

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA**BILL ANALYSIS**

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

House Bill 5066 (Substitute S-1 as reported)
Sponsor: Representative Andrew Richner
House Committee: Family and Civil Law
Senate Committee: Financial Services

Date Completed: 11-9-00

RATIONALE

A structured settlement from a personal injury claim or lawsuit is an arrangement in which one party agrees to pay a sum of money, usually in a series of future installment payments, to coincide with the projected financial needs of the injury victim or dependents. Instead of making a single lump sum payment, typically the liable party (or an insurer) will purchase an annuity or Treasury bonds, which will produce income for the injured party. The payments, including accumulated interest, are tax-free; are managed at no cost; and may be scheduled for any length of time, in fixed or varied amounts. For example, a \$650,000 settlement may be structured as 50% in cash and 50% in the form of monthly payments beginning at \$2,300, increasing by 3% per year, with 30 years of payments. Structured settlements are supposed to ensure that stable and securely guaranteed payments are available for long-range financial security and a regular and ongoing income stream for long-term personal assistance, medical, and other living needs.

Apparently, in the past, many injured persons who received single lump sum payments were unable to manage the large sum of money earmarked for future ongoing medical and living expenses. In many cases, people were not experienced in professional money management and the settlement proceeds intended to pay for a lifetime of expenses were invested unwisely or spent excessively in a matter of months or years. As a result, victims in most major personal injury cases now are advised to participate in structured settlements.

Although the settlements are designed to meet the victims' requirements over a lifetime, some people may find the need for a large lump sum to pay for immediate financial concerns. To circumvent the restrictions of structured settlements, some victims turn to businesses known as "factoring companies", which specialize in the purchase of structured settlement proceeds. Apparently, factoring companies make a single and immediate lump sum payment that can amount to a fraction of the lifetime

value of the periodic payments. In addition, the victims may lose the tax-free status of the payments, since the lump sum offered by a factoring company might be taxable. The business of purchasing structured settlements has grown rapidly, and many feel that the unregulated sale of structured settlement payments undermines the basic purpose of those settlements.

CONTENT

The bill would create the "Structured Settlement Protection Act" to provide that, unless a court approved the transfer of a structured settlement payment right that was subject to a contractual assignment restriction, a transfer would not be effective and a structured settlement obligor or annuity insurer would not be required to make payment directly or indirectly to a transferee. (In other words, if a person were entitled to receive periodic payments of damages for personal injuries, under a court judgment or settlement, that person (the payee) could not sell, assign, or otherwise dispose of the right to receive the payments without court approval, if such a transfer were prohibited or restricted in a contract or other agreement.) The court could not give its approval unless it found that the transfer was necessary for the payee and/or his or her dependents to avoid financial hardship. The person who would receive the transfer would have to obtain the consent of the payee, his or her dependents and beneficiaries, the party obligated to make the payments, and anyone who could invoke the contractual restriction on the transfer.

The following is a detailed description of the bill.

Definitions

"Structural settlement" would mean an arrangement for periodic payment of damages for personal injuries

established by settlement or judgment in resolution of a tort claim, but not in settlement of a worker's compensation claim. "Structured settlement payment right" would mean a right to receive periodic payments including lump sum payments under a structured settlement from the settlement obligor or the annuity insurer, where the payee or a protected party was a State resident, or the settled claim was pending before a State court when the structured settlement was reached. "Structured settlement obligor" would mean the party that had the continuing periodic payment obligation to the payee under a structured settlement agreement or a qualified assignment agreement.

"Contractual assignment restriction" would mean a term prohibiting or restricting transfer of a structured settlement payments right in a contract or agreement, including an annuity contract, a structured settlement agreement, a qualified assignment agreement, or a court order or administrative order approving a structured settlement.

"Transfer" would mean a sale, transfer, assignment, pledge, hypothecation, or other form of disposition, alienation, or encumbrance made for consideration.

Transfer Approval

To approve the transfer of a structured settlement payment right that was subject to a contractual assignment restriction, the court would have to find all of the following:

- The transfer complied with the bill's requirements and would not contravene other applicable law.
- The payee had established that the transfer was necessary to enable the payee or the payee's dependents, or both, to avoid imminent financial hardship and the transfer was not expected to subject the payee and/or the dependents to undue financial hardship in the future.
- The payee had received independent professional advice regarding the financial and legal effects and consequences of the transfer.
- The transferee had given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and had filed a copy of the notice with the court.
- The discount rate or rates used in determining the discounted present value of the structured settlement payments to be transferred did not exceed 25% per year.

The court also would have to find that, at least 10 days before the date on which the payee entered into the transfer agreement, the transferee had provided to the payee and each dependent a disclosure statement that contained all of the following:

- The amounts and due dates of the structured settlement payments to be transferred.
- The aggregate amount of the structured settlement payments to be transferred.
- The discounted present value of the structured settlement payments to be transferred and the discount rate or rates used in determining that value.
- The gross amount payable to the payee in exchange for the structured settlement payments to be transferred.
- An itemized listing of all brokers' commissions, service charges, application or processing fees, closing costs, filing or administrative charges, legal fees, notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount payable to the payee in exchange for the structured settlement payments to be transferred.
- The net amount payable to the payee after deduction of all commissions, fees, costs, expenses, and charges described above.
- The quotient, expressed as a percentage, obtained by dividing the net payment amount as described above, by the discounted present value of the payments to be transferred.
- The amount of any penalty and the aggregate amount of any liquidated damages and penalties payable by the payee in the event of any breach of the transfer agreement by the payee.

