

ATTORNEY'S LIENS IN ILLINOIS: AN ANALYSIS AND CRITIQUE

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I. INTRODUCTION

One of the unfortunate things about practicing law is that clients frequently do not pay their bills. Because Illinois adheres to the “American Rule” that denies the prevailing party in litigation recovery of attorney’s fees,¹ attorneys cannot rely on payment from the client’s adversary. Suing the client for breach of contract is time-consuming and can raise difficult ethical issues.² Because most clients who do not pay their attorneys are likely disappointed with the attorney’s services, a lawsuit against the client also invites counterclaims questioning the attorney’s competence or ethics. Moreover, suing a client is not attractive from a public relations perspective. Hence, an attorney is both ethically and practically restrained in collecting fees from the recalcitrant client.

Illinois courts have responded to this dilemma by creating two doctrines that give the attorney a property interest in, or claim to, some property of the client: the common law retaining lien and the “equitable lien.” In addition, the General Assembly enacted a statutory attorney’s lien in 1909 giving the attorney a lien on money or property recovered by the client on a claim prosecuted by the attorney.³

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1. See, e.g., *Brundidge v. Glendale Fed. Bank*, 659 N.E.2d 909, 911 (Ill. 1995); *Hamer v. Kirk*, 356 N.E.2d 524, 525 (Ill. 1976); *House of Vision, Inc. v. Hiyane*, 245 N.E.2d 468, 472 (Ill. 1969); *Ritter v. Ritter*, 46 N.E.2d 41, 43 (Ill. 1943); *Constant v. Matteson*, 22 Ill. 546, 560 (1859); *De Fontaine v. Passalino*, 584 N.E.2d 933, 943 (Ill. App. Ct. 2d Dist. 1991). For a perceptive examination of the history of the “American Rule,” see John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9 (1984).

2. For example, the attorney must continue to keep client communications confidential, except to the extent “necessary to establish or collect the lawyer’s fee.” *ILL. R. PROF CONDUCT* 1.6 (c)(3). In addition, the attorney is required to establish that the fee comports with the requirements of Rule 1.5. *Nottage v. Jeka*, 667 N.E.2d 91, 95–96 (Ill. 1996).

3. The statutory lien is now codified at 770 *ILL. COMP. STAT. 5/1 et seq.* (2004).

This article examines these three attorney's liens in Illinois.⁴ It will examine when these liens arise, the property to which they attach and the obligations they secure, how they are affected by the ethical constraints on attorneys, how they relate to other liens on the same property, and the protection they afford when the client files for bankruptcy. The article concludes that the statutory lien is a far superior mechanism for protecting the attorney's interest in getting paid, without infringing on the client's legitimate interests or the rights of innocent third parties.

II. DEFINING AND CLASSIFYING LIENS

Before examining the attorney's liens, it will be helpful to understand the terminology of liens generally. In Illinois, a lien is defined as:

a charge upon property, either real or personal, for the payment or discharge of a particular debt or duty in priority to the general debts or duties of the owner; an encumbrance upon property as security for the payment of a debt; or a hold or claim on another's property as security for the payment or performance of a debt, duty, or other obligation.⁵

Hence, in order for an attorney to have a "lien" there must be both some property to which the lien attaches and some obligation or duty that is secured by the lien. Merely having a claim against a client for the payment of fees is not sufficient to create a lien; there must be some charge or encumbrance on the client's property to which the lien attaches. When a lien attaches to property, the lienholder is preferred over other, general creditors of the debtor. Thus, an attorney's lien insures that the attorney is paid prior to the time the property subject to the lien can be distributed to either the client or to other creditors of the client.

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4. This article does not cover statutes that allow a party to recover its attorney's fees from its adversary in litigation, nor does it address the so-called "common fund" doctrine, which allows a client (or the client's attorney) to recover fees from a fund created by the attorney's efforts and which benefits persons other than the client. Although the common fund doctrine is sometimes categorized as a lien, Henry B. Vess, III, *LIENS UPON ILLINOIS TORT ACTIONS* § 2.31 (2002 & 2004 Supp.), it is not a device to allow an attorney to collect a fee from the client, or from property belonging to a client. As such, it raises issues vastly different from those discussed herein.
 5. *Eastman v. Messner*, 721 N.E.2d 1154, 1156 (Ill. 1999) (quoting *Gaskill v. Robert E. Sanders Disposal Hauling*, 619 N.E.2d 235, 237 (Ill. App. Ct. 5th Dist. 1993)).

There are many ways of classifying liens. One method is to characterize them by their source. Some liens are “common-law” liens, which result from judicial decisions saying that some common relationships give rise to a lien. Others are “statutory” liens created by the legislature. Still others are “equitable” liens, created when a court determines that the equities of a particular case justify giving one party a claim to another’s property for the purpose of avoiding unjust enrichment or of effectuating the intent of some agreement between the parties. In Illinois, all three liens exist in favor of attorneys.

A. Common Law Liens

“Common law” liens are frequently referred to as “possessory liens,” because the existence of the lien is dependent on the lienholder’s possession of the property subject to the lien.⁶ These liens customarily arise as a result of some services performed by the lienholder in relation to the property to which the lien attaches.⁷

There are two kinds of common law possessory liens: specific and general.⁸ A “specific” lien extends only to the indebtedness due the lienholder for services performed on the property concerning which the lien is claimed.⁹ The most common form of a “specific” common law lien is the artisan’s or artificer’s lien, where a bailee who increases the value of the bailor’s property has a lien on the property in the bailee’s possession for the value of his services.¹⁰ A “general” lien, on the other hand, is a lien that secures all the indebtedness owed by the debtor to the lienholder.¹¹ Common forms of “general” liens are those of the attorney, banker, factor, and innkeeper.¹²

A common law possessory lien, whether special or general, is simply the lienholder’s right to retain possession of the debtor’s property until the debt is paid.¹³ A common-law lienholder, other than a factor, does not have the right to sell the property subject to the lien.¹⁴

6. RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 107 at 512 (2d ed. 1955).

7. *Id.* at 506.

8. *Id.* at 509.

9. *Id.* at 509–510.

10. *Id.* at 511 & n.15.

11. *Id.* at 510.

12. *Id.* §109 at 527.

13. *Id.* §119 at 588.

14. *Id.*

Likewise, the lienholder does not have the right to a judicial order compelling sale of the property to satisfy the debt secured by the lien.¹⁵ As Illinois courts have put it, the lien is merely “passive” and cannot be “actively enforced.”¹⁶

B. Statutory Liens

The Illinois General Assembly has enacted several statutes creating liens.¹⁷ Sometimes, these liens are designed to restate and revise common law liens. An example is the Labor and Storage Lien Act,¹⁸ which codified the existing common law artisan’s lien, but also gave the lienholder a statutory power of sale.¹⁹ Sometimes, these liens are designed to provide liens to persons who did not have such liens at common law.²⁰ Generalization about statutory liens is difficult, because each statute sets forth unique requirements for the lien, as well as methods for enforcing the lien.

C. Equitable Liens

15. *Id.* at 589.

16. See generally *Anthony v. Bitler*, 911 F. Supp. 341, 342 (N.D. Ill. 1996); *Lucky-Goldstar Int’l (Am.), Inc. v. Int’l Mfg. Sales Co.*, 636 F. Supp. 1059, 1061 (N.D. Ill. 1986); *Upgrade Corp. v. Mich. Carton Co.*, 410 N.E.2d 159, 161 (Ill. App. Ct. 1st Dist. 1980); *Armstrong v. Zounis*, 26 N.E.2d 670, 673 (Ill. App. Ct. 1st Dist. 1940). A particularly disadvantageous aspect of the common law possessory lien is that the lienholder, other than a stablekeeper, cannot even charge the debtor with the costs of storing the property subject to the lien, nor claim such costs as being secured by the lien. BROWN, *supra* note 6, §119 at 590–91.

17. The statutes are collected in chapter 770 of the Illinois Compiled Statutes. The liens cover attorneys, health care services providers, horseshoers, innkeepers, artisans and storage facilities, liens against railroads, mechanic’s liens, miner’s liens, oil and gas liens, self-service storage facilities, stallion and jack service liens, and tool and die liens. The multitude of statutory liens was significantly reduced in 2003, when the General Assembly approved the Health Care Services Lien Act, 770 ILL. COMP. STAT. 23/1 *et seq.* (2003 Supp.), which consolidated eight previous lien statutes providing statutory liens to clinical psychologists, dentists, emergency medical services personnel, home health agencies, hospitals, optometrists, physical therapists, and physicians.

18. 770 ILL. COMP. STAT. 45/0.01, *et seq.* (2004).

19. 770 ILL. COMP. STAT. 45/6 (2004). To the same effect is the Labor and Storage Lien (Small Amount) Act, 770 ILL. COMP. STAT. 50/2–50/4 (2004).

20. The Attorney’s Lien Act, 770 ILL. COMP. STAT. 5/1 (2003 Supp.) is an example. This statutory lien is discussed in more detail in section IV, *infra*. In addition, the Health Care Services Lien Act, 770 ILL. COMP. STAT. 23/1 *et seq.* (2003 Supp.) provides a lien in favor of “health care professionals” and “health care providers” on any judgment recovered by the recipient of their services.

Like common law liens, “equitable liens” are also liens created by courts, but they differ markedly from the common law liens in most other respects. Common law liens are always possessory liens, but the equitable lien is not.²¹ An equitable lien has been defined as:

a charge or encumbrance upon property in possession of another [that is, someone other than the lien claimant], whereby the lien claimant may have the property involved used to satisfy the lienor's claims. It may arise from express or implied agreement, or may be granted by the court for general reasons of equity to prevent an unjust enrichment by the owner of the property charged.²²

An equitable lien is not really a “lien” at all. Instead, it is one of many remedies developed over the years by courts of equity as a remedy for a debt.²³ Because equity courts acted with *in personam* authority, as opposed to the *in rem* authority of law courts, equity courts developed a series of remedies allowing courts to ignore legal title to property and direct the owner of title to either convey the property to another or to hold the property subject to a claim of another. The two principal equitable remedies of this type are the constructive trust and the equitable lien. Although an equitable lien is similar to a constructive trust, there is one major difference. A constructive trust gives the plaintiff formal legal title to property by declaring the defendant to be a constructive trustee of the property for the plaintiff's benefit,²⁴ whereas an equitable lien merely gives the plaintiff a lien on the property which can be realized upon by a judicially ordered sale of the property.²⁵

An equitable lien arises in one of two distinct circumstances. First, a lien may result from the express or implied-in-fact agreement of the parties that a certain fund or property will stand as security for one party's debt to another.²⁶ Second, a lien may arise, not from some agreement of the parties, but to prevent unjust enrichment.²⁷ Illinois courts have recognized an equitable lien as an appropriate remedy in a

21. HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY §118 at 319 (2d ed. 1948).

22. BROWN, *supra* note 6, §107 at 508.

23. 1 DAN B. DOBBS, LAW OF REMEDIES §4.3(1) at 586–87 (Practitioner ed. 1993) (grouping the remedies of constructive trust, equitable lien, subrogation, and accounting for profits as equitable remedies designed to effect restitution).

24. *Id.* § 4.3(2) at 589.

25. *Id.* § 4.3(3) at 601.

26. *Id.*

27. DOBBS, *supra* note 23, § 4.3(3) at 601. *See also* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 118 at 319 (2d ed. 1948).

wide variety of situations, including many that do not involve an attorney or client.²⁸

An equitable lien on property may be “foreclosed,” where the property subject to the lien is subjected to a forced sale with the proceeds of the sale applied to payment of the lienholder’s claim.²⁹ This remedy makes an equitable lien significantly more valuable to a lienholder than a common law possessory lien, which is usually not subject to foreclosure.

III. THE ATTORNEY’S RETAINING LIEN

A. In General

The retaining lien was first recognized by the Supreme Court of Illinois in 1889.³⁰ This lien is a “general” or “retaining” lien.³¹ As such, it is merely possessory—*i.e.*, the lien only allows an attorney to retain the client’s property in the attorney’s possession until the attorney’s fees are paid or the lien is otherwise terminated. The lien cannot be “actively enforced,”³² meaning that the attorney has no right to bring an action in court to enforce the lien affirmatively. As one commentator has noted, the lien “is a method of holding the clients property hostage

28. See, e.g., *Pope v. Speiser*, 130 N.E.2d 507 (Ill. 1955) (plaintiff made valuable improvements on defendant’s farm with defendant’s knowledge and consent and defendant made repeated statements that farm would belong to plaintiff after defendant’s death; plaintiff entitled to equitable lien on property for the value of the improvements); *Robinson v. Robinson*, 429 N.E.2d 183 (Ill. App. Ct. 2d Dist. 1981) (married couple built house on land belonging to husband’s parents; when marriage dissolved, wife held entitled to equitable lien on property); *Econ. Fire & Cas. Co. v. Warren*, 390 N.E.2d 361 (Ill. App. Ct. 1st Dist. 1979) (fire insurer paid loss due to fire subsequently discovered to have been intentionally caused by joint owner of property; equitable lien imposed on property to recover portion of wrongfully obtained payment); *Meppen v. Meppen*, 53 N.E.2d 462 (Ill. App. Ct. 2d Dist. 1944) (executor of decedent’s estate had an equitable lien on devisee’s share of real property devised under the will in amount of claim estate had against devisee).

29. DOBBS, *supra* note 23, § 4.3(3) at 601.

30. *Sanders v. Seelye*, 21 N.E. 601 (Ill. 1889).

31. *Id.* at 602–03.

32. *Anthony v. Bitler*, 911 F. Supp. 341, 342 (N.D. Ill. 1996); *Lucky-Goldstar Int’l (Am.), Inc. v. Int’l Mfg. Sales Co.*, 636 F. Supp. 1059, 1061 (N.D. Ill. 1986); *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d 1075, 1078 (Ill. App. Ct. 1st Dist. 1991); *Upgrade Corp. v. Mich. Carton Co.*, 410 N.E.2d 159, 161 (Ill. App. Ct. 1st Dist. 1980); *Armstrong v. Zounis*, 26 N.E.2d 670, 673 (Ill. App. Ct. 1st Dist. 1940).

until fees are paid.”³³ Hence, its primary value to the attorney is the inconvenience it causes to the client.³⁴

B. The Requisites for the Retaining Lien

The retaining lien only arises if the attorney comes into possession of the property in the course of the attorney's professional employment.³⁵ It continues only so long as the attorney retains possession of the property.³⁶ The lien terminates if the attorney voluntarily gives up possession of the property,³⁷ but involuntary surrender of possession pursuant to a court order does not result in the loss of the lien.³⁸

So long as the attorney retains possession of the property, the retaining lien exists until the fees are paid or when adequate security is posted with a court.³⁹ Payment, of course, discharges the underlying obligation which is secured by the lien. The alternative of providing adequate security is usually the functional equivalent of being paid, because providing “security” means putting up property that can be sold if the attorney's fees are not paid. However, a client's mere promise to pay the fee or an acknowledgment of the legitimacy of the debt is not enough to terminate the lien, because the client has already promised to pay the fee and failed to do so.⁴⁰

C. The Property to Which the Lien Attaches

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33. Stephanie W. Kanwit, *Attorney's Liens: When Can You Retain a Client's Files?*, 79 Ill. B.J. 274 (1991).
 34. *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d at 1078.
 35. *Sanders*, 21 N.E. at 603 (Ill. 1889).
 36. *Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co.*, 720 N.E.2d 636, 640 (Ill. App. Ct. 1st Dist. 1999); *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d at 1078; *Upgrade*, 410 N.E.2d at 161.
 37. *Nichols v. Pool*, 89 Ill. 491, 494 (1878); *Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co.*, 720 N.E.2d 636, 640 (Ill. App. Ct. 1st Dist. 1999); *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d at 1078 (Ill. App. Ct. 1st Dist. 1991); *Upgrade*, 410 N.E.2d at 161.
 38. *Twin Sewer & Water, Inc.*, 720 N.E.2d at 644.
 39. *Lucky-Goldstar Int'l (Am.), Inc. v. Int'l Mfg. Sales Co.*, 636 F. Supp. 1059, 1061 (N.D. Ill. 1986); *Twin Sewer & Water, Inc.*, 720 N.E.2d at 644 (providing security or voluntary surrender of possession terminates lien); *In re Liquidation of Prestige Cas. Co.*, 659 N.E.2d 50, 52 (Ill. App. Ct. 1st Dist. 1995) (once adequate security provided, document may be ordered turned over, even if precise amount of attorney's fees not determined at the time); *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d at 1078.
 40. *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d 1075, 1078 (Ill. App. Ct. 1st Dist. 1991).

The retaining lien attaches to a wide array of property belonging to a client. One older Illinois decision said the retaining lien attaches to “any property of any kind belonging to the client and held by the attorney. It includes ordinary legal documents of the client in possession of the attorney, or money collected by the attorney.”⁴¹ Other courts have broadly described the property as “all papers or documents of the client placed in the attorney’s hands in his professional character,”⁴² or as “papers, money, securities, and property received from his client in the course of his professional employment.”⁴³ In *Sanders v. Seelye*,⁴⁴ the first Illinois Supreme Court decision to recognize the retaining lien, the court said “it makes no difference what the purpose may have been in placing [the property] in the attorney’s hands”⁴⁵

Despite this broad language, an important exception arose in the early twentieth century when Illinois courts began to recognize a “special purpose” exception to the general rule. In *Bour v. Thomas*,⁴⁶ the client was arrested and held on \$1,000 bond. The client was prepared to post his own money as bond, but his attorney advised him that he would “never get a cent of it back”⁴⁷ if he posted a cash bond. Instead, the attorney offered to post the attorney’s property as bond if the client would give the attorney the \$1,000. The client turned over the money to the attorney and, at the conclusion of the criminal case, demanded return of the money. The attorney claimed he was allowed to retain the money pursuant to his retaining lien. The court held the attorney had no retaining lien and distinguished *Sanders v. Seelye* by noting that in *Sanders* the property came into the hands of the attorneys during the course of their professional employment and was not held by them as “mere custodians.”⁴⁸ In contrast, the *Bour* court noted that the attorney held the money for a special purpose—*i.e.*, as security for his posting property as bond, and held: “An

41. *Needham v. Voliva*, 191 Ill. App. 256, 258 (1st Dist. 1915).

42. *Sanders v. Seelye*, 21 N.E. 601, 603 (Ill. 1889).

43. *Lucky-Goldstar*, 636 F. Supp. at 1061. Although no Illinois court has addressed the issue, an Arizona court has held that the retaining lien also entitles an attorney to retain possession of a lawyer’s own work product, such as a lawyer’s notes, research, and internal memoranda. The court noted that these materials are “clearly the lawyer’s property and remain[] his property at least until he is paid.” *Nat’l Sales & Serv. Co. v. Super. Ct.*, 667 P.2d 738, 740 (Ariz. 1983). *Accord* *Fed. Land Bank of Jackson in Receivership v. Fed. Intermediate Credit Bank of Jackson*, 127 F.R.D. 473, 479 (S.D. Miss. 1989); *Marco v. Sachs*, 109 N.Y.S.2d 224, 226 (Sup. Ct. 1951).

44. 21 N.E. 601 (Ill. 1889).

45. *Id.* at 603.

46. 170 Ill. App. 456 (1st Dist. 1912).

47. *Id.* at 457.

48. *Id.* at 461.

attorney has no lien on property placed in his hands for a special purpose under such circumstances that a trust arises which is inconsistent with, or adverse to, the claim of a lien.”⁴⁹ The *Bour* court gave the following explanation for the “special purpose” exception:

It has, however, been held that if the attorney is permitted to retain the property after the object for which it was given has failed, there is a general lien; but this is on the theory that permitting the papers or money to remain in the hands of an attorney after the object for which he received them has been accomplished or failed is equivalent to a general deposit, and can therefore have no application to a case where money or other property of a client is put into the hands of his attorney for a specific purpose, to be disposed of in a particular manner after such purpose shall have been accomplished. In such case no general lien can attach, because the terms of the bailment are inconsistent with the right to a lien. In such case the attorney becomes a bailee of the property for a special purpose, with the same rights, and subject to the same duties and liabilities, as any other bailee.⁵⁰

The “special purpose” exception was applied in two subsequent decisions. In *Wenstrand v. Rathje*,⁵¹ the court held that an attorney did not have a retaining lien where the client deposited money and securities with the attorney as a trustee to be used by a real estate dealer in the purchase of bonds or securities of hotel properties. The court noted that the attorney and client had agreed that the attorney would hold the money in a trust capacity and the attorney had agreed to be paid from the proceeds derived from sale of the hotel properties.⁵²

In *Jovan v. Starr*,⁵³ Jovan and Chigouris each gave \$2,000 to Starr, as their agent, for the purpose of making a tender for the purchase of stock in a corporation in which Jovan was a shareholder. The stock was held by Yowell, the corporation’s attorney. Starr, without disclosing his affiliation with Jovan and Chigouris, tendered the \$4,000 to Yowell as a down payment on the stock pursuant to a letter agreement providing the money should be returned if the corporation was placed in bankruptcy. A few months later, the corporation

49. *Id.*

50. *Id.* at 462–63 (citations omitted).

51. 22 N.E.2d 865 (Ill. App. Ct. 1st Dist. 1939) (abstract).

52. This result is consistent with other cases where a client has placed funds with an attorney to be held in trust or escrow. *E.g.*, *Campan v. Talbot Bank of Easton*, 319 A.2d 125 (Md. 1974) (funds from real estate closing deposited with attorney pending determination of multiple claims against seller); *Colonial Life Ins. Co. of Am. v. Anson Realty Co.*, 162 A. 111 (N.J. Ch. 1932) (proceeds from sale of corporate client held by attorney for benefit of client’s creditors); *City of New York v. Avenue U Serv. Ctr., Inc.*, 141 N.Y.S.2d 584 (Sup. Ct. 1955) (same).

53. 231 N.E.2d 637 (Ill. App. Ct. 1st Dist. 1967)

was placed in bankruptcy and Starr demanded return of the money from Yowell. Yowell claimed that Jovan, as a shareholder of the corporation, was obliged to pay Yowell's legal fees and he (Yowell) asserted a retaining lien on the money. The court held that Yowell did not have a retaining lien on the money. The court first noted that Starr did not disclose that he was acting on behalf of Jovan and that, therefore, Yowell did not know until much later that Jovan was connected with Starr.⁵⁴ As to the "special purpose" exception, the court said:

Furthermore, Yowell held the money only in the capacity as an escrowee. Under the letter agreement he was either to deliver the stock to Starr or return his earnest money deposit. Although Yowell may have been performing some legal services, in relation to the earnest money deposit, he was only a depository. Therefore, Yowell had no right to claim a retaining lien on the earnest money deposit and such funds must be returned.⁵⁵

However, the "special purpose" doctrine was not applied in *McCracken v. City of Joliet*.⁵⁶ There, attorneys preparing an appeal on behalf of a client obtained a "certificate of evidence" from the court reporter to assist them in preparing the abstract and brief on appeal. When the client failed to pay the attorneys the fee necessary to obtain the record and fired the attorneys, they retained the certificate of evidence, claiming a retaining lien. The client argued that the certificate of evidence was placed in the attorneys' hands for the "special purpose" of making up the record and perfecting an appeal. The court rejected the client's argument, noting: "There is nothing we can find in this record that indicates that the purpose for which [the attorneys] had possession of these papers was inconsistent with or adverse to their right to assert such a lien."⁵⁷

54. The court noted that no attorney-client relationship between Jovan and Yowell existed at the time the property came into Yowell's possession. *Id.* at 640.

