

THIS DOCUMENT RELATES TO:
LIEN ASSERTED BY GOLDBERG
PERSKY & WHITE V. SPID 100010870

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Goldberg relies on *McKenzie Constr., Inc. v. Maynard*,⁵ the precedent under which Judge Strawbridge consistently evaluated competing claims in the 26 decisions (resolving 30 total liens) he issued from 2019 until his retirement in the early fall of 2023. Judge Strawbridge adopted the *McKenzie* approach after concluding that federal procedural law governed Individually Retained Plaintiffs' Attorney (IRPA) liens—that is, federal courts' equitable powers to oversee attorney fees in class actions.⁶ The District Court approved that practice, and the Third Circuit affirmed via an unpublished opinion.⁷ Goldberg's basic pitch is that it put some time into the case shepherding the Player through the Program, and arranged for BAP and expanded BAP testing. But for its work, it reasonably points out, the Player would not have ultimately been paid. Many firms have gotten shares of fees under Judge Strawbridge's *McKenzie* approach to liens on relatively similar facts.

Wyatt contends that this well-established approach to lien adjudication wrongly creates federal common law, a practice *Erie R.R. Co. v. Tompkins* rejected.⁸ Wyatt explains that state substantive lien law—*quantum meruit* common law or attorney lien statutes—provides the only possible foundation for equitable fee awards. Wyatt further argues that, under *Klaxon Co. v. Stentor Elec. Mfg. Co.*,⁹ Pennsylvania choice-of-law rules apply and require application of the Commonwealth's substantive law to a lien dispute. Under Pennsylvania lien law, as Goldberg's representation didn't "substantially or primarily" generate the Award, Goldberg is entitled to no charging lien at all, whether it supports fees or costs. As far as I can tell, Wyatt's is the first brief presenting this set of *Erie*-derived arguments regarding the NFL Concussion Settlement's lien process.

Goldberg and Wyatt are ultimately fighting over a few thousand dollars. But both firms charge that the other's proposed approach will lead (or has led) to perverse outcomes and degradation of the functioning of the Settlement Program. And potentially, tens of millions of future lien-derived dollars are at stake, affecting more than a thousand asserted liens. I solicited supplemental briefing and now write to recommend an outcome.¹⁰ I have also posted this R&R on the MDL docket to notify potentially affected IRPAs of my proposed approach.¹¹

⁵ 823 F.2d 43 (3d Cir. 1987).

⁶ ECF No. 10368, Report and Recommendation (Jan. 7, 2019), at 12.

⁷ *In re NFL Players' Concussion Injury Litig.*, 826 F.App'x 136, 138 (3d Cir. 2020) (relying on parties' agreement that *McKenzie* provided the appropriate standard).

⁸ 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State [...] There is no federal general common law.").

⁹ 313 U.S. 487, 496 (1941) (holding that the principle of "equal administration of justice" requires federal courts sitting in each state to conform to the "conflict of laws rules" prevailing in that state's courts).

¹⁰ I asked both firms here, the NFL Parties, and Class Counsel for supplemental briefing. All parties but the NFL submitted supplemental materials.

¹¹ I issue Reports and Recommendations under the Court's order. See ECF No. 12343, Explanation and Order, (Sept. 21, 2023) (appointing me to "resolve controversies between counsel relating to their counsel fees"). Pursuant to that Order, I authored, and the Court approved, new Rules Governing Attorneys' Liens. ECF No. 12348-1, Rules Governing Attorneys' Liens, (Sept. 27, 2023). This is the second Report and Recommendation I have issued under these rules.

I will first describe the factual predicates of this dispute. I then suggest that accompanying the new lien rules and processes, now is an appropriate time to consider a new, slightly revised, approach to lien resolution.

First, Special Masters would continue to test the *total size* (and thus reasonableness) of the fee award under *McKenzie*, as an aspect of federal procedural law. Under *McKenzie*, I recommend finding the 22% total attorney's fee (for all potential lawyers) here to be reasonable.

Second, disputes turning on the *recognition of liens*—that is, testing equitable claims against the Player's Award or the successor attorney's contingency fee—would and should be governed by state substantive law. To determine which state's substantive law applies, I look to Pennsylvania's choice-of-law rules. Here—as will be typically the case—those rules point toward Pennsylvania law. Applying Pennsylvania lien law, I recommend the Court dismiss Goldberg's charging lien for its time spent on the Player's case, but award its reasonably incurred costs under a limited charging lien.

If the Court concludes that switching from *McKenzie* to state substantive lien law is not required, I have offered an alternative recommendation based on continuing the *McKenzie* approach both as to the reasonableness of the overall fee and the relative merits of competing claims to it. In that event, I recommend that the Court award Goldberg 15% of Wyatt's attorney's fee (around \$6,500 including the holdback), or 3.3% of the gross Award, plus the firm's reasonably incurred costs.

BACKGROUND: THE HISTORY OF THIS LIEN DISPUTE

The Player retained Goldberg on October 18, 2011, to represent him in a “personal injury claim for concussion-related brain injuries which [the Player] sustained as a result of [his] NFL football career.” Doc. 299878 at Ex. A. The agreement provided for a 40% cut of the “gross amount that is received or collected by reason of any suit or by reason of any settlement, unless a different percentage is required by applicable state law, plus reimbursement of all advanced costs if an action is filed in court or arbitration.” *Id.* The fee percentage on the written form has an undated and written correction to 25%, per Jason Luckasevic, the attorney at Goldberg who handled the representation. *Id.* Nothing in the firm's retainer agreement provided for a contractual right to payment of fees in the event of termination, nor is there a choice of law clause.

According to Goldberg's Statement of Dispute, over twelve years, it worked 55.7 hours on the Player's case, an average of a bit under 5 hours a year. Doc. 299878 at Ex. B.¹² Most of the listed time—29.3 hours—is undated. *Id.* Goldberg alludes to pre-Settlement activities, including updating a database with information received from the Player, reviewing unnamed threshold issues, preparing and filing a multi-plaintiff complaint on the Player's behalf on May 3, 2012 in the Superior Court of Los Angeles County, and filing a short-form complaint on July 12, 2012 for the Player in the multidistrict litigation in the Eastern District of Pennsylvania. *Id.* Additionally,

¹² Records reflecting 5.3 hours working on this lien, and an unknown number of hours advising on “poaching issues,” are included, though they may not have directly advanced the Player's Claim. Doc. 299878 at Ex. B.

Goldberg claims to have communicated with the Player around 135 times over the course of its representation, reviewed the Player's medical records, and prepared a third-party affidavit with a witness. *Id.* Finally, Goldberg advanced costs for two medical appointments—one in 2014, and one in 2016—as well as the Player's travel to the 2016 appointment and assorted messenger, postage, and copying charges. Doc. 299878 at Ex. C. Those costs total \$3,146.78. *Id.*

The Player's Claim experience began in 2017. I list significant dates below, having corroborated them with the Claims Administrator.

Firm	Date	Significant Event
Goldberg	February 10, 2017	Goldberg registered the Player. Doc. 12772.
	August 31, 2017	The Player underwent a BAP neuropsychological evaluation with Neuropsychologist A that revealed no impairment. Doc. 300716 at Ex. A.
	October 12, 2019	Goldberg asserts that it scheduled the Player for another BAP evaluation. Doc. 299878 at Ex. B.
	June 13, 2020	Neurologist A assessed the Player, reviewed his neuropsychological testing, and determined that the Player did not meet Settlement criteria for a Qualifying Diagnosis. Doc. 300716 at Ex. A.
	June 18, 2020	The BAP Administrator informed Goldberg that the Player did not meet the criteria for any Qualifying Diagnosis. Doc. 300716 at Ex. A.
	March 4, 2022	The Court approved the Norming Agreement, eliminating race-based norming in the Settlement Program and establishing a new scoring method. ¹³
	April 29, 2022	The Claims Administrator notified Goldberg that the Player qualified for a free Expanded BAP Examination, pursuant to the Norming Agreement. Doc. 263393.
	September 12, 2022	Goldberg requested, and the BAP Administrator scheduled, an expanded BAP appointment with Neuropsychologist B. Doc. 299878 at Ex. B.
	November 7, 2022	Neuropsychologist B examined the Player for his expanded BAP examination, finding no impairment.
	February 17, 2023	The Player turned 68 years old.

¹³ ECF No. 11648-2, Recommendation for Revising the Clinician's Manual for the Retired NFL Football Players' Baseline Assessment Program: Using Age and Education Adjusted Normative Reference Values and Revised Cutoffs for Defining Low Scores (Mar. 4, 2022).

Wyatt	March 2, 2023	The Player terminated his representation with Goldberg and hired Wyatt, along with a firm called Gibson Legal, to represent him instead. ¹⁴ Doc. 300716 at Ex. B. ¹⁵
	March 10, 2023	Goldberg filed a lien against any potential Award. Doc. 293684.
	March 21, 2023	The Player cancelled a scheduled March 31 BAP neurology appointment with Neurologist B due to a “personal matter.”
	March 27, 2023	Wyatt privately had the Player’s 2017 BAP neuropsychological testing—by Neuropsychologist A—rescored under the Norming Agreement’s new method, revealing overall impairment of Level 2.0. Doc. 285609.
	April 14, 2023	Neurologist B evaluated the Player through the MAF. Wyatt provided the rescored testing to Neurologist B, who diagnosed the Player with Level 1.5 Neurocognitive Impairment. <i>Id.</i>
	July 12, 2023	Wyatt submitted a Claim for the Player. Doc. 285799.
	August 28, 2023	The Claim Administrator determined that the Player was entitled to a Monetary Award. Doc. 288315.

The Player and his wife, in an affidavit Wyatt prepared, expressed frustration with Goldberg’s representation. Doc. 300716 at Ex. F. The affidavit states that they felt “abandoned” and “neglected,” with almost no contact from their lawyer. *Id.*

As the above chronology indicates, immediately on being retained, Wyatt privately arranged to have the Player’s 2017 neuropsychological testing rescored under the Norming Agreement’s new method, which demonstrated a qualifying level of impairment. Striking a hot iron, Wyatt scheduled an April 2023 MAF exam with the same physician who would have been the Player’s BAP neurologist in March. Neurologist B certified a Diagnosis based on the Player’s April 2023 exam, coupled with the rescored 2017 neuropsychological testing.

Wyatt then prepared and filed a Claim, relying on a FAQ that gives the Claims Administrator the discretion to permit the use of old neuropsychological test scores in particular circumstances.¹⁶ Wyatt helped shepherd the Claim through factual inquiries and the Claims Administrator determined that the Player was entitled to a Monetary Award. Doc. 288315. Five months had passed since Wyatt had been hired.

¹⁴ The retainer reflects an agreement between the Player and two firms, Wyatt and Gibson Legal, LLC. Doc. 300716 at Ex. B. Neither Wyatt nor Goldberg mentions Gibson’s involvement in the case, and I am left to assume that Wyatt has made a private arrangement with that firm.

¹⁵ The retainer agreement alludes to the possibility of liens, but only respecting prior representation of the Player by one of the parties to the retainer itself. Doc. 300716 at Ex. B. I recommend that the Court find that this form text is irrelevant to this dispute.

¹⁶ *Frequently Asked Questions: FAQ #109* (What must the medical records show for Level 1.5 and Level 2 Neurocognitive Impairment diagnoses made outside the BAP for living Retired NFL Football Players?), NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com>.

The Player argues that his Award was artificially depressed by Goldberg’s lack of advocacy during the term of its representation. “As time moved on, [the Player] got older, therefore it was a domino effect where he lost money because of them and that is not right.” Doc. 300716 at Ex. F. In other words, the Player believes that had Goldberg rescored the Player’s neuropsychological testing after March 2022 (when that option became available) but before February 2023 (the Player’s birthday), he would not have fallen a payment level (about \$20,000) on the monetary grid. But this would only have been true had the Player demonstrated a qualifying level of functional impairment in 2022, which is impossible to now know. Regardless, the Player opposes Goldberg’s lien.

THE SETTLEMENT’S HISTORIC APPROACH TO ATTORNEY LIENS

The Third Circuit has held that a district court may appraise the reasonableness of contingency fee contracts between attorneys and members of a class.¹⁷ On April 5, 2018, Judge Brody used that power to presumptively cap the fees that IRPAs can recover from their clients’ Awards in the Settlement Program.¹⁸ In making that decision, Judge Brody wrote:

To ensure that a 22% cap is fair to all parties involved, I must now crosscheck that number with an assessment of the relevant Third Circuit factors, data on contingent fee levels in this case, and data from other cases.

In assessing the reasonableness of contingent fees, the Third Circuit directs courts to consider the “circumstances existing at the time the arrangement is entered into, . . . the quality of the work performed, the results obtained, and whether the attorney’s efforts substantially contributed to the result.” *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987) [*McKenzie II*]. Importantly, a court must consider whether subsequent events have rendered an agreement—that may have been fair at the time of contracting—unfair at the time of enforcement. *Id.*¹⁹

The *McKenzie* cases involved a dispute between a lawyer and his client over an agreed-upon contingency fee.²⁰ The issue was whether the contingency fee was reasonable.²¹ In *McKenzie I*, the Third Circuit emphasized that an “attorney has the burden of proof as to the reasonableness of his fee when he sues to recover from his client.”²² *McKenzie II*, as Judge Brody cited, clarified the factors relevant to that reasonableness determination: consideration must be given to “circumstances existing at the time the arrangement is entered into, and thereafter, to the quality

¹⁷ See *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1114 (3d Cir. 1979) (“[T]he district court, both in its supervisory authority over those practicing before it and as part of its duties imposed by Fed. R. Civ. P. 23(e), does have the authority *Sua sponte* to set aside contingent fee agreements when it concludes they would yield unreasonable fees.”).

