

## 'Kirkeby' Clarifies Valuable Tool to Represent Creditors

By Jerome J. Blum

In *Kirkeby v. Superior Court*, 2004 DJDAR 8917 (Cal. July 22, 2004), the state Supreme Court held that a fraudulent-transfer claim alleging an actual transfer of real property and trying to avoid that transfer supports the recording of a notice of pendency of action (under Code of Civil Procedure Section 405 et seq.), commonly known as a lis pendens.

This holding clarifies and confirms a very significant tool for attorneys representing creditors. *Kirkeby* makes it clear that, even before obtaining a judgment (or a right-to-attach order) on a claim for money damages and in the same lawsuit, a party can record a lis pendens in conjunction with a fraudulent-transfer claim.

The Supreme Court resolved a split of authority by reversing the 4th District Court of Appeal (*Kirkeby v. Superior Court*, 109 Cal.App.4th 1275 (2003)) and following the reasoning of the 1st District Court of Appeal (in *Hunting World v. Superior Court*, 22 Cal.App.4th 67 (1994)).

A two-pronged test determines whether the lis pendens may be expunged: 1) does the pleading contain a real-property claim and, if so, 2) has the probable validity of the real-property claim been established by the preponderance of the evidence? Code of Civil Procedure Sections 405.31 and 405.32.

The Supreme Court in *Kirkeby* addressed only the first prong, namely whether the pleading of a fraudulent transfer of real property satisfied the real-property claim requirement. A real-property claim is defined in Code of Civil Procedure Section 405.4 as a cause of action ... "which would, if meritorious, affect ... title to, or the right to possession of, specific real property."

The *Kirkeby* appellate court had upheld the Superior Court's expungement of the lis pendens, finding that the real-property claim test had not been met. Its holding was directly contrary to *Hunting World*, in which the 1st District Court of Appeal held that a fraudulent transfer claim involving a transfer of real property was adequate to meet the real-property claim test of the lis pendens law.

ty and trying to avoid that transfer supports the recording of a lis pendens (even in the same suit for money damages).

The Supreme Court did not do two things. First, while it disagreed with the conclusion of the constructive-trust cases that the lis pendens analysis required looking at the underlying purpose of the complaint, it distinguished and failed to overrule those cases, particularly *Lewis*.

Because it relied on the remedy being sought in *Kirkeby*, the court just as easily could have noted that, if the classic remedy in a constructive-trust case is being sought (that of changing the title of the property to the name of the person or entity whose funds allegedly were used to purchase the property), it also clearly would meet the definition of "real property claim" by "affecting title" to the real property.

The Supreme Court said that the issue of whether a constructive-trust case is a proper basis for a lis pendens was not before it.

Although the Supreme Court determined that the plain language of the statute required its holding, it also tried to defend the adequacy of the safeguards of the lis pendens statute, including the requirement of showing the probable validity of the real-property claim.

In fact, the constructive-trust courts have the better part of this argument by suggesting that the attachment safeguards are greater and make more sense. First, of course, there is notice and a hearing in most attachment proceedings before the property is tied up.

Also, in the attachment context, you have to prove the probable validity of the money-damages claim, whereas in the lis pendens case, proving only the probable validity of the fraudulent transfer of real property may permit you to tie up the property without proving the probable validity of your claim for money. Compare Code of Civil Procedure Sections 484.090(a)(2) and 405.32.

However, the constructive-trust courts were ignoring the plain language of the lis pendens statute in order to protect the debtor from a result inconsistent with the attachment-law protections.

The Supreme Court correctly concluded that, where the situation directly fits the language of the lis pendens statute, the Legislature can change the result if it does not like it.

The second place that the Supreme Court failed to expand its holding was in making the specific remedy of avoidance of the transfer under Code of Civil Procedure Section 3439.07(a)(1) an integral part of its holding.

In so doing, it failed to observe that a fraudulent transfer can include the purchase of real property with the debtor's funds while putting title in a name other than that of the debtor. The definition of "transfer" in the fraudulent-transfer law is very broad and includes, as the court noted, "the payment of money." Code of Civil Procedure Section 3439.01(i).