In addition, the court would have to find that each protected party had given, in writing, its irrevocable

consent to the transfer; the party's waiver of all rights under each contractual transfer restriction applicable to it; the party's waiver of all rights with respect to the transferred payments; and the party's release of all claims against other protected parties with respect to the transferred structured settlement payments. ("Protected party" would mean the payee, a dependent of the payee, a beneficiary designated to receive payments following the payee's death, an annuity insurer, a structured settlement obligor, and any other party entitled to invoke the benefit of a contractual assignment restriction, whether as a party to or as a third party beneficiary of the annuity contract, structured settlement agreement, qualified assignment agreement, or the court order, administrative order, or other document in which the contractual assignment restriction appeared.)

Before the hearing on an application for court approval, the transferee would be responsible for obtaining all consents, waivers, and releases required from each protected party; filing signed originals of all consents, waivers, and releases with the court from which approval of the transfer was sought; providing signed originals of all consents, waivers, and releases to the annuity issuer and the structured settlement obligor; and providing copies of all consents, waivers, and releases to any protected party that requested copies.

Court Approval Application

The circuit court would have subject matter jurisdiction for an application for court approval of a transfer of a structured settlement payment right. At least 21 days before the scheduled hearing on the application, the transferee would have to file with the court and serve on all protected parties all of the following:

- Notice of the proposed transfer and application for court approval.
- A copy of the transferee's application to the circuit court.
- A copy of the transfer agreement.
- A copy of the disclosure statement.
- Notification that any interested party would be entitled to support, oppose, or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing, or both.
- Notice of the time and place of the hearing.
- Notification of the manner and time by which written responses to the application would have to be filed (which would have to be at least 10 days after service of the transferee's notice) in order to be considered by the court.

Other Provisions

The bill provides that a protected party could not waive the bill's requirements. A protected party could waive a contractual assignment restriction in writing only.

The bill could not be construed to authorize any transfer of a structured settlement payment right in contravention of applicable law or to give effect to any transfer of a structured settlement payment right that was void under applicable law.

The bill would apply to each transfer agreement reached on or after the 31st day after the bill's effective date, but would not affect the enforceability of a transfer agreement reached before the bill applied. The bill would not affect the effectiveness of a transfer, or the enforceability of an obligation to make payment to a transferee, under a transfer agreement that was reached before the bill applied.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would regulate the transfer of structured settlement rights in order to protect the interest of personal injury victims and their dependents. The growth of factoring companies reportedly has led to potentially unethical and illegal practices that undermine the benefits of structured settlements. Some factoring companies evidently use misleading advertising and high-pressure tactics to persuade financially unsophisticated individuals to sell structured settlements for a significantly reduced lump sum payment. Apparently, it is not uncommon for an injury victim to receive a lump sum that is half or less than half of the present value of the payments being sold. Just as lump sum settlements can be easily dissipated, the lump sum received from a factoring company also can be quickly spent, and the injured person ends up in the same situation that the structured settlement was intended to avoid. In addition, allowing factoring companies to purchase structured settlements without regulation does not serve the public interest if consumers exhaust their lump sum and need to resort to public assistance benefits at the expense of taxpayers.

Further, factoring transactions may result in the loss of the favorable tax treatment of the structured payments, thereby undermining the purpose of the tax break, which is to ensure long-term income protection for injury victims.

Opposing Argument

Factoring companies provide a valuable service by accelerating settlement payments when an individual's circumstances change sufficiently to justify a lump sum payment. The individual's needs may include debt elimination, college education, new business investment, or a medical emergency. Once a person agrees to a structured settlement, payment may be received only according to the set schedule. Changes in individual needs and circumstances cannot alter the amount and timing of the structured payments.

There are many cases in which a long-term settlement does not help the injury victim. For example, an article in *U.S. News and World Report* (1-25-99) reports that according to J.G. Wentworth, a factoring company, consumers benefit from services offered by factoring companies because they address immediate needs rather than guaranteed future payments. As examples, J.G. Wentworth pointed to a woman who sold a \$500 portion of her monthly structured payments for six years to pay for her mortgage and avoid foreclosure, and a quadriplegic who secured funds at a 12% discount rate to expand a successful business.

Response: The same article also describes a man who sold his remaining future settlement payments of \$67,500 to Wentworth for \$16,100,

which he spent within six months, and another man who gave up future payments totaling \$198,000 for \$54,000 and is now relying partially on public assistance.

Legislative Analyst: N. Nagata

FISCAL IMPACT

The bill would have a minimal impact on local courts regarding the process for approving the transfer of structured settlements.

Fiscal Analyst: B. Bowerman

H9900\5066a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.