¹⁸ ECF No. 9862, at 6.

¹⁹ *Id.* at 6–7.

²⁰ See generally *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985) [*McKenzie I*]; *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43 (3d Cir. 1987) [*McKenzie II*].

²¹ See generally *McKenzie I*; *McKenzie II*.

²² *McKenzie I*, at 100.

of the work performed, the results obtained, and whether the attorney's efforts substantially contributed to the result."²³

Under the *McKenzie* framework applied to this Settlement, leaving contingency fees uncapped would have led to the unreasonable and unfair result of having some players essentially paying two sets of attorney fees: one for the work of Class Counsel, and one for the work of their IRPA. As Judge Brody wrote, "Although some of the work of IRPAs may be considered separate and distinct from the work of Class Counsel, it is undeniable that all IRPAs have benefited from Class Counsel's work."²⁴ The fee cap was designed to cut through the "free-rider problem" between Class Counsel, who secured the fund for the group as a whole, and IRPAs, who secure pieces of that group fund for individuals.²⁵ Noting that the "IRPAs' work here involves the shepherding of their clients through the claims process of the Settlement Agreement," Judge Brody found that a 22% fee would be fair, but noted that attorneys would have the opportunity to petition to deviate (upward).²⁶

Neither the *McKenzie* cases, nor Judge Brody's initial use of them in her capping decision, compared the work of multiple IRPAs hired at different times to advance a single class member's claim within a settlement. Judge Brody applied *McKenzie*'s reasonableness inquiry in capping the fee, and referred petitions to deviate from the fee cap to Judge Strawbridge for analysis under *McKenzie*.²⁷ Judge Brody did not address the legal standard that should govern in attorney lien disputes. In Judge Brody's separate decision referring individual attorney lien disputes to Judge Strawbridge, she did not mention *McKenzie* or any question of substantive law.²⁸

Judge Strawbridge considered an initial lien dispute and issued his first opinion two years later. That decision considered three different contract/lien disputes. Judge Strawbridge extended *McKenzie* from petitions to deviate from the presumptive fee cap to *all* disputes relating to contingency fees. As he wrote, "Under Third Circuit precedent, we are obligated to review [contingency fee agreements] to determine if the fee sought is unreasonable in light of the five factors enumerated by the Third Circuit in *McKenzie*."²⁹

Later in the decision, Judge Strawbridge cited to *Mitzel v. Westinghouse Elec. Corp.*, which stated that although in general, the "right of a party or an attorney to recover attorney's fees from another party in a diversity action is a matter of substantive state law," "contingency fee agreements in diversity cases are to be treated as matters of procedure governed by federal law."³⁰ Judge Strawbridge stated:

²³ *McKenzie II*, at 45.

²⁴ ECF No. 9862, at 4.

²⁵ *Id.*

²⁶ *Id.* at 7–8.

²⁷ *Id.* at 8–9.

²⁸ ECF No. 7446, Order that Pursuant to Fed. R. Civ. P. 72(b), All Petitions for Individual Attorneys' Liens are Referred to the Honorable David R. Strawbridge (Apr. 4, 2017).

²⁹ ECF No. 10368, Report and Recommendation (Jan. 7, 2019), at 12.

³⁰ *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d 414, 417 (3d Cir. 1995).

Podhurst also challenges the applicability of Third Circuit law in this context, arguing that we are bound by state law, not federal law, in our evaluation of the reasonableness of the fee agreement here. Podhurst relies on dicta in *Novinger v. E.I. DuPont de Nemours & Co.*, 809 F.2d 212, 217 (3d Cir. 1987). This reliance is misplaced. This dicta from *Novinger* stated only that as a general matter state law applies to review of attorney fee contracts. In *Mitzel v. Westinghouse*, 72 F.3d 414 (3d Cir. 1995), the Circuit Court addressed the issue with greater particularity, explaining that while “generally” state law applies to the review of attorney fee contracts, contingent fee contracts are “treated differently.” *Id.* at 417.

Third Circuit has made clear however that in evaluating IRPA contracts that exist in a class action, that we must apply federal law and review these fee contracts for reasonableness. *Dunn*, 602 F.2d at 1110, n.8. “Rules regulating contingency fees pertain to conduct of members of the bar, not to substantive law which determines the existence or parameters of a cause of action.” *Mitzel*, 72 F.3d at 417 (*quoting Elder v. Metropolitan Freight Carriers, Inc.*, 543 F.2d 513, 519 (3d Cir. 1976)). Since “federal courts have the power to prescribe requirements for admissions before them and to discipline attorneys who have been admitted to practice before them . . . ‘such rules are of deep concern to the court which promulgated them.’” *Id.* This is why “contingency fee agreements in diversity cases are to be treated as matters of procedure governed by federal law.” *Id.*³¹

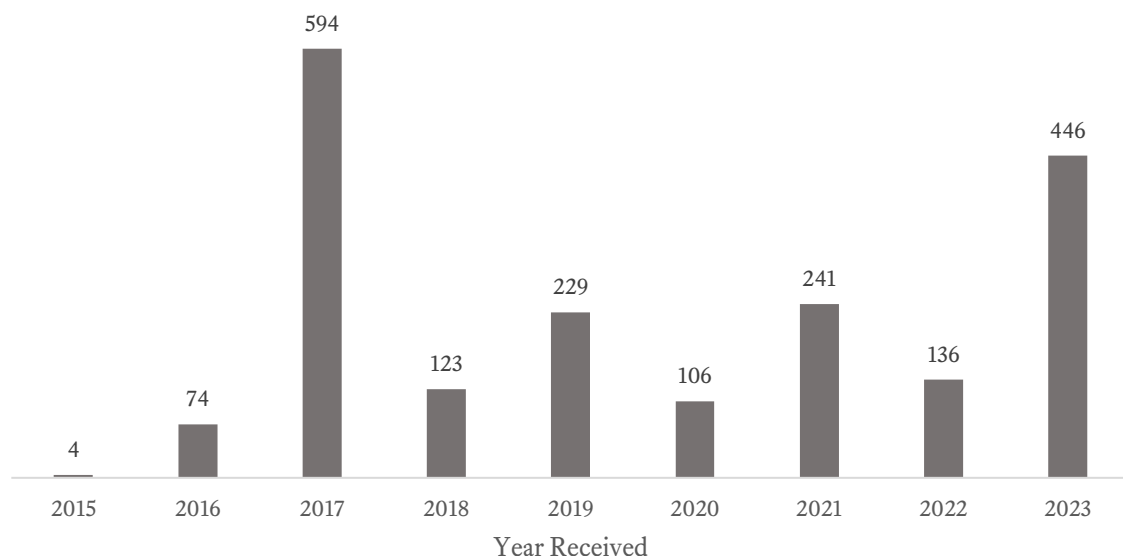
Judge Strawbridge followed this general approach in 25 subsequent recommendations. Some expanded on the rule further, applying *McKenzie* to decide on the allocation between two, or more, different attorneys.³²

When Judge Strawbridge wrote his first lien opinion in January 2019, there were 794 filed liens on the docket. Though hundreds of liens were resolved in the subsequent five years, the total number on the docket continues to grow. There are now 1,991 liens, of which 1,112 are complete and ready for dispute after a claim issues. The following figure depicts how many total liens have been filed in the Settlement Program in each complete year:

³¹ ECF No. 10368, at 31–32.

³² The application of *McKenzie* to attorney lien disputes led to a range of outcomes. In some cases, predecessor counsel received the entirety of the fee. *See, e.g.*, ECF Nos. 10383 (entire 20% fee went to predecessor counsel Locks Law); 11044 (entire \$3,022.86 fee went to predecessor counsel Provost); 11446 (entire 8% fee went to predecessor counsel Goldberg). In other cases, the entire fee went to the successor counsel. *See, e.g.*, ECF Nos. 10608 (entire 22% fee went to successor counsel Goldberg); 11975 (entire 22% fee went to successor counsel Lieff). Most of the time, at least when attorneys briefed the issue, there was some kind of split between predecessor and successor firms, though the precise divisions varied widely. *Compare* ECF No. 10514 (33.33% of an 18% attorney fee went to predecessor counsel, and 66.67% to successor counsel), *with* ECF No. 11278 (45% of a 20% attorney fee went to predecessor counsel, and 55% to successor counsel). In cases with more than two attorneys vying for the fee, the calculus became even more complicated. *Compare* ECF No. 10609 (splitting fee between three firms on a 41%, 36%, 23% basis), *with* ECF No. 11095 (splitting fee between three firms on a 9.09%, 50%, 40.91% basis). The Claims Administrator has, at the Special Masters’ direction, created a webpage hosting all public lien decisions: <https://www.nflconcussionsettlement.com/PD-SpecialMasterDecisions-AttorneyLienDispute.aspx>.

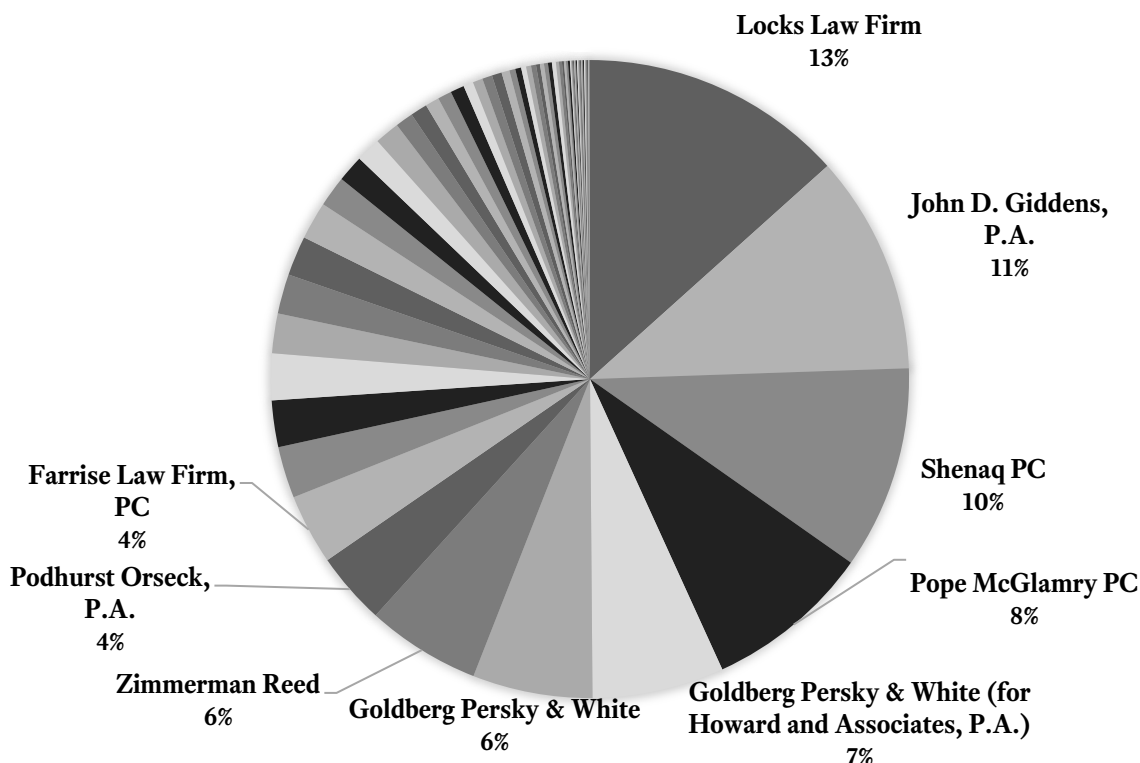
Number of Liens Asserted Each Year



These liens are in various states of resolution. Consider 2017's 600 odd liens. Most are still pending (either perfected, incomplete, or in process). Around one third were released (91), settled (around 80) and or resolved by decision (13).

In addition to their growing volume, lien filings are notable for their concentration. Just five firms—Locks Law, John D. Giddens, Shenag, Pope McGlamry, and Goldberg (including Goldberg as a representative for Howard and Associates)—have filed and will presumably prosecute more than half of all liens on the docket.

LIENS ASSERTED AS OF MARCH 7, 2024



The unlabeled portions of the above pie chart represent law firms who each assert less than four percent of the liens in the Settlement Program.

Finally, eleven players so far have more than three liens asserted against their Award.³³ This measure does not include each player's current representation, meaning that for each of these eleven players, *they have at least five law firms potentially in line for a fee*: four law firms who asserted a lien plus the player's current counsel. And we're still only in the first decade of the Program's long lifespan.

