

# Report to the Joint Legislative Council

## Study Committee on Transfer of Structured Settlement Payments



February 4, 2015

LCR 2015-02

Wisconsin Legislative Council  
One East Main Street, Suite 401  
Madison, WI 53703-3382  
Phone: (608) 266-1304  
Fax: (608) 266-3830

[www.legis.wisconsin.gov/lc](http://www.legis.wisconsin.gov/lc)



# STUDY COMMITTEE ON TRANSFER OF STRUCTURED SETTLEMENT PAYMENTS

Prepared by:  
Anna Henning and Brian Larson, Staff Attorneys  
February 4, 2015

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# PART I

## KEY PROVISIONS OF COMMITTEE RECOMMENDATION

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The Study Committee on Transfer of Structured Settlement Payments recommends the following bill draft to the Joint Legislative Council for introduction in the 2015-16 Session of the Legislature.

### **LRB-0731/1, RELATING TO STRUCTURED SETTLEMENT FACTORING TRANSACTIONS**

LRB-0731/1 creates a new statute regulating the transfer of rights to structured settlement payments in Wisconsin. Specifically, the bill creates all of the following with respect to transfers of structured settlement payment rights:

- Definitions of key terms relating to such transfers.
- Requirements for mandatory disclosures that must be made by a proposed purchaser of rights to structured settlement payments.
- Standards governing judicial review of transfers of structured settlement payment rights.
- Procedures, legal effects, and general provisions relating to the approval of such transfers.



# PART II

## COMMITTEE ACTIVITY

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### ASSIGNMENT

The Joint Legislative Council established the Study Committee on Transfer of Structured Settlement Payments and appointed the chairperson by a March 19, 2014 mail ballot. The committee was directed to do the following: (a) review the current method by which structured settlement payments are transferred in Wisconsin; (b) examine statutes regulating the practice in other states and under federal law; and (c) recommend a statute for adoption in Wisconsin that governs transfers of structured settlement payments. The committee was directed to consider items such as standards for disclosure of information to structured settlement recipients by entities seeking to purchase future settlement payments, the ability of parents and guardians to enter into structured settlements on behalf of minor children, and guidelines for use by judges in approving the transfer of structured settlement agreements.

Membership of the Study Committee was appointed by a May 21, 2014 mail ballot. The final committee membership consisted of three Representatives, one Senator, and six public members. A list of committee members is included as **Appendix 3** to this report.

### SUMMARY OF MEETINGS

The committee held four meetings on the following dates:

July 31, 2014

September 11, 2014

October 9, 2014

November 6, 2014

At the July 31, 2014 meeting, the Study Committee heard testimony from several invited speakers and had an initial discussion of the committee's assignment.

*April Southwick, Staff Attorney, Wisconsin Judicial Council*, provided background information regarding the review of the topic of structured settlement transfers undertaken by the Wisconsin Judicial Council and the Judicial Council's determination that the topic would be appropriate for a Legislative Council study committee.

*Hon. Gerald Ptacek and Hon. Michael Fitzpatrick, Circuit Court Judges*, described the structured settlement transfer process from their perspectives as circuit court judges. Judge Fitzpatrick said that judges encounter numerous challenges applying the current law in this area, leading to inconsistent application across the state. Both judges suggested that a state statute would

be of benefit. They suggested that the statute contain clear standards, or guideposts, for judges to apply, and perhaps a list of factors to consider.

**Earl Nesbitt, Executive Director and General Counsel, National Association of Settlement Purchasers**, provided testimony on behalf of the National Association of Settlement Purchasers (NASP), a trade association for companies who participate in the secondary market to purchase structured settlement payments. Mr. Nesbitt explained the history of the negotiations between stakeholder groups, including NASP and the National Structured Settlements Trade Association (NSSTA), and spoke in favor of the National Conference of Insurance Regulators (NCOIL) Model Act, which was the result of those negotiations. Mr. Nesbitt also provided details regarding various aspects of the secondary market, including pricing and discount rates.

**John McCulloch, National Marketing Director, EPS Settlement Group**, provided testimony on behalf of NSSTA, a trade association representing stakeholders in the primary market. He said that NSSTA supports the NCOIL Model Act. Mr. McCulloch also provided the committee with a document indicating certain proposed changes to the model act and answered questions regarding those proposed revisions.

**Brenda Bierman, Senior Claims Technical Specialist, Sentry Insurance**, described the structured settlement transfer process from her perspective as a claims technical specialist at an insurance company. She explained the steps in the claims process that may occur from resolution of a claim via structured settlement, through a factoring transaction, to the redirection of the transferred payments, and provided background information about the role of the annuity issuer in the transactions.

