

Model State Structured Settlement Protection Act

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Structured Settlements Provide Injured Individuals Financial Independence

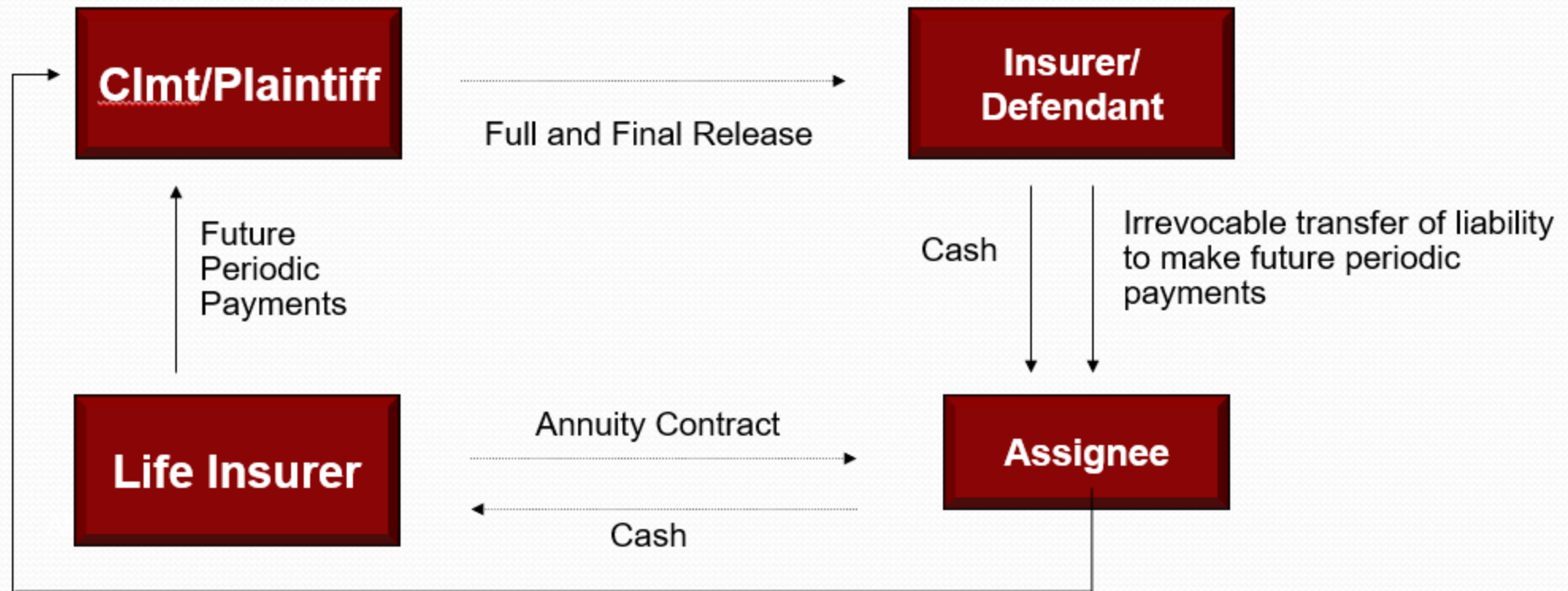
Structured settlements provide personal injury victims with tax-free periodic payments over extended periods of time. This provides them with financial security – a planned, dependable cash flow to cover their long-term medical and basic living needs.

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

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.

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.

THE STRUCTURED SETTLEMENT PROCESS



Specific Language Must Be Inserted Into the Release to Effectuate the Structured Settlement

Origins of Structured Settlement Protection Acts

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

States enacted statutes making transfers of structured settlement payment rights ineffective unless court approved.

In 2002, federal tax sanctions were enacted to reinforce the statute states by imposing a 40% federal excise tax on any transfer of payment rights that does not receive the required court approval.



- ***“Structured settlements provide strong public policy benefits. They provide long-term protection for injury victims and their families. They provide against the loss or dissipation of lump sum recoveries. Factoring companies, commonly using phone banks, advertising and high-pressure sales to “buy” a settlement for a small lump-sum, undermine these benefits and may exploit an injured person at a time when they need cash.”*** Sponsor’s Statement to N.J. Assembly Bill 2146, subsequently enacted as the New Jersey SSPA, quoted in *In re Spinelli*, 803 A.2d 172, 175 (N.J. Super. Ct. 2002).

NCOIL Model SSPA

- **The NCOIL Model SSPA, while serving as a blueprint for SSPAs enacted in all 50 states and the District of Columbia, has failed to keep pace with the ever-changing landscape of structured settlement factoring.**
- **In the last several years, individual state legislatures have amended their state SSPAs to provide not only increased protections from relentless factoring company solicitations, but also additional information for the reviewing court to ensuring judges are provided the necessary evidence 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.**
- **Additional amendments to the NCOIL Model SSPA would ensure it is the a comprehensive statute to which states may look when seeking to ensure their individual SSPA provides maximum 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.

Function and Conduct of SSPA Proceedings

Under SSPAs, submission of transfer applications for court approval serves two basic objectives:

- **Protecting payees and their dependents by conditioning any transfer on an objective factual determination that the proposed exchange of future settlement payments for immediate cash will be in their best interest.**
- **Avoiding future disputes by conditioning any transfer on a court's legal conclusion that the transfer will not contravene any statute or any other court order affecting the transferred payment rights.**

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.”**

Judicial Role in Reviewing and Ruling Transfer Petitions

- SSPAs require the transferee (*i.e.*, factoring company) to file the petition seeking approval of any transfer of structured settlement payment rights
- Petitions are generally unopposed and contain the minimum requirements of the SSPA (*e.g.*, the disclosure statement, purchase agreement, and proof of receipt or waiver of independent professional advice)
- Courts should not be required to make an affirmative finding regarding best interest based solely on the conclusory statements in the petition.
- As the Pennsylvania Superior Court noted, the trial judge is relying on “the forthrightness and good faith of counsel to provide all of the information available for the judge to make an informed decision on what is in the best interests of the” payee. *Barber v. Stanko, et al.*, 2021 WL 1940513 & 2021 WL 1940516 (Pa. Super. Ct. May 14, 2021).
- No SSPA defines “best interest.”
- The addition of best interest factors provides the trial judge with information to consider when rendering a decision that will have significant financial impact upon a structured settlement payee and the payee’s dependents.

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)

Assessing Best Interest

- **Courts should take into account:**
 - **Payee's income, expenses, assets and debts**
 - **Payee's current and future needs and those of his/her dependents, including living expenses, medical costs, an emergency requiring Payee to raise money immediately, and whether the proposed transfer will lead to future hardship for Payee and his/her dependents**
 - **The terms of the proposed transfer, including:**
 - **the payments to be transferred and the lump sum to be received**
 - **discount rate charged by transferee**
 - **Payee's proposed use of the proceeds of the transfer and documented support for the use.**
 - **Payee's age, financial acumen, and physical and mental condition**
 - **Payee's prior transfers of his/her structured settlement payment rights and how Payee used the proceeds of the prior transfer**
 - **Prior proposed transfers by Payee which were denied and why**

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.**

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*.

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.**

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**

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).**

Summary of 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.**
- **Affidavits from Payee and Transferee Disclosing All Prior Transfers and Affidavit from Payee with information regarding, among other things, income and reason for transfer.**
- **Enhanced Provisions Protecting Payee's from Harassment or Being Inappropriately taken Advantage of by the Use of Gifts or Checks.**