

# RESEARCH MEMORANDUM TO THE WISCONSIN JUDICIAL COUNCIL

To: The Wisconsin Judicial Council  
From: Bill Gleisner  
Date: April 6, 2013  
Re: California's Structured Settlement Protection Act

## Introduction

The California SSPA is comprised of a whole series of statutes. The current SSPA is the product of the 2010 California Session Law Chapter 593 (Senate Bill No. 510). In order to make this memorandum as comprehensive as possible, I am attaching the following items to this memo as Appendices.

- 1. Appendix A.** Hindert and Ulman, Transfers of Structured Settlement Payments – What Judges Should Know about Structured Settlement Protection Acts, from 44 *The Judges Journal* 19 (Spring 2005). This is an important document in California because it speaks to the public policy underlying state and federal structured settlement protection initiatives.
- 2. Appendix B.** *Henderson v. Sioteco*, 173 Cal. App. 4<sup>th</sup> 1059, 93 Cal. Rptr. 3d 321 (2009). This case highlighted problems with the California law that appear to have been addressed in the new laws that went into effect on January 1, 2010 with the signing of Chapter 593 into law by the Governor on October 11, 2009.
- 3. Appendix C.** California Session Law 593 (Senate Bill 510). The advantage of attaching this document is that it nicely summarizes each of the new statutes that make up California's Structured Settlement Protection Act (SSPA) that went into effect on January 1, 2010. Those statutes include: Cal. Ins. Code §§10134, 10135, 10136, 10137, 10138, 10139, 10139.3 and 10139.5.
- 4. Appendix D.** Erickson, Chapter 593: A Structure for the Transfer of Structured Settlements, 41 *McGeorge Law Review* 667 (2010), which is an excellent resource on the law as it currently exists in California and the history of how that law developed.

5. **Appendix E.** Cal. Ins. Code §10136 from Westlaw. While as noted there are other provisions, this is clearly a central provision. What I like about the Westlaw version of this section is that it has the forms exploded into view. In the Lexis and Deering versions you, you must click on a link to expose the referenced forms.
6. **Appendix F.** Cal. Ins. Code §10136 from Deering's California Code Annotated. What is interesting about this and the other new California SSPA is just how little gloss there is at present.
7. **Appendix G.** In this appendix are some of the forms that are to be distributed to payees, as they look when prepared according to the specifications of the Legislature Cal. Ins. Code §10136.
8. **Appendix H.** Justice Roggensack asked how structured settlements come into existence. In Appendix G I have attached a pdf of a public section from the website of the Wisconsin Association for Justice which makes the point of just how important structured settlements are to plaintiffs' lawyers when attempting to settle a major tort claim. I know that insurers and large defendants also like structured settlements because it allows them to fund a premium for an annuity at fraction of what it would cost to pay the settlement in present day dollars.

### **Discussion**

There was discussion at the last meeting about how it is important to draft a SSPA so as to avoid interfering with freedom of contract. Actually, there are other equally valid public policy considerations as to why a SSPA is important, even if there is an incidental impact on freedom of contract.

Because structured settlements often arise in the case of tort settlements involving minors or disabled individuals, it is important to remember “[t]hese settlement arrangements cut down on societal costs by ‘minimizing the risk that large lump sum recoveries will be dissipated, leaving victims of disabling injuries to fall back on public assistance.’”<sup>1</sup>

### **Background**

So called structured settlement factoring companies have been on the radar of both the state and federal governments for almost 20 years. Nearly all

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<sup>1</sup> Erickson, pp. 667-668; *see also*, Cal. Ins. Code §10134(j).

states have passed some form of a SSPA,<sup>2</sup> and the U.S. Treasury Department's 40% rule in IRS Code §5891 is a deliberate attempt by the Feds to prevent unfair factoring practices.<sup>3</sup>

The California SSPA has been on the books since 1999. However, it was vague and there was at least one appellate decision which highlighted the weaknesses in the law as it existed prior to 2010. In *Henderson v. Sioteco*, 173 Cal. App. 4<sup>th</sup> 1059, 93 Cal. Rptr. 3d 321 (2009) [a copy of which is set forth in full in attached Appendix B] the Court of Appeals rendered a decision which undercut California's SSPA in several significant respects. Often in court approved structured settlements there is a provision barring assignments or transfers (for the very reason that tort victims are often unsophisticated and require long term care which necessitates a long term annuity). The *Henderson* Court held that contractual restrictions on assignments of transfers are ineffective. *Id.* 1074. The Court went on to hold that anti-assignment provisions were against public policy. *Id.* 1075-76. The Court also concluded that settlement transfers did not offend California's usury law. *Id.* 1076. The Court also rejected the Superior Court's findings that the payee did not receive adequate professional representation or that the factoring company had otherwise acted in an unfair manner. *Id.* 1077-1080.

### **Chapter 593 and California's New SSPA**

The California Legislature acted to significantly strengthen that State's SSPA in 2010 when it enacted California Session Law 593 (Senate Bill 510), which is set forth in attached Appendix C. As mentioned *supra* Chapter 593 (as it is called<sup>4</sup>) created Cal. Ins. Code §§10134, 10135, 10136, 10137, 10138, 10139, 10139.3 and 10139.5. Since one can read each statute created by the Session Law in full in attached Appendix C, I will only briefly discuss each statute.

#### §10134

This section contains a set of definitions that are to be used and applied when addressing issues under California's SSPA. Some of the more interesting definitions include:

(c) "Discounted present value" means the fair present value of future payments, as determined by discounting those payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 670.

<sup>4</sup> Erickson, p. 670.

(d) "Effective equivalent interest rate," with respect to a transfer of structured settlement payment rights, means the annualized rate of interest on the net advance amount, calculated by treating the transferred structured settlement payments as if they were installment payments on a loan, with each payment applied first to accrued unpaid interest and then to principal...

(f) "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser meeting all of the following requirements:

(1) The adviser is engaged by a claimant or payee to render advice concerning the legal, tax, or financial implications of a structured settlement or a transfer of structured settlement payment rights.

(2) The adviser's compensation for rendering independent professional advice is not affected by occurrence or lack of occurrence of a settlement or transfer.

(3) A particular adviser is not referred to the payee by the transferee or its agent, except that the transferee may refer the payee to a lawyer referral service or agency operated by a state or local bar association...

(j) "Structured settlement agreement" means an arrangement for periodic payment of damages established by settlement or judgment in resolution of a tort claim in which the payment of the judgment or award is paid in whole, or in part, in periodic tax-free payments rather than a lump-sum payment.

What's interesting about the latter definition is that it appears structured settlements in California subject to the SSPA are limited to tort settlements.

#### §10135

This provision merely specifies that the SSPA only applies to transfers entered into after January 1, 2000. This may have significance in California, but seems otherwise immaterial.

#### §10136

This provision is important in part because it specifies the format and look of notices which must be given to payees (*see* Appendix G). It also specifies that compliance with §10136 is a prerequisite to any transfer becoming effective. Ten days before a payee (the owner of the settlement) executes a transfer agreement, the transferee (the factoring company) must give the payee the forms in Appendix G. The specifics of the transfer agreement must be spelled out in detail, including the discounted present value of structured settlement payments. In addition, the payee must receive the following statement:

Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, if the transferred structured settlement payments were installment payments on a loan, with each payment applied first to accrued unpaid interest and then to principal, it would be as if you were paying interest to us of % per year, assuming funding on the effective date of transfer.

Besides informing the payee that he or she have the right to seek independent professional advice, §10136 also requires the transferee to inform the payee in writing as follows: "If you believe you were treated unfairly or were misled as to the nature of the obligations you assumed upon entering into this agreement, you should report those circumstances to your local district attorney or the office of the Attorney General."

In the form authorized by this section one finds a provision for fees paid by the factoring company (*see* Appendix G) which reads as follows:

You are advised to seek independent legal or financial advice regarding the transaction and, under the law, the cost of that advice, up to one thousand five hundred dollars (\$1,500), will be paid by the transferee, the person or entity to whom you have agreed to transfer and assign the payments in question. The transferee or purchaser's accountant, counsel, or actuary may not advise you in this transaction.

#### §10137

This section not only mandates Court approval, it states that a Court must find that "[t]he transfer of the structured settlement payment rights is fair and reasonable and in the best interest of the payee, taking into account the welfare and support of his or her dependents."

#### §10138

This section is in effect a "consumer rights" statement on steroids. Besides specifying that the provisions of this section may not be waived by a payee, here are just some of the provisions in this section:

(a) A transfer agreement, as defined in subdivision (o) of Section 10134, shall not include any provision described in the paragraphs below. Any inclusion of a prohibited provision, with respect to a seller who is a California resident, shall make the contract void and unenforceable.

(1) Any provision that waives the seller's right to sue under any law, or in which the seller agrees not to sue, or that waives jurisdiction or standing to sue under the contract.

(2) Any provision that requires the seller to indemnify and hold harmless the buyer, or to pay the buyer's costs of defense, in any claim or action brought by the seller or on the seller's behalf contesting the sale for any reason.

...

(11) A provision that provides the transferee with a security interest or collateral interest in any structured settlement payment rights that exceed the actual dollar amount of the structured settlement payment rights being transferred.

(12) Any provision that creates a "buyer's first right of refusal" to purchase any remaining structured payment rights that the payee may desire to sell in the future.

### §10139

This section provides the Attorney General of California with a great many rights whenever a factoring company seeks court review. According to this section: (a) At the time of filing a petition pursuant to Section 10139.5 for court approval, the transferee shall file with the Attorney General a copy of the transferee's petition for approval, a copy of the written disclosure statement, ... a copy of the transfer agreement..." This section also provides as follows:

(b) The Attorney General may, but is not required to, review any transfer agreement in order to ensure that the transfer meets the requirements of this article.

(c) The Attorney General may charge a reasonable fee for the filing of the transfer agreement as provided in this section. The fee shall be paid by the transferee.

### §10139.3

In another section which cannot be waived by the payee, this section makes it crystal clear that compliance with the SSPA is entirely and completely the sole responsibility of the factoring company.

### §10139.5

This is a very long section which details all of the many findings a court must make before approving a transfer; and the "best interest of the payee is just the tip of the iceberg. Here are just a few of the findings which must be made (and the capitalization is in the original):

(b) WHEN DETERMINING WHETHER THE PROPOSED TRANSFER SHOULD BE APPROVED, INCLUDING WHETHER THE TRANSFER IS FAIR, REASONABLE, AND IN THE PAYEE'S BEST INTEREST, TAKING INTO ACCOUNT THE WELFARE AND SUPPORT OF THE PAYEE'S DEPENDENTS, THE COURT SHALL CONSIDER THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING, BUT NOT LIMITED TO, ALL OF THE FOLLOWING:

(1) THE REASONABLE PREFERENCE AND DESIRE OF THE PAYEE TO COMPLETE THE PROPOSED TRANSACTION, TAKING INTO ACCOUNT THE PAYEE'S AGE, MENTAL CAPACITY, LEGAL KNOWLEDGE, AND APPARENT MATURITY LEVEL.

(2) THE STATED PURPOSE OF THE TRANSFER.

(3) THE PAYEE'S FINANCIAL AND ECONOMIC SITUATION.

(4) THE TERMS OF THE TRANSACTION, INCLUDING WHETHER THE PAYEE IS TRANSFERRING MONTHLY OR LUMP SUM PAYMENTS OR ALL OR A PORTION OF HIS OR HER FUTURE PAYMENTS.

(5) WHETHER, WHEN THE SETTLEMENT WAS COMPLETED, THE FUTURE PERIODIC PAYMENTS THAT ARE THE SUBJECT OF THE PROPOSED TRANSFER WERE INTENDED TO PAY FOR THE FUTURE MEDICAL CARE AND TREATMENT OF THE PAYEE RELATING TO INJURIES SUSTAINED BY THE PAYEE IN THE INCIDENT THAT WAS THE SUBJECT OF THE SETTLEMENT AND WHETHER THE PAYEE STILL NEEDS THOSE FUTURE PAYMENTS TO PAY FOR THAT FUTURE CARE AND TREATMENT.

(6) WHETHER, WHEN THE SETTLEMENT WAS COMPLETED, THE FUTURE PERIODIC PAYMENTS THAT ARE THE SUBJECT OF THE PROPOSED TRANSFER WERE INTENDED TO PROVIDE FOR THE NECESSARY LIVING EXPENSES OF THE PAYEE AND WHETHER THE PAYEE STILL NEEDS THE FUTURE STRUCTURED SETTLEMENT PAYMENTS TO PAY FOR FUTURE NECESSARY LIVING EXPENSES.

(7) WHETHER THE PAYEE IS, AT THE TIME OF THE PROPOSED TRANSFER, LIKELY TO REQUIRE FUTURE MEDICAL CARE AND TREATMENT FOR THE INJURIES THAT THE PAYEE SUSTAINED IN CONNECTION WITH THE INCIDENT THAT WAS THE SUBJECT OF THE SETTLEMENT AND WHETHER THE PAYEE LACKS OTHER RESOURCES, INCLUDING INSURANCE, SUFFICIENT TO COVER THOSE FUTURE MEDICAL EXPENSES.

(8) WHETHER THE PAYEE HAS OTHER MEANS OF INCOME OR SUPPORT, ASIDE FROM THE STRUCTURED SETTLEMENT PAYMENTS THAT ARE THE SUBJECT OF THE PROPOSED TRANSFER, SUFFICIENT TO MEET THE PAYEE'S FUTURE FINANCIAL OBLIGATIONS FOR MAINTENANCE AND SUPPORT OF THE PAYEE'S DEPENDENTS, SPECIFICALLY INCLUDING, BUT NOT LIMITED TO, THE PAYEE'S CHILD SUPPORT OBLIGATIONS, IF ANY. THE PAYEE SHALL DISCLOSE TO THE TRANSFEREE AND THE COURT HIS OR HER COURT-ORDERED CHILD SUPPORT OR MAINTENANCE OBLIGATIONS FOR THE COURT'S CONSIDERATION.

### **The Hindert & Ullman Article**

Although it is somewhat dated (it was authored in 2005), the article by Hindert and Ulman in attached Appendix A is well researched, interesting and very thought provoking. It also apparently influenced California policymakers.<sup>5</sup>

There is a lengthy discussion in this article concerning the standards that courts should consider and how they should evaluate claimants.<sup>6</sup> There is an

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<sup>5</sup> Erickson, p. 667, n. 11.

<sup>6</sup> Hindert and Ulman, pp. 23 to 26.

interesting discussion about calculating discounted present value of transferred payments<sup>7</sup> and the likely sources of information on comparative discount/implied interest rates.<sup>8</sup> However, the position of the authors concerning the unusual position of courts when confronted with factoring cases is of the greatest interest.

It is the position of the authors that payees will never have sufficient sophistication or representation to do a good job on a case with potentially huge financial consequences. Therefore, the authors argue that courts must take a much greater role than that to which they are accustomed in questioning payees and even cross-examining factors.<sup>9</sup> Perhaps this is why California has required factoring companies to pay up to \$1500 for the professional services of payees and also provided the Attorney General of that state with enhanced rights to intervene on behalf of a payee.

Hindert and Ullman also underscore the view adopted in California that the most serious violations in the area of structure settlement purchases occur in the case of tort victims, especially minors.<sup>10</sup>

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<sup>7</sup> *Id.* at 24.

<sup>8</sup> *Id.* at 25.

<sup>9</sup> *Id.* at 26.

<sup>10</sup> *Id.* at 26.



# **APPENDIX A**

# Transfers of Structured Settlement Payment Rights

## What Judges Should Know About Structured Settlement Protection Acts

By Daniel W. Hindert and Craig H. Ulman

**Authors' Note:** *The authors would like to acknowledge the participation of Jared C. Fields, an associate with Parsons Behle & Latimer, who provided research assistance on this article.*

Structured settlements have enjoyed widespread acceptance and have become an established part of our legal landscape over the past twenty-five years. More than \$6 billion is now paid each year to fund new structured settlements in the United States, and an estimated \$100 billion or more has been paid in the aggregate to fund structured settlements that are in force today. Little controversy attended the development of structured settlements. Much controversy has accompanied the development of a secondary market, in which structured settlement "factoring" companies acquire from settlement recipients their rights to receive future payments.

Since 1997, the controversy surrounding structured settlement factoring has led thirty-eight states to enact statutes that make transfers of payment rights under structured settlements ineffective unless those transfers receive advance court approval. Since 2002, the Internal Revenue Code (IRC) has reinforced the state statutes by imposing a 40 percent federal excise tax if a transfer of structured settlement payment rights does not receive the required court approval.

Because of this unusual combination of state law requirements and federal tax sanctions, state courts throughout the country are being asked to rule on growing numbers of applications for approval of transfers of payment rights under state structured settlement protection acts (SSPAs). This article explains the SSPAs and their relationship to the IRC and discusses some of the key questions that courts need to address in ruling on SSPA applications.

### Structured Settlements and the Rise of Factoring

Structured settlements are settlements of tort claims involving physical injuries or physical sickness, and workers' compensation claims, under which settlement proceeds take the form of periodic payments, including scheduled lump sum payments. Structured settlements generally are funded by single-premium annuity contracts held by the party that is contractually obligated to make the future settlement payments.<sup>1</sup> Under federal tax rules designed to encourage the use of structured settlements, the full amount of each periodic payment, including the amount attributable to earnings under the annuity contract, is excludable from the settlement recipient's income under IRC section 104(a)(1) or (2). Congress has endorsed use of structured settlements

as a means of assuring continuing income to injury victims and minimizing the risk that lump sum recoveries will be dissipated, leaving victims of disabling injuries to fall back on public assistance.

Consistent with the congressional policy favoring use of structured settlements, and for reasons linked to their tax treatment, structured settlement agreements typically provide that a settlement recipient's rights to receive future payments may not be assigned or otherwise transferred. In some cases, transfers of payment rights are also restricted or prohibited under applicable statutes or court orders. Notwithstanding these restrictions, an active secondary market in structured settlement payment rights developed in the early 1990s. Through aggressive advertising, specialized finance companies—now commonly referred to as structured settlement factoring companies—began persuading structured settlement recipients (referred to herein as "payees") to trade future payments for present cash.

To circumvent the restrictions on assignment of payment rights, factoring companies arranged for payees to redirect their payments to factoring company addresses. The factoring companies would then collect the payments (endorsing checks in the payees' names, using powers of attorney and signature stamps) without

informing insurers that payment rights had been assigned.

Many payees who dealt with factoring companies were exploited. By fashioning transactions as purchases of future payment rights or as loans originated in states with generous usury laws, factoring companies often charged sharp discounts to payees who were ill equipped to appreciate the value of their future payments or to understand the onerous terms of factoring agreements. In some cases, factoring companies charged discounts equivalent to annual interest rates as high as 70 percent.<sup>1</sup> Payees who defaulted often were sued in remote forums specified in the factoring companies' form contracts. In many cases, these actions commenced with entry of confessed judgments against payees. Insurers responsible for making ostensibly nonassignable settlement payments became embroiled in collection actions brought by factoring companies. Insurers also faced uncertain tax consequences and risks of multiple liability when assigned settlement payments became subject to competing claims.

### Enactment of State SSPAs

Beginning in Illinois in 1997, state legislatures recognized the need to protect structured settlements against the abuses of factoring. As explained by legislators in New Jersey:

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.<sup>2</sup>

The legislatures in New Jersey and at least thirty-seven other states have responded by enacting SSPAs. As this article was going to press, SSPA legis-

lation was nearing enactment in four additional states: Arkansas (House Bill 2614), Kansas (House Bill 2160), Montana (Senate Bill 122), and New Mexico (House Bill 495). SSPA bills were also pending in Alabama (House Bill 91) and Oregon (Senate Bill 645).

Although they are not uniform, all of the SSPAs are derived from the same model legislation,<sup>3</sup> and they all reflect the same basic legislative scheme. Under each of the SSPAs:

- The transferee—that is, the factoring company—is required to make a series of disclosures designed to highlight the value of transferred payments and to contrast that value with the net amount that a payee stands to receive in exchange for the transferred payments. In most states, the transferee is required to disclose the discounted present value of the transferred payments, as determined by using the "Applicable Federal Rate" most recently published by the Internal Revenue Service for purposes of valuing annuities.<sup>4</sup>

- The effectiveness of any transfer of structured settlement payment rights is conditioned on advance court approval of the transfer,<sup>5</sup> based on findings that the transfer (1) will serve the best interests of the payee and the payee's dependents and/or is necessary to enable them to avoid hardships, and (2) will not contravene "applicable law" or, more specifically, applicable statutes or orders.<sup>6</sup> Ten SSPAs expressly require an affirmative finding regarding the fairness and reasonableness of a proposed transfer, a finding that generally should be implicit in any finding that a transfer will serve the best interests of a payee and his or her dependents.<sup>8</sup> Fourteen SSPAs expressly require a finding that a proposed transfer complies with those SSPAs.<sup>9</sup> Thirty-three SSPAs also require either a finding that the payee has received "independent professional advice" concerning the proposed transfer or, alternatively, a finding that the payee has been advised to seek independent professional advice

and has either received it or knowingly waived that advice.<sup>10</sup>

- At least some aspects of the procedure for seeking approval of proposed transfers are spelled out. For example, the statutes identify the categories of "interested parties" that are entitled to receive notice of a proposed transfer, the contents of the notice, and the minimum notice period that must elapse before an application can be heard.

- Key terms—e.g., "structured settlement," "structured settlement payment rights," and "transfer"<sup>11</sup>—are defined.

To this basic menu of statutory provisions, many SSPAs add supplemental protections for payees and their dependents and/or for structured settlement obligors and annuity issuers. For example, twenty-five SSPAs mandate that the transfer agreement between a payee and a factoring company be governed by the law of the payee's home state and/or that any disputes between the payee and the factoring company be heard in the courts of that state.<sup>12</sup> These same acts also prohibit or restrict transfer agreement provisions authorizing a factoring company to confess judgment against a payee.

Nineteen SSPAs provide that structured settlement obligors and annuity issuers cannot be required to divide payments between multiple recipients and/or provide that life-contingent payments may not be transferred in the absence of appropriate, agreed-upon mechanisms for confirming the payee's survival (or notifying the structured settlement obligor and annuity issuer in the event of the payee's death).<sup>13</sup>

### Enactment of IRC Section 5891

The abuses associated with structured settlement factoring drew attention not only from state legislators but also from the U.S. Treasury Department and Congress. Beginning in the federal budget for fiscal year 1999, the Treasury Department proposed that

## State Structured Settlement Protection Statutes

State	Statute
Alaska	ALASKA STAT. §§ 09.68.200–09.68.230
Arizona	ARIZ. REV. STAT. ANN. §§ 12-2901–12-2904
California	CAL. INS. CODE §§ 10134–10139.5
Colorado	COLO. REV. STAT. §§ 13-23-101 to 13-23-108
Connecticut	CONN. GEN. STAT. § 52-225g–52-225l
Delaware	DEL. CODE ANN. tit. 10, §§ 6601–6604
Florida	FLA. STAT. ANN. § 626.99296
Georgia	GA. CODE ANN. § 51-12-70-72, §§ 51-12-70-76 to 51-12-70-77
Idaho	IDAHO CODE § 28-9-109
Illinois	215 ILL. COMP. STAT. §§ 153/1–153/35
Indiana	IND. CODE ANN. §§ 34-50-2-1 to 34-50-2-11
Iowa	IOWA CODE ANN. §§ 682.1–682.7
Kentucky	KY. REV. STAT. ANN. §§ 454.430–454.435
Louisiana	LA. REV. STAT. ANN. § 9:2715
Maine	ME. REV. STAT. ANN. tit. 24A §§ 601.25, 2241–2246
Maryland	MD. CODE ANN. CTS. & JUD. PROC. §§ 5-1101–5-1105
Massachusetts	MASS. GEN. LAWS ANN. ch. 231C, § 1–5
Michigan	MICH. COMP. LAWS ANN. §§ 691.1191–691.1197
Minnesota	MINN. STAT. §§ 549.30–549.34
Mississippi	MISS. CODE ANN. §§ 11-57-1–11-57-15
Missouri	MO. REV. STAT. §§ 407.1060–407.1068
Nebraska	NEB. REV. STAT. §§ 25-3101–25-3107
Nevada	NEV. REV. STAT. § 42.030
New Jersey	N.J. STAT. ANN. §§ 2A:16-63–2A:16-69
New York	N.Y. GEN. OBLIG. LAW §§ 5-1701–5-1709
North Carolina	N.C. GEN. STAT. art. 44B §§ 1-543.10–1-543.15; art. 33 § 1-394.1
Ohio	OHIO REV. CODE ANN. §§ 2323.58–2323.587
Oklahoma	OKLA. STAT. ANN. tit. 12 §§ 3238–3245
Pennsylvania	40 PA. CONS. STAT. ANN. §§ 4001–4009
Rhode Island	R.I. GEN. LAWS ANN. §§ 27-9.3-1 to 27-9.3-7
South Carolina	S.C. CODE ANN. §§ 15-50-10–15-50-70
South Dakota	S.D. CODIFIED LAWS §§ 21-3B-1–21-3B-12
Tennessee	TENN. CODE ANN. tit. 47, ch. 18 §§ 1–7
Texas	TEX. REV. CIV. STAT. ANN. §§ 141.001–141.007
Utah	UTAH CODE ANN. §§ 78-59-101–78-59-108
Virginia	VA. CODE ANN. §§ 59.1-475–59.1-477
Washington	WASH. REV. CODE ANN. §§ 19.205.010–19.205.060, § 19.205.900
West Virginia	W. VA. CODE §§ 46A-6H-1–46A-6H-8

Congress impose a punitive federal excise tax on transfers of structured settlement payment rights, except in cases in which courts find that “the extraordinary and unanticipated needs of the original intended recipient” make these transfers desirable.<sup>14</sup> This proposal was incorporated in a series of bills sponsored in the U.S. House of Representatives by Rep. E. Clay Shaw, Jr. (R-Fla.) and Rep. Fortney (Pete) Stark (D-Cal.) and in the U.S. Senate by Sen. John Chafee (R-R.I.) and, following Sen. Chafee’s death, by Sen. Max Baucus (D-Mont.). The legislation ultimately was enacted as part of the Victims of Terrorism Tax Relief Act of 2001<sup>15</sup> and is now codified as IRC section 5891.

Section 5891 recognizes and reinforces the SSPAs.<sup>16</sup> Section 5891(a) imposes a 40 percent excise tax on any party that acquires payment rights in a “structured settlement factoring transaction,” a term whose definition in section 5891(c)(3) closely resembles the definition of “transfer” in the SSPAs. Section 5891(b) exempts from the 40 percent excise tax “a structured settlement factoring transaction in which the transfer of structured settlement payment rights is approved in advance in a qualified order.” A “qualified order” is defined as “a final order, judgment or decree” that is issued “under the authority of an applicable State statute<sup>17</sup> by an applicable State court<sup>18</sup> and finds that the proposed transfer “(i) does not contravene any Federal or State statute or the order of any court or responsible administrative authority, and (ii) is in the best interest of the payee, taking into account the welfare and support of the payee’s dependents.”<sup>19</sup> Thus, the conditions for exemption from the 40 percent federal excise tax coincide with the two primary conditions for an effective transfer of payment rights under the SSPAs.

Section 5891(d) clarifies that in any case in which applicable tax requirements were satisfied at the time a structured settlement was entered into, “the subsequent occur-

[GRAPHICS  
EXCERPTED]

Under both the SSPAs and IRC section 5891, a court is expected to make its own assessment of a payee's best interest, not simply to accept conclusory assertions by the payee or the factoring company.

rence of a structured settlement factoring transaction" will not adversely affect the tax treatment of the parties to the settlement.

In the context of proceedings for approval of proposed transfers of payment rights under the SSPAs, section 5891 is important primarily for two reasons:

1. the threat of the 40 percent excise tax means that no informed party that is subject to the taxing authority of the United States will seek to acquire structured settlement payment rights without obtaining approval of the transaction under the appropriate SSPA; and
2. by specifying the applicable State court from which a qualified order must be obtained, section 5891 effectively dictates the choice of forum for most proceedings under the SSPAs.