FEDERAL PROCEDURAL LAW PERMITS OVERSIGHT OF THE REASONABLENESS OF A FEE AWARD IN A LIEN DISPUTE

As the leading treatise on aggregate litigation explains:

Federal courts overseeing a class suit of course retain the inherent power to order sanctions, including fees, but beyond that power, it is not unusual for federal courts to apply federal fees law and/or federal calculation methods in common fund cases, even those arising under state law. There are a few decisions considering this

³³ These players are: SPIDs 100000471, 100001561, 100002017, 100006694, 100010453, 100013214, 100014169, 100014284, 100016511, 950002114, and 950004390.

approach—more often it is just accomplished in the breach—but there is a fair argument that the federal court’s equity powers authorize use of federal law. Similarly, a common fund fee award is a creature of equity, emanating from the court’s control of the fund and its ability to therefore extract a fee from the fund to ensure against unjust enrichment. To the extent that a federal court’s equitable powers are arguably the source of the common fund fee, application of federal fees law (including the calculation methods) seems appropriate and not inconsistent with the general principles underlying the so-called *Erie* doctrine.³⁴

This passage supports the District Court’s approach of using *McKenzie* to decide to cap IRPA fees under its procedural authority to monitor the class action. And it is also consistent with Judge Strawbridge’s initial lien opinion, which stated that the 22% cap was presumptive, but that petitions for upwards departure, along with the Court’s inherent supervisory powers over attorneys, created the need to at least consider analyzing if the fees sought were justified by the efforts.³⁵

Wyatt emphasizes language in *McKenzie* that it says casts doubt on the propriety of *downward* departures where the client does not object to the current IRPA’s fee.³⁶ Judge Strawbridge rarely granted such downward departures,³⁷ whether under *McKenzie* itself, or occasionally under the Court’s “supervisory power over the members of its bar” to reduce the current attorney’s fee award.³⁸ Following Judge Strawbridge’s wise practice, I recommend that this Court continue to permit the Special Masters to *sua sponte* inquire if a 22% fee—or the contracted-for fee, if lower than 22%—is justified given the facts of the lien dispute before them.

It should not be dispositive that the Player does not object to a 22% fee, though he does think that none of it should go to Goldberg, his first attorney. Wyatt charges Goldberg with sitting on the Player’s case for too long; Goldberg intimates that Wyatt moved too fast and somehow obtained an Award that the Player was not entitled to. None of this internecine conflict changes the relevant bottom line under the *McKenzie* reasonableness analysis, given that the Player obtained a favorable result from the Settlement Program. There is no evidence in the Claim history of the sort of flagrant lack of diligence, unprofessional conduct, lack of cooperation in audit, or fraud that

³⁴ WILLIAM B. RUBENSTEIN, NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 15.2 (6th ed. 2022).

³⁵ ECF No. 10368, at 26 n13.

³⁶ *McKenzie II* at 45 (“It should therefore be the unusual circumstance that a court refuses to enforce a contractual contingent attorney’s fee arrangement because of events arising after the contract’s negotiation.”).

³⁷ I can find only five examples of Judge Strawbridge reducing the current attorney’s fee beyond the lower of the fee cap or the contingency fee agreement, for a reason other than dividing up the fee between several successive attorneys. ECF Nos. 11044 (client had allegedly agreed to a 33.3% contingency fee with current attorney, but attorney refused to provide an actual contingency fee agreement and did not follow the lien dispute rules, so received no fee); 11446 (despite contingency fee agreement with current attorney, the attorney did not follow the lien dispute rules, so received no fee); 11802 (even though current attorney’s fee contract was for 22%, not “all of the counsel to have represented Player were at the table seeking a portion,” so the overall fee was reduced to 17% and then divided between current and predecessor counsel from there); 12147 (not all attorneys who had represented the Player were at the table, so the overall fee was reduced from 22% to 14.67% and divided between current and predecessor counsel from there); 12328 (current counsel received no fee due to violations of lien rules and rules of professional conduct).

³⁸ ECF No. 12328, at 29 (citing *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1109 (3d Cir. 1979)).

would counsel returning some of the fee to the Player himself. Therefore, I recommend that the total amount of 22% be available for distribution (subject to the now 1% holdback).

ATTORNEY LIENS IN DIVERSITY CASES ORIGINATE IN STATE SUBSTANTIVE LAW

The *division* of fees between two or more firms in a class action founded on state law claims adjudicated through diversity jurisdiction poses a different problem.³⁹ Again, turning to the NEWBERG & RUBENSTEIN ON CLASS ACTIONS treatise:

Federal courts process requests for attorney's fees in class actions according to the Federal Rules of Civil Procedure, specifically Rules 23(h) and 54(d)(2). However, these procedural rules are not an independent source of law authorizing attorney fees—rather, they provide the process for federal courts' consideration of fee requests authorized by either the substantive law or the agreement of the parties. Courts will determine what substantive fees law to apply by utilizing normal choice of law principles. What this means is that federal courts adjudicate fee questions much as they do any other question: utilizing federal procedure in all instances and either state or federal substantive law depending upon the nature of the case.

Most courts hold that when state law provides the rule of decision in the case (as in diversity cases), state law also governs counsel's entitlement to a fee, unless state law directly contradicts federal law. Further, if state law governs the fee entitlement, courts typically employ state law to determine the proper method for calculating the fee. Thus, the Tenth Circuit has held that in a common fund case based on Oklahoma state law, if Oklahoma courts would employ a lodestar instead of a percentage fee approach, the federal court was obligated to apply that approach as well.⁴⁰

Apart from the existing practice in this Settlement, I have not found other examples of courts sitting in diversity holding that federal procedural common law allowed them to discern the

³⁹ The underlying litigation that led to the Settlement was based on plaintiffs' state tort law claims. *See* Settlement Agreement, Recitals (B) ("Plaintiffs seek to hold the NFL Parties responsible for their alleged injuries under various theories of liability, including that the NFL Parties allegedly breached a duty to NFL Football players to warn and protect them from the long-term health problems associated with concussions and that the NFL Parties allegedly concealed and misrepresented the connection between concussions and long-term chronic brain injury.").

⁴⁰ RUBENSTEIN, *supra* note 34, at § 15.2.

merits of whether a lien exists or how to divide a fee among counsel.⁴¹ That is because there is no federal common law creating the right to a charging lien.⁴²

Goldberg had a contingency fee contract with the Player. That contract creates no post-termination payment rights. So, Goldberg's entitlement to be paid now must rest on an unjust enrichment cause of action, or a statute which would (in some states) create an equivalent charging lien. Whether there's merit to such an equitable claim is quintessentially a question of state law. Goldberg admits as much in its briefing when it states that it seeks to vindicate a "*quantum meruit*" right.⁴³ The point is also made in the filings of multiple lawyers before the first lien opinion, where attorneys routinely identified the chapter and verse of various state laws they believed created charging liens.⁴⁴

Judge Strawbridge appears to have disagreed. Unfortunately, it does not appear that the attorneys before him in his original lien opinion or any subsequent one fairly raised the *Erie* problem. In the first lien dispute, the lienholder sought application of state law only as a guide to

⁴¹ Cf. *R.D. Legal Funding Partners, LP v. Robinson*, 476 F.App'x 354, 354 (11th Cir. 2012) (applying Georgia law to "competing claims to legal fees earned in connection with a federal class action settlement in a personal injury mass toxic tort case"); *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1514 (11th Cir. 1988) (applying Alabama law to attorney lien dispute because "[f]ederal courts sitting in a state enforce that state's statute creating attorneys' liens"); *Adams, George, Lee, Schulte, & Ward, P.A. v. Westinghouse Elec. Corp.*, 597 F.2d 570, 573 (5th Cir. 1979) (applying Florida law to attorney lien dispute because "[n]o such lien is recognized under federal common law"); *Anderson v. Farmers Co-op Elevator Ass'n, Inc.*, 874 F.Supp. 989, 911 (D. Neb. 1995) (applying Nebraska law to attorney lien dispute because "[w]hile federal common law does not recognize the attorney's lien, federal courts sitting in a state enforce that state's statute creating attorneys' liens"); *Lucky-Goldstar Int'l (America), Inc. v. Int'l Mfg. Sales Co.*, 636 F.Supp. 1059, 1062 (N.D. Ill. 1986) (applying Illinois common law to attorney lien dispute); *In re Sea Catch, Inc.*, 36 BR. 226, 230 (D. Alaska 1983) (applying Alaska statutory law to attorney lien dispute).

⁴² See *Gottlieb v. GC Fin. Corp.*, 97 F.Supp.2d 1310, 1311 (S.D. Fla. 1999) (quoting *Webster v. Sweat*, 65 F.2d 109, 110 (5th Cir. 1933)) ("Federal courts, although they recognize no common-law lien in favor of attorneys, give effect to the laws of the states in which they are held."). The exception to this general rule is in federal question cases. See, e.g., *Pomerantz v. Schandler*, 704 F.2d 681, 682 (2d Cir. 1983) (holding that in a federal securities fraud case, "the nature and extent of an attorney's lien, is controlled by federal law"); accord *Misek-Falkoff v. Int'l Bus. Mach. Corp.*, 829 F.Supp. 660, 663 (S.D.N.Y. 1993) ("The nature and extent of an attorney's lien is controlled—certainly in a federal question case, and perhaps in all cases in federal court—by federal law."). Despite this dictum in *Misek-Falkoff*, federal courts sitting in New York have since squarely held that New York State's attorney lien statute "governs attorneys' charging liens in federal courts sitting in New York." *Stair v. Calhoun*, 722 F.Supp.2d 258, 267 (E.D.N.Y. 2010).

⁴³ See Doc. 302601 at 1 ("Thus, Petitioner seeks his quantum meruit legal fees and costs which must follow the precedent created by this Honorable Court and Judge Strawbridge all prior lien disputes."). Indeed, Goldberg was granted the right, pursuant to the order of a Florida court dated May 1, 2022, "to include representation of [an] Assignee [of the Howard firm] in the pursuit of fees and costs owed to the Assignment estate under charging liens in the NFL Concussion Litigation." See Order, *In re Howard & Associates, Attorneys at Law, P.A.*, Case No. 2021-CA-9064, Div. L (May 1, 2022).

⁴⁴ See, e.g., ECF No. 7064-1, Petition to Establish Attorney's Charging Lien (Jan. 6, 2017), at 4 (citing *Daniel Mones, P.A. v. Smith*, 486 So. 2d 559, 561 (Fla. 1986) in asserting it "satisfies the requirements for an attorney's charging lien under Florida law"); ECF No. 6518, Notice of Attorney's Lien (Apr. 24, 2015), at 1 (citing to Georgia statute O.C.G.A. § 15-19-14 in claiming it "has a lien in this case for reasonable attorney's fees, plus expenses"); ECF No. 6941, Notice of Attorney's Lien (Nov. 17, 2016), at 1 (citing Minn. Stat. § 481.13 to justify a "lien in this case for reasonable attorney's fees, plus expenses").

the Court's "evaluation of the *reasonableness* of the fee agreement here,"⁴⁵ not the existence of its lien. In citing *Mitzel* for its propositions about the *reasonableness* of fees, Judge Strawbridge was not alerted by counsel that the case analyzed the dispute before it under New Jersey choice of law principles, assuming for the sake of argument that the "issue were a matter of state law under the *Erie* test."⁴⁶ *Mitzel* also dealt with a single law firm, and the question was whether the agreed-upon contingency fee should be awarded or whether it was excessive and should be limited.⁴⁷

In all events, the proposition that a federal court has the power to cap unreasonable contingency fee agreements does not imply that it can apply federal substantive standards when asking if predecessor counsel has a right to recover against the client (and his current lawyer). I read the Third Circuit in *Novinger* as unequivocal in defining the difference between a federal court's *power* to resolve an attorney lien dispute and the *substantive law* that applies.⁴⁸ *Novinger* illustrates why this Court has jurisdiction to hear lien claims, and why those claims must rise or fall on the merits based on state rules of decision:

Attorneys' fee arrangements in diversity cases, and in most federal question cases as well, are matters primarily of state contract law. Nevertheless the federal forum has a vital interest in those arrangements because they bear directly upon the ability of the court to dispose of cases before it in a fair manner. This case is perfectly illustrative. Differences arose between the Novingers and the successive counsel. If the federal forum were powerless either to order counsel to turn over a file or to authorize voluntary withdrawal in the face of such differences, the court's ability to dispose of the case would be severely limited. Thus there cannot be any question that the court has authority to enter orders such as those directing Kramer to surrender the file upon which he claimed a state law retaining lien, and permitting Smith and Swartz to withdraw. This power necessarily includes the power to resolve disputes with respect to the payment of attorneys' fees and expenses.⁴⁹

Citing *Dunn*, which "recognized that federal courts have the power to monitor contingent fee arrangements," the *Novinger* court rejected a challenge to its jurisdiction over the attorney fee dispute, but went on to analyze that dispute using "Pennsylvania law governing attorney-client contracts for contingent fee representation."⁵⁰

As Third Circuit in *Chin v. Chrysler LLC* explained:

When a district court's jurisdiction is predicated on diversity of the parties, or when the court hears a state-law claim based on its supplemental jurisdiction, as we will assume it did here, the court must determine whether, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), a matter is substantive or procedural. *Simmons v. City*

⁴⁵ ECF No. 10368, at 31 (emphasis added).

⁴⁶ *Mitzel*, 72 F.3d at 417.

⁴⁷ *Id.* at 416.

⁴⁸ See generally *Novinger v. E.I. Du Pont de Nemours & Co.*, 809 F.2d 212 (3d Cir. 1987).

⁴⁹ *Id.* at 217.

