

# Model State Structured Settlement Protection Act

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## **Structured Settlements Provide Injured Individuals Financial Independence**

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Structured settlements provide personal injury victims with tax-free periodic payments over extended periods of time. This provides them with financial security – a planned, dependable cash flow to cover their long-term medical and basic living needs.

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Structured settlements serve the strong public policy of providing relatively unsophisticated and uneducated injury victims with secure streams of future periodic payments. Thereby ensuring they are not left destitute and relying on public funds.

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Reducing the burden on relatives of personal injury victims and public assistance costs by the premature dissipation of lump sum payments has been a mainstay of the public purpose behind structured settlements.

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Structured settlements provide streams of future periodic payments, secured by annuities, or in some cases, by U.S. Treasuries or other sources, to provide asset dissipation security and tax benefits to the recipients.

# Factoring of Structured Settlements

Factoring transactions have harmed the structured settlement product and have resulted in increased costs and burdens on annuity owners and issuers.

Early factoring transactions led to extensive litigation, including hundreds of collection actions brought against payees by factoring companies, often starting with confessed judgments, and corresponding garnishment proceedings against annuity owners and issuers.

Factoring transactions create complexities and uncertainties for annuity owners and issuers. The annuity contract was intended to pay the annuitant. Factoring results in payment administration burdens upon annuity owners and issuers.

Factoring transactions are often subject to competing claims from either other factoring companies or representatives of the annuitant thereby placing annuity owners and issuers at risk of being dragged into unnecessary litigation.

# Origins of Structured Settlement Protection Acts

Beginning in 1997, public attention to structured settlement factoring led to calls for remedial legislation at both the State and Federal levels.



- ***“I believe that the sales tactics used by the factoring companies, the sharp discounts charged to the personal injury victims, the onerous contracts and use of confessed judgments, and most importantly the impact in human terms on the personal injury victim and their families make these factoring transactions unconscionable. . . .The factoring companies are preying upon the most vulnerable of our society by inducing these personal injury victims to sell off their financial futures.”*** Minnesota Attorney General Mike Hatch, March 18, 1999.

- ***“Recently there has been dramatic growth in these transactions in which injured victims are induced by factoring companies to sell off future structured settlement payments intended to cover ongoing living and medical needs in exchange for sharply-discounted lump sum that then may be dissipated, placing the injured victim in the very predicament the structured settlement was intended to avoid.”*** Rep. Clay Shaw (R-Fla.), Cong. Rec. (daily ed.) E. 192 (Feb. 10, 1999)

# Structured Settlement Protection Acts

- In the late 1990's, to curb factoring abuses, to protect structured settlement payees, and to protect the annuity owners and issuers that fund structured settlements, the National Structured Settlement Trade Association ("NSSTA") created a model Structured Settlement Protection Act ("SSPA").
- Among other things, the SSPA invalidates all factoring transactions, unless, in connection with a particular transaction, a court proceeding is commenced, and the court determines the transaction in question is in the best interest of the payee and/or the payee's dependents.
- Unfortunately, rather than restrain factoring, SSPAs became a form of enabling legislation given the non-adversarial nature of the proceeding and the lack of sufficient factual or economic information provided to the court to make a full-informed decision.

# Basis and Standard for Court Review

- “The ultimate point, of course, is that the SSPA is a ‘paternalistic statute’ requiring the courts to engage in a fact-based inquiry and not merely serve as a ‘rubber stamp’.”
  - *In re 321 Henderson Receivables, L.P. (Lemanski)*, 819 N.Y.S.2d 826 (N.Y. Sup. Ct. 2006)
- “The heart of the SSPA’s protection lies in the courts’ independent discretionary determination whether or not the proposed transfer is in the best interest of the payee, taking into account the welfare and support of the payee’s dependents.”
  - *In re Petition of Settlement Funding of New York, L.L.C. (Neal Cunningham)*, 195 Misc.2d 721, 723, 761 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003)
- The “best interest” standard places the judiciary in the paternalistic role of ensuring payees are protected against factoring company exploitation, and courts must ensure that this protection “exists in fact, not merely in words.” The record must illustrate that [the Court] did more than simply ‘rubber stamp’ whatever bargain the factor may have struck with the payee.”
  - *In Re Rains*, 473 S.W.3d 461, 464-465 (Tex. App. 2015).
- The intent of the best interest finding is to make sure that a payee does not give up their right to a future-income stream in exchange for a much smaller present payment, absent a good reason.
  - *Settlement Capital Corp. v. BHG Structured Settlements, Inc.*, 319 F. Supp. 2d 729, 734 (N.D. Tex. 2004).
- “Structured Settlement Protection Acts have been enacted in Connecticut and many other states to protect payees from exploitation by factoring companies. The various requirements are designed to limit the opportunity for factoring companies to take advantage of payees who may lack an understanding of finance and succumb to pressure to sell payment rights for amounts far below fair market value.”
  - *Structured Asset Funding, LLC d/b/a 123 LumpSum v. Prudential Assigned Settlement Services Corp.*, Case. No. MMX CV 094009835S, 2009 Conn. Super. LEXIS 1059, at \*17 (Conn. Super. Ct. Apr. 16, 2009)