55. *Id.* The result in *Jovan* is consistent with cases from other jurisdictions where courts have held that funds deposited with an attorney by a client for the purpose of paying the funds to a third party are not subject to the attorney's retaining lien. *E.g.*, *Wilkerson v. Olcott*, 212 So. 2d 119 (Fla. Dist. Ct. App. 1968) (funds deposited with attorney to pay client's ex-wife and her attorney); *King v. Tyler*, 250 S.E.2d 784 (Ga. Ct. App. 1978) (check indorsed by client and delivered to attorney with directions to deposit into attorney's professional account and to use proceeds to pay certain of client's debts); *Ruffo v. Marcotte*, 3 La. App. 352 (1925) (funds to pay rent on dwelling occupied by client); *Anderson v. Bosworth*, 8 A. 339 (R.I. 1887) (money deposited with attorney for purpose of settling lawsuit); *Watts v. Newberry*, 57 S.E. 657 (Va. 1907) (pursuant to attorney's advice, client deposited drafts with attorney with the purpose of using funds to pay certain of client's creditors while also protecting funds from garnishment and attachment by other creditors).

56. 111 N.E. 131 (Ill. 1915).

57. *Id.* at 134.

The *McCracken* decision suggests the key to principled application of the “special purpose” exception. Rather than focusing on the nature of the “purpose” for which property was entrusted to the attorney by the client, it is more sensible to focus on whether this “purpose” is inconsistent with the attorney’s right to assert a lien against the property. If an attorney agrees to take possession of property subject to specific instructions as to its disposition, or to await further instructions as to its disposition, the attorney effectively agrees to hold that property pursuant to those instructions. However, where the attorney comes into possession of the client’s property without any understanding about the disposition of the property, the “special purpose” exception does not apply.

It is also noteworthy that in all the Illinois cases where the “special purpose” exception has been employed, the client’s “property” consisted primarily of money.⁵⁸ Rarely do clients hand over money to an attorney, other than to pay the attorney’s fee, unless the attorney is directed to use the money in specific fashion, such as for paying third parties on behalf of a client who wishes to remain anonymous. In such cases, the attorney is, in effect, no different than any other “straw party” who is merely a bailee for a special purpose. In such cases, it makes little sense to confer on the attorney a retaining lien with respect to the money, because his status as an attorney is incidental to his acquiring possession of the money.

D. The Obligations Secured by the Retaining Lien

There is little direct authority in Illinois about the precise obligations secured by the attorney’s retaining lien. The Illinois statutory attorney’s lien, discussed in Section IV, secures the fees contracted for by the attorney and client, except in cases where the attorney has died or been discharged prior to securing a settlement or judgment for the client, in which case the lien secures

58. This is consistent with the vast majority of cases from other jurisdictions where the courts have held that property deposited with an attorney is not subject to the retaining lien. Only a handful of cases have denied the attorney a retaining lien under the “special purpose” rule on property other than money. *E.g.*, *Nat’l Sales & Serv. Co. v. Super. Ct. of Maricopa County*, 667 P.2d 738 (Ariz. 1983) (documents delivered to attorney for delivery to another); *Lindsley v. Caldwell*, 137 S.W. 983 (Mo. 1911) (stock certificate delivered to attorney for delivery to another); *Bracher v. Olds*, 46 A. 770 (N.J. 1900) (deceased client’s will delivered to attorney with instructions to make copies and return original to safe controlled by client).

only the reasonable value of the services actually rendered.⁵⁹ There is every reason to believe the same obligations are secured by the retaining lien.⁶⁰

Illinois courts have not directly addressed the issue whether the retaining lien extends to costs incurred by the attorney in representing the client. The sparse case law from other jurisdictions suggests that the retaining lien does extend to costs incurred by the attorney, at least if the agreement provides that the client agrees to pay the attorney's costs and expenses.⁶¹ This conclusion is consistent with the general rule that the retaining lien is a "general" lien, which secures the general balance of the debt owed from the client to the attorney, not just the debt due the attorney relating to the matter pursuant to which the client delivered the property in question to the client.⁶²

E. Ethical Issues and the Retaining Lien

The retaining lien creates leverage in favor of an attorney due the inconvenience caused to the client by the attorney's possession of the client's property. Hence, there is clearly a potential conflict between asserting the retaining lien and the attorney's ethical duty to protect the client's interests. In particular, two provisions of the Illinois Rules of Professional Conduct are implicated when an attorney asserts a retaining lien. First, Rule 1.15(b) provides:

Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive and, upon request by the client . . . , shall promptly render a full accounting regarding such property.⁶³

In addition, Rule 1.16(d) provides:

[A] lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.⁶⁴

59. See discussion *infra*, text accompanying notes 207–19.

60. One Illinois case holds that the retaining lien secures only the reasonable value of the services actually rendered in the case of a discharged attorney. *Upgrade Corp. v. Mich. Carton Co.*, 410 N.E.2d 159, 160–61 (Ill. App. Ct. 1st Dist. 1980).

61. See, e.g., *Nat'l Sales & Serv. Co.*, 667 P.2d at 740; *Greek Catholic Union of Russian Brotherhoods of U.S. v. Russin*, 29 A.2d 489, 490 (Pa. 1943). The language in both cases was *dicta*.

62. RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 109 at 527 (2d ed. 1936).

63. ILL. R. PROF CONDUCT 1.15(b).

64. ILL. R. PROF CONDUCT 1.16(d).

Two reported decisions attempt to explain how these ethical restrictions coexist with the assertion of the retaining lien.

The most thorough discussion of how these ethical restrictions impact on the assertion of the retaining lien is found in *Lucky-Goldstar International (American), Inc. v. International Manufacturing Sales Co.*⁶⁵ In *Lucky-Goldstar* a plaintiff subpoenaed some records from the defendant's former attorney after the former attorney refused to disclose the records. Defendant's former attorney sought to quash the subpoena based on his retaining lien. The court declined to quash the subpoena, but conditioned its order compelling disclosure of the documents on the defendant's providing adequate security to the former attorney.⁶⁶

In the course of its opinion, the court discussed the ethical limitations on an attorney asserting a retaining lien, including the predecessors of both Rules 1.15(b) and 1.16(d). The court noted that these rules only require the attorney to deliver property to which the client is "entitled," but do not specify when a client is "entitled" to the property. The court said that, if the attorney has properly asserted the retaining lien, the client would not be "entitled" to the property, so the ethical rules themselves "do not advance the ball" on how to reconcile the rules and the assertion of the lien.⁶⁷

The *Lucky-Goldstar* court recognized that the retaining lien is designed to protect the attorney while the ethical rules are designed to protect the client. Hence, the issue involved balancing those conflicting interests. The court also noted, however, that the issue involved a third important consideration—effective judicial administration.⁶⁸ As a federal court hearing a diversity case, the court noted that it lacked the authority to determine the merits of the underlying dispute between the attorney and client over the attorney's fees,⁶⁹ a matter that should be worked out in state court, if necessary.⁷⁰ The court determined that its goal should be to provide access to the documents so the litigation could proceed, without prejudicing the rights of either the attorney or the client as to a dispute which the court was without jurisdiction to resolve.⁷¹

The *Lucky-Goldstar* court relied heavily on the reasoning of an informal opinion of the American Bar Association (ABA) Committee on Ethics and

65. 636 F. Supp. 1059 (N.D. Ill. 1986).

66. *Id.* at 1065.

67. *Id.* at 1962.

68. *Id.* at 1063.

69. *Id.* at 1063 (citing *Kanzelberger v. Kanzelberger*, 782 F.2d 774, 777 (7th Cir. 1986)).

70. 636 F. Supp. at 1063.

71. *Id.*

Professional Responsibility, which concluded that the “[m]ere existence of a legal right does not entitle a lawyer to stand on that right if ethical considerations require that he forego it.”⁷² The opinion noted that Ethical Consideration 2–32 suggested that even if an attorney had a right to sue a client for fees, the attorney should forego that legal right unless “necessary to prevent fraud or gross imposition by the client.”⁷³ The opinion concluded that the same “fraud or gross imposition” standard ought to apply to a dispute involving when a withdrawn attorney could ethically invoke the retaining lien.⁷⁴ The opinion listed seven factors to be balanced in determining whether an attorney asserting a valid retaining lien should nevertheless be required to turn over property to the client under the “fraud or gross imposition” standard:

the financial situation of the client, the sophistication of the client in dealing with lawyers, whether the fee is reasonable, whether the client clearly understood and agreed to pay the amount now owing, whether imposition of the retaining lien would prejudice the important rights or interests of the client or other parties, whether the failure to impose the lien would result in fraud or gross imposition by the client, and whether there are less stringent means by which the matter can be resolved or by which the amount can be secured.⁷⁵

The *Lucky-Goldstar* court then observed that these considerations suggested the attorney should forego asserting the retaining lien in five situations: (1) if it would prejudice the client’s ability to defend against a criminal charge or to assert or defend a similarly important personal liberty;⁷⁶ (2) if the court, other parties, or the public would be adversely affected by assertion of the lien;⁷⁷ (3) if the client is financially unable to pay the fee;⁷⁸ (4) if the attorney knew of the client’s financial inability at the beginning;⁷⁹ or (5) if the lawyer failed to assure agreement as to the amount or method of calculating the fee.⁸⁰ However, the court also observed that the lien could be

72. ABA Comm. on Ethics and Prof’l Responsibility, Informal Opinion 1461 (1980).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Lucky-Goldstar Int’l (Am.), Inc. v. Int’l Mfr. Sales Co.*, 636 F. Supp. 1059, 1063 (N.D. Ill. 1986).

77. *Id.* at 1064.

78. *Id.*

79. *Id.*

80. *Id.* (citing *Atl. & Great Lakes S.S. Corp. v. Steelmet, Inc.*, 431 F. Supp. 327, 328 (S.D.N.Y. 1977) (failure to arrange for payment of bills resulted in waiver of lien)). Other courts have held that the ethical obligations of an attorney preclude assertion of the lien in situations where the client is of limited resources and the files are of “vital importance” to processing the client’s claim. *See, e.g.*, *Miller v. Paul*, 615 P.2d 615, 620 (Alaska 1980). *See generally* Thomas G. Fischer, *Attorney’s Assertion of Retaining Lien as Violation of Ethical Code or Rules Governing Professional Conduct*, 69 A.L.R.4th 974 (1986).

asserted consistent with the ethical rules in situations where the client is financially able to pay a fee that was clearly agreed upon and due.⁸¹

The *Lucky-Goldstar* court commented that the seven considerations listed in the ABA opinion all involve interests of the attorney and client, while the court was also concerned with matters of effective judicial administration.⁸² The court noted that the assertion of the lien impinged on the plaintiff's legitimate discovery requests. Although the court noted that the mere presence of a third-party interest is not enough to require the attorney to disclose the documents,⁸³ the court clearly gave that matter considerable weight. However, the court also noted that the defendant was a sophisticated client, did not contest the amount of the fees due, nor claim that it could not afford to pay the fees.⁸⁴ In these circumstances, the court held that the appropriate way to balance the interests of all the parties was to deny the motion to quash, but conditioned on the client's posting adequate security.⁸⁵

The First District of the Illinois Appellate Court adopted much of the *Lucky-Goldstar* reasoning in *In re Liquidation of Mile Square Health Plan of Illinois*.⁸⁶ The *Mile Square* case was complicated because it involved an insolvency proceeding, but the court did not say anything on the ethical issue that was not covered in *Lucky-Goldstar*. The upshot of *Lucky-Goldstar* and *Mile Square* is that the retaining lien may be significantly limited in any case where the client lacks the ability to pay, has an immediate and pressing need for the property, or where there is a question about the fairness of the fee agreement or the client's understanding of it.

F. Remedies of the Attorney with Respect to the Property Subject to the Retaining Lien

81. *Lucky-Goldstar*, 636 F. Supp. at 1064.

82. *Id.* at 1063.

83. *Id.*

84. *Id.* at 1064. In addition, the court rejected a claim that the lien is void because the property held by the attorney had "no intrinsic value." *Id.* at 1064 n.8.

85. *Id.* at 1065. The court noted that this conditional approach had been approved in two earlier Illinois cases, although those cases did not address the ethical implications of asserting the lien. *Intaglio Serv. Corp. v. J.L. Williams & Co.*, 445 N.E.2d 1200 (Ill. App. Ct. 1st Dist. 1983); *Upgrade Corp. v. Mich. Carton Co.*, 410 N.E.2d 159 (Ill. App. Ct. 1st Dist. 1980). Given the court's resolution of the matter, it did not have to decide whether it could have dismissed the defendant's counterclaim if the defendant did not post the security required.

86. 578 N.E.2d 1075 (Ill. App. Ct. 1st Dist. 1991).

Like virtually all common-law possessory liens, the attorney's retaining lien cannot be enforced by an action by the attorney.⁸⁷ Likewise, the attorney has no right to sell the property subject to the lien, as is the case of an ordinary secured party.⁸⁸ Because the lien cannot be "actively enforced" or liquidated by sale of the property subject to the lien, the primary value of the lien is the leverage it gives the attorney due to the inconvenience suffered by the client by being deprived of the property.⁸⁹

Complicated problems arise when a client seeks discovery of the materials being held by the attorney. In such circumstances, compelling disclosure of the materials would effectively destroy the value of the lien.⁹⁰ The consequences of a client's request for discovery have been discussed in a series of four cases decided by the First District of the Illinois Appellate Court. In the first case, *Ross v. Wells*,⁹¹ an attorney filed a complaint against a former client seeking to recover his fees. The client procured a subpoena ordering the attorney to produce all his files pertaining to the legal services provided. When the attorney refused based on his retaining lien, the client sought to hold the attorney in contempt. The trial court dismissed the petition, but the appellate court reversed. It noted that a lawyer should not ordinarily be compelled to surrender property subject to the retaining lien because disclosure would annul the value of the lien.⁹² However, the court agreed there is an exception where the attorney brings an action to recover fees and the client seeks discovery of the property in that action. The court noted that the attorney would be required

87. "[E]quity has no jurisdiction to adjudicate a possessory or retaining lien. That lien is defined as the attorney's right to retain possession of property belonging to his client which comes into his hands within the scope of his employment until his charges are paid." *Needham v. Voliva*, 191 Ill. App. 256, 258 (1st Dist. 1915). See generally *Anthony v. Bitler*, 911 F. Supp. 341, 342 (N.D. Ill. 1996); *Lucky-Goldstar Int'l (Am.), Inc. v. Int'l Mfg. Sales Co.*, 636 F. Supp. 1059, 1061 (N.D. Ill. 1986); *Upgrade Corp. v. Mich. Carton Co.*, 410 N.E.2d 159, 161 (Ill. App. Ct. 1st Dist. 1980); *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d 1075, 1078 (Ill. App. Ct. 1st Dist. 1991); *Armstrong v. Zounis*, 26 N.E.2d 670, 673 (Ill. App. Ct. 1st Dist. 1940).

88. *Armstrong v. Zounis*, 26 N.E.2d 670, 673 (Ill. App. Ct. 1st Dist. 1940). In a much earlier case, *Scott v. Morris*, 131 Ill. App. 605 (1st Dist. 1907), the court said in *dicta* that the attorney would have had the right to proceed and sell the property if the administrator of the client's estate had failed to "make redemption by selling it." *Id.* at 608 (citing *Levy v. Chi. Nat'l Bank*, 158 Ill. 88 (1895)). However, *Levy* involved an ordinary secured credit transaction and not an attorney asserting a retaining lien. The issue was not raised directly in *Scott*, because the administrator of the client's estate had paid the attorney, subsequently discovered that the estate was insolvent, and then sued the attorney to recover the payment.

89. *Anthony v. Bitler*, 911 F. Supp. 341, 342 (N.D. Ill. 1996); *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d 1075, 1078 (Ill. App. Ct. 1st Dist. 1991). See also Janet Fairchild, *Attorney's Retaining Lien as Affected by Action to Collect Legal Fees*, 45 A.L.R.4th 198, 200 (1986).

90. *Ross v. Wells*, 127 N.E.2d 519, 520 (Ill. App. Ct. 1st Dist. 1955).

91. 127 N.E.2d 519 (Ill. App. Ct. 1st Dist. 1955).

92. *Id.* at 520.

to prove the nature of the services rendered in his action for fees⁹³ and that the subpoenaed documents would be highly relevant to prove those services. The court also said, as a matter of policy:

Consistent with the duty a lawyer owes to make a full and complete disclosure of his transactions with his client, out of which arises his claim for fees, he should be willing, without the need for coercion, to produce the books and papers that directly bear upon such claim for fees. We feel it is of greater importance to the profession that a high level of professional duty be maintained, than to protect the retaining lien of a lawyer, as claimed in the instant case.⁹⁴

Ross was distinguished in *Upgrade Corp. v. Michigan Carton Co.*⁹⁵ where plaintiffs' attorney had withdrawn his appearance in the underlying action, apparently due to plaintiffs' failure to pay fees. Plaintiffs' remaining attorney filed a petition asking the court to order the former attorney to turn over all his files in the underlying action. The former attorney claimed a retaining lien and refused to turn over the files. The trial court ordered the former attorney to turn over those files, but ordered that the former attorney be given a statutory lien pursuant to the Attorney's Lien Act.⁹⁶ On appeal, the appellate court affirmed the trial court's order to the extent it ordered the files released, but only conditioned on the giving of some other form of adequate security.⁹⁷ The court rejected the client's argument that *Ross* required disclosure of the materials and distinguished *Ross* as involving a case where the attorney affirmatively sought to recover his fees by filing suit. *Upgrade*, however, involved a situation where the attorney invoked the retaining lien defensively, in opposition to the client's motion seeking disclosure. The court noted with approval that courts in other jurisdictions had recognized the attorney's property interest in the retaining lien and compelled disclosure of the materials at the request of the client only if the client pays the fees or provides adequate security.⁹⁸

93. The court recited the well-established rule that an attorney has the burden of proving that the contract with the client was entered into fairly and after full disclosure of relevant facts to the client. *Id.* at 521.

94. *Id.* at 521.

95. 410 N.E.2d 159 (Ill. App. Ct. 1st Dist. 1980).

96. Then codified at Ill. Rev. Stat., ch. 13, ¶ 14 (1977); now codified as 770 ILL. COMP. STAT. 5/1.

97. 410 N.E.2d at 161. The court noted that the substitute lien under the Attorney's Lien Act would not be "adequate" security due to the uncertainty of the outcome of the underlying litigation. *Id.*

98. *Id.* at 162. Finally, the court noted that the trial court should have made a determination of the amount of fees due the attorney, so that the amount of payment of adequate security could be determined. *Id.* If a client has posted adequate security, an attorney's refusal to obey a court's order requiring disclosure is punishable by contempt. *Comet Cas. Co. v. Schneider*, 424 N.E.2d 911, 916 (Ill. App. Ct. 1st Dist. 1981).

In *Intaglio Service Corp. v. J.L. Williams & Co.*⁹⁹ the court attempted to explain its decisions in *Ross* and *Upgrade*. In *Intaglio* an attorney had represented a defendant in the underlying action. The plaintiff's complaint was dismissed, but the appellate court reversed and remanded to the trial court for further proceedings. During the pendency of the appeal, defendant's attorney withdrew for nonpayment of fees. The attorney then filed a separate lawsuit seeking to recover his fees. The client then filed, in the underlying action, a motion to compel the attorney to turn over the attorney's files on the matter. The trial court ordered the client to pay the attorney a portion of the fees and to pay an additional sum into court as security for the remainder of the fees, the amount of which was to be determined at a later time. The client appealed and the appellate court affirmed. The court rejected the client's argument that, under *Ross*, the attorney had waived his lien by filing the lawsuit for fees, explaining that *Ross*

merely held that when an attorney files a suit for fees and the client contests the amount of the fees, the client is entitled to discovery *in that action* because, consistent with the duty of full and complete disclosure, the attorney has a duty to produce the books and records in that action that directly bear on the claim for fees. The court nowhere held or even suggested that the attorney waived its lien. Except in the action for attorney's fees, and as we have already noted that suit is not involved in this litigation, the attorney has a right to his retaining lien until his fee is paid or proper and sufficient security given.¹⁰⁰

Intaglio thus limited the rationale for compelling disclosure of the materials held by the attorney without requiring that the client to pay the fee or post adequate security to the situation presented in *Ross*—*i.e.*, where the attorney files an action to recover fees and the client seeks discovery of the materials in that action.

The result in *Intaglio* is certainly consistent with the reasoning of the *Ross* court. In the attorney's action for fees at issue in *Ross*, the materials held by the attorney would be relevant to proving the extent of the attorney's services and should be disclosed. However, in the underlying action between the client and its adversary, these materials would not even be relevant and disclosure should be required only on condition the client provide adequate security for payment of the fees.

99. 445 N.E.2d 1200 (Ill. App. Ct. 1st Dist. 1983).

100. *Id.* at 1205 (emphasis in original).

Finally, in 1999, the court attempted to reconcile *Ross*, *Upgrade*, and *Intaglio*. In *Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co.*¹⁰¹ attorneys representing the plaintiffs moved to withdraw and defendants objected to the withdrawal because the attorneys had not complied with various discovery requests. The trial court granted the motion to withdraw, but conditioned on compliance with the discovery orders. The attorneys then filed a petition to adjudicate both a retaining lien and a statutory lien. The court ordered plaintiffs to pay \$40,000 to the clerk of the court to secure payment of the attorneys' fees and ordered the attorneys to turn over the property in their possession to plaintiffs' new counsel.

