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Notes: When a Contract for the Purchase of Land Is Executed Prior to the Initiation of a Suit Involving the Property's Title, Lis Pendens May Be Precluded from Affecting the Purchaser's Interest under the Doctrine of Equitable Conversion. *Deshields v. Broadwater*, 338 Md. 422, 659 A.2d 300 (1995)

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WHEN A CONTRACT FOR THE PURCHASE OF LAND IS EXECUTED PRIOR TO THE INITIATION OF A SUIT INVOLVING THE PROPERTY'S TITLE, *LIS PENDENS* MAY BE PRECLUDED FROM AFFECTING THE PURCHASER'S INTEREST UNDER THE DOCTRINE OF EQUITABLE CONVERSION. *DeShields v. Broadwater*, 338 Md. 422, 659 A.2d 300 (1995).

I. INTRODUCTION

A court decree awarding an interest in property does not necessarily result in legal title being conveyed to the prevailing party. A third-party purchaser may have an interest in the property that is superior, preventing the execution of the decree. The application of two conflicting doctrines, one that protects a third-party purchaser and one that protects a litigant's property interest, will determine legal title of the contested property.

Equitable conversion protects a bona fide purchaser's interest in many situations.¹ The doctrine of *lis pendens*² prevents a property interest from being alienated to the detriment of the litigating parties during pendency of a suit.³ Generally, one must be a party to an action to be bound by a judgment or decree.⁴ However, an interest in property acquired by a third-party purchaser, while litigation affecting its title is pending, is subject to the result of that

1. See *infra* notes 35-46 and accompanying text.

2. "Lis pendens literally means a pending action." *Permanent Fin. Corp. v. Taro*, 71 Md. App. 489, 493, 526 A.2d 611, 612 (1987) (quoting *Angelos v. Maryland Cas. Co.*, 38 Md. App. 265, 268, 380 A.2d 646, 648 (1977)), *cert. granted*, 311 Md. 193, 533 A.2d 670 (1987). *Lis pendens* is the control that a court acquires over property involved in a suit until final judgment. See 54 C.J.S. *Lis Pendens* § 2, at 393 (1987). A *pendente lite* purchaser is one who purchases property during the pendency of a suit in which the rights of the property are being litigated. See 8 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 4308 (1963). *Black's Law Dictionary* defines *pendente lite nihil innovetur* as, "[d]uring a litigation nothing new should be introduced." BLACK'S LAW DICTIONARY 1134 (6th ed. 1990).

3. See *infra* notes 20-34 and accompanying text.

4. See *Applegarth v. Russell*, 25 Md. 317, 320 (1866) (citing JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 400 (6th ed. 1853)).

litigation.⁵

A question of law arises when an executory contract for sale has been entered into prior to the filing of an action giving constructive notice of *lis pendens*, but the conveyance is subsequent. One legal maxim provides that "when there are competing equities, one of which was acquired pre-litigation, it is the pre-existing equity that prevails."⁶

In *DeShields v. Broadwater*,⁷ the Court of Appeals of Maryland held that this maxim is applicable when the doctrine of equitable conversion competes with the doctrine of *lis pendens*.⁸ The court determined that parties may be bound by a judicial decree which involved *lis pendens*.⁹ With the *DeShields* decision, the Court of Appeals of Maryland joined the majority of jurisdictions addressing this issue, holding that a property interest created by an executory contract, executed prior to the filing of a pleading, is unaffected by a judgment of the subsequently filed action.¹⁰

II. BACKGROUND

Lis pendens and equitable conversion are doctrines that have common law origins.¹¹ Today, *lis pendens* has been codified in all but

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5. See *DeShields v. Broadwater*, 338 Md. 422, 433, 659 A.2d 300, 305 (1995). "Ordinarily, it is true, that the decree of a court binds only the parties and their privies in representation or estate, but he who purchases during pendency of a suit is held bound by the decree made against the person from whom he derives title" *Applegarth*, 25 Md. at 320 (quoting STORY, *supra* note 4, § 400).
 6. *DeShields*, 338 Md. at 441-42, 659 A.2d at 309 (citing *Himmighoefer v. Medalion Indus.*, 302 Md. 270, 281, 487 A.2d 282, 287-88 (1984)). "A still more accurate statement is that as between persons having only equitable interests, if their interests are in all other respects equal, priority in time gives a better equity." 30A C.J.S. *Equity* § 127 (1992).
 7. 338 Md. 422, 659 A.2d 300 (1995).
 8. See *id.* at 441, 659 A.2d at 309. An action involving *lis pendens* will not have priority over an equitable interest acquired for valuable consideration prior to the filing of suit. See *id.*
 9. See *id.* at 441-42, 659 A.2d at 309.
 10. See *id.* at 442, 659 A.2d at 309.
 11. See *Massachusetts Bonding & Ins. Co. v. Knox*, 18 S.E.2d 436, 438 (N.C. 1942).
The law of *lis pendens* stems back to the Roman law where the rule was "a thing concerning which there is a controversy is prohibited during suit, from being alienated." The same rule was formulated and adopted by Lord Bacon, thereafter becoming firmly fixed in the English law, inherited by us as part of the common law.

Id.

Equitable conversion principles developed in the English Court of Chancery

four states¹² and is recognized in all fifty states and the District of Columbia.¹³ Equitable conversion is recognized in forty-seven states

beginning in the early seventeenth century. 3 AMERICAN LAW OF PROPERTY § 11.22 (A.J. Casner ed., 1952). Equitable conversion is based on the theory that equity treats that as being done which should have been done. See THOMPSON, *supra* note 2, § 4447. Therefore, when the vendee contracts to buy and the vendor to sell, in equity the vendee becomes the owner of the land, and the vendor the owner of the purchase money. See *id.*

