

THE EVOLVING LAW OF ATTORNEYS' LIENS

Attorneys have a statutory right to assert liens securing compensation for their legal services. GL c. 221, Sec. 50.

“Attorneys’ liens are devices, first created by the common law, which help attorneys deal with the oft-encountered reluctance of certain clients to pay for legal fees at the conclusion of a matter.” Boswell v. Zephyr Lines, 414 Mass. 241 (1993). As Judge Cardozo said, the lien protects attorneys against the “knavery of their clients, by disabling the clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained.” Id. It’s a more effective means of securing payment than filing an action for breach of contract or quantum meruit.

The SJC has recognized an important public policy aspect to the attorneys’ lien, since it services an important societal goal of improving access to legal services by helping lawyers get paid for their work. Since it most often arises in the context of plaintiff’s litigation, it is consistent with the concept of a contingent fee of providing for access to legal services for clients who could otherwise not afford them. Ropes & Gray v. Jalbert, 454 Mass. 407 (2009).

In Massachusetts, the statute originally was passed as long ago as 1810. In its current version, it provides as follows:

From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client’s cause of action, counterclaim or claim, upon the judgment, decree or other order in his client’s favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may

determine and enforce the lien; provided, that the provisions of this sentence shall not apply to any case where the method of the determination of attorneys' fees is otherwise expressly provided by statute.

A charging lien is an equitable right to have costs and fees due to the attorney paid to him in the judgment or recovery in that particular suit. Northeastern Avionics, Inc. v. City of Westfield, 63 Mass. App. Ct. 509 (2005). The Supreme Judicial Court has held that a lien under section 50 is analogous to a bill to reach and apply under chapter 214. First, there is a legal aspect to the proceeding: the establishment of an indebtedness from the defendant to the plaintiff. Second, there is an equity aspect: the process of collecting the debt, if established, out of property rights which cannot be reached on an execution. The petitioning lawyer is entitled to a jury trial on the first aspect, i.e., the establishment of the debt.

The type of lien established by the statute is a charging lien, which binds the judgment or money decree for payment of expenses incurred and for services rendered by an attorney with respect to the particular action or suit. Reder v. Torphy, 357 Mass. 153 (1970). This is to be distinguished from a possessory or retaining lien on the client's property that comes into the lawyer's possession during the case. Craft v. Kane, 51 Mass. App. Ct. 648, 651 (2001).

The lawyer must show five things: an action was commenced; the attorney appeared for the client in the action; a court entered a judgment, decree or order in that action; the judgment, decree or order was favorable to the lawyer's client; and proceeds were derived from the judgment, decree or order. Northeastern Avionics v. City of Westfield, 63 Mass. App. Ct. 509 (2005).

If there is no decree or judgment in the client's favor, there is no lien. Torphy. Thus, in Torphy, the lawyer sought a lien on his client's stock certificates and bank books, which had been placed in escrow pending a divorce case. The lawyer was not entitled to a possessory lien

on the items. In rejecting the lawyer's request to enforce the lien, the court noted that there had been no judgment in the client's favor, so there was nothing to which the statutory lien could attach. Torphy v. Reder, 357 Mass. at 156.

However, a judgment includes a stipulation of dismissal. Craft v. Kane, 51 Mass. App. Ct. at 652. Thus, a lien may attach to a stipulation of dismissal filed pursuant to an agreement to settle a claim in return for money. Although the stipulation itself is not a proceeds-producing order, when it is filed, the money is "proceeds" to which the lien applies. In Craft v. Kane, the court affirmed a lien on proceeds from a fire insurance settlement that had been paid into escrow and held in constructive trust for the lawyer's former client. The lien is unaffected by the subsequent dismissal of the lawsuit. Craft v. Kane, 51 Mass. App. Ct. at 651-652. This is obvious, since if the dismissal wiped out the lien, the lawyer would lose most of the protection intended by the statute. The client and the defendant cannot nullify the lien by the expedience of dismissing the suit.

