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Attorney Liens in Oregon: Tool or Trap?

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Although attorney liens have existed in statutory form in Oregon since 1862, the recent economic climate has renewed focus on them as a collection tool.¹ Attorney liens come in two varieties in Oregon. The first, called a “charging lien” and created by ORS 87.445, places a lien for fees over the action or resulting judgment in a litigated matter the lawyer handled successfully for a client. The second, called a “retaining lien” and created by ORS 87.430, places a lien for fees over the client’s file and other property in the lawyer’s possession.² While the former is a potentially powerful collection tool for litigators, the latter can be a deceptively dangerous trap for lawyers. This article will survey both.

With each, it is important to note two caveats at the outset. First, the liens only apply when there is a direct attorney-client relationship between the lawyer and the client. Second, the lawyer will still need to demonstrate entitlement to and the amount of the fee claimed by either agreement with the client or *quantum meruit*.³

The Tool: Charging Liens

ORS 87.445 defines charging liens:

“An attorney has a lien upon actions, suits and proceedings after the commencement thereof, and judgments, orders and awards entered therein in the client’s favor and the proceeds thereof to the extent of fees

and compensation specially agreed upon with the client, or if there is no agreement, for the reasonable value of the services of the attorney.”

ORS 87.445 draws a distinction between liens on judgments and liens on actions settled short of a final judgment. Each has a different mechanism to perfect the lien. With both, however, the significant practical element that makes them a powerful collection tool for the prevailing party’s lawyer is that the *nonprevailing* party’s obligation is *not* extinguished until the lien is addressed. Liens on judgments are not satisfied unless, under ORS 87.475(2)-(3), the lien is paid directly or the full amount of the judgment is paid into the court by the nonprevailing party (which releases the nonprevailing party but *not* the prevailing party from the lien). See *O’Meara v. Cullick*, 200 Or App 562, 567-68, 116 P3d 236 (2005). Liens on settlements, in turn, may be enforced against *either* the prevailing lawyer’s client *or* the settling party under ORS 87.475(1)-(2) and *Potter v. Schlessor Company, Inc.*, 335 Or 209, 63 P3d 1172 (2003).

The requirements for perfecting liens on judgments and their duration vary somewhat under ORS 87.450, 87.455, and 87.460, depending on whether the judgment is for, respectively, money, personal property or real estate. See *Rockwood Water Dist. v. Steve Smith Contracting, Inc.*, 80 Or App 136, 139-140, 720 P2d 1332 (1986) (discussing the common elements and distinctions among the three). A lien notice for the former must be filed with the clerk of the court involved (within three years of entry) and lasts until the judgment itself expires under ORS Chapter 18. Lien notices under the latter two must be filed with the

county recorder (within one year for personal property and six months for real estate) and must generally be foreclosed within one year after the lien notice is filed. Failure to timely file or foreclose the lien within these periods voids the lien by operation of law under ORS 87.465. ORS 87.470 governs the content of lien notices and requires information concerning the judgment involved and the amount of fees due. Foreclosure of liens on judgments over personal and real property are governed generally by ORS Chapter 88. By contrast, foreclosure of a lien on a money judgment is neither defined nor delimited by specific statutory procedures, but rather, “are various and are apparently, in the absence of statutory direction, controlled by peculiar circumstances attending the character of the lien asserted, that is, for example, whether the amount claimed is fixed or determined, unliquidated or contingent, or whether the claim rests upon asserted reasonable value in the absence of an express agreement for compensation.” *Crawford v. Crane*, 204 Or at 67; accord *Lee v. Lee*, 5 Or App 74, 79 n.1, 482 P2d 745 (1971).

Liens on settlement proceeds are considered “charges on the action” itself. They arise with the filing of the action involved and no formal notice is required. *Potter v. Schlessner Company, Inc.*, 335 Or at 213.^{4, 5} “The lien is a charge on the action, and the parties to the action cannot extinguish or affect the attorney’s lien by any means (such as settlement) other than by satisfying the underlying claim of the attorney for the fees incurred in connection with the

action.” *Id.* at 214. No particular foreclosure mechanism is prescribed or proscribed and, as noted earlier, the lien can be enforced against a settling party who resolves a case without ensuring that the prevailing party’s attorney fees have been paid. *Id.* at 215-16.

Under ORS 87.490, charging liens generally have priority over all other liens except tax liens (and prior liens of record on real or personal property at issue). See *Valley Credit Service, Inc. v. Kelley*, 165 Or App 169, 173, 994 P2d 1229 (2000).⁶ In bankruptcy, the validity of an attorney’s lien is governed by state law. *In re Century Cleaning Services, Inc.*, 202 BR 149, 152 (D Or Bankr 1996), *rev’d on other grounds*, 195 F3d 1053 (9th Cir 1999).⁷ If a lawsuit is necessary to foreclose a charging lien, ORS 87.485 allows the prevailing party to recover reasonable attorneys fees. See *Robinowitz v. Pozzi*, 127 Or App 464, 469-70, 872 P2d 993 (1994); *but see Rockwood Water Dist. v. Steve Smith Contracting, Inc.*, 80 Or App at 140-41 (finding that an interpleader action brought by a losing party to determine competing claims to a judgment that included the prevailing party’s law firm lien was not a “foreclosure” for purposes of ORS 87.485).