12. The District of Columbia, Maine, Maryland, New Hampshire, and Vermont do not have *lis pendens* statutes.
13. See ALA. CODE §§ 35-4-130 to -139 (1975 & Supp. 1995); ALASKA STAT. § 09.45.840 to .940 (Michie 1994); ARIZ. REV. STAT. ANN. § 12-1191 (West 1994); ARK. CODE ANN. §§ 16-59-101 to -107 (Michie 1987 & Supp. 1995); CAL. CIV. PROC. CODE §§ 405.20 to 405.60 (Supp. 1995); COLO. REV. STAT. § 38-35-110 (1990 & Supp. 1995); COLO. R. CIV. PRO. CODE 105(f) (1989); CONN. GEN. STAT. ANN. §§ 52-325 to -326 (West 1991 & Supp. 1995); DEL. CODE ANN. tit. 25, §§ 25-1601 to -1614 (1989); FLA. STAT. ANN. § 48.23 (West 1994 & Supp. 1995); GA. CODE ANN. §§ 44-14-610 to -613 (1982 & Supp. 1995); HAW. REV. STAT. § 634-51 (1993); IDAHO CODE § 5-505 (1990 & Supp. 1995); ILL. ANN. STAT. ch. 30, para. 121 (1969 & Supp. 1992); IND. CODE ANN. §§ 34-1-4-1 to -8 (Michie 1986 & Supp. 1996); IOWA CODE ANN. §§ 617.11 to .15 (West 1950 & Supp. 1995); KAN. STAT. ANN. § 60-2201 (1994); KY. REV. STAT. ANN. §§ 382- 440 (Banks-Baldwin 1993); LA. CODE CIV. PROC. ANN. arts. 3751-3753 (West 1961 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 184, § 15 (West 1991 & Supp. 1995); MICH. COMP. LAWS ANN. §§ 600.2701 to .2731 (West 1986 & Supp. 1995); MINN. STAT. ANN. §§ 557.020 to .021 (West 1988 & Supp. 1995); MISS. CODE ANN. §§ 11-47-1 to -15 (1972 & Supp. 1995); MO. ANN. STAT. § 527.260 (West 1953 & Supp. 1995); MONT. CODE ANN. § 70-19-102 (1995); NEB. REV. STAT. § 25-531 (1989); NEV. REV. STAT. ANN. §§ 14.010 to .017 (Michie 1986 & Supp. 1995); N.J. STAT. ANN. §§ 2A:15-6 to :15-17 (West 1987 & Supp. 1995); N.M. STAT. ANN. §§ 38-1-14 to -15 (Michie 1987 & Supp. 1995); N.Y. C.P.L.R. 6501-6515 (McKinney 1980 & Supp. 1996); N.C. GEN. STAT. §§ 1-116 to -120.2 (1995); N.D. CENT. CODE §§ 28-05-07 to -09 (1974); OHIO REV. CODE ANN. §§ 2703.26 to .27, 5309.58 (West 1994); OKLA. STAT. ANN. tit. 12, § 2004.2 (West 1993); OR. REV. STAT. § 93.740 (1995); 42 PA. CONS. STAT. ANN. § 4302 (1981 & Supp. 1995); R.I. GEN. LAWS § 9-4-9 (1985 & Supp. 1996); S.C. CODE ANN. § 15-11-10 to -50 (Law. Co-op. 1977 & Supp. 1996); S.D. CODIFIED LAWS ANN. §§ 15-10-1 to -11 (Michie 1984 & Supp. 1995); TENN. CODE ANN. §§ 20-3-101 to -105 (1994); TEX. PROP. CODE ANN. §§ 12.007 to .008 (West 1984 & Supp. 1996); UTAH CODE ANN. § 78-40-2 (1996); VA. CODE ANN. §§ 8.01-268 to - 269 (Michie 1992); WASH. REV. CODE ANN. §§ 4.28.320 to .325 (West 1988 & Supp. 1995); W. VA. CODE §§ 55-11-1 to -3 (1994 & Supp. 1995); WIS. STAT. ANN. § 840.10 (West 1994); WYO. STAT. ANN. §§ 1-6-106 to -109 (Michie 1988). Some of these statutes merely codify the state's common law *lis pendens* doctrine. See, e.g., ALASKA STAT. §§ 09.45.840 to .940 (1994). Others modify the common law, but do not abrogate it. See, e.g., *Stark Piano Co. v. Fanin*, 279 S.W. 1080 (Ky. 1926). Other state's statutes expressly repeal the common law doctrine of *lis pendens*. See, e.g., DEL. CODE ANN. tit. 25, § 1614 (1989).

and the District of Columbia.¹⁴ Maryland is one of four states that does not have a *lis pendens* statute, but Maryland does recognize the common law doctrines of both *lis pendens* and equitable

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14. See *Caltrider v. Caples*, 160 Md. 392, 153 A. 445 (1931); see also *Grass v. Ward*, 451 So. 2d 803 (Ala. 1984); *Currington v. Johnson*, 685 P.2d 73 (Alaska 1984); *Passey v. Great W. Ass'n*, 850 P.2d 133 (Ariz. Ct. App. 1993); *Smith v. MRCC Partnership*, 792 S.W.2d 301 (Ark. 1990); *Rogers v. Davis*, 34 Cal. Rptr. 2d 710 (Ct. App. 1994); *Konecny v. Gunten*, 379 P.2d 158 (Colo. 1963); *Fidelity Trust Co. v. BVD Assoc.*, 492 A.2d 180 (Conn. 1985); *Brizler Corp. v. Weiner*, 171 A.2d 65 (Del. 1961); *Gustin v. Stegall*, 347 A.2d 917 (D.C. 1975); *Munshower v. Martin*, 641 So. 2d 909 (Fla. Dist. Ct. App. 1994); *Simmons v. Krall*, 412 S.E.2d 559 (Ga. Ct. App. 1991); *Bank of Hawaii v. Horwoth*, 787 P.2d 674 (Haw. 1990); *Holscher v. James*, 860 P.2d 646 (Idaho 1993); *Farmer's State Bank v. Neese*, 665 N.E.2d 534 (Ill. App. Ct. 1996); *Funk v. Funk*, 563 N.E.2d 127 (Ind. Ct. App. 1990); *Frisbie v. Director of Taxation for the Dep't of Revenue*, 566 P.2d 29 (Kan. Ct. App. 1977); *Tatman v. Cook's ADM'X*, 195 S.W.2d 72 (Ky. Ct. App. 1946); *Bakery v. Commissioner of Corp. & Taxation*, 140 N.E. 593 (Mass. 1925); *Brooks v. Gillow*, 89 N.W.2d 457 (Mich. 1958); *Frederick v. Peoples Bank of Madison Lake*, 385 N.W.2d 11 (Minn. Ct. App. 1986); *Tinsley v. State Tax Comm.*, 235 So. 2d 698 (Miss. 1970); *In re King*, 572 S.W.2d 200 (Mo. Ct. App. 1978); *Sharbono v. Darden*, 715 P.2d 433 (Mont. 1986); *Father Flanagan's Boys' Home v. Graybill*, 132 N.W.2d 304 (Neb. 1964); *Herndon v. Gritz*, 920 P.2d 998 (Nev. 1996); *In re Jesseman*, 429 A.2d 1036 (N.H. 1981); *Jacobs v. Great Pac. Century Corp.*, 484 A.2d 1312 (N.J. Super Ct. App. Div. 1984); *Frietze v. Frietze*, 437 P.2d 137 (N.M. 1968); *Johnson v. Johnson*, 490 N.Y.S.2d 324 (N.Y. 1985); *Green v. Gustafson*, 482 N.W.2d 842 (N.D. 1992); *Sanford v. Breidenbach*, 173 N.E.2d 702 (Ohio Ct. App. 1960); *First Mustang State Bank v. Garland Bloodworth Inc.*, 825 P.2d 254 (Okla. 1991); *Security Bank v. Chiapuzio*, 747 P.2d 335 (Or. 1987); *Partrick & Wilkins Co. v. Reliance Ins. Co.*, 456 A.2d 1348 (Pa. 1983); *Grant v. Briskin*, 603 A.2d 324 (R.I. 1992); *Brooks v. Counsel of Co-Owners of Stones Throw Property Regime I*, 445 S.E.2d 630 (S.C. 1994); *Schlosser v. Norwest Bank of South Dakota*, 506 N.W.2d 416 (S.D. 1993); *Campbell v. Miller*, 562 S.W.2d 827 (Tenn. Ct. App. 1977); *Parson v. Wolfe*, 676 S.W.2d 689 (Tex. Ct. App. 1984); *Lach v. Deseret Bank*, 746 P.2d 802 (Utah Ct. App. 1987); *City of Manassas v. Board of County Supervisors*, 458 S.E.2d 568 (Va. 1995); *Tate v. Wood*, 289 S.E.2d 432 (W. Va. 1982); *Carefree Homes, Inc. v. Production Credit Ass'n*, 260 N.W.2d 759 (Wis. 1978); *W.A. Moncrief v. Louisiana Land & Exploration Co.*, 861 P.2d 500 (Wyo. 1993). Louisiana, Maine, and Vermont have not recognized the doctrine of equitable conversion; however, they will enforce a land sale contract with a decree of specific performance. See *Brown v. Ardoin*, 663 So. 2d 194 (La. Ct. App. 1995); *Pederson v. Cole*, 501 A.2d 23 (Me. 1985); *First Nat'l Bank v. Laperle*, 86 A.2d 635 (Vt. 1952). Only Washington explicitly rejects the doctrine of equitable conversion. See *Estate of Phillips v. Nyhus*, 874 P.2d 154, 159 (Wash. 1994) (stating affirmatively that Washington does not recognize the doctrine of equitable conversion).

conversion.¹⁵

The doctrines of equitable conversion and *lis pendens* affect property interests. *Lis pendens* provides constructive notice to all prospective purchasers of property¹⁶ that any interest acquired in that property is subject to the outcome of the suit.¹⁷ Alternatively, equitable conversion converts the buyer's interest into equitable interest and the seller's interest into a legal interest,¹⁸ thereby allocating certain rights to each party.¹⁹ When an executory contract for sale is entered into prior to the filing of an action giving rise to *lis pendens*, these two equitable doctrines collide.