⁵⁰ *Id.* at 217–218.

of *Phila.*, 947 F.2d 1042, 1085 (3d Cir. 1991). If the matter is determined to be substantive, and a choice-of-law question is presented, the court must then perform a choice-of-law analysis to determine which state's substantive law applies. The Supreme Court has made plain that these are two distinct questions.⁵¹

The Court then cited *Klaxon*⁵² for the proposition that “when a choice-of-law question exists, a district court must apply the choice-of-law rules of the state in which it sits in order to determine which state's law applies.”⁵³ In *Chin*, the appropriate choice of law rules were those of New Jersey because that was the state in which the district court sat.⁵⁴

Following these cases leads me to a slightly different position than Judge Strawbridge's. I cannot recommend that an attorney in the Settlement should be permitted to invoke federal procedural law to justify its entitlement to a lien against a client who terminated the representation, nor against counsel which currently represents that client. As there is no free-floating federal right to a charging lien, if such an equitable entitlement exists, state law must be at its root. The question of *which* state's law is left to Pennsylvania's choice of law rules, under *Klaxon*, as that is the state in which this Court sits.

DOES THE LAW OF THE CASE COMPEL A CONTRARY OUTCOME?

Goldberg's main response to the above line of argument is that Judge Strawbridge's approach should be followed because it is precedential within the Settlement Program. This argument alludes to the discretionary law of the case doctrine, which “prevents reconsideration of legal issues already decided in earlier stages of a case.”⁵⁵ The doctrine “only applies within the same case,” and “affects only issues that were expressly or necessarily resolved by prior decisions in the same case.”⁵⁶ Moreover, “it only governs the power of a court to revisit its prior orders prior to final judgment.”⁵⁷

I recommend finding that the law of the case doctrine is inapt here.⁵⁸ Judge Strawbridge did not clearly hold in his first lien opinion that federal procedural law created the right to a lien, as he

⁵¹ *Chin v. Chrysler LLC*, 538 F.3d 272, 278 (3d Cir. 2008).

⁵² *Klaxon*, 313 U.S. at 496.

⁵³ *Chin*, 538 F.3d at 279.

⁵⁴ *Id.*

⁵⁵ *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55, 61 (3d Cir. 2023) (internal quotations omitted).

⁵⁶ *Id.* (internal quotations omitted).

⁵⁷ *In re Visteon Corp.*, 579 F.App'x 121, 128 (3d Cir. 2014) (internal quotations omitted).

⁵⁸ Goldberg submits that Pennsylvania's law of the case doctrine, not federal law, should govern. Doc. 319199 at 2-3. But the law of the case doctrine is procedural, resolving how courts manage their own decision-making processes, not substantive. *See Home Depot*, 59 F.4th at 61 (citing several federal common law cases to define parameters of law of the case doctrine); cf. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (holding that “federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity”). Before *Semtek* was decided, one scholar argued that although “recent case law has paid scant attention to whether a federal court sitting in diversity should be bound by the law of the case doctrine of the state in which it sits,” circuits should follow what they were doing with respect to preclusion doctrine, such that “in circuits where federal preclusion law governs in successive diversity suits, law of the case should be procedural.” Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 633, 640 (1987). That's

was focused on reasonableness of the fees, where it appears the parties were litigating a live contingency contract. I have not seen a later lien brief presented the *Erie* question, rather disputes appear to have consented to the *McKenzie* rules.⁵⁹ That is illustrated by the direct appeal of the first lien opinion. Lawyers did not raise an *Erie* problem before the District Court; the Third Circuit affirmed explicitly relying on the parties' concession that *McKenzie* provided the appropriate rule of decision.⁶⁰

More generally, the law of the case does not apply across lien disputes. The Third Circuit has squarely held that "distinct actions" within a multidistrict proceeding retain their individual character as separate cases for purposes of law of the case doctrine.⁶¹ In each of these attorney lien disputes, the parties vary, both from one another and from the parties to the Settlement. The Qualifying Diagnoses and their procedural histories are unique. Attorney retainer agreements change from lien dispute to lien dispute. And liens resolved today are governed by a different set of rules from those in the past.⁶² Simply put, that one set of legal principles applied to a particular lien dispute should not estop the Court from coming to a different answer for a later decided lien in these ancillary proceedings.

Setting aside the formal law of the case doctrine, Goldberg also highlights the Program's interest in reliance and predictability. More than a thousand liens have been filed under the *McKenzie* approach which has prevailed for the last four years. The Court has approved multiple Reports and Recommendations by Judge Strawbridge, with no salient examples of attorneys raising objections that this system wrongly creates federal common law. Attorney filing liens have not been prompted to identify or think about the specific state law which generates their entitlement. And it is possible that they have made settlements relying on the *McKenzie* federal framework, which,

certainly what the Third Circuit did in *Home Depot*, 59 F.4th at 61. Under *Erie* and especially after *Semtek*, federal law of the case doctrine applies here. In all events, the state doctrine appears little different and would have the same discretionary applicability: the distinction here is without an obvious difference.

⁵⁹ See *Schiavone Constr. Co. v. Time, Inc.*, 735 F.2d 94, 96 (3d Cir. 1984) (because the parties appeared to "implicitly agree" on the applicable choice of law, the Court declined to *sua sponte* challenge their decision).

⁶⁰ *In re NFL Players' Concussion Injury Litig.*, 826 F.App'x. at 138 ("We assess challenges to contingent-fee arrangements using factors from a pair of cases, *McKenzie I* and *McKenzie II*. Neither party disputes this."). Podhurst, which originally had contested the application of *McKenzie* before Judge Strawbridge, explicitly abandoned that position in its appellate briefing. Brief for Appellee/Cross-Appellant at 17, *In re NFL Players' Concussion Injury Litig.*, 826 F.App'x (Nos. 19-1760 & 19-1771) ("It Is Uncontested That the Magistrate Judge Employed the Correct Legal Framework.").

⁶¹ See *Home Depot*, 59 F.4th at 61 ("The law of the case doctrine cannot be applied across distinct actions in this multidistrict proceeding."); see also *U.S. v. Pozsgai*, Civil Action No. 88-6545 (E.D. Pa. Nov. 9, 2020) ("Law of the case rules have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" (emphasis added) (quoting *Casey v. Planned Parenthood of Se. Pennsylvania*, 14 F.3d 848, 856 (3d Cir. 1994)). As Wyatt points out, the Settlement Program has treated attorney lien cases as separate actions, even when they were filed in the multidistrict docket. Compare ECF No. 9760, Order Adopting Rules Governing Attorney's Liens (Mar. 6, 2018), at Rule 7 ("If an attorney wants to assert an Attorney's Lien, or otherwise present a claim against a SCM in any way related to a SCM's Award, he or she must file a notice, but notice only, of Attorney's Lien in the United States District Court for the Eastern District of Pennsylvania, Case No. 2:12-md-02323-AB.") (emphasis added), with ECF No. 12348-1, at Rules 2 and 3 ("Attorneys are no longer permitted to file Attorney Liens on the MDL Docket," but instead must file with the Claims Administrator in order to "assert an Attorney's Lien against the award, or potential future award, of a Settlement Class Member").

⁶² See ECF No. 12348-1 (showing new set of procedural rules for attorney lien disputes in the Settlement Program).

in very broad strokes, appears to be more generous toward predecessor counsel than many states' approaches.⁶³

This isn't an easy knot to cut. Goldberg presses on the systemic benefits of the status quo; Wyatt on its increasingly chilling effect on zealous representation of players with low-value claims. Wyatt writes:

Wyatt has already had lien disputes in which a Player retained three prior attorneys, all of whom claimed they were entitled to significant legal fees. As the Settlement will exist for the next 50+ years, Players will have more and more Liens attached to their files. This will naturally occur for among other reasons, many lawyers will retire or move to other practice areas.

At the same time, the monetary size of awards will decrease over the next 50+ years as Players get older. Attorneys will increasingly not want to represent Players—especially, older Players with less seasons—when there are multiple Liens on a file and given the reality of the 22% fee cap . . .

To be frank and clear: continuation of the current system will harm Players (especially those at the economic margins of the Monetary Grid) by making it increasingly unattractive for lawyers to take on new clients and spend the money necessary to obtain Awards as free testing in BAP ends over the next couple of years.

Doc. 300716 at 4 n.7.

Class Counsel, filing a brief statement in this matter, agrees with Wyatt that the overhang from prior liens threatens harm to members of the class:

Class Counsel has received numerous emails and telephone calls from Retired Players who are not satisfied with their current IRPA. In fact, many of those Retired Players who have contacted Class Counsel are not even sure of the name of their current IRPA because that IRPA has not contacted them in several years . . . A number of the Retired Players have advised Class Counsel that some IRPAs have declined to take them on as new clients because they were concerned that if they were able to get the Retired Player an award, the prior IRPA(s) would file an attorney lien and be awarded a large portion of the fee

This settlement program is unique in that it will be in effect for another 58 years, and it is likely that many Retired Players will not be diagnosed with a Qualifying Diagnosis for another 20, 30, or even 40 years. Those Retired Players need to have quality representation so that they can successfully file a claim and receive an award

⁶³ Wyatt's supplemental brief argues that the "harshness" of the result is mitigated by negotiations occurring outside of court.

whenever they are diagnosed, whether that's next year or 40 years from now. Therefore, it is imperative that IRPAs are incentivized to not only remain zealous in the representation of their current clients, but also to accept new clients, who may no longer trust that their current IRPA is willing to do what is necessary on their behalf.

Doc. 319396.

Ultimately, to the extent systemic consequences are to be weighed, they support Wyatt's position. The number of liens on the docket, and the difficulty of predictably resolving them under *McKenzie*, may be creating drag on new claims. As Class Counsel points out, these problems are most acute for older class members with small expected-value claims, and whose Awards are increasingly anchored by multiple, difficult to disentangle, liens. Over time, tangled liens will fuel mischief. Consistently applying state law governing charging liens should resolve liens more quickly, might increase incentives for zealous advocacy of players with low-value claims, and would provide clearer rules to reduce gamesmanship. It is also, in my judgment, the legally correct outcome.

APPLYING PENNSYLVANIA CHOICE OF LAW RULES, PENNSYLVANIA LAW APPLIES TO THIS LIEN DISPUTE

I next ask which state's charging lien law applies to this particular dispute. To answer that question, we must undertake a conflict-of-law analysis, which starts with Pennsylvania's conflicts law.

In *Hammersmith v. TIG Insurance Co.*, the Third Circuit held that "the Pennsylvania Supreme Court would apply *Griffith* [*v. United Air Lines*] to contract disputes."⁶⁴ The *Griffith* analysis—as articulated in *Hammersmith*—also applies in Pennsylvania to *quantum meruit* claims.⁶⁵

⁶⁴ *Hammersmith v. TIG Ins. Co.*, 430 F.3d 220, 228 (3d Cir. 2007).

⁶⁵ See *In re Actiq Sales & Mktg. Prac. Litig.*, 307 F.R.D. 150, 163 (E.D. Pa. 2015) (applying *Hammersmith*'s articulation of the two-step *Griffith* "conflict of laws analysis" to assess "whether an actual conflict exists among the unjust enrichment laws of the fifty states"). Pennsylvania precludes "recovery in quantum meruit and unjust enrichment if the parties have a valid and enforceable contract that governs the same subject matter as the quantum meruit and unjust enrichment claims." *Global Sourcing LLC v. DBDK Int'l, LLC*, 2018 U.S. Dist. LEXIS 18850 at *15 (E.D. Pa. 2018); see also *Lackner v. Glosser*, 2006 Pa. Super. 14, 33 (Pa. Super. Ct. 2006) ("By its nature, the doctrine of quasi-contract, or unjust enrichment, is inapplicable where a written or express contract exists."). Wyatt's claim to an attorney fee here, which is governed by a current attorney-client relationship pursuant to a valid retainer agreement, is contractual. However, Goldberg was terminated—its contract no longer binds the firm or its client. Therefore, Goldberg's claim to a fee rests on *quantum meruit*, which in Pennsylvania is a "form of restitution" sounding in "neither contract nor tort." *Powers v. Lycoming Engines*, 328 F.App'x 121, 126 (3d Cir. 2009) (internal quotations omitted). Regardless, *Griffith* is the choice of law test that applies.

