WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 3

TO: MEMBERS OF THE STUDY COMMITTEE ON THE TRANSFER OF STRUCTURED SETTLEMENT PAYMENTS

FROM: Brian Larson and Anna Henning, Staff Attorneys

RE: Options Regarding WLC: 0011/2, Relating to the Transfer of Structured Settlement Payments

DATE: October 29, 2014

This memorandum provides background information and options regarding two issues that the committee reserved for future discussion during its consideration of WLC: 0011/1, a bill draft relating to transfer of structured settlement payments, at its October 9, 2014 meeting. The first issue involves disclosures required to be made by a person seeking to purchase rights to structured settlement payments. The second issue involves the treatment of payments that are subject to Medicare set-aside requirements under federal law. The options presented in this Memo are not intended to be an exhaustive set of options for the committee's consideration.

DISCLOSURE PROVISIONS

Background

At the committee's September 11, 2014 meeting, committee members generally agreed that certain disclosures should be added to the list of disclosures that are required to be made by a person seeking to purchase rights to structured settlement payments ("transferee") under the Model State Structured Settlement Protection Act ("model act"). One of the disclosure provisions that was included in the modified bill draft requires a transferee to disclose the "discount rate" for the transaction.

During the committee's October 9, 2014 meeting, it was mentioned that the concept of "discount rate," as it applies to transfers of structured settlement payment rights, can be expressed in two ways: (1) as the discounted present value of the payments to be transferred; and (2) as the effective annual interest rate for the net amount to be paid for the payment rights.

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Committee members noted that both of those articulations of the "discount rate" concept are already included in separate provisions of the bill draft.

Some committee members suggested that, rather than "discount rate," it would be beneficial to include a disclosure that expresses the ratio between the present value of the payments to be transferred and the net amount that will be received by a payee in exchange for those payments. Several other states require that such a ratio be included among the disclosures that must be made by a transferee. It appears that those other state laws generally require that disclosure to be made in the form of a quotient (expressed as a percentage) that represents the net payment amount divided by the discounted present value.[1]

Options for Consideration

The committee could consider the following options relating to the additional disclosure provision:

1. Remove the provision requiring disclosure of "discount rate" and not replace it.

2. Replace that provision with a requirement to disclose the ratio of the net amount to be received divided by the discounted present value of the payments to be transferred. That ratio could be expressed as a percentage or in another manner, such as cents on the dollar. If the committee chooses to require the disclosure of such a ratio, the committee could require that disclosure to be made in a particular format. For example, it could require the following sentence to be disclosed: "The net amount that you will receive in exchange for the structured settlement payments is ___% of the discounted present value of those payments."

3. Replace that provision with an alternative disclosure requirement. For example, an alternative requirement could require a discount rate to be expressed in the form of an annual discount rate, similar to an annual interest rate for a loan. If the committee considers that option, it might wish to review the existing provision in the bill draft that requires the disclosure of an effective interest rate, in order to ensure that the bill draft does not create any unnecessary confusion.

TREATMENT OF PAYMENTS THAT ARE SUBJECT TO MEDICARE SET-ASIDE ARRANGEMENTS

Background

In the committee's review of the bill draft, some committee members expressed concern that transfers of structured settlement payments may conflict with requirements relating to Medicare set-aside (MSA) arrangements under 42 U.S.C. s. 1395y (b) (2). Under the federal Medicare Secondary Payer (MSP) Act, payments may not be made under Medicare when "payment has been made, or can reasonably be expected to be made under a workman's

[1] "Discounted present value" is a defined term in the bill draft. It is defined to mean "the present value of future payments determined by discounting the payments to the present using the applicable federal rate for determining the present value of an annuity, as most recently issued by the federal Internal Revenue Service."

compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance." [42. U.S.C. s. 1395y (b) (2) (A) (ii).]

This provision of federal law must be taken into account by an individual who receives a settlement, judgment, award, or other payment in connection with an injury ("injured party"). The provision essentially requires Medicare to seek reimbursement for payments for items or services made on behalf of an injured party who is a Medicare beneficiary. [42 U.S.C. s. 1395y (b).]

In addition, the MSP Act creates an obligation to take future Medicare interests into account when the injured party is a Medicaid beneficiary or when the award is of a certain size and there is a reasonable expectation of Medicare enrollment within the next 30 months. As is typical in the area of worker's compensation law, the obligation may be met through an MSA arrangement under the federal regulations. The primary purpose of an MSA arrangement is to ensure that after a settlement has been received by a Medicare beneficiary, all future payments with respect to the injury may come from the MSA, and no additional conditional Medicare payments should be necessary.

Currently, there is no federal administrative process to allow a party to confirm whether an MSA arrangement is required in a given instance, or that sufficient proceeds from a settlement have been allocated to an MSA. Nonetheless, the Center of Medicare and Medicaid Services (CMS) retains the right to retroactively review settlements to determine whether Medicare's interests have been adequately taken into account. When required, CMS has standing to seek reimbursement from the primary payer or an entity that has received a payment from the primary payer, which may include a beneficiary, provider, supplier, physician, attorney, state agency, or another insurer. In some cases, CMS may recover double damages. [42 U.S.C. s. 1395y (b).]

During its October 9, 2014 meeting, some committee members suggested revisions to a provision of the bill draft that prohibits the approval of the transfer of benefits that are part of an MSA arrangement established under 42 U.S.C. s. 1395y (b) (2).[2]

Options for Consideration

The committee could consider the following options relating to the treatment of payments that may be subject to an MSA arrangement:

1. Retain the prohibition. Under this option, a court would be prohibited from approving a transfer of payments "that are part of" an MSA arrangement. (This could be broadened to refer to payments "required to be protected" under the federal MSP Act.)

[2] Study committee members also generally agreed to remove the reference to Medicaid special needs trusts from the bill draft, as well as the phrase "responsible administrative authority." These additional changes, which are described in the October 9, 2014 minutes, are generally outside the scope of this Memo.

2. Remove the prohibition. Under this option, the bill draft would not include a prohibition on transfers of payments subject to an MSA arrangement. Instead, the bill draft would remain silent on the issue.

3. Narrow the scope. Under this option, the bill would exclude payments subject to an MSA arrangement from the definition of a "structured settlement payment transaction." This would, in effect, make the statute inapplicable to payments subject to an MSA arrangement.

4. Add a mandatory consideration. Under this option, when a court determines whether a transfer is in the best interests of the payee and his or her dependents, the court would be required to take into account whether the payments are subject to an MSA arrangement.

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