# NCOIL Model SSPA

- **The NCOIL Model SSPA has served as a blueprint for the SSPAs enacted in all 50 states and the District of Columbia.**
- **Historically, the NCOIL Model SSPA has lagged behind the various state SSPAs which have been amended to ensure courts are provided the necessary information to reach a reasoned determination.**
- **The current NCOIL Model SSPA includes provisions that reduce factoring company competition by prohibiting certain contact with payees who are pursuing transactions with other companies.**
- **While there have been changes to the NCOIL Model SSPA, there is room for improvement. Additional amendments, if enacted, would provide a more comprehensive model for states across the country to adopt, ensuring greater protection for structured settlement payees and any party impacted by a factoring transaction.**

# Recent Amendments Strengthen SSPAs

- ❖ In 2015, the Washington Post ran a series of articles exposing “How Companies Make Millions Off Lead-Poisoned Poor Blacks” and “The Flawed System That Allows Companies to Make Millions Off the Injured”
  - The Maryland Judiciary and Legislature immediately enacted provisions to require, among other things, (a) Payee “Consent” form providing detailed information as to employment, marital status, dependents, financial obligations, etc.; (b) Independent Professional Advisor “Affidavit” detailing communications with Payee and the advisor’s investigation as to the payee’s understanding of the proposed transfer; (c) Court may appoint, at the expense of the petitioner, a guardian *ad litem* or require Payee to be examined by a qualified independent mental health specialist, if the structured settlement arose from a claim of lead poisoning or a matter involving a mental or cognitive impairment to Payee; and (d) petition to include a summary of prior transfers.
  
- ❖ In 2021, the Minnesota Star Tribune ran an expose on factoring
  - The Minnesota Legislature immediately enacted provisions to, among other things, (a) authorize the Court to appoint an attorney adviser to make an independent assessment and advise the court as to whether the proposed transfer is in the payee’s best interest; (b) a list of factors for the court to consider when determining whether a proposed transfer is in a payee’s best interest; (c) limitations on the manner, methods and frequency by which factoring companies may communicate with payees; and (d) affidavits from the transferee and payee regarding all prior transfers.
  
- ❖ In 2022, the McClatchy Media Network ran an expose on factoring
  - The South Carolina Legislature immediately enacted provisions to, among other things, (a) authorize the Court to appoint an attorney adviser to make an independent assessment and advise the court as to whether the proposed transfer is in the payee’s best interest; (b) a list of factors for the court to consider when determining whether a proposed transfer is in a payee’s best interest; (c) limitations on the manner, methods and frequency by which factoring companies may communicate with payees; and (d) affidavits from the transferee and payee regarding all prior transfers.



# Vulnerable Payees are Targeted

- **They have suffered tragic, disabling injuries, and received large settlements to be paid over their lifetimes.**
- **Then little-regulated firms came calling.**
- **Judges, charged with looking out for their best interest, sign off on companies buying their future payments in a series of deals.**
- **Structured Settlement Protection Acts are failing to protect injury victims' money.**

# Aggressive Buyers with Inducements and Relentless Calls Trap Payees into Deals

- Firms go to great lengths to find people who receive settlements, trolling docket, swamping payees with checks, calls and ads even after they've agreed to sell. The payoff for the purchaser is extraordinary.



# Participating in Transactions Involving Highly Vulnerable Persons

Court records show that many settlement recipients in Minnesota struggle with mental health problems or addiction, often as a result of a car crash. Among those who agreed to sell some or all of their settlement payments in Minnesota are 63 people who were ordered to obtain mental health services by a state judge. That list includes 27 people who were involuntarily committed to a mental institution at least once after engaging in bizarre or self-destructive behavior. Dozens of other customers were left cognitively impaired by lead paint poisoning or head injuries.

In some cases, records show, companies were allowed to buy payments just months after a person was released from mental health care facilities. Others were ordered to obtain mental health services shortly after the sale closed.

Minnesota Star Tribune – Fall 2021

- **Five months after Judge Joseph Carter decided that Laura Dalluhn’s mental problems were so severe she had to be confined to a psychiatric hospital, she was back in his courtroom. This time, however, Dalluhn was the one requesting the hearing. She wanted the Dakota County judge’s approval to sell \$60,135 in settlement payments she was due to collect in the coming years.**

Minnesota Star Tribune – Fall 2021

# Guardians Provide Valuable Resource

- In Albuquerque, N.M., guardians often put on the brakes, and help victims keep more of their settlements.
- In Washington, D.C., those seeking lump sums get legal aid – and better deals result.
- The appointment of an independent third-party advisor provides the reviewing court with additional information to consider in determining whether a given transaction is in the payee's best interest. The SSPAs of West Virginia, Delaware, Maryland, Minnesota, and South Carolina all include provisions allowing the court to appoint an *ad litem*.