The Trap: Retaining Liens

ORS 87.430 defines retaining liens:

“An attorney has a lien for compensation whether specially agreed or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien

created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim.”

On its face, ORS 87.430 appears both broad and simple. It seems broad because, unlike its charging lien cousin, it applies to both litigation and nonlitigation matters. It appears simple because, again unlike its charging lien cousin, it does not require any steps to foreclose.⁸

Beyond its face, however, ORS 87.430 creates a deceptive trap in three ways.

First, as to “papers,” Rule of Professional Conduct 1.16(d) and Oregon State Bar Formal Ethics Opinion 2005-90 (2005) require a lawyer to surrender a client’s file regardless of the lawyer’s lien rights if the client needs the materials and is not otherwise able to satisfy the lien.⁹ In other words, a financially ailing client’s need for the file “trumps” the lawyer’s retaining lien.

Second, as to “money,” RPC 1.15-1(e) and OSB Formal Ethics Opinion 2005-149 (2005) require a lawyer to keep disputed funds in the lawyer’s trust account pending resolution of the dispute. In other words, if (as is often the case) the client disputes the lawyer’s right to money held in trust for the payment of fees, the lawyer needs to keep the disputed funds in trust notwithstanding the lawyer’s retaining lien.

Third, as to “property,” RPC 1.15-1(e) and *In re Boothe*, 303 Or 643, 652-53, 740 P2d 785 (1987), require a lawyer to keep disputed property unliquidated

pending resolution of the dispute. Again, therefore, if (as is often the case) the client disputes the lawyer's right to property held in trust, the lawyer needs to hold the disputed property unliquidated notwithstanding the lawyer's retaining lien.

The lawyers' duties noted are not solely regulatory (although they also have important regulatory consequences). See *In re Starr*, 326 Or 328, 341, 952 P2d 1017 (1998) ("The existence of a lien does not excuse a lawyer from complying with ethical requirements."). In *Kidney Ass'n of Oregon v. Ferguson*, 315 Or 135, 144, 843 P2d 442 (1992), the Supreme Court recognized that the Rules of Professional Conduct reflect a lawyer's underlying fiduciary duties to the lawyer's client. Therefore, a client who claims damage from a lawyer wrongfully withholding a file (or funds or other property) would also have a basis to pursue a civil claim for breach of fiduciary duty against the lawyer (in addition to or in lieu of a bar complaint).

Summing Up

Charging liens provide litigators with a powerful collection tool because they create a remedy for the prevailing lawyer that cannot effectively be ignored by either the lawyer's client or the nonprevailing party. Retaining liens, by contrast, can create a deceptively dangerous trap for a lawyer who attempts to invoke them against a client who needs the file but cannot then satisfy the lien.

ABOUT THE AUTHOR

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¹ For a history of attorney liens in Oregon, see William J. Ohle, "Oregon Attorneys' Liens: Their Function and Ethics," 27 Willamette L Rev 891, 892-93 (1991).

² For more on the origins of this nomenclature, see *Crawford v. Crane*, 204 Or 60, 61-63, 282 P2d 348 (1955).

³ For a discussion of both caveats, see *Hahn v. Oregon Physicians' Service*, 786 F2d 1353, 1355-56 (9th Cir 1985).

⁴ This fact does not give the lawyer a direct interest in the case involved. See *In re Grimes' Estate*, 170 Or 204, 220-21, 131 P2d 448 (1943) (interpreting the predecessor to ORS 87.480).

⁵ If a lawyer has withdrawn for nonpayment, it is prudent from a practical perspective to file and serve a lien notice in any event so that the lawyer's lien rights cannot be ignored if the case later settles short of a judgment.

⁶ For the treatment of liens by offsetting judgments, see generally *Clackamas Town Center Associates v. Jandel Foods*, 98 Or App 12, 777 P2d 420 (1989), *Ketcham v. Selles*, 96 Or App 121, 772 P2d 419 (1989), and *Hartford Acc. & Indem. Co. v. Pyle*, 271 Or 97, 530 P2d 843 (1975).

⁷ The Ninth Circuit's decision on the other issues involved was abrogated by *Lamie v. United States Trustee*, 540 US 526, 124 S Ct 1023, 157 LEd2d 1024 (2004).

⁸ ORS 87.435 allows a client to substitute a surety bond or letter of credit for the disputed fees. ORS 87.440, in turn, gives the lawyer a right to petition a court to determine the adequacy of the bond or letter of credit. Under ORS 9.360, a client may seek an order compelling the lawyer to deliver to the client papers or money received in the course of handling a case. See *McClure v. Hess*, 91 Or App 281, 754 P2d 37 (1988). ORS 9.370, in turn, permits a court to determine the validity of an accompanying attorney lien within the context of a proceeding to compel the release of the lawyer's file under ORS 9.360. See *Crawford v. Crane*, 204 Or at 66.

⁹ Under the same authority, a client unable to pay but in need of a file would not be required to pay photocopy charges as a condition of receiving a file. See OSB Formal Ethics Op 2005-125 at 4 n.3 (2005).