

PROFESSIONAL LIABILITY UPDATE

November 1, 2004

Issue No. 195

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Edward F. Donohue, III

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Joseph P. McMonigle

Douglas J. Melton

Jessica B. Rudin

Steven Sharafian

Ann L. Strayer

Jennifer W. Suzuki

Jeanette Traverso

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Kevin Whittaker

Irene K. Yesowitch

ATTORNEY'S LIENS

California Law

By Jennifer A. Becker

*Brown v. Superior Court* (2004) 116 Cal.App.4<sup>th</sup> 320 (rev. den. May 19, 2004)

*The Third District holds that a contractual attorney's fee lien can take priority over a statutory judgment lien perfected later in time. A separate action must be filed to enforce an attorney's fee lien, but a court considering an application to satisfy a judgment lien should take into consideration priority attorney's fees liens.*

Vortran Corporation (Vortran) prevailed in an action against Vortran Medical Technology, Inc., (VMT action). While the VMT action was pending Cyclon Corporation (Cyclon) prevailed in arbitration against Vortran and obtained a judgment. (Cyclon judgment) Cyclon then filed a notice of lien in the VMT action based on its judgment. Vortran's attorney Michael E. Brown filed a motion in the VMT action seeking to establish priority of his contractual lien over Cyclon's judgment lien. The court denied Brown's motion without prejudice.

Five years later Cyclon filed an application in the VMT action for an order to satisfy its lien through the proceeds of the VMT judgment. Brown opposed the motion and asserted that his lien had priority. Brown also asserted that he did not need to file an independent action since there was no dispute as to the amount of the fees and costs due or the existence of the lien. The trial court concluded Brown was not

a party to the VMT action and could not intervene. Brown was required to bring a separate independent action against his client Vortran to enforce his lien. The court denied Brown's motion to determine lien priority, and granted Cyclon's application. The Court of Appeal agreed in part with the trial court, but remanded the case for further proceedings.

Under C.C.P. § 708.410 a judgment creditor may obtain a lien on a judgment debtor's interest in a pending action by filing a notice and an abstract of judgment. Formal intervention is not necessary to enforce the lien. Cyclon had perfected its lien in the VMT action.

An attorney's contractual lien for legal services may be created either by express or implied contract. An attorney's lien is created and takes effect at the time the fee agreement is executed. It is a lien that can be created and protected without notice. Brown claimed that his lien was based on

written fee agreements executed two years prior to Cyclon's perfection of its lien. It had priority pursuant to Civil Code § 2897, which provides that lien priority is determined by the time of a lien's creation.

The trial court in the VMT action had no jurisdiction to determine the existence or validity of an attorney lien on the judgment. An attorney is not a party to the underlying action and has no right to intervene. After the client obtains a judgment, the attorney must bring a separate, independent, action against the client to establish the existence of the lien, to determine the amount of the lien, and to enforce it. Brown was entitled to assert his lien claim by filing a notice of lien in the VMT action but the trial court had no power to determine in that action whether Brown's lien claim was valid or invalid.

The Court of Appeal rejected Brown's argument that the court does have jurisdiction over an attorney's lien claim when there is no dispute between the attorney and the client. While a judgment creditor claiming a judgment lien under C.C.P. § 708.410 et seq. is deemed a party to the underlying action, there is no similar statute that conveys party status on an attorney claiming a contractual lien against the proceeds of the judgment.

Requiring a separate action would not violate Brown's ethical obligations because there was an actual controversy between Brown and Cyclon justifying a declaratory relief action. This does not require a money judgment against Brown's client. If it is determined that Brown's contractual lien claim is valid it would have priority over the judgment lien Cyclon obtained later. That lien can

be enforced in the declaratory relief action without having to obtain a judgment lien under § 708.410 et seq. in the VMT action.

It was within the trial court's discretion to apply the judgment proceeds to satisfy Cyclon's judgment lien. However, attorney contractual liens serve an important public policy. Thus, when a trial court has notice of an attorney's claim of a priority contractual lien, it must take all relevant circumstances into account. The party making the application bears the burden of persuading the court the application should be granted and the judgment proceeds applied to satisfy the judgment creditor's lien, notwithstanding the attorney's potentially senior claim of a lien on those proceeds.

The trial court had the power and the responsibility to take Brown's claim of a lien into account in deciding whether to grant or deny Cyclon's application. It could constitute an abuse of discretion for the trial court to direct payment of the judgment proceeds to Cyclon without giving Brown a fair opportunity to first litigate the validity of his lien claim in a separate action.

Although Brown could not delay in bringing a separate action on his lien claim indefinitely, it appeared that the trial court did not adequately consider all the circumstances. Brown's belief that he did not need to file a separate action was mistaken but not unreasonable since this decision was the first one to establish the need to file a separate action. Brown's first motion was denied without prejudice, which may have encouraged Brown's mistaken belief that he did not need to file a separate action. The record was unclear about what had

transpired in the five years between Brown's motion and Cyclon's application and this may have a bearing on the exercise of the court's discretion. In its application Cyclon expressly acknowledged Brown's competing lien claim and Cyclon did not offer any evidence showing why it would be just and reasonable for the court to allow Cyclon to collect the judgment proceeds despite Brown's claim of a potentially senior attorney lien.

*Comment:* This is the first published opinion to establish that an attorney must bring a separate action to validate a contractual lien.