### Reviewing and Ruling on Applications Under SSPAs

In any case in which a payee proposing to transfer payment rights resides in a state that has enacted an SSPA, the transaction is almost certain to be submitted for court approval in the payee's home state, often in the payee's home county. Thus, growing numbers of state courts are being called upon to review and rule on transfer applications, and the trend

will only continue as additional states enact SSPAs.

What should courts expect to see when they receive transfer applications? How should courts handle those applications, most of which will be unopposed? What issues must a court expect to rule on in every case? What other issues should a court be prepared to consider? The

following sections of this article address these questions, taking into account the express requirements and the legislative objectives of the SSPAs, together with recent case law applying them.

**Contents of a transfer application.** Under most SSPAs, a transfer application is made in the name of the transferee, i.e., the factoring company,<sup>20</sup> and includes the following:

- a formal application describing the proposed transfer, alleging compliance with applicable statutory requirements and requesting entry of an order approving the proposed transfer and including the findings required (1) under the applicable SSPA(s) and (2) for a qualified order under IRC section 5891(b);
- a copy of the transfer agreement between the payee and the factoring company;
- a copy of the disclosure statement(s) given to the payee under the applicable SSPA(s);
- a copy of the notice provided to interested parties to inform them of the proposed transfer and their opportunity to oppose, support, or otherwise respond; and
- if not included in the transfer application itself, a listing of the names and ages of the payee's dependents, if any.

Even when some of the above items are not required under the

SSPA(s) applicable to a specific transfer, they will often be included in a transfer application because it is simpler for factoring companies to prepare and submit common denominator applications that meet the documentation requirements of many SSPA(s) rather than tailor their applications to satisfy the more limited requirements that may apply in some cases.

**Conduct of proceedings.** Must a court conduct a hearing on an application for approval of a transfer of structured settlement payment rights, even if the application is unopposed? Most SSPAs provide for a hearing and afford interested parties the opportunity to be heard, with or without filing any written response. If a hearing is not required to be scheduled under the applicable SSPA(s), or if a hearing is scheduled but no interested party registers any opposition to a proposed transfer, can the court appropriately dispense with a hearing if the applicant submits an affidavit from the payee indicating that the applicable statutory conditions will be fulfilled? While some courts are prepared to rule on transfer applications on the basis of a paper record alone or, at any rate, without hearing testimony from the payee, other courts have found that a thorough evaluation of a payee's best interest, as required under the SSPAs and IRC section 5891, requires that a court hear directly from, and be able to question, the payee.<sup>21</sup>

However it receives evidence regarding a payee's best interest, a court should expect to hear from and question an applicant's counsel concerning the statutory requirement that a proposed transfer not contravene applicable statutes and court orders (or, under some SSPAs, "applicable law"). A court should not be expected to make an affirmative finding on this subject based solely on conclusory allegations in an application, nor should it be the responsibility of a court to identify and review potentially conflicting statutes, court orders, or other sources of applicable law.

Whether or not an application is the subject of a formal hearing, and however the court receives evidence concerning the payee's best interest, it is clear that the applicant (normally, but not always, the factoring company) has the burden of establishing that the applicable statutory requirements are met.<sup>22</sup>

**Courts must address the payee's best interest.** To qualify for exemption from the excise tax imposed under IRC section 5891, a structured settlement factoring transaction must be found to be in the "best interest of the payee taking into account the welfare and support of the payee's dependents."<sup>23</sup> To be effective under the applicable SSPA(s), a transfer must be found to satisfy that same test or a similar test plus, in ten states, the separate requirement that the transfer be found to be "fair and reasonable." All of these tests are referred to collectively in this article as the "best interest" test.

While it is commonly recognized that "[t]he heart of the SSPA's protection lies in the courts' independent discretionary determination"<sup>24</sup> whether a proposed transfer satisfies the best interest test, courts have applied differing approaches in making that determination. Some courts have required a showing of "an unforeseeable change in circumstances"<sup>25</sup> or a "compelling and reasonably informed necessity"<sup>26</sup> as a basis for best interest findings. Other courts have adopted a more flexible approach. For example, the Court of Appeals of Minnesota has explained:

We believe that the best interests determination involves a more global consideration of the facts, circumstances, and means of support available to the payee and his or her dependents. These considerations would include, among other case specific factors, the reasonable preference of the payee, in light of the payee's age, mental capacity, maturity level, and stated purpose for the transfer. . . .

The factors for consideration should also include whether the periodic

payments of the structured settlement were intended to cover future income loss or future medical expenses. If so, the district court should inquire whether the payee has means of support aside from the structured settlement to meet these obligations. . . . The district court should also consider whether the offered discount rate is in line with the market rate for similar transfers . . . . Finally, the district court should consider whether the transfer is in the best interests of the payee's dependents; we believe this may involve an assessment of whether the payee can meet the financial needs of and obligations to the payee's dependents if the transfer is allowed to proceed.<sup>27</sup>

A New York trial court opinion has offered the following synthesis:

Although the [New York] statute does not define the best interests of the Payee, developing case law and the intent of the statute suggest the Court should consider: (1) the Payee's age, mental capacity, physical capacity, maturity level, independent income, and ability to support dependents; (2) purpose of the intended use of the funds; (3) potential need for future medical treatment; (4) the financial acumen of the Payee; (5) whether the Payee is in a hardship situation to the extent that he or she is in "dire straits"; (6) the ability of the payee to appreciate financial consequences based on independent legal and financial advice; [and] (7) the timing of the application.<sup>28</sup>

Courts have also recognized that the evaluation of a payee's best interest contemplated by the SSPAs is analogous to best interest determinations provided for in the context of family law, probate, and guardianship proceedings,<sup>29</sup> as well as proceedings for approval of commutation of workers' compensation benefits.<sup>30</sup>

In evaluating the terms of a proposed transfer, either as part of a general best interest analysis or for purposes of making a specific finding regarding the fairness and reasonableness of the transfer, courts have understandably been troubled by the

discount rates commonly charged in factoring transactions. Those rates have been characterized as "punishingly high,"<sup>31</sup> "exorbitant,"<sup>32</sup> and "unconscionable and overreaching."<sup>33</sup> Some courts have imposed de facto caps on allowable discount rates.<sup>34</sup> Most courts have adopted a less rigid approach, recognizing that "[t]he more pressing the need, the more reasonable it may be for a payee to obtain immediate cash at a steep discount rate."<sup>35</sup>

Courts routinely require that applicants prove that proposed discount rates are reasonable.<sup>36</sup> In evaluating the reasonableness of proposed rates, courts may consider evidence of the "market" rates commonly charged in structured settlement factoring transactions, but they tend to view that evidence skeptically. A recent New York ruling explained that

while petitioner asserts that the structured settlement market is "competitive," with price quotes being given freely to interested sellers by different funding companies . . . , the Legislature's imposition of a requirement for court approval provides a strong indication of its conviction that market factors alone are not sufficient to ensure the fairness of such transactions, or to prevent abusive or predatory practices which may pervade the industry. This may be a consequence of the fact that individuals desiring to sell their payments often have no other means of obtaining cash, and are therefore, to a certain extent, "at the mercy" of firms that are in the business of purchasing such payments, creating an inherent inequality in bargaining power. Under these circumstances, the mere fact that a payee is free to "shop around" among firms to obtain the best price offered does not necessarily mean that the terms of the resulting contract will be "fair" or "reasonable."<sup>37</sup>

Neither the SSPAs themselves nor cases provide—or can be expected to provide—any precise formula for applying the best interest test, but the cases suggest, and experience confirms, that a court should:

- Recognize that under both the SSPAs and IRC section 5891 a court is expected to make its own assessment of a payee's best interest, not simply to accept conclusory assertions by the payee or the factoring company.

- Insist that the payee appear in person, if possible, because evaluation of a payee's best interest is "a task that does not lend itself to long distance litigation."<sup>38</sup> If a personal appearance is not possible, the court should consider at least interviewing the payee by telephone.

- Be prepared to question the payee and any other witnesses testifying in support of an application, whether or not there is any opposition. The direct testimony of a payee proffered by a factoring company in support of its application for approval of a transfer of payment rights often is formulaic, shedding limited light on the needs of the payee and the payee's dependents. Even when someone

opposes an application, the opponent is not likely to be well situated to elicit critical information.<sup>39</sup> Unless the court is prepared to ask probing questions, it may receive little more than the fragmentary information that typically appears in affidavits submitted in support of transfer applications.

- Take into account a payee's sophistication, recognizing that in many cases payees have structured settlements precisely because their attorneys and/or their family members believed, sometimes with the concurrence of a court, that they needed the protection and security of a structured settlement rather than an all-cash settlement with the attendant dissipation risk. A court should be particularly wary in any case involving a young payee whose structured settlement was entered into before he or she reached the age of majority. These payees can be especially vulnerable to the high-pressure sales tactics sometimes employed by factoring companies.<sup>40</sup>

- Recognize the risk that a payee may enter into (or may already have entered into) other factoring transactions that, in conjunction with the transaction that the court is considering, may prove to be extremely detrimental to the payee's financial position. The court should ask any payee whether he or she has been party to any prior factoring transaction, including any proposed transaction that may have been disapproved by another court.<sup>41</sup> If the answer is affirmative, the court should insist that the applicant and/or the payee provide the details of the prior transaction(s), including, in the case of any prior transaction that received court approval, (1) the anticipated use of the transaction proceeds, as described to the court that approved the prior transaction; and (2) the payee's actual use of those proceeds.<sup>42</sup>

- Find that a proposed transfer satisfies the best interest test if the applicant has established that, taking all of the relevant circumstances into account, the transfer would be reason-

able, i.e., that a fully informed, reasonable person whose personal and family situation coincided with those of the payee would enter into such a transaction. If the applicant has not established that the proposed transfer meets this standard, the application should be disapproved.

In considering the appropriateness of the terms of a proposed transfer, a court should:

- Recognize that the required disclosure of the discounted present value of transferred payments, as calculated using the Applicable Federal Rate published by the Internal Revenue Service, provides only a "rough comparison" to the net amount that a payee stands to receive in a factoring transaction.<sup>43</sup> A more precise comparison can be made by obtaining a quote for the premium that a life insurer would charge in issuing a new annuity contract providing for the same payments that are to be transferred from the payee to the factoring company. The New York SSPA requires that such a quote be obtained and included in the transferee's disclosure statement.<sup>44</sup>

- Appreciate that although they generally are documented as purchases of payment rights, structured settlement factoring transactions can be analogized to loans secured by transferred payments.<sup>45</sup> Accordingly, the interest rate that is implicit in a factoring transaction can be a useful point of reference. In considering the appropriateness of such an implicit interest rate, however, a court should be aware that the fees charged by some factoring companies can dramatically affect a payee's borrowing costs. If a factoring company charges fees that are deducted from the proceeds otherwise available to the payee, the principal amount of the putative loan is effectively reduced and the interest rate implicit in the transaction is effectively increased.<sup>46</sup>

- Compare the discount rate and/or the implicit interest rate in a proposed factoring transaction with



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rates charged in other transactions, including both those that have been approved and those that have been disapproved based on the best interest test. In making these comparisons, however, a court should recognize that because of the inherent inequality in bargaining power between payees and factoring companies, rates consistent with the levels established in other factoring transactions are not necessarily fair, reasonable, or otherwise in a payee's best interest.<sup>47</sup> If the discount rate for a proposed transaction exceeds those levels, that may constitute persuasive evidence that the transaction terms are *not* in the payee's best interest; it does not follow, however, that a proposed rate that corresponds to levels established in other factoring transactions *is* in the payee's best interest.

• Consult readily available sources of information on comparative discount/implied interest rates charged in structured settlement factoring transactions. These sources include (1) rate information disclosed in the growing numbers of SSPA rulings addressing the best interest test, and (2) the data presented in a March 2004 study prepared by the California Attorney General's Office, *Impact of Prior Court Approval on the Transfer of Structured Settlement Payment Rights*. This study, prepared for the California legislature, includes a survey of hundreds of structured settlement transfers involving California payees between 2000 and 2003, including approximately 800 transfers that were the subject of applications for court approval under the California SSPA in 2002 and 2003. The findings from this study regarding discount/interest rates are summarized in the tables at right.<sup>48</sup> Because discount rates charged by factoring companies are not systematically recorded and published, the California study is a unique resource for information about the terms of a large number of structured settlement factoring transactions.

**Contract Price as a Percent of Present Value<sup>49</sup>**

	<i>Mean</i>	<i>Median</i>
2000	59.9	59.9
2001	55.1	55.1
2002	54.3	55.3
2003	54.0	55.1

**Average Contract Prices as a Percent of Present Value (By Purchaser)**

	2002		2003	
	<i>Mean</i>	<i>(Median)</i>	<i>Mean</i>	<i>(Median)</i>
JG Wentworth	52.9	(54.6)	NA	
321 Henderson Receivables	57.3	(58.0)	57.0	(59.5)
Settlement Funding	52.9	(52.4)	45.8	(46.4)
Settlement Capital Corp.	53.1	(51.1)	47.8	(52.6)

**Minimum and Maximum Contract Prices as a Percent of Present Value (By Purchaser)**

	2002		2003	
	<i>Min.</i>	<i>(Max.)</i>	<i>Min.</i>	<i>(Max.)</i>
JG Wentworth	17.6	(80.0)	NA	
321 Henderson Receivables	23.5	(90.0)	13.5	(83.6)
Settlement Funding	26.4	(81.5)	14.2	(72.8)
Settlement Capital Corp.	30.0	(84.3)	17.2	(75.8)

**Effective-Equivalent Interest Rates Compared to Alternative Sources of Credit<sup>50</sup> (As Percents)**

	2000	2001	2002	2003
<b>Effective-Equivalent Interest Rates:</b>				
Mean	19.5	20.9	19.8	19.2
<b>Effective-Equivalent Interest Rates:</b>				
Median	19.8	20.1	19.9	19.3
Prime Rate	9.23	6.91	4.67	4.12
30-Year Conventional Mortgage	8.06	6.97	6.54	5.82
Credit Cards	15	15	12	12



[GRAPHICS  
EXCERPTED]

**Courts hearing transfer applications should insist that applicants specifically identify interested parties and submit proof that they have been notified.**

**Courts must address noncontravention of applicable law and compliance with SSPA requirements.** For purposes of determining whether a proposed transfer of payment rights contravenes applicable law or applicable statutes and orders, and for purposes of specifically determining whether the transfer complies with the applicable SSPA(s), where an express finding of such compliance is required, a court must consider whether the transfer satisfies objective SSPA requirements. The following questions, among others, should be considered: Has the payee been given the required disclosures? Does the transfer agreement omit any provisions that are mandated under the applicable SSPA(s)—e.g., choice of law and choice of forum provisions? Does the agreement include any provisions that are proscribed under the applicable SSPA(s)—e.g., broad confession of judgment clauses? Does the notice furnished to interested parties include the required documents and information? These requirements are straightforward, and courts generally have little difficulty ascertaining whether they have been satisfied.

Finding that a proposed transfer would not contravene applicable law or applicable statutes and court orders can be more difficult. Both the SSPAs and IRC section 5891 provide for such findings because in some cases a transfer of payments rights, even if it is approved by a court, would conflict with preexisting legal restrictions that

neither the state nor the federal legislation is intended to disturb. Sources of such legal restrictions include:

- Workers' compensation laws, most of which prohibit or sharply restrict assignment of benefits, including benefits payable through structured settlements.<sup>51</sup> Some state legislatures have addressed this

potential conflict by making their SSPAs wholly inapplicable to transfers of payment rights under workers' compensation settlements.<sup>52</sup>

- State tort reform statutes and other statutory compensation schemes, which in some cases prohibit or restrict assignment of recoveries, including payment rights under structured settlements.<sup>53</sup>

- Court orders approving settlements. Because they are commonly used to resolve tort claims of minors, as well as adults who have suffered injuries that have rendered them legally incompetent, structured settlements often are submitted for court approval before they are implemented. The court order approving a settlement often includes antiassignment provisions or incorporates the terms of a settlement agreement that contains antiassignment provisions.<sup>54</sup> Unless such an order has been appropriately modified, a later transfer of payment rights under the settlement is likely to conflict with the order.

- Contractual antiassignment restrictions. The settlement documents governing structured settlements typically prohibit any assignment of the payees' rights to receive future settlement payments. The effectiveness of these contractual antiassignment provisions was extensively litigated between factoring companies and insurers in the context of factoring transactions that predated the enactment of SSPAs.<sup>55</sup> Insofar as con-

tractual antiassignment provisions were effective to bar an assignment of payment rights prior to enactment of the SSPAs, they generally remain effective for that purpose if an insurer or other party that has standing to invoke the antiassignment provisions seeks to enforce them.<sup>56</sup> Taking into account the protections available under the SSPAs and IRC section 5891, however, insurers now do not generally find it necessary to insist on enforcement of antiassignment provisions. Thus, contravention of purely contractual antiassignment provisions, as distinguished from antiassignment provisions contained in a statute or a court order, is an issue that effectively is waived in most cases.

**Courts must address independent professional advice.** Under all of the SSPAs other than the Georgia, Indiana, Kentucky, Tennessee, and West Virginia statutes, approval of a transfer of payment rights requires a finding that the payee either has received independent professional advice or has knowingly waived the right to receive it. Of the SSPAs that require these findings, eleven require findings that the payee has actually received independent professional advice; waiver is not permitted.<sup>57</sup>

In any case in which a court is asked to find that a payee has received independent professional advice (whether or not the payee could, under the applicable SSPA(s), have waived this advice), the court should consider whether the adviser was truly independent, i.e., disinterested. As courts in several states have recognized, payees sometimes are referred to advisers—typically attorneys—by factoring companies. Sometimes the advisers are paid by factoring companies from the proceeds of the transactions on which they render ostensibly independent advice. In some instances, purportedly independent advice has been confirmed in printed form letters provided by factoring companies.<sup>58</sup> Such arrangements are difficult to reconcile

with a finding that a payee has received professional advice that is truly independent.<sup>59</sup>

A court that is asked to find that a payee has received independent professional advice may also wish to ask whether the professional adviser recommended for or against the proposed transfer of payment rights. Absent evidence that the professional adviser endorsed the transfer, the court may appropriately assume that there was no such endorsement.<sup>60</sup>

When a court is asked to make a finding that a payee has knowingly waived independent professional advice, the court should be prepared to question the payee in order to satisfy itself that the payee appreciates the reasons for obtaining independent professional advice and has nevertheless made an informed decision to forego that advice.

**Identifying the applicable SSPA(s).** Each SSPA applies, at least by implication, to any transfer of payment rights by a payee who is domiciled in the enacting state.<sup>61</sup> Most SSPAs also apply under other conditions, which typically are spelled out in the statutory definition of "structured settlement." For example, an SSPA may apply if

- the underlying structured settlement was approved by a court in the enacting state,
- the structured settlement agreement is governed by the laws of the enacting state, or
- the structured settlement obligor or the annuity issuer is domiciled in the enacting state or has its principal place of business in that state.<sup>62</sup>

Because of these multiple triggering conditions, many proposed transfers of payment rights are subject to more than one SSPA. That does not mean that these transfers must receive approval from multiple courts. It means simply that the court in the forum state in which a transfer application is filed, normally the payee's home state, should be prepared to consider whether the proposed transfer complies or fails

to comply with the requirements of any other applicable SSPA, insofar as they may differ from the requirements of the forum state's SSPA. Consistent with both the doctrine of comity and the Full Faith and Credit Clause of the Constitution,<sup>63</sup> the courts in any forum state must take into account applicable SSPAs enacted in other states.

Because the substantive requirements of the SSPAs are largely the same, a proposed transfer that meets the requirements of the SSPA in the payee's home state generally will meet all or most of the requirements of any other applicable SSPA. In some cases, additional requirements will come to bear. For example, if a factoring company proposes to acquire structured settlement payment rights from a payee who is domiciled in New Jersey, the transfer will be subject to the New Jersey SSPA, and the application for approval of the transfer will be filed in a New Jersey court. If, however, the underlying structured settlement was approved by a court in Delaware, the transfer will also be subject to the Delaware SSPA. The substantive requirements of the Delaware and New Jersey SSPAs coincide in most respects. If, however, the transfer would conflict with the terms of the structured settlement, the Delaware statute, unlike the New Jersey statute, will require that the court find that the transfer has been "expressly approved in writing" by certain interested parties and by the court that approved the settlement.<sup>64</sup> Thus, in ruling on the transfer application, the court in New Jersey should, in addition to considering the issues that are common to the two statutes, determine whether the proposed transfer has received the approvals required under the Delaware statute.<sup>65</sup>

Recognizing that proposed transfers of payment may be subject to the SSPA(s) of states other than the forum state, a court hearing a transfer application should insist that the applicant's counsel identify all such

other SSPAs and any substantive requirements of these other SSPAs that differ from the requirements of the SSPA of the forum state.

**Notice to interested parties.** With the exception of the Louisiana statute, every SSPA requires that interested parties be given notice and an opportunity to oppose (or to support or otherwise comment on) applications for approval of transfers of payment rights.<sup>66</sup> The term "interested parties" typically is defined to include the payee, certain named beneficiaries, the structured settlement obligor, the annuity issuer, and "any other party that has continuing rights or obligations" under a structured settlement. As courts have recognized, these statutory notice requirements are intended "to insure that due process is afforded to those who may be interested in a proposed transfer."<sup>67</sup> Consistent with their due process function, the notice requirements also reduce the risk that an approved transfer of payment rights will be vulnerable to a future challenge by someone who was a party to the underlying structured settlement and did not participate in the transfer. At a more practical level, notice affords interested parties, especially structured settlement obligors and annuity issuers, an opportunity to identify potential problems affecting a proposed transfer and, where possible, to work with the applicants to resolve those problems consensually.

Although factoring companies derive valuable protection from providing effective notice to interested parties, notices often are misdirected or omitted altogether. Accordingly, courts hearing transfer applications should insist that applicants specifically identify all interested parties and submit proof that they have been duly notified. In cases in which notice requirements may not have been satisfied, courts should insist that they be satisfied before an application is heard.<sup>68</sup>

**Conflicting interests in payment rights.** A payee who is or has been

the subject of a bankruptcy proceeding may not be able to transfer payment rights without having taken appropriate steps to establish that those rights are free of claims of creditors. In most cases, those steps will include exempting the payment rights from administration as property of the payee's bankruptcy estate.<sup>69</sup> A payee's ability to transfer payment rights may also be limited by a divorce decree or separation agreement or by applicable property laws that afford a payee's present or former spouse an interest in payment rights. Circumstances like these should be identified and resolved before a transfer is proposed, let alone submitted for court approval. However, if a court perceives that a payee's bankruptcy trustee or present or former spouse (or anyone else who has not joined in or consented to a proposed transfer) has, or may have, an interest in payment rights that the payee proposes to transfer, the court should insist that the circumstances be examined, disclosed, and resolved to its satisfaction.

### Conclusion

By the time courts are asked to rule on them, most applications for approval of transfers of structured settlement payment rights are unopposed. The interested parties that are most likely to have objections to a proposed transfer—the structured settlement obligor and the annuity issuer—typically will have raised any objections informally and resolved them consensually with the factoring company before a court hears the application.

The absence of opposition does not mean, however, that a transfer application should be granted. Approval of a proposed transfer under applicable SSPA(s) depends, as does exemption from the 40 percent excise tax under IRC section 5891, on express findings that the transfer satisfies the best interest test, that the transfer will not contravene applicable law, and, in most cases, that the payee either has received or has knowingly waived independent professional advice.

These findings should be made only after thorough evaluation of each transfer application and the supporting evidence in light of the statutory mandates and the well-recognized objectives of the SSPAs.

### Endnotes

1. The party contractually obligated to make future settlement payments, referred to in most SSPAs as the "structured settlement obligor," normally is either (1) a property and casualty or workers' compensation insurer (or a self-insured entity), or (2) an "assignment company," typically an affiliate of the annuity issuer, which assumes the direct contractual obligation to make future settlement payments through a "qualified assignment" under IRC § 130.

2. See, e.g., J.G. Wentworth S.S.C. v. Jones, Jefferson Cty., Ky. Cir. Ct. No. 97CI5285, July 20, 1998 Op. and Order at 2, *aff'd*, 28 S.W.3d 309, 315 (Ky. Ct. App. 2000) ("[i]n the four cases here the rate of return to Wentworth varied between 36 and 68 percent per year"); Windsor-Thomas Group, Inc. v. Parker, 782 S.2d 478, 480 (Fla. Dist. Ct. App. 2001) (finding that "from a functional viewpoint" a factoring company's "Fund Acquisition Agreement" with a payee was "a secured promissory note with an annual interest rate of approximately 100 percent"); Press Release, N.Y. Attorney General's Office, Spitzer Announces First-of-Its-Kind Agreement to Protect Consumers Who Win, and Then Sell, Personal Injury Settlements (July 29, 1999) ("in a substantial number of transactions [J.G. Wentworth] effectively received an annual rate of more than 25% of the amount paid to the consumer, and in some cases the rate was as high as 70%").

3. Sponsor's Statement to N.J. Assembly Bill 2146, subsequently enacted as the New Jersey SSPA, *quoted in In re Transfer of Structured Settlement Rights* by Joseph Spinelli, 803 A.2d 172, 175 (N.J. Super. Ct. 2002). See also 2002 Sess. Law News of N.Y., Legis. Mem. ch. 537 (McKinney's) (Assembly Mem. in Support of A6936A, subsequently enacted as the New York SSPA).

4. Each of the current SSPAs is derived from one of several versions of the Model Structured Settlement Protection Act developed by the National Structured Settlements Trade Association and promoted by that association and other insurance industry associations, often in cooperation with state attorneys general, state bar organizations, and others concerned about protecting structured settlements. In September 2000, the National Structured Settlements Trade Association and prominent factoring companies, together with the factoring companies' trade association, the National Association of Settlement Purchasers, agreed

on a combined state and federal legislative package, including a version of the Model Structured Settlement Protection Act that both groups agreed to support. Most of the SSPAs enacted since September 2000 have been closely patterned after that agreed-upon model. In February 2004, that model was adopted by the National Conference of Insurance Legislators as its Model State Structured Settlement Protection Act, replacing a Model Structured Settlement Transfers Protection Act, also derived from the National Structured Settlements Trade Association model legislation and adopted by the National Conference of Insurance Legislators in July 2000.

5. Pursuant to IRC § 7520, the Internal Revenue Service publishes the "Applicable Federal Rate" (also referred to as the "Section 7520 rate" monthly in the *Internal Revenue Service Bulletin*. See *Treas. Reg.* § 1.7520-1. In cases in which transferred payments resemble monthly (or other regular periodic) payments on a loan (i.e., a loan equal in principal amount to the lump sum that the payee receives from the factoring company), factoring transactions can appropriately be analogized to secured loans, and disclosure of effective interest rates may be more informative than disclosure of the present value of the future payments to be transferred. Where the transferred payments include lump sums, however, or where the first transferred payment is not scheduled to be made until long in the future (so that there is, in effect, a prolonged period of negative amortization), disclosure of implied interest rates is less informative, because the transactions bear little resemblance to home mortgage loans or revolving credit arrangements with which payees are likely to be familiar. The SSPAs in four states require disclosure of implied interest rates in addition to disclosure of the discounted present value of transferred payments. See CAL. INS. CODE § 10136(a)(7); LA. REV. STAT. ANN. § 9:2715(B)(2)(g); MASS. GEN. LAWS ANN. ch. 231C § 2(a)(2)(vii); NEB. REV. STAT. § 25-3104(b)(viii).

6. Some SSPAs provide for approval of a transfer of structured settlement payment rights either by a court or, if applicable, by an administrative authority that had exclusive jurisdiction over the settled claim. In practice, such administrative authorities are encountered very rarely. Accordingly, this article refers only to consideration of transfers of payment rights by courts.

7. The SSPAs in four states do not explicitly require findings that transfers will not contravene applicable law or applicable statutes and orders. However, each of those SSPAs includes a provision recognizing that the statute does not authorize any transfer that would contravene applicable law. See IND. CODE ANN. § 34-50-2-9(c)(1); LA. REV. STAT. ANN. § 2715(G); MD. CODE ANN. CTS. & JUD. PROC. § 5-1105(b); W. VA. CODE § 46A-6H-4.

8. The SSPAs that require express findings regarding the fairness and reasonableness of proposed transfers are those enacted in CA, DE, FL, MD, MA, NE, NY, NC, OH, and TN.