A. *Lis Pendens*

The doctrine of *lis pendens* was founded upon the public policy of preventing alienation or encumbrance of title during the progress of a suit in order to prevent endless litigation.²⁰ *Lis pendens* is applicable only when the object of the proceeding is the title of the property in question²¹ and applies throughout the appeals process.²²

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15. See MD. RULE 12-102 (recognizing the doctrine of *lis pendens*); *Caltrider v. Caples*, 160 Md. 392, 396, 153 A. 445, 447 (1931) (recognizing the doctrine of equitable conversion).
 16. See *Lee v. Silva*, 240 P. 1015, 1018 (Cal. 1925); *Applegarth v. Russell*, 25 Md. 317, 320 (1866); see also *infra* notes 22-34 and accompanying text.
 17. See, e.g., *Angelos v. Maryland Cas. Co.*, 38 Md. App. 265, 268, 380 A.2d 646, 648 (1977).
 18. See *Motels of Md., Inc. v. Baltimore County*, 244 Md. 306, 313-14, 223 A.2d 609, 613 (1966) (stating that "equity treats a contract of sale of real estate as transferring an equitable estate or interest to the vendee, leaving the vendor the holder of the bare legal title"); *Newport Terminals, Inc. v. Sunset Terminals, Inc.*, 566 P.2d 1181, 1184 (Or. 1977).
 19. See *infra* text accompanying notes 43-46.
 20. See *Inloes v. Harvey*, 11 Md. 519 (1857); see also *Moore v. Zelic*, 170 N.E. 664, 666 (Ill. 1930) (stating that "[t]he doctrine of *lis pendens* is based on the questions of public policy and convenience as necessary to the administration of justice, in order that decisions in pending suits may be binding and given full effect and that an end be had to litigation").
 21. See *Angelos*, 38 Md. App. at 268, 380 A.2d at 648. *Lis pendens* applies only in a proceeding directly relating to the property in question. See *Feigley v. Feigley*, 7 Md. 537, 564 (1855). To invoke the doctrine of *lis pendens*, the property described must be at the very essence of controversy between the litigants. See *Katz v. Banning*, 617 N.E.2d 729, 733 (Ohio Ct. App. 1992). "A few states, however, provide that a *lis pendens* is available if the litigation affects personalty as well." Janice Gregg Levy, *Lis Pendens And Procedural Due Process: A Closer Look After Connecticut v. Doebr*, 51 Md. L. Rev. 1054, 1058 (1992). Generally, the property must be of a character subject to the rule, the court must have jurisdiction of the person and the *res*, and the property must be sufficiently de-

It operates only against real or leasehold property that is located in the state in which the action is pending.²³ It is unavailable in actions that seek to recover money damages prior to securing a lien upon property subject to *lis pendens*.²⁴ In Maryland, all purchasers are deemed to have constructive notice after the complaint is filed.²⁵ Additionally, *lis pendens* has been held to be proper in, but not limited to, proceedings such as the following: an action for specific performance of a contract of sale;²⁶ an action to enforce a lien, charge, or encumbrance against property;²⁷ divorce proceedings involving marital property;²⁸ injunctive relief regarding use of subject property;²⁹ and condemnation proceedings against subject

scribed in the pleading or the place of recording to enable purchasers to ascertain the identity of the property. See 54 C.J.S. *Lis Pendens* §§ 7-9 (1987).

22. *Lis pendens* carries over to appeal because "[a]n appeal is usually held to be a continuation of the action, and not a new action, and one who knows of the pendency of the suit and the rendition of the judgment is presumed to know that an appeal may be taken from the judgment within the time prescribed by law." *Golden v. Riverside Coal & Timber Co.*, 211 S.W. 761, 763-64 (Ky. 1919); see *Perry Park Country Club, Inc. v. Manhattan Sav. Bank*, 813 P.2d 841, 844 (Colo. 1991); *Srager v. Koenig*, 651 A.2d 752, 754 (Conn. App. 1994); 54 C.J.S. *Lis Pendens* § 23 (1987). *Lis pendens* also has been held to continue pending a rehearing awarded on appeal. See *West Virginia Pulp & Paper Co. v. Cooper*, 106 S.E. 55, 60 (W. Va. 1921).
23. See *Permanent Fin. Corp. v. Taro*, 71 Md. App. 489, 495, 526 A.2d 611, 613 (1987), cert. granted, 311 Md. 193, 533 A.2d 670 (1987); see also *Rickey Land & Cattle Co. v. Miller*, 218 U.S. 258 (1987).
24. See *Warfel v. Brady*, 95 Md. App. 1, 8, 619 A.2d 171, 174 (1993); see also *Tanner v. Wilson*, 192 S.E. 425, 427-28 (Ga. 1937); *Moore v. Zelic*, 170 N.E. 664, 666-67 (Ill. 1930); *W.H. Hopper & Assoc., Inc. v. Dunaway*, 396 So. 2d 43, 44 (Miss. 1981).
25. See MD. RULE 12-102; see also *Applegarth*, 25 Md. at 328. When the property is located in a different county other than where the action is pending, a certified copy of the complaint must be filed in the county in which the property is located. See MD. RULE 12-102. Cases pending in United States district courts have *lis pendens* effect without filing in local circuit court. Cf. *Permanent Fin. Corp.*, 71 Md. App. at 494, 526 A.2d at 613.
26. See *Marr v. Bradley*, 59 N.W.2d 331, 332-33 (Minn. 1953) (holding that *lis pendens* binds a subsequent purchaser even though expensive improvements were made to the property).
27. See *Ballard v. Lawyers Title of Ariz.*, 552 P.2d 455, 457 (Ariz. Ct. App. 1976) (stating that a purchaser who enters into a contract for sale during the pendency of a suit to foreclose a mechanics lien is bound by the judgment).
28. See *Moore*, 170 N.E. at 666-67; *Lombardo v. Gerard*, 592 N.E.2d 1333, 1334 (Mass. 1992).
29. See J. PAUL RIEGER, JR., EXAMINING TITLES TO REAL ESTATE IN MARYLAND 23-24 (1995).

property.³⁰

Lis pendens does not prevent alienation; it only places a cloud on the property title.³¹ This result can lead to harsh consequences because it may be difficult for a prospective purchaser to find out if the title is clouded.³² To remedy this problem, some states have enacted rules that require the notice to be recorded.³³ Maryland does not have such a statute and makes reference to *lis pendens* only in

30. *See id.*

31. *See Applegarth*, 25 Md. at 327. *Lis pendens* also has a chilling effect on the alienability of property that is the object of the suit. *See DeShields*, 338 Md. at 434, 659 A.2d at 305-06. Some states have held that if the operation of *lis pendens* proves harsh or arbitrary in some particular instance, equity can and should refuse to give it effect. *See, e.g., White v. Wensaur*, 702 P.2d 15, 18 (Okla. 1985) (holding that if the defendant's property was in imminent danger of being foreclosed upon, *lis pendens* should be released so that the property could be sold). The Supreme Court of Oklahoma stated that "it is essential that the court, when called upon to act on a motion to discharge *lis pendens*, take testimony to ascertain the exact nature and extent of any possible prejudice that could result from the release of notice and whenever appropriate, safeguard the threatened rights by other available means less drastic in character." *Id.*, at 18-19.

