

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

House Bill 42
Judiciary

(Delegate Haynes)

Transfer of Structured Settlements - Childhood Lead Poisoning Claims -
Requirements and Limitations

This bill establishes separate procedural requirements and limits for proposed transfers of structured settlement payment rights resulting from a settlement of judgment in a personal injury claim for childhood lead poisoning.

The bill applies prospectively to an application for a transfer of structured settlement payment rights under a transfer agreement approved by a court on or after June 1, 2016.

The bill takes effect June 1, 2016.

Fiscal Summary

State Effect: The bill is procedural and does not materially affect State finances.

Local Effect: The bill is procedural and does not materially affect local finances.

Small Business Effect: None, assuming factoring companies or purchasers are not considered small businesses.

Analysis

Bill Summary: The bill's provisions apply to a proposed transfer of structured settlement payment rights resulting from a settlement or judgment in resolution of a claim for damages for personal injury caused by the ingestion of lead by a minor.

An authorization for a transfer of structured settlement payment rights must be filed in (1) the circuit court for the county in which the payee is domiciled or (2) if the payee is not domiciled in the State, in the circuit court that approved the structured settlement agreement or in which the settled claim was pending when the parties entered into the structured settlement.

The payee must appear in person at the hearing on the application. A payee may not transfer more than 25% of the discounted present value of future payment under the structured settlement agreement, calculated as of the date the agreement was approved by a court.

At the hearing on the application, the court must inquire whether the payee has entered into any prior agreements to transfer structured settlement payment rights.

Current Law/Background: Under a traditional settlement agreement, the claimant in a personal injury or workers' compensation action receives a single, lump sum payment in settlement of his or her claim. Under a structured settlement agreement, the claimant (or "payee") instead agrees to receive multiple, smaller payments – typically paid out over the course of many years. Structured settlements have several benefits from a public policy perspective. First, they promote the long-term financial stability of the payee by providing a steady stream of income that can be used to pay future expenses arising from the payee's injury or disability. Second, they minimize the risk that the payee will squander his or her award and become reliant on public assistance. In support of these objectives, federal law encourages the use of structured settlement agreements by granting special treatment to structured settlement payments under the tax code.

Factoring Transactions: Since 1975, insurance companies have committed an estimated \$350 billion to structured settlements. This has given rise to a secondary market for structured settlement payments. In some cases, a payee may choose to transfer the rights to receive future payments under a structured settlement agreement in exchange for an immediate, discounted, cash payment. This is called a "factoring transaction," and the companies that specialize in these transfers are known as "factoring companies." Proponents of the factoring industry argue that factoring companies provide an important service to individuals who typically do not have access to traditional forms of credit. A payee may use the cash acquired through a factoring transaction to purchase a vehicle, make a down payment on a house, pay emergency medical bills, or cover other large expenses. However, critics argue that factoring transactions undermine the protective purpose of structured settlement agreements.

In August 2015, *The Washington Post* published an exposé of Maryland's factoring industry. The story described payees, many of them victims of childhood lead poisoning, who had sold their rights to structured settlement payments for pennies on the dollar.

One company featured in the article petitioned to buy about \$6.9 million worth of future payments – which had a present value of \$5.3 million – for about \$1.7 million. The article raised questions about how Maryland regulates the factoring market and the extent to which current law adequately protects vulnerable payees from aggressive or misleading business practices.

Maryland's Structured Settlement Protection Act: According to the National Association of Settlement Purchasers, as of November 2015, 49 states, including Maryland, have adopted some sort of structured settlement protection act. Although the statutes vary in their details, all of them require judicial oversight and approval of factoring transactions.

Maryland's structured settlement protection law, codified in §§ 5-1101 through 5-1105 of the Courts Article, was enacted in 2000. The law prohibits the direct or indirect transfer of structured settlement rights, unless the transfer is authorized in an order of a court based on a finding that:

- the transfer is necessary, reasonable, or appropriate;
- the transfer is not expected to subject the payee or the payee's dependents to undue or unreasonable financial hardship in the future;
- the payee received independent professional advice regarding the legal, tax, and financial implications of the transfer; and
- the transferee (typically, a factoring company) disclosed to the payee the discounted present value of the future payments being transferred.

The transferee must file with the circuit court and serve on all interested parties a notice of the proposed transfer and an application for its authorization.

One of the primary criticisms of Maryland's structured settlement protection law is that it is vulnerable to inconsistent application. While the law requires a court to determine whether a transfer is "necessary, reasonable, or appropriate," it provides no clear guidance on how the court should reach that determination. As a result, judges are left to apply their own, necessarily subjective, criteria to each factoring transaction. Another issue is presented by the law's jurisdictional provisions, which allow petitions to transfer structured settlements to be brought in any county with jurisdiction over an "interested party." Critics have alleged that the law allows factoring companies to "forum shop" for a judge more amenable to their position. Several publications have reported that petitions are overwhelmingly brought outside of payees' counties of residence. There is concern that when a court does not have ties to a payee, it may be less sensitive to the payee's needs and more likely to approve a transaction that is not in the payee's best interests.

Critics also question whether State law adequately assures that payees receive independent professional advice concerning factoring transactions. The law defines “independent professional advice” as the advice of an attorney, certified public accountant, actuary, or “other licensed professional adviser,” who is engaged by the payee to render advice concerning the legal, tax, and financial implications of a transfer of structured settlement payment rights. This broad definition of adviser poses several problems. If the adviser is not an attorney, he or she should not be providing legal advice to the payee. On the other hand, if the adviser is an attorney, he or she may not be competent to give advice regarding the tax or financial implications of a transfer agreement. Moreover, although the law specifies that the adviser may not be affiliated with the transferee, many factoring companies provide payees with lists of potential advisers, and some companies even offer to advance the advisers’ fees. Payees and their advisers are not required to attend or testify at hearings to approve the transfer of structured settlement rights. Therefore, it is often difficult for courts to assess the qualifications of a particular adviser or to determine how well a payee understands the terms of a particular transfer agreement.

Changes to the Maryland Rules: In response to articles in the *Washington Post* and the *Maryland Bar Journal*, on October 15, 2015, the Standing Committee on Rules of Practice and Procedure submitted a report to the Maryland Court of Appeals recommending certain changes to the Maryland Rules. The Court of Appeals ordered that the new rules be adopted on December 7, 2015. The rules went into effect on January 1, 2016 and apply to all actions commenced on or after that date and, insofar as practicable, all actions pending on that date.

The rules are intended to provide structure and guidance with respect to proceedings on petitions to approve the transfer of payment rights under a structured settlement agreement.

Key provisions of the rules include:

- a petition for court approval of a structured settlement transfer must be filed in the circuit court for the county where the payee resides (if the payee resides in the State), the circuit court for the county in which the most recent petition was filed (if the payee does not reside in the State but a petition has been filed in the State for the payee in the past), or any circuit court (if the payee does not reside in the State and does not have any prior petitions);
- the payee (unless excused by the court), the payee’s independent professional adviser, and a duly authorized officer or employee of the transferee must be present to answer questions at the hearing on the petition;
- the court may appoint a guardian *ad litem* for the payee or arrange for an independent mental health evaluation of the payee; and
- the payee must consent to the transfer by completing a specified consent form.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City, Judiciary (Administrative Office of the Courts), Maryland Department of the Environment, Department of Health and Mental Hygiene, National Association of Settlement Purchasers, Department of Legislative Services

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