9. The SSPAs in the following states include this requirement: AK, AZ, DE, FL, GA, ME, MA, MI, MN, MO, NE, NY, OH, and TN. The West Virginia SSPA requires an express finding of compliance with the disclosure requirements of the act. See W. VA. CODE § 46A-6H3(f)(2).

10. The five states whose SSPAs do not require any findings concerning independent professional advice are GA, IN, KY, TN, and WV.

11. The term "transfer" typically is defined to mean a "sale, assignment, pledge, hypothecation or other alienation or encumbrance of structured settlement payment rights made by a payee for consideration." Thus, a "transfer" entails both alienation of existing payment rights and receipt of consideration by the payee. If future structured settlement payments are rescheduled pursuant to the underlying settlement documents (as originally written or as amended by agreement among the payee, the structured settlement obligor and the annuity issuer) there is no "transfer" within the SSPA definition.

12. The SSPAs of the following states include one or both of these requirements: AK, AZ, CA, CO, CT, FL, ID, IL, IA, LA, MA, MN, MS, MO, NE, NJ, NY, OK, RI, SC, SD, TX, UT, VA, and WA.

13. The SSPAs of the following states include one or both of these provisions: AZ, CA, CO, CT, ID, IL, IA, MS, NJ, NY, OK, RI, SC, SD, TN, TX, UT, VA, and WA.

14. See, e.g., FISCAL YEAR 1999 BUDGET OF THE U.S. GOVERNMENT. GENERAL EXPLANATIONS OF THE ADMINISTRATION'S REVENUE PROPOSALS at 122 (Feb. 1998).

15. See § 115 of H.R. 2884, enacted as Pub. L. No. 107-134, 115 Stat. §§ 2427 *et seq.* Section 115 of H.R. 2884 was taken verbatim from H.R. 1514, 107th Cong., 1st Sess., which was the 107th Congress's version of corresponding bills introduced by the same sponsors in the 106th and 105th Congresses. See S. 1045, 106th Cong., 1st Sess. (proposing enactment of IRC § 5891 imposing an excise tax on structured settlement factoring transactions); H.R. 263, 106th Cong., 1st Sess. (same): S. 2543, 105th Cong., 2d Sess. (same); H.R. 4314, 105th Cong., 2d Sess. (same).

16. By December 2001, when H.R. 2884 passed, SSPAs had been enacted in thirty states. (Several of those SSPAs have since been amended or reenacted to conform more closely to the model legislation.)

17. "Applicable State statute" is defined for this purpose as a statute that provides for entry of the appropriate order, judgment, or decree and has been enacted by:

(A) The State in which the payee of the structured settlement is domiciled, or

(B) If there is no statute described in subparagraph (A), the State in which either the party to the structured settlement [i.e., the structured settlement obligor] . . . or the person issuing the funding asset [i.e., the annuity issuer] for the structured settlement is domiciled or has its principal place of business.

IRC § 5891(b)(3).

18. "Applicable State court" means "a court of the State which enacted" the "applicable State statute," except that if the applicable state statute is not a statute that has been enacted in the payee's home state, the applicable state court may also be "a court of the State in which the payee of the structured settlement is domiciled." IRC § 5891(b)(4). Like many of the SSPAs, § 5891 also contemplates possible approval of a transfer of structured settlement payment rights by an administrative authority that had exclusive jurisdiction over the settled claim. See § 5891(b)(2)(B)(ii) and note 6, *supra*.

19. IRC § 5891(b)(2).

20. The Indiana and Kentucky SSPAs suggest that either the transferee or the payee may apply for approval of a transfer. See IND. CODE ANN. §§ 34-50-2-8(b)(3)(C), 34-50-2-7(4); KY. REV. STAT. ANN. § 454.435. Under the Pennsylvania SSPA, only the payee is authorized to apply. See 40 PA. CONS. STAT. ANN. § 4004.

21. See, e.g., *In re R & P Capital Res., Inc. (Hildreth)*, 772 N.Y.S.2d 461, 464 (N.Y. Sup. Ct. 2003) ("In order to satisfy the court's obligation . . . to make inquiry of the propriety of the transaction for the individual consumer petitioner, a personal appearance necessarily is required."); *In re Transfer of Structured Settlement Proceeds to 321 Henderson Receivables Ltd. P'ship (Dreyer)*, Dubois Cty., Ind. Super. Ct. No. 19D01-0304-MI-0033, June 6, 2003 Order Denying Transfer ¶ 6 ("Absent personal testimony by the payee . . . Petitioner was not able to present evidence or produce information that convinces the court that the transfer contemplated is in the best interest of the payee"); cf. *In re Settlement Funding (Platt)*, 774 N.Y.S.2d 635, 637, 641 (N.Y. Sup. Ct. 2003) (noting that the payee was "present and provided the Court with an opportunity to evaluate credibility, financial acumen, and the extent to which he was or was not being compelled to make the transfer" and stressing "the Court's ability to see and hear the Payee and raise such inquiries as it felt necessary"); *In re 321 Henderson Receivables Ltd. P'ship (DeMallie)*, 769 N.Y.S.2d 859, 860 (N.Y. Sup. Ct. 2003) (payee "did not appear personally before the court, and the court has only fragmentary information about his resources, living situation, health and financial needs").

22. See, e.g., *In re Ovation Capital, LLC (Lizotte)*, 2004 WL 233327, at \*3 (Mass. Super. Ct. 2004) ("[t]he burden rests with the payee to demonstrate that the proposed transfer is in his best interests"). In seventeen states, allocation of

the burden of proof is codified in SSPA provisions stating that the transferee is solely responsible for fulfilling the conditions for an effective transfer. The states that have this SSPA provision are AZ, CO, CT, ID, IL, IA, MS, NJ, NY, OK, RI, SC, SD, TX, UT, VA, and WA.

23. IRC § 5891(b)(2)(A)(ii).

24. *In re Settlement Funding (Cunningham)*, 761 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003).

25. *DeMallie*, 769 N.Y.S.2d at 863; *In re Settlement Funding (Asproules)*, 2003 N.Y. Slip Op. 51638(U) at \*3 (N.Y. Sup. Ct. Dec. 30, 2003); but see also *In re Settlement Capital Corp. (Ballos)*, 769 N.Y.S.2d 817, 823 (N.Y. Sup. Ct. 2003) (declining "to adopt, as a general proposition, a 'best interest' standard that bespeaks of 'desperate or dire straits' or a 'life or death emergency'"); accord, *In re David Lantz, Steuben Cty., N.Y. Sup. Ct.*, Index No. 88477, Jan. 9, 2004, Decision at 3. In discussing the best interest test, several New York courts have cited legislative history suggesting that under the New York SSPA transfers should be approved only in cases involving "true hardship." E.g., *DeMallie*, 769 N.Y.S.2d at 862; *Ballos*, 769 N.Y.S.2d at 818 n.1. The New York SSPA has recently been amended to state that "[p]rovided the court makes the [best interest/fairness and reasonableness] findings . . . there is no requirement for the court to find that an applicant is suffering from a hardship to approve the transfer of structured settlement payment rights." 2004 N.Y. Laws ch. 480 (amending N.Y. GEN. OBLIG. LAW § 5-1706(b)).

26. *In re Structured Settlement Payment Rights of Mario Curto, Phila. Cty., Pa. Ct. of Common Pleas*, Sept. Term 2003 No. 03714, Mar. 23, 2004 Mem. at 4.

27. *Settlement Capital Corp. v. State Farm Mut. Auto. Ins. Co. (Lundgren)*, 646 N.W.2d 550, 556 (Minn. Ct. App. 2002) (citations omitted).

28. *In re Petition of Settlement Capital Corp. (Platt)*, 774 N.Y.S.2d 635, 638-39 (N.Y. Sup. Ct. 2003) (citing *Lundgren*, *Spinelli*, 803 A.2d 172, and *Ballos*, 769 N.Y.S.2d 817). See also *Lizotte*, 2004 WL 233327, at \*3.

29. *Spinelli*, 803 A.2d 172, 175.

30. *Curto*, *supra* note 26, at 3.

31. *DeMallie*, 769 N.Y.S.2d at 861.

32. *In re Johnny Bush, Allegheny Cty., Pa. Ct. of Common Pleas*, Civ. No. GD04-008825, Apr. 29, 2004 Opinion and Order at 4.

33. *Asproules*, 2003 N.Y. Slip Op. 51638(U) at \*4.

34. See, e.g., *Cunningham*, 761 N.Y.S.2d at 819 ("initially an interest rate of no more than 8% would be 'fair and reasonable' so long as the transferee does not charge its counsel fees and costs to the payee as transfer expenses"). In three states, the SSPAs themselves impose statutory ceilings on discount rates. See MICH. COMP. LAWS ANN. § 691.1193(1)(a)(vi) (discount rate "used in determining the discounted present value of the structured settlement pay-

ments to be transferred may not exceed 25% per year"); NEB. REV. STAT. § 25-3104(5) (transferee may not "contract for or receive a discount or finance charge that would result in an effective annual rate in excess of the maximum interest rate per year applicable in Nebraska to a consumer loan"); N.C. GEN. STAT. § 1-543.12(6) ("[t]he discount rate used in determining the net amount payable to the payee . . . does not exceed an annual percentage rate of prime plus five percentage points calculated as if the net amount payable to the payee . . . was the principal amount of a consumer loan").

35. *DeMallie*, 769 N.Y.S.2d at 861. See also, e.g., *Platt*, 774 N.Y.S.2d at 641 ("[n]o universal percent prohibition can be adopted as a judicial standard, given the need for flexibility and the function delegated to the courts to use their discretion"); *In re Ryan Barr*, 2004 WL 2008607, at \*2-\*4 (N.Y. Sup. Ct. 2004); *Bush*, *supra* note 32, at 4.

36. See, e.g., *Davis v. Travelers Cas. & Sur. Co.*, 2002 Conn. Super. LEXIS 2256, at \*8 (June 10, 2002); *Ballos*, 769 N.Y.S.2d at 825-29; *In re Chrystal Dashnaw*, Washington Cty., N.Y. Sup. Ct., Index No. 57-1-2003-0206, July 31, 2003 Order and Judgment at 3.

37. *In re Rapid Settlements, Ltd. (Phillips)*, 2004 WL 3214459, at \*2 (N.Y. Sup. Ct. Oct. 24, 2004) (citations omitted). See also, e.g., *Cunningham*, 761 N.Y.S.2d at 818-19; *Ballos*, 769 N.Y.S.2d at 826 ("basing a determination upon the comparable or prevailing interest rates in the industry is dubious"); *DeMallie*, 769 N.Y.S.2d at 861-62; *Spinelli*, 803 A.2d 172 at 178-79.

38. *Hildreth*, 772 N.Y.S.2d at 463.

39. If the party opposing an application is the structured settlement obligor or the annuity issuer, it typically will have little or no information about the payee. If the party opposing the application is a member of the payee's family or someone else who has continuing rights or obligations under the payee's structured settlement, the opponent, although perhaps acquainted with the payee's situation, is likely to be appearing pro se. Thus, even when an application is opposed, the opponent is not likely to conduct any searching cross-examination.

40. For a detailed account of such sales tactics, see *Wiggins v. Peachtree Settlement Funding (In re Wiggins)*, 273 B.R. 839, 849-50 (Bankr. D. Idaho 2001).

41. See *In re Jessica Reehl, Rensselaer Cty.* N.Y. Sup. Ct., Index No. 207392, Apr. 29, 2003 Decision/Order at 5 ("the Court is of the view that in order to assess the overall best interest of the payee, and the welfare of the payee's dependents, the application should disclose whether other periodic payments have been transferred, the date of such transfer(s), and the consideration received"). Transfer applications do not generally include such information. Nor do they include information about other

instances in which proposed transfers by a payee may have been disapproved by other courts. When a transfer application has been disapproved in one forum (or withdrawn in response to opposition), it is not uncommon for a similar application, making no reference to the application that was disapproved (or withdrawn), to be filed in another forum.

42. See, e.g., *Phillips*, 2004 WL 3214459, at \*1: When . . . [the payee's first transfer of payment rights] was brought before this court for approval, Phillips claimed that she was going to use the money to put a down payment on a home, purchase a used car to enable her to work at Wal-Mart, purchase clothes for her son and furniture for the house, and put the remainder into a savings account. . . . That clearly did not happen, however, because she is once again before the court looking to sell her final payment, for even less cash, again to put a down payment on a home.

43. *Spinelli*, 803 A.2d at 178.

44. See N.Y. GEN. OBLIG. LAW § 5-1703(d).

45. See note 5, *supra*.

46. See *Barr*, 2004 WL 2008607, at \*1 ("[w]here fees are imposed on a modest advance payment, doing so results in a dramatic increase to the effective rate of interest if the advance were considered a loan. For example, in *Asproules*, the 19.82% discount rate jumped to an effective loan rate of 22.49% since the \$2.200 in fees reduced Mr. Asproules' gross advance of \$16,200 to a net of \$14,000.").

47. In particular, payees seeking to transfer payments for the second (or third or fourth) time may effectively have been locked into dealing with the same factoring companies with which they dealt before. Factoring agreements, especially those entered into before enactment of SSPAs and IRC § 5891, often create encumbrances that extend to all of a payee's payment rights, not just the specific payment rights that are sold (or earmarked to repay a secured loan). These encumbrances can make it difficult, time-consuming and costly for a payee contemplating a second (or subsequent) factoring transaction to do business with a different factoring company. Even when there is no encumbrance in favor of the first factoring company with which a payee has done business, practical considerations often make it difficult for a payee to change factoring companies unless all of the payments assigned to the first factoring company have been made before the payee proposes to transfer payment rights to a different company. The discount/interest rates offered to payees in second (or subsequent) transactions are often higher, sometimes substantially higher, than the rates charged in initial transactions.

48. CALIFORNIA ATTORNEY GENERAL'S OFFICE, IMPACT OF PRIOR COURT APPROVAL ON THE TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS 9-10, tables 4-7 (2004). In these tables, "contract price" refers to the net payment made by the factoring company in

exchange for transferred payment rights, and "present value" refers to the discounted present value of transferred future payments, as calculated using the discount rate published by the Internal Revenue Service for purposes of valuing annuities, i.e., the Applicable Federal Rate described in note 5, *supra*.

49. Until January 2002, the California SSPA did not require that transfers receive prior court approval, although it did require that transfer agreements be filed with the Attorney General's Office. Hence the data for 2000 and 2001 reflect a regime in which the fairness and reasonableness of transfer terms was not subject to judicial evaluation. The data for 2002 and 2003 cover transactions that were subject to court approval but without regard to whether the transactions were approved. (Most were.) Interview with Cynthia Robinson, Associate Governmental Program Analyst, Office of the California Attorney General, March 8, 2005. Thus, the rates for all years covered in the California study are those that factoring companies charged, or sought to charge, not rates that courts necessarily approved.

50. The "effective-equivalent" interest rates from which these mean and median figures are derived were taken directly from the factoring companies' disclosures of "effective equivalent interest rates," as required under CAL. INS. CODE § 10136(a)(7). Interview with Cynthia Robinson, Associate Governmental Program Analyst, Office of the California Attorney General, March 8, 2005. Those disclosures in many cases would have understated the effective cost of borrowing for customers of factoring companies that charge fees that are deducted from the transaction proceeds. See note 46, *supra*.

51. See, e.g., *Florida Asset Financing Corp. v. Utah Labor Comm'n*, 2004 UT App. 273, 98 P.3d 436, 439-40 (Utah Ct. App. 2004), cert. granted, \_\_\_ P.3d \_\_\_, 2004 WL 3210799 (Utah Dec. 3, 2004) (contrasting Utah's Workers' Compensation statute with those of states that "explicitly prohibit the assignment of [worker's compensation] benefits," including the statutes of Arizona, California, Florida, Kentucky, and Nevada); *J.G. Wentworth, S.S.C., L.P. v. SAFE-CO Life Ins. Co.*, 755 So. 2d 138, 139 (Fla. Dist. Ct. App. 1999) (affirming summary judgment invalidating purported purchase of future payments under settlement of Florida workers' compensation claim); *In re Roger Dunn*, 2005 WL 758610, at \*1 (Ind. Cir. Ct. 2005) (finding that the Illinois Workers' Compensation Act prohibited transfer of payment rights under a workers' compensation settlement), appeal noticed Apr. 5, 2005; *Bernard Johnson v. Friendly Hiking Servs., Inc.*, Cal. Workers' Comp. App. Bd. No. SF405873, June 12, 1998 Minutes of Hearing and Order ("under [California] Labor Code § 4900, a claim for Workers' Compensation, including payments of compensation to be made under a settlement agreement, cannot be assigned before payment").



52. The states in this category are CA, CO, FL, ID, IN, KY, LA, MD, MN, NE, NY, NC, OH, SC, TN, and WV. *Cf. In re StratCap Invs., Inc.*, 796 N.E.2d 73 (Ohio Ct. App. 2003) (finding that definition of "structured settlement" in Ohio SSPA does not extend to settlements of workers' compensation claims); *Dunn*, 2005 WL 758610, at \*2 (same, under Indiana SSPA).

53. *See, e.g.*, COLO. REV. STAT. § 13-64-209 (restricting assignment of rights to receive periodic payments under postjudgment settlements of medical malpractice actions); 735 ILL. COMP. STAT. § 5/2-1715 (same); MONT. CODE ANN. § 25-9-405 (same); N.Y. C.P.L.R. §§ 5038, 5048 (same); *see also, e.g.*, J.G. Wentworth S.S.C. L.P. v. Ortega, Palm Beach Cty., Fla. Civ. No. CA-02-03013 AJ, July 2, 2002 Final Order ¶ 3 ("The proposed transfer of structured settlement payment rights from Ortega to Wentworth would 'contravene other applicable law' because it would . . . violate the provisions of New York Civil Practice Law and Rules § 5041 *et seq.* . . . which created and governs Ortega's payment rights and which . . . prohibits transfer of such rights.").

54. *Cf. N.Y. C.P.L.R. § 1206(c)* ("the ability of an infant who has attained the age of eighteen years to accelerate the receipt of future installment payments pursuant to a structured settlement agreement shall be governed by the terms of such agreement").

55. *See, e.g.*, J.G. Wentworth S.S.C. L.P. v. Callahan, 649 N.W.2d 694, 699 (Wis. Ct. App. 2002) and cases cited therein.

56. *See, e.g., In re Emerald Funding Corp.* (*Brown*), Monroe Cty., N.Y. Sup. Ct. Index No. 2003/3376, June 4, 2003, Mem. Decision at 7 ("If prior to the act [the New York SSPA] a clause such as the one at issue here barred assignment . . . it should operate just as effectively afterwards."); *Lizotte*, 2004 WL 233327 at \*4; *Rapid Settlements, Ltd. v. SAFECO Nat. Life Ins. Co.* (*Morgan*), 2005 WL 246458, at \*2 (Conn. Super. Ct. Jan. 4, 2005) (disapproving application under Connecticut SSPA based on contravention of anti-assignment provisions); *In re Transfer by Raye Ann Brown*, Del. Cty., Ind. Cir. Ct. No. 18C03-0204-PL-11, July 3, 2002 Order (same, under Indiana SSPA); *In re Transfer [by] Vincent Zarbaugh*, Franklin Cty., Ohio Probate Ct. No. 484364, Jan. 14, 2002 Entry (same, under Ohio SSPA); *In re Transfer [by] Troy Walker*, Fayette Cty., Tenn. Cir. Ct. No. 4647, Feb. 23, 2005 Order (same, under Tennessee SSPA); *cf. Platt*, 774 N.Y.S.2d 635, 639-40 (citing cases under New York SSPA in which insurers objected to transfers based on antiassignment provisions); *but see also Spinelli*, 803A.2d 172, 181 (approving transfer over insurer's objection; finding that antiassignment provision did not nullify the transfer); *Lundgren*, 646 N.W.2d 550, 554 ("the court is arguably empowered to override an antiassignment clause").

57. The SSPAs in the following states require a finding that the payee has actually received independent professional advice: AK, DE, FL,

LA, ME, MD, MA, MI, MN, NC, and OH.

58. *See, e.g., In re Approval for Transfer of Structured Settlement by Renee Woodard*, Linn Cty., Iowa Dist. Ct. No. LACV 043227, Nov. 8 Order Denying Petition (attorney's letter "was in virtually identical form to those of attorneys' letters in similar proceedings reviewed by this Court. . . . [Attorney] further advised this Court that his name had been provided to Ms. Woodard on a list of attorneys suggested by [the factoring company]. . . . In light of the manner in which representation was provided to Ms. Woodard, a serious question arises as to how the attorneys on [the factoring company's] attorneys list are paid."); *Zarbaugh*, *supra* note 56, at 3 ("The Court notes that the [attorney's] letter is a pre-printed form . . . which [the factoring company] provided to [the attorney]. At the hearing, Counsel for [the factoring company] explained to the Court that [the attorney's] name appears on a list of attorneys that [the factoring company] provided to [the payee]. Additionally, the Court notes that at the bottom of the letter, [the attorney] advises [the factoring company] to 'send a \$300.00 check . . . this payment will represent payment in full of my legal fees for services rendered to [the payee] regarding this matter.'")

59. Many SSPAs define the term "independent professional advice" (or an equivalent term) in a manner that disqualifies advice rendered by anyone who is affiliated with or compensated by a transferee. Definitions of this kind appear in the SSPAs of the following states: AK, CA, DE, FL, LA, ME, MD, MA, MI, MN, MO, NY, NC, and OH.

60. *See Cunningham*, 761 N.Y.S.2d at 818 ("these applications should be treated as coming without the independent advisor's endorsement unless the advisor submits an affidavit expressly stating that he or she endorses the transfer and gives specific reasons for doing so").

61. Unlike other SSPAs, the Indiana, Nevada, and West Virginia statutes do not specify the conditions under which they apply.

62. This combination of triggering conditions appears in the SSPAs of the following states: CT, IL, IA, MS, NJ, NY, OK, RI, SD, TX, UT, VA, and WA.

63. U.S. CONST. art IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State"); *see also* 28 U.S.C. § 1738 (implementing the Full Faith and Credit Clause).

64. *See* DEL. CODE ANN. tit. 10, § 6602(p)(2) (definition of "structured settlement payment rights"), § 6601(5)a.1-2 (requiring approvals).

65. Two courts have considered and rejected constitutional objections to application of the SSPA(s) of states other than the state in which a payee is domiciled. *See Legal Asset Funding, LLC v. Travelers Cas. & Sur. Co.*, 155 F. Supp. 2d 90 (D.N.J. 2001) (confirming applicability of Connecticut SSPA to a transfer of payment rights by a Texas resident); *Settlement Funding LLC v.*

*Hunt*, St. Louis Cty. Mo. Cir. Ct. Cause No. 01 CC-2247, Sept. 10, 2002 Judgment (finding Kentucky SSPA applicable to a transfer by a payee allegedly residing in Missouri).

66. The Louisiana SSPA provides for authorization of a transfer of structured settlement payment rights "in advance by ex parte order." LA. REV. STAT. ANN. § 2715.B(1). It is not clear how this procedure can be reconciled with due process. In practice, however, interested parties generally are notified of applications made under the Louisiana SSPA.

67. *In re Katherine Campina*, Benton Cty. Minn. Dist. Ct. No. C5-99-1177, Jan. 10, 2002 Order at 8 (vacating prior order under Minnesota SSPA approving transfer in the absence of notice to certain interested parties).

68. Courts should also be prepared to consider whether there are parties who may not fall within the applicable SSPA definition(s) of "interested parties" but may nevertheless be indispensable parties. If, for example, a payee has been party to a previous factoring transaction, the transferee in that prior transaction may have (or claim to have) an interest that extends to payment rights that are the subject of a new application. Whether or not the prior transferee qualifies as an interested party under the applicable SSPA(s), it should nevertheless be made party to the new proceeding, based on applicable joinder rules because the prior transferee claims an interest in the subject payment rights. Disposition of the new application in the prior transferee's absence may impair its ability to protect its claimed interest and may leave the structured settlement obligor and annuity issuer subject to substantial risks of incurring double obligations. *Cf. Fed. R. Civ. P. 19(a)*.

69. Depending on the nature of the underlying settlement, structured settlement payment rights may qualify for exemption under any of a variety of federal and state laws, including, for example, § 522(d)(11) of the Bankruptcy Code, the Federal Employees' Compensation Act, 5 U.S.C. § 8130, state workers' compensation laws, and state insurance laws applicable to annuity contracts.

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## **APPENDIX B**

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*173 Cal. App. 4th 1059, \**; *93 Cal. Rptr. 3d 321, \*\**;  
*2009 Cal. App. LEXIS 687, \*\*\**; *69 U.C.C. Rep. Serv. 2d (Callaghan) 22*

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321 HENDERSON RECEIVABLES ORIGINATION LLC, Plaintiff and Appellant, v. CYNTHIA ELAINE SIOTECO et al., Defendants and Respondents. [And 10 other cases.] \*

\* *In re Moua* (Super. Ct. Fresno County, No. 08CECG00111); *In re Goodwin* (Super. Ct. Fresno County, No. 08CECG00165); *In re Vivian* (Super. Ct. Fresno County, No. 08CECG00390); *In re Raney* (Super. Ct. Fresno County, No. 08CECG00493); *In re Bowles* (Super. Ct. Fresno County, No. 08CECG00631); *In re Cook* (Super. Ct. Fresno County, No. 08CECG00639); *In re Castellanoz* (Super. Ct. Fresno County, No. 08CECG00644); *In re Wenstrom* (Super. Ct. Fresno County, No. 08CECG00772); *In re Duran*. (Super. Ct. Fresno County, No. 08CECG00823); *In re Cox* (Super. Ct. Fresno County, No. 08CECG00847).

F056205

COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

173 Cal. App. 4th 1059; 93 Cal. Rptr. 3d 321; 2009 Cal. App. LEXIS 687; 69 U.C.C. Rep. Serv. 2d (Callaghan) 22

May 6, 2009, Filed

**PRIOR HISTORY: [\*\*\*1]**

APPEAL from a judgment of the Superior Court of Fresno County, No. 08CECG00848, Alan M. Simpson, Judge.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant factoring company sought review of a final order from the Superior Court of Fresno County (California), which, in consolidated cases, denied its petitions for approval of transfer of structured settlement payments under the Structured Settlement Transfer Act, [Ins. Code, § 10136 et seq.](#), from respondent transferors.

**OVERVIEW:** After a tentative ruling found a petition in an unrelated case to be defective, the factoring company sought voluntary dismissal with prejudice of its pending petitions. Instead, the trial court denied the petitions. The court concluded that the company was not



entitled to voluntarily dismiss the pending petitions because they were not complaints as defined in [Code Civ. Proc., § 581, subd. \(a\)\(2\)](#), and because trial had commenced. Absent any objections by interested parties, [Cal. U. Com. Code, § 9408](#), did not bar court-approved structured settlement transfers containing anti-assignment provisions. The prohibition against usury in [Cal. Const., art. XV, § 1](#), was not implicated because a structured settlement transfer was not a loan or forbearance but was instead a sale, as indicated in [Ins. Code, § 10136, subd. \(b\)](#). Some findings on independent professional advice under [Ins. Code, §§ 10134, subd. \(f\), 10139.5, subd. \(a\)\(2\)](#), were erroneous. Printing most of the disclosures in 14-point type size and bolded, while enclosing only the required disclosures in a box with a bolded border, was permissible. [Ins. Code, § 10137](#), did not allow voiding of previously court-approved transfers.

**OUTCOME:** The court reversed the trial court's order and remanded with directions to allow the factoring company to amend the petitions to correct any errors prior to any new hearing on the petitions.