The lien also attaches to an order, including a pre-judgment order against a defendant to pay money into an escrow for the benefit of a plaintiff. In Cohen v. Lindsey, 38 Mass. App. Ct. 1 (1995), a tenant was required to pay \$10,000 per month as rent into court until a litigation was resolved. The lawyer filed a lien, which was disputed by the FDIC, which argued that the lien only was enforceable after a final judgment. Rejecting the argument, the Appeals Court held that the statute applied to interim orders. The order that the tenant/defendant pay money into court created a fund as potential security for the lawyer's client pending entry of final judgment in the case. The effect was the same as an equitable attachment to reach and apply. The order required payment to the client. This was different from a straightforward attachment. The court noted in *dicta* that an attachment might not give rise to an attorney's lien. Id., 38 Mass. App. Ct. at 6.

The court further held that the attorney's lien had priority in time over a claim by the FDIC on a mortgage. The lien takes effect on the authorized commencement of the action and the filing of the lien. Id. at 7. The court remanded for determination of the appropriate amount of a reasonable fee.

A charging lien survives the withdrawal of counsel, even if the attorney is not handling the case when the client obtains any money, but only if the withdrawal was "not wholly voluntary." Phelps Steel, Inc. v. Von Deak, 24 Mass. App. Ct. 592 (1987). "Not voluntary" means a breakdown in the relationship, illness of the lawyer, or development of an unforeseen or not reasonably foreseeable conflict of interest. It will be difficult to assert a lien in those circumstances where the lawyer voluntarily withdraws from the case. And, if you withdraw (or even if you get fired) and the client loses at trial, there is no right to recover under a quantum meruit theory for the work you did. Liss v. Studeny, 450 Mass. 473 (2008).

There has been disagreement among courts in different states as to whether only one attorney may assert a lien. For example, in New York, whose rules allow only one lawyer to appear "of record," only that attorney has the right to assert a lien. Even if another lawyer contributes substantially to the case, only one lawyer has the right to assert a lien.

The rule is different in Massachusetts. Boswell v. Zephyr Lines, 414 Mass. 341 (1993). In the case, a lawyer who worked with or for Dane Shulman asserted a right to the fee. He filed a lien under Section 50, and Shulman opposed it. They submitted competing affidavits. The lawyer, Emilio DiLoreto, had an oral agreement with Shulman to work on Shulman cases while maintaining his own practice. DiLoreto worked on the case, but Shulman himself signed the complaint. Either Shulman or DiLoreto signed subsequent pleadings and motions. But it was always Shulman's firm name and address that appeared on the pleadings. The contingent fee

agreement was between the client and Shulman. DiLoreto said that he did most of the pretrial work and conducted most of the settlement negotiations. However, the case settled after DiLoreto had severed his relationship with the firm.

The Superior Court ruled that the lawyer was entitled to half the fee. The SJC reversed but in *dicta* noted that lawyers other than those who sign a Notice of Appearance are entitled to enforce the lien. The court held that this rule made Section 50 consistent with MRCP 11. Section 50 provides that a lawyer who “appears” for a client has the right to file a lien. Rule 11 provides that a lawyer may appear by filing a notice of appearance or by signed pleadings and motions on behalf of a client. Thus, an associate who signs motions or pleadings, but who does not actually sign a notice of appearance, has the right to assert an attorneys’ lien. The statute is not limited to “attorneys of record.”

However, the analysis does not stop there. A mere appearance without a right to collect the fee from the client directly does not support a lien against the proceeds of the client’s recovery. The attorney must establish a substantive contractual or quantum meruit basis to recover fees from the client as a prerequisite to filing a lien. In Boswell, the court held that an associate counsel has no underlying right to recover fees from the client unless the client authorized or ratified the employment of the associated lawyer. Boswell, 414 Mass. at. 250. This need not be express, but the circumstances must be such as to raise an inference that the client expected that the associated lawyer would look to the client for payment. In Boswell, DiLoreto had not signed the contingent fee agreement with the client, so he had no right of recovery against her. He could not sue her on the contract. He had the right to sue Shulman in a separate action under their oral agreement, but he could not assert a lien against the settlement proceeds.

The lien in and of itself does not entitle the lawyer to a specific fee, nor does it limit the court in its determination of evaluating the reasonableness of the fee. Cohen v. Lindsay, 38 Mass. App. Ct. 1, 6 (1995).