Plaintiffs filed an interlocutory appeal and the appellate court reversed. The court reviewed the prior cases and said the trial court had no jurisdiction to adjudicate the attorney's retaining lien.¹⁰² The court reconciled *Upgrade* with the cases holding that the retaining lien cannot be actively enforced by saying that in *Upgrade* the former attorney was asserting the retaining lien defensively against a motion by new counsel for the client to turn over papers in the former attorney's possession. In *Twin Sewer*, to the contrary, the attorney initiated the proceeding by filing the petition to adjudicate the lien and the clients never sought production of the property on which the attorney claimed a lien. The court emphasized the importance of this distinction:

Initially, this distinction may seem trivial, but upon closer examination, it is clear that since the common law retaining lien is constantly referred to as being a passive lien that may not be actively enforced in a judicial proceeding, the *Upgrade* court allowed the former counsel to assert his retaining lien *as a defense* to a petition for discovery filed by his former client. . . . Had the court not allowed the attorney this defensive measure, his lien would have been rendered meaningless. But the court never stated that the attorney could accelerate this process by bringing a petition to adjudicate the lien before the former client actively sought the files in the attorney's possession.¹⁰³

The upshot of these four cases is that a withdrawing attorney asserting a retaining lien cannot seek payment or adequate security for payment from the client unless and until the former client files some motion or other pleading seeking production or discovery of the property subject to the lien. In the absence of such a motion or pleading, the retaining lien remains merely a "passive" lien and one which a court has no jurisdiction to adjudicate.¹⁰⁴

101. 720 N.E.2d 636 (Ill. App. Ct. 1st Dist. 1999).

102. *Id.* at 642-43.

103. *Id.* at 643 (emphasis in original).

104. *Id.* at 644.

However, if the attorney files an action seeking to recover his fees, he will be required to disclose or produce any property relevant to his services without being entitled to adequate security, so long as the client's request is filed in the same action.¹⁰⁵

This series of cases nicely illustrates the ultimate dilemma faced by an attorney who asserts a retaining lien against a former client. If the materials subject to the lien are not indispensable to the client, the lien is of little practical value to the attorney. If the attorney files an action to recover his fees, he must produce the materials under *Ross* and has no right to adequate security as a condition to producing them. On the other hand, if the attorney does not file an action for fees and the client does not seek an order compelling production of the materials, the court lacks jurisdiction to adjudicate either the lien or the amount of fees under *Twin Sewer*. Although this poses a dilemma for attorneys, the dilemma is a function of the scope of the common law lien—*i.e.*, if the debtor does not have a pressing need for the property subject to the lien, withholding possession is an ineffective way to coerce payment of the debt.

G. The Retaining Lien and Insolvency of the Client

The United States Court of Appeals for the Seventh Circuit has held that the attorney's retaining lien survives bankruptcy of the client, regardless of whether the bankruptcy is a liquidation or a reorganization.¹⁰⁶ However, the

105. *Ross v. Wells*, 127 N.E.2d 519 (Ill. App. Ct. 1st Dist. 1955). Difficult issues are raised when the request for the materials held by the attorney pursuant to the retaining lien comes, not from the client, but from a third party. A few federal cases have arisen where a litigation adversary of the client seeks production of the materials from the client's former attorney and the attorney resists by claiming a valid retaining lien. In these cases, the courts have balanced the value of the retaining lien to the lawyer against the policies of unfettered and equitable administration of justice. In *Lucky-Goldstar Int'l (Am.), Inc. v. Int'l Mfg. Sales Co.*, 636 F. Supp. 1059, 1064 n.8, (N.D. Ill. 1986), the court allowed disclosure of the materials, but only conditioned on the former client's posting adequate security for the payment of fees. The court noted in that case that the former clients did not claim that they were unable to pay the fee or that they did not understand the fee agreement. In *Jernryd v. Nilsson*, 117 F.R.D. 416 (N.D. Ill. 1987) the court ordered production of the materials without the posting of adequate security because it found, on the peculiar facts of that case, that the existence of the retaining lien would not inconvenience the former client (who was no longer a party to the lawsuit) or provide the attorneys with leverage for the payment of their fees. Accordingly, the policy of full disclosure prevailed. *Id.* at 417–418. In *Anthony v. Bitler*, 911 F. Supp. 341, 343 (N.D. Ill. 1996), the court refused to order disclosure of the materials, in light of the close relationship between the client and the party seeking disclosure, because disclosure to the third party would effectively be disclosure to the client. *Id.* at 342. As these cases suggest, the resolution of these disputes in highly fact-specific and generalization is difficult.

106. *In re Brown*, 527 F.2d 799, 801 (7th Cir. 1976).

court noted that access to the bankrupt's records by the trustee is necessary to further the goal of equitable distribution of the bankruptcy estate.¹⁰⁷ Thus, the court ordered the documents to be produced subject to a court order preserving the priority afforded by the attorney's lien. The court reasoned that if there is money in the estate, the attorney should be entitled to priority; if not, the attorney would not be paid in any event.¹⁰⁸

At one time, a similar result pertained in state liquidation proceedings of insurance companies.¹⁰⁹ Subsequently, the General Assembly enacted two amendments to the Illinois Insurance Code which gave the liquidator the right to possess all the property of the insolvent insurer, specifically including "litigation files,"¹¹⁰ and which authorized courts to issue orders to prevent waste of assets or the obtaining of liens, "specifically including common law retaining liens."¹¹¹ An appellate court decision has held that these amendments were designed to relegate attorneys to the status of general creditors of the insolvent insurer.¹¹²

H. Summary: Is the Retaining Lien Worth Retaining?

The principal advantage of the retaining lien is its simplicity. No notice or other formalities are required for the lien to attach. Possession of the client's property alone is sufficient "notice" of the attorney's interest in the property. However, this advantage is outweighed by the many limitations on the lien.

The retaining lien is most effective if the property held by the attorney is intrinsically valuable, such as money or marketable securities, and where the property's value exceeds the amount of the fee secured by the lien. In those cases, the client has a real economic incentive to settle with the attorney to obtain possession of the property. However, the "special purpose" doctrine has been applied in virtually every Illinois case involving a deposit of money or securities with the attorney, thus depriving the attorney of a retaining lien with

107. *Id.* at 802.

108. *Id.* at 801.

109. In *In re Liquidation of Mile Square Health Plan of Ill.*, 578 N.E.2d 1075 (Ill App. Ct. 1st Dist. 1991) the court held that attorneys could assert their retaining lien over files prepared in the course of representing their former client, a subsequently-insolvent insurer against a claim by the Commissioner of Insurance, as liquidator, that the files should be turned over to him. *Id.* at 1078. The *Mile Square* decision was followed in *In re Liquidation of Prestige Cas. Co.*, 659 N.E.2d 50, 52 (Ill. App. Ct. 1st Dist. 1995).

110. 215 ILL. COMP. STAT. 5/191 (2004).

111. 215 ILL. COMP. STAT. 5/189 (2004).

112. *In re Coronet Ins. Co.*, 698 N.E.2d 598 (Ill. App. Ct. 1st Dist. 1998).

respect to those types of property. Hence, the retaining lien is only likely to be recognized in cases where the property has little or no intrinsic value, which diminishes the client's economic incentive to pay the fees to obtain the property.

In addition, the "passive" nature of the lien deprives the attorney of any meaningful way of liquidating the lien. Absent the ability to sell the property and lacking a right to seek a court order compelling sale of the property, the attorney's only "remedy" is to continue to hold on to the property. If the client has no pressing need for the property, the existence of the lien will not increase the likelihood that the client will actually pay the attorney's fee. If the attorney attempts to collect his fees by filing a lawsuit against the client, the attorney will be required to disclose this property to the client if the client properly requests disclosure in discovery in the attorney's action, with no requirement that the client either pay the fee or post adequate security as a condition to disclosure.¹¹³ In cases where the property consists of records necessary to prosecute or defend some litigation, this disclosure is likely to have the practical effect of compelling the attorney to surrender the records, thereby destroying the value of the lien. Only if the client affirmatively seeks recovery of the records, other than in the course of discovery in the attorney's action to recover fees, will the attorney likely be able to reduce his lien to money, as the posting of adequate security has become a common practice where a court grants a client's request to compel the attorney to disclose the records.¹¹⁴

Finally, even if the property is valuable and the client has some pressing need to obtain it from the attorney, the attorney is not entitled to assert the lien if the assertion would be inconsistent with the attorney's ethical obligations to the client. Because Illinois courts have adopted a balancing test that focuses on the client's need for the property and the client's ability to pay the fees, the attorney may well have an ethical obligation to turn over the property to the client, especially in cases where the property consists of documents necessary to prosecute or defend a lawsuit and the client lacks the ability to pay the fee. Although Illinois courts have not yet dealt with the claim in the case of an economically disadvantaged client, it is highly likely that the balancing test endorsed in *Lucky-Goldstar* and *Mile Square* would compel the attorney to turn over the property to the client without any form of adequate security.

In light of these difficulties in successfully asserting the retaining lien, it is a fair question to ask whether Illinois courts should continue to recognize the

113. *Ross v. Wells*, 127 N.E.2d 519 (Ill. App. Ct. 1st Dist. 1955).

114. *Intaglio Serv. Corp. v. J. L. Williams & Co.*, 445 N.E.2d 1200 (Ill. App. Ct. 1st Dist. 1983); *Upgrade Corp. v. Mich. Carton Co.*, 410 N.E.2d 159 (Ill. App. Ct. 1st Dist. 1980).

attorney's retaining lien. Although the vast majority of American jurisdictions still recognize the retaining lien, the American Law Institute has recently recommended abrogating the lien in the *Restatement (Third) of the Law Governing Lawyers*.¹¹⁵ The *Restatement* concluded that the retaining lien's drawbacks outweighed the protection it affords to the attorney's legitimate interest in receiving compensation.¹¹⁶ Noting that the lien "is in tension with the fiduciary responsibilities of lawyers,"¹¹⁷ the *Restatement* concluded that the attorney can be adequately protected by other mechanisms, such as payment in advance by the client or by taking a consensual security interest in the client's recovery in the matter upon which the attorney is engaged or in other property of the client.¹¹⁸

The *Restatement's* position is supported by some compelling reasons. Given the balancing test adopted by Illinois courts in *Lucky-Goldstar* and *Mile Square*, the retaining lien is most likely to be of practical value to the attorney in cases where the client is financially able to pay the fees. In these situations, the alternative methods of securing payment suggested by the *Restatement* would provide protection equivalent to that provided by the retaining lien, without raising the ethical issues associated with the retaining lien. In the converse situation, where a poor client has a significant need for the property held by the attorney, the attorney would likely be deemed to be acting unethically in retaining the client's property. In this situation, the lien is unlikely to lead to recovery for the attorney and has little, if any, practical value.

Abolishing the retaining lien in favor of consensual security arrangements between attorney and client would not eliminate all ethical issues if the attorney seeks to enforce those consensual arrangements against a recalcitrant client. These consensual arrangements would be subject to the ordinary rules that any fee contract between an attorney and client be reasonable.¹¹⁹

115. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43 (2000). This position was a reversal of the Institute's previous position in two other Restatements, where the attorney's retaining lien was specifically recognized. See RESTATEMENT (SECOND) OF AGENCY § 464 (1957); RESTATEMENT OF SECURITY § 62(b) (1941).

116. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 43, cmt. b (2000).

117. *Id.*

118. *Id.* at cmts. a & b. Although the *Restatement* does not address the issue in detail, presumably these consensual security arrangements would be subject to the ordinary rules relating to mortgages on real property or security interests in personal property. Alternatively, an attorney representing a client in litigation can perfect a lien on the client's recovery in that litigation under the Attorney's Lien Act, 770 ILL. COMP. STAT. 5/1 (2004), discussed in the next section of this article.

119. *Nottage v. Jeka*, 667 N.E.2d 91, 95–96 (Ill. 1996). For a discussion of the factors relevant to determining the reasonableness of the fee, see David P. Pasulka, *An Illinois Attorney's Guide to Fee Dispute Cases*, 84 ILL. B.J. 622 (1996).

However, this ethical limitation arises anytime the attorney seeks to recover fees from the client and therefore poses no greater burden on an attorney than under current law.

The consensual arrangements would also likely be subject to the requirement that the attorney make full and fair disclosure to the client of all material facts regarding the transaction.¹²⁰ This ethical limitation should pose no significant hurdle to the honest attorney, who can make a record of these matters at the outset of the representation. Abolishing the retaining lien would, however, remove the ethical issues resulting from withholding the client's property that presently make assertion of the retaining lien ethically questionable.

Moreover, abolishing the retaining lien in favor of consensual security arrangements would have the advantage of requiring the attorney and client to discuss and agree on these consensual arrangements at the outset of the representation. This requirement means that the client cannot legitimately claim surprise if the attorney later seeks to enforce these consensual arrangements. This would be a significant improvement over the current state of affairs, where there is no requirement that the attorney disclose his right to a retaining lien at the time the contract with the client is formed.¹²¹

Finally, abolishing the lien does not mean that the client is entitled to free legal services. Even the *Restatement* acknowledges that the client is not entitled to "any document prepared by the lawyer or at the lawyer's expense" until the lawyer is paid, so long as the lawyer's nondelivery "would not unreasonably harm the client or former client."¹²²

120. See, e.g., *Anderson v. Sconza*, 534 N.E.2d 445, 448 (Ill. App. Ct. 1st Dist. 1989) (contingent fee agreement entered into after establishment of attorney-client relationship subject to presumption of undue influence that must be rebutted by evidence of full disclosure and fairness). This presumption is strongest when the contract between the attorney and client is entered into after the attorney-client relationship has been established. *Id.* See also *Durr v. Beatty*, 491 N.E.2d 902, 907 (Ill. App. Ct. 5th Dist. 1986); *Neville v. Davinroy*, 355 N.E.2d 86, 89 (Ill. App. Ct. 5th Dist. 1976). The *Restatement* treats such a contract as "business or financial transaction with a client," subject to the requirements that client have adequate information about the transaction and the risks presented by the lawyer's involvement in it, the terms of the transaction are fair and reasonable to the client, and the client consents after being encouraged and given a reasonable opportunity to seek independent legal advice on the transaction. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §§ 43, 122, 126 (2000).

121. *Cf.* *Catherwood v. Morris*, 196 N.E. 519, 523 (Ill. 1935) (statutory lien); *Eckwall v. Eckwall*, 20 N.E.2d 305 (Ill. App. Ct. 1st Dist. 1939) (abstract) (same).

122. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 43 (2000). To the extent that the document represents the attorney's own "work product," some cases even say that this material does not belong to the client at all, even if the client pays the fees. *Fed. Land Bank of Jackson in Receivership v. Fed. Intermediate Credit Bank of Jackson*, 127 F.R.D. 473, 479 (S.D. Miss. 1989); *Marco v. Sachs*, 109 N.Y.S.2d 224, 226 (Sup. Ct. 1951).

In conclusion, although the attorney's retaining lien has a long tradition in Illinois, the current limitations on its application make it useful to attorneys in only a very few cases involving well-off clients. In these limited situations, the consensual security arrangements suggested by the *Restatement* provide adequate protection to the attorney's legitimate interests without raising the specter of unethical conduct. In short, Illinois should join the three other states that have rejected the retaining lien.¹²³

IV. THE ATTORNEY'S STATUTORY LIEN

A. Introduction

Illinois courts, while recognizing a common-law retaining lien, have never recognized a common-law "charging" lien—*i.e.*, a lien on a judgment procured in litigation in which the attorney represents the client.¹²⁴ Although other states recognized such a lien,¹²⁵ one early supreme court decision gave the following policy reasons for not recognizing a charging lien in Illinois:

For the fifty years that Illinois has been a state, our profession has thriven in worldly goods, and its members have been trusted leaders of society, without asking for the establishment of this rule, or deeming it needful for their protection, and in our opinion its establishment would, in the end, bring discredit upon the profession at large, through its abuse in the hands of the unprincipled and avaricious.¹²⁶

123. *See, e.g.*, Acad. of Cal. Optometrists, Inc. v. Super. Ct., 124 Cal. Rptr. 668 (Ct. App. 1975); 1976 Minn. Laws 1140 (repealing statute recognizing retaining lien); 55 Mo. Formal Opin. 115 (1979) (unclear if Missouri law recognizes retaining lien, but even if it does, attorney may not ethically assert it.).

124. Hull v. Culver, 32 N.E. 265, 267 (Ill. 1892); LaFramboise v. Grow, 56 Ill. 197 (1870); Forsythe v. Beveridge, 52 Ill. 268 (1869); Humphrey v. Browning, 46 Ill. 476 (1868); Dinsmoor v. Bressler, 56 Ill. App. 207, 211 (2d Dist. 1893); Bromwell v. Turner, 37 Ill. App. 561, 564 (1st Dist. 1890); Hawk v. Ament, 28 Ill. App. 390, 394 (2d Dist. 1888).

125. *Humphrey*, 46 Ill. at 486.

126. *Forsythe*, 52 Ill. at 271–72. *See also* Henchey v. City of Chi., 41 Ill. 136 (1866), where the court observed:

To hold that a lien attaches to a claim for unliquidated damages before judgment would embarrass parties in all attempts to settle the suits amicably, and thereby greatly to prevent a result always held to be desirable. Especially would this be the case under a system of practice such as ours, where the compensation of attorneys is not fixed by law. Under such a rule, attorneys, by making a demand of unreasonable fees, would be able to prevent a settlement whenever they should desire. Highly as we

Even while refusing to recognize the common-law charging lien, Illinois courts suggested that attorneys address their claims to the legislature.¹²⁷ Attorneys did just that and in 1909 the General Assembly first enacted the Attorney's Lien Act ("the Lien Act").¹²⁸ The Lien Act has been amended on seven occasions, with most of the amendments being of a technical nature dealing with how the notice of lien is to be served,¹²⁹ with conforming the Lien Act to changes in the rules of civil procedure,¹³⁰ adding "costs and expenses" to fees as the obligation secured by the lien,¹³¹ and, most recently, limiting the amount of the fee secured by the lien in cases where there is also a lien arising under the Health Care Services Lien Act.¹³² The current version of the Lien Act provides:

Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such suits, claims, demands or causes of action, plus costs and expenses. In the case of a claim, demand, or cause of action with respect to which the total amount of all liens under the Health Care Services Lien Act meets or exceeds 40% of the sum paid or due the injured person, the total amount of all liens under this Act shall not exceed 30% of the sum paid or due the injured person. All attorneys shall share proportionate amounts within this statutory limitation. If an appeal is taken by any party to a suit based on the claim or cause of action, however, the attorney's lien shall not be affected or limited by the provisions of this Act.

To enforce such lien, such attorneys shall serve notice in writing, which service may be made by registered or certified mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming

think of our profession, we do not deem it desirable that they should thus be able to control the most important interests of their clients, independently of the wishes of the latter. It is better that clients be at liberty to adjust their difficulties if they can.

Id. at 141.

127. *Humphrey*, 46 Ill. at 486.

128. 1909 Ill. Laws 97, § 1.

129. 1927 Ill. Laws 186, § 1 (specified service by registered mail); 1957 Laws 1291, § 1 (authorized certified mail as an alternative to registered mail).

130. P.A. 77-934, § 1 (deleting reference to "term time or vacation"); P.A. 79-1365, § 4 (replacing "decree" with "order"); P.A. 87-425, § 1 (deleting redundant language in sentence on how the lien is enforced by petition).

131. P.A. 86-1156, § 1.

132. P.A. 93-51, § 900.

such lien and stating therein the interest they have in such suits, claims, demands or causes of action. Such lien shall attach to any verdict, judgment or order entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than 5 days' notice to the adverse party, adjudicate the rights of the parties and enforce the lien.¹³³

B. The Requisites for the Statutory Lien

Illinois courts have repeatedly stated that the lien, being a creation of a statute, arises only where the requirements of the Lien Act have been strictly followed.¹³⁴ Courts ordinarily specify three requirements under the Lien Act: (1) the attorney must have been hired by the client to assert a claim; (2) the attorney must perfect the lien by serving written notice; and (3) the notice must be served on the party against whom the client has a claim.¹³⁵ Each of these elements will be examined separately.

1. Attorney Hired by Client to Assert a Claim

Ordinarily, there is little dispute that the attorney was hired by the client to assert a claim, but three distinct problems relating to this element have arisen. The first arises when a client lacks the capacity to contract, thus raising the issue of who may contract with an attorney on the client's behalf. In *Caruso v. Pelling*,¹³⁶ the court found that an attorney who had entered into a contract with the mother of an injured minor satisfied this requirement, even

133. 770 ILL. COMP. STAT. 5/1 (2004).

134. See, e.g., *People v. Philip Morris, Inc.*, 759 N.E.2d 906, 911 (Ill. 2001); *Haj v. Am. Bottle Co.*, 103 N.E. 1000, 1001 (Ill. 1914); *Unger v. Checker Taxi Co.*, 174 N.E.2d 219, 221 (Ill. App. Ct. 1st Dist. 1961); *Schlake v. Lumbermens Mut. Cas. Co.*, 166 N.E.2d 622, 624 (Ill. App. Ct. 1st Dist. 1960); *Cazalet v. Cazalet*, 54 N.E.2d 61, 63 (Ill. App. Ct. 3d Dist. 1944).

135. *Matchett v. Wold*, 818 F.2d 574, 576 (7th Cir. 1987), cert. denied, 484 U.S. 897 (1987); *In re T.C. Assocs., Ltd.*, 163 B.R. 140, 145 (Bankr. N.D. Ill. 1994); *In re Del Grosso*, 111 B.R. 178, 182 (Bankr. N.D. Ill. 1990); *In re Kleckner*, 93 B.R. 143, 145 (N.D. Ill. 1988); *People v. Philip Morris, Inc.*, 759 N.E.2d 906, 911 (Ill. 2001); *Rhoades v. Norfolk & W. Ry. Co.*, 399 N.E.2d 969, 973 (Ill. 1979).

136. 271 Ill. App. 318 (1st Dist. 1933).

though the contract between the attorney and the mother did not identify the mother as the next friend of the injured minor.¹³⁷

The second problem arises when an attorney who has contracted with a client hires another lawyer to prosecute the case for the client. In *Crabb v. Robert R. Anderson Co.*,¹³⁸ the client hired two attorneys to represent him in a personal injury action. When the attorneys dissolved their business relationship, one of them took the client's file and hired a third attorney to represent the client. The third attorney prosecuted the claim to a favorable judgment and then sued to enforce a lien under the Lien Act. The court held that the attorney had no lien because there was no contract between the attorney and the client—only a contract between the third attorney and the original attorney.¹³⁹

The third problem arises when an attorney engages in misconduct in procuring the contract with the client. Although this issue will be addressed in more detail later in this article,¹⁴⁰ several Illinois cases conclude that if the misconduct is sufficient to invalidate the contract, the first element is not established and no lien arises.¹⁴¹

2. *Written Notice of the Lien*

The most commonly-litigated issue in statutory lien cases is whether the written notice of lien complies with the Lien Act's requirements. Reported cases deal with three subissues about the service of notice of lien: (1) the method of service; (2) the content of the notice; and (3) the timing of the notice.

a. Method of Service

137. *Id.* at 322. *Accord*, *Abrams v. Berg's Mkt & Liquor Store*, 45 N.E.2d 1000 (Ill. App. Ct. 1st Dist. 1942) (abstract).

138. 254 N.E.2d 551 (Ill. App. Ct. 1st Dist. 1969).