After the conclusion of the presentations, Chair Ott led a discussion of the committee assignment. It was generally agreed that the state would benefit from the passage of a statute regarding structured settlement transfers, and that the committee would proceed with preparation of a draft bill.

At the September 11, 2014 meeting, the Study Committee heard presentations by several invited speakers and discussed a preliminary bill draft.

**Fredric Kolb, Professor, University of Wisconsin-Eau Claire**, addressed financial considerations relating to the transfer of structured settlements. He described two core questions that he believes the committee should consider: (1) Will conditions be in place to assure that a person seeking to sell his or her rights to payments under a structured settlement is able to make a well-informed decision?; and (2) Is the market sufficiently liquid to allow for a fair valuation? He also presented examples of purchase prices for structured settlement annuities available for sale to investors and provided recommendations to the committee.

**Victor Harding, Attorney, Warshafsky Law Firm**, described the history regarding the use of structured settlements and discussed considerations made when plaintiffs agree to structured settlements.

**Gretchen Viney, Clinical Professor, University of Wisconsin Law School**, described her experience and perspective as a guardian ad litem (GAL) for many years, and as an author of several publications relating to guardianship in Wisconsin. She stated that she believes that attorneys who



serve as GALs for minors lack authority to advocate in favor of structured settlements for minors. She also noted that in Wisconsin, consideration of a “best interest” standard is typically paired with appointment of a GAL.

The committee then discussed WLC: 0011/P1, a preliminary bill draft based on the model act created by the NSSTA and the NASP. The committee members agreed that several modifications should be made to the bill draft for the committee’s consideration. Those modifications included the addition of several specific disclosures that a person seeking to purchase rights to payments under a structured settlement must make to a person selling such rights; the addition of several factors to guide a judicial determination regarding whether a given transfer is in a person’s best interest; and certain modifications relating to procedures for judicial review of a proposed transfer of structured settlement payment rights.

At the October 9, 2014 meeting, the committee discussed WLC: 0011/1, a bill draft incorporating the modifications discussed at the committee’s September meeting. Comments from Legislative Council staff throughout the draft served as a basis for the committee’s discussion. Following a robust discussion of the bill draft, committee members agreed that several modifications should be made to the bill draft for the committee’s review. The modifications related to definitions, required disclosures, approval standards, procedures for judicial review, and initial applicability.

At the November 6, 2014 meeting, the committee discussed and voted on several modifications to WLC: 0011/2, a bill draft that incorporated modifications agreed to at the committee’s October meeting. Memo No. 3, *Options Regarding WLC: 0011/2*, served as a basis for the committee’s discussion. Chair Ott entertained motions on three specific modifications to the bill draft, and all three motions carried by unanimous voice vote.

At the conclusion of the meeting, Chair Ott thanked committee members for their service and advised members that the committee would vote by mail ballot to approve the final version of the bill draft.



# PART III

## RECOMMENDATION INTRODUCED BY THE JOINT LEGISLATIVE COUNCIL

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### **LRB-0731/1, RELATING TO STRUCTURED SETTLEMENT FACTORING TRANSACTIONS**

#### **Background**

The Study Committee developed and approved LRB-0731/1, relating to structured settlement factoring transactions, in response to the committee's charge. Structured settlements are settlements that include periodic payments in lieu of, or in addition to, lump sum awards in civil actions. They are most frequently utilized in personal injury cases, and are thought to be particularly appropriate in cases in which a plaintiff has been seriously injured and may have a continued need for care in the future.

Wisconsin is one of just two states that does not have a law governing the transfer of structured settlement payments. Other states' laws were prompted, in part, by a federal law that imposes a 40% excise tax on transactions to transfer rights to structured settlement payments, unless the transactions are approved by a court or relevant administrative body in the state in which the current recipient of the payments resides. [26 U.S.C. s. 5891.] Because of the federal law, persons seeking to transfer structured settlement payment rights must seek court approval for those transactions in order to avoid the 40% tax. Because Wisconsin does not have a law governing the approval of such transfers, Wisconsin courts that review proposed transfers of structured settlement rights currently must apply other states' laws in such reviews.

In its initial discussion, the committee agreed that the state would benefit from the enactment of a state law governing the transfer of structured settlement payment rights. The committee decided to utilize a model law developed in 2000 by the NSSTA and the NASP as a basis for its discussion, as many other states have done. The bill draft approved by the committee contains most provisions of the model law, with some modifications that were developed through committee discussion and in response to presentations heard by the committee. Key modifications were made in the areas of mandatory disclosures, standards for approval, and procedural requirements.