In *Griffith*, Pennsylvania rejected the old place-of-injury rule, which required applying the law of the state in which the injury occurred, in favor of a “more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.”⁶⁶

Under *Griffith*, the choice of law determination looks to the law of the jurisdiction with the most significant relationship to the occurrence and the parties, placing importance on analysis of the policies underlying the conflicting laws and the relationship of the particular contacts to those policies.⁶⁷

The factors to be considered in this contacts analysis include (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of residence of the parties.⁶⁸

But before engaging with contacts, the first step in *Griffith* asks if there is a true conflict between the laws of each state that might apply.⁶⁹ This step has two sub-steps. First, is there “an actual conflict” between the laws.⁷⁰ “If two jurisdictions’ laws are the same, then there is no *conflict* at all, and a choice of law analysis is unnecessary.”⁷¹ Second, if “there are relevant differences between the laws, then the court should examine the governmental policies underlying each law, and classify the conflict as ‘true,’ ‘false,’ or an ‘unprovided-for’ situation.”⁷² A true conflict arises “only if *both* jurisdictions’ interests would be impaired by the application of the other’s laws.”⁷³

I do not recommend finding that the parties to this dispute have identified an actual conflict of laws. The makings of such a problem are, to be sure, in the mix. The Settlement chooses to be interpreted under New York law, but was negotiated in Pennsylvania, and is subject to the Eastern District of Pennsylvania’s continuing supervision. Goldberg is a Pennsylvania firm. The Player is from Tennessee. Wyatt practices in New York and its retainer agreement with the Player contains a choice of law provision stating that the agreement “shall be construed, performed, and enforced

⁶⁶ *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 21 (1964). Wyatt, in supplemental briefing, invites the application of *Melmark, Inc. v. Schutt*, 651 Pa. 714 (2019), a more recent Pennsylvania choice of law case. Arguably, *Melmark* reaffirms *Griffith*’s continued relevance in Pennsylvania’s choice of law analysis. See *id.* at 727 (citing *Griffith* and *Klaxon* for the proposition that “[c]ourts conduct a choice-of-law analysis under the choice-of-law rules of the forum state”). But even if *Melmark* provides direction for a more precise “Erie-guess” than *Griffith*, *Hammersmith* would compel the *Griffith* approach until the Court of Appeals finds to the contrary. See *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1343 (3d Cir. 1990) (holding that even when intervening Pennsylvania Supreme Court decisions “cast some doubt” on the Third Circuit’s prior *Erie* guess, “in the absence of a *clear* statement by the Pennsylvania Supreme Court to the contrary or other persuasive evidence of a change in Pennsylvania law, we are bound by the holdings of previous panels of this court”) (emphasis in original). *Melmark* does not provide this level of clarity.

⁶⁷ *Ario v. Underwriting Members of Lloyd’s of London Syndicates* 33, 996 A.2d 588, 593 (Pa. Commw. Ct. 2010).

⁶⁸ See *id.* at 595 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (AM. L. INST. 1971)).

⁶⁹ *Hammersmith*, 430 F.3d at 229.

⁷⁰ *Davis v. GEICO Gen. Ins. Co.*, 957 F. Supp.2d 544, 548 (M.D. Pa. 2013).

⁷¹ *Hammersmith*, 430 F.3d at 230 (emphasis in original).

⁷² *Id.*

⁷³ *Id.* (emphasis in original).

in accordance with, and governed by, the internal laws of the State of New York, without giving effect to the principles of conflicts of laws thereof.” Doc. 300716 at Ex. B.

And yet in response to my call for supplemental briefing, Goldberg wrote two things.

First, it agreed that “under a reading of *Griffith* it would appear that Pennsylvania law should apply.” Doc. 319199 at 5. Since I agree that *Griffith* applies, I would stop there: there’s no need to reach to find a conflict of state laws where the parties agree on how the analysis turns out.

But second—cutting in the other direction—Goldberg suggests that (perhaps notwithstanding *Griffith*) New York law might be applicable because the Settlement itself is to be governed by New York law. *Id.* Goldberg does not explain how under *Griffith* the Settlement’s choice of law provision applies to equitable claims by former attorneys against players’ Awards. The relevant Settlement provision states:

Notwithstanding any contrary law applicable to the underlying claims, this Settlement Agreement and the Releases hereunder will be interpreted and enforced in accordance with the laws of the State of New York, without regard to conflict of law principles.⁷⁴

Wyatt states forcefully that a lien claim is not a dispute about “this Settlement Agreement and the Releases hereunder” and the choice of law provision is inapt. Perhaps so. But more importantly, Goldberg’s briefing does not illustrate why New York lien law should result from application of this provision under a *Griffith* choice of law analysis. Goldberg does not describe the content of New York lien law, or what policies it furthers. It makes no attempt to balance the relevant analyses, or even to show they are in conflict. It is inadvisable to create a conflict where one has not been plausibly shown to exist. As Goldberg has not identified how an alternative legal regime’s application would lead to a different result, I conclude that any potential conflict between New York and Pennsylvania law is false.

In a properly presented case, if an attorney asserts a state-law lien regime distinct from Pennsylvania’s and shows how it would produce a different result, more will have to be said on “which state has the ‘greater interest in the application of its law.’”⁷⁵ At baseline, I am persuaded that Pennsylvania has a very strong interest in application of its attorney-regulation regime through its lien law, and that interest is at its apogee when the lienholder is a Pennsylvania attorney. It is therefore my recommendation that the Court hold that Pennsylvania lien law applies to this dispute.⁷⁶

⁷⁴ Settlement Agreement, Section 27.1(a).

⁷⁵ *Hammersmith*, 480 F.3d at 229 (quoting *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 702 (Pa. Super. Ct. 2000)).

⁷⁶ In briefing to Judge Strawbridge in the lien dispute culminating in ECF No. 10298, Report and Recommendation (Oct. 10, 2018), a Minnesota-based attorney argued for the application of Minnesota lien law because the “retainer agreement between [the Player] and ZR contains a choice-of-law provision applying Minnesota law.” Zimmerman Reed, LLP Stmt. of Dispute, at 8 (July 11, 2018). While that lienholder did not grapple with Pennsylvania choice of law rules, it is conceivable that in the future, a true conflict could be shown between the lien law of Pennsylvania and

UNDER PENNSYLVANIA LAW, GOLDBERG IS NOT ENTITLED TO A CHARGING LIEN FOR ITS FEES

In Pennsylvania, the “seminal case on the issue” of attorney charging liens is *Recht v. Urban Redevelopment Authority*.⁷⁷ The *Recht* test entails a five-part threshold inquiry:

[B]efore a charging lien will be recognized and applied, it must appear (1) that there is a fund in court or otherwise applicable for distribution on equitable principles, (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his compensation, (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised and (5) that there are equitable considerations which necessitate the recognition and application of the charging lien.⁷⁸

Under *Recht*, only if a charging lien is properly recognized can a prior counsel then assert a right to recover under a *quantum meruit* theory. *Quantum meruit* recovers a fair and reasonable sum in light of the work done.

All of the attorney lien cases that will present themselves in the Settlement Program are likely to easily meet *Recht* factors (1), (3), and (4): the fund exists in the form of the Award, the retainer between the player and the attorney establishes the no-other-recourse contingency fee agreement, and the lien will be limited to costs, fees, and other expenses specific to the attorney’s work for that player. The factors in contention in the typical lien dispute will be (2) and (5). Factor

the lien law of another state with a significant interest in the dispute. This would be the beginning, not the end, of the inquiry. Firms would likely need to show why an abandoned contract’s choice of law clause remains relevant to an equitable claim. On the other side of the ledger, Pennsylvania has a particularly strong interest in regulating contingency fee contracts between class members and individually retained plaintiffs’ attorneys in a class action settlement certified and administered by a federal court sitting within its borders. See *Wyndmoor Learning Ctr., Inc. v. City of Wilmington*, 1996 WL 117471 at *6 (E.D. Pa. 1996) (holding that Pennsylvania law applied where “settlement negotiations occurred between counsel in Pennsylvania, and the settlement agreement was allegedly entered into in Pennsylvania”). And, as Judge Strawbridge found, Pennsylvania’s rules of professional conduct apply to regulate attorney conduct regarding liens within the Settlement. ECF No. 12328, at 10. For this reason, among others, Pennsylvania’s interest would likely weigh quite heavily in the case of a true conflict. See generally E.H. Schopler, *Conflict of Laws as to Attorneys’ Liens*, 59 A.L.R.2d 564, 1958 WL 11124 (1958) (“The generally accepted rule is that the existence and effect of an attorney’s lien arising under such a contract is governed by the law of the place where the contract is to be performed, that is, where the contemplated action or proceeding is to be instituted, and not by the law of the place where the contract was made (supposing that the contract was made and was to be performed in different places).”); *In re Engage*, 315 B.R. 208, 212 (D. Mass. 2004) (“That the law of the jurisdiction where judgment entered should control seems obvious: but for the judgment, there is no right to enforce a charging lien.”). That said, it is possible that in a future lien dispute, lienholders might successfully assert the greater interest of another state’s lien law. This implies that there might be different lien outcomes depending on the constellation of lienholders. Wyatt points out that certain Restatement provisions provide authority for a contrary and uniform answer—Pennsylvania law will always apply. Whether that is true is a problem for another Report and Recommendation.

⁷⁷ *Austin v. Thyssenkrupp Elevator Corp.*, 254 A.3d 760, 764 (Pa. Super. Ct. 2021).

⁷⁸ *Recht v. Urb. Redev. Auth.*, 402 Pa. 599, 608 (1961).

(2) deals with a causal connection between the attorney's work and the Monetary Award determination, and factor (5) is a catchall that allows the court to consider principles of equity and fairness in making its decision.

In *Recht* itself, the Pennsylvania Supreme Court applied factor (2) as follows:

While [the attorney's] services were valuable to Recht's cause it follows from what we have said that his services did not operate, substantially or primarily, to create the fund upon which he now claims the right to a charging lien. His services were rendered in [a prior proceeding] and not in [this one], and, therefore, not in the litigation which gave rise to that fund. He has no right to a charging lien as against that fund.⁷⁹

The focus is on "the extent to which the attorney's skill and services actually produced the fund," not whether the attorney "assisted, or provided valuable services, or contributed in some measure."⁸⁰ Starting a "case on the track that ultimately led to the result" does not establish the requisite relationship under factor (2) if the firm "had little if any role in producing the result."⁸¹ "The services must have substantially, primarily, largely, to a substantial extent, if not exclusively or entirely, procured or generated the fund itself."⁸²

Recht's rule controls the resolution of multiple, competing liens. While "more than one firm can be entitled to a charging lien, each such firm must demonstrate that its services substantially and primarily contributed to the creation of the fund."⁸³ For example, predecessor counsel in *Austin v. Thyssenkrupp Elevator Corp.* made this showing because he "undisputedly represented Austin from the commencement of the underlying personal injury lawsuit until after [the elevator company] and Austin reached the oral settlement agreement."⁸⁴ By contrast, predecessor counsel in *In re Independent Pier Co.* failed to meet *Recht* factor (2) because while the firm filed the complaint and performed "certain work relating to [the] claims before and after filing it," the litigation was "ultimately successful three years after [the successor attorney] took it over."⁸⁵ The prior firm's services did not substantially or primarily contribute to the creation of the fund.⁸⁶

The *Recht* factor (2) test is a constrictive one, which appears to deny equitable reimbursement for attorney work maintaining an action pursuant to expired contingency agreements in many circumstances where it was otherwise competently done. In this respect it may differ from other states' lien laws. But "seminal case" though it may be,⁸⁷ *Recht* is not the only

⁷⁹ *Id.* at 609–610.

⁸⁰ *In re Independent Pier Co.*, 210 B.R. 261, 264 (E.D. Pa. 1997).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Austin*, 254 A.3d at 766.

⁸⁵ *Independent Pier Co.*, 210 B.R. at 265.

⁸⁶ *Id.*

⁸⁷ *Austin*, 254 A.3d at 764.

Pennsylvania precedent in the field of attorney fees derived from *quantum meruit* principles. And recent precedent muddies some of the water that the *Recht* bright-line rule left clear.

Specifically, in 2018, the Pennsylvania Supreme Court in *Meyer* addressed the issue of whether to recognize a *quantum meruit* claim by a predecessor attorney against a successor attorney, rather than a client.⁸⁸ The predecessor attorney argued that the “time it spent preparing the [...] Litigation for trial, including conducting depositions, selecting expert witnesses, reviewing medical records and preparing motions, directly benefitted” the successor attorney because the successor attorney essentially inherited an already-worked-up case.⁸⁹ Because the successor attorney, not the client, was allegedly unjustly enriched, and as the client had already paid its attorney fee, it was proper for the predecessor attorney to pursue the *quantum meruit* claim directly against its successor.⁹⁰ The *Meyer* Court, agreeing, wrote:

A claim for damages in *quantum meruit* is fundamentally an equitable claim of unjust enrichment in which the party seeking recovery must demonstrate:

(1) [the] benefits conferred on defendant by plaintiff; and (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. The application of the doctrine depends on the particular factual circumstances of the case at issue. In determining if the doctrine applies, our focus is not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.⁹¹

The Court noted that in “the context of contingent fee matters, the principle of *quantum meruit* may apply when a client fires counsel before litigation proceeds are generated and a contingent fee can be collected.”⁹² And in fashioning this *quantum meruit* action against a successor attorney, rather than a *Recht* charging lien against the client, *Meyer* embraced a but-for theory of causation:

It is axiomatic that without predecessor counsel’s effective litigation of a civil action, successor counsel will not have the opportunity to reach a favorable verdict or settlement. In that sense, predecessor counsel who is fired by the client before collecting a fee for work on litigation, has obviously conferred a benefit upon both the client and successor counsel who concludes the matter and receives a percentage of the proceeds as a fee. In such a case, someone must make initiating counsel whole [...]

⁸⁸ *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 645 Pa. 362, 372 (2018).

⁸⁹ *Id.* at 375–376.

⁹⁰ *Id.*

⁹¹ *Id.* at 378 (quoting *Shafer Elec. & Constr. v. Mantia*, 626 Pa. 258, 96 A.3d 989, 993 (Pa. 2014)).