139. *Id.* at 553. The court was careful to note that it was not adjudicating any rights the third attorney might have against the lawyer who had hired him. *See also* *Klein v. Chi. Title & Trust Co.*, 14 N.E.2d 852, 856 (Ill. App. Ct. 1st Dist. 1938) (attorney who was salaried employee of corporation had no lien claim against his employer).

140. *See* Section IV.E, *infra*.

141. *Morentin v. Vazquez (In re Estate of Morentin)*, 230 N.E.2d 53 (Ill. App. Ct. 1st Dist. 1967); *Phelps v. Elgin, Joliet & E. Ry. Co.*, 217 N.E.2d 519 (Ill. App. Ct. 1st Dist. 1966); *Zazove v. Richardson*, 33 N.E.2d 615 (Ill. App. Ct. 1st Dist. 1941) (abstract).

The 1909 version of the Lien Act did not specify a method of service of the notice and courts held that personal service was required.¹⁴² After the Lien Act was amended to allow service by registered mail and later service by registered or certified mail, courts held that the notice must be served by one of these methods or by personal service and failure to do so was fatal to the lien.¹⁴³

This strict view is not universal, however. Illinois courts have divided over the effect of a defendant's admission that it received notice of the lien, even if the method of service failed to comply with the Lien Act. Some courts held that the lien was enforceable, despite noncompliance with the Lien Act, so long as the defendant admitted to receiving the notice.¹⁴⁴ Other courts held that failure to comply with the Lien Act's requirements for service of the notice renders the lien unenforceable.¹⁴⁵

These two lines of cases are essentially irreconcilable. Although the cases holding actual notice is sufficient contain no reasoning in support of their holdings, they can be explained by a lack of prejudice to the defendant from noncompliance with the Lien Act's requirements if the defendant admits that it received actual notice of the lien.

On the other hand, the arguments against allowing actual notice to suffice under the Lien Act are more compelling. Allowing actual notice to suffice is not consistent with decisions in other statutory lien cases holding that failure to comply with statutory notice requirements is fatal to the lien,¹⁴⁶ even if the

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142. *Haj v. Am. Bottle Co.*, 103 N.E. 1000, 1001 (Ill. 1913); *Hall v. Metropolitan Life Ins. Co.*, 18 N.E.2d 388, 390 (Ill. App. Ct. 1st Dist. 1938).
143. *TM Ryan Co. v. 5350 S. Shore, L.L.C.*, No. 1-05-0575, 2005 WL 2372810 at *2-3 (Ill. App. Ct. 1st Dist. Sept. 27, 2005); *Unger v. Checker Taxi Co.*, 174 N.E.2d 219, 221 (Ill. App. Ct. 1st Dist. 1961) (regular mail not sufficient); *Cazalet v. Cazalet*, 54 N.E.2d 61, 63-64 (Ill. App. Ct. 3d Dist. 1944) (registered mail never delivered; notice by regular mail insufficient).
144. *Limbach v. Vihon*, 210 Ill. App. 73 (1st Dist. 1918) (abstract) (notice sent by registered mail, not personal service; *held*, notice sufficient where defendant admitted receipt); *Smith v. Am. Bridge Co.*, 194 Ill. App. 500, 501 (1st Dist. 1915) ("As notice was actually received by the defendant, we regard the statute requiring personal service as having been complied with."). *See also* *People v. \$31,990, 704 F. Supp. 165* (N.D. Ill. 1989), where the court said in *dicta* that service on the State in the method allowed by the Statute on Statutes, now codified at 5 ILL. COMP. STAT. 70/1.25 (2004), was sufficient because the notice provision of the Attorney's Lien Act was "permissive rather than mandatory." 704 F. Supp. at 166 n.1.
145. *Olsen v. Russell (In re Kleckner)*, 93 B.R. 143, 145 (N.D. Ill. 1988); *In re Del Grosso*, 111 B.R. 178, 182 (Bankr. N.D. Ill. 1990); *Unger v. Checker Taxi Co.*, 174 N.E.2d 219, 221 (Ill. App. Ct. 1st Dist. 1961); *Tuohy v. Chi. & Joliet Elec. Ry. Co.*, 200 Ill. App. 446, (1st Dist. 1916) (admission of service by defendant not an admission that service was done in compliance with the Lien Act).
146. *E.g.*, *Hill Behan Lumber Co. v. Marchese*, 275 N.E.2d 451, 453 (Ill. App. Ct. 2d Dist. 1971) (subcontractor's claim under Mechanic's Lien Act); *Suddarth v. Rosen*, 224 N.E.2d 602, 603-04 (Ill. App. Ct. 2d Dist. 1967) (and cases cited) (same); *Gabbert v. Antonsen*, 266 Ill. App. 89 (1st Dist. 1932) (lien under Labor and Storage Lien Act); *Weidle v. Elgin, Joliet & E. Ry. Co.*, 152 Ill. App. 292 (1st Dist. 1910) (lien under Liens Against Railroad Act).

party entitled to statutory notice had actual notice of the claim from another source.¹⁴⁷ If these courts are willing to hold lay persons to strict compliance with the statutory requirements, there seems little reason to excuse an attorney.

Furthermore, the concept of “actual notice” is a fluid one and one that can cause real prejudice to a defendant. Many defendants are corporate or other entities, and responsibility for disseminating information is frequently compartmentalized. Agents of the defendant may well be instructed to deal with certain, obviously important, forms of notice by forwarding the notice to other agents in a routinized way, whereas less formal notices might not be so forwarded. By allowing ordinary correspondence or other informal notice of the claim of a lien to be treated as the equivalent of personal service or service by registered or certified mail, these courts invite misdirection of important correspondence in these entities.

b. Content of Notice

The Lien Act requires that the notice must “claim[] such lien” and must state “the interest [the attorneys] have in such suits, claims or causes of action.” In *Cazalet v. Cazalet*,¹⁴⁸ the court found that no lien arose where the attorney’s notice to the defendant failed to either claim a lien or to state the amount of the attorney’s fee.¹⁴⁹ However, in cases where the attorney’s notice does claim a lien, but erroneously states the amount of the fee, courts have generally held the notice effective.¹⁵⁰

Although these results might appear inconsistent at first blush, they can be reconciled. In cases where the notice fails to claim any lien on behalf of the attorney, the Lien Act’s purpose of informing the defendant that any settlement of the claim with the plaintiff must account for the plaintiff’s attorney’s fees

147. *Suddarth*, 224 N.E.2d at 603–04 (subcontractor’s claim under Mechanic’s Lien Act) (“The statute makes no exceptions for cases where the owner may have actual notice of the subcontractor’s claim from some source other than those included in [the statute].”). *But see*, *Cirincione v. Johnson*, 703 N.E.2d 67, 69 (Ill. 1998) (physician’s failure to send notice to tort defendant did not defeat lien under Physician’s Lien Act, where was tort defendant was not a party to the litigation between physician and tort plaintiff’s attorney).

148. 54 N.E.2d 61 (Ill. App. Ct. 3d Dist. 1944).

149. *See also* *TM Ryan Co. v. 5350 S. Shore, L.L.C.*, No. 1–05–0575, 2005 WL 2372810 at *3 (Ill. App. Ct. 1st Dist. Sept. 27, 2005) (letter failed to claim lien or specify attorney’s interest in client’s claim).

150. *Home Fed. Savings & Loan Ass’n of Centralia v. Cook*, 525 N.E.2d 151 (Ill. App. Ct. 5th Dist. 1988) (attorney’s notice claiming a lien on “any and all proceeds” recovered held sufficient, even though no reference to amount of fee); *Ryan v. Chi., Milwaukee, St. Paul & Pac. R.R.*, 259 Ill. App. 472 (1st Dist. 1930) (where contract was for 1/4 of recovery before suit or 1/3 of recovery if suit filed, notice referring only to 1/3 fee held sufficient). *Contra* *Steele v. Lamb*, 184 Ill. App. 577 (1st Dist. 1914) (notice overstating attorney’s interest in claim is deficient).

is totally frustrated. However, if the omission in the notice only relates to the amount of the fee, the defendant suffers no conceivable prejudice. So long as the defendant is aware that any settlement it might make will be divided between the plaintiff and the plaintiff's attorney, the exact parameters of that division are not of any concern to the defendant. The defendant will have all the knowledge it needs to make a settlement offer which, if accepted, will be paid jointly to the attorney and client, leaving them to sort out the amount of the attorney's claim.

c. Timing of Notice

Although the Act does not specify when the notice must be sent, case law makes it clear that the notice must be served during the pendency of the attorney-client relationship. Notice of lien sent by an attorney after the attorney has been discharged by the client is untimely, even when sent the day after termination of the relationship.¹⁵¹ In addition, the notice must be sent before any judgment on, or settlement of, the client's claim has been paid.¹⁵² However, so long as the attorney-client relation exists at the time notice is served and so long as the notice is served before the claim is paid, the notice may be served at any time prior to the time the judgment would expire.¹⁵³

3. Service of Notice on Adverse Party

Several cases have discussed the person on whom the notice of lien is to be served. The Lien Act specifies service "upon the party against whom their clients may have such suits" and courts have literally enforced that requirement. Service of the notice on the adverse party's attorney is not sufficient.¹⁵⁴ Likewise, in cases where the adverse party has undergone some

151. Rhoades v. Norfolk & W. Ry. Co., 399 N.E.2d 969, 974 (Ill. 1979); Anderson v. Anchor Org. for Health Maint., 654 N.E.2d 675, 684 (Ill. App. Ct. 1st Dist. 1995) (alternative holding); Paul v. Neely, 508 N.E.2d 401, 405 (Ill. App. Ct. 4th Dist. 1987); Dep't of Pub. Works v. Exch. Nat'l Bank, 417 N.E.2d 1045, 1048 (Ill. App. Ct. 2d Dist. 1981).

152. Silberstein v. Joos, 375 N.E.2d 580 (Ill. App. Ct. 3d Dist. 1978); Rendtorff v. Lowman, 184 Ill. App. 391 (3d Dist. 1913).

153. City of Chi. v. Goebel, 21 N.E.2d 844 (Ill. App. Ct. 1st Dist. 1939); Catherwood v. Morris, 196 N.E. 519 (Ill. 1935).

154. *In re* Midway Indus. Contractors, Inc., 272 B.R. 651, 669 (Bankr. N.D. Ill. 2001); *In re* Del Grosso, 111 B.R. 178, 182 (Bankr. N.D. Ill. 1990); Cazalet v. Cazalet, 54 N.E.2d 61, 63 (Ill. App. Ct. 3d Dist. 1944); Reynolds v. Alton, Granite & St. Louis Traction Co., 211 Ill. App. 158, 160-61 (4th Dist. 1918).

form of reorganization, the notice must be served on the present legal entity.¹⁵⁵ However, notice to the client is not required.¹⁵⁶

a. Excluded Cases

The Lien Act contains no exceptions to the general rule that an attorney has a lien on the client's cause of action. However, courts have created several exceptions to the general rule, holding an attorney's statutory lien does not attach to the client's cause of action in certain situations.¹⁵⁷

i. Actions Against Government Entities

Several cases hold that the attorney's statutory lien cannot be enforced against a municipal corporation.¹⁵⁸ These cases rely on another line of cases holding that municipal corporations are not generally subject to garnishment¹⁵⁹ or other forms of relief designed to assist in the collection of private debts.¹⁶⁰ These other cases reason that it would unduly interfere with the operation of a municipal corporation if its affairs were interrupted by being brought into disputes between private parties, that public funds should not be diverted to the benefit of some private creditors over other citizens, and that a municipal corporation should not be utilized as a mechanism for the collection of private debts.¹⁶¹ Analogizing to these cases, a court held that a municipal corporation should not be embroiled in the essentially private dispute over fees between an attorney and client.¹⁶²

155. *De Parcq v. Gardner*, 83 N.E.2d 32 (Ill. App. Ct. 1st Dist. 1948) (when railroad was dissolved in bankruptcy proceedings and a trustee appointed, service on the railroad, but not the trustee, was held insufficient).

156. *Catherwood v. Morris*, 196 N.E. 519, 523 (Ill. 1935); *Eckwall v. Eckwall*, 20 N.E.2d 305 (Ill. App. Ct. 1st Dist. 1939) (abstract).

157. In addition, some statutes expressly prohibit liens from attaching to funds disbursed under the statute. For example, the Worker's Compensation Act prohibits "any lien" against "any payment, claim, award or decision" under that statute. 820 ILL. COMP. STAT. 305/21 (2004). Courts have applied this provision to reject claims under the Lien Act. *See Muller v. Jones*, 613 N.E.2d 271, 273 (Ill. App. Ct. 4th Dist. 1993); *Lasley v. Tazewell Coal Co.*, 223 Ill. App. 462, 463-64 (3d Dist. 1921).

158. *City of Chi. v. Korshak*, 658 N.E.2d 1165, 1173 (Ill. App. Ct. 1st Dist. 1995); *Marks v. Checker Taxi Co.*, 157 N.E.2d 430 (Ill. App. Ct. 1st Dist. 1959) (abstract); *Brazil v. City of Chi.*, 43 N.E.2d 212, 216 (Ill. App. Ct. 1st Dist. 1942).

159. *Merwin v. City of Chi.*, 45 Ill. 133 (1867), *overruled by Henderson v. Foster*, 319 N.E.2d 789 (Ill. 1974).

160. *See, e.g., Addyston Pipe & Steel Co. v. City of Chi.*, 48 N.E. 967, 969 (Ill. 1897) (creditor's bill does not lie against city); *City of Chi. v. Hasley*, 25 Ill. 596, 597 (1861) (city immune from execution).

161. *See, e.g., Merwin v. City of Chi.*, 45 Ill. 133 (1867).

162. *Brazil v. City of Chi.*, 43 N.E.2d 212, 216 (Ill. App. Ct. 1st Dist. 1942).

The continued validity of these cases is doubtful. In *Henderson v. Foster*¹⁶³ the Illinois Supreme Court rejected the doctrine that a municipal corporation is not liable in a garnishment action and overruled earlier cases to the contrary.¹⁶⁴ The court noted that the 1970 Illinois Constitution had rejected the doctrine of sovereign immunity unless preserved by the legislature. The court also noted that the judiciary, not the legislature, had created the immunity for municipal corporations from garnishment and like proceedings.¹⁶⁵ The court rejected the argument that complying with a garnishment order would be an inconvenience to the municipal corporation, finding that this inconvenience is outweighed by the greater public policy of requiring debtors to pay their debts.¹⁶⁶

Given the reasoning in *Henderson*, much of the rationale for denying an attorney's lien claim against a municipality disappears. Because such a claim could only arise in instances where the municipality is a party to litigation and has received notice of the attorney's lien, it is difficult to find any additional burden on the municipality that would arise from honoring the lien by paying the amount of any judgment or settlement jointly to the attorney and client.

ii. Insurers/Subrogation Actions

In ordinary circumstances, the attorney's statutory lien may not be asserted against the defendant's insurer, because the insurer is not ordinarily a party against whom a claim or cause of action is asserted.¹⁶⁷ Despite this general rule, in *McArdle v. Great American Indemnity Co.*¹⁶⁸ an attorney was allowed to assert a lien against defendant's insurer. In that case, the attorney had given notice of statutory lien to the defendant and the defendant's insurer had settled the case and paid the plaintiff. The attorney then sued the defendant to enforce the attorney's lien, obtained a judgment which was returned unsatisfied, and then sued the insurer, claiming that the lien was covered by the defendant's policy. The court held the attorney was entitled to his lien and noted that the attorney "becomes a part owner of the decree in favor of the client and stands in the same position as if the client had assigned to him an interest in the decree."¹⁶⁹ However, the court failed to articulate any reason why the insurer,

163. 319 N.E.2d 789 (Ill. 1974).

164. *Id.* at 792-93.

165. *Id.* at 792-93.

166. *Id.* at 793.

167. *Yellen v. Bloom*, 61 N.E.2d 269 (Ill. App. Ct. 1st Dist. 1945); *Berkemeier v. Dormuralt Motor Sales, Inc.*, 263 Ill. App. 211 (1st Dist. 1931).

168. 41 N.E.2d 964 (Ill. App. Ct. 1st Dist. 1942).

169. *Id.* at 967.

a non-party to the action, should be subject to the statutory lien, except for the fact that the insurer had obtained a bond from the plaintiff indemnifying the insurer from the attorney's claim.

Just as insurers are not parties to the litigation involving their insureds and thus ordinarily not subject to the statutory lien, the statutory lien does not extend to a proceeding brought by one insurer to confirm an arbitration award based on the insurer's subrogation rights against another insurer. In *Country Mutual Insurance Co. v. State Farm Mutual Auto Insurance Co.*¹⁷⁰ the court held that an insurer that had been held liable to another insurer in an arbitration proceeding did not have the right to implead the injured party's attorney in an action brought by the injured party's insurer to affirm the arbitration award. The court noted that courts have held that even the lien only attaches to the proceeds of litigation or settlement and that the arbitration award of the client's claims and that the attorney's client was not a party to the arbitration proceeding.¹⁷¹ The court also noted that the lien only extends to proceeds of litigation or settlement that the attorney recovers for the client through the attorney's professional efforts and that the injured party's attorney had no role in the underlying arbitration proceeding between the two insurers.¹⁷²

iii. Dissolution of Marriage Actions

Three opinions contain broad language that the Lien Act does not apply to an action for dissolution of marriage.¹⁷³ The only case which contains any reasoning for this conclusion is the 1931 decision in *Thoresen v. Thoresen*,¹⁷⁴

170. 792 N.E.2d 15 (Ill. App. Ct. 1st Dist. 2003).

171. *Id.* at 20.

172. *Id.* (citing *People v. Philip Morris, Inc.*, 759 N.E.2d 906 (Ill. 2001)). See also *Watkins v. GMAC Financial Services*, 785 N.E.2d 40 (Ill. App. Ct. 1st Dist. 2003).

173. *Stoller v. Onusko*, 295 N.E.2d 118, 119 (Ill. App. Ct. 1st Dist. 1973); *Pressney v. Pressney*, 90 N.E.2d 119, 121 (Ill. App. Ct. 1st Dist. 1950); *Thoresen v. Thoresen*, 12 N.E.2d 28, 30–31 (Ill. App. Ct. 1st Dist. 1937). However, where a separate count to establish a beneficial interest in real property is joined in the same complaint with a count for dissolution of marriage, the Act applies to that portion of the case dealing only with the real property issue and the attorney is entitled to a lien to the extent of his fees incurred in dealing with that issue. *Rosmanitz v. Rosmanitz*, 249 N.E.2d 153, 154–55 (Ill. App. Ct. 1st Dist. 1969).

174. 12 N.E.2d 28 (Ill. App. Ct. 1st Dist. 1931). The other two cases denying a statutory lien in divorce actions involved other reasons for denying the attorney's fee claim. In *Stoller v. Onusko*, 295 N.E.2d 118 (Ill. App. Ct. 1st Dist. 1973), the attorneys had entered into a contingent fee agreement to represent the spouse in the divorce, in violation of the then-applicable ethical rules. *Id.* at 119. The court held the fee contract unenforceable and the court refused to grant any relief to the attorneys based on the unenforceable contract. *Id.* This holding is consistent with the general rule that courts will not grant a statutory lien to an attorney who has engaged in misconduct sufficiently egregious to invalidate the contract. The matter is discussed in Sections IV.B.1 *supra* and IV.E., *infra*. In *Pressney v. Pressney*, 90 N.E.2d 119 (Ill. App. Ct. 1st Dist. 1950), the court held that under the then-

where the court found that the statutory language creating a lien “upon all claims, demands and causes of action, including all claims for unliquidated damages” referred only to claims of causes or action for damages.¹⁷⁵ The court reasoned that actions for divorce have as their primary object the dissolution of the marriage and that distribution of the marital property is only incidentally involved.¹⁷⁶

The *Thoresen* court's rationale is not consistent with the way courts have dealt with the scope of the Lien Act in cases not involving dissolution of marriage. In *Reed Yates Farms, Inc. v. Yates*,¹⁷⁷ the court found the Lien Act did apply to a case involving dissolution of a family business, where the attorney represented a family member who received a portion of the proceeds of the sale of the business. In that case, the court held that there was a “recovery” under the Lien Act, to the extent of the client's allocated share of the business' assets.¹⁷⁸

The claim in *Yates* could hardly be characterized as a claim for “damages,” any more than the divorce proceeding in *Thoresen*. Both cases involved a lawsuit to dissolve a legally-recognized entity, with the consequent distribution of the entity's assets. The *Yates* case is clearly a better interpretation of the Lien Act, which covers “all claims, demands and causes of actions.” The Lien Act refers to an “unliquidated claim for damages,” but only as an example of a claim or cause of action subject to the lien, not as a limitation. The statutory language also extends the lien to money “or property” recovered on behalf of the client. This language clearly suggests that actions where the ownership of property is litigated and the client “recovers” some property are also subject to the Lien Act.

Although the rationale in *Thoresen* is far from compelling, subsequent legislative action makes it less likely that an attorney will have any incentive to pursue a claim under the Lien Act in a dissolution of marriage action. Since 1976, the Marriage and Dissolution of Marriage Act¹⁷⁹ has authorized a court to enter an order compelling either party in a dissolution action to pay

existing divorce statutes, the court did not have jurisdiction to adjudicate a claim of attorney's fees in the divorce action itself. *Id.* at 121. *See also In re* Petition of Neiman, 289 N.E.2d 715 (Ill. App. Ct. 2d Dist. 1972). When the Illinois Marriage and Dissolution of Marriage Act was enacted in 1976, it specifically authorized a court to award attorney's fees in divorce actions, thus negating the holding on this issue in *Pressney*. *See Nottage v. Jeka*, 667 N.E.2d 91, 94 (Ill. 1996).

175. *Id.* at 30.

176. *Id.*

177. 526 N.E.2d 1115 (Ill. App. Ct. 4th Dist. 1988), *appeal denied*, 122 Ill. 2d 593, 530 N.E.2d 263 (1989).

178. *Id.* at 1122. *See also* Catherwood v. Morris, 196 N.E. 519 (Ill. 1935).

179. 750 ILL. COMP. STAT. 5/101 *et seq.* (2004).

attorney's fees.¹⁸⁰ The statute provides a comprehensive procedure by which a former attorney can seek an award of fees,¹⁸¹ and allows the court to require contribution from the opposing party.¹⁸² In 1997, this statute was amended to provide that the statutory procedure for awarding fees "is exclusive as to the right of any counsel (or former counsel) of record to petition a court for an award and judgment for final fees and costs during the pendency of a proceeding under this [statute]."¹⁸³ This language strongly suggests that the attorney (or former attorney) cannot seek to establish a lien under the Lien Act for fees for services rendered during the representation, at least so long as the dissolution proceeding is pending.