#### *Mandatory Disclosures*

The model law includes eight disclosures that a person seeking to purchase rights to payments under a structured settlement ("transferee") must make to the person selling such rights ("payee"). Based on testimony and using examples from other states' laws as a guide, the committee added three additional disclosures to the list of disclosures required under the model law. Those additional disclosure provisions require a transferee to disclose: (1) a statement regarding the effective annualized rate of interest on the money received in exchange for structured settlement

payment rights; (2) a statement that the transferee's attorney does not represent the payee; and (3) a statement informing the payee that structured settlement transfers have financial consequences and advising the payee to seek independent professional advice regarding the transfer agreement and that the failure to obtain such advice may constitute a waiver.

#### *Standards for Judicial Approval*

The model act includes three factors for judicial approval of structured settlement payment transfers. All three factors are required findings under federal tax law. One of those three factors is whether a transfer is in the best interest of the payee taking into account the welfare and support of the payee's dependents.

Judges and other presenters testified that it would be helpful if Wisconsin's law included factors to provide additional guidance to judges regarding that "best interest" standard. Thus, the committee added several factors that judges may consider when determining whether a given transfer of structured settlement payment rights is in a payee's best interest. The committee discussed whether those considerations should be mandatory or discretionary and decided that they should be discretionary. However, in situations involving a payee who is a minor or has been adjudicated incompetent, the committee added two additional factors, described below, which a court must consider.

The committee engaged in extensive discussions regarding whether Wisconsin's law should restrict the transfer of payments that are part of a Medicare set-aside arrangement or a Medicaid special needs trust. The committee decided that the bill draft should prohibit the transfer of payments that are part of a Medicare set-aside arrangement but should remain silent regarding the transfer of payments that are part of a Medicaid special needs trust.

#### *Procedures*

The committee also made some changes to the model act regarding procedures applicable to judicial review of structured settlement transfer agreements. Most significantly, the committee added a provision specifying that a hearing must be held on a proposed transfer agreement and requiring a payee to attend such a hearing in most circumstances. The committee also added certain items to the list of materials required to be served on interested parties in such a proceeding.

### **Description**

The bill draft creates a state law governing the transfer of structured settlement payment rights. The bill draft is based on and modifies the Model State Structured Settlement Protection Act, a model law developed by the NSSTA and the NASP.

#### *Required Disclosures*

The bill draft requires a prospective purchaser of structured settlement payment rights ("transferee") to disclose all of the following information to the person who currently holds those rights ("payee"):

- The amounts and due dates of the structured settlement payments to be transferred.
- The aggregate amount of the payments.

- The discounted present value of the payments to be transferred and the amount of the applicable federal rate used in calculating the discounted present value.
- The gross advance amount.
- An itemized listing of all applicable transfer expenses, other than attorney fees and related disbursements payable in connection with the transferee's petition for approval of the transfer, and the transferee's best estimate of the amount of any such fees and disbursements.
- The net advance amount.
- The amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee.
- A statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee.
- The effective 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, and written in the following format: "YOU WILL BE PAYING THE EQUIVALENT OF AN INTEREST RATE OF \_\_% PER YEAR."
- A statement that the transferee's attorney does not represent the payee in connection with the proposed transfer.
- A statement informing the payee that structured settlement transfers have financial consequences and advising the payee to seek independent professional advice regarding the transfer agreement and that the failure to obtain such advice may constitute a waiver.

*Standard of Review*

In order for a transfer of structured settlement payment rights to take effect, the bill draft requires the transfer to have been approved in a final court order, based on express findings by the court that all of the following are true:

- The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.
- The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived such advice in writing.
- The transfer does not contravene any applicable statute or the order of any court or other government authority.

The bill draft provides that a court may consider any of the following factors when determining whether a proposed transfer is in the best interest of the payee:

- Whether the payee understands the financial ramifications of the transfer agreement and is entering into the agreement voluntarily.
- The financial terms of the transfer agreement.
- Whether the payee is delinquent in the payment of taxes in this state or in any payments required to be made pursuant to a restitution order in a criminal or juvenile delinquency proceeding, or pursuant to a child support order.
- Any other considerations the court deems appropriate.

In addition, in cases in which a payee is a minor or has been adjudicated incompetent in Wisconsin, the reviewing court must consider all of the following factors when determining whether a transfer is in the payee's best interest:

- The physical and mental health of the payee.
- The payee's overall financial situation.

Finally, the bill draft prohibits the approval of a transfer of structured settlement payments that are part of a Medicare set-aside arrangement established under federal law.