⁹² *Id.*

In such a situation, where both the client and successor counsel retain a benefit achieved in part by predecessor counsel's work, where predecessor counsel has not been remunerated for that work, and no contract governs the situation, we hold predecessor counsel may recover damages in *quantum meruit* [...]

Such a claim is viable only where the facts demonstrate unjust enrichment, that is, successor counsel has received and retained a benefit from predecessor counsel, which would be unjust to retain without some payment to predecessor counsel. Our decision today does not preclude a *quantum meruit* claim by predecessor counsel against a former client, where the benefit is similarly conferred upon and unjustly retained by the client without payment to predecessor counsel.⁹³

At the same time, the *Meyer* court cited *Recht* to define when a “charging lien will be recognized and applied.”⁹⁴ And the *Meyer* rule, holding that predecessor counsel can recover directly against successor counsel under *quantum meruit*, formally is triggered only “when the new lawyer *has already been paid* a contingency fee for the work to which the former lawyer contributed. Thus the money that may rightfully, in part, belong to the predecessor attorney is now in the hands of the new attorney, and the client is no longer the correct party against whom to proceed.”⁹⁵ Wyatt, by contrast, has yet to receive a fee.

Pennsylvania courts post-*Meyer* continue to cite *Recht* to define if a charging lien can be recognized against a terminated attorney's former client. *Austin*, discussed above, is one.⁹⁶ Others from the Superior Court include *Sawyer v. Taylor*,⁹⁷ *Pashuck v. Tyler*,⁹⁸ and *Jackson v. Shefa Invs., LLC*.⁹⁹ Meanwhile, the Superior Court has glossed *Meyer* as “simply a restatement” of established “principles concerning fee agreements,” namely that a discharged attorney with a contingency fee agreement “‘generally has a claim in *quantum meruit* to recover his fees.’”¹⁰⁰ It has also been cited for the elements a plaintiff must allege “[t]o sustain a claim of unjust enrichment”¹⁰¹ in situations other than successor and predecessor attorneys fighting over a contingency fee.¹⁰²

⁹³ *Id.* at 379, 380, 383.

⁹⁴ *Id.* at 373 n6.

⁹⁵ *Joseph Q. Mirachi Legal Services, P.C. v. Thorpe*, 2020 WL 2030036 at *9 (E.D. Pa. 2020) (internal citations omitted) (emphasis added).

⁹⁶ *Austin*, 254 A.3d 760.

⁹⁷ 2023 Pa. Super. Unpub. LEXIS 2032 at *8 (Pa. Super. Ct. 2023) (citing *Austin*, 254 A.3d and *Recht*, 402 Pa. for the five-factor test “[t]o establish entitlement to an attorney's charging lien”).

⁹⁸ 2021 Pa. Super. Unpub. LEXIS 2920 at *6 (Pa. Super. Ct. 2021) (citing the *Recht* test for the “five things” that “the party seeking the lien must show”).

⁹⁹ 2019 Pa. Super. Unpub. LEXIS 2927 at *6 (Pa. Super. Ct. 2019) (“In *Recht* our Supreme Court set forth the five conditions which must be met before a charging lien will be recognized and applied...”).

¹⁰⁰ *Rudinski v. Hawk*, 2020 Pa. Super. Unpub. LEXIS 1053 at *7 (Pa. Super. Ct. 2020) (quoting *Angino & Rovner v. Jeffrey R. Lessin & Assocs.*, 131 A.3d 502, 508 (Pa. Super. Ct. 2016)).

¹⁰¹ *Fischl v. AXA Life Ins. Co.*, 2019 Pa. Dist. & Cnty. Dec. LEXIS 4891 at *10–*11 (Allegheny Cnty. Ct. C.P. 2019).

¹⁰² See *Wilson v. Parker*, 227 A.3d 343, 345, 353 (Pa. Super. Ct. 2020) (citing *Meyer* for unjust enrichment elements in a “dispute over a tract of land located in Bedford County, Pennsylvania”).

Though the caselaw is not always entirely clear, on balance I recommend finding that the Pennsylvania Supreme Court would continue to apply *Recht*, and specifically factor (2), in deciding to recognize a lien for work done by a predecessor counsel in an action against the current client.¹⁰³ In so recommending, I follow Judge Strawbridge’s opinion in a lien dispute arising in an entirely different litigation: *Paddick v. Butt*.¹⁰⁴ There, Judge Strawbridge relied on *Recht* to hold that the attorney was entitled to a fee, then cited to *Meyer* for the “next issue” of “whether that recovery may be had under a contract theory, which would permit him to recover under the termination clause in the contingency fee agreement, or under quantum meruit...”¹⁰⁵ That is, Judge Strawbridge held that lien recognition under *Recht* is a precondition to a *Meyer* analysis.¹⁰⁶

Following this approach, I recommend the Court apply *Recht* factors (2) and (5) to the facts of this dispute. Applying factor (2), liens within the Settlement Program often lie somewhere in between *Recht*—where the attorney did not participate in the matter that produced the fund at all—and *Austin*—where the attorney did everything from initiation of the case through the negotiation of the settlement. But as the District Court recognized in capping the fee, the work of IRPAs has already been limited by the contributions of Class Counsel. What matters (in assessing the IRPA’s contribution under *Recht*) is the Monetary Award that a given claimant received: it is that fund that we are assessing.

Therefore, only work that directly supported the individual Award goes into the *Recht* factor (2) calculus. Effort such as early communication with the player, filing a multi-plaintiff or short form complaint, and preparing briefing for an attorney lien dispute may have value in an abstract sense, but these kinds of tasks are not proximally connected to the creation of the individual Award fund. Nor does work on other, even-if-related, cases.¹⁰⁷ Legal service that contributes to securing an individual player’s Award includes timely representation accomplishing the following sorts of tasks:

¹⁰³ Compare *In re Thorpe*, 755 Fed. App’x. 177, 179, 183 (3d Cir. 2018) (citing *Meyer*, not *Recht*, in a case against the client, though on facts that would have satisfied *Recht*), with *Walker v. Pa. Dep’t of Corr.*, 828 Fed. App’x. 118, 120, 120 n.1 (3d Cir. 2020) (citing *Recht*, not *Meyer*, in evaluating a lien). See also, e.g., *Abate v. Wal-Mart Stores East, L.P.*, 2022 U.S. Dist. LEXIS 16310 at *4 (W.D. Pa. 2022) (“Pursuant to *Recht* Urban Redevelopment Authority of Clairton, 402 Pa. 599, 168 A.2d 134 (Pa. 1961), Pennsylvania courts utilize a five-part test to determine the enforceability of a charging lien.”); *Mammarella v. Baptist Senior Fam.*, 2024 U.S. Dist. LEXIS 8039 (W.D. Pa. 2024) (“Under Pennsylvania law, five factors must be proven for an attorney’s charging lien to be recognized.”) (citing *Recht*, 402 Pa.).

¹⁰⁴ *Paddick v. Butt*, 2018 WL 1991737 at *12 (E.D. Pa. 2018) (citing *Recht* for “whether Paddick has successfully asserted a charging lien”).

¹⁰⁵ *Id.* at *14.

¹⁰⁶ In allowing for recovery against successor attorneys, *Meyer* would *have* to provide for a different test than *Recht* because *Recht* mandates a lawyer-client agreement as a prerequisite to recovery from that client’s fund. But predecessor and successor attorneys of a given client will only sometimes have agreements with one another predating the fee dispute. (I am aware of several agreements of that type within this Program.) Any action between attorneys based on a contract is different in kind from one based on a fund that parties previously agreed would be used to pay the attorney—the *Meyer* rule essentially operates to create a contract where none ever existed, to prevent unjust enrichment though a contract implied-in-law.

¹⁰⁷ *Greek Catholic Union of Russian Blds. v. Russin*, 340 Pa. 295, 296 (1941) (“As to the charging lien, it has always been recognized that it extends only to services rendered in the proceedings creating the fund and not to services rendered in other cases.”).

- Registering the player for the Settlement Program.
- Scheduling the player for a BAP exam.
- Arranging for and advancing costs for a MAF exam.
- Compiling and filing a Claim package.
- Securing rescoring of a player's neuropsychological testing.
- Communicating with the Claims Administrator with requests for additional information.
- Responding to and navigating the player through an audit of his Claim.
- Filing and arguing an appeal.
- Responding to an appeal by the NFL Parties.

Considering this list, Goldberg registered the Player for the Settlement Program and arranged for two trips through the BAP.¹⁰⁸ But Goldberg did not privately accomplish rescoring of old exams, pay for a MAF neurology exam that substantiated functional impairment, file a claim package, prosecute an appeal, or communicate with the Claims Administrator about an issue with the Player's file.

Waiting-and-seeing is not wrongful, but the *Recht* test requires more than merely preserving a claim. The problem is that the Award for this Claim proximately resulted from (1) re-scoring the 2017 neuropsychological testing; (2) scheduling a new neurologist exam with those testing results in hand; and (3) preparing and submitting a fresh Claim. These were tasks accomplished by Wyatt, with alacrity. Had Wyatt not been hired, it is fair to infer that Goldberg's representation would not have soon resulted in successful Claim.

To be sure, Goldberg's work was useful and preservative. But ultimately, its claim for a charging lien rests on having asked the BAP Administrator to schedule an exam—paid for by the Program because of the negotiated Settlement—the scoring outcome of which was later a necessary but not sufficient part of a Claim file that another counsel assembled and pressed forward. That advocacy was not “substantially or primarily” the cause of the Award: Goldberg's work “started the case on the track” but was not the engine of recovery.¹⁰⁹ Evaluating these factors, I recommend that the Court find that Goldberg's work did not “substantially, primarily, largely, to a substantial extent, if not exclusively or entirely” procure the Player's Monetary Award.¹¹⁰

Therefore, *Recht* factor (2) leads me to conclude that Goldberg is not entitled to a fee for its work.

¹⁰⁸ In assessing these services' potential contribution to the Award, it's relevant that Goldberg did not know the second (expanded) BAP neuropsychology exam had been completed, or that a BAP neurology exam had been scheduled, as of the filing the Statement of Dispute in this matter. It could have reached out to the Player between the fall of 2022 and the spring of 2023 to learn of the status of the Player's examinations. Rather, Goldberg wrote, “Counsel assumes that [the Player] attended this appointment but was never scheduled for a neurology appointment.” Doc. 299878 at Ex. B. This suggests a breakdown of communications between client and counsel.

¹⁰⁹ *Independent Pier Co.*, 210 B.R. at 264.

¹¹⁰ *Id.*

UNDER PENNSYLVANIA LAW, GOLDBERG IS ENTITLED TO A LIMITED CHARGING LIEN FOR ITS COSTS

Wyatt argues that costs follow the fee: without establishing the threshold entitlement to a lien, Goldberg cannot recover its costs either. Goldberg responds that it seeks its costs under its retainer agreement. The retainer states that the Player will pay a fee percentage of the “amount that is received or collected by reason of any suit or by reason of any settlement . . . plus reimbursement of all advanced costs if an action is filed in court” Doc. 299878 at Ex. A. But the entire premise of this lien dispute is that Goldberg’s recovery, if any, lies in *equity*, not in the contract which the Player was free to discharge.¹¹¹ That outcome is no accident: there is a “long-standing line of cases in Pennsylvania holding that the only remedy available to a discharged attorney, on a contingency or any other contract with a client, is through *quantum meruit*.”¹¹² Moreover, *Recht* factor (4) would appear to support Wyatt’s position that to recover costs under *Recht*, IRPAs must establish they have a valid lien.¹¹³

But following this path ignores the equitable considerations in *Recht* factor (5). That factor spotlights “equitable considerations which necessitate the recognition and application of the charging lien.”¹¹⁴ For example, Pennsylvania “courts will look at whether an attorney properly handled a case or whether the attorney breached some obligation to the client in determining the equitable considerations applied to establish a charging lien.”¹¹⁵ Likewise, “[a]ny lien an attorney may have may be lost by reason of his own misconduct and infidelity to his client’s interests.”¹¹⁶ That is, in practice *Recht* factor (5) operates often as a barrier to recovery, though it’s explicitly stated as a basis for it.

I have not found a Pennsylvania case precisely matching this circumstance. But I predict that a Pennsylvania court following *Recht* would conclude that factor (5)’s equitable considerations necessitate reimbursement for costs even absent a fee award. Those equitable considerations find support in *Meyer*’s statements about the hazards of a contingency fee attorneys, and Goldberg’s explicit retainer contract statement that costs are recoverable. Simply put, it would be unreasonable and would violate attorneys’ settled expectations not to reimburse costs.

¹¹¹ See *Powers*, 328 F.App’x at 126 (“Pennsylvania, however, does not consider unjust enrichment to be either an action in tort or contract. Unjust enrichment, rather, an equitable remedy and synonym for *quantum meruit*, is ‘a form of restitution.’”) (quoting *Mitchell v. Moore*, 729 A.2d 1200, 1202 n.2 (Pa. Super. Ct. 1999)).

¹¹² *Angino & Rovner v. Jeffrey R. Lessin & Assoc.*, 131 A.3d 502, 509 (Pa. Super. Ct. 2016).

¹¹³ *Recht*, 402 Pa. 599 at 608 (“[T]he lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised.”).