The statute creates two exceptions to this exclusive procedure. The first exception allows a former attorney to pursue an award of fees while the dissolution action is still pending so long as ninety days have passed after the entry of an order allowing the former attorney to withdraw.¹⁸⁴ That exception would not allow the former attorney to assert a lien claim under the Lien Act, however, because there would be no judgment or recovery to which the lien could attach, due to the dissolution action still being pending. The second exception allows an attorney (or former attorney) to pursue an independent action for an award of fees after the time for filing a petition under the statute has expired, so long as the action is filed within one year from the expiration of that time. The statute provides that if an independent action is brought, the limitations of the statutory procedure "shall in no way be deemed to have diminished any other right of any counsel (or former counsel) to pursue an award and judgment for legal fees and costs on the basis of remedies that may otherwise exist under applicable law."¹⁸⁵ This language at least suggests that, if an attorney had properly perfected a lien under the Lien Act, and if there was a "recovery" in the dissolution action, the attorney might well be permitted to assert the lien in this independent proceeding.

C. The Property to Which the Lien Attaches

Although the Lien Act provides that the lien attaches to all "claims, demands and causes of action . . . placed in [the attorneys'] hands by their clients for suit or collection," the Illinois Supreme Court quickly recognized

180. *Id.* at 5/508 (2002).

181. *Id.* at 5/508(c), (e).

182. *Id.* at 5/508(a), 5/503(j).

183. *Id.* at 5/508(a). This language was added by P.A. 89-712. 1996 Ill. Laws 4054.

184. *Id.* at 5/508(e)(1).

185. *Id.* at 5/508(e).

that the Act creates “a lien upon the proceeds, only, of the litigation or settlement of the claim.”¹⁸⁶ Hence, if the client fails to receive any proceeds from a judgment, there is nothing to which the lien can attach.¹⁸⁷

The lien is not limited to judgments, but extends to the proceeds of a settlement of the claim,¹⁸⁸ even if the attorney is not aware of the settlement.¹⁸⁹ Some Illinois cases contain unfortunate language suggesting that, as soon as the attorney serves notice of his lien on the defendant, the attorney is treated as an “assignee” of the client’s cause of action.¹⁹⁰ If that were true, the attorney would have an ownership interest in the cause of action and the attorney’s consent would be required before the cause of action could be settled.¹⁹¹ However, Illinois law is perfectly clear that the client retains the right to settle the case¹⁹² or dismiss the lawsuit, without the attorney’s knowledge or consent, notwithstanding the attorney’s lien.¹⁹³ Hence, it is very clear that the attorney does not acquire any ownership rights in the client’s cause of action by virtue of asserting a lien.

Rather than an analogy to an assignment, a more apt analogy would be to a debtor’s granting a secured party a security interest in an “account” under Article Nine of the Illinois Commercial Code.¹⁹⁴ In that case, the debtor is still

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186. *Baker v. Baker*, 101 N.E. 587, 588 (Ill. 1913). *See also* *Anastos v. O’Brien*, 279 N.E.2d 759, 763 (Ill. App. Ct. 1st Dist. 1972) (“neither the contingent fee agreement nor the lien gives a lawyer any interest in the litigation *other than the proceeds*.”) (emphasis added).
187. *Marcus v. Wilson*, 306 N.E.2d 554 (Ill. App. Ct. 1st Dist. 1973). *See also* *Scott v. New York, C. & St. L. R. Co.*, 159 F.2d 618 (7th Cir. 1947). The majority held that an attorney who had prosecuted a wrongful death claim on behalf of an Illinois administrator had no lien on a judgment given in an Indiana lawsuit brought on behalf of a different Indiana administrator. *Id.* at 622. The court noted that no judgment was entered in favor of the attorney’s client and hence no lien arose. *Id.* at 619–20. A dissenting judge argued that the lien attached to the “cause of action” and hence should attach to the Indiana judgment. *Id.* at 620 (Evans, J., dissenting). *See also*, *Process Color Plate Co. v. Chi. Urban Transp. Dist.*, 466 N.E.2d 1033, 1037 (Ill. App. Ct. 1st Dist. 1984) (no lien attaches to defendant’s assets).
188. *Standidge v. Chi. Rys. Co.*, 98 N.E. 963 (Ill. 1912). The court relied on the statutory language “and to any money or property which may be recovered” and noted this language would be wholly unnecessary if the lien extended only to judgments. *Id.* at 966. *See also* *Catherwood v. Morris*, 196 N.E. 519, 522 (Ill. 1935).
189. *Standidge*, 98 N.E. at 964. In fact, the *Standidge* court recognized that one of the principal reasons behind the Act was to protect attorneys from clients who accepted settlement offers made directly from the defendant, without the knowledge of the plaintiff’s attorney. *Id.* at 966.
190. *Eckwall v. Eckwall*, 20 N.E.2d 305 (Ill. App. Ct. 1st Dist. 1939) (abstract); *Cohen v. Kircheimer*, 2 N.E.2d 592 (Ill. App. Ct. 1st Dist. 1936) (abstract); *Dreyfuss v. Freud*, 209 Ill. App. 345, 346 (App. Ct. 1st Dist. 1918).
191. These agreements have long been held to be invalid as champertous. *See, e.g.*, *Milanko v. Jensen*, 88 N.E.2d 857, 860 (Ill. 1949); *North Chi. St. R.R. Co. v. Ackley*, 49 N.E. 222, 226 (Ill. 1897).
192. *Case v. Emerson-Brantingham Co.*, 109 N.E. 671, 672 (Ill. 1915); *Standidge v. Chi. Ry. Co.*, 98 N.E. 963, 966–67 (Ill. 1912); *Foy v. India Rubber Tire Co.*, 211 Ill. App. 252, 253 (1st Dist. 1918).
193. *Miller v. Miller*, 163 N.E. 343, 344 (Ill. 1928).
194. 810 ILL. COMP. STAT. 5/9–101 *et seq.* (2004).

entitled to compromise or even forgive payment of the account without the secured party's consent.¹⁹⁵ However, once the account debtor is notified of the secured party's security interest and directed to pay the debt to the secured party, the account debtor may not discharge the underlying debt by continuing to pay the debtor.¹⁹⁶ Similarly, the attorney's statutory lien does not affect the client's ability to settle or dismiss the claim, but once notice of the lien is given to the defendant, the defendant cannot discharge the amount of any judgment or settlement by paying the client directly.¹⁹⁷

Ordinarily, of course, the defendant will pay the proceeds of the cause of action to the client, but one court has extended the attorney's lien to "proceeds" that are paid to a third party, so long as the payment is made on behalf of the client. In *LeFevre, Zeman, Oldfield & Schwarm Law Group, Ltd. v. Wal-Mart Stores, Inc.*¹⁹⁸ the court said that the lien extended to health insurance benefits paid, not to the client, but to the persons who had provided medical services to the client. The court said that it was clear that if the insurer did not pay the providers, the client would have been obligated to do so; hence, the attorneys did "recover" these payments for the client.¹⁹⁹

However, just because a client (or a third party) receives payment from a defendant does not necessarily mean that the payment constitutes "proceeds" of a cause of action. In *Robert S. Pinzur, Ltd. v. The Hartford*,²⁰⁰ client was an employee who participated in a group health insurance program. After the client was hospitalized, the insurer did not pay her providers, and she retained an attorney to pursue a claim against the insurer. Several weeks later, after the attorney notified the insurer of his lien, the insurer paid the providers about \$35,000, but did not remit any part of the payment to the attorney. The trial court granted summary judgment for the attorney in his action to enforce a lien against the insurer, but the appellate court reversed, saying a hearing was required in light of the insurer's argument that the payments had merely been delayed due to an audit of the account due to the providers' overcharging the client and hence the payments would have been made even without the attorney's efforts.²⁰¹ The court said there was a factual dispute over whether the attorney's efforts caused the insurer to pay. The court noted that the Lien Act only provides a lien on money or property "recovered, *on account of* such

195. *Id.* at 5/905 (a), (b).

196. *Id.* at 5/9-406(a).

197. *Case v. Emerson-Brantingham Co.*, 109 N.E. 671, 672 (Ill. 1915); *Standidge v. Chi. Rys. Co.*, 98 N.E. 963, 966-67 (Ill. 1912).

198. 706 N.E.2d 130 (Ill. App. Ct. 5th Dist.), *appeal denied*, 714 N.E.2d 528 (1999).

199. *Id.* at 134.

200. 511 N.E.2d 1281 (Ill. App. Ct. 2d Dist.), *appeal denied*, 515 N.E.2d 126 (Ill. 1987).

201. *Id.* at 1288.

suits . . . ”²⁰² The court said this language requires two things. First, there must be some money or property “recovered,” or secured from an adversarial party who has refused to turn over what the client claims is due. Second, when the Lien Act says recovery must be “on account of” various actions, this means the recovery must be the result of action taken by the attorney.²⁰³

So long as the judgment or settlement is paid in cash or by check, there is little room for debate that the attorney’s lien extends to those proceeds. A harder issue is whether the lien extends to property when the judgment in the client’s cause of action affects property ownership or distribution. A number of decisions hold that the attorney’s lien extends to this property, so long as there is a sufficient connection between the judgment and the property so that it is proper to characterize the property as something “recovered” for the client. Illinois courts have held that where the cause of action is realized upon by the client’s acquisition of both real and personal property, the attorney’s lien attaches to that property.²⁰⁴ Likewise, where a lawsuit involved the proper distribution of the assets of a family-run business and the client was one of the competing claimants, the attorney’s lien attached to that portion of the proceeds of the sale of the business allocated to the client under the judgment.²⁰⁵ However, where the attorney merely preserves the client’s property from adverse claims by others, the attorney’s lien did not attach to that property.²⁰⁶ These cases establish that the lien attaches to property to which the client obtains legal title as a result of the litigation conducted by the attorney, but does not attach if the client’s legal title to property is merely preserved by the litigation.

D. The Obligations Secured by the Statutory Lien

202. *Id.*

203. *Id.* (“We conclude that an attorney seeking to enforce a lien must show that the judgment or recovery was achieved as a result of services performed by him.”).

204. *Catherwood v. Morris*, 196 N.E. 519 (Ill. 1935). *See also Dreyfuss v. Freud*, 209 Ill. App. 345 (1st Dist. 1918) (abstract) (where a decree in favor of client is a lien upon realty, the attorney’s lien attaches to the realty).

205. *Reed Yates Farms, Inc. v. Yates*, 526 N.E.2d 1115, 1122 (Ill. App. Ct. 4th Dist.), *appeal denied*, 122 Ill. 2d 593, 530 N.E.2d 263 (1988).

206. *Grossberg v. Knight*, 266 Ill. App. 183, 186 (1st Dist. 1932). In *Grossberg*, a son and daughter owned a bank account as joint tenants with their father. When the father died, other heirs sued to compel the executor to inventory the bank account as an asset of the estate. Son’s attorney persuaded the court to reject the heirs’ claim. The court held that no lien attached to the account. *Id.* at 191.

The Lien Act now makes it clear that the lien secures, not only the attorney's fees, but also "costs and expenses."²⁰⁷ Although no Illinois authorities are directly on point, it is generally held that the lien is a specific lien, and thus covers only the fees and costs incurred by the attorney in the representation of the client in the matter culminating in the settlement or judgment, not fees or costs incurred in other, unrelated matters.²⁰⁸ The lien, however, may cover fees and costs incurred after the judgment or settlement is reached, so long as the services provided by the attorney are directed at payment of the judgment or settlement.²⁰⁹

So long as the attorney-client relationship continues to exist, the attorney is entitled to assert the lien in the full amount of the fee called for by the contract between the attorney and client. For many years following the enactment of the Lien Act, Illinois courts also held that the attorney was entitled to a lien on the proceeds of the client's judgment or settlement for the full amount of the fees called for under the contract, even if the attorney was later discharged by the client and another attorney had procured the settlement or judgment.²¹⁰ As a consequence, it was not uncommon for multiple attorneys to have liens amounting to significant portions of the client's recovery.

The Illinois Supreme Court rejected that result in *Rhoades v. Norfolk & West Railway Co.*²¹¹ In *Rhoades*, the court noted that a client is entitled to discharge an attorney at any time, for any reason, and that the earlier cases allowing a discharged attorney a lien for the full amount of fees called for by the contract would render the right largely meaningless.²¹² As a consequence, the court held that an attorney discharged without cause is only entitled to

207. 770 ILL. COMP. STAT. 5/1 (2004). The "costs and expenses" language was added by P.A. 86-1156, § 1. This amendment changed the result cases decided under an earlier version of the Act holding the lien did not cover costs and expenses incurred by the attorney in conjunction with the representation. See *Brook v. Smerling*, 204 Ill. App. 250 (1st Dist. 1917) (abstract). See also *Carlson v. Powers*, 587 N.E.2d 1240 (Ill. App. Ct. 2d Dist. 1992) (giving effect to the language in the amendment).

208. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 116 at 568 & n.44 (2d ed. 1955).

209. See *W. Iron Co. v. Brittain (In re Carlson)*, 206 Ill. App. 14 (1st Dist. 1917) (fees incurred during ninety-day period in which execution was stayed by defendant's filing an appeal bond subject to the lien).

210. See, e.g., *Schlake v. Lumbermens Mut. Cas. Co.*, 166 N.E.2d 622, 625 (Ill. App. Ct. 1st Dist. 1960) (client hired and discharged multiple attorneys; court noted that law will not allow the entire recovery to be consumed by attorneys' fees); *Tulka v. Chi. City Ry. Co.*, 259 Ill. App. 234, 238 (1st Dist. 1930) (subsequently discharged attorney still entitled to lien for 1/3 of recovery, even though other attorneys procured recovery; court stated: "A client cannot by discharging an attorney, except for good cause, deprive him of his lien."); *Majka v. Metropolitan Life Ins. Co.*, 18 N.E.2d 53 (Ill. App. Ct. 1st Dist. 1938 (first case)) (abstract) (previously discharged attorneys entitled to their contract fees of 1/3 and 1/5 of the recovery, even though a third attorney brought the action leading to the recovery).

211. 399 N.E.2d 969 (Ill. 1979).

212. *Id.* at 974.

payment of the reasonable value of the services rendered by the attorney, not the full fee called for by the contract.²¹³ The court reasoned that this holding fairly balanced the client's interest in being represented by an attorney of his choice and the attorney's interest in fair compensation for services performed.²¹⁴

The holding in *Rhoades* has also been applied where an attorney has withdrawn for good cause. In *Reed Yates Farms, Inc. v. Yates*,²¹⁵ the court adopted the reasoning of *Rhoades* where an attorney had withdrawn after the client had filed a misconduct claim (later found to be meritless) with the ARDC and where the client had not paid fees to the attorney as agreed. Likewise, in *Leoris and Cohen, P.C. v. McNiece*,²¹⁶ the court noted that an attorney could properly withdraw and assert a lien if there was a "complete breakdown of the attorney-client relationship" coupled with a refusal to reimburse the attorney for costs as agreed.²¹⁷ Finally, in *Kannewurf v. Johns*,²¹⁸ the court extended the holding in *Rhoades* to cover a situation where the attorney had withdrawn because the clients had persistently refused to give him authority to negotiate a settlement for less than the policy limits of defendant's insurance. The court said that the client's conduct had made it "unreasonably difficult for [the attorney] to carry out his employment effectively"²¹⁹ In summary, these cases suggest that, so long as an attorney is justified from withdrawing from the representation under the Illinois Rules of Professional Conduct, the attorney's lien continues, but only secures the reasonable value of the attorney's services.

E. Ethical Issues and the Statutory Lien

Unlike the attorney's common-law retaining lien, which involves withholding the client's property from the client, an attorney's statutory lien is not necessarily adverse to the client's legitimate interests. Although asserting a statutory lien may reduce the amount of proceeds payable directly to the client, the reduction is only to the extent of the client's promise to pay the attorney's fees in the first place. Hence, asserting the statutory lien is not, itself, unethical.

213. *Id.* at 975.

214. *Id.*

215. 526 N.E.2d 1115 (Ill. App. Ct. 4th Dist. 1988).

216. 589 N.E.2d 1060 (Ill. App. Ct. 2d Dist. 1992).

217. *Id.* at 1064–65.

218. 632 N.E.2d 711 (Ill. App. Ct. 5th Dist. 1994).

219. *Id.* at 715 (quoting ILL. R. PROF CONDUCT R. 1.6).

A different problem is whether an attorney's unethical conduct should defeat the attorney's ability to enforce a statutory lien. Two distinct lines of cases have emerged dealing with this issue.

Several cases have invalidated an attorney's lien in situations where the attorney engaged in overreaching tactics at the time the attorney-client contract was formed. An example is *In re Estate of Morentin*,²²⁰ where the attorney approached the mother of an eight-year-old boy who had been injured in an automobile accident only an hour earlier and persuaded the mother, who could not speak, read, or write English, to sign a contingent fee contract with the attorney. The court rejected the attorney's claim of a statutory lien and said there was ample evidence that the mother did not comprehend the legal significance of the contingent fee agreement. The court also found the attorney's conduct to be inconsistent with the obligation to make complete disclosure when contracting with a client.²²¹

However, in *Reed Yates Farms, Inc. v. Yates*,²²² the client claimed that the attorney had failed to do a number of things required by the ethical rules during the course of representing the client. The court said these allegations should not affect the attorney's right to assert a lien. The court noted that Illinois law does not authorize a court to deny attorney's fees that were tainted by unprofessional conduct. The court stated that the Illinois Supreme Court has exclusive authority over attorney discipline matters and that a court's reducing or eliminating fees as a sanction for unprofessional conduct would infringe on the supreme court's exclusive authority.²²³

Although *Yates* seems to be at odds with the earlier cases, the decisions can be reconciled. The earlier cases denying a lien due to attorney's misconduct all involved misconduct at the time the attorney-client contract was entered into where the conduct was sufficiently egregious to justify rescission of the contract. Because an attorney-client contract is a prerequisite to the statutory lien,²²⁴ misconduct of this type certainly justifies invalidating the lien. However, where the alleged misconduct occurs after the formation of a valid

220. 230 N.E.2d 53 (Ill. App. Ct. 1st Dist. 1967).

221. *Id.* at 55. See also *Phelps v. Elgin, Joliet & E. Ry. Co.*, 217 N.E.2d 519 (Ill. App. Ct. 1st Dist. 1966) (attorneys had client sign contract on way to her spouse's funeral, while she was distraught and on medication; attorneys' lien denied and attorneys held not entitled to recover in *quantum meruit* because the evidence showed they did not "do one iota of work" towards the ultimate recovery procured by another attorney); *Zazove v. Richardson*, 33 N.E.2d 615 (Ill. App. Ct. 1st Dist. 1941) (abstract) (denying an attorney's lien when the contract was procured with client while she was at hospital, under medication, during surgery on her son; attorney's lien denied).

222. 526 N.E.2d 1115 (Ill. App. Ct. 4th Dist. 1988), *appeal denied*, 530 N.E.2d 263 (1988).

223. *Id.* at 1122-23.

224. See text accompanying note 135, *supra*.

attorney-client contract, such misconduct does not affect the existence of the attorney's statutory lien.²²⁵ This is consistent with Illinois cases that generally recognize that an attorney who is discharged for cause is nevertheless entitled to compensation for the reasonable value of services rendered to the client.²²⁶

F. Priority Issues and the Statutory Lien

Other persons may claim a lien on, or other interest in, the property to which the attorney's statutory lien attaches. In these cases, it is necessary to determine the priority of the competing interests in property. Because the ordinary rule is that the first property interest to be perfected has priority over property interests that are perfected later, it is necessary to determine the time at which an attorney's statutory lien has become sufficiently associated with the property so that it becomes "perfected." Absent a statute which specifically states the relative priority of the attorney's statutory lien and other property interests, the attorney's statutory lien is perfected on the date the attorney serves notice of the lien on the defendant.²²⁷ If this notice of lien is served before the date that a competing property interest in the client's cause of action or claim is perfected, the statutory lien has priority over that competing property interest,²²⁸ but if the attorney's lien notice is served after the competing interest in the property is perfected, the attorney's lien is subordinate to that competing interest.²²⁹

In many cases, however, the attorney's statutory lien will compete with another statutory lien. The most common competing statutory lien is a lien arising in favor of a health care professional. Prior to 2002, eight different

225. Of course, if the attorney were discharged, the attorney is not entitled to compensation based on the contract, but only the reasonable value of his services. See text accompanying notes 207–19, *supra*.

226. *Johns v. Klecan*, 556 N.E.2d 689, 696 (Ill. App. Ct. 1st Dist. 1990); *Tobias v. King*, 406 N.E.2d 101, 104 (Ill. App. Ct. 1st Dist. 1980).

227. *McKee-Berger-Mansueto, Inc. v. Bd. of Educ. of Chi.*, 691 F.2d 828, 834 (7th Cir. 1982).

228. See *Great Am. Ins. Co. v. Dept. of Revenue*, 226 F. Supp. 512, 514 (N.D. Ill. 1963) (judgment lien perfected after service of attorney's notice of lien).

229. *McKee-Berger-Mansueto, Inc.*, 691 F.2d at 834 (holding that a federal tax lien is superior when perfected prior to service of attorney's notice of lien); *Watkins v. GMAC Fin. Servs.*, 785 N.E.2d 40, 44 (Ill. App. Ct. 1st Dist. 2003) (security interest in insurance as proceeds of collateral perfected prior to attorney's service of notice of lien); *Fornoff v. Smith*, 281 Ill. App. 232 (4th Dist. 1935) (garnishment lien superior when garnishment served prior to attorney's notice of lien).

statutes granted liens to various health care providers.²³⁰ The liens attached to the claim or cause of action of the injured person who received medical care from these providers. All the statutes granting liens contained identical language stating that nothing in the statute “affects the priority of any attorney’s lien arising under [the Attorney’s Lien Act].”²³¹ In *Carlson v. Powers*²³² the court held that this provision in the Hospital Lien Act expressly made the hospital’s lien subordinate to the attorney’s statutory lien.²³³

In 2002, these eight statutes were consolidated into the Health Care Services Lien Act,²³⁴ which contains identical language about the statute’s affect on the attorney’s statutory liens. However, the priority of the attorney’s lien *vis a vis* the health care services lien will no longer be a matter of practical importance, because the Health Care Services Lien Act specifically limits both the liens of attorneys and the health care providers to a total of 70% of the recovery in cases where both liens attach.²³⁵ Hence, the combined liens of the attorneys and health care providers will never exhaust the injured party’s recovery and the issue of priority between the competing liens will not arise.²³⁶

G. The Statutory Lien and the Client’s Bankruptcy

An attorney’s statutory lien that is properly perfected under the Lien Act is enforceable in a bankruptcy proceeding involving the client.²³⁷ However, like any other statutory lien created under state law, if the requirements of the

230. 770 ILL. COMP. STAT. 10/0.01 *et seq.* (2004) (clinical psychologists); 770 ILL. COMP. STAT. 20/0.01 *et seq.* (2004) (dentists); 770 ILL. COMP. STAT. 22/1 *et seq.* (2004) (emergency medical services personnel); 770 ILL. COMP. STAT. 25/1 *et seq.* (2004) (home health agencies); 770 ILL. COMP. STAT. 35/0.01 *et seq.* (2004) (hospitals); 770 ILL. COMP. STAT. 72/1 *et seq.* (2004) (optometrists); 770 ILL. COMP. STAT. 75/1 *et seq.* (2004) (physical therapists); 770 ILL. COMP. STAT. 80/0.01 *et seq.* (2004) (physicians).