32. *See Permanent Fin. Corp. v. Taro*, 71 Md. App. 489, 492, 526 A.2d 611, 612 (1987).

Many of the effects of common law *lis pendens* were as harsh as the inequities the rule sought to avoid. Because all that was required of a litigant who wished to bind land was that he file a suit concerning the land, often a reasonable search and diligent search by a prospective purchaser would not reveal the existence of litigation affecting title, or would reveal litigation whose object would remain unknown to the searcher.

Thomas Stone Marrion, *Connecticut's Lis Pendens Shapes Up*, 16 CONN. L. REV. 413, 414 (1984).

33. *See MD. RULE 12-102*; 54 C.J.S. *Lis Pendens* § 14 (1987). "Some states make the filing of a notice in accordance with their terms a prerequisite to the commencement or existence of *lis pendens*." *Id.*; *see also Jones v. Ainell*, 186 S.W. 65, 66 (Ark. 1916) ("[A] suit affecting the title or any lien on real estate is not *lis pendens* until notice of the pendency of the action is filed in accordance with the statute."). Colorado's *lis pendens* rule provides:

Only after filing a pleading wherein the affirmative relief is claimed affecting the title to real property, a party may record in the office of the clerk and recorder of the county in which the property is situated a notice of *lis pendens* containing the names of the parties, the nature of the claims, and a legal description of the property in that county affected thereby; such notice shall from the time of recording thereof, and only from such time, be constructive notice to all persons acquiring an interest

COLO. R. CIV. P. 105(f)(1) (1989) (emphasis added).

the Maryland Rules of Court.³⁴

B. Equitable Conversion

Equitable conversion³⁵ occurs when a buyer and seller enter into an executory contract of sale that equity would specifically enforce.³⁶ An executory contract of sale is one which may be valid and binding.³⁷ In order for equitable conversion to occur, the contract must be free from equitable imperfections and enforceable against the purchaser and the vendor in an action for specific performance.³⁸ If the contract is bona fide and made for valuable consideration, the conversion occurs when the contract is executed.³⁹

To be bona fide, the purchaser must not have constructive or actual notice of another equitable interest in the property.⁴⁰ If the suit is filed after the contract for sale is entered into, then the purchaser could not have had constructive notice created by *lis*

34. See MD. RULE 12-102. In Maryland, *lis pendens* operates much like the common-law doctrine. See Levy, *supra* note 21, at 1087.

35. In *Motels of Md., Inc. v. Baltimore County*, 244 Md. 306, 223 A.2d 609 (1966), the court of appeals addressed the doctrine of equitable conversion and noted:

That equity treats a contract of sale of real estate as transferring an equitable estate or interest to the vendee, leaving the vendor the holder of bare legal title, is firmly established in Maryland It is equally firmly established of course that equity ordinarily will transform the equitable interest of a vendee into a legal estate by granting specific performance of the contract to sell and convey.

Id. at 313-14, 223 A.2d at 613.

36. See Harlan F. Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369, 371 (1913). A contract that equity would specifically enforce is one which the vendee has the right to compel specific performance under the maxim "that equity regards that as being done which ought to be done." Orville P. Cockerill, *Equitable Conversion In California*, 1 S. CAL. L. REV. 309, 310 (1928).

37. See *Coe v. Hays*, 328 Md. 350, 358, 614 A.2d 576, 580 (1992) (citing *Birckner v. Tilch*, 179 Md. 314, 323, 18 A.2d 222, 226 (1941)).

38. See *id.* "[E]quitable conversion is applicable only when there is a specifically enforceable contract between the parties, and the changes in the rights, duties, powers and liabilities of the parties which result from the making of the contract consequences of the equitable right to specific performance." 3 AMERICAN LAW OF PROPERTY, *supra* note 11, § 11.22.

39. See *Caltrider v. Caples*, 160 Md. 392, 396, 153 A. 445, 447 (1931). Where property passes under a contract of sale, conversion operates from the time of the execution of the instrument, unless the parties agree that the conversion will not take place until a later date. See *id.*

40. See *Coe*, 328 Md. at 358, 614 A.2d at 580.

pendens.⁴¹ If the purchaser had no knowledge of the plaintiff's interest in the property or intention to bring suit involving title to the property, the purchaser is without actual knowledge.⁴²

Similar to *lis pendens*, equitable conversion creates an equitable interest in property by allocating each party's interest and, in some circumstances, making the purchaser's interest superior to the vendor's interest.⁴³ For instance, equitable conversion protects a purchaser's interest created by a contract for sale from a vendor's conveyance to a third party during the contract's executory period.⁴⁴ In addition, it protects a purchaser's interest from imposition of a mechanic's lien against the vendor during the same period.⁴⁵ Equitable conversion has also been applied to bar the execution of a restrictive covenant after the contract has been entered into.⁴⁶

C. Purchase Occurring Prior to *Lis Pendens*

The prevailing rule is that by the virtue of equitable conversion, *lis pendens* will not affect a purchaser's interest if an executory contract of sale is entered into prior to the filing of an action.⁴⁷ Numerous cases from different jurisdictions have followed this rule as early as the nineteenth century.⁴⁸ The rationale is that the equitable interests created through equitable conversion and *lis pendens* are equal.⁴⁹ Furthermore, when two equal competing equities exist, the

41. See, e.g., *Roberts v. Friedell*, 15 N.W.2d 496, 499 (Minn. 1944).

42. See *infra* notes 60-62 and accompanying text.

43. "[T]he doctrine is invoked in allocating the benefits and burdens incident to property . . ." 3 AMERICAN LAW OF PROPERTY, *supra* note 11, § 11.22.

44. See *In re Estate of Clark*, 447 N.W.2d 549 (Iowa App. 1989).

45. See *Himmighoefer v. Medallion Indus., Inc.*, 302 Md. 270, 280, 487 A.2d 282, 287-88 (1985).

46. See *DeBoer v. Oakbrook Home Ass'n, Inc.*, 359 N.W.2d 768 (Neb. 1984).

47. See *Dodge v. Clark*, 268 F. 784, 787 (5th Cir. 1920); *Lee v. Silva*, 240 P. 1015, 1018 (Cal. 1925); *Golden v. Riverside Coal & Timber Co.*, 211 S.W. 761, 763-64 (Ky. 1919); *Parks v. Smoot's Adm'rs*, 48 S.W. 146, 147-48 (Ky. 1898); *Meyering v. Russell*, 220 N.W.2d 121, 125 (Mich. Ct. App. 1974), *rev'd on other grounds*, 224 N.W.2d 280 (Mich. 1974); *Roberts v. Friedell*, 15 N.W.2d 496, 499 (Minn. 1944); *Tinnon v. Tanksley*, 408 S.W.2d 98, 103 (Mo. 1966); *Abington v. O'Dell*, 197 S.W. 339, 340 (Mo. 1917); *Bristow v. Thackston*, 86 S.W. 94, 99 (Mo. 1905); *Star v. Norstebly*, 30 N.W.2d 718, 720 (N.D. 1948); *Walker v. Goldsmith*, 12 P. 537, 542 (Or. 1886); *Perszyk v. Milwaukee Elec. Ry. & Light Co.*, 254 N.W. 753, 756 (Wis. 1934).

48. See E.W.H., *Doctrine of Lis Pendens as Applied Against One Who Takes Deed Pending Action Pursuant to Executory Contract Entered Into Before Action Commenced*, 93 A.L.R. 404 (1934).

49. See *DeShields v. Broadwater*, 338 Md. 422, 441, 659 A.2d 300, 309 (1995).

one first in time will prevail.⁵⁰ This leads to the conclusion that the interest created by equitable conversion will be superior to the subsequent interest created by *lis pendens*.