**CORE TERMS:** payee's, structured settlement, structured, settlement payments, antiassignment, professional advice, settlement, intangible, advice, disclosure, factoring, annuity, consolidated, security interests, settlement agreement, actual commencement of trial, voluntary dismissal, legal conclusion, transferor, Transfer Act SSTA, public policy, annuity contract, tentative rulings, estoppel letters, promissory note, periodic, obligor, independent counsel, type size, court-approved

## LEXISNEXIS® HEADNOTES


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**HN1** Where the issues raised on appeal are legal issues, they are reviewed de novo. The application of a statute to undisputed facts is a question of law subject to de novo review. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN2** Whether a factoring transaction is usurious is a question of law subject to independent review. [More Like This Headnote](#)


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**HN3** The proper interpretation of constitutional or statutory provisions is a question of law subject to de novo review. [More Like This Headnote](#)


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**HN4** Courts must ascertain legislative intent so as to effectuate a law's purpose. In the construction of a statute, the office of the judge is simply to ascertain and declare what is contained therein, not to insert what has been omitted, or to omit what has been inserted. Legislative intent will be determined so far as possible from the language of statutes, read as a whole, and if the words are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. 'The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [More Like This Headnote](#)


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**HN5** [Code Civ. Proc., § 581](#), provides ways for a party to dismiss an action and ways for a plaintiff or the trial court to dismiss a complaint. Besides distinguishing methods of dismissals for an action and a complaint, [§ 581](#) also distinguishes between the time period before actual commencement of trial and the time period after actual commencement of trial. For example, after actual commencement of trial, a party may dismiss an action with or without prejudice only with written consent of all other parties. [§ 581, subd. \(b\)\(2\)](#). Similarly, after actual commencement of trial, a plaintiff can only voluntarily dismiss its complaint with prejudice. [§ 581, subd. \(e\)](#). [Section 581](#) defines "action," "complaint," "plaintiff," and actual commencement of "trial." [§ 581, subd. \(a\)](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


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**HN6** A proceeding to approve a Structured Settlement Transfer Act (SSTA), [Ins. Code, § 10136 et seq.](#), petition is an action for the purposes of [Code Civ. Proc., § 581](#). Also, the SSTA petitioner or the transferee is a plaintiff for the purpose of [§ 581](#). [More Like This Headnote](#)


[Civil Procedure](#) > [Dismissals](#) > [Voluntary Dismissals](#) > [General Overview](#) 

**HN7** Apart from certain statutory exceptions, a plaintiff's right to a voluntary dismissal under [Code Civ. Proc., § 581](#), appears to be absolute. Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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**HN8** See [Code Civ. Proc., § 581, subd. \(a\)\(2\)](#).



[Civil Procedure](#) > [Dismissals](#) > [Voluntary Dismissals](#) > [General Overview](#) 

[Torts](#) > [Procedure](#) > [Settlements](#) > [Structured Settlements](#) > [Transfers](#) 


*HN9* [Code Civ. Proc., § 581](#), does not include "petition" in its definition of "complaint."

 Thus, a Structured Settlement Transfer Act, [Ins. Code, § 10136 et seq.](#), petition is not a complaint for the purposes of [§ 581](#). [More Like This Headnote](#)

[Commercial Law \(UCC\)](#) > [Secured Transactions \(Article 9\)](#) > [Third Party Rights](#) > [Assignments](#) 


*HN10* See [Cal. U. Com. Code, § 9408](#).



[Commercial Law \(UCC\)](#) > [Secured Transactions \(Article 9\)](#) > [Third Party Rights](#) > [Assignments](#) 

[Torts](#) > [Procedure](#) > [Settlements](#) > [Structured Settlements](#) > [Transfers](#) 

*HN11* The plain language of [Cal. U. Com. Code, § 9408, subds. \(a\), \(b\)](#), indicates that contractual restrictions on assignments or transfers of general intangibles are generally ineffective to the extent that the restrictions impair the creation of security interests arising out of a sale of the payment intangible or to the extent that the restrictions provide that the assignment or transfer of the general intangible is a breach of the contract. [Section 9408, subd. \(c\)](#), applies to any statutory restrictions on assignment or transfers of general intangibles, although [§ 9408, subd. \(e\)](#), provides that [§ 9408, subd. \(c\)](#), does not apply to the Structured Settlement Transfer Act, [Ins. Code, § 10136 et seq.](#) [Section 9408](#) is applicable to structured settlement payments because the structured settlement payments are considered general intangibles and because the California Uniform Commercial Code does not contain the uniform provision excluding annuities from its reach. [More Like This Headnote](#)

[Commercial Law \(UCC\)](#) > [Secured Transactions \(Article 9\)](#) > [Third Party Rights](#) > [Assignments](#) 

[Torts](#) > [Procedure](#) > [Settlements](#) > [Structured Settlements](#) > [Transfers](#) 


*HN12* [Cal. U. Com. Code, § 9408](#), evidences a public policy against anti-assignment provisions in general. The Structured Settlement Transfer Act, [Ins. Code, § 10136 et seq.](#), evidences a public policy in favor of court-approved factoring transactions. Thus, public policy favors the legal conclusion that anti-assignment provisions do not bar court-approved transfers of structured settlement payments. [More Like This Headnote](#)

[Contracts Law](#) > [Defenses](#) > [Usury](#) 


*HN13* See [Cal. Const., art. XV, § 1](#).



Contracts Law > Defenses > Usury 


**HN14** A loan that charges an interest rate greater than 10 percent per annum is  
 usurious. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


Contracts Law > Defenses > Usury 

**HN15** Without a loan or forbearance, usury cannot exist. [More Like This Headnote](#)  



Torts > Procedure > Settlements > Structured Settlements > Transfers 

**HN16** See [Ins. Code, § 10136, subd. \(b\)](#).  



Torts > Procedure > Settlements > Structured Settlements > Transfers 


**HN17** The transfer of structured settlement payment rights under the Structured  
 Settlement Transfer Act, [Ins. Code, § 10136 et seq.](#), is not a loan secured by  
assignment of periodic payments but is a sale of certain rights to receive periodic  
payments. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


Torts > Procedure > Settlements > Structured Settlements > Transfers 

**HN18** The Structured Settlement Transfer Act, [Ins. Code, § 10136 et seq.](#), requires that  
 a superior court must find that the payee has been advised in writing by the  
transferee to seek independent professional advice regarding the transfer and has  
either received that advice or knowingly waived that advice in writing before the  
superior court can approve the transfer. [Ins. Code, § 10139.5, subd. \(a\)\(2\)](#). [More Like  
This Headnote](#) | [Shepardize: Restrict By Headnote](#)

Torts > Procedure > Settlements > Structured Settlements > Transfers 


**HN19** See [Ins. Code, § 10134, subd. \(f\)](#). [Shepardize: Restrict By Headnote](#)  



Torts > Procedure > Settlements > Structured Settlements > Transfers 


**HN20** The Structured Settlement Transfer Act (SSTA), [Ins. Code, § 10136 et seq.](#),  
 provides that independent professional advice means advice of an attorney, certified  
public accountant, actuary, or other licensed professional adviser concerning the  
legal, tax, or financial implications of a structured settlement or a transfer of  
structured settlement payment rights. The language suggests that the independent  
professional is required to provide advice on the legal, tax or financial implications of

a structured settlement or a transfer of structured settlement rights; however, the SSTA does not unambiguously require that one independent professional must provide all three types of advice. Moreover, with respect to legal advice, non-attorneys must be wary of the prohibition on not practicing law. The SSTA also does not detail specifically what constitutes adequate advice on the legal, tax, or financial implications of the factoring transaction. It is left to the superior court to determine whether adequate independent professional advice has been provided to the payee. The discretionary nature of this determination cautions against a finding of attorney incompetence based upon a failure to provide the required advice because certain superior court judges may believe some advice is required while other superior court judges may believe that that same advice is not required by the SSTA. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Torts](#) > [Procedure](#) > [Settlements](#) > [Structured Settlements](#) > [Transfers](#) 


**HN21**  A Structured Settlement Transfer Act (SSTA), [Ins. Code, § 10136 et seq.](#), petition can be granted if the payee knowingly waives receipt of independent professional advice in writing. [Ins. Code, § 10139.5, subd. \(a\)\(2\)](#). Thus, a finding that the payee did not receive independent professional advice does not preclude a subsequent refiling of the same SSTA petition that includes such written waivers. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)


[Torts](#) > [Procedure](#) > [Settlements](#) > [Structured Settlements](#) > [Transfers](#) 


**HN22**  The Structured Settlement Transfer Act (SSTA), [Ins. Code, § 10136 et seq.](#), does not require that some disclosures be in 14-type size and other portions be in smaller type-size. Rather, it requires that some portions of the disclosures be at least or no less than 12-point type, and that other portions be printed in 14-point type, circumscribed by a box with a bold border. Thus, it is not a violation of the SSTA to print most of the disclosures in 14-point type size and bolded, while enclosing only the required disclosures in a box with a bolded border. [More Like This Headnote](#)

[Civil Procedure](#) > [Dismissals](#) > [Voluntary Dismissals](#) > [Court Orders](#) > [Conditions](#) 

[Torts](#) > [Procedure](#) > [Settlements](#) > [Structured Settlements](#) > [Transfers](#) 

**HN23**  A superior court has the discretion to condition an order dismissing a Structured Settlement Transfer Act (SSTA), [Ins. Code, § 10136 et seq.](#), petition without prejudice to require that future SSTA petitions involving the same payees and annuity attach the prior dismissal order. [More Like This Headnote](#)

[Torts](#) > [Procedure](#) > [Settlements](#) > [Structured Settlements](#) > [Transfers](#) 

**HN24**  A superior court cannot void a previously court-approved Structured Settlement Transfer Act, [Ins. Code, § 10136 et seq.](#), transfer pursuant to [Ins. Code, § 10137](#). [More Like This Headnote](#)

**SUMMARY:**

## CALIFORNIA OFFICIAL REPORTS SUMMARY

In consolidated cases, the trial court denied a factoring company's petitions for approval of transfer of structured settlement payments under the Structured Settlement Transfer Act (**Ins. Code, § 10136 et seq.**) from respondent transferors. After a tentative ruling found a petition in an unrelated case to be defective, the factoring company sought voluntary dismissal with prejudice of its pending petitions. Instead, the trial court denied the petitions. (Superior Court of Fresno County, No. 08CECG00848, Alan M. Simpson, Judge.)

The Court of Appeal reversed the trial court's order and remanded with directions to allow the factoring company to amend the petitions to correct any errors prior to any new hearing on the petitions. The court concluded that the company was not entitled to voluntarily dismiss the pending petitions because they were not complaints as defined in **Code Civ. Proc., § 581, subd. (a)(2)**, and because trial had commenced. Under the public policy evidenced by **Cal. U. Com. Code, § 9408**, where no interested parties have objected, the antiassignment provisions in the annuity contract, settlement agreement, or other related contracts do not bar transfers of structured settlement payment rights. The prohibition against usury in **Cal. Const., art. XV, § 1**, was not implicated because a structured settlement transfer is not a loan or forbearance but is instead a sale, as indicated in **Ins. Code, § 10136, subd. (b)**. The court also concluded that many of the trial court's findings on independent professional advice were erroneous. Further, the court held that printing most of the disclosures in 14-point type size and bolded, while enclosing only the required disclosures in a box with a **[\*1060]** bolded border, was permissible. **Ins. Code, § 10137**, does not allow voiding previously court-approved transfers. (Opinion by Ardaiz, P. J., with Cornell and Gomes, JJ., concurring.)

**HEADNOTES**

## CALIFORNIA OFFICIAL REPORTS HEADNOTES

**CA(1) ↓(1) Statutes § 21—Construction—Legislative Intent—Effectuating Purpose of Law.**—Courts must ascertain legislative intent so as to effectuate a law's purpose. In the construction of a statute, the office of the judge is simply to ascertain and declare what is contained therein, not to insert what has been omitted, or to omit what has been inserted. Legislative intent will be determined so far as possible from the language of statutes, read as a whole, and if the words are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.

**CA(2) ↓(2) Dismissal and Nonsuit § 2—Definitions and Distinctions—Action and Complaint.**—**Code Civ. Proc., § 581**, provides ways for a party to dismiss an action and ways for a plaintiff or the trial court to dismiss a complaint. Besides distinguishing methods of dismissals for an action and a complaint, **§ 581** also distinguishes between the time

period before actual commencement of trial and the time period after actual commencement of trial. For example, after actual commencement of trial, a party may dismiss an action with or without prejudice only with written consent of all other parties (§ 581, subd. (b)(2)). Similarly, after actual commencement of trial, a plaintiff can only voluntarily dismiss its complaint with prejudice. (§ 581, subd. (e)). Section 581 defines “action,” “complaint,” “plaintiff,” and actual commencement of “trial” (§ 581, subd. (a)).

**CA(3) ↓(3) Dismissal and Nonsuit § 2—Definitions and Distinctions—Action—Structured Settlement Transfer Petition.**—A proceeding to approve a Structured Settlement Transfer Act (SSTA) (**Ins. Code, § 10136 et seq.**) petition is an action for the purposes of **Code Civ. Proc., § 581**. Also, the SSTA petitioner or the transferee is a plaintiff for the purpose of § 581.

**CA(4) ↓(4) Dismissal and Nonsuit § 3—Voluntary Dismissal—Right to Voluntary Dismissal.**—Apart from certain statutory exceptions, a plaintiff’s [**\*1061**] right to a voluntary dismissal under **Code Civ. Proc., § 581**, appears to be absolute. Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action.

**CA(5) ↓(5) Dismissal and Nonsuit § 2—Definitions and Distinctions—Complaint—Structured Settlement Transfer Petition.**—**Code Civ. Proc., § 581**, does not include “petition” in its definition of “complaint.” Thus, a Structured Settlement Transfer Act (**Ins. Code, § 10136 et seq.**) petition is not a complaint for the purposes of § 581.

**CA(6) ↓(6) Secured Transactions § 4—Security Agreement—General Intangibles—Antiassignment Provisions—Structured Settlement Transfers.**—The plain language of **Cal. U. Com. Code, § 9408, subds. (a), (b)**, indicates that contractual restrictions on assignments or transfers of general intangibles are generally ineffective to the extent that the restrictions impair the creation of security interests arising out of a sale of the payment intangible or to the extent that the restrictions provide that the assignment or transfer of the general intangible is a breach of the contract. **Section 9408, subd. (c)**, applies to any statutory restrictions on assignment or transfers of general intangibles, although § 9408, subd. (e), provides that § 9408, subd. (c), does not apply to the Structured Settlement Transfer Act (**Ins. Code, § 10136 et seq.**). **Section 9408** is applicable to structured settlement payments because the structured settlement payments are considered general intangibles and because the California Uniform Commercial Code does not contain the uniform provision excluding annuities from its reach.

**CA(7) ↓(7) Secured Transactions § 4—Security Agreement—General Intangibles—Antiassignment Provisions—Structured Settlement Transfers.**—**Cal. U. Com. Code, § 9408**, evidences a public policy against antiassignment provisions in general. The Structured Settlement Transfer Act (**Ins. Code, § 10136 et seq.**) evidences a public policy in favor of court-approved factoring transactions. Thus, public policy favors the legal conclusion that antiassignment provisions do not bar court-approved transfers of structured settlement payments.

**CA(8) ↓(8) Consumer and Borrower Protection Laws § 50—Usury—What Constitutes Usury—Excessive Interest Rate on Loan.**—A loan that charges an interest rate greater than 10 percent per annum is usurious.

**CA(9) ↓(9) Consumer and Borrower Protection Laws § 50—Usury—What Constitutes Usury—Loan or Forbearance.**—Without a loan or forbearance, usury cannot exist. [**\*1062**]



**CA(10) ↓ (10) Compromise, Settlement, and Release § 7—Settlements—Structured Settlements—Transfer—Sale of Rights.**—The transfer of structured settlement payment rights under the Structured Settlement Transfer Act (**Ins. Code, § 10136 et seq.**) is not a loan secured by assignment of periodic payments but is a sale of certain rights to receive periodic payments.

**CA(11) ↓ (11) Compromise, Settlement, and Release § 7—Settlements—Structured Settlements—Transfer—Independent Professional Advice.**—The Structured Settlement Transfer Act (SSTA) (**Ins. Code, § 10136 et seq.**) provides that independent professional advice means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser concerning the legal, tax, or financial implications of a structured settlement or a transfer of structured settlement payment rights (**Ins. Code, § 10134, subd. (f)**). The language suggests that the independent professional is required to provide advice on the legal, tax or financial implications of a structured settlement or a transfer of structured settlement rights; however, the SSTA does not unambiguously require that one independent professional must provide all three types of advice. Moreover, with respect to legal advice, nonattorneys must be wary of the prohibition against practicing law. The SSTA also does not detail specifically what constitutes adequate advice on the legal, tax, or financial implications of the factoring transaction. It is left to the superior court to determine whether adequate independent professional advice has been provided to the payee. The discretionary nature of this determination cautions against a finding of attorney incompetence based upon a failure to provide the required advice because certain superior court judges may believe some advice is required while other superior court judges may believe that that same advice is not required by the SSTA.

**CA(12) ↓ (12) Compromise, Settlement, and Release § 7—Settlements—Structured Settlements—Transfer—Independent Professional Advice.**—A Structured Settlement Transfer Act (SSTA) (**Ins. Code, § 10136 et seq.**) petition can be granted if the payee knowingly waives receipt of independent professional advice in writing (**Ins. Code, § 10139.5, subd. (a)(2)**). Thus, a finding that the payee did not receive independent professional advice does not preclude a subsequent refiling of the same SSTA petition that includes such written waivers.

**CA(13) ↓ (13) Compromise, Settlement, and Release § 7—Settlements—Structured Settlements—Transfer—Mandatory Disclosures.**—The Structured Settlement Transfer Act (SSTA) (**Ins. Code, § 10136 et seq.**) does not require that some disclosures be in 14-point type size and other portions [**\*1063**] be in smaller type size. Rather, it requires that some portions of the disclosures be at least or no less than 12-point type, and that other portions be printed in 14-point type, circumscribed by a box with a bold border (**Ins. Code, § 10136**). Thus, it is not a violation of the SSTA to print most of the disclosures in 14-point type size and bolded, while enclosing only the required disclosures in a box with a bolded border.

**CA(14) ↓ (14) Dismissal and Nonsuit § 3—Voluntary Dismissal—Conditions—Structured Settlement Transfer Proceeding—Attachment of Dismissal Order to Future Petitions.**—A superior court has the discretion to condition an order dismissing a Structured Settlement Transfer Act (SSTA) (**Ins. Code, § 10136 et seq.**) petition without prejudice to require that future SSTA petitions involving the same payees and annuity attach the prior dismissal order.

**CA(15) ↓ (15) Compromise, Settlement, and Release § 7—Settlements—Structured Settlements—Transfer—Court Approval—Effect.**—A superior court cannot void a



previously court-approved Structured Settlement Transfer Act ([Ins. Code, § 10136 et seq.](#)) transfer pursuant to [Ins. Code, § 10137](#).

*CA(16)* [↓](#) **(16) Compromise, Settlement, and Release § 7—Settlements—Structured Settlements—Transfer—Court Approval.**—Because the superior court committed multiple prejudicial errors in making its factual findings and in reaching legal conclusions when it entered a final consolidated order denying petitions for approval of transfer of structured settlement payments, and because these errors could not be separated from valid findings and legal conclusions, it was necessary to reverse the entire consolidated order.

[[Levy et al., Cal. Torts \(2009\) ch. 75, § 75.11A](#); 6 Witkin, *Cal. Procedure* (5th ed. 2008) *Proceedings Without Trial*, § 311; 4 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Security Transactions in Real Property*, § 166; 1 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Contracts*, § 471; 5 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Torts*, § 97.]

**COUNSEL:** [Reed Smith](#) [▼](#), [Margaret M. Grignon](#) [▼](#), [Wendy S. Albers](#) [▼](#), [Zareh Jaltorossian](#) [▼](#); [McCormick Barstow](#), [James P. Wagoner](#) [▼](#) [✓](#) and [Todd W. Baxter](#) [▼](#) [✓](#) for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

**JUDGES:** Opinion by [Ardaiz](#) [▼](#), P. J., with [Cornell](#) [▼](#) and [Gomes, JJ.](#), concurring.

**OPINION BY:** [Ardaiz](#) [▼](#) [**\*1064**]

## OPINION

[\*\*325] [ARDAIZ](#) [▼](#), P. J.—

### INTRODUCTION

Petitioner, 321 Henderson Receivables Origination LLC (hereinafter Henderson), appeals from a final consolidated order denying its petition for approval of transfer of structured settlement payment, contending that the superior court committed multiple legal errors. For the following reasons, we reverse. <sup>1</sup>

### FOOTNOTES

<sup>1</sup> We also grant Henderson's request for judicial notice.

### FACTUAL [**\*\*2**] BACKGROUND AND PROCEDURAL HISTORY <sup>2</sup>

### FOOTNOTES

<sup>2</sup> We have included a full background and procedural history, which is based upon the record filed and representations made by the appellant, in order to provide context to

Henderson's decision to appeal.

## A. General Background

Henderson, an indirect subsidiary of J.G. Wentworth, LLC, is a factoring company. Factoring companies deal with people who receive structured settlements. "Structured settlements are a type of settlement designed to provide certain tax advantages. In a typical personal injury settlement, a plaintiff who receives a lump-sum payment may exclude this payment from taxable income under I.R.C. [Internal Revenue Code] § 104(a)(2) (providing that the amount of any damages received on account of personal injuries or sickness are excludable from income). However, any return from the plaintiff's investment of the lump-sum payment is taxable investment income. In contrast, in a structured settlement the claimant receives periodic payments rather than a lump sum, and all of these payments are considered damages received on account of personal injuries or sickness and are thus excludable from income. Accordingly, a structured settlement effectively **[\*\*\*3]** shelters from taxation the returns from the investment of the lump-sum payment. [Citations.]" (*Western United Life Assur. Co. v. Hayden* (3d Cir. 1995) 64 F.3d 833, 839–841 (*Western*).

"Before 1983, the utility of structured settlements was diminished by the credit risk that the recipient would have to assume. [Citation.] Because the annuity was merely a matter of convenience and did not give the recipient any right in the annuity, in the case of the settling defendant's default the plaintiff could not seek redress from the annuity issuer. [Citation.] This **[\*1065]** presented a problem if the settling defendant's general credit risk was high." (*Western, supra*, 64 F.3d at p. 840.)

"Congress addressed this problem by enacting I.R.C. § 130. [Citation.] ... [S]ection 130 allows a tax-neutral transaction in which the settling defendant assigns and a third party assumes the obligation to make periodic payments under most section 104(a)(2) structured settlements. When the third party assignee ... has a credit rating superior to that of the settling defendant, such an assignment and assumption agreement benefits a plaintiff ... by allowing her to rely on the assignee's superior credit. [Citation.]" (*Western, supra*, 64 F.3d at p. 840.)

**[\*\*326]** "A **[\*\*\*4]** key characteristic of a structured settlement is that the beneficiary of the settlement must not have actual or constructive receipt of the economic benefit of the payments. [Citation.]" (*Western, supra*, 64 F.3d at pp. 839–840.) Moreover, until January 2002, the third party assignee or structured settlement obligor could exclude the cost of a "qualified assignment" from its gross income only if the annuity provided that the periodic structured settlement payments "cannot be accelerated, deferred, increased, or decreased by the recipient of such payments." (*Int.Rev. Code*, § 130(c)(2)(B).) Thus, prior to January 2002, explicit antiassignment provisions in the annuity contract or settlement agreement were required in order for the payees and obligors to receive federal tax benefits from structured settlements.

The periodic structured settlement payments are locked in at the time of settlement based upon the settlement agreement and the annuity contract. However, sometimes, the structured settlement recipient or payee requires immediate cash because of changes in personal circumstances. In these cases, payees sometimes sell some or all of their future payments to factoring companies **[\*\*\*5]** for an immediate cash payment. Thus, a factoring transaction partially or fully destroys the "structured" aspect of a structured settlement because it permits the payee to convert some or all of the periodic payments

into a lump-sum payment.

Partially to ensure that a transfer of a structured settlement payment has no adverse tax impact on any of the persons involved in a factoring transaction, in January 2002, Congress amended the Internal Revenue Code by adopting section 5891 to expressly sanction a tax-free transfer of structured settlement payments. Court-approved factoring transactions were encouraged by the imposition of a 40 percent excise tax on unapproved transactions. In California, the court approval process is governed by the Structured Settlement Transfer Act, (hereinafter SSTA), which requires (1) disclosures to the transferor of the structured settlement payment rights, (2) notice to the Attorney General, and (3) court approval. (See [Ins. Code, § 10136 et seq.](#)) **[\*1066]**

The court-approval process requires the factoring company to file a petition in the county in which the transferor resides for approval of the transfer, attaching copies of the petition, the transfer agreement, **[\*\*\*6]** the disclosure form, the annuity contract, any qualified assignment agreement and the structured settlement agreement, a list of the names and ages of the transferor's dependents, notice of the court hearing date, and notice of a right to respond. ([Ins. Code, § 10139.5, subd. \(c\).](#))

After consideration of the petition and its attached documents, any written support or opposition by interested parties, and any evidence presented at the hearing, the court grants or denies the petition. In order to grant the petition for approval, the court must expressly find (1) the transfer is in the best interest of the transferor, taking into account the welfare and support of the transferor's dependents; (2) the transferor has been advised in writing to seek independent professional advice and either has received that advice or knowingly waived it; (3) the transferor has received the disclosure form; (4) the transfer agreement complies with [Insurance Code sections 1016 and 10138](#); (5) the transfer does not contravene any applicable statute or court order; (6) the transferor reasonably understands the terms of the transfer agreement and disclosure form; and (7) the transferor understands his or her **[\*\*\*7]** right to cancel and does not **[\*\*327]** wish to do so. ([Ins. Code, § 10139.5, subd. \(a\).](#))

The transfer agreement is effective only upon approval in a final court order. ([Ins. Code, § 10139.5, subd. \(a\).](#)) The court that approves the transfer retains "continuing jurisdiction to interpret and monitor the implementation of the transfer agreement ... ." ([Ins. Code, § 10139.5, subd. \(f\).](#))

Since 2002, Henderson has obtained judicial approval of more than 2,000 structured settlement payment transfers throughout California, including factoring transactions made in Fresno County. However, beginning in March of 2008, several superior court judges in Fresno County issued tentative rulings denying petitions brought by factoring companies other than Henderson. The judges cited concerns that such transfers were barred by antiassignment provisions in the annuity contracts and underlying settlement agreements, and could contravene orders approving a minor's compromise. The tentative rulings also criticized documentation provided by the petitions, accused the factoring companies and their lawyers of willfully omitting material facts and documents, directed the clerk to serve the order on the Attorney General and State **[\*\*\*8]** Bar, and required the factoring companies to attach the order to future petitions filed in Fresno County.

## B. Instant Petitions

Henderson filed the petitions involved in this appeal in February and March 2008. No interested parties opposed the petitions. **[\*1067]**

Judge Simpson heard the petitions on the following dates: *Moua* and *Goodwin*—March 27, 2008; *Bowles*—April 2, 2008; *Castallanoz* and *Wenstrom*—April 10, 2008; *Vivian*—April 23, 2008; *Raney*, *Sioteco*, *Cook*, *Cox* and *Duran*—April 29, 2008. Judge Simpson had not issued any tentative rulings before the hearings on the petitions. During the hearings, Judge Simpson did not indicate how he would rule on the petitions. Instead, after hearing argument of counsel and, in some cases, questioning the payees, Judge Simpson took the petitions under submission.

On April 29, 2008, a Fresno County Superior Court judge issued a tentative ruling in a pending Henderson petition proceeding (*In re David Fleming* (Super. Ct. Fresno County, No. 08CECG0098) (*Fleming*)). The tentative ruling denied the petition for approval because it found that Henderson had not complied with the requirements of the SSTA. The tentative ruling criticized Henderson for omitting material information and documents [\*\*\*9] from the petition for court approval, and voiced the concerns about the antiassignment provisions in the annuity contract and underlying settlement agreement. In addition, the tentative ruling found that Henderson had a pattern and practice of referring lawyers to the transferors in violation of the SSTA's independent counsel requirement and directed that the *Fleming* order be served on the Attorney General and State Bar, and attached to certain future SSTA petitions.

Although the *Fleming* tentative order did not explicitly void prior court approvals of SSTA petitions, the tentative order concluded that errors similar to the ones that the court found in the *Fleming* petition, such as the failure to include required documentation with the petition and to comply with the independent counsel requirement, would void any prior court approval of SSTA petitions. In addition, the tentative order stated that Henderson was not entitled to the structured settlement payments that were transferred and that Henderson could not recover the lump-sum [\*\*\*328] payments that it made to the transferors. The tentative ruling required Henderson to serve the order on each person who had transferred payments to Henderson [\*\*\*10] in the approximately 100 Fresno and Kern County petition cases as well as the insurers in those transactions.