231. 770 ILL. COMP. STAT. 10/6 (clinical psychologists); 770 ILL. COMP. STAT. 20/6 (dentists); 770 ILL. COMP. STAT. 22/6 (emergency medical services personnel); 770 ILL. COMP. STAT. 25/6 (home health agencies); 770 ILL. COMP. STAT. 35/5 (hospitals); 770 ILL. COMP. STAT. 72/7 (physical therapists); 770 ILL. COMP. STAT. 80/6 (physicians).

232. 587 N.E.2d 1240 (Ill. App. Ct. 2d Dist. 1992).

233. *Id.* at 1242.

234. 770 ILL. COMP. STAT. 23/1 *et seq.* (2004).

235. 770 ILL. COMP. STAT. 23/10(c) (2004). This provision limits the attorney’s lien to 30% of the recovery in cases where the health care service liens exceed 40% of the recovery and limits the liens of all health care providers to 40% of the recovery. *Id.*

236. 770 ILL. COMP. STAT. 23/10(c). According to the statute, these limitations do not apply in case of an appeal, but even then the question of priority would not arise unless the attorney’s lien exceeded 60% of the recovery. *Id.*

237. *In re Whitford*, 101 B.R. 559, 562 (Bankr. S.D. Ill. 1989); *In re Kleckner*, 65 B.R. 433, 434–35 (Bankr. N.D. Ill. 1986), *rev’d on other grounds*, 93 B.R. 143 (N.D. Ill. 1988).

Lien Act have not been complied with, the statutory lien can be avoided by the trustee.²³⁸ If the statutory lien is avoided, the attorney is relegated to the status of an unsecured creditor, unless the attorney can convince the court that the attorney should be awarded an “equitable lien.”²³⁹

H. Remedies

Unlike the attorney's retaining lien, which cannot be actively enforced, the Lien Act expressly authorizes the court to adjudicate the rights of the parties and enforce the lien “on petition filed by such attorneys or their clients.”²⁴⁰ The petition is ordinarily filed in the client's case,²⁴¹ but may also be filed as a separate lawsuit.²⁴² The only requirement specified in the Act is that five days' notice must be given to the party “against whom their clients may have such suits, claims or causes of action”²⁴³ and courts have interpreted this language to mean that the notice must be served on the defendant, but not on the client.²⁴⁴ The proceeding to adjudicate the lien typically requires a hearing, but does not give rise to a right to jury trial.²⁴⁵

There are a number of procedural questions that have arisen about the nature of the hearing to determine the attorney's petition to enforce the lien, including difficult issues about evidence to measure the amount of a “reasonable” fee. However, the case law on these issues is thoroughly explored elsewhere²⁴⁶ and is beyond the scope of this article.

I. Summary: The Utility of the Statutory Lien

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238. *In re Kleckner*, 93 B.R. 143, 145 (N.D. Ill. 1988) (failure to send notice to defendant by method required under the Lien Act); *Kallen v. Litas*, 47 B.R. 977, 984–85 (N.D. Ill. 1985) (failure to serve notice on the defendant).
239. *In re Kleckner*, 93 B.R. 143, 145–50 (N.D. Ill. 1988). The attorney's equitable lien in bankruptcy is discussed in Section V.F., *infra*.
240. 770 ILL. COMP. STAT. 5/1 (2004).
241. *Standidge v. Chi. Ry. Co.*, 98 N.E. 963, 966 (Ill. 1912).
242. *Scott v. N.Y., Chi. & St. Louis R.R.*, 159 F.2d 618, 620 (7th Cir.), *cert. denied*, 331 U.S. 844 (1947).
243. 770 ILL. COMP. STAT. 5/1 (2004).
244. *Tulka v. Chi. City Ry.*, 259 Ill. App. 234, 236 (1st Dist. 1930). *Cf. Baker v. Baker*, 101 N.E. 587, 588 (Ill. 1913).
245. *Standidge v. Chi. Rys.*, 98 N.E. 963, 965 (Ill. 1912).
246. An excellent source for case law authority interpreting the mechanisms for enforcing the statutory lien in tort actions is HENRY B. VESS, III, LIENS UPON ILLINOIS TORT ACTIONS §§ 2.72–2.87 (2002 & 2004 Supp.). On the specific issue of measuring the amount of fees, *see* David P. Pasulka, *An Illinois Attorney's Guide to Fee Disputes*, 84 ILL. B.J. 622 (1996).

The statutory lien has many advantages over the attorney's retaining lien. One of the principal advantages of the statutory lien is that it does not, in any meaningful way, put the attorney and client in an adversarial position, as does the retaining lien. Because the property subject to the lien, the proceeds of a judgment or settlement, is initially in the hands of the adverse party, the attorney can enforce the lien even without the cooperation of the client. If the adverse party does not take steps to abide by the attorney's lien by paying the judgment or settlement jointly to the attorney and client, the attorney has the right to pursue the adverse party for the fees and costs subject to the lien.²⁴⁷ This minimizes the need for the attorney to sue the client, with its attendant ethical and practical problems.

Likewise, the statutory lien can be enforced directly by an action brought by the client or the attorney, unlike the "passive" retaining lien. Because the lien can be enforced by petition in the underlying proceeding, any issues that might arise with respect to the amount of the fee can be resolved by the judge who presided over the underlying proceeding, who is in the best position to evaluate the attorney's performance, as well as the contributions of other attorneys who might also have a claim for a lien even though they were discharged or withdrew prior to resolution of the underlying proceeding.

In addition, the statutory lien does not pose any significant burdens on defendants. Once the defendant has been served with notice of the lien, the defendant should be aware that any settlement or any judgment that results from the litigation must be paid jointly to the plaintiff and the plaintiff's attorney.

Finally, the requirements for the statutory lien are now well-established. Although the Act has spawned a lot of litigation, most of the significant questions have been resolved for many years and attorneys ought to be perfectly capable of satisfying the Act's requirements in all but the most unusual cases. This should be contrasted with the significant uncertainty surrounding the ethical limits on the assertion of the retaining lien, which makes virtually any claim of such a lien by the attorney a litigable issue.

The statutory lien is not, however, a panacea guaranteeing that all attorneys will be paid all the time. The statutory lien is of little value to the transactional attorney, who does not represent a client in litigation and whose efforts do not produce a judgment or settlement to which the statutory lien could attach. Likewise, the statutory lien is of little assistance to defense lawyers who, absent the assertion of a counterclaim against the plaintiff, would not ordinarily represent clients who "recover" any money or property from the plaintiff.

247. *Standidge v. Chi. Rys.*, 98 N.E. 963, 967 (Ill. 1912).

Although these attorneys do not have the statutory lien as protection, it may well be that these attorneys are less at risk for nonpayment of fees, as their clients tend to be, on balance, more creditworthy than many plaintiffs. Because these clients may be assumed to have significant assets, the attorneys are free to enter into a consensual arrangement with the client, whereby the client gives the attorney a security interest in some of the clients property to secure payment of the attorney's fees.

In short, the Lien Act is an efficient mechanism of securing payment for an attorney that leads to predictable results in most cases, with a minimum of administrative or other transaction costs associated with resolving disputes that arise between the attorney and client.

V. THE ATTORNEY'S "EQUITABLE LIEN"

A. In General

The judicially-created "equitable lien" in favor of an attorney was first recognized in Illinois in 1871.²⁴⁸ The Supreme Court of Illinois has defined the equitable lien as:

the right to have property subjected, in a court of equity, to the payment of a claim. It is neither a debt nor a right of property but a remedy for a debt. It is simply a right of a special nature over the property which constitutes a charge or encumbrance thereon, so that the very property itself may be proceeded against in an equitable action and either sold or sequestered under a judicial decree, and its proceeds in one case or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists. . . . Equity recognizes, in addition to the personal obligation, in some cases, a peculiar right over the thing concerning which a contract deals, which it calls a "lien," and which, though not property, is analogous to property, by means of which the plaintiff is enabled to follow the identical thing and to enforce the defendant's obligation by a remedy which operates directly upon that thing.²⁴⁹

248. *Smith v. Young*, 62 Ill. 210 (1871).

249. *Watson v. Hobson*, 81 N.E.2d 885, 890 (Ill. 1948).

Although Illinois courts have long recognized equitable liens in favor of attorneys, the reported cases do not discuss the reasons why attorneys are entitled to this remedy. This is not surprising, as very few Illinois cases dealing with equitable liens in any context contain an enlightening discussion of the reasons for granting this remedy. In order to explore the reasons for granting attorneys an equitable lien, it will be helpful to understand the general categories of Illinois cases where an equitable lien is deemed to be an appropriate remedy.

Ordinarily, an equitable lien is an appropriate remedy in two different situations: (1) because of the “parties’ relationship and dealings” in the particular case; or (2) because a written contract reflects the parties’ intent to satisfy a debt from particular property.²⁵⁰ Examining the Illinois cases where equitable liens are granted in general will establish that the policy basis for affording an attorney an equitable lien is based on the second of these reasons, not the first.

1. Liens Based on “Relationship and Dealings”: Unjust Enrichment As the Guiding Principle

When Illinois courts grant equitable liens based on the parties’ “relationship and dealings,” they do so for the purpose of avoiding unjust enrichment, even though the parties did not expressly agree to give the equitable lien claimant an interest in the property. Most Illinois cases imposing equitable liens on property in cases not involving attorneys are based on this unjust enrichment principle.

The equitable lien is a common remedy in disputes involving co-tenants of property. If one co-tenant makes valuable improvements to the commonly-owned property and the property is subsequently partitioned, the improving co-tenant is entitled to an equitable lien on the interests of the other co-tenants in the amount of the proportionate share of the value of the improvements made.²⁵¹ Were it not for this doctrine, the other co-tenants benefitting from the

250. *Small v. Beverly Bank*, 936 F.2d 945, 949 (7th Cir. 1991) (applying Ill. law); *Avco Delta Corp. Canada Ltd. v. United States*, 484 F.2d 692, 703 (7th Cir. 1973) (applying Ill. law), *cert. denied sub nom.* *Canadian Parkhill Pipe Stringing Ltd. v. United States*, 415 U.S. 931 (1974); *Einoder v. Mt. Greenwood Bank (In re Einoder)*, 55 B. R. 319, 327 (Bankr. N.D. Ill. 1985) (applying Ill. law); *Hargrove v. Gerill Corp.*, 464 N.E.2d 1226, 1231 (Ill. App. Ct. 2d Dist. 1984).

251. *Oppenheimer v. Szulerecki*, 130 N.E. 325, 327 (Ill. 1921). The *Oppenheimer* court relied on a long line of earlier supreme court decisions reaching the same result in partition cases, although they did not use the terminology “equitable lien” as a justification for the result. See *Mahoney v. Mahoney*, 65 Ill. 406 (1872); *Kurtz v. Hibner*, 55 Ill. 514 (1870); *Dean v. O’Meara*, 47 Ill. 120 (1868); *Louvalle v. Menard*, 1 Gilman 39 (Ill. 1844).

proceeds of the partition action would be unjustly enriched because the value of their interests in the property was increased by the improver's efforts.²⁵²

This same principle also extends to persons who improve the defendant's property, even though the improver is not a co-owner. For example, in *Robinson v. Robinson*²⁵³ a married couple built a house on land owned by the husband's parents. When the marriage dissolved, the wife was granted an equitable lien on the parents' property in amount of one-half of the value of the house.²⁵⁴ The *Robinson* court expressly based its decision on unjust enrichment.²⁵⁵ Likewise, in *Pope v. Speiser*²⁵⁶ the plaintiff, with defendant's knowledge and consent, made valuable improvements on defendant's farm and defendant made repeated statements that the farm would belong to plaintiff after defendant's death. The court held the plaintiff was entitled to an equitable lien on the property in the amount of the value of the improvements he had made. The *Speiser* court also specifically referred to unjust enrichment and restitution principles as the justification for the equitable lien.²⁵⁷

An equitable lien also arises from the "relationship and dealing" of the parties where the plaintiff has conferred a benefit on the defendant as a result of the defendant's fraudulent conduct. In *Economy Fire & Casualty Co. v. Warren*,²⁵⁸ the plaintiff-insurer paid fire insurance benefits to a married couple. Subsequently, the insurer discovered that the wife had intentionally set the fire. The court granted the insurer an equitable lien on the property to the extent of the payments.²⁵⁹ A similar result pertains when the claim for equitable lien is based on a breach of fiduciary duty by the defendant.²⁶⁰ Granting an equitable

252. Merely improving property that results in a benefit to other owners is not, itself, a sufficient basis upon which to predicate a claim of unjust enrichment. RESTATEMENT OF RESTITUTION § 46 (1937). However, when the owner of property seeks the assistance of a court of equity, as by filing an action for partition, the court of equity can condition this relief on appropriate payment to the improver. *Id.* at cmt. c.

253. 429 N.E.2d 183 (Ill. App. Ct. 2d Dist. 1981).

254. *Id.* at 188–89. See also *Oppenheimer v. Szulerecki*, 130 N.E. 325, 327 (Ill. 1921) (where a lease required landlord to rebuild in case of destruction of the demised building, but the landlord failed to rebuild, and the tenant reconstructed the building, which became the property of the landlord, the tenant was entitled to an equitable lien for the reasonable cost of the restoration of the building).

255. *Robinson*, 429 N.E.2d at 188.

256. 130 N.E.2d 507 (Ill. 1955).

257. *Id.* at 511.

258. 390 N.E.2d 361 (Ill. App. Ct. 1st Dist. 1979).

259. The court did find that the equitable lien could not be enforced against the husband's interest in the property, as the husband was completely innocent of any wrongdoing. *Id.* at 363–64.

260. See *In re Comm'r of Banks and Real Estate*, 764 N.E.2d 66, 100–01 (Ill. App. Ct. 1st Dist. 2001) (noting general rule that where trustee wrongfully commingles trust funds with other funds and commingled funds are used to acquire property, an equitable lien is imposed on the property in favor of trust beneficiaries, assuming that the trust beneficiaries can adequately trace the trust funds into the property). There is very little authority on the availability of equitable liens in actions against

lien in these circumstances is a quintessential form of avoiding unjust enrichment to the person who commits the fraud.²⁶¹

The equitable lien in favor of an attorney has none of these attributes and cannot be justified on unjust enrichment principles. The attorney has not improved the value of the client's property nor is the client guilty of fraud or breach of fiduciary duties. Instead, the client has merely promised to pay the attorney a fee and the attorney seeks to enforce that debt by claiming an interest in some property of the client.

As a general rule, absent a reason to invalidate a contract, such as fraud or mistake, a person who renders services to another pursuant to a contract is not entitled to restitution against the other for the value of these services.²⁶² Under this general rule, because the attorney has provided services to the client pursuant to a contract, the attorney is not entitled to make a claim of unjust enrichment upon which to predicate the relief of an equitable lien.²⁶³ There is an exception to the general rule where the other party has committed a material breach,²⁶⁴ but even this exception does not apply in cases where the other's only remaining obligation under the contract is to pay a liquidated sum of money.²⁶⁵ Because the client's promise in most attorney-client agreements is

fiduciaries in Illinois, because in most cases of wrongdoing by a trustee or other fiduciary, the plaintiff will couch its complaint in the form of a constructive trust, rather than an equitable lien. *See, e.g., Ray v. Winter*, 367 N.E.2d 678 (Ill. 1977). By invoking the constructive trust doctrine, the plaintiff is allowed to recover the entire value of the property subject to the constructive trust, even if the value of the property is significantly in excess of the value of the plaintiff's misappropriated property. 1 DAN B. DOBBS, *LAW OF REMEDIES* § 4.3(2) at 592 (Practitioner ed. 1993). An equitable lien based on unjust enrichment is limited to the amount of the unjust enrichment. *Id.* at 603.

261. *See generally*, RESTATEMENT OF RESTITUTION §§ 40, 170 & cmt. a (1937).

262. *Id.* at §107. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 86, cmt. f (1981).

263. RESTATEMENT OF RESTITUTION §§107-108 (1937). This is consistent with Illinois cases holding that mere nonpayment of a money debt is insufficient to justify imposing a constructive trust. *See, e.g., In re T. Brady Mechanical Services, Inc.*, 133 B.R. 441, 446 (Bankr. N.D. Ill. 1991); *Midwest Decks, Inc. v. Butler & Baretz Acquisitions, Inc.*, 649 N.E.2d 511, 518 (Ill. App. Ct. 1st Dist. 1995). The remedy in these cases is a suit for breach of contract, not a constructive trust or equitable lien.

264. RESTATEMENT OF RESTITUTION §§107-108 (1937). In such circumstances, the *Restatement of Restitution* permits a restitution claim, but only in accordance with the principles set forth in the *Restatement of Contracts*. *Id.* at § 108(a).

265. "The remedy of restitution in money is not available to one who has fully performed his part of a contract, if the only part of the agreed exchange for such performance that has not been rendered by the defendant is a sum of money constituting a liquidated debt . . ." RESTATEMENT OF CONTRACTS § 350 (1932). However, if the defendant was obligated to perform some other obligation, such as transferring property to the plaintiff, restitution for the plaintiff's services would be permissible. *Id.* at cmt. c, illus. 3. The premise for this distinction is that the valuation difficulties inherent in determining the "reasonable value" of a plaintiff's services can be avoided by simply requiring the plaintiff to pursue his breach of contract claim for a liquidated amount of money. On the other hand, where the defendant was to provide property to the plaintiff, the value of which may well be in dispute, valuation difficulties will arise no matter which remedy (breach of contract or restitution) the plaintiff elects. In such cases, the burden of uncertainty ought to fall on the breaching defendant, and

simply the payment of an ascertainable sum of money, the attorney would not be entitled to claim restitution based on unjust enrichment. In summary, then, granting an equitable lien to an attorney cannot be based on the policy against unjust enrichment.

2. *Equitable Liens Arising from Express Agreement of the Parties*

Absent unjust enrichment, an equitable lien may arise from an agreement of the parties indicating that they intended a debt to be satisfied from particular property. Illinois courts recognize this basis for equitable liens in two situations not involving attorneys.

One illustration of this is the so-called “vendor’s lien.” When a vendor contracts to sell real property to a purchaser, but does not reserve an express lien either by a mortgage or by retention of title pending payment of the purchase price, an equitable lien is recognized in favor of the vendor for the unpaid purchase price.²⁶⁶ The lien is not an interest in property, but merely a right in the vendor to resort to the property in equity if the purchase price is not paid.²⁶⁷

The vendor’s lien arises from the parties’ agreement, including both the language used and the circumstances surrounding the execution of the agreement. The Illinois Supreme Court has noted that the “instrument or the surrounding circumstances” must indicate an intention that the property be held as security for the obligation.²⁶⁸ Other cases are more likely to find a vendor’s lien absent express language stating that the property is to be held as security for the obligation, and refer instead to an “implied agreement” existing between the vendor and purchaser²⁶⁹ or, stated negatively, that no vendor’s lien arises if the parties’ agreement or conduct indicates that none was intended.²⁷⁰

the plaintiff allowed to pursue either theory at his election. *See generally*, E. ALLAN FARNSWORTH, CONTRACTS §12.20 at 825–26 (4th ed. 2001).

266. *Krajcir v. Egidi*, 712 N.E.2d 917, 925 (Ill. App. Ct. 1st Dist. 1999); *Mellon Bank, N.A. v. Midwest Bank & Trust Co.*, 638 N.E.2d 640, 649 (Ill. App. Ct. 1st Dist. 1993).

267. *Krajcir*, 712 N.E.2d at 925; *Mellon Bank*, 638 N.E.2d at 649.

268. *Hibernian Banking Ass’n v. Davis*, 129 N.E. 540, 542 (Ill. 1921). There is dicta in three cases indicating that the lien does not arise from “agreement of the parties,” see *Wright v. Buchanan*, 123 N.E. 53, 56 (Ill. 1919); *Mitchell v. Shaneberg*, 37 N.E. 576, 578 (Ill. 1894); *Mills v. Mills*, 169 N.E.2d 177, 180–81 (Ill. App. Ct. 2d Dist. 1960). However, this language is best understood as meaning that the contract between the vendor and purchaser does not have to explicitly reference a “lien” in order for the vendor’s lien to arise.

269. *See, e.g.*, *Beal v. Harrington*, 4 N.E. 664, 666 (Ill. 1886); *Wendell v. Pinneo*, 127 Ill. App. 319, 323 (3d Dist. 1906).

270. *Krajcir*, 712 N.E.2d at 926; *Mellon Bank*, 638 N.E.2d at 649; *Pruitt Office Machines, Inc. v. Liberty Nat’l Bank of Chi.*, 93 N.E.2d 104, 105 (Ill. App. Ct. 1st Dist. 1950).

Illinois courts also recognize an equitable lien in favor of a real estate mortgagee where the mortgage contains a pledge of the “rents and profits” from the real estate subject to the mortgage.²⁷¹ These decisions make it clear that the equitable lien arises solely from the intention of the parties as expressed in the mortgage.²⁷² There is no “unjust enrichment” to the mortgagor in these cases, because the mortgagor is entitled to retain the rents and profits so long as the mortgagor does not default in making the payments secured by the mortgage. The rights of the mortgagee to these rents and profits pursuant to its equitable lien only accrue when the mortgagee takes possession of the property after the mortgagor’s default in payment.²⁷³

Like the vendor’s lien and the mortgagee’s lien on rents and profits, the attorney’s equitable lien is premised on the attorney and client entering into a contract that contemplated that the attorney would be compensated out of some specific property usually the proceeds of litigation conducted by the attorney on behalf of the client, not for the prevention of unjust enrichment. This is made clear when one examines how Illinois courts have set forth the requisites for the attorney’s equitable lien.

B. The Requisites for the Attorney’s Equitable Lien

An “equitable lien” in favor of an attorney does not arise from the mere existence of an attorney-client relationship, but only arises if the contract²⁷⁴ between the attorney and the client creates an “equitable assignment.”²⁷⁵ An “equitable assignment” usually arises where the client has executed a contingent fee agreement that gives the attorney a claim to some percentage of

271. *Anna Nat’l Bank v. Prater*, 506 N.E.2d 769, 776 (Ill. App. Ct. 5th Dist. 1987); *Liss v. Harris*, 26 N.E.2d 133, 137 (Ill. App. Ct. 1940).

