

Attorney Liens

Introduction

Quite properly, attorneys generally want to get paid for their services, even from clients who do not have the means or the will to pay promptly. One way to be assured of payment is to obtain a security interest in a client's right to recover money in a lawsuit by means of a contract in which the client grants to the attorney a lien which applies to the client's interest in a settlement or judgment in the action for which the lawyer is hired. Hourly fee agreements and contingent fee agreements may be treated differently. In insurance coverage litigation, a policyholder's coverage attorney's lien usually has priority over other liens, including a plaintiff's judgment creditor's lien.

Statutory Authority

"A lien is a charge imposed upon specific property by which it is made security for the performance of an act"¹ "as a security for the performance of all the obligations [of] the owner of the property (a general lien)"² or "only as security for the performance of a particular act or obligation (a special lien)"³ "A lien is created: 1. By contract of the parties; or, 2. By operation of law."⁴ "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In that case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest."⁵ "A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence."⁶

Contract Language

"The parties' contract not only uses the term 'Lien,' but indicates [the attorney] may look to the judgment or settlement as security for its fees and expenses. Consequently, the retainer agreement, if otherwise valid, created a lien."⁷ "That the agreement did not use the term 'lien' did not prevent the creation of a lien. [T]he parties are not required to use the term lien in their contract in order to create the lien. The security provides that [A] 'grants to [B] a security interest in any and all of the collateral,' defined to include [A's] interest in [a lawsuit] to secure payment. Such language describes a lien as defined by Civil Code section 2874."⁸

¹ Civ. Code § 2872 (ellipsis omitted).

² Civ. Code § 2874 (ellipsis omitted).

³ Civ. Code § 2875 (ellipsis omitted).

⁴ Civ. Code § 2881.

⁵ Civ. Code § 2883(a).

⁶ Civ. Code § 2884.

⁷ *Saltarelli & Steonovich v. Douglas* (1995) 40 Cal.App.4th 1, 6.

⁸ *Bluxome Street Asso. v. Fireman's Fund Ins. Co.* (1988) 206 Cal.App.3d 1149, 1153 (*Bluxome*) (ellipses omitted).

Liens May Apply to Judgments

“A lien in favor upon the proceeds of a prospective judgment in favor of [a plaintiff] has been recognized in numerous cases and neither logic nor authority justifies the conclusion that such liens do not apply to judgments.”⁹

Contractual Attorney Lien

1. Equitable Principles

Lien may be created by contract or by operation of law.¹⁰ “In this state an attorney has neither a retaining nor charging lien for compensation on a judgment secured by his services in the absence of a contract containing an agreement for a lien. Such a lien is, in reality, an equitable assignment for security. The equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and equity and to prevent unfair results.”¹¹

2. Security Interest

A fee agreement creating an attorney’s lien on the client’s recovery in the action creates a security interest in a recovery in favor of the attorney for payment of fees and costs. A contractual lien may be given for past or future legal services.¹² “In whatever terms one characterizes an attorney’s lien under a contingent fee contract, it is no more than a security interest in the proceeds of the litigation.”¹³ It does not operate to transfer a part of the cause of action to the attorney, but simply gives the attorney a lien upon the client’s recovery.¹⁴

3. Hourly Fee Agreements

Hourly fee agreements may be treated differently from contingent fee agreements both in assessing the fairness of a fee and in granting a lien priority. “A member shall not knowingly acquire [a] security interest adverse to a client, unless its terms are fair and reasonable fully disclosed and [t]he client is advised [to] seek the advice of an independent lawyer and [t]he client thereafter consents in writing.”¹⁵

4. Contingent Fee Agreements

A client may grant a lien to an attorney who has a contingent fee agreement without seeking the advice of an independent lawyer.¹⁶ “The real question in each case is whether or not the parties have contracted that the lawyer is to look to the judgment he may secure as security for

⁹ *Bluxome, supra*, 206 Cal.App.3d at 1155 (ellipsis omitted).

¹⁰ “A lien is created: 1. By contract of the parties; or, 2. By operation of law.” (Civ. Code § 2881.)

¹¹ *Wagner v. Sariotti* (1943) 56 Cal.App.2d 693, 697-98 (ellipses omitted).

¹² *Street Assocs. v. Fireman’s Fund Ins. Co.* (1988) 206 Cal.App.3d 1149, 1153-1154.

¹³ *Isrin v. Superior Court* (1965) 63 Cal.2d 153, 158.

¹⁴ *Benci-Woodward v. Comm. of Internal Revenue* (9th Cir. 2000) 219 F.3d 941, 943; *Siciliano v. Fireman’s Fund Ins. Co.* (1976) 62 Cal.App.3d 745, 752.

¹⁵ See, *Fletcher v. Davis* (2004) 33 Cal.4th 61, 69; Cal. State Bar Form.Opns. 1981-62.