Before similar orders could be issued in the special proceedings on appeal, on May 5, 2008, Henderson filed requests for voluntary dismissal with prejudice of its pending 11 petitions before Judge Simpson. The superior court, however, did not enter any of the dismissals. Rather, between May 19, and May 27, 2008, Judge Simpson issued virtually identical orders in 10 of the 11 cases.

In the orders, Judge Simpson denied the respective petitions and ordered the matters dismissed with prejudice. Judge Simpson denied Henderson's [\*1068] unilateral requests for voluntary dismissal because he held that Henderson could not dismiss the petitions under [Code of Civil Procedure section 581](#) (because Henderson was not a "plaintiff") or under [Code of Civil Procedure section 581, subdivision \(b\)\(2\)](#) (because the payees had not filed written consent).

Judge Simpson also found that the SSTA required strict judicial scrutiny of petitions. Judge Simpson further found that the respective petitions were deficient in their required disclosures and that the petitions violated the antiassignment clauses in the [\*\*\*11] settlement agreements.

Judge Simpson concluded that Attorneys Nathan Miller, Dixon Kummer, Loren Nizinski, James Felton, and Eugene Ahtirski were not acting as independent counsel for the payees because they have filed similar estoppel letters in cases involving J.G. Wentworth and

Henderson. The estoppel letters did not contain representations that they had advised the payees about income tax consequences or loss of governmental benefits. According to the superior court, the named attorneys “can more properly be characterized as JG Wentworth counsel masquerading as attorneys for the payees in order to push the sales through by creating a false appearance of independent counsel.” Judge Simpson concluded that the named attorneys violated [Business and Professions Code section 6068, subdivision \(d\)](#), because they misrepresented to the superior court that they were independent counsel in the 107 cases known of in Riverside, Kern and Fresno County matters listed in the attachments to the consolidated order.

Judge Simpson also concluded that Henderson could not recover its purchase price from the payees because of Henderson's unclean hands.

He further concluded that the transfer violated California's **\*\*\*12** Usury Law because the effective interest rate of the transfer exceeded 10 percent. Judge Simpson also concluded that the transfer was effectively a loan subject to the Usury Law because there was no risk to Henderson, and all of the risk was placed on the payees.

Judge Simpson concluded these errors would render any prior transfer void under [Insurance Code section 10137](#).

Based on these conclusions, Judge Simpson not only denied the petitions, but ordered the clerk to serve the order on the Attorney General and ordered Henderson to attach a copy of the order to any future SSTA petition filed in Fresno County and to any case in this state involving a payee listed in the exhibits to the order. The orders indicated that they would become final unless Henderson objected within 10 days and requested a hearing. **\*1069**

On May 28 and 29, 2008, Henderson filed objections and requested a hearing in the 10 cases in which Judge Simpson had issued orders. Henderson then filed supplemental **\*\*329** objections addressing new issues raised by the superior court. The superior court held a consolidated hearing in 10 of the cases on June 19, 2008. On June 18, 2008, however, the superior court issued a similar tentative **\*\*\*13** ruling in the *Cook* special proceeding. Henderson also filed objections to the *Cook* tentative ruling.

On August 26, 2008, Judge Simpson issued a consolidated order in all 11 cases indicating he intended to take judicial notice “of the Fresno Superior Court file for all petitions presented by J.G. Wentworth or 321 Henderson in the Court from January 1, 2002 to present, in addition to the materials available for such petitions from the public websites of the Superior Courts of Kern and Riverside Counties.” The superior court gave Henderson 10 days to file written objections. Henderson filed its objections on September 5, 2008.

On that day, Judge Simpson entered a final consolidated order (essentially adopting the prior orders) in all 11 cases. In the September 5 consolidated order, Judge Simpson denied Henderson's requests for voluntary dismissal of the petitions because, according to the superior court, Henderson is not a “plaintiff” for the purposes of [Code of Civil Procedure section 581](#) and the payees did not give written consent. Judge Simpson concluded that, under [Insurance Code section 10137](#), transfers of structured settlement rights that did not comply with the SSTA, violated other applicable laws, or were not court **\*\*\*14** approved were void.

Judge Simpson further concluded that the instant SSTA petitions should be denied because they violated the antiassignment provisions in the respective annuity contracts, qualified assignments, minor's compromise, or settlement agreements. He concluded that the

transfers would violate California's Usury Law, [California Constitution, article XV, section 1](#), because the transfer was functionally a loan. Judge Simpson also concluded that Henderson violated the SSTA's independent counsel requirement because it did not use a lawyer referral service that was operated by a state or local bar association and the lawyers that were referred to the payees did not provide the payees with all of the professional advice required by the SSTA. Judge Simpson found that Henderson did not comply with the disclosure requirements of the SSTA and failed to serve all of the interested parties.

Based on these conclusions and findings, Judge Simpson directed the clerk to serve the order on the Attorney General and the State Bar. Additionally, he directed Henderson to attach the order to future petitions for certain payees in approximately 200 other cases (some of which were in other counties) **[\*\*\*15]** and all future petitions filed in Fresno County for five years and to serve a copy of **[\*1070]** the order "on each person or entity listed on any proof of service for any and all of the petitions listed in the Exhibits attached" to the order, "as well as any California agent for service of process for affected insurers."

Henderson appealed, and this court granted Henderson's motion to consolidate the appeals in the 11 cases and to stay enforcement of the order pending appeal. Henderson's petition for writ of supersedeas, staying the order until determination of the appeal on the merits, is currently pending before this court. <sup>3</sup>

## FOOTNOTES

<sup>3</sup> Based upon our decision in this appeal, we deny Henderson's petition for writ of supersedeas as moot.

## DISCUSSION

### A. Standard of Review

<sup>HN1</sup> The issues raised on appeal are legal issues and are thus reviewed de novo. **[\*\*\*330]** For example, the issue of whether the petitions could be voluntarily dismissed under [Code of Civil Procedure section 581](#) <sup>4</sup> involves the application of a statute to undisputed facts and is thus a question of law subject to de novo review. (*Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 264 [82 Cal. Rptr. 3d 629].) Similarly, <sup>HN2</sup> whether a factoring transaction is usurious **[\*\*\*16]** is a question of law subject to independent review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800–802 [35 Cal.Rptr.2d 418, 883 P.2d 960].) Finally, <sup>HN3</sup> the proper interpretation of constitutional or statutory provisions is a question of law subject to de novo review. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74 [89 Cal. Rptr. 2d 10].)

## FOOTNOTES

<sup>4</sup> All further section citations are to the Code of Civil Procedure, unless otherwise indicated.



<sup>CA(1)</sup> (1) Many of the issues raised require interpretation and construction of statutes. “The principles governing the proper construction of a statute are well established ... .” (*California Teachers Assn. v. Governing Bd. of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369, 375 [119 Cal. Rptr. 2d 642].) <sup>HN4</sup> “Courts must ascertain legislative intent so as to effectuate a law's purpose. [Citations.] “In the construction of a statute ... the office of the judge is simply to ascertain and declare what is ... contained therein, not to insert what has been omitted, or to omit what has been inserted; ...” [Citation.] Legislative intent will be determined so far as possible from the language of statutes, read as a whole, and if the words are reasonably free from ambiguity and uncertainty, the courts will **\*\*\*17** look no further to ascertain its meaning. [Citation.] “The court should take into account matters such as *context*, the object in view, the evils to be remedied, the history of the times and of *legislation upon the same subject*, public policy, and contemporaneous **[\*1071]** construction.” [Citations.] “Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.” [Citations.]’ ” (*Id.* at pp. 375–376.)

## B. Dismissal Under Section 581

On appeal, Henderson contends that the superior court erred when it concluded that Henderson could not voluntarily dismiss its SSTA petitions. We disagree.

<sup>HN5</sup> <sup>CA(2)</sup> (2) Section 581 provides ways for a party to dismiss an “action,” and ways for a “plaintiff” or the trial court to dismiss a “complaint.” Besides distinguishing methods of dismissals for an “action” and a “complaint,” section 581 also distinguishes between the time period before “actual commencement of trial” and the time period after “actual commencement of trial.” For example, after actual commencement of trial, a party may dismiss an “action” with or without prejudice only with written consent of all other **\*\*\*18** parties. (§ 581, subd. (b)(2).) Similarly, after “actual commencement of trial,” a “plaintiff” can only voluntarily dismiss its “complaint” with prejudice (§ 581, subd. (e).)

<sup>HN6</sup> <sup>CA(3)</sup> (3) Section 581 defines “action,” “complaint,” “plaintiff,” and actual commencement of “trial.” (§ 581, subd. (a).) This court has held that a proceeding to approve an SSTA petition is an “action” for the purposes of section 581. (*321 Henderson Receivables Origination LLC v. Tomahawk* (2009) 172 Cal.App.4th 290 [91 Cal.Rptr.3d 232].) We also held that the SSTA petitioner or the transferee is a **\*\*\*331** “plaintiff” for the purpose of section 581. (172 Cal.App.4th 290.)

<sup>CA(4)</sup> (4) Finally, <sup>HN7</sup> “[a]part from certain ... statutory exceptions, a plaintiff's right to a voluntary dismissal [under section 581] appears to be absolute. [Citation.] Upon the proper exercise of that right, a trial court would thereafter lack jurisdiction to enter further orders in the dismissed action.” (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784 [176 Cal. Rptr. 104, 632 P.2d 217].)

Here, prior to Henderson's requests for voluntary dismissal under section 581, “trial” had commenced because there had been hearings on the petitions and the cases had been submitted. Moreover, the requests for voluntary dismissal **\*\*\*19** with prejudice were unilateral—there were no written consents by the payees. Thus, Henderson could not voluntarily dismiss its petitions pursuant to the various methods available to dismiss an “action” under section 581. Instead, in order to voluntarily dismiss with prejudice the instant SSTA **[\*1072]** petitions, Henderson must show that an SSTA petition is a “complaint” for the purposes of section 581. (See § 581, subd. (e) [“After the actual commencement of trial, the court shall dismiss the complaint, or any causes of action

asserted in it, in its entirety or as to any defendants, with prejudice, if the plaintiff requests a dismissal ... .”).)

<sup>CA(5)</sup> (5) Section 581, subdivision (a)(2) provides that <sup>HNB</sup> “[c]omplaint” means a complaint and a cross-complaint.” Unlike section 425.16, <sup>HNS</sup> section 581 does not include “petition” in its definition of “complaint.” (See § 425.16, subd. (h) [“For purposes of this section, ‘complaint’ includes ‘cross-complaint’ and ‘petition,’ ‘plaintiff’ includes ‘cross-complainant’ and ‘petitioner,’ and ‘defendant’ includes ‘cross-defendant’ and ‘respondent.’”].) Moreover, sections 1063 and 1064, which address special proceedings such as the proceeding to approve an SSTA petition, do not **[\*\*\*20]** address the term “petition.” (See §§ 1063 [addressing terms “plaintiff” and “defendant”], 1064 [addressing terms “judgment,” “motion,” and “order.”].) Thus, we conclude that an SSTA petition is not a “complaint” for the purposes of section 581. Although the superior court erred in concluding that Henderson was not a “plaintiff” for the purposes of section 581, there was no prejudicial error because Henderson could not unilaterally request voluntary dismissal with prejudice of the petitions since trial had actually commenced. Having concluded that the petitions could not be dismissed under section 581, we turn to the merits of the superior court’s final consolidated order denying the petitions.

### C. Antiassignment Provisions

The superior court concluded that the petitions must be denied because the antiassignment provisions in “[t]he annuity, qualified assignment, minor’s compromise, or settlement agreement bar transfer of the structured settlement payments by each of the payees at issue.” Henderson contends that the antiassignment provisions do not bar the factoring transactions at issue because the provisions are unenforceable under the California Uniform Commercial Code, or because **[\*\*\*21]** the parties have waived enforcement of those provisions. The superior court concluded that the California Uniform Commercial Code was inapplicable because it does not apply to life insurance, and that public policy prohibits waiver of the antiassignment provisions. We disagree with the superior court, and conclude that, where no interested parties have objected, the antiassignment provisions do not bar transfers of structured settlement payment rights.

**[\*\*\*332]** The documents attached to the petitions contain various antiassignment provisions. For example, the annuity contract in the *Moua* petition contains the following provision: “No Payee or Beneficiary of this policy has the power to assign any payments or benefits of this annuity policy. Any attempt **[\*1073]** to make an assignment is void.” The settlement agreement in the *Sioteco* petition provides that plaintiff cannot accelerate future payments, receive the present discounted value of future payments, or change or modify the manner, mode or method of meeting any payment. The various court orders approving a minor’s compromise attached to the instant petitions, however, do not contain any antiassignment provisions. Thus, the court order approving **[\*\*\*22]** a minor’s compromise does not bar transfers of structured settlement payment rights.

California Uniform Commercial Code, section 9408 provides in relevant part:

<sup>HN10</sup> (a) Except as otherwise provided in subdivision (b), a term in a promissory note ... or a general intangible, including a contract, ... and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or ... to, the assignment or transfer of, or the creation, attachment, or perfection of a security interest in, the promissory note ... or general intangible, is ineffective to the extent that the term does, or would do, either of the following:



“(1) It would impair the creation, attachment, or perfection of a security interest.

“(2) It provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note ... or general intangible.

“(b) Subdivision (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.

“(c) **\*\*\*23** A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, ... to the assignment or transfer of, or the creation of a security interest in, a promissory note, ... or general intangible, including a contract, ... is ineffective to the extent that the rule of law, statute, or regulation does, or would do, either of the following:

“(1) It would impair the creation, attachment, or perfection of a security interest.

“(2) It provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right **[\*1074]** of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note ... or general intangible. [¶] ... [¶]

“(e) Subdivision (c) does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in paragraph (1) or (2) of subdivision (a) of [Section 104 of Title 26 of the United States Code](#), as amended ... , to the extent that subdivision (c) is inconsistent with those laws.” (Cal. U. Com. Code, § 9408.)

HN11 <sup>CA(6)</sup> **(6)** The **\*\*\*24** plain language of [California Uniform Commercial Code, section 9408, subdivisions \(a\) and \(b\)](#) indicates that contractual restrictions on assignments or transfers of general intangibles are generally ineffective to the extent that the restrictions **\*\*\*333** impair the creation of security interests arising out of a sale of the payment intangible or to the extent that the restrictions provide that the assignment or transfer of the general intangible is a breach of the contract. [California Uniform Commercial Code, section 9408, subdivision \(c\)](#) applies to any statutory restrictions on assignment or transfers of general intangibles, although [subdivision \(e\)](#) of the same section provides that [subdivision \(c\)](#) does not apply to the SSTA.

[Section 9408 of the California Uniform Commercial Code](#) is applicable to structured settlement payments because the structured settlement payments are considered general intangibles. (See, e.g., *In re Pacific/West Communications Group, Inc.* (9th Cir. 2002) 301 F.3d 1150, 1155 [noting that, under the Cal. U. Com. Code, “ ‘once a claim arising in tort has been settled and reduced to a contractual obligation to pay (as in, but not limited to, a structured settlement) **\*\*\*25** the right to payment becomes intangible and ceases to be a claim arising in tort’ ”]; [Cal. U. Com. Code, § 9102, subd. \(a\)\(61\)](#) [“‘Payment intangible’ means a general intangible under which the account debtor’s principal obligation is a monetary obligation.”].) Moreover, [section 9408](#) applies to sales of structured settlement payments. (See [Cal. U. Com. Code, § 9109, subd. \(a\)](#) [“Except as otherwise provided in subdivisions (c) and (d), this division [division 9] applies to each of the following: [¶] ... [¶] (3) A sale of accounts, chattel paper, payment intangibles, or promissory notes.”].)

Finally, [California Uniform Commercial Code section 9408](#) is applicable to structured settlement payments because, unlike the Uniform Commercial Code (UCC), the California Uniform Commercial Code does not contain the uniform provision excluding annuities from its reach. (See [U. Com. Code, § 9-109](#).) As noted by the UCC Committee of the Business Law Section of the State Bar of California, “California has permitted the creation and perfection of security interests in insurance policies under the Prior California [\*1075] [Commercial] Code for some 30 years now and the Revised California [Commercial] Code [\*\*\*26] continues the California practice of permitting the creation and perfection of such security interests under Division 9.” (The UCC Committee of the Business Law Section of the State Bar of California, UCC Committee Report on Revised Division Nine of the California Commercial Code and California's Non-uniform Provisions (2002) &t;[http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/ucc/2002\\_ucc-committee-report-on-revised-division-nine.pdf](http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/ucc/2002_ucc-committee-report-on-revised-division-nine.pdf)&t; [as of May 6, 2009].)

We disagree with the court in [Johnson v. First Colony Life Ins. Co. \(E.D.Cal. 1998\) 26 F.Supp.2d 1227](#), that the California Uniform Commercial Code does not apply to the assignment or transfer of a structured settlement payment right. (*Id.* at p. 1230.) The *Johnson* court provides no analysis for its conclusion that the California Uniform Commercial Code does not apply to the annuity contract at issue in the case.

Although we conclude that contractual antiassignment provisions are generally ineffective in barring transfers of structured settlement payment rights, it is possible that the annuity issuer or the settlement obligor might be able to enforce those antiassignment provisions in certain situations. (See [Johnson v. Landucci \(1942\) 21 Cal.2d 63, 68 \[130 P.2d 405\] \[\\*\\*\\*27\]](#) [noting that contractual antiassignment provisions are for the benefit of the obligor]; see also [Ins. Code, § 10139.3, subd. \(d\)](#) [“The transferee and any assignee shall be liable to the structured settlement obligor [\*\*\*334] and the annuity issuer for any and all taxes incurred as a consequence of the transfer or as a consequence of any failure of the transferee or assignee to comply with this article or the terms of the structured settlement agreement.”].) The record, however, indicates that the annuity issuers and settlement obligors were notified of the SSTA petitions and did not object in the superior court. Thus, it appears that the annuity issuers and settlement obligors may have waived their right to enforce the antiassignment provisions. A determination of these issues, however, is not necessary to resolve this appeal because the annuity issuers and settlement obligors have not made an appearance in the superior court or before this court. Thus, we decline to address the issues of waiver and enforcement of antiassignment clauses by the annuity issuers and settlement obligors, especially in light of the fact that we do not have the benefit of arguments by a party other than the factoring [\*\*\*28] companies.

<sup>CA(7)</sup> (7) The superior court, however, did conclude that public policy bars the waiver of the contractual antiassignment clauses with respect to factoring transactions. We disagree. We conclude that <sup>HN12</sup> [California Uniform Commercial Code section 9408](#) evidences a public policy against antiassignment provisions in general and that the SSTA, [Insurance Code section 10136 et seq.](#), evidences a public policy in favor of court-approved factoring transactions. [\*1076] Thus, public policy favors the legal conclusion that antiassignment provisions do not bar court-approved transfers of structured settlement payments.

Therefore, we conclude that, where no interested parties object to the transfer of structured settlement payment rights, the antiassignment provisions in the annuity contract, settlement agreement or other related contracts do not bar the factoring transaction at issue in this appeal.

D. California's Usury Law

<sup>CA(8)</sup> (8) The superior court also concluded that the SSTA petitions must be denied because the transfers would violate the prohibition on usury found in California's Constitution, which provides: <sup>HN13</sup> "No person, association, copartnership or corporation shall by charging any fee, bonus, commission, **\*\*\*29** discount, or other compensation receive from a borrower more than the interest authorized under this section upon any loan or forbearance of any money, goods or things in action." (Cal. Const., art. XV, § 1.) Under current California law, <sup>HN14</sup> a loan that charges an interest rate greater than 10 percent per annum is usurious. (*Regents of University of California v. Superior Court* (1976) 17 Cal.3d 533, 536 [131 Cal. Rptr. 228, 551 P.2d 844].) <sup>CA(9)</sup> (9) However, <sup>HN15</sup> "[w]ithout a loan or forbearance, usury cannot exist." (*Ghirardo v. Antonioli, supra*, 8 Cal.4th at pp. 801–802.)

The superior court concluded that the transfer of structured settlement payment rights is a loan secured by assignment of the payments, and not a sale of a portion of the annuity. We disagree.

The instant petitions in this appeal follow the court-approved process provided in the SSTA. The transfer of structured settlement agreements is repeatedly described as a sale in the SSTA. For example, the SSTA describes the payee as a "seller." (See, e.g., *Ins. Code, § 10138, subd. (a)*.) The required disclosures expressly equate the word "transfer" with a sale: <sup>HN16</sup> "You are selling (technically called "transferring") your right to receive your payments under a structured **\*\*\*30** settlement.' " (*Ins. Code, § 10136, subd. (b)*.) Disclosures are required for " 'Total dollar amount of payments **\*\*\*335** you are selling' " and " 'Present value of amount you are selling.' " Finally, the SSTA mentions a loan only as a hypothetical for comparison purposes. The SSTA requires the following disclosure to payees:

" 'If you did not sell your right to receive structured settlement payments, but instead borrowed the net amount of \$ \_\_\_ and paid that loan back in installments with each of the payments you are now selling, the equivalent interest rate you would be paying for that loan would be \_\_\_% per year.' " (*Ins. Code, § 10136, subd. (b)*.) **\*\*\*1077**

<sup>CA(10)</sup> (10) Thus, <sup>HN17</sup> the transfer of structured settlement payment rights under the SSTA is not a loan secured by assignment of periodic payments but is a sale of certain rights to receive periodic payments.

#### E. SSTA's Independent Professional Advice Requirement

The superior court also concluded that it could not approve the SSTA petitions because there were violations of the SSTA's independent professional advice requirement. <sup>HN18</sup> The SSTA requires that a superior court must find that "[t]he payee has been advised in writing by the transferee to seek independent professional advice **\*\*\*31** regarding the transfer and has either received that advice or knowingly waived that advice in writing" before the superior court can approve the transfer. (*Ins. Code, § 10139.5, subd. (a)(2)*.) The SSTA defines <sup>HN19</sup> "[i]ndependent professional advice" as "advice of an attorney, certified public accountant, actuary, or other licensed professional adviser meeting all of the following requirements: [¶] (1) The adviser is engaged by a claimant or payee to render advice concerning the legal, tax, or financial implications of a structured settlement or a transfer of structured settlement payment rights. [¶] (2) The adviser's compensation for rendering independent professional advice is not affected by occurrence or lack of occurrence of a settlement or transfer. [¶] (3) A particular adviser is not referred to the payee by the transferee or its agent, except that the transferee may refer the payee to a lawyer referral service or agency operated by a state or local bar association." (*Ins. Code, §*

10134, subd. (f).)

We conclude that many of the superior court's factual findings and legal conclusions on the issue of whether the payees received "independent professional advice" were erroneous. Thus, **\*\*\*32** the consolidated order is reversed and the matters remanded to the superior court for new hearings on this issue.

First, we disagree with the superior court's findings with respect to Attorneys Loren Nizinski, James Felton, and Eugene Ahtirski because these attorneys did not represent any of the 11 payees that were addressed in the consolidated order. Instead, the superior court apparently reached its conclusions that these attorneys are not independent counsel based upon its independent review of publicly available judicial records in the superior courts of Fresno, Kern and Riverside Counties. Further, there is no indication that these attorneys were presented with an opportunity to challenge these findings. Thus, the superior court's findings concerning these attorneys must be vacated because the superior court improperly made factual findings about persons and matters that were not before the court.

Second, we disagree that there is sufficient evidence to support the finding that Henderson has engaged in a systematic violation of the independent **\*\*\*1078** professional advice requirement. It appears correct that Nathan Miller, who represented payees Moua, Goodwin, Vivian, Bowles, Castellanoz, **\*\*\*33** Duran, Wenstrom, and Sioteco, **\*\*\*336** also represented many other payees in transfers involving Henderson. However, the fact that Mr. Miller provided identical estoppel letters for the payees and that some payees may have been improperly referred to Mr. Miller is insufficient evidence to support the conclusion that Henderson systematically violated the SSTA's independent professional advice requirement. We note that the superior court did not make any complaints about Paul G. Carpio, who represented payee Cox, or Colin T. Smith, who represented payee Cook. That alone creates an inference that Henderson was not systematically violating the independent professional advice requirement.

We also disagree with the superior court's finding that Henderson provided counsel to the payees because, in some cases, it improperly referred the payees to certain attorneys and it required that the payees provide an estoppel letter prepared by their attorney. We note that the referral was allegedly improper because a referral service used by Henderson was not a "referral service or agency operated by a state or local bar association," as required by the SSTA. (*Ins. Code, § 10134, subd. (f).*) However, the use of an improper referral service does **\*\*\*34** not necessarily mean that Henderson is providing payees with counsel. Similarly, the fact that Henderson requires payees to deliver an estoppel letter does not mean that Henderson is providing counsel to the payees. Rather, it is likely that Henderson was trying to streamline the court-approval process by including a document (the estoppel letter) with the SSTA petition that shows the payee had received independent professional advice. Thus, the superior court's subsequent legal conclusion that Henderson owed a fiduciary duty to the payees because it provided them with counsel must be reversed.

Furthermore, we disagree with the superior court's legal conclusion that Mr. Miller and Mr. Dixon Kummer did not satisfy their duty of competency because their estoppel letters did not contain representations that they provided the payees with "advice the Legislature thought necessary, such as whether the client should enter into the agreement in the first place, whether there are tax consequences, or whether the client might lose government benefits such as SSI, Medicare, or Medicaid upon receipt of a lump sum." The estoppel letters are not sufficient evidence to support the finding that the **\*\*\*35** attorneys did not discuss the legal, tax or financial implications of the structured settlement or transfer of structured settlement payment rights with the payees. Rather, the estoppel letters contain

representations for use by Henderson. The fact that these representations were insufficient for the superior court to find that the payees have received independent professional advice does not mean that these same insufficient representations support a finding that counsel were incompetent. Instead, a finding that counsel were **[\*1079]** incompetent should have been supported by citations to the record of the testimony of the payees and attorneys at the hearings on the petitions.

**HN20** **CA(11)** **(11)** The SSTA provides that independent professional advice means “advice of an attorney, certified public accountant, actuary, or other licensed professional adviser” “concerning the legal, tax, or financial implications of a structured settlement or a transfer of structured settlement payment rights.” (Ins. Code, § 10134, subd. (f).) The language suggests that the independent professional is required to provide advice on the legal, tax or financial implications of a structured settlement or a transfer of structured settlement rights; however, the SSTA **[\*\*\*36]** does not unambiguously require that one independent **[\*\*\*37]** professional must provide all three types of advice. Moreover, with respect to legal advice, nonattorneys must be wary of the prohibition on not practicing law. The SSTA also does not detail specifically what constitutes adequate advice on the legal, tax, or financial implications of the factoring transaction. It is apparently left to the superior court to determine whether adequate independent professional advice has been provided to the payee. The discretionary nature of this determination cautions against a finding of attorney incompetence based upon a failure to provide the required advice because certain superior court judges may believe some advice is required while other superior court judges may believe that that same advice is not required by the SSTA.

**CA(12)** **(12)** Besides our objections to the superior court's factual and legal conclusions on the independent professional advice requirement, we also note that **HN21** an SSTA petition can be granted if the payee knowingly waives receipt of independent professional advice in writing. (Ins. Code, § 10139.5, subd. (a)(2).) Thus, a finding that the payee did not receive independent professional advice **[\*\*\*37]** does not preclude a subsequent refiling of the same SSTA petition that includes such written waivers.

In light of our conclusion that there was insufficient evidence to support the superior court's findings that Henderson has systematically violated the independent counsel and that named counsel did not fulfill their fiduciary duties to the payees, the requirement that Henderson attach the consolidated order to future SSTA petitions and the order that the clerk serve the consolidated order on the Attorney General and the State Bar must be vacated because those orders were predicated on these findings.

#### F. Other Requirements of the SSTA

The superior court concluded that the Henderson petitions violated the requirements of the SSTA by (1) failing to include complete copies of the annuity contract, including the antiassignment provisions; (2) making the **[\*1080]** entire disclosure bolded and 14-point type size instead of just the required portion of the disclosure; (3) failing to include itemization of expenses; (4) having blanks in the transfer agreement; (5) failing to include a “verification”; and (6) not serving the beneficiaries of the annuities at issue or payee's counsel.