The lawyer bears the burden of proving a contract or a right to recover in quantum meruit. Bistany v. PNC Bank, 585 F.Supp.2d 179 (D. Mass. 2008). The statute does not confer the right to a specific contract amount. Id. The lawyer is entitled only to a reasonable fee as determined by the court based on factors such as the lawyer's ability and reputation, the time spend working on the case, and the prices other attorneys in the area usually charge for similar work.

There is no lien if the plaintiff makes no recovery. Curly Customs v. Pioneer Financial, 62 Mass. App. Ct. 92 (2004). In that case, the first of two lawyers for a plaintiff filed a notice of an attorneys' lien. He also filed a verified motion to determine the amount of, and enforce, the lien and a request for injunctive relief. He asked for lien in a specific amount and an injunction against the defendant, Fleet Bank, from paying anything that might ultimately come due to the plaintiff as a result of the underlying litigation.

The problem was that the client/plaintiff lost at trial. In the meantime, the client never answered the notice of attorney's lien, and the lawyer moved to default him. Although the judge denied the motion for a lien, he allowed a default judgment to enter against the client, since the client had failed to answer. The Appeals Court reversed. It re-emphasized the general rule that the attorneys' lien is limited to the "proceeds derived" from the client's cause of action. "Thus, no lien exists in general with respect to amounts that may be owed by the client pursuant to the contract with the attorney. Rather, the lien exists only on proceeds obtained by the client in the

underlying proceeding; consequently, if there are no such proceeds, there is no lien.” Curly Customs, Inc. 62 Mass. App. Ct. at 97.

Going back to the original point, the motion to determine the lien cannot be decided until there are actual proceeds. As the court in Curly Customs held, it’s premature to rule on the lien until the underlying case had been tried and a party had prevailed. The request is one to “determine” the lien and is normally made by motion in the underlying case. Also, there is no need for a court ruling that the lien existed. “The lien is created by operation of statute.” Curly Customs, 62 Mass. App. Ct. at fn. 7. The problem with the procedure utilized by the lawyer in that case was that he conflated a complaint with a notice of lien and tried to use the default procedures of Rule 55 to “default” his client and obtain the right to his fees.

An interesting issue, which is illustrative of the general issues with attorneys’ liens, concerns whether you can get a lien on a patent. That was the issue in Ropes & Gray v. Jalbert, which also dealt with the question whether a lawyer could assert a lien in any proceeding, not just a lawsuit. Ropes & Gray had a complicated procedural history, most of which involves bankruptcy procedure. In simple terms, R&G represented a company in filing patent applications with the US Patent and Trademark Office. It claimed to be owed over \$108,000 for this work. When the client filed for bankruptcy, R&G filed an attorneys’ lien under Section 50 on certain patents and patent prosecution actions and cash proceeds of any prepetition sale or other patents. The SJC affirmed the lawyers’ right to assert an attorneys’ lien. First, it held that filing a patent application for a client constitutes an appearance under the language of the statute: “from the authorized commencement of an action, counterclaim or other proceeding in any court” and from “the appearance in any proceeding before any state or federal department, board or commission.” Filing an action at the PTO constitutes an appearance.

The court in Ropes & Gray also held that an attorneys' lien is not confined to traditional litigation in court. This holding is based on amendments to Section 50 in 1945 that expanded the definition of a proceeding. In addition, it is not necessary for there to be a "judgment" in the traditional sense. The 1945 amendments expanded Section 50 to include three separate bases for the lien: "(1) upon a client's cause of action, counterclaim or claim; (2) upon the judgment, decree or other order in the client's favor entered or made in such proceeding; and (3) upon the proceeds derived therefrom." Thus, it's not only a "judgment" to which the proceeds attach. In the context of patent prosecution work, the patent application is the client's "claim." It's a request for recognition of a property right. Thus, the lawyer may assert a lien on the patent application when it is filed with the USPTO and the lien necessarily remains attached to the subsequently issued patent.

In opposing the lawyers' lien, the liquidating supervisor of the client argued that liens would then be filed against all sorts of property rights, such as copyrights, taxi medallions, nursing home licenses, zoning variances, building permits, liquor licenses, environmental permits and the like. The SJC seemed unfazed by this. It based its holding on the plain language of the statute. It deferred to the intent of the Legislature. The SJC recognized that lawyers perform valuable functions, not just in court but in administrative proceedings as well.