The party filing an action giving rise to *lis pendens* has three options if a contract of sale was entered into prior to the filing of a lawsuit.⁵¹ First, the party may make the purchaser a party to the suit, thereby binding the purchaser to the court's decision.⁵² Second, the filing party may argue that the purchaser had actual knowledge of the adverse claim and is, therefore, a *mala fide* purchaser not entitled to protection from *lis pendens*.⁵³ Third, the party can argue that the purchaser had not paid any consideration, or only a portion of the purchase price, prior to the filing of the action⁵⁴—although this argument, by itself, is probably not sufficient to bind the purchaser.⁵⁵

Generally, a judgment or decree in an action will not bind any person who is not a party to that action.⁵⁶ The rule is based upon the omitted party's due process right to be heard.⁵⁷ An exception to this rule applies when the omitted third-party stands in privity to one who is properly made a party to the action.⁵⁸ However, one who acquires property rights through an executory contract prior to the commencement of an action is not in privity with the vendor.⁵⁹ Therefore, a purchaser with an equitable interest created by an executory contract prior to the suit involving title will not be bound by the court's decree unless the purchaser is made a party to the suit.⁶⁰ Indeed, a plaintiff with actual knowledge of the purchaser will find little sympathy from the court if the purchaser is not made a

50. See *Walker v. Goldsmith*, 17 P. 537, 538 (Or. 1888); see also *Himmighoefer v. Medallion Indus., Inc.*, 302 Md. 270, 272, 487 A.2d 282, 284 (1984); *Newport Terminals, Inc. v. Sunset Terminals, Inc.*, 566 P.2d 1181, 1184 (Or. 1977).

51. See, e.g., *Meyering*, 220 N.W.2d at 125.

52. See, e.g., *id.*; *Tinnon v. Tanksley*, 408 S.W.2d 98, 103 (Mo. 1966).

53. See *infra* notes 60-62 and accompanying text.

54. See *infra* notes 63-76 and accompanying text.

55. See *Meyering*, 220 N.W.2d at 125.

56. See *Roberts v. Friedell*, 15 N.W.2d 496, 499 (Minn. 1944). "In order to make such judgment or decree binding, the rights of the party sought to be bound must have accrued subsequent to the commencement of the action." *Id.*

57. Cf. *id.* at 499; *Four-G Corp. v. Ruta*, 151 A.2d 546, 551 (N.J. Super. Ct. App. Div. 1959) (stating that it would be a violation of due process to deprive a party of property rights when he was a stranger to the action).

58. See *Roberts*, 15 N.W.2d at 499.

59. See *id.* (citing *Dull v. Blackman*, 169 U.S. 243, 248 (1898)).

60. See *Tinnon v. Tanksley*, 408 S.W.2d 98, 103 (Mo. 1966).

party to the suit.⁶¹ Likewise, a purchaser's interest may be subject to the decree of the court if he had actual knowledge of another party's interest before he obtained his interest in the land, or if he knew that a suit was intended but not yet filed.⁶²

Finally, the fact that the purchaser paid nominal or no consideration before the action was filed carries little weight with the court.⁶³ In fact, it has been rejected by many jurisdictions,⁶⁴ but applied primarily in conjunction with other factors adverse to the purchaser.⁶⁵ For example, in *Siedschlag v. Griffin*,⁶⁶ although a contract was executed nineteen days before the action was filed, the Wisconsin Supreme Court held that the purchaser was still bound by *lis pendens*.⁶⁷ The court stated that the consideration, if paid at all, was paid after the purchaser knew of the fraudulent nature of the deed held by the vendor.⁶⁸ Additionally, the purchaser had not received

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61. See, e.g., *Roberts*, 15 N.W.2d at 499 (stating that the plaintiff knew that the purchaser was in possession and was deliberately omitted as a party, therefore, the judgment was not binding upon him); *Abingdon v. O'Dell*, 197 S.W. 339, 340 (Mo. 1917) (stating that there was no excuse for not making the purchaser a party particularly because the purchaser was in possession).
 62. See *In re Justice*, 418 F.2d 1162, 1164 (D.C. Cir. 1969) (recognizing *lis pendens* does not apply against one who had actual notice of a suit or petition); *Golden v. Riverside Coal & Timber Co.*, 211 S.W. 761, 764 (Ky. Ct. App. 1919) (stating that a purchaser with actual knowledge holds the property without any more rights than his vendor to the extent that his purchase affects the rights of the successful litigant); *Tuft v. Federal Leasing*, 657 P.2d 1300 (Utah 1982); see also *Roberts*, 15 N.W.2d at 499.
 63. See generally *DeShields v. Broadwater*, 338 Md. 422, 445-46, 659 A.2d 300, 311-12 (1995). However, some jurisdictions have held a purchaser *pendente lite* if the purchaser originally bought without notice but subsequently was notified of an infirmity in the title before paying any consideration. See *Watts v. Noble*, 262 S.W. 1114, 1116 (Ky. 1924).
 64. See *Dodge v. Clark*, 268 F. 784, 787 (5th Cir. 1920); *Lee v. Silva*, 240 P. 1015, 1018-19 (Cal. 1925); *Golden*, 211 S.W. at 764; *Parks v. Smoot's Adm'rs*, 48 S.W. 146, 147-48 (Ky. 1898); *Meyering v. Russell*, 220 N.W.2d 121, 125 (Mich. Ct. App. 1974), *rev'd on other grounds*, 224 N.W.2d 280 (Mich. 1974); *Roberts*, 15 N.W.2d at 499; *Tinnon*, 408 S.W. at 103; *Abingdon v. O'Dell*, 197 S.W. 339, 340 (Mo. 1917); *Bristow v. Thackston*, 86 S.W. 94, 99 (Mo. 1905); *Star v. Norstebly*, 30 N.W.2d 718, 720 (N.D. 1948); *Walker v. Goldsmith*, 17 P. 537, 542 (Or. 1886); *Perszyk v. Milwaukee Elec. Ry. & Light Co.*, 254 N.W. 753, 756 (Wis. 1934).
 65. See *infra* notes 70-80 and accompanying text.
 66. 112 N.W. 18 (Wis. 1907).
 67. See *id.* at 18, 20-21.
 68. See *id.* at 18, 20. The deed was fraudulent because the description of the land was inadequate. See *id.*

or recorded the deed prior to the filing of the action.⁶⁹

In *Lightle v. Schmidt*,⁷⁰ the Supreme Court of Arkansas noted that a purchaser had not paid any part of the purchase money and held that the purchaser was bound by the judgment entered against the vendor.⁷¹ Moreover, the court noted the contract was oral and that the purchaser had not taken possession.⁷²

Finally, in *Fisher v. Shropshire*,⁷³ the Supreme Court dealt with a suit to enforce a vendor's lien where the contract was oral, all of the purchase money had not been paid prior to the filing of the *lis pendens*, and the conveyance occurred after the *lis pendens* was filed.⁷⁴ Although the equitable rights under the contract of sale arose before the equitable rights created by the vendor's lien, the court held that the vendor's lien was a superior right.⁷⁵ Additionally, the court held that the purchaser was protected for the amount paid under the contract of sale before the suit involving a vendor's lien was filed because the purchaser's rights were not affected.⁷⁶

In contrast to *Shropshire*, where a statute resolved the issue, the Court of Appeals of Maryland, in *DeShields v. Broadwater*,⁷⁷ relied on common law, opinions from other jurisdictions,⁷⁸ and *Himmighoefer*

69. *See id.* A Wisconsin statute at the time of this case provided that "every purchaser or encumbrancer whose conveyance or incumbrance is not recorded or filed shall be deemed a subsequent purchaser or encumbrancer and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were made a party thereto." *Id.* at 20-21.

70. 222 S.W. 46 (Ark. 1920).

71. *See id.* at 47.