¹¹⁴ *Id.*

¹¹⁵ See Fee Agreements in Pennsylvania, Pennsylvania Bar Institute § 1–3 (2d ed. 2006) (citing *Brandywine Sav. & Loan v. Redev. Auth.*, 514 A.2d 673 (Pa. Commw. Ct. 1986), *appeal denied*, 527 A.2d 545 (Pa. 1987)).

¹¹⁶ ROBERT L. ROSSI, ATTORNEYS’ FEES § 12:25 (3d ed. 2001); see also RESTATEMENT (SECOND) OF AGENCY § 469 (AM. L. INST. 1958) (agent not entitled to compensation for conduct which is disobedient or breach of duty of loyalty to principal).

Judge Shapiro's 1990 opinion in *Tudor Square Assocs. v. Lexington Ins. Co.* supports recognizing a special-purpose lien.¹¹⁷ There, Judge Shapiro denied a general charging lien under *Recht* for a substantial portion of work done that did not lead to an award, but recognized a "limited charging lien" for the reasonable value of a predecessor attorney's time that was tightly linked to the award, on the theory that any other result would be unjust.¹¹⁸ So too here: it would be unjust to allow a successor IRPA and the Player to benefit from expenses reasonably incurred by a prior IRPA. Here, I recommend finding that the precise hours that Goldberg spent that can be "substantially or primarily" attributed to the ultimate Award are *de minimis*. But the Court could still conclude that Goldberg's costs did substantially support the Award, and thus justify a limited purpose attorney's lien.

I recognize the seeming oddness of this result: Wyatt's briefing that costs and fees are usually inseparable has force. But it would undermine the Settlement goals to reach that result, as current attorneys would hesitate before advancing costs for MAF exams for players if they were uncertain of recovering those costs in the event of termination. Developing medical records in these Settlement cases is a necessary (and expensive) investment towards an eventual Award. Doctors certifying Awards often rely upon evidence of decline or impairment established by comparing current with past records. Developing a medical file through investment over time marks IRPA practice in this Program, involving "shepherding of their clients through the claims process of the Settlement Agreement."¹¹⁹ If the Settlement Program did not award at least costs to predecessor attorneys, successor attorneys and Players would be unjustly enriched by that prior expenditure. I do not think Pennsylvania courts would countenance that outcome.

For these reasons, I recommend this Court follow Judge Shapiro's decision in *Tudor Square* and permit a "limited charging lien" for recovery of reasonably expended costs, even where fees are not otherwise recoverable.

**IF THE COURT DECIDES TO CONTINUE APPLYING MCKENZIE,
GOLDBERG'S LIEN SHOULD BE LIMITED TO 15% OF WYATT'S FEE, PLUS COSTS**

Under Judge Strawbridge's *McKenzie* approach, the factors that determine the allocation of the attorney fee between Goldberg and Wyatt are: (1) circumstances at the agreement's inception, (2) circumstances later, (3) the quality of the work, (4) the results obtained, and (5) the substantiality of the connection between the work and the results.¹²⁰ These factors do not precisely instruct the fact-finder how to divide a fee between two or more competing counsel.

As is typically the case, factors (1) and (2) do not heavily weigh on the division between the disputing firms. Goldberg places emphasis on the risk that it took in taking on representation of the Player in 2011, well before the Settlement began and "without any known success expected." Doc. 302601 at 1. Wyatt, by contrast, took on the Player's case in 2023, when the Settlement Program

¹¹⁷ *Tudor Square Assocs. v. Lexington Ins. Co.*, 1990 WL 67278 at *4, *6 (E.D. Pa. 1990).

¹¹⁸ *Id.* at *6.

¹¹⁹ ECF No. 9862, at 7–8.

¹²⁰ *McKenzie II* at 45.

was well underway. Judge Strawbridge’s prior decisions tended to discuss risk, but with a light touch on its importance in attorney fee allocations, relative to the other *McKenzie* factors.¹²¹

Factor (3), “the quality of the work performed,”¹²² considers various measures of quality attorney work: promptness, efficiency, individually tailored legal advice, regular attorney-client communication, and action which preserves a client’s legal rights.¹²³ My review here is constrained by the thin record: Goldberg has submitted a summary sheet of its communications, while the Player and his wife have filed a conclusory affidavit denying that they found the work competent or responsive.

Goldberg states that it “completed all tasks for the representation of [the Player] except for obtaining a monetary award. This lack of obtaining an award came at no fault of Petitioner as [the Player] simply did not qualify, per testing, while represented by the Petitioner.” Doc. 302601 at 1. But when it filed its lien dispute statement, Goldberg did not know the results of the Player’s fall 2022 BAP neuropsychological exam, and had not asked the Player or the BAP Administrator to learn more. If there is record evidence of Goldberg repeatedly reaching out to the Player over the years to inquire if his condition had progressed such that a MAF examination would’ve been potentially indicated, it is missing from Goldberg’s submissions. And for over a year, from March 2022 through March 2023, Goldberg had the Player’s 2017 BAP testing in hand, knew of the interim norms, and could have investigated the utility of rescoring. By contrast, Wyatt was able to rescore the 2017 BAP testing quickly to support a Qualifying Diagnosis. When added to the Player’s complaints about Goldberg’s lack of communication, these facts support finding that *McKenzie* factor (3) weighs in favor of Wyatt over Goldberg.

Factor (4), “the results obtained,”¹²⁴ refers here to the Monetary Award of \$196,101.00 for a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment made when the Player was 68 years old. The result obtained would have been higher if the Qualifying Diagnosis had been made at any point prior to the Player’s birthday in February 2023, when the Player was still represented by Goldberg.¹²⁵ Goldberg had the opportunity, as of the March 2022 Norming Agreement, to rescore the Player’s neuropsychological testing and seek MAF neurological testing to establish Player’s functional impairment. In that counterfactual world, assuming the Player would have exhibited the requisite functional impairment, the result obtained would have started from the age 67 starting point (before offsets) of \$201,003, rather than the age 68 starting point of \$220,755.¹²⁶ Conversely, had Wyatt sat on the Player’s file and waited a year before arranging for rescoring, the Player, at

¹²¹ See, e.g., ECF No. 11308, Report and Recommendation (Mar. 16, 2021), at 8–11, 17 (comparing “substantial” risk taken by Goldberg, who represented the Player from 2011 to 2016, with the “alleviated” risk taken by successor firm, but ultimately reasoning that “the substantiality of [Goldberg’s] work as an IRPA in Player securing the Monetary Award that he received is necessarily reduced given [...] the work of Class Counsel, and the attorneys working with them for the common benefit during that same period from 2011 to 2016”).

¹²² *McKenzie II* at 45.

¹²³ See *McKenzie I* at 101; ECF No. 12328, at 14–15.

¹²⁴ *McKenzie II* at 45.

¹²⁵ See Monetary Award Grid by Age at Time of Qualifying Diagnosis (As of 1/11/2024), NFL CONCUSSION SETTLEMENT, https://www.nflconcussionsettlement.com/Docs/Monetary_Award_Grid.pdf (showing starting points for calculating an award for Level 1.5 Neurocognitive Impairment at age 67, \$220,755, and age 68, \$201,003).

¹²⁶ *Id.*

age 69, would have been starting from \$181,251.¹²⁷ Therefore, *McKenzie* factor (4) also weighs in favor of Wyatt over Goldberg—the former ensured that the result was the highest it could be given the evidence presented.

Finally, in analyzing factor (5), “whether the attorney’s efforts substantially contributed to the result,”¹²⁸ Judge Strawbridge looked at a wide range of categories of work that contribute to the ultimate Award:

- (1) review of medical records and necessary actions taken to ensure medical conditions were identified and diagnosed at the earliest possible date;
- (2) support of their individual clients to ensure their lawsuit would have evidentiary support should the matter proceed to trial;
- (3) review of other litigation that was related to ensure claims in this litigation would not be negatively impacted;
- (4) support of their individual clients in understanding the ongoing settlement negotiations and risks, and in ultimately making the determination of whether to opt out of the class;
- (5) shepherding the individual client through a claims process from registration to receipt of a Monetary Award;
- (6) support of clients who were seeking loans and were exposed to predatory lending practices; and
- (7) providing necessary support in other personal matters collaterally related to this litigation.¹²⁹

This list embodies a different—and less tightly connected—idea of causation than that embraced in *Recht*. Judge Strawbridge’s approach to *McKenzie* factor (5) includes work done in the case before the Settlement Program was created, and even work on personal and financial matters for players that are only “collaterally related to this litigation.”¹³⁰

Here, Goldberg provides evidence of work touching Categories (1), (2), (3), (4), and (5). Regarding Category (1), Goldberg did schedule two BAP exams, and its statement of costs shows that it also facilitated medical appointments for the Player before the Settlement went into effect. Doc. 299878 at Ex. C. However, Wyatt—not Goldberg—“ensure[d] medical conditions were identified and diagnosed at the earliest possible date.”¹³¹ Similarly, regarding Category (5), Goldberg registered the Player for the Settlement Program, but Wyatt shepherded the Player through an actual claims process to receipt of a Monetary Award.

As for Category (2), Goldberg asserts that it reviewed threshold issues relevant to the Player, including consideration of potential experts. Doc. 299878 at Ex. B. Goldberg’s list of

¹²⁷ *Id.*

¹²⁸ *McKenzie II* at 45.

¹²⁹ ECF No. 12328, at 16-17.

¹³⁰ *Id.* at 17.

¹³¹ *Id.* at 16.

communications with the Player suggests that Goldberg carried out Category (3) work when it advised the Player “on status of claims made as to co-defendant, Riddell.” *Id.* It also engaged in Category (4) work when, it states, it advised the Player on various aspects of the ongoing Settlement negotiations, including whether to accept, reject, or appeal the Settlement. *Id.*

Wyatt, meanwhile, engaged in Category (1) and (5) work by ensuring that the Player’s testing was promptly rescored, by compiling a claim package, and by submitting the Claim that produced the Monetary Award.

Evaluating *McKenzie* factor (5)’s “substantial contribution” focuses on both quantity (more Categories covered, more volume of work) and quality (more effective, but targeted work). The overall purpose of these Categories is to determine “whether the attorney’s efforts substantially contributed to the result.”¹³² As the firm that arranged for the Qualifying Diagnosis and filed the Claim that produced a Monetary Award, Wyatt has the better argument on *McKenzie* factor (5).

Overall, then, *McKenzie* factors (3), (4), and (5) weigh in favor of a division that is tilted toward Wyatt, while factors (1) and (2) boost Goldberg. If the Court decides that the continued operation of the *McKenzie* analysis as developed by Judge Strawbridge is appropriate, I recommend that Wyatt receive 85% of the total attorney fee and Goldberg 15%. This recommendation builds on a trend in Judge Strawbridge’s decisions to award attorneys who did not file the ultimately successful Claim smaller percentage recoveries.¹³³

¹³² *McKenzie II* at 45.

¹³³ See, e.g., ECF No. 11288, Memorandum Opinion (Feb. 19, 2021), at 16 (awarding 85% of the fee to successor counsel and 15% to predecessor counsel because at the time the Player discharged predecessor counsel, “that firm had attempted to achieve a monetary award for him but failed” and the “underlying medical reports had been rejected as invalid and could not serve to support any second claim attempt”).

RECOMMENDATION

I recommend that the Court distribute fees and costs as follows:

- (1) Under Pennsylvania's charging lien doctrine, I recommend that Goldberg receive no fees as its work did not substantially or primarily contribute to the Player's Award. Wyatt would retain the full 22% fee (of \$43,142.22), subject to a 1% holdback. Both Wyatt and Goldberg would be entitled to recovery of their reasonably incurred costs.
- (2) If the Court rejects my first recommendation and is inclined to continue to apply the *McKenzie* approach to lien adjudication, I recommend that fees be split: 85% to the Wyatt firm and 15% to the Goldberg firm (i.e., Wyatt to have a right recover 85% of \$43,142.22, Goldberg 15%, with both to be subject pro rata to the holdback). Both firms would also be permitted to recover their reasonably incurred costs.

The Parties may file objections to this Report and Recommendation.¹³⁴

Date: April 28, 2024



David A. Hoffman, Special Master

¹³⁴ See ECF No. 12348-1, at Rule 7.

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

No. 2:12-md-02323-AB
MDL No. 2323

Kevin Turner and Shawn Wooden, on behalf
of themselves and others similarly situated,

Plaintiffs,

v.

National Football League and NFL Properties,
LLC, successor-in-interest to NFL Properties,
Inc.,

Defendants.

THIS DOCUMENT RELATES TO:

Attorney's Lien Dispute
Goldberg, Persky & White, PC

v.

SPID No. 100010870

ORDER

On April 28, 2024, Special Master David A. Hoffman filed a Report and Recommendation ("R&R") concerning an attorney lien dispute between former and current counsel for a settlement class member. Special Master Hoffman recommended that the Court apply an analysis for resolution of former counsel's attorney lien according to Pennsylvania state law. ECF No. 12396.

Former counsel, that is, the lienholder, objected to the proposed resolution. ECF No. 12408. Current counsel for the class member filed a response to the objection. ECF No. 12410.

I accept Special Master Hoffman's approach to the resolution of attorney lien disputes going forward. But I do so recognizing that other circumstances might justify dividing a fee between lawyers in an appropriate case.