The SJC also held, consistent with its finding that a lawyer is entitled to a lien for reasonable fees and expenses on patents and patent applications, that the lien also attaches to the proceeds from the sale of such a property right. The lien is not limited to proceeds from a "judgment." The intent of the legislature would be frustrated if patent lawyers could not attach the proceeds from the sale of patents. The lien attaches as soon as the USPTO grants the patent. Unlike a court, there is no judgment or decree that compels someone to pay money to the client.

However, much like a perfected security interest in collateral, the attorneys' lien attaches at the time of the filing with the Patent Office. At that point, the lien is inchoate. It matures when proceeds are derived from the sale of the patent or patent application to which the lien is attached. Ropes & Gray, fn. 11.

Similarly, the lawyer has the right to attach the proceeds of a settlement where a client receives the settlement funds from a cause of action. Ropes & Gray, fn. 12; Kourouvacilis v. American Fed'n of State, County and Mun. Employees, 65 Mass. App. Ct. 521, fn. 1 (2006).

Interesting issues arise when the client files for bankruptcy protection during the case. As I have already noted, an inchoate lien arises when the attorney files the action. The lien becomes choate when a judgment, decree or other order is entered in the client's favor. Even if the judgment enters after the filing date, the lawyer may enforce the lien. The issue arose in In re Albert, 206 B.R. 636 (Bkrcty. D. Mass. 1997). There, the bankruptcy trustee argued that, because the judgment in state court did not enter until after the filing date, the lien was not "perfected" and thus was subject to the trustee's avoidance powers under the Bankruptcy Code. Rejecting this argument, Judge Boroff held that, where state law provides that the effective date of an attorney's lien relates back to the commencement of the attorney's services, the bankruptcy trustee cannot avoid the transaction. Since Massachusetts law provides that the lien exists from the commencement of the action, the entry of judgment relates back to the original date. Albert 206 B.R. at 640.

Judge Boroff also addressed the related question about the extent of the lien. First, he held that the lien only covers work for pre-petition services. Compensation for post-petition services is governed by bankruptcy law. As for the pre-petition work, the court has the right to review the reasonableness of pre-petition fees that are the subject of the attorney's lien. Albert,

206 B.R.at 641. This is true even in a straight contingent fee situation. The court has the right, under both bankruptcy law and Massachusetts law, to review the reasonableness of the fee and the contingent fee agreement. If the lawyer is not hired post-petition by the trustee, he is, in effect, discharged. Thus, his compensation would be on a quantum meruit basis under the contingent fee arrangement. Id.

The factors here are the same as in any case where fees are at issue: time spent; skill and experience of the lawyer; the complexity of the case; the caliber of the services; the success achieved; the demand for the attorney's services by others; prices usually charged for similar services by other attorneys in the same area and the value of the property affected by the controversy. Id., *citing Phelps Steel, Inc. v. Von Deak*, 24 Mass. App. Ct. 592, 595 (1987); *see also Berman v. Linnane*, 434 Mass. 301, 302-303 (2001). As with most such cases, courts will rely on the lodestar method.

It appears clear that the statute protects only a lawyer who represents a party with a claim, not a defendant. The argument is indirectly addressed in In re Leading Edge Products, Inc., 121 B.R. 128 (Bkrcty. D. Mass. 1990). There, the law firm represented a debtor in bankruptcy and sought payment of a fee of \$158,000 for representing the company in a state court case. The state court case involved claims against the client by Mitsubishi. The lawyers alleged that the settlement of the case allowed the client to avoid paying Mitsubishi \$5.4 million. The bankruptcy judge rejected the argument. He held that the plain language of the statute limited the lien to actual receipt of cash or cash equivalents. "It seems likely to the Court that the drafters of Section 50 contemplated the existence of a fund, either made up of cash or capable of being reduced to cash, generated from a judgment, decree or other order, including an order approving a settlement. The benefit derived from the elimination of Mitsubishi's claim did not

bring anything into the estate per se – it merely reduced the amount of money that had to be paid out of the Debtor’s estate. The court finds that this is not the equivalent to ‘proceeds.’” Leading Edge, 121 B.R. at 131.