272. *Anna Nat’l Bank*, 506 N.E.2d at 776 (“this right derives from the real estate mortgage itself and does not depend upon compliance with [the Uniform Commercial Code]”); *Liss*, 26 N.E.2d at 137 (“Whatever rights the mortgagee in the case at bar acquired arose from the contractual obligations of the parties as expressed in the trust deed.”).

273. *Anna Nat’l Bank*, 506 N.E.2d at 776.

274. Illinois courts have not been clear on whether the agreement between the attorney and the client must be an express, written agreement. *Compare* *Watson v. Hobson*, 81 N.E.2d 885, 891 (Ill. 1948) (no equitable lien attached to real property because the clients’ promise that the attorneys could look to some real estate to recover their fees was oral and not enforceable under the statute of frauds) *with* *Lewsader v. Wal-Mart Stores, Inc.*, 694 N.E.2d 191 (Ill. App. Ct. 4th Dist. 1998) (equitable lien may arise from an implied-in-fact contract).

275. *Hawk v. Ament*, 28 Ill. App. 390, 394 (2d Dist. 1888). *See also* *Dougherty v. Hughes*, 165 Ill. 384 (1897) (no equitable lien arose where parents of injured child gave power of attorney to pursue claim to a collection agency, which hired an attorney who settled the claim; no contract between parents and attorney existed).

the client's recovery. In order to find an "equitable assignment," there must be an implied appropriation of the recovery, or some designated part, proportion, or percentage of the recovery.²⁷⁶ A mere recitation that the attorney is to receive "reasonable compensation" out of a fund is not sufficient to meet this requirement because there is no designated percentage of other identifiable quantity of the recovery "assigned" to the attorney.²⁷⁷

Illinois courts have distinguished the "equitable assignment" of a portion of a fund that creates an "equitable lien" from a "mere personal promise to pay" the attorney's fees that does not create an equitable lien. This distinction, first drawn by the Supreme Court of Illinois in *Lewis v. Braun*,²⁷⁸ has spawned many cases which attempt to parse the language of the attorney-client contract²⁷⁹ to determine whether the language falls in the "equitable assignment" category or the "personal promise to pay" category.

For example, in *Home Federal Savings & Loan Ass'n of Centralia v. Cook*,²⁸⁰ the court held that the following contract language was sufficient to create an equitable lien: "We agree to pay said attorneys a contingent fee of 40% of any monies received . . ." However, in *In re Key West Restaurant & Lounge, Inc.*,²⁸¹ the court held the following language was not sufficient to create an equitable lien: "the client agrees to pay to the Attorneys an amount equal to seventeen and a half (17 ½%) percent of all sums recovered from [insurer] by reason of a trial and judgment awarded therein . . ." These cases, indicate that if the contract between the client and the attorney uses language committing the client to pay "an amount equal to" some percentage of the recovery, courts are likely to treat the contract as merely giving rise to a personal promise to pay, and hence no equitable lien arises.²⁸² However, if the

276. *Achs v. Maddox*, 530 N.E.2d 612, 614 (Ill. App. Ct. 2d Dist. 1988).

277. *Hull v. Culver*, 32 N.E. 265, 267 (Ill. 1892).

278. 191 N.E. 56 (Ill. 1934).

279. Determining whether an equitable assignment has occurred or whether it is merely a promise to pay is dependent on the language of the agreement between attorney and client. *McKee-Berger-Mansueto, Inc. v. Bd. of Educ. of Chi.*, 691 F.2d 828, 835 (7th Cir. 1982); *In re Del Grosso*, 111 B.R. 178, 183 (Bankr. N.D. Ill. 1990); *Lauria v. Titan Sec. (In re Lauria)*, 243 B.R. 705, 710 (Bankr. N.D. Ill. 2000); *Olsen v. Russell (In re Kleckner)*, 65 B.R. 433, 435 (Bankr. N.D. Ill. 1986), *rev'd on other grounds*, 93 B.R. 143 (N.D. Ill. 1988); *In re Key West Rest. & Lounge, Inc.*, 54 B.R. 978, 984 (Bankr. N.D. Ill. 1985); *Achs v. Maddox*, 530 N.E.2d 612, 615 (Ill. App. Ct. 2d Dist. 1988).

280. 525 N.E.2d 151, 153 (Ill. App. Ct. 5th Dist. 1988). *See also Kallen v. Ash, Anos, Freedom and Logan (In re Brass Kettle Rests., Inc.)*, 790 F.2d 574 (7th Cir. 1986).

281. 54 B.R. 978 (Bankr. N.D. Ill. 1985). *See also In re Del Grosso*, 111 B.R. 178, 183 (Bankr. N.D. Ill. 1990).

282. *See, e.g., LeFevre, Zeman, Oldfield & Schwarm Law Group, Ltd. v. Wal-Mart Stores, Inc.*, 706 N.E.2d 130, 133 (Ill. App. Ct. 5th Dist. 1999), *appeal denied*, 714 N.E.2d 528 (Ill. 1999) ("I agree to pay my attorney a sum equal to 40 percent (40%) of whatever may be recovered . . .") (emphasis added); *Dep't of Pub. Works v. Exch. Nat'l Bank*, 417 N.E.2d 1045 (Ill. App. Ct. 2d Dist. 1981) ("We

contract between the client and attorney uses language committing the client to pay a fee “of” some percentage of the recovery, courts are likely to treat the contract as creating an equitable assignment of a portion of the recovery and hence an equitable lien does arise.²⁸³ In fact, one recent federal bankruptcy court decision emphasized the importance of the word “of” as necessary to connect the percentage to the recovery.²⁸⁴

Although this grammatical distinction may seem to be trivial, it is perfectly consistent with the policy basis for granting an equitable lien to an attorney. As noted earlier,²⁸⁵ the attorney’s equitable lien on the client’s recovery results from a clear intention of the parties to make a portion of the client’s recovery stand as security for the attorney’s fee as expressed in the parties’ contract. Absent a clear expression of this intention, the attorney-client contract only contains a client’s promise to pay the fee. If the client fails to pay, the client may be liable for breach of contract, but this breach does not give rise to a claim for unjust enrichment sufficient to justify imposing an equitable lien in favor of the attorney. Hence, Illinois courts have been correct to parse the language of the attorney-client contract to ascertain the intention of the parties.

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- hereby agree to pay you . . . *an amount equal to* [28% of the recovery over \$132,000]”) (emphasis added); *Vill. of Clarendon Hills v. Mulder*, 663 N.E.2d 435 (Ill. App. Ct. 2d Dist. 1996) (“We agree to pay you . . . *an amount equal to* one-third (1/3) of [recovery over] \$585,000”) (emphasis added).
283. *See, e.g., Kallen v. Ash, Anos, Freedman and Logan (In re Brass Kettle Restaurants, Inc.)*, 790 F.2d 574, 576 (7th Cir. 1986) (“the undersigned agrees to pay the firm . . . *forty percent (40%) of any recovery*”) (emphasis added); *McKee-Berger-Mansueto, Inc. v. Bd. of Educ. of Chi.*, 691 F.2d 828, 837 (7th Cir. 1982) (“The terms of that contingent fee arrangement entitle us to *one-third (1/3) of any and all recoveries made on the claims*”) (emphasis added); *In re Kleckner*, 65 B.R. 433, 435 (Bankr. N.D. Ill. 1986), *rev’d on other grounds*, 93 B.R. 143 (N.D. Ill. 1988) (“I agree to pay said attorneys’ fees as follows: *50% of whatever may be recovered* from said claim, whether by suit, settlement, or in any other manner”); *Lewsader v. Wal-Mart Stores, Inc.*, 694 N.E.2d 191, 198 (Ill. App. Ct. 4th Dist. 1998) (“Client hereby agrees to pay to Attorney for all of the said services rendered and to be rendered by Attorney, the following: (a) *33 1/3 of any amount recovered* by settlement . . . (b) *40% of any amount recovered* after final judgment . . .”) (emphasis added).
284. *In re Midway Indus. Contractors, Inc.*, 272 B.R. 651, 670 (Bankr. N.D. Ill. 2001). This grammatical distinction explains the results in most cases, but there is one case that is not consistent with this distinction and which seems to ignore the clear intent of the parties as expressed in the contract language. In *In re Del Grosso*, 111 B.R. 178 (Bankr. N.D. Ill. 1990), the contract provided that the client agreed to “pay [attorney] as compensation for his services, and hereby assign to him, one-third of any sum obtained or recovered therefrom by suit, settlement or otherwise.” Even though this language certainly indicated an intention to assign to the attorney a portion of the recovery, the court held that no equitable lien arose because the attorney did very little work after referring the case to another attorney. *Id.* at 183. *Contra Wegner v. Arnold*, 713 N.E.2d 247, 252 (Ill. App. Ct. 2d Dist. 1999), *appeal denied*, 720 N.E.2d 1107 (Ill. 1999) (an equitable lien was created when the contract provided: “In consideration of all legal services to be rendered in this cause, claimant agrees to pay and hereby assign as a lien to the attorney, the sum of one-third (1/3) of the gross amount recovered through settlement or trial.”).
285. *See* Section V.A., *supra*, text accompanying notes 248–73.

C. The Property to Which the Equitable Lien Attaches

In theory, an equitable lien in favor of an attorney can attach to almost any property, so long as the contract between the attorney and client indicates that the parties intended the attorney's claim to be satisfied out of that property. In fact, two courts have held that the lien attaches to real property, when the real property is the subject of litigation in which the attorney represented the client.²⁸⁶ However, in all the other reported cases, the property to which the equitable lien attached was the proceeds of a lawsuit in which the attorney represented the client.²⁸⁷ Therefore, the equitable lien attaches to the same property on which the attorney could have perfected a statutory lien under the Lien Act.

D. The Obligations Secured by the Equitable Lien

In theory, the equitable lien could secure to any obligation owed by the client to the attorney, so long as the contract between the client and attorney clearly identifies that obligation. In practice, however, the obligation covered by the contract is almost always the client's duty to pay the attorney a contingent fee of a percentage of the client's recovery in the lawsuit where the attorney represents the client.

Because the extent of the equitable lien is determined by the contract of the parties, whether an attorney's costs and expenses, in addition to his fees, is subject to the equitable lien is determined by the language of the contract. In *Achs v. Maddox*,²⁸⁸ the contract only specified the attorney's fees as being paid out of the client's recovery, but a separate provision in the contract required the client to reimburse the attorney for expenses on a monthly basis. Because the requirement for monthly reimbursement of expenses was inconsistent with a conclusion that the expenses were to be paid out of the recovery, the equitable

286. *Smith v. Young*, 62 Ill. 210 (1871); *Slusarz v. Slusarz*, 151 N.E.2d 411 (Ill. App. Ct. 1st Dist. 1958) (clients agreed their attorney would be paid out of proceeds of the sale of property subject to the lawsuit).

287. Thus, if the client obtains no recovery, there is no property to which the lien may attach. *Cf. Damron v. City of Eldorado*, 21 N.E.2d 641 (Ill. App. Ct. 4th Dist. 1939) (attorneys represented City in connection with municipal improvement, with a fee of 4% of the cost of the improvements, but the improvements were never approved by Department of Public Works & Buildings; *held*: no lien existed because the contract contemplated that City was to pay percentage of Motor Vehicle Fuel Tax fund and payments to the fund were never made).

288. 530 N.E.2d 612 (Ill. App. Ct. 2d Dist. 1988).

lien did not secure the client's obligation to reimburse the attorney's costs and expenses.²⁸⁹

Although the equitable lien usually secures repayment of fees at the contract rate, in cases where the attorney has died²⁹⁰ or been discharged by the client²⁹¹ prior to the client's claim being resolved by settlement or judgment, the attorney's equitable lien is limited to recovery for the reasonable value of his services.

All of these cases are perfectly consistent with the contractual basis for the attorney's equitable lien. If the contract contains a promise to reimburse the attorney for expenses independent of any recovery, then an equitable lien should not extend to those expenses because there is nothing to indicate the parties intended the client's recovery to be security for the repayment of those expenses. Likewise, where the attorney has performed the contract and generated a recovery for his client, he is entitled to his fees, measured by the contract. However, where the attorney's services are terminated through death or discharge prior to the time of recovery, the attorney's contribution to creating the recovery is less than was contemplated by the contingent fee contract, and the measure of his fees subject to the equitable lien must be measured by some other standard.²⁹²

In summary, in almost all the reported Illinois decisions, the attorney's equitable lien gives the attorney a lien on the client's recovery to secure repayment of the attorney's fees. Because the Lien Act also grants an attorney a lien for his fees and expenses on the client's recovery, the equitable lien covers the same obligations that the attorney could secure by complying with the Lien Act.

E. Ethical Issues and the Equitable Lien

Unlike the retaining lien, an attorney claiming an equitable lien does not withhold the client's property from the client. Because the equitable lien ordinarily arises only when litigation yields a recovery for the client, asserting the equitable lien does not impede the client's ability to prosecute litigation. As a result, no Illinois cases even suggest that an attorney might violate ethical obligations owed to the client merely by asserting an equitable lien.

289. *Id.* at 616.

290. *Lewsader v. Wal-Mart Stores, Inc.*, 694 N.E.2d 191, 199 (Ill. App. Ct. 4th Dist. 1998).

291. *Wegner v. Arnold*, 713 N.E.2d 247, 252 (Ill. App. Ct. 2d Dist. 1999).

292. *Lewsader*, 694 N.E.2d at 199.

Although asserting an equitable lien may not be unethical, a different issue arises when an attorney asserts an equitable lien and the client claims that the attorney has engaged in unethical conduct that should lead the court to deny the attorney's claim for an equitable lien. As noted earlier,²⁹³ when an attorney claims a statutory lien under the Lien Act, Illinois courts have disagreed whether the lien should be affected by the attorney's misconduct. With respect to equitable liens, the result is clearer. The only reported decision involving an attorney's misconduct and a claim of an equitable lien is *In re Del Grosso*,²⁹⁴ where the court found that an attorney had violated the rule against fee-splitting by not obtaining the client's consent to the fee-splitting arrangement. The court concluded the attorney should be precluded from asserting an equitable lien in this circumstance.²⁹⁵

Because the equitable lien is a species of equitable relief and equitable relief has traditionally been discretionary in Illinois,²⁹⁶ considering the plaintiff's conduct is usually highly relevant in determining whether equitable relief should be granted.²⁹⁷ In particular, in cases not involving attorneys, Illinois courts have held that inequitable conduct by the person seeking an equitable lien justifies denying the equitable lien, even if the ordinary requirements for the equitable lien are present.²⁹⁸ The holding in *Del Grosso* is certainly consistent with that principle.

F. The Equitable Lien and the Client's Bankruptcy

Asserting an equitable lien against a client who has filed for bankruptcy raises very complicated issues. Indeed, one commentator has described the "current disarray" of cases attempting to enforce an equitable lien in

293. See Section IV.E, *supra*, text accompanying notes 220–26.

294. 111 B.R. 178 (Bankr. N.D. Ill. 1990).

295. *Id.* at 185. The court did allow the attorney an unsecured claim against the bankrupt estate.

296. See, e.g., *Lewsader*, 694 N.E.2d at 199.

297. See, e.g., *Long v. Kemper Life Ins. Co.*, 553 N.E.2d 439, 441 (Ill. App. Ct. 2d Dist. 1990).

298. *Heidenbluth v. Fromhold*, 38 N.E. 930, 931 (Ill. 1894) (contractor claiming equitable lien on property held estopped under the "clean hands" doctrine due to fraud in inflating the contract price for the work done in effort to defraud third party); *Commercial Nat'l Bank v. Burch*, 31 N.E. 420, 423 (Ill. 1892) (creditor who sought equitable lien on assets of insolvent corporation held not entitled to such relief under the "clean hands" doctrine due to creditor's agent's misrepresentations to corporation). Cf. *Carlyle v. Jaskiewicz*, 464 N.E.2d 751 (Ill. App. Ct. 1st Dist. 1984) (court acknowledged "clean hands" doctrine as a bar to equitable lien claim, but found that lien claimant had not engaged in misconduct relating to the transaction out of which the equitable lien claim arose); *Cutler v. Hicks*, 268 Ill. App. 161 (3d Dist. 1932) (same).

bankruptcy²⁹⁹ and identified at least eight different situations where creditors have sought, with varying degrees of success, to enforce an equitable lien in bankruptcy.³⁰⁰ This is not surprising, given the fundamental theoretical disagreements over the extent to which equitable remedies like equitable liens and constructive trusts should be enforced in bankruptcy.³⁰¹

As a general matter, in bankruptcy proceedings, state law determines property rights.³⁰² Consequently, bankruptcy courts look to Illinois law to determine whether a particular attorney-client contract constitutes an “equitable assignment” or a “mere promise to pay.”³⁰³ Assuming that the attorney can establish that the parties intended an “equitable assignment,” so that state law would create an equitable lien, two additional issues arise that are controlled by federal bankruptcy law. First, can the equitable lien survive the bankruptcy trustee’s avoiding powers? Second, is the equitable lien a voidable preferential transfer?

1. *The Equitable Lien and the Trustee’s Avoiding Powers*

As to the first question, under section 544 of the Bankruptcy Code³⁰⁴ the trustee can avoid a transfer of property, including a lien, that would be voidable by a creditor with a judicial lien arising on the date of the filing of the bankruptcy petition³⁰⁵ or by a bona fide purchaser of real property.³⁰⁶ Because attorneys rarely claim an equitable lien against real property,³⁰⁷ the principal issue about the equitable lien and the trustee’s avoiding power is whether an attorney claiming an equitable lien on the proceeds of a judgment or settlement could enforce the lien against a judgment creditor with a lien on the judgment or settlement. One bankruptcy dispute in Illinois shows the difficulty of applying the avoiding powers to an attorney’s claim of an equitable lien.

299. Jeffrey Davis, *Equitable Liens and Constructive Trusts in Bankruptcy: Judicial Values and the Limits of Bankruptcy Distribution Policy*, 41 FLA. L. REV. 1, 8 (1989).

300. *Id.* at 20–68.

301. See generally Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265 (1998); Emily Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297.

302. *Butner v. United States*, 440 U.S. 48, 55 (1979).

303. See, e.g., *In re Brass Kettle Rest., Inc.*, 790 F.2d 574, 575 (7th Cir. 1986); *In re Del Grosso*, 111 B.R. 178, 183 (Bankr. N.D. Ill. 1990).

304. 11 U.S.C. § 544 (2000).

305. *Id.* at § 544(a)(1).

306. *Id.* at § 544(a)(3).

307. Research discloses only two reported cases in Illinois where the equitable lien of the attorney was claimed on real property belonging to the client. *Smith v. Young*, 62 Ill. 210 (1871); *Slusarz v. Slusarz*, 151 N.E.2d 411 (Ill. App. Ct. 1st Dist. 1958).

In *In re Kleckner*,³⁰⁸ the client signed a contingent fee agreement with the attorney in a personal injury matter. The attorney settled the case, received the settlement check, deducted his fee, and remitted the remainder to the client, who filed bankruptcy a few weeks later. The trustee sought to recover the fee and the attorney claimed an equitable lien on the settlement in the amount of his fee. The bankruptcy court held that the equitable lien claimed by the attorney was voidable by the trustee under section 544(a) because an equitable lien on the proceeds of a claim is not perfected until judgment is entered on the claim.³⁰⁹ Because the claim had been settled without a judgment being entered, the court held the equitable lien was unperfected and thus the trustee could avoid it.³¹⁰

The attorney appealed and the district court reversed the bankruptcy court's holding.³¹¹ The district court noted that the attorney had already been paid when he deducted his fees from the settlement check and therefore the debt from the client had been satisfied and any "lien" securing the debt was discharged prior to the date the client filed for bankruptcy. Hence, there was no "lien" to "avoid" under section 544(a).³¹²

2. *The Equitable Lien as a Voidable Preference*

Under section 547 of the Bankruptcy Code,³¹³ the trustee in bankruptcy can avoid a transfer of property for the benefit of a creditor, made on account of an antecedent debt and while the debtor was insolvent, if the transfer was made within ninety days before the filing of the bankruptcy petition³¹⁴ and if the transfer enables the creditor to receive more than the creditor would have received in a liquidation proceeding if the transfer had not been made.³¹⁵ Two reported bankruptcy cases dealing with attorneys' claims of equitable liens under Illinois law have dealt with the preference question.

In re Brass Kettle Restaurant, Inc.,³¹⁶ involved an attorney who had represented the client in various actions arising out of a fire at the client's

308. 65 B.R. 433 (Bankr. N.D. Ill. 1986), *reconsideration denied*, 81 B.R. 464 (1988), *rev'd*, 93 B.R. 143 (N.D. Ill. 1988).

309. 65 B.R. at 436 (citing *Marbach v. Gnabl*, 219 N.E.2d 572 (Ill. App. Ct. 1st Dist. 1966)).

310. *Id.* The court also held that the payment to the attorney was a preferential transfer. The bankruptcy court's decision on the preference issue is discussed *infra*, text accompanying notes 313–20.

311. 93 B.R. 143 (N.D. Ill. 1988).

312. *Id.* at 146 & n.3.

313. 11 U.S.C. § 547 (2000).

314. The time period is one year if the transferee is an "insider" as defined in 11 U.S.C. § 101(31). *Id.* at § 547(b)(4)(B).

315. *Id.* at § 547(b).

316. 790 F.2d 574 (7th Cir. 1986).

business. One of the actions resulted in a \$40,000 settlement, from which the attorney had deducted an amount equal to its contingent fee and placed in a segregated account. A month later, the client filed for bankruptcy and the attorney remitted the remainder of the settlement proceeds to the trustee. The trustee sought to recover the payment to the attorney as a preferential transfer and the district court agreed. On appeal, in an opinion remarkable only for its brevity, the court noted that the equitable lien “attached” when the client executed the contingent fee agreement, which represented a contemporaneous exchange of promises. The court then held that “this agreement did not constitute a preferential transfer because it was not a ‘transfer of property of the debtor . . . for or on account of an antecedent debt owed by the debtor before such transfer was made’”³¹⁷

Two years later, the district court in *In re Kleckner*³¹⁸ determined that an attorney’s deducting the amount of the attorney’s fee from a settlement check within 90 days of the client’s bankruptcy was not a preferential transfer because the amount of the deduction was not “property of the debtor” under section 547(a). The court noted that the language of the contingent fee agreement was sufficient to constitute an “equitable assignment” of that part of the settlement representing the attorney’s contingent fee and that while an equitable lien would have to be perfected like any other creditor’s lien, an assignment does not give rise to the necessity to perfect.³¹⁹ Because the contingent fee agreement constituted this “assignment,” the court concluded that the debtor “had no right to disburse” that portion of the settlement fund that represented the attorney’s contingent fee and that such portion was therefore not “property of the debtor.”³²⁰ In addition to this technical analysis of the nature of the attorney’s and clients’ interests in the settlement proceeds, the court also noted that the policy behind contingent fees is to open the judicial process to persons who may not otherwise be able to afford an attorney and that a decision invalidating the payment of attorney’s fees as a preference would frustrate the important governmental purpose of assisting indigent litigants in enforcing their legal rights.