**CA(13)** **(13)** We disagree that Henderson **[\*\*\*38]** violated the SSTA by making the entire disclosure bolded and 14-point type size. **HN22** The SSTA does not require that some disclosures be in 14-point type size and other portions be in smaller type size. Rather, it requires that some portions of the disclosures be “at least” or “no less” than 12-point type, and that other portions be “printed in 14-point type, circumscribed by a box with a bold

border.” (**Ins. Code, § 10136.**) Thus, Henderson did not violate the SSTA by printing most of the disclosures in 14-point type size and bolded, and enclosing only the required disclosures in a box with a bolded border.

<sup>CA(14)</sup> ¶ (14) With respect to the other alleged errors, they are sufficiently serious to support the superior court's discretionary denial of an SSTA petition. We disagree, however, that these errors require a dismissal with prejudice. Rather, these errors can be corrected in subsequently refiled petitions. The superior court thus should have dismissed without prejudice petitions containing these errors. <sup>HN23</sup> ¶ The superior court also has the discretion to condition the order dismissing the petition without prejudice to require that future SSTA petitions involving the same payees and annuity attach the prior dismissal order **[\*\*338]** (which is **[\*\*39]** not the consolidated order in this case).

<sup>CA(15)</sup> ¶ (15) We also disagree with the superior court's findings that other Henderson SSTA petitions besides the 11 at issue in this appeal suffer from some or all of these errors. Those petitions are not before the superior court, and the superior court committed legal error in making factual findings and legal conclusions about those petitions. To the extent that the superior court is voiding petitions that have been approved by other courts, the superior court is also committing legal error. (See *321 Henderson Receivables Origination LLC v. Ramos* (2009) 172 Cal.App.4th 305 [91 Cal. Rptr. 3d 222] [holding that <sup>HN24</sup> ¶ a superior court cannot void a previously court-approved SSTA transfer pursuant to **Ins. Code, § 10137**].)

<sup>CA(16)</sup> ¶ (16) Because the superior court has committed multiple prejudicial errors in making its factual findings and in reaching legal conclusions, and because these errors cannot be separated from valid findings and legal conclusion, we will reverse the entire consolidated order. Henderson may amend the SSTA petitions at issue to correct any errors prior to any new hearing on the petitions. **[\*1081]**

## DISPOSITION

The judgment is reversed. Appellant shall bear its own costs.

Cornell, **[\*\*40]** J., and Gomes, J., concurred.

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## **APPENDIX C**



*2009 Cal ALS 593, \*; 2009 Cal SB 510;  
2009 Cal Stats. ch. 593*

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2009 REGULAR SESSION  
CHAPTER 593 (Senate Bill No. 510)

#### BILL TRACKING SUMMARY FOR THIS DOCUMENT

2009 Cal ALS 593; 2009 Cal SB 510; 2009 Cal Stats. ch. 593

Approved by Governor October 11, 2009. Filed with Secretary of State October 11, 2009.

Urgency legislation is effective immediately, Non-urgency legislation will become effective January 1, 2010

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To view the next section, type .np\* and TRANSMIT.  
To view a specific section, transmit p\* and the section number. E.g. p\*1  
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#### **DIGEST:**

##### **Structured settlements: payment transfers.**

Existing law provides that no direct or indirect transfer of structured settlement payment rights is effective unless the transfer has been approved in advance in a final court order based on certain written court findings.

This bill would specify that those provisions only apply to agreements with certain connections to California. This bill would also specify new information to be included in the written disclosure statement provided to the payee prior to executing the transfer agreement. This bill would specify circumstances the court must consider before approving the transfer. This bill would provide that every application for approval of a transfer of structured settlement payment rights shall contain specified information. This bill would also specify notice and disclosure requirements that must be complied with prior to any transfer.

#### **SYNOPSIS:**

An act to amend [Sections 10134, 10135, 10136, 10137, 10138, 10139, 10139.3, and 10139.5 of the Insurance Code](#), relating to structured settlements.

**NOTICE: [A>** UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED **<A]**  
**[D>** Text within these symbols is deleted **<D]**

#### **TEXT:**

The people of the State of California do enact as follows:

**[\*1]** SECTION 1. [Section 10134 of the Insurance Code](#) is amended to read:

§ 10134.

For the purposes of this article, the following terms have the following meanings:

(a) "Buyer's first right of refusal" means any provision in the transfer agreement or related documents that obligate the payee to give to the buyer the first choice or option to purchase any remaining structured settlement rights belonging to the payee.

(b) "Dependents" include the payee's spouse and minor children and all other family members and other persons for whom the payee is legally obligated to provide support, including alimony.

(c) "Discounted present value" means the fair present value of future payments, as determined by discounting those payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

(d) "Effective equivalent interest rate," with respect to a transfer of structured settlement payment rights, means the annualized rate of interest on the net advance amount, calculated by treating the transferred structured settlement payments as if they were installment payments on a loan, with each payment applied first to accrued unpaid interest and then to principal.

(e) "Expenses" means all broker's commissions, service charges, application or processing fees, closing costs, filing or administrative charges, legal fees, notary fees and other commissions, fees, costs, and charges that a payee would have to pay to transfer the structured settlement payment rights of a structured settlement agreement or that would be deducted from the gross consideration that would be paid to the payee in connection with the transfer of the structured settlement payment rights of a structured settlement agreement.

(f) "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser meeting all of the following requirements:

(1) The adviser is engaged by a claimant or payee to render advice concerning the legal, tax, or financial implications of a structured settlement or a transfer of structured settlement payment rights.

(2) The adviser's compensation for rendering independent professional advice is not affected by occurrence or lack of occurrence of a settlement or transfer.

(3) A particular adviser is not referred to the payee by the transferee or its agent, except that the transferee may refer the payee to a lawyer referral service or agency operated by a state or local bar association.

(g) "Interested parties" means, with respect to a structured settlement agreement, the payee, the payee's attorney, any beneficiary **[A>IRREVOCABLY <A]** designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the

structured settlement obligor, and any other party who has continuing rights or obligations under the structured settlement agreement. If the designated beneficiary is a minor, the beneficiary's parent or guardian shall be an interested party.

(h) "Payee" means an individual who received tax-free payments pursuant to a structured settlement agreement.

(i) "Qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of Section 130 of Title 26 of the United States Code, as amended from time to time.

(j) "Structured settlement agreement" means an arrangement for periodic payment of damages established by settlement or judgment in resolution of a tort claim in which the payment of the judgment or award is paid in whole, or in part, in periodic tax-free payments rather than a lump-sum payment. A structured settlement agreement entered into pursuant to [Section 667.7 of the Code of Civil Procedure](#) or [Section 970.6 or 984 of the Government Code](#) is not subject to the provisions of this article other than the requirements of Section 10138.

(k) "Structured settlement obligor" means the party that has the continuing periodic payment obligation to the payee under a structured settlement agreement or a qualified assignment agreement.

(l) "Structured settlement payment rights" means rights to receive periodic payments, including lump-sum payments, pursuant to a structured settlement agreement, whether from the settlement obligor or an annuity issuer.

(m) "Terms of the structured settlement" include, with respect to a structured settlement agreement, the terms of the structured settlement agreement, annuity contract, qualified assignment agreement, and any order or approval of a court or responsible administrative authority or other governmental authority authorizing or approving the structured settlement.

(n) "Transfer" means any sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made for consideration.

(o) "Transfer agreement" means the agreement providing for the transfer, and any other document used to effectuate the transfer, from the payee to the transferee of structured settlement payment rights of a structured settlement agreement.

(p) "Transferee" means any person receiving structured settlement payment rights resulting from a transfer.

**[\*2]** SEC. 2. [Section 10135 of the Insurance Code](#) is amended to read:

§ 10135.

(a) This article is only applicable to transfers entered into on or after January 1, 2000.

(b) Notwithstanding subdivision (a), the changes to this article made by the act amending this section in the 2001-02 Regular Session shall only be applicable to transfers entered into on or after January 1, 2002.

**[A>(C)<A]** **[A>**THIS ARTICLE IS ONLY APPLICABLE TO TRANSFERS OF STRUCTURED SETTLEMENT PAYMENT RIGHTS IF ONE OF THE FOLLOWING REQUIREMENTS IS MET: **<A]**

**[A>(1)<A]** **[A>**THE PAYEE IS DOMICILED IN CALIFORNIA AT THE TIME THE TRANSFER AGREEMENT IS SIGNED BY THE PAYEE. **<A]**

**[A>(2)<A]** **[A>**THE PAYEE IS NOT DOMICILED IN CALIFORNIA AT THE TIME THE TRANSFER AGREEMENT IS SIGNED AND THE STATE WHERE THE PAYEE IS DOMICILED DOES NOT HAVE A STRUCTURED SETTLEMENT TRANSFER STATUTE, BUT EITHER THE STRUCTURED SETTLEMENT OBLIGOR OR ANNUITY ISSUER IS DOMICILED IN CALIFORNIA. **<A]**

**[\*3]** SEC. 3. [Section 10136 of the Insurance Code](#) is amended to read:

§ 10136.

(a) No **[A>DIRECT OR INDIRECT<A]** transfer of structured settlement payment rights **[D>**, either directly or indirectly, **<D]** shall be effective by a payee **[D>**domiciled in this state, or by a payee entitled to receive payments under a structured settlement funded by an insurance contract issued by an insurer domiciled in this state or owned by an insurer or corporation domiciled in this state, **<D]** **[A>TO WHICH THIS ARTICLE APPLIES<A]** and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee, unless all of the provisions of this section are satisfied.

(b) Ten or more days before the payee executes a transfer agreement, the transferee shall provide the payee with a separate written disclosure statement, accurately completed with the information that applies to the transfer agreement, in substantially the following form, in at least 12-point type unless otherwise indicated (bracketed instructions shall not appear in the form):

[Click here to view form](#)

(c) The transfer agreement shall be written in at least 12-point type and shall be complete and without blank spaces to be completed after the payee's signature. The transfer agreement shall set forth clear and conspicuously, and in no less than 12-point type, all of the following:

(1) A statement that the agreement is not effective until the date on which a court enters a final order approving the transfer agreement and that payment to the payee pursuant to the transfer agreement will be delayed up to 30 days or more after the date the payee signed the transfer agreement in order for the court to review and approve the transfer agreement.

(2) The amounts and due dates of the structured settlement payments to be transferred.

(3) The aggregate amount of the structured settlement payments to be transferred. This amount shall be disclosed in the form prescribed in subdivision (b) **[D>**in the space for "Total dollar amount of payments you are selling**<D]**. **[D>**"**<D]**

(4) The aggregate amount of all expenses, if any, to be deducted from the purchase price to be paid to the payee in exchange for the payments to be transferred, and an itemization of all expenses by type and amount.

(5) The amount payable to the payee, net of all expenses, in exchange for the payments to be transferred. This amount shall be disclosed in the form prescribed in subdivision (b) **[D>** in the spaces for "Net amount paid to you" and "net amount**<D]**. **[D>"<D]**

(6) The discounted present value of all structured settlement payments to be transferred and a statement that "This is the value of your structured settlement in current dollars." This amount shall be disclosed in the form prescribed in subdivision (b) **[D>** in the space for "Present value of amount you are selling**<D]**. **[D>"<D]**

(7) The federal rate, as described in subdivision (c) of Section 10134, used in determining the discounted present value.

(8) The effective equivalent interest rate, which shall be disclosed in the following statement:

[Click here to view form](#)

(9) The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments.

(10) A statement that the payee should obtain independent professional advice regarding any federal and state income tax consequences arising from the proposed transfer, and that the transferee may not refer the payee to any specific adviser for that purpose.

(11) A statement that the court approving the transfer agreement retains continuing jurisdiction to interpret and monitor implementation of the agreement as justice may require.

(12) The following statement: "If you believe you were treated unfairly or were misled as to the nature of the obligations you assumed upon entering into this agreement, you should report those circumstances to your local district attorney or the office of the Attorney General."

(13) The following statement printed in 14-point type, circumscribed by a box with a bold border, and set forth immediately above or adjacent to the space reserved for the payee's signature: "You have the right to cancel this agreement without any cost or obligation until the date the court approves this agreement. You will receive notice of the court hearing date when approval may occur. You must cancel in writing and send your cancellation to [insert transferee's name and address]."

(d) The contract for transferring the structured settlement payment rights may not violate Section 10138.

(e) At any time before the date on which a court enters a final order approving the transfer agreement pursuant to Section 10139.5, the payee may cancel the transfer agreement, without cost or further obligation, by providing written notice of cancellation to the transferee.

**[\*4]** SEC. 4. [Section 10137 of the Insurance Code](#) is amended to read:

§ 10137.

A transfer of structured settlement payment rights is void unless **[D>all of<D]** **[A>A COURT REVIEWS AND APPROVES THE TRANSFER AND FINDS <A]** the following conditions are met:

(a) The transfer of the structured settlement payment rights is fair and reasonable and in the best interest of the payee, taking into account the welfare and support of his or her dependents.

(b) The transfer complies with the requirements of this article, will not contravene other applicable law, and **[D>is <D]** **[A>THE COURT HAS REVIEWED AND <A]** approved **[D>by a court <D]** **[A>THE TRANSFER <A]** as provided in Section 10139.5.

**[\*5]** SEC. 5. [Section 10138 of the Insurance Code](#) is amended to read:

§ 10138.

(a) A transfer agreement, as defined in subdivision (o) of Section 10134, shall not include any provision described in the paragraphs below. Any inclusion of a prohibited provision, with respect to a seller who is a California resident, shall make the **[D>contract <D]** **[A>PROVISION <A]** void and unenforceable.

(1) Any provision that waives the seller's right to sue under any law, or in which the seller agrees not to sue, or that waives jurisdiction or standing to sue under the contract.

(2) Any provision that requires the seller to indemnify and hold harmless the buyer, or to pay the buyer's costs of defense, in any claim or action brought by the seller or on the seller's behalf contesting the sale for any reason.

(3) Any provision that waives benefits or rights conferred by law with respect to garnishment of wages.

(4) Any provision providing that the contract is confidential or proprietary, belonging to the buyer.

(5) Any provision in which the seller stipulates to a confession of judgment.

(6) Any provision requiring the seller to pay the buyer's attorney's fees and costs if the purchase agreement is not completed.

(7) Any provision requiring the seller to pay any tax liability arising under the federal tax laws, other than the seller's own tax liability, if any, that results from the transfer.

(8) Any provision providing for brokerage fees incurred in the contract to be deducted from the purchase price disclosed pursuant to paragraph (5) of subdivision (b) of Section 10136.

(9) **[A>IF THE PAYEE IS DOMICILED IN CALIFORNIA AT THE TIME THAT THE TRANSFER AGREEMENT IS SIGNED BY THE PAYEE, <A]** any forum selection provision providing for jurisdiction to be in a court outside of California for any action arising under the contract.

(10) **[A]** IF THE PAYEE IS DOMICILED IN CALIFORNIA AT THE TIME THAT THE TRANSFER AGREEMENT IS SIGNED BY THE PAYEE, **<A]** any choice-of-law provision that provides for controlling law to be other than California law in any action arising under the contract.

(11) A provision that provides the transferee with a security interest or collateral interest in any structured settlement payment rights that exceed the actual dollar amount of the structured settlement payment rights being transferred.

(12) Any provision that creates a "buyer's first right of refusal" to purchase any remaining structured payment rights that the payee may desire to sell in the future.

(b) The provisions in this section may not be waived by agreement of the parties.

**[\*6]** SEC. 6. [Section 10139 of the Insurance Code](#) is amended to read:

§ 10139.

(a) At the time of filing a petition pursuant to Section 10139.5 for court approval, the transferee shall file with the Attorney General a copy of the transferee's petition for approval, a copy of the written disclosure statement required by subdivision (a) of Section 10136, a copy of the transfer agreement as defined in subdivision (o) of Section 10134, **[A]** AND, UNLESS EXCEPTED PURSUANT TO SUBPARAGRAPH (H) OF PARAGRAPH (2) OF SUBDIVISION (F) OF SECTION 10139.5, **<A]** a copy of the annuity contract, **[D]** a copy of **<D]** any qualified assignment agreement, **[D]** a copy of **<D]** the underlying structured settlement agreement, **[D]** a copy of **<D]** **[A]** OR **<A]** any order or approval of any court or responsible administrative authority authorizing or approving the structured settlement, **[A]** AND **<A]** a copy and proof of notice to the interested parties, and a verified statement from the transferee stating that all of the conditions set forth in Sections 10136, 10137, and 10138 have been met.

(b) The Attorney General may, but is not required to, review any transfer agreement in order to ensure that the transfer meets the requirements of this article.

(c) The Attorney General may charge a reasonable fee for the filing of the transfer agreement as provided in this section. The fee shall be paid by the transferee.

(d) This section does not apply to a transfer by a payee who is not a resident of California at the time the payee executes the transfer agreement.

**[\*7]** SEC. 7. [Section 10139.3 of the Insurance Code](#) is amended to read:

§ 10139.3.

(a) None of the provisions of this article may be waived **[A]** BY THE PAYEE **<A]** .

(b) Compliance with the requirements set forth in Sections 10136, 10137, and 10138 shall be solely the responsibility of the transferee in any transfer of structured settlement payment rights.

(c) A payee who proposes to make a transfer of structured settlement payment rights shall not incur any penalty, shall not forfeit any application fee or other payment, and shall not otherwise incur any liability to the proposed transferee based on any failure of that transfer



to satisfy the requirements of Sections 10136, 10137, and 10138.

(d) The transferee and any assignee shall be liable to the structured settlement obligor and the annuity issuer for any and all taxes incurred as a consequence of the transfer or as a consequence of any failure of the transferee or assignee to comply with this article or the terms of the structured settlement agreement.

(e) Neither the annuity issuer nor the structured settlement obligor may be required to divide any structured settlement payment between the payee and any transferee or assignee or between two or more transferees or assignees.

**[\*8]** SEC. 8. [Section 10139.5 of the Insurance Code](#) is amended to read:

§ 10139.5.

(a) A direct or indirect transfer of structured settlement payment rights is not effective and a structured settlement obligor or annuity issuer is not required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order based on express written findings by the court that:

(1) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.

(2) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received that advice or knowingly waived **[D>**that advice**<D]** **[A>**,**<A]** in writing **[A>**, THE OPPORTUNITY TO RECEIVE THE ADVICE**<A]** .

(3) The transferee has **[A>**COMPLIED WITH THE NOTIFICATION REQUIREMENTS PURSUANT TO PARAGRAPH (2) OF SUBDIVISION (F), THE TRANSFEREE HAS**<A]** provided the payee with a disclosure form that complies with Section 10136 **[A>**,**<A]** and the transfer agreement complies with Sections 10136 and 10138.

(4) The transfer does not contravene any applicable statute or the order of any court or other government authority.

(5) The payee **[D>**reasonably**<D]**understands the terms of the transfer agreement, including the terms set forth in the disclosure statement required by Section 10136.

(6) The payee **[D>**reasonably**<D]**understands and does not wish to exercise the payee's right to cancel the transfer agreement.

(b) **[A>** WHEN DETERMINING WHETHER THE PROPOSED TRANSFER SHOULD BE APPROVED, INCLUDING WHETHER THE TRANSFER IS FAIR, REASONABLE, AND IN THE PAYEE'S BEST INTEREST, TAKING INTO ACCOUNT THE WELFARE AND SUPPORT OF THE PAYEE'S DEPENDENTS, THE COURT SHALL CONSIDER THE TOTALITY OF THE CIRCUMSTANCES, INCLUDING, BUT NOT LIMITED TO, ALL OF THE FOLLOWING: **<A]**

**[A>**(1)**<A]** **[A>** THE REASONABLE PREFERENCE AND DESIRE OF THE PAYEE TO COMPLETE THE PROPOSED TRANSACTION, TAKING INTO ACCOUNT THE PAYEE'S AGE, MENTAL CAPACITY, LEGAL KNOWLEDGE, AND APPARENT MATURITY LEVEL. **<A]**

**[A>(2)<A]** [A> THE STATED PURPOSE OF THE TRANSFER. <A]

**[A>(3)<A]** [A> THE PAYEE'S FINANCIAL AND ECONOMIC SITUATION. <A]

**[A>(4)<A]** [A> THE TERMS OF THE TRANSACTION, INCLUDING WHETHER THE PAYEE IS TRANSFERRING MONTHLY OR LUMP SUM PAYMENTS OR ALL OR A PORTION OF HIS OR HER FUTURE PAYMENTS. <A]

**[A>(5)<A]** [A> WHETHER, WHEN THE SETTLEMENT WAS COMPLETED, THE FUTURE PERIODIC PAYMENTS THAT ARE THE SUBJECT OF THE PROPOSED TRANSFER WERE INTENDED TO PAY FOR THE FUTURE MEDICAL CARE AND TREATMENT OF THE PAYEE RELATING TO INJURIES SUSTAINED BY THE PAYEE IN THE INCIDENT THAT WAS THE SUBJECT OF THE SETTLEMENT AND WHETHER THE PAYEE STILL NEEDS THOSE FUTURE PAYMENTS TO PAY FOR THAT FUTURE CARE AND TREATMENT. <A]

**[A>(6)<A]** [A> WHETHER, WHEN THE SETTLEMENT WAS COMPLETED, THE FUTURE PERIODIC PAYMENTS THAT ARE THE SUBJECT OF THE PROPOSED TRANSFER WERE INTENDED TO PROVIDE FOR THE NECESSARY LIVING EXPENSES OF THE PAYEE AND WHETHER THE PAYEE STILL NEEDS THE FUTURE STRUCTURED SETTLEMENT PAYMENTS TO PAY FOR FUTURE NECESSARY LIVING EXPENSES. <A]

**[A>(7)<A]** [A> WHETHER THE PAYEE IS, AT THE TIME OF THE PROPOSED TRANSFER, LIKELY TO REQUIRE FUTURE MEDICAL CARE AND TREATMENT FOR THE INJURIES THAT THE PAYEE SUSTAINED IN CONNECTION WITH THE INCIDENT THAT WAS THE SUBJECT OF THE SETTLEMENT AND WHETHER THE PAYEE LACKS OTHER RESOURCES, INCLUDING INSURANCE, SUFFICIENT TO COVER THOSE FUTURE MEDICAL EXPENSES. <A]

**[A>(8)<A]** [A> WHETHER THE PAYEE HAS OTHER MEANS OF INCOME OR SUPPORT, ASIDE FROM THE STRUCTURED SETTLEMENT PAYMENTS THAT ARE THE SUBJECT OF THE PROPOSED TRANSFER, SUFFICIENT TO MEET THE PAYEE'S FUTURE FINANCIAL OBLIGATIONS FOR MAINTENANCE AND SUPPORT OF THE PAYEE'S DEPENDENTS, SPECIFICALLY INCLUDING, BUT NOT LIMITED TO, THE PAYEE'S CHILD SUPPORT OBLIGATIONS, IF ANY. THE PAYEE SHALL DISCLOSE TO THE TRANSFEREE AND THE COURT HIS OR HER COURT-ORDERED CHILD SUPPORT OR MAINTENANCE OBLIGATIONS FOR THE COURT'S CONSIDERATION. <A]

**[A>(9)<A]** [A> WHETHER THE FINANCIAL TERMS OF THE TRANSACTION, INCLUDING

THE DISCOUNT RATE APPLIED TO DETERMINE THE AMOUNT TO BE PAID TO THE PAYEE, THE EXPENSES AND COSTS OF THE TRANSACTION FOR BOTH THE PAYEE AND THE TRANSFEREE, THE SIZE OF THE TRANSACTION, THE AVAILABLE FINANCIAL ALTERNATIVES TO THE PAYEE TO ACHIEVE THE PAYEE'S STATED OBJECTIVES, ARE FAIR AND REASONABLE. <A]

[A>(10)<A] [A> WHETHER THE PAYEE COMPLETED PREVIOUS TRANSACTIONS INVOLVING THE PAYEE'S STRUCTURED SETTLEMENT PAYMENTS AND THE TIMING AND SIZE OF THE PREVIOUS TRANSACTIONS AND WHETHER THE PAYEE WAS SATISFIED WITH ANY PREVIOUS TRANSACTION. <A]

[A>(11)<A] [A> WHETHER THE TRANSFEREE ATTEMPTED PREVIOUS TRANSACTIONS INVOLVING THE PAYEE'S STRUCTURED SETTLEMENT PAYMENTS THAT WERE DENIED, OR THAT WERE DISMISSED OR WITHDRAWN PRIOR TO A DECISION ON THE MERITS, WITHIN THE PAST FIVE YEARS. <A]

[A>(12)<A] [A> WHETHER, TO THE BEST OF THE TRANSFEREE'S KNOWLEDGE AFTER MAKING INQUIRY WITH THE PAYEE, THE PAYEE HAS ATTEMPTED STRUCTURED SETTLEMENT PAYMENT TRANSFER TRANSACTIONS WITH ANOTHER PERSON OR ENTITY, OTHER THAN THE TRANSFEREE, THAT WERE DENIED, OR WHICH WERE DISMISSED OR WITHDRAWN PRIOR TO A DECISION ON THE MERITS, WITHIN THE PAST FIVE YEARS. <A]

[A>(13)<A] [A> WHETHER THE PAYEE, OR HIS OR HER FAMILY OR DEPENDENTS, ARE IN OR ARE FACING A HARDSHIP SITUATION. <A]

[A>(14)<A] [A> WHETHER THE PAYEE RECEIVED INDEPENDENT LEGAL OR FINANCIAL ADVICE REGARDING THE TRANSACTION. THE COURT MAY DENY OR DEFER RULING ON THE PETITION FOR APPROVAL OF A TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS IF THE COURT BELIEVES THAT THE PAYEE DOES NOT FULLY UNDERSTAND THE PROPOSED TRANSACTION AND THAT INDEPENDENT LEGAL OR FINANCIAL ADVICE REGARDING THE TRANSACTION SHOULD BE OBTAINED BY THE PAYEE. <A]

[A>(15)<A] [A> ANY OTHER FACTORS OR FACTS THAT THE PAYEE, THE TRANSFEREE, OR ANY OTHER INTERESTED PARTY CALLS TO THE ATTENTION OF THE REVIEWING COURT OR THAT THE COURT DETERMINES SHOULD BE CONSIDERED IN REVIEWING THE TRANSFER. <A]

(c) [A> EVERY PETITION FOR APPROVAL OF A TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS, EXCEPT AS PROVIDED IN SUBDIVISION (D), SHALL INCLUDE, TO THE EXTENT KNOWN AFTER THE TRANSFEREE HAS MADE REASONABLE INQUIRY WITH THE PAYEE, ALL OF THE FOLLOWING: <A]

**[A>(1) THE PAYEE'S NAME, ADDRESS, AND AGE. <A]**

**[A>(2) THE PAYEE'S MARITAL STATUS, AND, IF MARRIED OR SEPARATED, THE NAME OF THE PAYEE'S SPOUSE. <A]**

**[A>(3) THE NAMES, AGES, AND PLACE OR PLACES OF RESIDENCE OF THE PAYEE' S MINOR CHILDREN OR OTHER DEPENDENTS, IF ANY. <A]**

**[A>(4) THE AMOUNTS AND SOURCES OF THE PAYEE'S MONTHLY INCOME AND FINANCIAL RESOURCES AND, IF PRESENTLY MARRIED, THE AMOUNTS AND SOURCES OF THE MONTHLY INCOME AND FINANCIAL RESOURCES OF THE PAYEE'S SPOUSE. <A]**

**[A>(5) WHETHER THE PAYEE IS CURRENTLY OBLIGATED UNDER ANY CHILD SUPPORT OR SPOUSAL SUPPORT ORDER, AND, IF SO, THE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF ANY INDIVIDUAL, ENTITY, OR AGENCY THAT IS RECEIVING CHILD OR SPOUSAL SUPPORT FROM THE PAYEE UNDER THAT ORDER OR THAT HAS JURISDICTION OVER THE ORDER OR THE PAYMENTS IN QUESTION. <A]**

**[A>(6) INFORMATION REGARDING PREVIOUS TRANSFERS OR ATTEMPTED TRANSFERS, AS DESCRIBED IN PARAGRAPH (11), (12), OR (13) OF SUBDIVISION (B). THE TRANSFEREE OR PAYEE MAY CHOOSE TO PROVIDE THIS INFORMATION BY PROVIDING COPIES OF PLEADINGS, TRANSACTION DOCUMENTS, OR ORDERS INVOLVING ANY PREVIOUS ATTEMPTED OR COMPLETED TRANSFER OR BY PROVIDING THE COURT A SUMMARY OF AVAILABLE INFORMATION REGARDING ANY PREVIOUS TRANSFER OR ATTEMPTED TRANSFER, SUCH AS THE DATE OF THE TRANSFER OR ATTEMPTED TRANSFER, THE PAYMENTS TRANSFERRED OR ATTEMPTED TO BE TRANSFERRED BY THE PAYEE IN THE EARLIER TRANSACTION, THE AMOUNT OF MONEY RECEIVED BY THE PAYEE IN CONNECTION WITH THE PREVIOUS TRANSACTION, AND GENERALLY THE PAYEE'S REASONS FOR PURSUING OR COMPLETING A PREVIOUS TRANSACTION. THE TRANSFEREE'S INABILITY TO PROVIDE THE INFORMATION REQUIRED BY THIS PARAGRAPH SHALL NOT PRECLUDE THE COURT FROM APPROVING THE PROPOSED TRANSFER, IF THE COURT DETERMINES THAT THE INFORMATION IS NOT AVAILABLE TO THE TRANSFEREE AFTER THE TRANSFEREE HAS MADE A REASONABLE EFFORT TO SECURE THE INFORMATION, INCLUDING MAKING AN INQUIRY WITH THE PAYEE. <A]**

**(d) [A> WITH RESPECT TO THE INFORMATION REQUIRED TO BE INCLUDED IN EVERY PETITION FOR APPROVAL OF A TRANSFER OF STRUCTURED SETTLEMENT PAYMENT RIGHTS PURSUANT TO PARAGRAPHS (2), (3), (4), (5), AND (6) OF SUBDIVISION (C), THAT INFORMATION SHALL BE DEEMED TO BE INCLUDED IN THE PETITION IF IT IS PROVIDED AT THE SCHEDULED HEARING ON THE PROPOSED TRANSFER THROUGH ORAL TESTIMONY OR DOCUMENTARY EVIDENCE FILED WITH THE COURT AND MADE A PART OF THE RECORD CONSISTENT WITH THE RULES OF EVIDENCE AND PROCEDURE. <A]**

**[D>(b)<D] [A>(e)<A]** Following a transfer of structured settlement payment rights

under this article:

(1) The structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments.