72. *See id.* at 46-47. In essence, the court held that the contract entered into prior to the filing of the suit by a third party was not a binding contract of sale and, thus, would not invoke the doctrine of equitable conversion. *See id.* at 47.

73. 147 U.S. 133 (1892) (applying Iowa law in a diversity case).

74. *See id.* at 142.

75. *See id.* at 140 (stating that a vendor's lien in Iowa is granted according to equitable principles).

76. *See id.*

77. 338 Md. 422, 659 A.2d 300 (1995).

78. *See id.* at 442-43, 659 A.2d at 309-10 (citing *Patton v. Darden*, 148 So. 806, 808 (Ala. 1933); *Rooney v. Michael*, 4 So. 421, 423 (Ala. 1888); *Lee v. Silva*, 240 P. 1015, 1018 (Cal. 1925); *Marshall v. Charland*, 31 S.E. 791, 791 (Ga. 1898); *Bowen v. Jameson*, 4 S.W.2d 401, 403 (Ky. 1898); *Parks v. Smoot's Adm'rs*, 48 S.W. 147, 147 (Ky. 1898); *Roberts v. Friedell*, 15 N.W.2d 496, 499 (Minn. 1944); *Tinnon v. Tanksley*, 408 S.W.2d 98, 103 (Mo. 1966); *Four-G Corp. v. Ruta*, 151 A.2d 546, 551 (N.J. Super. Ct. Ap. Div. 1959); *Star v. Norsteby*, 30 N.W.2d 718, 720 (N.D. 1948); *Young's Adm'r v. McClung*, 50 Va. 336 (1852); *West Virginia Pulp & Paper Co. v. Cooper*, 106 S.E. 55, 59 (W.V. 1921); *Perszk v. Milwaukee Elec. Ry. & Light Co.*, 254 N.W. 753, 755-56 (Wis. 1934)).

v. Medallion Industries.⁷⁹ *Himmighoef* was a Maryland case in which the court of appeals held that when competing equities exist, one of which was acquired prior to litigation, it is the pre-existing equity that prevails.⁸⁰

In *DeShields*, the Court of Appeals of Maryland joined the majority of jurisdictions that had addressed the issue concerning which interest is superior when a pre-existing equitable right created by equitable conversion competes with a subsequent interest created by *lis pendens*.⁸¹ The court held that a property interest created by an executory contract executed prior to the filing of a pleading is unaffected by the judgment of the subsequently filed action.⁸² In other words, property that is purchased prior to litigation is not affected by *lis pendens* because of equitable conversion.

III. INSTANT CASE

At issue in *DeShields* was commercial property located at 5361 Sheriff Road, Prince George's County, Maryland.⁸³ On March 23, 1984, Phunlop and Chitra Sriuthai (the Sriuthais) purchased Jack's Liquors, Inc., (Jack's) from Shirley DeShields (DeShields).⁸⁴ Thirteen months later, the Sriuthais purchased the property on which Jack's was situated.⁸⁵ In 1986, DeShields sued the Sriuthais for breach of contract arising out of the sale of Jack's and subsequently gained control over the business.⁸⁶ A settlement agreement gave DeShields, who was acting as chief executive officer of Jack's, control over the corporate affairs of the business, with an agreement that she pay rent to the Sriuthais over the next five years with an option to renew.⁸⁷

On January 30, 1989, the Sriuthais contracted to sell the Sheriff Road property to Tommy Broadwater, Jr. (Broadwater).⁸⁸ Jack's con-

79. 302 Md. 270, 487 A.2d 282 (1984).

80. *See id.* at 274, 487 A.2d at 284. "In [*Himmighoef*], the equitable interest obtained by contract purchasers from the builder of a subdivision were held to be superior to mechanics liens judicially entered after the contracts of sale were made but before deeds to the purchasers were executed, acknowledged, and recorded." *DeShields*, 338 Md. at 442, 659 A.2d at 309.

81. *See DeShields*, 338 Md. at 442, 659 A.2d at 309.

82. *See id.*

83. *See id.* at 428, 659 A.2d at 303.

84. *See id.* at 428-29, 659 A.2d at 303.

85. *See id.*

86. *See id.* at 430, 659 A.2d at 303-04.

87. *See id.*

88. *See id.* at 429, 659 A.2d at 303. The purchase price was \$135,000, and Broadwa-

tinued to operate on the property.⁸⁹ On March 28, 1989, Jack's brought suit for constructive trust and damages against the Sriuthais, asking the court to convey the title of the Sheriff Road property from the Sriuthais to Jack's.⁹⁰ Broadwater was not named in the action; however, he did file a motion to intervene that was subsequently denied.⁹¹ Judgment was entered against the Sriuthais on April 17, 1991.⁹² Jack's attorney was appointed trustee to convey, by quitclaim deed, the Sriuthais' interest in the property.⁹³ Broadwater, however, claiming to be the owner of the property, failed in his attempt to negotiate a lease agreement with Jack's and filed a complaint against DeShields for possession of the property due to non-payment of rent.⁹⁴

Jack's action against the Sriuthais for a constructive trust on the property was consolidated with Broadwater's action against DeShields for possession of the property.⁹⁵ DeShields and Jack's⁹⁶ contended that under the doctrine of *lis pendens* the purchaser is bound by the judgment in a pending constructive trust suit.⁹⁷ DeShields argued that the Sheriff Road property was sold after the constructive trust suit was commenced.⁹⁸ She argued further that under *lis pendens*, the purchaser would be bound by the judgment in the constructive trust action.⁹⁹

The Circuit Court for Prince George's County held that the property was purchased before the constructive trust suit was initiated and, by virtue of equitable conversion, was not affected by the outcome of that suit.¹⁰⁰ On its own motion, the court of appeals granted certiorari.¹⁰¹ Because the suit was filed after the contract of sale was executed, but before settlement between the Sriuthais and Broadwater,¹⁰² the critical issue before the court of appeals was the

ter paid a \$10,000 down payment into an escrow account. *See id.*

89. *See id.* at 428, 659 A.2d at 303.

90. *See id.* at 430-31, 659 A.2d at 304.

91. *See id.* at 431, 659 A.2d at 304.

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. Hereinafter referred to collectively as DeShields.

97. *See DeShields*, 338 Md. at 440, 659 A.2d at 309.

98. *See id.*

99. *See id.*

100. *See id.* at 442, 659 A.2d at 309.

101. *See id.* at 428, 659 A.2d at 303.

102. *See id.* at 439, 659 A.2d at 308.

effect of the executory contract.¹⁰³

A. *Effect of Executory Contract of Sale Prior to Suit Involving Lis Pendens*

DeShields argued that “purchase,” in the context of *lis pendens*, either referred to the conveyance of the property or possession of the property by Broadwater, and not to the execution of an executory contract of sale.¹⁰⁴ Rejecting this argument, the trial court ruled that purchase, as it relates to *lis pendens*, referred to the “signing of [an] executory contract.”¹⁰⁵ The court of appeals affirmed the trial court’s holding, following the prevailing rule that purchase occurs when equitable conversion occurs.¹⁰⁶

Equitable conversion is said to occur when the contract is executed provided that the sale is bona fide, made for valuable consideration, and one that a court would specifically enforce against an unwilling purchaser.¹⁰⁷ The contract between Broadwater and the Sriuthais was binding and for valuable consideration.¹⁰⁸ Therefore, absent notice of the litigation prior to executing the contract, the elements of equitable conversion were satisfied and barred the application of *lis pendens*.¹⁰⁹

B. *Actual Notice*

Broadwater’s interest may have been barred if he had actual or constructive notice of DeShields’s constructive trust suit prior to entering into the contract.¹¹⁰ “Because *lis pendens* provides constructive

103. *See id.*

104. *See id.* at 440, 659 A.2d at 309. DeShields argued that because legal title passed when Broadwater came into possession, Broadwater did not purchase the property until the July 12, 1989 settlement date, three and one-half months after suit was filed. *See id.*

105. *Id.* at 440, 659 A.2d at 308-09.