3. *Evaluating the Attorney’s Equitable Lien in Bankruptcy*

317. *Id.* at 576 (quoting 11 U.S.C. § 547(b) (Supp. V 1981)).

318. 93 B.R. 143 (N.D. Ill. 1988), *rev’g* 65 B.R. 433 (Bankr. N.D. Ill. 1986).

319. *Id.* at 150 & n.8.

320. *Id.* at 150. The court cited with approval *In re Hudson Valley Quality Meats, Inc.*, 29 B.R. 67 (Bankr. N.D. N.Y. 1982), where the court said that in order for a transfer to diminish or deplete the debtor’s estate, the property must “belong[] to and [be] transferred by a debtor who may exert such control over it as to specify which creditor shall become the transferee” *Id.* at 78.

These bankruptcy cases exhibit a fundamental misunderstanding of the nature of the attorney's equitable lien. As Illinois courts have noted on many occasions, an "equitable lien" is not "a right of property but a remedy for a debt."³²¹ Thus, it is incorrect to characterize the attorney's "remedy for a debt" as constituting an interest in property, as all of these bankruptcy decisions have done. As a result of this misunderstanding, bankruptcy cases focus on when this "lien" arose or became "perfected" as if it were an ordinary security interest in property. Because these cases fail to recognize that an equitable lien is merely a remedy, they overlook the crucial question that should be asked when an attorney seeks an equitable lien against the property of a bankrupt client: are the policies justifying granting an equitable lien under state law also present in federal bankruptcy proceedings? The answer should be a resounding "no."

In a thoughtful article on the subject,³²² Professor Emily Sherwin convincingly demonstrated that sometimes the policies behind imposing equitable liens in state courts are also present in bankruptcy. For example, there are situations where the bankruptcy estate (and hence the unsecured creditors) would be unjustly enriched if the equitable lien claimant is not protected.³²³ In these cases, the bankruptcy court should enforce the equitable lien because the equitable lien would serve its remedial purpose of preventing unjust enrichment. For example, if the debtor obtained property from the claimant by fraud or other similar form of misconduct, the defrauded claimant can establish all three of these elements. Hence, the estate was unjustly enriched and the equitable lien remedy would be justified.³²⁴

In general, for an equitable lien to be recognized in bankruptcy, Professor Sherwin would require that the equitable lien claimant establish: (1) a loss to him and a corresponding gain to the estate; (2) the gains obtained at the claimant's expense are among the assets of the estate; and (3) the claimant did not voluntarily extend credit to the debtor.³²⁵ However, Professor Sherwin also convincingly demonstrated that where there is no unjust enrichment to the bankruptcy estate (and hence to the unsecured creditors), it makes no sense to

321. See, e.g., *Watson v. Hobson*, 81 N.E.2d 885, 890 (Ill. 1948).

322. Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297. Although her article focused on constructive trusts, Professor Sherwin noted that the "equitable lien" serves the same purpose as the constructive trust remedy—i.e., the prevention of unjust enrichment, and that the only significant difference is that the constructive trust remedy gives the claimant title to the property, whereas the equitable lien merely gives the claimant a lien on the property. *Id.* at 301–02.

323. *Id.* at 297, 340–61.

324. *Id.* at 350–55.

325. *Id.* at 340.

enforce the equitable lien in bankruptcy because it is inconsistent with bankruptcy's equitable distribution principle.³²⁶

When considering how these sound principles apply to the attorney's equitable lien claim in bankruptcy, it is important to remember that the attorney's equitable lien is not based on concepts of unjust enrichment; instead, it is based on effectuating the intent of parties as expressed in the contingent fee contract.³²⁷ Under Professor Sherwin's analysis, the attorney's lien could not be justified in bankruptcy because the attorney voluntarily extended credit to the client by agreeing to defer payment until the client obtains a recovery at the conclusion of the litigation. Denying an equitable lien to an attorney places the attorney in exactly the same position as any other unsecured creditor who provided goods or services to the debtor on credit. Because the attorney, like those creditors, voluntarily assumed the risk of the client's default and bankruptcy,³²⁸ there is no equitable reason to prefer the attorney by granting an equitable lien. Hence, the attorney's lien cannot be justified in bankruptcy on any theory of unjust enrichment to the bankruptcy estate.

As noted earlier, the attorney's equitable lien is based on effectuating the intention of the parties that the attorney be paid out of the client's recovery as evidenced in the attorney-client contingent fee agreement. So long as the attorney and the client are the only contestants to the fund, this intention can be carried out with no injury to third parties. However, when the client files for bankruptcy, granting an equitable lien to the attorney harms unsecured creditors by insulating from their claims the portion of the client's recovery subject to the equitable lien. In this situation, the rationale for allowing the attorney a superior claim to the client's property to the exclusion of other unsecured creditors cannot be legitimately based on carrying out the intention of the attorney and client. Instead, granting the attorney an equitable lien is simply a way of giving attorneys a priority claim to a portion of the bankruptcy estate, all without any basis in the Bankruptcy Code for this priority.

Allowing an attorney to claim an equitable lien in bankruptcy when the attorney has not perfected a statutory lien under the Lien Act subverts the Bankruptcy Code's equitable distribution scheme. Even though the Bankruptcy Code recognizes liens properly perfected under state law, thus

326. *Id.* at 318–29, 337–40.

327. *See* Sections V.A.1–2, *supra*.

328. Indeed, the attorney's claim for an equitable lien is even weaker than claims by other unsecured creditors, because by agreeing to a contingent fee, the attorney explicitly recognizes the possibility that no compensation will occur if the litigation is unsuccessful.

creating an exception to the equitable distribution principle,³²⁹ courts have generally insisted that lienholders comply with relevant state laws governing the creation and perfection of liens. Where the claimant has failed to do so, bankruptcy courts are reluctant to grant relief to the creditor under a theory of "equitable lien."³³⁰

As noted in Section IV, the Lien Act provides a clear statutory mechanism by which an attorney can claim a lien on any recovery procured on behalf of the client. When the attorney fails to comply with the simple and straightforward requirements of the Lien Act, a procedure that would assure the attorney of secured status in the event of bankruptcy,³³¹ the attorney should not be elevated to the status of a secured party by the use of the equitable lien remedy.

Recent bankruptcy cases have recognized the validity of Professor Sherwin's analysis and may well spell doom for that attorney's equitable lien in bankruptcy. In *In re Omegas Group, Inc.*,³³² the Sixth Circuit rejected a constructive trust claim over some assets the debtor had acquired by fraud. The court recognized that a constructive trust is not really a "trust" at all and is not even an interest in property; instead, it is simply a remedy that is created only by judicial action.³³³ The court then held that unless the claimant has obtained a judicial decree of constructive trust prior to the debtor's filing of bankruptcy, the claimant is barred from seeking constructive trust relief in bankruptcy court and is relegated to the status of an ordinary unsecured creditor.³³⁴

Recent bankruptcy decisions in the Seventh Circuit have adopted the rationale of *Omegas*.³³⁵ The clearest statement is *In re Nova Tool & Engineering, Inc.*,³³⁶ where the court rejected a creditor's claim of constructive trust over certain receivables owned by the debtor because they represented the

329. This principle has both its defenders, *see, e.g.*, James J. White, *Efficiency Justifications for Personal Property Security*, 37 Vand. L. Rev. 473 (1984), and its detractors, *see, e.g.*, Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996).

330. *See, e.g.*, *Small v. Beverly Bank*, 936 F.2d 945, 950 (7th Cir. 1991) ("A creditor who [fails] to take all the steps required to perfect a lien should not be allowed to fall back on an assertion of an equitable lien to frustrate the Bankruptcy Code policy of recognizing only perfected interests in property."); *In re Einoder*, 55 B.R. 319, 328 (Bankr. N.D. Ill. 1985) (same).

331. *See* Section IV.G, *supra*.

332. 16 F.3d 1443 (6th Cir. 1994).

333. *Id.* at 1449.

334. *Id.*

335. *In re Nova Tool & Eng'g, Inc.*, 228 B.R. 678 (Bankr. N.D. Ind. 1998); *In re CL Furniture Galleries, Inc.*, No. 95C 50103, 1995 WL 756853 (N.D. Ill. Dec. 20, 1995); *In re Foos*, 183 B.R. 149 (Bankr. N.D. Ill. 1995).

336. 228 B.R. 678.

fruits of the debtor's misappropriation of the creditor's propriety information. In the course of its opinion, the *Nova Tool* court quoted extensively from, and adopted much of the reasoning of, *Omeegas*. In addition, the court specifically noted that the remedies of constructive trust and equitable lien are essentially identical,³³⁷ thus suggesting that equitable liens are also not enforceable in bankruptcy unless the claimant has obtained a judicial declaration of equitable lien prior to the time bankruptcy is filed.

Although *Omeegas* has been criticized for its overbroad holding that no constructive trust ought to be granted as a remedy by a bankruptcy court,³³⁸ even those critics recognize the basic validity of Professor Sherwin's central point—*i.e.*, a constructive trust or equitable lien ought not be granted in bankruptcy unless the equitable grounds for those remedies apply in the context of claims by third-party creditors of the debtor.³³⁹ Thus, there may be cases where the claimant can establish that the bankruptcy estate (and hence the unsecured creditors) would be unjustly enriched unless the constructive trust/equitable lien is granted to the claimant.³⁴⁰ In such cases, it is perfectly appropriate to grant the equitable lien remedy as it continues to serve its primary remedial purpose—the avoidance of unjust enrichment. However, where the purpose of the equitable lien is merely to effectuate the intention of the parties, as is the case for the attorney's equitable lien, this justification must give way to the equitable distribution principle of bankruptcy law.

G. The Priority of the Equitable Lien Outside of Bankruptcy

Even outside of the client's bankruptcy, an attorney claiming an equitable lien occasionally discovers that another creditor of the client also claims a lien on the same property. In this situation, the court must determine which of the competing liens has priority. In order to determine issues of priority, courts have felt compelled to determine when an equitable lien has become sufficiently associated with the property so that the lien can be said to have "attached" to the property. One court has held that an equitable lien "arises" or "attaches" at the time the client executes the contingent fee contract.³⁴¹

337. *Id.* at 682.

338. Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265, 269–77 (1998).

339. *Id.* at 288–89 & nn. 61–62.

340. *See, e.g.*, Sherwin, *supra* note 301, at 350–60.

341. *McKee-Berger-Mansueto, Inc. v. Bd. of Educ. of Chi.*, 691 F.2d 828, 837 (7th Cir. 1982). This is consistent with the holdings of a number of federal bankruptcy cases that the equitable lien arises when the contingent-fee contract is entered into by the attorney and client. *See, e.g.*, *In re Brass*

Illinois courts have adopted a “first in time” rule to determine priority when the competing interest is a mortgage lien,³⁴² a tax lien,³⁴³ or the lien of a garnishment.³⁴⁴ Under this rule, if the attorney and client execute the contingent-fee contract prior to the time the other lien attaches, the equitable lien has priority; otherwise, not. However, when the competing interest is another equitable lien, one court has not utilized “first in time” rule, but examined the equities of the case to justify giving priority to a non-negligent claimant over a competing claimant who had been negligent.³⁴⁵

The treatment of equitable liens in these priority cases suffers from many of the same shortcomings as the treatment of the equitable lien in bankruptcy. Courts have mistakenly assumed that the “equitable lien” is an interest in property which “attaches” or becomes “perfected” at some fixed point in time relative to competing interests in the property. However, the equitable lien is not an interest in property—it is a remedy designed to effectuate the intention of the parties. When third-party rights are asserted with respect to the property, and those rights in the property were perfected prior to the time the court orders an equitable lien in favor of an attorney, it makes little sense to afford the attorney’s equitable lien priority over the third party’s interest in the property, because by effectuating the “intention” of the attorney and client, the equitable lien deprives the third party of an interest in the property to the extent of the attorney’s claim. Because the third party has taken the steps necessary to perfect its interest in the client’s property, whereas the attorney has not taken the steps necessary to perfect its interest under the Lien Act, the use of the equitable lien doctrine really works a subordination of the other party’s property interest in favor of the attorney, in situations where the other party would have no meaningful notice of the attorney’s claim. Just as in the bankruptcy setting, Illinois courts have achieved this result without articulating any justification.

H. Summary: Should the Attorney’s Equitable Lien be Retained?

Kettle Rest., Inc., 790 F.2d 574, 575 (7th Cir. 1986), *rev’g* Kallen v. Litas, 47 B.R. 977 (N.D. Ill. 1985); *In re* Kleckner, 93 B.R. 143, 150 & n.8 (N.D. Ill, 1988), *rev’g* 65 B.R. 433, 435 (Bankr. N.D. Ill. 1986) (applying Illinois law).

342. *Vill. of Clarendon Hills v. Mulder*, 663 N.E.2d 435, 442 (Ill. App. Ct. 2d Dist. 1996).

343. *McKee-Berger-Mansueto, Inc. v. Bd. of Educ.*, 691 F.2d 828, 837 (7th Cir. 1982).

344. *Williams v. W. Chi. St. R.R.*, 64 N.E. 1024 (Ill. 1902); *Nat’l Bank of Albany Park v. Newberg*, 289 N.E.2d 197 (Ill. App. Ct. 1st Dist. 1972).

345. *Home Fed. Sav. & Loan Ass’n of Centralia v. Cook*, 525 N.E.2d 151, 154 (Ill. App. Ct. 5th Dist. 1988).

Illinois courts have long recognized an attorney's equitable lien on the client's recovery in cases where the contingent fee contract shows the parties' intention that the recovery be subjected to the attorney's claim for fees. However, several compelling reasons suggest that this approach is badly flawed.

First, the equitable lien essentially duplicates the statutory lien. They secure the same obligations,³⁴⁶ attach to the same property,³⁴⁷ and arise in the same circumstances.³⁴⁸ The equitable lien was created prior to the time the statutory lien came into existence³⁴⁹ and it may well have served a purpose at a time when Illinois did not recognize a common-law charging lien for attorneys. However, since the Lien Act was enacted in 1909, attorneys are allowed to perfect a statutory charging lien by the simple expedient of giving notice to the adverse party. In light of that statutory procedure, the equitable lien provides no additional protection to an attorney.

Second, the traditional predicate for any form of equitable relief is the absence of an adequate legal remedy, a requirement that applies equally to equitable liens.³⁵⁰ Because the statutory lien affords the attorney all the protection that an equitable lien would afford, there is a perfectly adequate legal remedy for the attorney's claim. Furthermore, an attorney's failure to comply with the Lien Act should not justify granting an equitable lien, because when a person's own neglect or fault makes a legal remedy unavailable, this

346. In fact, the statutory lien is slightly broader than the equitable lien, because it covers not only the attorney's fees, but the costs and expenses of litigation as well. The equitable lien covers only what the contract specifies and, if the contract does not indicate that costs and expenses are to be paid out of the proceeds of the litigation, the equitable lien does not secure repayment of those amounts. *Achs v. Maddox*, 530 N.E.2d 612, 616 (Ill. App. Ct. 2d Dist. 1988).

347. Because the equitable lien arises almost exclusively in contingent fee contracts, and because contingent fee agreements almost always specify a percentage of the client's recovery, they are essentially coterminous with the Lien Act's coverage of "money or property" that is "recovered" as a result of prosecuting the client's claim or cause of action.

348. In fact, the equitable lien applies almost exclusively to contingent fee contracts, whereas the statutory lien can apply to any contractual fee arrangement between the attorney and client. Hence, in every case where an attorney asserts an "equitable lien," the attorney could have perfected a statutory lien.

349. The equitable lien was first recognized in Illinois in 1871, *see Smith v. Young*, 62 Ill. 210 (1871), well before the 1909 enactment of the Lien Act.

350. *LaSalle Bank v. First Am. Bank*, 736 N.E.2d 619, 627 (Ill. App. Ct. 1st Dist. 2000) (no equitable lien where land contract vendee had breach of contract action against vendor); *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust Co.*, 653 N.E.2d 875, 880 (Ill. App. Ct. 1st Dist. 1995) (equitable lien denied where adequate legal remedy under Mechanic's Lien Act); *First Bank of Roscoe v. Rinaldi*, 634 N.E.2d 1204, 1212 (Ill. App. Ct. 2d Dist. 1994) (developer had no equitable lien against property in light of adequate legal remedy of breach of contract claim). Although the adequacy of the legal remedy is not relevant in cases where equity creates the substantive right, *see Dan B. Dobbs, LAW OF REMEDIES* § 2.5 (2) at 128–29 (Practitioner 2d ed. 1993), this exception would not apply to the attorney's equitable lien, where the right arises from the parties' contract.

does not constitute sufficient “inadequacy of the legal remedy” to justify equitable relief.³⁵¹

Third, in other instances where the legislature has enacted a statutory scheme for creating a lien, courts have rejected an “equitable lien” as a remedy when the potential lienor has failed to follow the statutory requirements. For example, when a lien claimant fails to perfect a mechanic’s lien in the method required by the Mechanic’s Lien Act,³⁵² Illinois courts have uniformly held that the claimant is not entitled to claim an equitable lien on the property.³⁵³ Likewise, consensual security interests in most forms of personal property can be created by following the procedures of Article Nine of the Uniform Commercial Code. Although there is no Illinois case directly on point,³⁵⁴ the overwhelming weight of authority in other jurisdictions holds that a secured party who has failed to comply with the requirements of Article Nine is not allowed to claim an “equitable lien” on the property.³⁵⁵ This holding is consistent with the Official Comments to the 1972 version of Article Nine,³⁵⁶ which expressly reject resort to an “equitable lien” or “equitable mortgage” when the creditor has failed to comply with the requirements of Article Nine,

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351. See, e.g., *Volini v. Dubas*, 613 N.E.2d 1295, 1303 (Ill. App. Ct. 2d Dist. 1993) (plaintiff’s failure to bring breach of contract action to recover past-due payments barred constructive trust claim); *Jansen Real Estate Corp. v. Cullerton*, 364 N.E.2d 905, 907–08 (Ill. App. Ct. 1st Dist. 1977) (plaintiff’s failure to pursue statutory tax refund action barred from claiming equitable relief). See generally, *Comm’r v. Shapiro*, 424 U.S. 614, 634 n.15 (1976).
352. 770 ILL. COMP. STAT. 60/0.01–39 (2004).
353. *Hill Behan Lumber Co. v. Marchese*, 275 N.E.2d 451, 453 (Ill. App. Ct. 2d Dist. 1971); *Vanderlaan v. Berry Constr. Co.*, 255 N.E.2d 615, 617 (Ill. App. Ct. 4th Dist. 1970).
354. In *Midwest Decks, Inc. v. Butler & Baretz Acquisitions, Inc.*, 649 N.E.2d 511, 518 (Ill. App. Ct. 1st Dist. 1995), the court in *dicta* noted that Article Nine has not displaced equitable remedies like the constructive trust or resulting trust, but found that neither was supported by the facts of the case.
355. See, e.g., *FDIC v. W. Hugh Meyer & Assoc., Inc.*, 864 F.2d 371 (5th Cir. 1989), *reh’g en banc denied*, 871 F.2d 121 (5th Cir. 1989); *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. 1973); *Schwegmann Giant Super Mkts. v. Golden Eagle Ins. Co.*, 693 F. Supp. 478 (E.D. La. 1988); *In re Washington Commc’ns Group, Inc.*, 10 B.R. 676 (Bankr. D. D.C. 1981); *In re Delta Molded Prods., Inc.*, 416 F. Supp. 938 (N.D. Ala. 1976); *In re Dean and Jean Fashions, Inc.*, 329 F. Supp. 663 (W.D. Okla. 1971); *In re Shinville Assocs., Inc.*, 46 B.R. 352 (Bankr. W.D. Mich. 1985) (equitable mortgage); *Blessing v. Norwest Bank Marion*, 429 N.W.2d 142 (Iowa 1988); *Bewigged by Suzzi, Inc. v. Atl. Dept. Stores*, 359 N.E.2d 721 (Ohio App. 1976). *Contra In re Air Fla. Sys., Inc.*, 49 B.R. 321 (Bankr. S. D. Fla. 1985) (equitable lien attached to proceeds even though security interest did not attach to them). See also Note, *Security Agreements, Equitable Liens, and the Uniform Commercial Code*, 69 COLUM. L. REV. 1280, 1287 (1969).
356. U.C.C. § 9–203 cmt. 5 (1999) (“The theory of equitable mortgage, insofar as it has operated to allow creditors to enforce informal security arrangements against debtors, may well have developed as a necessary escape from the elaborate requirements of execution, acknowledgment and the like which nineteenth century chattel mortgage acts vainly relied upon as a deterrent to fraud. Since this Article reduces formal requisites to a minimum, the doctrine is no longer necessary or useful.”).

and which should continue to be persuasive under the current version of Article Nine.³⁵⁷

Indeed, in Illinois courts, attorneys are the only persons allowed to claim an equitable lien after failing to follow the required method for perfecting an analogous statutory lien.³⁵⁸ These courts give no justification for their holdings and no explanation for why attorneys should receive this preferential treatment. In an age of increasing cynicism about the cozy relationship between judges and attorneys, these cases ought to be reconsidered and overruled.

VI. CONCLUSION

As this survey has shown, there are a number of doctrines that Illinois attorneys have invoked to recover fees by claiming an interest in property owned by clients. As the sheer volume of cases cited herein shows, attorneys frequently resort to these doctrines to get paid. However, in their understandable desire to assist attorneys in collecting fees that are unquestionably due from the clients, Illinois courts have created two “liens” in favor of attorneys that have outlived their usefulness. The attorney’s retaining lien, the oldest such device recognized in Illinois, has now developed such ethical baggage as to be useless in all but the rarest of cases. Likewise, the equitable lien, developed at a time when attorneys had common-law no charging lien, is now simply redundant in light of the statutory charging lien under Lien Act. It is time for Illinois courts to abandon these doctrines and require attorneys who seek some security for the payment of their fees to rely on consensual security interests in the client’s property or the lien arising under the Lien Act.

357. U.C.C. § 9–101, cmt. 1 (2005) provides in relevant part:

Former Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however, these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to former Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.

358. Two courts have specifically held that an attorney’s failure to perfect a lien under the Lien Act does not bar a claim for an equitable lien. *McKee-Berger-Mansueto, Inc. v. Bd. of Educ. of Chi.*, 691 F.2d 828, 835–36 (7th Cir. 1982) (applying Ill. law); *Lewsader v. Wal-Mart Stores, Inc.*, 694 N.E.2d 191, 196 (Ill. App. Ct. 4th Dist. 1998).