attorneys to sign off on *lis pendens* in even the most meritorious of cases.

The Jennings' Article that led to the adoption of the Jennings' Lis Pendens Law was entitled "There Oughta Be a Law." Maybe so. But there certainly shouldn't be a Jennings' Lis Pendens Law—at least not if we want to keep the *lis pendens* available as a practical litigation remedy in the first place.

²⁹ See Alexei Oreskovic, *Desperately Seeking Insurance: Soaring Malpractice Coverage Rates Have Lawyers Up In Arms*, THE RECORDER (San Francisco), April 1, 2002, at 1.