#### *Procedures for Court Approval*

The bill draft establishes certain procedures governing judicial review of agreements to transfer structured settlement payment rights. Regarding venue, the bill draft specifies that petitions for approval of a transfer of structured settlement payment rights must be brought in the county in which the payee resides. The bill draft requires that a hearing be held on the petition, and it requires the payee to attend the hearing in person, unless the court determines that appearance via audiovisual technology is appropriate or that good cause exists for the payee not to appear.

The bill draft requires a transferee to file and serve on all interested parties a notice of the proposed transfer not less than 20 days prior to the hearing on the transfer. The following information must be included with the notice:

- A copy of the transferee's petition.
- A copy of the transfer agreement.
- A copy of the disclosure statement required under s. 895.66, Stats.
- A listing of each of the payee's dependents, together with each dependent's age.
- Notification that any interested party is entitled to support, oppose, or otherwise respond to the transferee's petition, either in person or by counsel, by submitting written comments to the court or by participating in the hearing.

- 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 petition must be filed in order to be considered by the court.
- An affidavit from the payee stating whether the payee is delinquent in the payment of taxes in this state or in any payments required to be made pursuant to a restitution order in a criminal or juvenile delinquency proceeding, or pursuant to a child support order.





## COMMITTEE AND JOINT LEGISLATIVE COUNCIL VOTES

The following draft was recommended by the Study Committee on Transfer of Structured Settlement Payments.

### STUDY COMMITTEE VOTE

The Study Committee voted by a November 14, 2014 mail ballot, to recommend the following draft to the Joint Legislative Council for introduction in the 2015-16 Session of the Legislature. The vote on the draft was as follows:

- WLC: 0011/3, relating to transfer of structured settlement payments, passed by a vote of Ayes, 10 (Reps. Ott, Wachs, and Schraa; Sen. Taylor; and Public Members Bachhuber, Fitzpatrick, La Fleur, Malsch, Nevitt, and Ptacek); and Noes, 0. [WLC: 0011/3 subsequently became LRB-0731/1.]



## JOINT LEGISLATIVE COUNCIL

### SENATE MEMBERS

**MARY LAZICH, Co-Chair**  
4405 South 129<sup>th</sup> St.  
New Berlin, WI 53151

**ALBERTA DARLING**  
1325 West Dean Road  
River Hills, WI 53217

**SCOTT FITZGERALD**  
N4692 Maple Road  
Juneau, WI 53039

**RICK GUDEX**  
361 East Division St.  
Fond du Lac, WI 54935

**MARK MILLER**  
4903 Roigan Terrace  
Monona, WI 53716

**TERRY MOULTON**  
980 118<sup>th</sup> St.  
Chippewa Falls, WI 54729

**JERRY PETROWSKI**  
720 North 136<sup>th</sup> Avenue  
Marathon, WI 54448

**FRED A. RISSER**  
100 Wisconsin Avenue  
Unit 501, Madison, WI 53703

**JENNIFER SHILLING**  
2608 Main Street  
La Crosse, WI 54601

**LENA TAYLOR**  
1518 West Capitol  
Milwaukee, WI 53206

**VAN WANGGAARD**  
1246 Blaine Ave.  
Racine, WI 53405

### ASSEMBLY MEMBERS

**JOAN BALLWEG, Co-Chair**  
170 W. Summit Street  
Markesan, WI 53946

**TYLER AUGUST**  
116 Evelyn Lane Unit 3A  
Lake Geneva, WI 53147

**PETER BARCA**  
1339 38 Ave.  
Kenosha, WI 53144

**DAN KNODL**  
N101 W14475 Ridgefield Ct.  
Germantown, WI 53022

**CORY MASON**  
3611 Kinzie Ave  
Racine, WI 53405

**JOHN MURTHA**  
2283 20<sup>th</sup> Ave.  
Baldwin, WI 54002

**JOHN NYGREN**  
N2118 Keller Rd.  
Marinette, WI 54143

**KATRINA SHANKLAND**  
5782 Sandpiper Dr.  
Stevens Point, WI 54482

**JIM STEINEKE**  
Room 115  
State Capitol

**CHRIS TAYLOR**  
306 West  
State Capitol

**ROBIN VOS**  
960 Rock Ridge Road  
Burlington, WI 53105

This 22-member committee consists of the majority and minority party leadership of both houses of the Legislature, the co-chairs and ranking minority members of the Joint Committee on Finance, and 5 Senators and 5 Representatives appointed as are members of standing committees.