(2) The transferee shall be liable to the structured settlement obligor and the annuity issuer if the transfer contravenes the terms of the structured settlement for the following:

(A) Any taxes incurred by those parties as a consequence of the transfer.

(B) Any other liabilities or costs, including reasonable costs and attorney's fees, arising from compliance by those parties with the order of the court or arising as a consequence of the transferee's failure to comply with this article.

(3) Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two, or more, transferees or assignees.

(4) Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this article.

**[D>(c)<D] [A>(f)<A]** (1) **[D>An application<D] [A>A PETITION<A]** under this article for approval of a transfer of structured settlement payment rights shall be made by the transferee and brought in the county in which the payee resides **[A>AT THE TIME THE TRANSFER AGREEMENT IS SIGNED BY THE PAYEE, OR, IF THE PAYEE IS NOT DOMICILED IN CALIFORNIA, IN THE COUNTY IN WHICH THE PAYEE RESIDES OR IN THE COUNTY WHERE THE STRUCTURED SETTLEMENT OBLIGOR OR ANNUITY ISSUER IS DOMICILED<A]** .

(2) Not less than 20 days prior to the scheduled hearing on any **[D>application<D] [A>PETITION<A]** for approval of a transfer of structured settlement payment rights under this article, the transferee shall file with the court and serve on all interested parties a notice of the proposed transfer and the **[D>application<D] [A>PETITION<A]** for its authorization, and shall include the following with that notice:

(A) A copy of the transferee's **[D>application<D] [A>CURRENT PETITION AND ANY OTHER PRIOR PETITION, WHETHER APPROVED OR WITHDRAWN, THAT WAS FILED WITH THE COURT IN ACCORDANCE WITH PARAGRAPH (6) OF SUBDIVISION (C) <A]** .

(B) A copy of the **[A>PROPOSED<A]** transfer agreement **[A>AND DISCLOSURE FORM REQUIRED BY PARAGRAPH (3) OF SUBDIVISION (A) <A]** .

(C) A listing of each of the payee's dependents, together with each dependent's age.

(D) A copy of the disclosure required in subdivision (b) of Section 10136.

(E) A copy of the annuity contract **[A>, IF AVAILABLE<A]** .

(F) A copy of any qualified assignment agreement **[A>, IF AVAILABLE<A]** .

(G) A copy of the underlying structured settlement agreement **[A>, IF AVAILABLE<A]** .

(H) **[A>** IF A COPY OF A DOCUMENT DESCRIBED IN SUBPARAGRAPH (E), (F), OR (G) IS UNAVAILABLE OR CANNOT BE LOCATED, THEN THE TRANSFEREE IS NOT REQUIRED TO ATTACH A COPY OF THAT DOCUMENT TO THE PETITION OR NOTICE OF THE PROPOSED TRANSFER IF THE TRANSFEREE SATISFIES THE COURT THAT REASONABLE EFFORTS TO LOCATE AND SECURE A COPY OF THE DOCUMENT HAVE BEEN MADE, INCLUDING MAKING INQUIRY WITH THE PAYEE. IF THE DOCUMENTS ARE AVAILABLE, BUT CONTAIN A CONFIDENTIALITY OR NONDISCLOSURE PROVISION, THEN THE TRANSFEREE SHALL SUMMARIZE IN THE PETITION THE PAYMENTS DUE AND OWING TO THE PAYEE, AND, IF REQUESTED BY THE COURT, SHALL PROVIDE COPIES OF THE DOCUMENTS TO THE COURT AT A SCHEDULED HEARING. **<A]**

(I) **[A>** PROOF OF SERVICE SHOWING COMPLIANCE WITH THE NOTIFICATION REQUIREMENTS OF THIS SECTION. **<A]**

**[D>(H)<D] [A>(J)<A]** Notification that any interested party is entitled to support, oppose, or otherwise respond to the transferee's **[D>application,<D] [A>PETITION,<A]** either in person or by counsel, by submitting written comments to the court or by participating in the hearing.

**[D>(I)<D] [A>(K)<A]** Notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the **[D>application<D] [A>PETITION<A]** must be filed, which may not be less than 15 days after service of the transferee's notice, in order to be considered by the court.

**[A>(L)<A] [A>**IF THE PAYEE ENTERED INTO THE STRUCTURED SETTLEMENT AT ISSUE WITHIN FIVE YEARS PRIOR TO THE DATE OF THE TRANSFER AGREEMENT, THEN THE TRANSFEREE SHALL PROVIDE THE FOLLOWING NOTICE TO THE PAYEE'S ATTORNEY OF RECORD AT THE TIME THE STRUCTURED SETTLEMENT WAS CREATED, IF THE ATTORNEY IS LICENSED TO PRACTICE IN CALIFORNIA, AT THE ATTORNEY'S ADDRESS ON FILE WITH THE STATE BAR OF CALIFORNIA. THE NOTICE SHALL BE DELIVERED BY REGULAR MAIL AND SHALL CONTAIN THE FOLLOWING LANGUAGE: **<A]**

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**[D>(d)<D] [A>(g)<A]** All court costs and filing fees shall be paid by the transferee.

**[D>(e)<D] [A>(h)<A]** No later than the time of filing the petition for court approval, the transferee shall advise the payee of the payee's right to seek independent counsel and financial advice in connection with the transferee's petition for court approval of the transfer agreement, and shall further advise the payee that if the payee retains counsel, a licensed certified public accountant, or a licensed actuary in connection with a petition for an order approving the transfer agreement, that the transferee shall pay the fees of the payee's counsel, accountant, or actuary, regardless of whether the transfer agreement is approved, and regardless of whether the attorney, accountant, or actuary files any document or appears at the hearing on the **[D>application<D] [A>PETITION<A]** for transfer, in an aggregate amount not to exceed one thousand five hundred dollars (\$1,500). The transferee's accountant, counsel, or actuary may not advise the payee.

**[D>(f)<D] [A>(i)<A]** The court shall retain continuing jurisdiction to interpret and

monitor the implementation **[A]** AND CLOSING OF THE TRANSACTION THAT IS THE SUBJECT **<A]** of the transfer agreement as justice requires.

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## **APPENDIX D**

*41 McGeorge L. Rev. 667, \**

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**LENGTH:** 5068 words

Insurance: Chapter 593: A Structure for the Transfer of Structured Settlements

**NAME:** Corrie Erickson

**LEXISNEXIS SUMMARY:**

... Since 1997, nearly all states have passed some form of the Structured Settlement Protection Act (SSPA), which makes the transfer of structured settlement payment rights ineffective without prior court approval. ... The legislation's sponsors hoped that it would prevent payees from "being preyed upon by unscrupulous "factoring companies"" and suppress fears that the transfers would "threaten the favorable tax treatment given to the parties ... under a structured settlement if the periodic payment rights were sold to another." ... Additional Limits on the Scope of Existing Law Chapter 593 restricts application of the California SSPA to agreements in which the payee is domiciled in California at the time the transfer agreement is signed, or either the obligor or annuity insurer of the settlement is domiciled in a state with no statute regulating the transfer of structured settlements. ... If the documents are available but subject to a confidentiality provision, Chapter 593 allows the transferee to summarize "the payments due and owing to the payee," pending any further requests for production of the documents by the court. ... The "Best Interests" Test Although Chapter 593 makes several changes to the California SSPA, the most consequential change will likely be the expansion of the "best interests" test criteria.

**HIGHLIGHT:** Code Sections Affected

Insurance Code PP 10134, 10135, 10136, 10137, 10138, 10139, 10139.3, 10139.5 (amended).

SB 510 (Corbett); 2009 STAT. Ch. 593.

**TEXT:**  
**[\*667]**

I. Introduction

At just three years of age, Orion Olson began experiencing vision and neurological problems associated with injuries sustained from a dog bite. <sup>1</sup> He continued to encounter hardship, dropping out of high school in his teens and later finding himself homeless. <sup>2</sup> Hope, however, lingered on the horizon. When Olson turned eighteen, he would begin collecting periodic payments totaling \$ 75,000, an amount he obtained in the settlement of a lawsuit relating to the dog attack. <sup>3</sup> Unfortunately, after receiving his first payment of \$ 7,500, Olson discovered that the money was not enough to sustain him. <sup>4</sup> After watching a television advertisement for a company offering cash in exchange for settlements like his, he sold the remaining \$ 67,500 balance of his settlement to a finance company for a meager \$ 16,500. <sup>5</sup> "I needed money," Olson reflected, "if I could get the money out like they were saying on TV, I wouldn't have to worry about being on the street anymore." <sup>6</sup> Regrettably, he was wrong. <sup>7</sup> Just six months later, the money was gone, and Olson was living out of his car. <sup>8</sup>

For the past twenty-five years, the federal government has encouraged the use of structured settlements <sup>9</sup> for compensating injury victims. <sup>10</sup> These settlement **[\*668]** arrangements cut down on societal costs by "minimizing the risk that lump sum recoveries will be dissipated, leaving victims of disabling injuries to fall back on public assistance." <sup>11</sup> Nevertheless, private market forces often supplant the public benefits of structured settlements. <sup>12</sup> In the early 1990s, a secondary market developed in which financial companies began to purchase from structured settlement holders (payees) their rights to collect future payments. <sup>13</sup> These companies, now commonly known as structured settlement factoring companies, use aggressive advertising to convince payees to "trade [their] future payments for present cash." <sup>14</sup> The factoring companies' exploitive tactics sparked a great deal of controversy. <sup>15</sup> One article noted that "factoring companies often charged sharp discounts to payees who were ill equipped to appreciate the value of their future payments" <sup>16</sup> and "in some cases, factoring companies charged discounts equivalent to annual interest rates as high as 70 percent." <sup>17</sup>

Before long, state legislatures saw a need for regulation. <sup>18</sup> Since 1997, nearly all states have passed some form of the Structured Settlement Protection Act (SSPA), which makes the transfer of structured settlement payment rights ineffective without prior court approval. <sup>19</sup> Chapter 593 adds to the protections of the current California SSPA by increasing the notification requirements associated with the transfer and by specifying the factors a court must consider when determining whether a structured settlement sale is in the "best interests" of the payee. <sup>20</sup>

## II. Legal Background

### A. Existing California Law

In 1999, the California Legislature followed the lead of several other states and enacted the California SSPA to defend its citizens against the abuses of unfair factoring transactions. <sup>21</sup> The legislation's sponsors hoped that it would **[\*669]** prevent payees from "being preyed upon by unscrupulous "factoring companies"" and suppress fears that the transfers would "threaten the favorable tax treatment given to the parties ... under a structured settlement if the periodic payment rights [were] sold to another." <sup>22</sup>

The California SSPA ensures fairness in factoring transactions by rendering a transfer agreement ineffective unless it meets several conditions. <sup>23</sup> Initially, the transferee must present the payee with "a separate written disclosure statement" clearly detailing the terms of the agreement and encouraging the payee to seek "independent professional advice" in

negotiating the transfer. <sup>24</sup> The transfer must also satisfy what is commonly known as the "best interests" test, meaning that it is "fair and reasonable and in the best interest of the payee, taking into account the welfare and support of his or her dependents." <sup>25</sup> Even if the transfer is in the "best interests" of the payee, it must not "contravene other applicable law." <sup>26</sup> Transfer agreements containing certain provisions, such as forum selection clauses or terms of indemnity, may also render the arrangement "void and unenforceable." <sup>27</sup> Finally, a transfer that complies with all of the enumerated requirements will not take effect until the court approves it "in a final court order based on express written findings." <sup>28</sup>

To obtain approval, the transferee must file an application with the court and all interested parties. <sup>29</sup> The application must include a copy of the transfer agreement, the required disclosures, the annuity contract, the underlying structured settlement agreement, any qualified assignment agreement, and a listing of each of the payee's dependents. <sup>30</sup> The notice must also include a statement that interested parties are invited to partake in the court's approval of the agreement, either in writing or in person, and the time and place of the hearing. <sup>31</sup>

## **[\*670]**

### B. Federal Regulations

California and other states with laws paralleling the California SSPA were not alone in noticing the problems associated with transfers of structured settlement payment rights. Organizations at the federal level moved to address the abuses as well. <sup>32</sup> In 1999, the U.S. Treasury Department urged Congress to supplement the protective frameworks of the states by imposing a punitive tax on certain structured settlement transfers. <sup>33</sup> Congress later adopted and enacted this proposal as part of the Victims of Terrorism Tax Relief Act of 2001, now codified as [section 5891 of the Internal Revenue Code](#). <sup>34</sup> Section 5891 imposes a forty-percent tax on any party who acquires structured settlement payment rights through a factoring transaction. <sup>35</sup> It does not, however, apply to a "factoring transaction in which the transfer of structured settlement payment rights is approved in advance in a qualified order." <sup>36</sup> Through this savings provision, section 5891 works with the laws enacted in many states by ensuring that "no informed party that is subject to the taxing authority of the United States will seek to acquire structured settlement payment rights without obtaining approval of the transaction under the appropriate [SSPA]." <sup>37</sup>

### III. Chapter 593

#### A. Redefining the Court's Role

Chapter 593 makes several changes to existing law, but perhaps the most significant change involves a clarification of the court's role in making the "best interests" determination. <sup>38</sup> Chapter 593 directs the court to determine that all required conditions of the statute are met before approving a petition to transfer **[\*671]** structured settlement payment rights. <sup>39</sup> In determining whether the transfer should be approved, the court must consider whether it is "fair, reasonable, and in the payee's best interest." <sup>40</sup> Under Chapter 593, this determination involves considering several criteria that make up the "totality of circumstances" surrounding the proposed transfer. <sup>41</sup> Chapter 593 also mandates that the petition for transfer include certain personal and financial information about the payee. <sup>42</sup>

#### B. Notice Requirements

Chapter 593 expands on current law by requiring the transferee to disclose more

information in its notice to the payee.<sup>43</sup> Specifically, the notice must explain that the discount rate applied in the factoring transaction is higher than the rate used by the Internal Revenue Service to calculate the present value of the settlement.<sup>44</sup> Chapter 593 also amends the procedure that the transferee must follow when filing its petition for transfer with the court.<sup>45</sup> Under Chapter 593, the petition for transfer must include the disclosure statement provided to the payee and any prior transfer petitions "whether approved or withdrawn."<sup>46</sup> A copy of this petition must also be provided to certain interested parties.<sup>47</sup> Chapter 593 confines the class of annuity beneficiaries that fall within the definition of "interested parties" to include only those beneficiaries that are "irrevocably" designated in the underlying annuity agreement.<sup>48</sup> Furthermore, Chapter 593 expands notice requirements with respect to the payee's former attorney.<sup>49</sup> If the attorney of record at the creation of the structured settlement is licensed to practice in California, then he or she is required to be notified of the pending **[\*672]** transfer if it takes place within five years of the date of the original structured settlement agreement.<sup>50</sup>

### C. Additional Limits on the Scope of Existing Law

Chapter 593 restricts application of the California SSPA to agreements in which the payee is domiciled in California at the time the transfer agreement is signed, or either the obligor or annuity insurer of the settlement is domiciled in a state with no statute regulating the transfer of structured settlements.<sup>51</sup> It also relieves transferees from providing the court with certain documents if they are unavailable or cannot be located, so long as the transferee shows that he or she has made a reasonable attempt to locate the document, "including making inquiry with the payee."<sup>52</sup> If the documents are available but subject to a confidentiality provision, Chapter 593 allows the transferee to summarize "the payments due and owing to the payee," pending any further requests for production of the documents by the court.<sup>53</sup>

## IV. Analysis

### A. Support and Opposition to Chapter 593

Chapter 593 was sponsored by Consumer Attorneys of California (CAOC), an organization of over 3,000 attorneys who represent the interests of plaintiffs and consumers.<sup>54</sup> CAOC maintains that Chapter 593 will provide "further substantive and procedural protections" for those consumers engaging in structured settlement transfers.<sup>55</sup> The Governor's Office of Planning and Research, however, expressed concern with the addition of new criteria to the existing protections of the California SSPA.<sup>56</sup> It argued that Chapter 593 will "impose numerous and nebulous criteria to obtain court approval for a sale of structured settlements" and will "create more problems and procedures than guidance for a court and individuals seeking to legitimately sell or buy an asset."<sup>57</sup>

## **[\*673]**

### B. The "Best Interests" Test

Although Chapter 593 makes several changes to the California SSPA, the most consequential change will likely be the expansion of the "best interests" test criteria.<sup>58</sup> Current California law protects potential victims of predatory structured settlement transactions by requiring the court to find that the transaction is in the "best interests" of the payee.<sup>59</sup> However, prior to Chapter 593, California law did not prescribe any concrete criteria for making this determination.<sup>60</sup> Chapter 593 fills this void by instituting the "totality of the circumstances" test for court approval of a petition to transfer structured settlement

payment rights. <sup>61</sup> This test reflects patterns in other state legislatures and courts of other jurisdictions. <sup>62</sup>

Recognizing the need to protect structured settlement holders against the abusive practices of factoring companies, nearly all states have enacted some form of SSPA. <sup>63</sup> The SSPAs are not identical from state to state, but most are derived from the Model Structured Settlement Protection Act created by the National Structured Settlement Trade Association. <sup>64</sup> While only some SSPAs add supplemental protections for payees, such as mandatory choice of law provisions, most require the factoring company to make certain written disclosures to the payee, and all of the SSPAs provide that no sale of a structured settlement is effective without prior court approval of the transfer. <sup>65</sup> Court approval must be based on a finding that the transfer "will serve the best interests of the payee and the payee's dependents." <sup>66</sup> However, the term "best interests" is often ill-defined. <sup>67</sup> Although some states, such as New York, provide a more detailed explanation of the term, most use the simple definition set forth in the Model Act. <sup>68</sup>

**[\*674]** This lack of definitional detail has resulted in various judicial interpretations of the state statutory schemes. <sup>69</sup> While some courts seem to demand a showing of "an unforeseeable change in circumstances" before approving a transfer, other courts take a more variable approach. <sup>70</sup> For example, in a 2002 case, the Minnesota Court of Appeals stated that "the best interests determination involves a more global consideration of the facts, circumstances, and means of support available to the payee and his or her dependents." <sup>71</sup> Another area of confusion for the courts in the "best interests" analysis arises when attempting to evaluate the reasonableness of the exorbitant discount rates that are often attached to structured settlement transfers. <sup>72</sup> While some courts have "imposed de facto caps on allowable discount rates," others have acknowledged that in certain circumstances, greater financial need may justify a steeper discount rate. <sup>73</sup>


As one scholar put it, "neither the SSPAs nor the decisional law that has emerged under those acts gives any precise formula for applying the best interest test." <sup>74</sup> Chapter 593 directly addresses this shortcoming in California's laws by prescribing specific criteria for the court to consider when making the "best interest" determination. <sup>75</sup>

## V. Conclusion

"Anyone who watches daytime television is bombarded with advertisements seeking to buy out structured settlements." <sup>76</sup> But what people are not told is that they will be subjected to lengthy court review before completing their transactions, a process that requires legal sophistication and patience to understand. <sup>77</sup> For these individuals, Chapter 593 may be more than just an evaluation mechanism for the courts. <sup>78</sup> If the criteria of Chapter 593 provides clearer guidelines, it will assist the payee in "understanding the significance of their decision, creating a time and process for reflection." <sup>79</sup> Ultimately, Chapter 593 may be a way to ensure that "desperate" and "financially unsophisticated people" truly get what they bargained for. <sup>80</sup>

## Legal Topics:

For related research and practice materials, see the following legal topics:

[Tax Law > Federal Income Tax Computation > Compensation & Welfare Benefits > Disability Payments \(IRC secs. 104-106\) > Military & Terrorist Actions Awards](#) 

[Torts > Procedure > Settlements > Structured Settlements > Tax Consequences](#) 

## FOOTNOTES:

<sup>1</sup>n1. Margaret Mannix, *Settling for Less: Should Accident Victims Sell Their Monthly Payouts?*, U.S. News & World Rep., Jan. 25, 1999, at 63, available at [http://www.usnews.com/usnews/biztech/articles/990125/archive\\_000140.htm](http://www.usnews.com/usnews/biztech/articles/990125/archive_000140.htm).

<sup>2</sup>n2. *Id.*

<sup>3</sup>n3. *Id.*

<sup>4</sup>n4. *Id.*

<sup>5</sup>n5. *Id.*

<sup>6</sup>n6. *Id.*

<sup>7</sup>n7. Mannix, *supra* note 1.

<sup>8</sup>n8. *Id.*

<sup>9</sup>n9. "Structured settlements" are periodic payment arrangements, often financed with single-premium annuity contracts, that compensate victims for their injuries over time, rather than in one lump sum. Senate Judiciary Committee, *Committee Analysis of SB 510*, at 2 (Apr. 28, 2009).

<sup>10</sup>n10. Nat'l Structured Settlements Trade Ass'n, *Learn More About Structured Settlements*, <http://www.nssta.com/i4a/pages/index.cfm?pageid=3290> (last visited Feb. 27, 2010) (on file with the McGeorge Law Review).



<sup>11</sup> Daniel W. Hindert & Craig H. Ulman, Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts, 44 Judges' J. 19, 19 (2005), available at [http://www.abanet.org/jd/publications/jjournal/2005spring/hindert\\_ulman.pdf](http://www.abanet.org/jd/publications/jjournal/2005spring/hindert_ulman.pdf) (on file with the McGeorge Law Review).

<sup>12</sup> Id.

<sup>13</sup> Senate Judiciary Committee, Committee Analysis of SB 510, at 2 (Apr. 28, 2009).

<sup>14</sup> Hindert & Ulman, *supra* note 11, at 19.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id. at 20.

<sup>19</sup> Id. at 19; Daniel W. Hindert et al., Structured Settlements and Periodic Payment Judgments § 16.04 (Law Journal Press 2009) (1986).

<sup>20</sup> Senate Judiciary Committee, Committee Analysis of SB 510, at 1 (Apr. 28, 2009).

<sup>21</sup> Id. at 2-3; see also Hindert et al., *supra* note 19 (describing the general legislative scheme reflected by the current Structured Settlement Protection Acts in the different states).

<sup>22</sup> Assembly Committee on Judiciary, Committee Analysis of SB 491, at 5 (July 13,

1999); see also Hindert & Ulman, *supra* note 11, at 19 ("Under federal tax rules designed to encourage the use of structured settlements, the full amount of each periodic payment, including the amount attributable to earnings under the annuity contract, is excludable from the settlement recipient's income under [IRC section 104\(a\)\(1\)](#) or (2).").

¶n23. [Cal. Ins. Code § 10136\(a\)](#) (West 2005).

¶n24. *Id.* § 10136(b). For the definition of "independent professional advice," see *id.* § 10136(a). See also *id.* § 10139.5(a)(2) (indicating that before a court can approve the transfer, it must make an express written finding that the payee "has either received that advice or knowingly waived that advice in writing").

¶n25. *Id.* § 10137(a); Hindert et al., *supra* note 19, at 16-64 to 16-65.

¶n26. [Cal. Ins. Code § 10137\(b\)](#) (West 2005).

¶n27. *Id.* § 10138.

¶n28. *Id.* § 10139.5(a); see also *id.* § 10139.5(a)(1)-(6) (listing the express findings a court must make).

¶n29. *Id.* § 10139.5(c)(1), (c)(2)(A)-(H).

¶n30. *Id.*

¶n31. *Id.* § 10139.5(c)(2)(H)-(I).

¶n32. Hindert & Ulman, *supra* note 11, at 20.

¶n33. *Id.*

<sup>34</sup> Id.

<sup>35</sup> 26 U.S.C.A. § 5891(a) (West 2002); see also Hindert & Ulman, *supra* note 11, at 20 (explaining that the exact amount of the tax assessed by section 5891 is calculated as forty percent of the factoring discount received by the buyer in the settlement transfer transaction).

<sup>36</sup> 26 U.S.C.A. § 5891(b); Hindert & Ulman, *supra* note 11, at 20-21. For the purposes of section 5891, a "qualified order" is a judgment which finds that the transfer of payments under a structured settlement arrangement complies with all of the following: it "does not contravene any Federal or state statute" or court order, it "is in the best interest of the payee, taking into account the welfare and support of the payee's dependents," and it is issued "under the authority of an applicable State statute in an applicable State court" or qualified administrative authority. 26 U.S.C.A. § 5891(b)(2).

<sup>37</sup> See Hindert & Ulman, *supra* note 11, at 21 ("The conditions for exemption from the [forty] percent federal excise tax coincide with the ... conditions for an effective transfer of payment rights under the SSPAs.").

<sup>38</sup> See Assembly Committee on Judiciary, Committee Analysis of SB 510, at 1-5 (June 30, 2009) (reviewing the several changes made by Chapter 593, yet focusing on the impact of "best interests" criteria).

<sup>39</sup> Cal. Ins. Code § 10139.5(a)(3) (amended by Chapter 593).

<sup>40</sup> Id. § 10139.5(b) (amended by Chapter 593).

<sup>41</sup> See *id.* (defining the "totality of the circumstances" analysis). The "totality of the circumstances" analysis includes: the desire of the payee to go through with the transaction, taking into account his or her "age, mental capacity, legal knowledge and apparent maturity level"; the purpose, fairness and terms of the factoring transaction; whether the funds were related to an injury that requires future and continued medical care and whether the payments are still needed for that purpose; whether the funds are needed for present or continued care of the payee's dependents; whether the payee was involved in previous transactions regarding his or her structured settlement payments, and whether he or she was satisfied with those transactions; and additional factors as enumerated in the statute. *Id.*

<sup>42</sup> See id. § 10139.5(c) (amended by Chapter 593) (defining this information to include payee's name, address, age, marital status, family composition, financial resources, and several other factors as enumerated in the statute).

<sup>43</sup> Id. § 10136(b) (amended by Chapter 593).

<sup>44</sup> Id.

<sup>45</sup> Cal. Ins. Code § 10139.5(f)(2) (amended by Chapter 593).

<sup>46</sup> Id. § 10139.5(f)(2)(A)-(B) (amended by Chapter 593).