# The Judges

## Hampered by Doubts and Vague Laws

- **The Star Tribune found that “judges are often hampered by doubts and vague laws. They say that the final, often reluctant arbiter in settlement buyout cases are given little information about sellers and few rules on companies seeking to buy.”**
- **“Judges say they are routinely deprived of key information about the people selling their payments, including medical records and court filings that might provide insight about their cognitive ability or mental competency.”**
- **McClatchy’s interviews with judges showed there was no consensus on what “best interest” means. “We would talk about them at the annual judicial conference, talking about the structured settlement (transfers), and you’d get (fellow judges’) opinions of it,” said Kimball, the retired York County, South Carolina judge. “How do you treat it?’ ‘What do you do?’ And I know one judge, who is also retired, who would never approve them, and another judge who is retired who would always approve them, all of which seems pretty arbitrary.”**

# Additional Provisions for NCOIL Model SSPA

- **List of Factors for the Court to Consider when Determining whether a Transaction is in the Payee's Best Interest.**
- **Court provided with Discretion to Appoint an Attorney Advisor to Make Independent Assessment and Advise the Court.**
- **Enhanced Provisions Protecting Payee's from Harassment or Being Inappropriately taken Advantage of by the Use of Gifts or Checks.**
- **Affidavits from Payee and Transferee Disclosing All Prior Transfers and Affidavit from Payee with information regarding, among other things, income and reason for transfer.**



# Guidelines for Assessing Best Interest

**In determining whether a proposed transfer is in the best interests of the payee, taking into consideration the payee's dependents, if any, the court shall, among other things, consider the following:**

- (1) the reasonable preference of the payee, in light of the payee's age, mental capacity, maturity level, understanding of the terms of the agreement, and stated purpose for the transfer;**
- (2) if the periodic payments were intended to cover future income or losses or future medical expenses, whether the payee has means of support aside from the structured settlement to meet these obligations;**
- (3) whether the payee can meet the financial needs of, and obligations to, the payee's dependents if the transfer is allowed to proceed, including child support and spousal maintenance;**
- (4) whether the payee completed previous transactions involving the payee's structured settlement payment rights and the timing, size, stated purpose, and actual use of the proceeds;**
- (5) the impact of the proposed transfer on current or future eligibility of the payee or the payee's dependents for public benefits; and**
- (6) any other factors or facts the court determines are relevant and should be considered.**

# Appointment of Independent Advisor

- **The appointment of an independent third-party advisor provides the reviewing court with additional information to consider in determining whether a given transaction is in the payee's best interest. The independent advisor will be able to assess, among other things, the payee's personal situation, injuries, income, and employment status – all things that are not part of the transfer petition filed with the court, yet essential for an informed decision.**

**The court is authorized and may, in its discretion, appoint an attorney to make an independent assessment and advise the court whether the proposed transfer is in the best interest of the payee, taking into consideration the payee's dependents, if any, and the factors enumerated in Section 6(b). The attorney may consult with a certified public accountant, actuary, or other licensed professional adviser, if necessary. All costs and reasonable fees for the appointed attorney shall be borne by the transferee, in an amount determined by the court, but not to exceed [\$        ]. The fee shall be deposited with and disbursed to the attorney adviser by the court**

- **The court must appoint an advisor in connection with the transfer of a minor's structured settlement payment rights or in cases involving a payee suffering from a mental or cognitive impairment.**

# Enhanced Anti-Harassment Protections and Prohibitions

- **Solicit a prospective payee through the conveyance of a document which resembles a check or other form of payment.**
- **Provide a transfer agreement or related document that purports to give the transferee the first choice or option to purchase any remaining structured settlement payments rights belonging to the payee which are not subject to the structured settlement transfer proceeding.**
- **Communicate with a payee, a prospective payee, or a person associated with the payee: (a) after they have requested the company cease further communication; and (b) at unusual times, and definitely before 8:00 a.m. and after 9 p.m.**
- **Referring a payee to an independent professional advisor (whose advice will then not be genuinely independent).**

# Fulsome Disclosure of Prior Transactions

- **In evaluating whether a transfer is in the best interest of a payee, judges often are not provided with sufficient factual context within which to issue a thoughtful decision. Courts generally have no information regarding any prior transfers by a payee (whether approved or denied), when any prior transfers or attempted transfers may have occurred, and how the payee used the proceeds from any prior transactions. Requiring petitions to include information regarding prior transfers (both approvals and denials) provides the reviewing court with context from which to make a reasoned determination as to whether the transaction is in the payee's best interest.**
  - **a sworn affidavit from the transferee listing any prior transfers by the payee that includes the details of the reasonable measures taken to search for and identify prior transfers to any person or entity other than the transferee or an affiliate or an assignee of the transferee and any prior proposed transfer applications by the payee to any person or entity other than the transferee or an affiliate or an assignee of a transferee or affiliate which were denied**
  - **an affidavit from the payee disclosing all prior transfers by the payee to any person or entity**