Although the remedy sought would not be avoidance of the property transfer, it might include, based on Code of Civil Procedure Section 3439.07(a)(3)(C), the change in title of the property to the name of the debtor whose funds were used, thereby clearly meeting the real-property claim prong of the lis pendens law by affecting title. This issue may be dealt with in another case, because these facts also were not before the Supreme Court in *Kirkeby*.



**The Supreme Court rejected extending the rationale of the constructive-trust line of cases to the fraudulent-transfer area.**

In so doing, the Supreme Court rejected the *Kirkeby* appellate court's attempt to extend the rationale of the "constructive trust" line of cases to the fraudulent-transfer area.

Significant cases in this constructive-trust line include *Urez Corp. v. Superior Court*, 190 Cal.App.3d 1141 (1987), *LaPaglia v. Superior Court*, 215 Cal.App.3d 1322 (1989), *Lewis v. Superior Court*, 30 Cal.App.4th 1850 (1994), *Burger v. Superior Court*, 151 Cal.App.3d 1013 (1984), and *Deane v. Superior Court*, 164 Cal.App.3d 292 (1985).

Those courts said that, where the real claim was for money damages and not about specific real property, merely adding a real-property claim to support a lis pendens in order to tie up the property, (thereby making it available for execution once the money damages claim was adjudicated), was impermissible.

In fact, the constructive-trust courts said that such tactics constituted an end run around the attachment statutes. See *Burger* and *Deane*.

Their argument against permitting a lis pendens in the money-damages claim situation is that the attachment law is the appropriate provisional remedy; that is, only if a creditor can meet the requirements and safeguards of that law is he or she entitled to tie up a debtor's real property pre-judgment on a claim for money.

Under the constructive-trust cases' rationale, one might be able to use a lis pendens in conjunction with a fraudulent transfer claim only after a judgment for money damages was entered or, at a minimum, only after a right-to-attach order was issued.

At that point, no due-process issues were involved because the creditor had proved his right to his money claim. Therefore, placing a lis pendens on a specific piece of real property on which the creditor wished to levy was justifiable.

After a creditor records a lis pendens, the debtor (or any other party or nonparty with an interest in the real property) may make a motion to expunge the lis pendens. Code of Civil Procedure Section 405.30.

In that case, the claimant filed a Superior Court fraudulent-transfer action and recorded a lis pendens when the defendant transferred real property to his wife in response to the claimant's prior filing of a federal lawsuit for money damages (based on trademark infringement).

The *Kirkeby* appellate court had tried to distinguish *Hunting World*, noting that the *Hunting World* case itself pointed out that the only cause of action alleged was the fraudulent-transfer action, whereas in the other cases, various other causes of action had been stated.

The *Kirkeby* appellate court seems to have been stretching by its suggestion that *Hunting World* was distinguishable merely because the fraudulent transfer cause of action was pleaded in a separate lawsuit from the underlying money claim.

Its conclusion, citing *Lewis*, was that the *Hunting World* case "did not eliminate the necessity for a trial court to look at the underlying purpose of the complaint."

In overruling the appellate court, the *Kirkeby* Supreme Court focused on the "plain language" of the lis pendens statute and concluded it was clear on its face.

The Supreme Court specifically held that the appellate court's view that an inquiry was necessary into the "underlying purpose" (that is, was there a real-property claim or merely an attempt to tie up real property when the actual claim was for money damages) was not supported by the law. The Supreme Court clearly relied on, and came down on the side of, *Hunting World*.

In order to reach its conclusion that a fraudulent transfer of real property meets the real-property claim requirement, the Supreme Court included as an apparently essential part of its holding that the remedy sought, was, under Code of Civil Procedure Section 3439.07(a)(1), "the voiding of a transfer of title of specific real property."

Therefore, as a result of *Kirkeby*, today the law is that a fraudulent-transfer claim alleging an actual transfer of real proper-

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