<sup>47</sup> Id. § 10139.5(f)(2) (amended by Chapter 593).

<sup>48</sup> Id. § 10134(g) (amended by Chapter 593).

<sup>49</sup> Id. § 10139.5(f)(2)(L) (amended by Chapter 593).

<sup>50</sup> Id.; Assembly Committee on Judiciary, Committee Analysis of SB 510, at 2 (June 30, 2009).

<sup>51</sup> Cal. Ins. Code § 10135(c) (amended by Chapter 593). Forum selection provisions limiting jurisdiction to a court other than a California court or choice-of-law provisions that mandate law other than that of California to be controlling are grounds to find a structured settlement agreement void and unenforceable with respect to those agreements arising out of the first situation described in the text accompanying this note. Id. § 10137(a)(9)-(10) (amended by Chapter 593).

<sup>52</sup> Id. § 10139.5(f)(2)(H) (amended by Chapter 593).

<sup>53</sup> Id.

<sup>54</sup> Senate Floor, Committee Analysis of SB 510, at 4 (Aug. 26, 2009); Consumer Attorneys of California, About CAOC, <http://www.caoc.com/CA/index.cfm?event=showPage&pg=history> (last visited Feb. 27, 2010) (on file with the McGeorge Law Review).

<sup>55</sup> Senate Floor, Committee Analysis of SB 510, at 5 (Aug. 26, 2009).

<sup>56</sup> Id. at 5-6.

<sup>57</sup> Id. at 6.

<sup>58</sup> See The Dolan Law Firm, Protecting Californians from Predatory Settlement Purchases, [http://knowledgebase.findlaw.com/kb/2009/Jun/1126938\\_1.html](http://knowledgebase.findlaw.com/kb/2009/Jun/1126938_1.html) (last visited Feb. 27, 2010) [hereinafter The Dolan Law Firm] (on file with the McGeorge Law Review) (noting that Chapter 593 will protect consumers by providing guidance for the court in applying the "best interests" test).

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Senate Bill (Structured Settlements), Fact Sheet, [www.aclhic.com/SB\\_510\\_Fact\\_Sheet.doc](http://www.aclhic.com/SB_510_Fact_Sheet.doc) (last visited Feb. 27, 2010) [hereinafter Fact Sheet] (on file with the McGeorge Law Review).

<sup>62</sup> Id.

<sup>63</sup> See Hindert et al., *supra* note 19, at 16-47 n.1.1 ("As of early 2008, only New Hampshire, North Dakota, Vermont and Wisconsin do not have an SSPA.").

<sup>64</sup>Id. at 16-49.

<sup>65</sup>Id. at 16-50 to 16-52.

<sup>66</sup>Id. at 16-51.

<sup>67</sup>Id. at 16-51 to 16-52.

<sup>68</sup>Compare [N.Y. Gen. Oblig. Law § 5-1706\(b\)](#) (McKinney 2004) (establishing that the transfer must be in the best interest of the payee, taking into account additional factors such as whether the terms of the transaction and the discount rate are fair and reasonable, and noting that financial hardship is not required for approval), with Model State Structured Settlement Protection Act § 4(a)(i) (2000) (noting only that the transfer must be in the best interest of the payee, taking into account the welfare and support of the payee's dependents).

<sup>69</sup>Hindert et al., *supra* note 19, at 16-64.

<sup>70</sup>Id. at 16-65.

<sup>71</sup>[Settlement Capital Corp. v. State Farm Mutual Auto. Ins. Co.](#), 646 N.W.2d 550, 556 (Minn. Ct. App. 2002).

<sup>72</sup>Hindert et al., *supra* note 19, at 16-67.

<sup>73</sup>Id.

<sup>74</sup>Id. at 16-69.

¶n75. Fact Sheet, supra note 61.

¶n76. Id.

¶n77. Hindert & Ulman, supra note 11, at 20.

¶n78. The Dolan Law Firm, supra note 58.

¶n79. Id.

¶n80. Id.

# **APPENDIX E**



## Article 2.3. Transfers of Structured Settlement Payment Rights (Refs & Annos)

Effective: January 1, 2011

West's Ann.Cal.Ins.Code § 10136

### § 10136. Required disclosures for transfers of structured settlement payment rights; notice of proposed transfers; transfer agreement requirements; cancellation

#### Currentness

(a) No direct or indirect transfer of structured settlement payment rights by a payee to which this article applies shall be effective, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee, unless all of the provisions of this section are satisfied.

(b) Ten or more days before the payee executes a transfer agreement, the transferee shall provide the payee with a separate written disclosure statement, accurately completed with the information that applies to the transfer agreement, in substantially the following form, in at least 12-point type unless otherwise indicated (bracketed instructions shall not appear in the form):

“Disclosure Notice Required By Law [14-point boldface type]

You are selling (technically called ‘transferring’) your right to receive your payments under a structured settlement. You should get this disclosure notice at least 10 days before you sign any contract.

IMPORTANT TERMS: [14-point boldface type ]

You have agreed to sell to the transferee future payments totaling \_\_\_ dollars (\$\_\_\_) in exchange for a purchase price of \_\_\_ dollars (\$\_\_\_).

Those future payments have a discounted present value equal to \_\_\_ dollars (\$\_\_\_), calculated by applying the discount rate of \_\_\_ percent utilized by the Internal Revenue Service to value annuities in probate proceedings.

The purchase price to be paid to you was calculated using a discount rate of \_\_\_ percent.

The purchase price payable to you is less than the present value of the future payments stated above because the discount rate of your transaction is greater than the rate utilized by the Internal Revenue Service.

For comparison purposes:

If you did not sell your right to receive structured settlement payments, but instead borrowed the net amount of \$\_\_\_ and paid that loan back in installments with each of the payments you are now selling, the equivalent interest rate you would be paying for that loan would be \_\_\_% per year.

[The text and information set forth above under 'IMPORTANT TERMS' shall be in 14-point type and circumscribed by a box with a bold border]

To figure the net amount we are paying, we have charged you for the following expenses:

[itemize in a list by type and amount]

for a total of \$\_\_\_ in expenses.

You should get independent professional advice about whether selling your structured settlement payments is a good idea for you and for your dependents.

You are advised to seek independent legal or financial advice regarding the transaction and, under the law, the cost of that advice, up to one thousand five hundred dollars (\$1,500), will be paid by the transferee, the person or entity to whom you have agreed to transfer and assign the payments in question. The transferee or purchaser's accountant, counsel, or actuary may not advise you in this transaction.

You also should get independent professional advice from an accountant or lawyer experienced in tax matters about any income tax consequences from selling your structured settlement payments. We cannot give you the name of anyone to advise you.

Court approval is needed [14-point boldface type]. A court must approve any agreement you sign to sell your rights under a structured settlement. You will not receive any money until the court approves the sale. Court approval could take more than 30 days following the day you sign an agreement selling your rights under a structured settlement.

A sale of future structured settlement payments will mean that you will no longer receive the future payments that are sold. You are advised to enter into this transaction only after you have carefully considered the consequences of the transaction.

You may cancel the contract before court approval [14-point boldface type]. You may cancel the agreement selling (or transferring) your rights under a structured settlement without any cost or obligation. You may cancel at any time before the court approves the contract. You will get notice of the date of the court hearing.

If you want to cancel, you do not need any special form. But, you must cancel in writing. Send your cancellation to: [insert transferee's name and address].

If you believe that you have been treated unfairly or have been misled, you should contact your local district attorney or the state Attorney General."

(c) The transfer agreement shall be written in at least 12-point type and shall be complete and without blank spaces to be completed after the payee's signature. The transfer agreement shall set forth clear and conspicuously, and in no less than 12-point type, all of the following:

(1) A statement that the agreement is not effective until the date on which a court enters a final order approving the transfer agreement and that payment to the payee pursuant to the transfer agreement

will be delayed up to 30 days or more after the date the payee signed the transfer agreement in order for the court to review and approve the transfer agreement.

(2) The amounts and due dates of the structured settlement payments to be transferred.

(3) The aggregate amount of the structured settlement payments to be transferred. This amount shall be disclosed in the form prescribed in subdivision (b).

(4) The aggregate amount of all expenses, if any, to be deducted from the purchase price to be paid to the payee in exchange for the payments to be transferred, and an itemization of all expenses by type and amount.

(5) The amount payable to the payee, net of all expenses, in exchange for the payments to be transferred. This amount shall be disclosed in the form prescribed in subdivision (b).

(6) The discounted present value of all structured settlement payments to be transferred and a statement that "This is the value of your structured settlement in current dollars." This amount shall be disclosed in the form prescribed in subdivision (b).

(7) The federal rate, as described in [subdivision \(c\) of Section 10134](#), used in determining the discounted present value.

(8) The effective equivalent interest rate, which shall be disclosed in the following statement:

"YOU WILL BE PAYING THE EQUIVALENT OF AN INTEREST RATE OF \_\_\_% PER YEAR.

Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, if the transferred structured settlement payments were installment payments on a loan, with each payment applied first to accrued unpaid interest and then to principal, it would be as if you were paying interest to us of \_\_\_% per year, assuming funding on the effective date of transfer."

This percentage amount shall be disclosed in the form prescribed in subdivision (b) in the space for "the equivalent interest rate you would be paying for this loan would be \_\_\_% per year."

(9) The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments.

(10) A statement that the payee should obtain independent professional advice regarding any federal and state income tax consequences arising from the proposed transfer, and that the transferee may not refer the payee to any specific adviser for that purpose.

(11) A statement that the court approving the transfer agreement retains continuing jurisdiction to interpret and monitor implementation of the agreement as justice may require.

(12) The following statement: "If you believe you were treated unfairly or were misled as to the nature of the obligations you assumed upon entering into this agreement, you should report those circumstances to your local district attorney or the office of the Attorney General."

(13) The following statement printed in 14-point type, circumscribed by a box with a bold border, and set forth immediately above or adjacent to the space reserved for the payee's signature: "You have

the right to cancel this agreement without any cost or obligation until the date the court approves this agreement. You will receive notice of the court hearing date when approval may occur. You must cancel in writing and send your cancellation to [insert transferee's name and address].”

(d) The contract for transferring the structured settlement payment rights may not violate [Section 10138](#).

(e) At any time before the date on which a court enters a final order approving the transfer agreement pursuant to [Section 10139.5](#), the payee may cancel the transfer agreement, without cost or further obligation, by providing written notice of cancellation to the transferee.

## Credits

(Added by [Stats.1999, c. 742 \(S.B.491\)](#), § 1. Amended by [Stats.2001, c. 624 \(A.B.268\)](#), § 3; [Stats.2004, c. 582 \(A.B.2161\)](#), § 1; [Stats.2006, c. 538 \(S.B.1852\)](#), § 465; [Stats.2009, c. 593 \(S.B.510\)](#), § 3; [Stats.2010, c. 328 \(S.B.1330\)](#), § 144.)

### Notes of Decisions (4)

West's Ann. Cal. Ins. Code § 10136, CA INS § 10136

Current with urgency legislation through Ch. 3 of 2013 Reg.Sess.

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## NOTES OF DECISIONS (4)

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# **APPENDIX F**

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[Article 2.3. Transfers of Structured Settlement Payment Rights](#) > **§ 10136. Disclosure; Notice; Compliance with § 10138**

Citation: **CAL. INS. CODE 10136**

*Cal Ins Code § 10136*

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the 2013 Regular Session of the 2013-2014 Legislature.

INSURANCE CODE  
Division 2. Classes of Insurance  
Part 2. Life And Disability Insurance  
Chapter 1. The Contract  
Article 2.3. Transfers of Structured Settlement Payment  
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Cal Ins Code § 10136 (2013)

**§ 10136. Disclosure; Notice; Compliance with § 10138**

**(a)** No direct or indirect transfer of structured settlement payment rights by a payee to which this article applies shall be effective, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee, unless all of the provisions of this section are satisfied.

**(b)** Ten or more days before the payee executes a transfer agreement, the transferee shall provide the payee with a separate written disclosure statement, accurately completed with the information that applies to the transfer agreement, in substantially the following form, in at least 12-point type unless otherwise indicated (bracketed instructions shall not appear in the form):

[Click here to view form](#)

**(c)** The transfer agreement shall be written in at least 12-point type and shall be complete and without blank spaces to be completed after the payee's signature. The transfer agreement shall set forth clear and conspicuously, and in no less than 12-point type, all of

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the following:

**(1)** A statement that the agreement is not effective until the date on which a court enters a final order approving the transfer agreement and that payment to the payee pursuant to the transfer agreement will be delayed up to 30 days or more after the date the payee signed the transfer agreement in order for the court to review and approve the transfer agreement.

**(2)** The amounts and due dates of the structured settlement payments to be transferred.

**(3)** The aggregate amount of the structured settlement payments to be transferred. This amount shall be disclosed in the form prescribed in subdivision (b).

**(4)** The aggregate amount of all expenses, if any, to be deducted from the purchase price to be paid to the payee in exchange for the payments to be transferred, and an itemization of all expenses by type and amount.

**(5)** The amount payable to the payee, net of all expenses, in exchange for the payments to be transferred. This amount shall be disclosed in the form prescribed in subdivision (b).

**(6)** The discounted present value of all structured settlement payments to be transferred and a statement that "This is the value of your structured settlement in current dollars." This amount shall be disclosed in the form prescribed in subdivision (b).

**(7)** The federal rate, as described in subdivision (c) of Section 10134, used in determining the discounted present value.

**(8)** The effective equivalent interest rate, which shall be disclosed in the following statement:

[Click here to view form](#)

**(9)** The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments.

**(10)** A statement that the payee should obtain independent professional advice regarding any federal and state income tax consequences arising from the proposed transfer, and that the transferee may not refer the payee to any specific adviser for that purpose.

**(11)** A statement that the court approving the transfer agreement retains continuing jurisdiction to interpret and monitor implementation of the agreement as justice may require.

**(12)** The following statement: "If you believe you were treated unfairly or were misled as to the nature of the obligations you assumed upon entering into this agreement, you should report those circumstances to your local district attorney or the office of the Attorney General."

**(13)** The following statement printed in 14-point type, circumscribed by a box with a bold border, and set forth immediately above or adjacent to the space reserved for the payee's signature: "You have the right to cancel this agreement without any cost or obligation until the date the court approves this agreement. You will receive notice of the court hearing date when approval may occur. You must cancel in writing and send your cancellation to

[insert transferee's name and address]."



**(d)** The contract for transferring the structured settlement payment rights may not violate Section 10138.

**(e)** At any time before the date on which a court enters a final order approving the transfer agreement pursuant to Section 10139.5, the payee may cancel the transfer agreement, without cost or further obligation, by providing written notice of cancellation to the transferee.

#### History:

Added [Stats 1999 ch 742 § 1 \(SB 491\)](#). Amended [Stats 2001 ch 624 § 3 \(AB 268\)](#); [Stats 2004 ch 582 § 1 \(AB 2161\)](#); [Stats 2006 ch 538 § 465 \(SB 1852\)](#), effective January 1, 2007; [Stats 2009 ch 593 § 3 \(SB 510\)](#), effective January 1, 2010; [Stats 2010 ch 328 § 144 \(SB 1330\)](#), effective January 1, 2011.

#### Notes:

-  1. Amendments
-  2. Note

##### 1. Amendments:

-  2001 Amendment
-  2004 Amendment
-  2006 Amendment
-  2009 Amendment
-  2010 Amendment

##### 2001 Amendment:

**(1)** Amended the introductory clause of subd (a) by adding **(a)** "separate"; and **(b)** ", in at least 14-point type,"; **(2)** added subd (a)(1); **(3)** redesignated former subds (a)(1)-(a)(5) to be subds (a)(2)-(a)(6); **(4)** added subd (a)(7); **(5)** redesignated former subds (a)(6) and (a)(7) to be subds (a)(8) and (a)(9); **(6)** substituted "obtain independent professional advice" for "consult with their own counsel, accountant, or financial advisor" in subd (a)(9); **(7)** added subd (a)(10); **(8)** substituted subd (a)(11) for former subd (a)(8) which read: "A statement that " THE PROVISIONS OF THIS CONTRACT ARE GOVERNED BY CALIFORNIA'S UNFAIR PRACTICES ACT, [BUSINESS AND PROFESSIONS CODE SECTION 17200](#). IF YOU BELIEVE YOU WERE TREATED UNFAIRLY OR WERE MISLED AS TO THE NATURE OF THE OBLIGATIONS YOU ASSUMED UPON ENTERING INTO THIS AGREEMENT, YOU MAY CALL YOUR LOCAL DISTRICT ATTORNEY OR THE OFFICE OF THE ATTORNEY GENERAL FOR ASSISTANCE."; **(9)** added subd (a)(12); **(10)** substituted "all of the disclosures" for "the language" in the last paragraph of subd (a); **(11)** substituted subd (b) for former subd (b) which read: "(b) The transferee provides written notice of the proposed transfer to all other interested parties 10 or more days prior to the date specified in the transfer agreement as the date on which the transfer agreement first becomes binding upon the payee and 60 or more days prior to the date on which the first payment is due under a schedule established by the structured settlement agreement. At any time prior to the date on which the transfer agreement first becomes binding upon the payee, the payee may



cancel the transfer agreement without cost or further obligation, by providing written notice of cancellation to the transferee."

**✚ 2004 Amendment:**

Substituted this section for the former one which read:

"No transfer of structured settlement payment rights, either directly or indirectly, shall be effective by a payee domiciled in this state, or by a payee entitled to receive payments under a structured settlement funded by an insurance contract issued by an insurer domiciled in this state or owned by an insurer or corporation domiciled in this state, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee, unless all of the following subdivisions are satisfied:

"(a) Ten or more days prior to the effective date of a transfer agreement, the transferee provides the payee with a separate written disclosure statement, in at least 14-point boldface type, disclosing all of the following:

"(1) The effective date of the transfer.

"(2) The amounts and due dates of the structured settlement payments to be transferred.

"(3) The aggregate amount of the structured settlement payments to be transferred.

"(4) The gross amount of all expenses, if any, to be deducted from the amount to be paid to the payee in exchange for the payments to be transferred.

"(5) The amount payable to the payee, net of all expenses, in exchange for the payments to be transferred.

"(6) The discounted present value of all structured settlement payments to be transferred and the discount rate used in determining that discounted present value.

"(7) The effective equivalent interest rate, which shall be disclosed in the following statement:

" 'YOU WILL BE PAYING THE EQUIVALENT TO AN INTEREST RATE OF \_\_\_\_\_ % PER YEAR.

"Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, if the transferred structured settlement payments were installment payments on a loan, with each payment applied first to accrued unpaid interest and then to principal, it would be as if you were paying interest to us of \_\_\_\_\_ % per year, assuming funding on the effective date of transfer.'

"(8) The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments.

"(9) A statement that the payee should obtain independent professional advice regarding any federal and state income tax consequences arising from the proposed transfer, and that the transferee may not refer the payee to any specific adviser for that

purpose.

"(10) A statement of the payee's irrevocable and nonwaivable right of rescission pursuant to paragraph (2) of subdivision (b).

"(11) The following statement in capital letters: 'IF YOU BELIEVE YOU WERE TREATED UNFAIRLY OR WERE MISLED AS TO THE NATURE OF THE OBLIGATIONS YOU ASSUMED UPON ENTERING INTO THIS AGREEMENT, YOU SHOULD REPORT THOSE CIRCUMSTANCES TO YOUR LOCAL DISTRICT ATTORNEY OR THE OFFICE OF THE ATTORNEY GENERAL.'

"(12) If court approval of the transfer agreement is required, all of the following shall apply:

"(A) The effective date of the transfer agreement shall be deemed to be the date that the agreement was signed by the payee.

"(B) The payee shall be advised that payment to the payee pursuant to the transfer agreement is contingent upon court approval of the transfer agreement.

"(C) The payee shall be advised that payment to the payee pursuant to the transfer agreement will be delayed up to 30 days or more in order for the court to review and approve the transfer agreement.

"No contract for the transfer of structured settlement payment rights shall be valid unless the seller has separately acknowledged that he or she has read all of the disclosures required by this subdivision.

"(b)(1) The transferee provides written notice of the proposed transfer to all other interested parties 10 or more days prior to the date specified in the transfer agreement as the date on which the transfer agreement first becomes binding upon the payee and 60 or more days prior to the date on which the first payment is due under a schedule established by the structured settlement agreement.

"Notice shall not be required by this paragraph if court approval of the transfer is required and notice is given pursuant to paragraph (6) of subdivision (c) of Section 10139.5.

"(2) At any time prior to the date on which the transfer agreement first becomes binding upon the payee, the payee may cancel the transfer agreement without cost or further obligation, by providing written notice of cancellation to the transferee.

"(3) The notice to interested parties shall include the effective date of the transfer and identify the structured settlement payment rights being transferred and the due dates of those payments.

"(4) Any notice required by this subdivision shall be deemed to have been given if addressed to the recipient's last known address and deposited, first-class postage prepaid, in the United States mail not less than five calendar days prior to the date on which the notice is required to be provided.

"(c) The contract for transferring the structured settlement payment rights does not violate the provisions of Section 10138."

### 🚩 2006 Amendment:

(1) Substituted single quotes for double quotes around the words "transferring" and "IMPORTANT TERMS" in the form under subd (b); and (2) deleted "the" after "Present value of" in the last sentence of subd (c)(6).

### 🚩 2009 Amendment:

(1) Amended subd (a) for the former subd (a) which read: "(a) No transfer of structured settlement payment rights, either directly or indirectly, shall be effective by a payee domiciled in this state, or by a payee entitled to receive payments under a structured settlement funded by an insurance contract issued by an insurer domiciled in this state or owned by an insurer or corporation domiciled in this state, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee, unless all of the provisions of this section are satisfied."; (2) amended subd (b) by (a) substituting the four paragraphs following the Important Terms for "Total dollar amount of \$\_\_\_\_\_ payments you are selling: Present value of amount you \$\_\_\_\_\_are selling: Net amount paid to you: \$\_\_\_\_\_"; (b) adding "You are advised to seek independent legal or financial advice regarding the transaction and, under the law, the cost of that advice, up to one thousand five hundred dollars (\$1,500) will be paid by the transferee, the person or entity to whom you have agreed to transfer and assign the payments in question. The transferee or purchaser's accountant, counsel, or actuary may not advise you in this transaction."; and (c) adding "A sale of future structured settlement payments will mean that you will no longer receive the future payments that are sold. You are advised to enter into this transaction only after you have carefully considered the consequences of the transaction."; (3) deleted "in the space for 'Total dollar amount of payments you are selling' " at the end of subd (c)(3); (4) deleted "in the spaces for 'Net amount paid to you' and 'net amount' " at the end of subd (c)(5); and (5) deleted "in the space for 'Present value of amount you are selling' " at the end of subd (c)(6).

### 🚩 2010 Amendment:

Amended subd (a) by (1) deleting "shall be effective" after "payment rights"; and (2) adding "shall be effective,".

### 🚩 2.

### Note

[Stats 2004 ch 582](#) provides:

SEC. 6. This act shall apply only to agreements for the transfer of structured settlement payment rights that are executed on or after January 1, 2005.

### 🚩 Collateral References:

[Cal. Torts \(Matthew Bender\(R\)\) § 75.11A.](#)

### 🚩 Law Review Articles:

[Insurance: Chapter 593: A Structure for the Transfer of Structured Settlements. 41](#)

McGeorge L. Rev. 667.

### Annotations:

Construction and Application of Uniform Rule of Evidence 106, Applying Doctrine of Completeness to Writings and Recorded Statements. [27 ALR6th 183](#).

### Hierarchy Notes:

[Div. 2, Pt. 2 Note](#)

[Div. 2, Pt. 2, Ch. 1 Note](#)

[Div. 2, Pt. 2, Ch. 1, Art. 2.3 Note](#)

## LexisNexis 50 State Surveys, Legislation & Regulations

[Structured Settlements](#)

### 📄 Notes of Decisions:

📄 [1. Practice and Procedure](#)

#### 📄 **1. Practice and Procedure**

In denying petitioners' motion to dismiss their SSTA (Structured Settlement Transfer Act) petition without prejudice pursuant to [CCP § 581](#), subd. (b), the trial court erred in concluding that petitioners could not voluntarily dismiss their SSTA petition because a factoring company was a party to the proceeding and the company had not timely consented to the dismissal. The company's consent was not required because it was not a party to petitioners' action. 321 [Henderson Receivables Origination LLC v. Ramos \(2009, 5th Dist\)](#) 172 Cal App 4th 305, 91 Cal Rptr 3d 222, 2009 Cal App LEXIS 376.

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[Article 2.3. Transfers of Structured Settlement Payment Rights](#) > **§ 10136. Disclosure; Notice; Compliance with § 10138**

## **APPENDIX G**

**“Disclosure Notice Required By Law [14-point boldface type]**

You are selling (technically called ‘transferring’) your right to receive your payments under a structured settlement. You should get this disclosure notice at least 10 days before you sign any contract.

**IMPORTANT TERMS: [14-point boldface type ]**

You have agreed to sell to the transferee future payments totaling \_\_\_dollars (\$\_\_\_) in exchange for a purchase price of \_\_\_ dollars (\$\_\_\_).

Those future payments have a discounted present value equal to \_\_\_ dollars (\$\_\_\_), calculated by applying the discount rate of \_\_\_ percent utilized by the Internal Revenue Service to value annuities in probate proceedings.

The purchase price to be paid to you was calculated using a discount rate of \_\_\_ percent.

The purchase price payable to you is less than the present value of the future payments stated above because the discount rate of your transaction is greater than the rate utilized by the Internal Revenue Service.

For comparison purposes:

If you did not sell your right to receive structured settlement payments, but instead borrowed the net amount of \$\_\_\_\_\_ and paid that loan back in installments with each of the payments you are now selling, the equivalent interest rate you would be paying for that loan would be \_\_\_% per year.

[The text and information set forth above under ‘IMPORTANT TERMS’ shall be in 14-point type and circumscribed by a box with a bold border]

To figure the net amount we are paying, we have charged you for the following expenses:

[itemize in a list by type and amount]

for a total of \$\_\_\_\_\_ in expenses.

You should get independent professional advice about whether selling your structured settlement payments is a good idea for you and for your dependents.

You are advised to seek independent legal or financial advice regarding the transaction and, under the law, the cost of that advice, up to one thousand five hundred dollars (\$1,500) will be paid by the transferee, the person or entity to whom you have agreed to transfer and assign the payments in question. The transferee or purchaser’s accountant, counsel, or actuary may not advise you in this transaction.

You also should get independent professional advice from an accountant or lawyer experienced in tax matters about any income tax consequences from selling your structured settlement payments. We cannot give you the name of anyone to advise you.

Court approval is needed [14-point boldface type]. A court must approve any agreement you sign to sell your rights under a structured settlement. You will not receive any money until the court approves the sale. Court approval could take more than 30 days following the day you sign an agreement selling your rights under a structured settlement.

A sale of future structured settlement payments will mean that you will no longer receive the future payments that are sold. You are advised to enter into this transaction only after you have carefully considered the consequences of the transaction.

You may cancel the contract before court approval [14-point boldface type]. You may cancel the agreement selling (or transferring) your rights under a structured settlement without any cost or obligation. You may cancel at any time before the court approves the contract. You will get notice of the date of the court hearing.

If you want to cancel, you do not need any special form. But, you must cancel in writing. Send your cancellation to: [insert transferee’s name and address].

If you believe that you have been treated unfairly or have been misled, you should contact your local district attorney or the state Attorney General.”

“YOU WILL BE PAYING THE EQUIVALENT OF AN INTEREST RATE OF \_\_\_% PER YEAR.

Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, if the transferred structured settlement payments were installment payments on a loan, with each payment applied first to accrued unpaid interest and then to principal, it would be as if you were paying interest to us of \_\_\_% per year, assuming funding on the effective date of transfer.”

This percentage amount shall be disclosed in the form prescribed in subdivision (b) in the space for “the equivalent interest rate you would be paying for this loan would be \_\_\_% per year.”

# **APPENDIX H**





**PREMIER  
SETTLEMENT  
SERVICES, INC.**

Plaintiff Only Structured Settlements

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## Plaintiff Only Experience

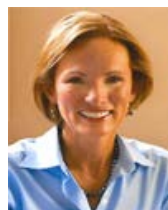
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