106. *See id.* at 442, 659 A.2d at 309. The court stated that the majority of jurisdictions “hold . . . that *lis pendens* filed after the execution of the sales contract does not affect the interest of the contract purchaser.” *Id.* (citations omitted).

107. *See id.* at 438-39, 659 A.2d at 308-09. DeShields did not dispute that the contract was specifically enforceable at the time the contract was executed. *See id.*

108. *See id.* at 440, 659 A.2d at 309. Broadwater contracted to purchase the property for \$135,000. *See id.* at 429, 659 A.2d at 303. The purchase was contingent upon a title search to confirm the Sriuthais’ fee simple title, a survey of the property, and to confirm a down payment of \$10,000 into an escrow account. *See id.* Broadwater’s attorney had some difficulty acquiring an accurate survey of the property which delayed closing until July 12, 1989. *See id.* at 429, 440, 659 A.2d at 303, 309.

109. *See id.* at 439-42, 659 A.2d at 308-09.

110. *See id.* at 445, 659 A.2d at 311.

notice of the equity claimed by the plaintiff, the transferee's actual notice of that equitable claim prevents that transferee from being a purchaser in good faith."¹¹¹ The trial court found that Broadwater entered into an executory contract almost two months before the constructive trust suit was filed against the Sriuthais.¹¹² Therefore, Broadwater did not have constructive notice.¹¹³ Additionally, the trial court found that when Broadwater entered into the contract of sale he did not have actual notice that DeShields contemplated suing the Sriuthais or that DeShields claimed any interest in the property.¹¹⁴ Several noted factors support this finding.

First, DeShields showed Broadwater a copy of the settlement agreement requiring DeShields to pay the Sriuthais rent for the proceeding five years, recognizing the Sriuthais as landlords of the property.¹¹⁵ Second, the court found that the Sriuthais informed Broadwater that DeShields did not want to purchase the property.¹¹⁶ In addition, Broadwater had several conversations with DeShields prior to settlement on the property, during which DeShields gave Broadwater no indication that she claimed any interest in the property.¹¹⁷ Thus, the court held that Broadwater did not have actual notice and was a bona fide purchaser for value.¹¹⁸

C. *Purchaser Made a Party to the Suit*

Conversely, the court recognized that DeShields had notice of Broadwater's claim to the property, and that DeShields deliberately excluded him as a party by opposing Broadwater's motion to inter-

111. *Id.* at 436, 659 A.2d at 306. A purchaser with actual notice of another person's equitable interest is a *mala fide* purchaser. *See id.* (citing *Newport Terminals, Inc. v. Sunset Terminals, Inc.*, 566 P.2d 1181, 1185 (Or. 1977)).

112. *See id.* at 439, 659 A.2d at 308.

113. *See id.*

114. *See id.* at 431, 659 A.2d at 304. The trial court concluded that neither Broadwater or any agent of Broadwater had any knowledge of the suit prior to July 12, 1989. *See id.* at 432, 659 A.2d at 304.

115. *See id.* at 431-32, 659 A.2d at 304.

116. *See id.* at 432, 659 A.2d at 304.

117. *See id.* Broadwater and DeShields had several conversations. The first was on January 30, 1989, when Broadwater informed DeShields that he had purchased the property, and the second was within the following two weeks. *See id.* DeShields did not claim any interest in the property in either of the conversations. *See id.* DeShields apparently recognized Broadwater as the new owner, as is evident by her statement to Broadwater: "You'll be my landlord and we'll get along." *Id.*

118. *See id.*

vene.¹¹⁹ If, however, DeShields wanted Broadwater to be bound by the court's judgment, she needed to join Broadwater as a party.¹²⁰ DeShields could not rely on *lis pendens*¹²¹ because when property is transferred prior to the initiation of the action, *lis pendens* is inapplicable and the rule that the decree of the court binds only those parties before it applies.¹²²

D. Collateral Estoppel and Law of the Case

DeShields's final contention on appeal was that *lis pendens* was applicable against Broadwater because the court had denied the motion to intervene in the case between Jack's and the Sriuthais.¹²³ DeShields reasoned that the court denied Broadwater's motion to intervene because *lis pendens* was applicable.¹²⁴ On appeal, the court rejected this argument because there was no basis for the denial of the motion to intervene in the record—the denial could have been based on the motion's timeliness.¹²⁵

IV. ANALYSIS

A. The Only Equitable Holding

Equitable conversion is founded upon the policies of fairness

119. *See id.* at 447, 659 A.2d at 312. Broadwater moved to intervene, claiming that he had an interest in the subject matter of the constructive trust suit between DeShields and the Sriuthais and that his interest was not being adequately represented. *See id.* DeShields opposed the motion to intervene, despite her knowledge that Broadwater claimed an interest in the property prior to the initiation of the suit. *See id.* DeShields argued that Broadwater was not a necessary party because her action involved *lis pendens*. *See id.*

120. *See id.*

121. *See id.* The court stated that a person whose interest exists at the commencement of the suit will not be bound by the proceedings unless he is made a party. *See id.* at 444, 659 A.2d at 311.

122. *See id.* at 436, 659 A.2d at 306. The court stated that joining a third-party purchaser as a party to the suit affecting title to that property is simply a recognition that a plaintiff does not rely on *lis pendens* for the suit. *See id.* at 445, 659 A.2d at 311.

123. *See id.* at 447, 659 A.2d at 312. Although the *DeShields* court held *lis pendens* inapplicable due to equitable conversion, the opinion did not hold that *lis pendens* was inapplicable to a suit involving a constructive trust. *See id.* However, other jurisdictions have stated that *lis pendens* is not proper in a suit praying for constructive trust on real property. *See, e.g., Katz v. Banning*, 617 N.E.2d 729, 733 (Ohio Ct. App. 1992).

124. *See DeShields*, 338 Md. at 447, 659 A.2d at 312.

125. *See id.*

and enforcing contracts that are binding upon both parties.¹²⁶ Neither policy is deemed more important than the other. A court will enforce an executory contract by decreeing specific performance.¹²⁷ It would not be equitable to allow a vendor to avoid a contract of sale with a bona fide purchaser when the vendor loses a suit involving *lis pendens*, when the same contract would be enforceable against the purchaser if the vendor prevailed in the suit in an action for specific performance. Both the purchaser and the party filing the suit have important interests to protect. Therefore, the maxim of "first in time will prevail" is the only equitable solution.

B. Practical Considerations

Practicing lawyers need to be aware of which parties they must join when a property interest has been acquired prior to the filing of a lawsuit.¹²⁸ Identifying interested parties may be accomplished by asking a party who is in possession of the property before the suit is filed or by checking land records. However, it may be somewhat more difficult if a party who has acquired an interest is not yet in possession or if the contract of sale is not recorded. The defendant in a suit affecting title must be asked whether any interest has been sold or conveyed. If so, the party that has acquired the interest must be made a party so that they may be bound by the judgment.¹²⁹ Once a party, the court must decide whether the plaintiff's interest is superior to that of the third party purchaser. To convince a court of this superior right, a plaintiff might argue that the contract is no longer enforceable under a statutory provision.¹³⁰

126. See *supra* notes 35-46 and accompanying text.

127. See *supra* note 38.

128. See *supra* part II(C).

129. See *supra* part II(C).

130. See, e.g., MD. CODE ANN., REAL PROP. § 10-401 (1996). There is a limitation on the enforcement of recorded land contracts in Maryland.