COMMITTEE LIST

<b>Legislative Council Study Committee on Transfer of Structured Settlement Payments</b>	
<p><b>Chair Jim Ott</b>, Representative 11743 N. Lakeshore Dr. Mequon, WI 53092</p> <p><b>Bruce Bachhuber</b>, Attorney Hanaway Ross S.C. 345 S. Jefferson St. Green Bay, WI 54301</p> <p><b>Catherine La Fleur</b>, Attorney La Fleur Law Office, S.C. 826 N. Plankinton Ave., 3<sup>rd</sup> Floor Milwaukee, WI 53203</p> <p><b>Elizabeth Nevitt</b>, Attorney Nevitt Law Office P.O. Box 337 Pickett, WI 54964</p> <p><b>Michael Schraa</b>, Representative 220 Wyldeberry Ln. Oshkosh, WI 54904</p>	<p><b>Vice Chair Dana Wachs</b>, Representative 437 Lincoln Ave. Eau Claire, WI 54701</p> <p><b>Michael Fitzpatrick</b>, Circuit Court Judge Rock County 51 S. Main St. Janesville, WI 53545</p> <p><b>Benjamin Malsch</b>, Vice President to Trust Officer 171 East Fox Dale Rd. Fox Point, WI 53217</p> <p><b>Gerald Ptacek</b>, Circuit Court Judge Circuit Court Branch 1 County of Racine Racine County Courthouse 730 Wisconsin Ave. Racine, WI 53403</p> <p><b>Lena Taylor</b>, Senator 1518 West Capitol Milwaukee, WI 53206</p>

STUDY ASSIGNMENT: The Study Committee shall be directed to do the following: (a) review the current method by which structured settlement payments are transferred in Wisconsin; (b) examine statutes regulating the practice in other states and under federal law; and (c) recommend a statute for adoption in Wisconsin that governs transfers of structured settlement payments. The committee shall consider items such as standards for disclosure of information to structured settlement recipients by entities seeking to purchase future settlement payments, the ability of parents and guardians to enter into structured settlements on behalf of minor children, and guidelines for use by judges in approving the transfer of structured settlement agreements.

10 MEMBERS: 3 Representatives; 1 Senator; and 6 Public Members.

LEGISLATIVE COUNCIL STAFF: Anna Henning, and Brian Larson, Staff Attorneys; and Julie Learned, Support Staff.



## COMMITTEE MATERIALS LIST

*[Copies of documents are available at [www.legis.wisconsin.gov/lc/](http://www.legis.wisconsin.gov/lc/)]*

### **July 31, 2014 Meeting**

- Staff Brief 2014-06, Transfer of Structured Settlement Payments (July 24, 2014)
- Model State Structured Settlement Protection Act
- California Structured Settlement Protection Act
- Oregon Structured Settlement Protection Act
- New York Structured Settlement Protection Act
- Article, by Daniel W. Hindert and Craig H. Ulman, "Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts," Judges' Journal (Spring 2005).
- Presentation, by Brenda Bierman, Senior Claims Technical Specialist, Sentry Insurance
- PowerPoint Presentation, from John McCulloch, National Marketing Director, EPS Settlements Group
- Article, from John McCulloch, National Marketing Director, EPS Settlements Group
- PowerPoint Presentation, by Earl Nesbitt, Executive Director and General Counsel, National Association of Settlement Purchaser
- Memo No. 1, 1998 Senate Bill 298, Relating to Structured Settlement Agreements (July 31, 2014)
- Senate Bill 298

### **September 11, 2014 Meeting**

- WLC: 0011/P1, relating to transfer of structured settlement payments
- Memo No. 2, Potential Governmental Interests in Structured Settlement Factoring Transactions (September 4, 2014)
- Handout, from Fredric Kolb, "IN-FORCE Fixed Term Annuities" (September 5, 2014)
- Handout, from Fredric Kolb, Professor, University of Wisconsin-Eau Claire, "Is Structured Settlement Annuity a Good Deal? Yes, but..."

- Handout, from Fredric Kolb, "Recommendations to the 2014 Legislative Council Study Committee on Transfer of Structured Settlement Payments"

**October 9, 2014 Meeting**

- Bill Draft WLC: 0011/1, relating to transfer of structured settlement payments.
- Letter, from Judge Michael Fitzpatrick, Rock County Circuit Court (October 7, 2014).

**November 6, 2014 Meeting**

- WLC: 0011/2, relating to transfer of structured settlement payments.
- Memo No. 3, "Options Regarding WLC: 0011/2, Relating to the Transfer of Structured Settlement Payments" (October 29, 2014)
- November 14, 2014 Mail Ballot
- WLC: 0011/3, relating to transfer of structured settlement payments
- Results of the November 14, 2014 Mail Ballot

Mail Ballot of the Study Committee on the Transfer of Structured Settlement Payments (November 14, 2014)