¹⁶ *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 49; Cal. State Bar Form.Opn. 2006-170.

his fee. If so, an equitable lien is created.”¹⁷ One case refused to honor an attorney’s lien because it was “for attorney fees incurred pursuant to an hourly fee contract, not a contingency fee agreement. The public policy considerations set forth in [another case] therefore do not apply to [this hourly] contractual lien.”¹⁸

5. Notice of Lien Not Required

An attorney need not file a notice of lien in an action in which the attorney is then representing the client to establish the lien or to maintain its priority over later liens.¹⁹ The “preferential treatment” given to attorney liens is based on public policy favoring legal representation.²⁰

6. Limited Scope

Attorneys may secure payment of their fees and costs in litigation by the agreement of the client. However, the resulting contractual security interest of the lawyer applies only to the client’s interest in a settlement or judgment in the action for which the lawyer was hired. However, unless the terms of the contract so provide, the attorney’s lien provides no security for the lawyer in any other matter in which the client may recover.

Attorney Discharged

Even if the attorney has been discharged, the lien is entitled to priority over subsequent liens on the same judgment even if the subsequent creditor had no notice of the lien.²¹ Where an attorney with a contractual lien on the client’s recovery is discharged or withdraws prematurely from the action, the attorney must file an independent action against the former client to establish the existence of the lien, to determine the amount of the lien, and to enforce it.²²

Procedure

The attorney can file a declaratory relief action against the competing lien holder to determine the lien’s validity, amount, and priority. Filing suit against the client is not required.²³ Upon proof of the existence of an attorney’s contractual lien on the judgment, the court may stay enforcement of a competing lien until there is a judicial determination of lien priority in an independent action. Indeed, it may be ‘an abuse of discretion for the trial court to direct payment of the judgment proceeds without giving (the attorney) a fair opportunity to first litigate the validity of

¹⁷ *Gelfand, Greer, Popko & Miller v. Shivener* (1973) 30 Cal.App.3d 364, 371; see also *Cetenko v. United Calif. Bank* (1982) 30 Cal.3d 528, 531 (*Cetenko*).

¹⁸ *Pou Chen Corp. v. MTS Products* (2010) 183 Cal.App.4th 188, 194 (*Pou Chen*).

¹⁹ *Cetenko, supra*, 30 Cal.3d at 533, fn. 5 [filing notice was deemed ‘in excess of caution’ and ‘superfluous’ to determination of its priority.] *Carroll v. Interstate Brands Corp.* (2002) 99 Cal.App.4th 1168, 1172-1173 (*Carroll*).

²⁰ *Cappa v. F. & K Rock & Sand, Inc.* (1988) 203 Cal.App.3d 172, 174.

²¹ *Id.* at 176.

²² *Id.* at 1173.

²³ *Id.* at 333.

his lien claim in a separate action.’²⁴

Priority of Competing Liens

Insurance coverage litigation by a policyholder may attract many claims by competing lien holders such as the plaintiff’s liability attorney, the plaintiff’s coverage counsel, the policyholder’s coverage counsel, the plaintiff as judgment creditor, and other judgment creditors of the plaintiff or the policyholder. California law is clear that an attorney’s lien upon a recovery in a policyholder’s insurance coverage lawsuit has priority over a judgment creditor’s lien.

1. First In Time Rule

“Other things being equal, different liens upon the same property have priority according to the time of their creation.”²⁵ An attorney’s “contractual lien for fees in the [third party] litigation has priority in time over [a] judgment creditor lien, because a contractual lien for attorney’s fees, entered into before the client has succeeded in recovering any proceeds by way of litigation, is ‘first in time’ as to such potential proceeds. The liens of other creditors, such as attachment liens and judgment liens, reach only the debtor’s interest in property, and are subject to prior equities against the debtor. This rule, as it applies to judgment creditors, is reflected in [Civ. Code] section 708.410, subdivision (a), which provides that a judgment creditor may only obtain a lien against a ‘judgment debtor who is a party to a *pending* action or special proceeding.’ Until [the attorney] filed the [third party] litigation, there was no pending action, and thus there was nothing upon which [a judgment creditor] could place a lien.”²⁶

2. Judgment Creditor Lien Created Upon Filing Notice

“A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action may obtain a lien to satisfy the judgment creditor’s money judgment. To obtain a lien under this article, the judgment creditor shall file a notice of lien . . . in the pending action.”²⁷ An “attorney’s lien was created at the time of the [retainer] contract, and had priority over attachments levied on the verdict and judgment by a creditor of the client [judgment debtor]. The reason for affording the attorney’s lien priority was that it was first in time, and ‘an attachment lien reaches only the interest of the debtor in the attached property and is therefore subject to prior equities against the debtor.’”²⁸ “[A] lien for attorney’s fees and costs is almost always created before an action is filed and a judgment creditor’s lien can only be created by filing notice once the action is pending, an attorney’s lien is always first in time.”²⁹

3. Public Policy

“Public policy favors giving attorneys’ contractual liens for legal services priority over judgment creditors’ liens. It is often crucial for debtors to be able to retain legal counsel, and a debtor’s ability to retain counsel may also accrue to the benefit of the client’s creditors. Thus, a

²⁴ *Id.* at 335 (ellipsis omitted).

