

**Gallagher Sharp Newsflash:
Law Firms May Not Collect Settlement Proceeds from Insurers in Certain
Circumstances under New Supreme Court of Ohio Decision**

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I. The Supreme Court of Ohio Holds that Law Firms Must Sue Former Clients, Not Insurers, for Cases Settled Before a Suit is Filed.

This morning, the Supreme Court of Ohio issued *Kisling, Nestico & Redick, L.L.C. v. Progressive Max Ins. Co.*, Slip Opinion No. 2020-Ohio-82¹, wherein it established that an insurer that settles a personal-injury claim with an accident victim before suit is filed does not have a duty to distribute a portion of the settlement proceeds to the victim's former lawyer pursuant to a charging lien.

Kisling, Nestico & Redick, L.L.C.'s ("KNR") represented a plaintiff who was injured in an automobile accident. The plaintiff and KNR entered into a contingent-fee agreement that purported to give KNR a charging lien on one-quarter (1/4) the plaintiff's proceeds. Before filing suit on the plaintiff's behalf, KNR engaged in unsuccessful negotiations with the alleged tortfeasor's insurer, Progressive Southeastern Insurance Company ("Progressive"). The plaintiff then discharged KNR. After being discharged, KNR informed Progressive that it was claiming a lien against any settlement funds paid by Progressive to the plaintiff.

The plaintiff eventually settled the case *pro se* for \$13,044, which Progressive paid to him in full. The plaintiff did not pay KNR for any work that the firm did prior to discharge. KNR sued Progressive for failing to protect its charging lien. The trial court granted summary judgment for KNR, finding that Progressive was "liable for the *quantum meruit* value of KNR's legal services[.]" The Eighth District affirmed, holding that a charging lien becomes binding on a third-party when that party has notice of the lien.

The Supreme Court of Ohio reversed the Eighth District's decision, noting that while "ordinarily, the enforceability of a charging lien is dependent on the power of the court in which the fund was created," because no lawsuit was filed in the underlying case, there was no court-created fund or judgment. As such, "there was no existing action in which KNR could pursue its claim to a portion of the fund created by the settlement." KNR's suit against Progressive was really a claim "that it ha[d] an equitable interest in the fund created by the settlement. Thus, the key question [wa]s whether Progressive ever controlled that fund."

¹ The opinion is available at: <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-82.pdf>.

The Supreme Court of Ohio held that Ohio common law has established that “a settlement fund is created when the tortfeasor or his insurer pays the agreed-upon amount and receives a release from the victim,” so the fund was not created until the money was out of Progressive’s hands. “An equitable remedy awards a plaintiff particular funds or property *in the defendant’s possession.*” As such, the Supreme Court of Ohio held that “KNR had to proceed against its former client[, not Progressive] ... for payment.”

It should be noted that a distinguishing fact in this case is the lack of a lawsuit filed before the underlying settlement. This leaves open whether the result would have been different if KNR had filed suit on behalf of the plaintiff before being discharged. Based on the Court’s discussion of the enforcement of a charging lien depending on the power of the court in which the fund was created, it is possible that a law firm may still be able to proceed against an insurer to enforce a charging lien if a case has been filed.

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