When the buyer is not in possession of the property, no recorded contract for the sale of the property is enforceable or constitutes an encumbrance of the title, as against persons other than the original parties, unless within five years after the date set out in the recorded contract for the delivery of the deed, an action or proceeding is commenced to enforce the contract. If no date for the delivery of the deed is designated in the recorded contract, any action or proceeding shall be commenced within five years after the date when, according to the terms of the recorded contract, the final payment or installment of the purchase price was required to be paid.

Id.

Additionally, because cases pending in United States District Court can have *lis pendens* effect in Maryland without filing in local circuit courts the party should search federal court dockets.¹³¹ Thus, a party performing a title search must check both state and federal dockets.¹³²

A party that has acquired an interest which is subject to suit involving *lis pendens* may have both a substantive and a procedural argument. This party may assert that the interest was obtained before the action was filed.¹³³ This could be as simple as arguing that an executory contract of sale, which is valid and binding, was entered into prior to the date the suit was commenced.¹³⁴ However, depending on the particular state's requirements, a party that has acquired an interest subsequent to a suit may still argue that the suit was not filed according to the state's statutory requirements and is therefore ineffective.¹³⁵ The attorney must be aware, however, that his client's actual notice of another's intention to initiate an action involving title to the property will defeat this argument.¹³⁶

C. Maryland's General Assembly Should Codify *Lis Pendens*

The Maryland legislature should follow the trend established in forty-six states and enact a *lis pendens* statute.¹³⁷ The statute should be written to abrogate some of the harsh effects and inadequacies of *lis pendens* under the common-law doctrine by requiring that the action be filed with the land records.¹³⁸ Additionally, a statutory provision requiring a prior hearing or other safeguards, such as a bond requirement, could protect a property interest from being

131. See *Permanent Fin. v. Taro*, 71 Md. App. 489, 494, 526 A.2d 611, 613 (1987) (stating that a suit pending in a federal court would seem to affect a purchaser of land in the same district), *cert. granted*, 311 Md. 193, 533 A.2d 670 (1987). Some states, such as New York, require an action in federal court to comply with requirements of state law to have *lis pendens* effect. See *Cayuga Indian Nation v. Fox*, 544 F. Supp. 542 (D.N.Y. 1982).

132. See J. PAUL RIEGER, JR., *EXAMINING TITLES TO REAL ESTATE IN MARYLAND* 7 (1995). A title abstractor will need to search land records, register of wills records, State Department of Taxation records, local court records, federal district court and bankruptcy records and the County Treasurer's/Director of Finance/local "town" tax offices and their records. See *id.*

133. See *DeShields v. Broadwater*, 338 Md. 422, 442, 659 A.2d 300, 309 (1995).

134. See *supra* notes 51-55 and accompanying text.

135. See *generally supra* note 13.

136. See *supra* notes 60-62 and accompanying text.

137. See *supra* note 13.

138. See *supra* notes 31-34 and accompanying text.

clouded.¹³⁹

1. Requirement to File an Action in the Land Records

Lis pendens can have harsh effects if a third-party purchaser acting in good faith purchases property *pendente lite* without actual notice.¹⁴⁰ This problem is compounded in Maryland because *lis pendens* is effective once the suit has been filed.¹⁴¹ The purchaser may obtain constructive notice only by checking the court's docket to find out if a suit has been filed involving the title to property they wish to purchase. Checking court dockets when purchasing property is common. However, the court docket may not provide the relevant information required to determine the effect that *lis pendens* has over the title to the property.¹⁴² The legislature should require that the person filing suit also record the suit with the appropriate land records office. In addition, all relevant information concerning the extent of the *lis pendens* over the property should be filed.¹⁴³ These steps will make it more likely that a purchaser will discover the *lis pendens* and its extent before purchasing.¹⁴⁴ This is a minimal inconvenience to the party wishing to file the action as compared to the harsh effects a purchaser *pendente lite*, without actual notice or with inadequate notice, may encounter.¹⁴⁵

2. Due Process Requirement of Hearing

Although the doctrine of *lis pendens* is not an actual lien on the property, it does cloud the title that prevents the effective disposition of the property.¹⁴⁶ A purchaser will be deterred from buying a

139. See *supra* note 33.

140. See *supra* notes 31-34 and accompanying text.

141. See *Applegarth v. Russell*, 25 Md. 317, 327-28 (1866); MD. RULE 12-102(a). When the property is located in a county other than where the action is pending, a certified copy of the pleading must be filed in the county where the property is located. See MD. RULE 12-102(b).

142. See *supra* note 2 and accompanying text.

143. This should be a requirement because, although *lis pendens* is not an actual lien, its effects are much like a lien on the property.

144. The comments to the New York *lis pendens* statute explain that the recording requirement is necessary to protect innocent purchasers from unnecessary hardship arising from difficulty in discovering the pending lawsuit. See N.Y. CIV. PRAC. L. & R. 6501 cmt. C6501:1 (1980) (stating that the statutory *lis pendens* doctrine is derived from the philosophy of recording acts and gives priority to an innocent purchaser who records the conveyance before judgment, unless the plaintiff has filed a notice of pendency).

145. See *supra* note 32 and accompanying text.

146. See *Kukanskis v. Griffith*, 430 A.2d 21, 25 (Conn. 1980).

property interest that is subject to *lis pendens*. *Lis pendens* statutes that do not provide for a prejudgment opportunity to be heard may be unconstitutional as violative of due process.¹⁴⁷ Many statutes provide safeguards and opportunities to be heard when *lis pendens* has been invoked.¹⁴⁸ Maryland has a rule that protects the defendant's interest in such situations, which probably provides sufficient due process protection.¹⁴⁹ However, a statute that provides for a hearing and other possible safeguards, such as bond requirements, may serve to better protect property from being clouded.

V. CONCLUSION

The doctrine of *lis pendens* varies from state to state,¹⁵⁰ and is necessary for the administration of justice.¹⁵¹ Unfortunately, the doctrine has been responsible for harsh results when notice of pending litigation is not discovered by an innocent purchaser or when a

147. See Levy, *supra* note 21, at 1076.

Error is most likely when there is no opportunity for a prefiling or postfiling hearing at which the property owner can challenge the validity of the *lis pendens*, when few or no statutory grounds for cancellation exist, and when there is no bond requirement available to protect against damage to the property owner's interests.

Id.

148. See, e.g., COLO. R. CIV. P. 105(f)(2) (1996). Colorado's civil procedure rule provides:

Any interested person may petition the court in the action identified in the notice of *lis pendens* for a determination that a judgment on the issues raised by the pleadings in the pending action will not affect all, or a designated part, of the real property described in the notice of *lis pendens*, or a specifically described interest therein. After a hearing on such petition, the court shall make findings of fact and enter an order setting forth the description of the property as contained in the recorded notice of *lis pendens* and the description of the portion thereof or the interest therein, if any, the title to which will not be affected by judgment on the issues then pending in the action.

Id. For an extensive discussion on the due process requirement for *lis pendens* statutes see generally Levy, *supra* note 21.

149. See MD. RULE 12-102(c)(1). The rule states: "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." *Id.* This allows the defendant who is being sued for an interest in real property to contest the *lis pendens*, prelitigation, and avoid a cloud on the title to the property.

150. See *supra* note 13.

151. See *supra* note 20 and accompanying text.

defendant's title to property is clouded unnecessarily.¹⁵² Purchasers of real property should be protected to the fullest extent possible while still preserving the underlying purpose of the *lis pendens* doctrine. The doctrine's purpose is in no way affected by a statute requiring the notice to be located in the land records or giving a defendant a prejudgment opportunity to contest the *lis pendens*. Over time, the doctrine has evolved in some states, serving its purpose in a more efficient and equitable manner.¹⁵³ Maryland, like other states that continue to rely on the common law or that do not adequately protect an innocent purchaser or defendant, should consider codifying the doctrine in order to abrogate some of its harsh effects.

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152. See *supra* notes 31-34 and accompanying text.

153. See *supra* part II.