²⁵ Civ. Code § 2897.

²⁶ *Pangborn Plumbing Corp. v. Carruthers & Skiffington* (2002) 97 Cal.App.4th 1039, 1051 (*Pangborn*) (citations omitted).

²⁷ Code Civ. Proc. § 708.410(a)(b) (ellipses omitted).

²⁸ *Cetenko, supra*, 30 Cal.3d at 534.

²⁹ *Cappa, supra*, 203 Cal.App.3d at 175.

judgment that interferes, directly or indirectly, with a party's ability to retain counsel may be said to aggrieve that party."³⁰ "Public policy favors the conclusion we reach in this case. If an attorney's claim for a lien on the judgment based on a contract for fees earned prior to and in the action cannot prevail over the lien of a subsequent judgment creditor, persons with meritorious claims might well be deprived of legal representation because of their inability to pay legal fees or to assure that such fees will be paid out of the sum recovered in the latest lawsuit. Such a result would be detrimental not only to prospective litigants, but to their creditors as well."³¹

4. Other Liens

An attorney's lien has priority over a subsequent judgment creditor's lien,³² one case ruled that a judgment debtor's equitable right of off-set took priority over an attorney's contractual lien for fees and costs pursuant to a contingency agreement entered into after entry of the judgment.³³ An attorney's lien has priority over a federal tax lien even if the government filed notice of the tax lien before the attorney's lien was created.³⁴ An attorney's lien has priority over a medical lien. "Accordingly, as a matter of law, the amount recovered by the plaintiff in a personal injury lawsuit always goes first to satisfy the attorney lien for fees and costs before it is used to satisfy medical liens."³⁵

5. Priority of Plaintiff's Liability Lawyer

Because attorney liens are created by contract, a plaintiff who retains a liability attorney may grant a security interest in favor of the plaintiff's attorney in the plaintiff's recovery on a judgment in a liability case. However, if coverage litigation is required to compel an insurer to pay a judgment, the attorney prosecuting the coverage action may acquire an attorney's lien in the coverage contest that has priority over the the plaintiff's judgment lien and the plaintiff's attorney's contractual lien.

6. Priority of Plaintiff's Coverage Lawyer

If a plaintiff retains separate coverage counsel pursuant to a separate retainer agreement that also grants a lien, a more complex set of rights may arise. A plaintiff may grant to coverage counsel a security interest in the plaintiff's recovery in the liability suit. A lien created in favor of the plaintiff's coverage lawyer should be junior to a lien created in favor of the plaintiff's liability lawyer because of it ia first in time. However, the editor has found no reported California opinions deciding this issue. A plaintiff may also grant to coverage counsel a security interest in an insurance coverage suit filed on behalf of the plaintiff. The plaintiff may sue a defaulting insurer directly pursuant to Ins. Code § 11580 or pursuant to an assignment of rights from the policyholder/defendant. The plaintiff's coverage lawyer is likely to have priority over the plaintiff's liability lawyer even though the liability suit is "first in time" since the liability retainer

³⁰ *Pangborn, supra*, 97 Cal.App.4th at 1047 (citation omitted).

³¹ *Cetenko, supra*, 30 Cal.3d at 535-36.

³² See, *Cetenko, supra*, 30 Cal.3d at 529; *Brown v. Superior Court* (2004) 116 Cal.App.4th 320, 327-328.

³³ *Pou Chen, supra*, 183 Cal.App.4th at 193-94.

³⁴ 26 USCA § 6323(b)(8); see also *Bree v. Beall* (1981) 114 Cal.App.3d 650, 657-658.

³⁵ *Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 616-620.

agreement is not likely to apply to a separate coverage suit and the liability lawyer's lien attaches only to the plaintiff's recovery, which is likely to be junior to the lien of the plaintiff's coverage lawyer. Again, the editor has found no reported California opinions deciding this issue.

Practice Pointer

The mere existence of numerous contingent fee lawyers competing for a large share of a limited recovery is likely to produce frustration and anger for all involved. As an alternative, all end-game monetary issues may be negotiated by cooperating attorneys and clients at the earliest possible time,³⁶ including from the moment that an insurer reserves rights. Otherwise, all of the players may suffer unanticipated and frustrating dilution.³⁷

³⁶ See, *Assignable Rights Under a Liability Insurance Policy*

³⁷ See, *Dilution: Plaintiff's Monetary Curse*