AND NOW, this 5th day of September, 2024, upon consideration of the Attorney Lien identified above and the Report and Recommendation of Special Master David A. Hoffman dated April 28, 2024 (ECF No. 12396), it is

ORDERED that:

1. The Report and Recommendation is **ADOPTED** and the attorney lien is **RESOLVED** in accordance with Recommendation #1 (R&R at p. 32);
2. The attorney lienholder, Goldberg, Persky & White, is **AWARDED** \$3,146.78 of the funds withheld from the Monetary Award for reimbursement of reasonably incurred costs; and
3. Current counsel, JR Wyatt Law, is **AWARDED** the funds withheld from the Monetary Award for counsel fee.

IT IS FURTHER ORDERED that the Claims Administrator disburse the withheld funds in accordance with this ruling, the provisions of the Settlement

Agreement, and all Court Orders regarding implementation.

s/ANITA B. BRODY, J.

ANITA B. BRODY, J.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-2839

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS
CONCUSSION INJURY LITIGATION

Goldberg, Persky & White, P.C.,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:12-md-02323)
District Judge: Honorable Anita B. Brody

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on July 7, 2025

Before: RESTREPO, BIBAS, and CHUNG, *Circuit Judges*

(Filed: August 27, 2025)

OPINION*

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

RESTREPO, *Circuit Judge*

A law firm filed a charging lien asserting it was entitled to fees for its efforts in representing a retired player in the NFL concussion injury litigation. Applying Pennsylvania lien law, the court-appointed special master recommended the firm receive only its reasonably incurred costs but no slice of the fee. The District Court adopted the recommendation, and because it did not abuse its discretion in doing so, we will affirm.

I.

In 2011, a retired NFL player (Player) retained Goldberg, Persky & White, P.C. (Goldberg) to represent him in his suit against the NFL for damages connected to head injuries from his professional playing career. All concussion-related lawsuits against the NFL were consolidated in a multidistrict litigation (MDL) in the Eastern District of Pennsylvania. *See In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 421 (3d Cir. 2016). After years of negotiations, the cases settled for nearly \$1 billion. *Id.* at 447.

The administration of this settlement is complex, so most players individually retain counsel to assist with obtaining an award. Goldberg registered Player to receive an award in 2017, but his initial neurological tests did not reveal a qualifying impairment. In March 2022, the District Court approved an agreement eliminating race-based norming in the settlement program and establishing a new scoring method for the neurological tests. Under this agreement, Player qualified for expanded testing and could have his initial neurological tests rescored under the new method. Goldberg scheduled an appointment for Player, but after the expanded testing, he again failed to qualify for an award.

By March 2023, Player grew frustrated with Goldberg and felt “abandoned” and “neglected.” *In re Nat’l Football League Players Concussion Inj. Litig.*, No. 2:12-md-02323-AB, 2024 WL 2012241, at *4 (E.D. Pa. Apr. 29, 2024) [hereinafter *R&R*], *report and recommendation adopted*, No. 2:12-md-02323-AB, 2024 WL 4281447 (E.D. Pa. Sept. 5, 2024). He fired Goldberg and hired J.R. Wyatt Law (Wyatt), one of the law firms that spearheaded the 2022 agreement that changed the testing and scoring protocol. The switch proved to be a gamechanger as Wyatt zipped into action. The law firm had Player’s 2017 neurological results rescored under the new method. Those updated scores revealed a qualifying impairment, so Wyatt promptly submitted a claim on Player’s behalf. Within a month of the rescoring, the claims administrator approved a \$196,101 award for Player. Wyatt is set to receive about \$43,000 in legal fees for its work in securing the award. *R&R* at *1.

Days after its firing, Goldberg filed a charging lien, also known as an attorney lien, against any future award to Player based on the efforts it provided from October 2011 to March 2023. As described by Goldberg, those efforts amounted to 55.7 hours of work over twelve years and just over \$3,000 in costs incurred. Most of the listed time (29.3 hours) is undated, and Goldberg’s descriptions make much of it appear to be pre-settlement. Just over five hours reflect work on this lien, and an unknown number of hours were spent on “poaching issues.” *R&R* at *3 n.12.

Anticipating fights over fees related to the settlement program, the District Court early on adopted a set of rules and referred to a magistrate judge all fee petitions filed by individually retained counsel. *See In re Nat’l Football League Players’ Concussion Inj.*

Litig., 826 F.App'x 136, 138 (3d Cir. 2020). Two years ago, that magistrate judge retired, and the District Court appointed a special master to take his place. The special master authored a new set of rules, which the District Court approved. In this dispute, the special master applied a different approach from the one applied by the magistrate judge to similar disputes. Under this new approach, he recommended the District Court apply Pennsylvania charging lien law and find that Wyatt should receive the full contingency fee, and that Goldberg should receive only its reasonably incurred costs.¹ The District Court issued an order adopting that recommendation while noting that other circumstances might still justify dividing the fee. Goldberg appeals that order. We review the order adopting the recommendation for abuse of discretion. *See In re NFL Players' Concussion Inj. Litig.*, 962 F.3d 94, 101 (3d Cir. 2020).

II.²

Goldberg objects to the special master's new approach to lien disputes and his application of that approach here. Because both are sensible and legally sound, we hold that the District Court did not abuse its discretion in adopting the recommendation.

A. The special master's new approach to charging lien disputes.

A district court may assess the reasonableness of contingency fees in class action lawsuits and MDLs. *See Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1114 (3d Cir. 1979).

¹ If the District Court rejected that recommendation because it preferred the prior approach to lien adjudication, the special master recommended the following fee split: 85 percent to Wyatt and 15 percent to Goldberg.

² The District Court had jurisdiction under 28 U.S.C. § 1332, and we have jurisdiction under 28 U.S.C. § 1291.

In this MDL, the District Court capped the contingency fees earned by individually retained counsel like Goldberg and Wyatt at 22 percent. *In re Nat'l Football League Players' Concussion Inj. Litig.*, No. 2:12-MD-02323-AB, 2018 WL 1658808, at *1 (E.D. Pa. Apr. 5, 2018). In doing so, it applied the so-called *McKenzie* framework for analyzing the reasonableness of contingency fees. The *McKenzie* framework calls for consideration, among other things, of the “circumstances existing at the time the arrangement is entered into, . . . the quality of the work performed, the results obtained, and whether the attorney’s efforts substantially contributed to the result.” *McKenzie Constr., Inc. v. Maynard*, 823 F.2d 43, 45 (3d Cir. 1987). Following the District Court’s lead, the magistrate judge then applied the *McKenzie* framework to all disputes relating to the contingency fees—including twenty-six lien disputes between current and former individually retained attorneys over dividing the contingency fee.

In his recommendation, the special master departed from this approach. After asking for supplemental briefing from the parties on what substantive law should apply, he determined that the more legally sound approach was to apply state substantive law to disputes turning on the recognition of charging liens—that is, equitable claims by former attorneys who no longer represented a player when he received an award. So in resolving the Goldberg’s charging lien claim, he applied state substantive law, rather than the federal *McKenzie* standard:

Goldberg had a contingency fee contract with the Player. That contract creates no post-termination payment rights. So, Goldberg’s entitlement to be paid now must rest on an unjust enrichment cause of action, or a statute which would (in some

states) create an equivalent charging lien. Whether there's merit to such an equitable claim is quintessentially a question of state law. Goldberg admits as much in its briefing when it states that it seeks to vindicate a '*quantum meruit*' right.

R&R at *10. This approach is legally sound because, as the special master noted, there is "no free-floating federal right to a charging lien." *Id.* at *11. If Goldberg is entitled to a portion of Player's award, the special master concluded that "state law must be at [the] root" of its equitable claim. *Id.* We see no issue with the District Court exercising its wise discretion to approve of this approach.

B. The law-of-the-case doctrine does not bar the District Court from adopting the new approach because each lien dispute is a distinct action.

Goldberg questions this departure, contending the special master erred in not applying the *McKenzie*-based framework. Invoking the law-of-the-case doctrine, Goldberg argues the magistrate judge's use of the *McKenzie* framework in the previous charging lien disputes should have precedential effect within the settlement program. And if the special master had applied the *McKenzie* framework, Goldberg contends it would be entitled to some part of Wyatt's contingency fee.

But the law-of-the-case doctrine forecloses only "reconsideration of legal issues already decided in earlier stages of a case." *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55, 61 (3d Cir. 2023) (internal quotations omitted). And it applies only in "the same case" and only to issues already "expressly" or "necessarily resolved" in that case. *Id.* (internal quotations omitted). The doctrine "cannot be applied across distinct actions in [a] multidistrict proceeding." *Id.* Simply put, each lien dispute arising from this MDL settlement is a distinct action, so the law-of-the-case doctrine does not apply.

C. Goldberg failed to show the outcome would be any different under New York law.

Goldberg next contends—in a single paragraph of its brief—that the special master erred in applying Pennsylvania law and should have applied New York law instead. Here again, the special master’s reasoning is sound, and it was within the District Court’s discretion to adopt it. If the parties dispute the substantive law that should apply to a state-law claim, federal courts must apply the conflict of law rules of the forum state to determine which state’s substantive law should govern. *Chin v. Chrysler LLC*, 538 F.3d 272, 278 (3d Cir. 2008) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). We have held that the Pennsylvania Supreme Court would apply the principles of *Griffith v. United Air Lines Inc.*, 203 A.2d 796 (Pa. 1964), to conflict of laws questions in contract cases. See *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 228 (3d Cir. 2007). The first step of the *Griffith* analysis is to determine whether there is a true conflict between the laws of each state that might apply. *Id.* at 229. Without an actual conflict, no further choice-of-law analysis is needed, and the court applies the law of the forum state. See *id.*

In its briefs before the special master, Goldberg agreed that under a *Griffith* analysis, Pennsylvania law would apply. Yet it also suggested that New York law should apply per a clause in the settlement agreement. Because Goldberg neither explained why the clause applied to this dispute nor identified an actual conflict between Pennsylvania and New York law, the special master applied Pennsylvania lien law. On appeal, Goldberg abandons its concession that Pennsylvania law applies under a *Griffith* analysis and

makes only a cursory argument that the settlement’s choice-of-law clause governs (presumably, despite *Griffith*). But Goldberg again provides no factual or legal support, arguing in conclusory fashion only that this dispute “aris[es] under” the agreement “which requires adherence to New York law.” Appellant’s Br. at 14. Nor does it describe New York lien law or explain how applying it would change the outcome.

The special master declined to find a conflict because Goldberg failed to plausibly show one existed or that it would make a difference. The District Court adopted that recommendation as a proper exercise of its equitable authority to implement the settlement agreement. Goldberg’s one-paragraph ipse dixit before this Court fails to persuade us that the District Court relied on an errant conclusion in applying Pennsylvania substantive law.

D. The District Court did not abuse its discretion in adopting the special master’s recommendation, which reasonably applied Pennsylvania lien law.

Goldberg’s final argument is that the special master failed to properly apply Pennsylvania lien law to the facts before him. As the special master stated, before an equitable charging lien is recognized and applied in Pennsylvania, prior counsel must satisfy the five-part threshold inquiry set out in *Recht v. Urban Redevelopment Authority of the City of Clairton*, 168 A.2d 134 (Pa. 1961), by establishing:

- (1) that there is a fund in court or otherwise applicable for distribution on equitable principles, (2) that the services of the attorney *operated substantially or primarily* to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his compensation, (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised and (5) that there are equitable considerations

which necessitate the recognition and application of the charging lien.

Id. at 138–39 (emphasis added). After reviewing post-*Recht* Pennsylvania case law developments, the special master reasonably found that the Pennsylvania Supreme Court would apply *Recht*, with an emphasis on the second causation factor, to determine whether Goldberg held an enforceable charging lien.

The special master explained that the “fund” here is Player’s individual award, so only work that led directly to that award should be considered. Though he acknowledged Goldberg’s efforts in registering Player for the settlement program and arranging for two neurological evaluations, the special master found that Goldberg’s work did not “operate[] substantially or primarily to secure” the award. *Id.* at 139. It was Wyatt’s expedience—in re-scoring the 2017 test results, in scheduling a new exam with those results in hand, and in preparing and submitting the successful claim—that provided “the engine of recovery.” *R&R* at *19. Relying on the equitable considerations of *Recht*’s fifth factor, however, the special master recommended finding Goldberg was entitled to a limited charging lien for its costs incurred in the representation.

Goldberg challenges the special master’s *Recht* analysis and focuses its argument on the fifth factor. It urges that the special master ignored the important work it performed: (1) as an early mover in the NFL concussion litigation, (2) as class counsel once the cases were consolidated, and (3) as Player’s attorney in the initial stages of the claim process. Appellant’s Br. at 15–17. But the first two categories of work did not “operate[] substantially or primarily” to secure this specific award. *Recht*, 168 A.2d at 139. And

the special master's recommendation did recognize the third, finding it would be unjust to leave Goldberg without a limited charging lien for the reasonable value of its time and costs "tightly linked" to the award. *R&R* at *21. However, because the precise hours that Goldberg spent that could be substantially or primarily attributed to the award were de minimis, Goldberg only received its costs incurred.

Goldberg merely disputes the special master's reasonable conclusions rather than point to any legal or factual error in his analysis. Thus, its final argument meets the same fate as its first two. In the end, Goldberg fails to show the District Court abused its discretion in adopting the special master's recommendation.

III.

For the reasons above, we will affirm the District Court's order.