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THE STRUCTURED SETTLEMENT SECONDARY MARKET FILLS A NEED BUT  
RECKLESS LACK OF OVERSIGHT OF THE SECONDARY AND TERTIARY MARKET  
CREATES PROBLEMS IN NEED OF CONSTRUCTIVE SOLUTIONS

by

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## EXECUTIVE SUMMARY

‘The notion of future consequences, so essential to our development as functional citizens, as adults, is relegated to the background, inviting us to remain in a state of permanent childhood.’<sup>2</sup> From top to bottom, we are becoming a society ruled by impulse, by the reflexive reach for quick rewards. We are becoming an Impulse Society<sup>3</sup>. Nearly every consumer proposition today, from credit to fast food and entertainment to social media and online shopping, capitalizes on our anti-future bias: in all cases, we’re provided immediate pleasure, while any costs, whether financial, physical, or emotional, are deferred so seamlessly that they vanish from our perception<sup>4</sup>. And there is nothing more impulsive when it comes to money than “cash now”, whether it is pay day loans, cash now for structured settlements, lottery winnings or future retirement income. Yet in the elaborate world of financial products, one of the most peculiar and least understood is the lump sum cash purchase of structured settlement (payment rights) by companies like J.G. Wentworth<sup>5</sup>.

Before his April 19, 2015 death after being severely injured in police custody, before Baltimore plunged into rioting, the life of Freddie Gray was a case study in the effect of lead paint on poor blacks. The lead poisoning Gray suffered as a child may have contributed to his difficulties with

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<sup>2</sup>Paul Roberts *Instant Gratification* The American Scholar Autumn 2014

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

<sup>5</sup>Jeffrey P. Stradling “I Have a Structured Settlement and I Need Oversight Now” The Consumer Financial Protection Bureau and the Structured Settlement Industry New Mexico School of Law 2015

learning, truancy and arrests — all of it culminating in a 2008 lead-paint lawsuit and a windfall of cash locked inside a structured settlement. By late 2013, Gray was striking deals with Access Funding<sup>6</sup>. People like Gray who have suffered lead poisoning as children are especially vulnerable to predatory transactions. Many are impulsive and mentally disabled, but not so much that the law regards them as incapable of acting on their own behalf, as long as they're 18 or older<sup>7</sup>. In less than one week since August 25, 2015, when the Washington Post broke its story about how companies such as Access Funding make millions off lead poisoned poor blacks, there has been a level of outrage that has galvanized the Attorney General of Maryland, Maryland state lawmakers and sparked a Congressional investigation, led by Rep. Elijah Cummings<sup>8</sup>. The Congressional investigation is looking into the structured settlement purchase industry to examine how companies purchase payment streams from settlement recipients for a lump-sum payment upfront, as well as the adequacy of existing legal protections for settlement recipients<sup>9</sup>. As someone who has studied and written about the structured settlement and structured settlement secondary market for a decade, I have to say that it's about time. In my opinion however, it is important for any investigation and subsequent amendments to structured settlement laws to adequately consider and address what happens both before and after a structured settlement transfer petition is submitted to a Court for approval.

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<sup>6</sup> *How Companies Make Millions Off Lead Poisoned Poor Blacks* Terrence McCoy Washington Post August 25, 2015 [http://www.washingtonpost.com/local/social-issues/how-companies-make-millions-off-lead-poisoned-poor-blacks/2015/08/25/7460c1de-0d8c-11e5-9726-49d6fa26a8c6\\_story.html](http://www.washingtonpost.com/local/social-issues/how-companies-make-millions-off-lead-poisoned-poor-blacks/2015/08/25/7460c1de-0d8c-11e5-9726-49d6fa26a8c6_story.html)

<sup>7</sup> Ibid.

<sup>8</sup> Letter dated August 27, 2015 from Rep. Elijah E. Cummings Ranking Member of the Committee Oversight and Government Reform to Michael Borkowski CFO of Access Funding <http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2015-08-27%20EEC%20to%20Mr.%20Borkowski%20CEO%20Access%20Funding.pdf> (Note: Cumming's letter addresses Borkowski as CEO, when the Access Funding website refers to him with the title CFO. CEO is Lee J. Jundanian)

<sup>9</sup> Ibid.

This paper will examine the structured settlement secondary market as it exists at time of publication, will identify problem areas and propose constructive solutions for the benefit and consideration of consumers, lawmakers, the structured settlement industry and the insurance industry.

## I. Background and Brief History of Structured Settlement Factoring

Structured settlements provide a negotiated, customized, stable, secure guaranteed stream (or streams) of payments to recipients that are income-tax free<sup>10</sup> or income tax deferred<sup>11</sup>.

Structured settlements can be funded with annuities or obligations of the United States government<sup>12</sup>. Since the Periodic Payment Settlement Act of 1982 (“PPSA”), the majority of structured settlement annuities are purchased by qualified assignment companies which assume the obligation to pay future payments as damages, from the Defendant or the Defendant’s insurance company. Prior to the enactment of the PPSA, structured settlement annuities were held by the Defendant or the Defendant’s insurer. As a general creditor of the Defendant or the Defendant’s insurer, the plaintiff was subject to the claims of its creditors with no closure or separation from the source of their loss, or the entity paying the claim on their behalf. The Defendant had to front the cost of funding the future payments, but only had a pro tanto discharge of the future payment obligation, had to carry a contingent liability on its books and

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<sup>10</sup> If paid as damages that are excludable from income as set forth in IRC§104(a)(2), or for payments for workers compensation claims or awards as set forth under IRC§104(a)(1)

<sup>11</sup> For Structured attorney fees, or for payment of taxable damages.

<sup>12</sup> IRC §130(d)

carried the burden of default risk of the life insurance company issuing the annuity used to fund the future payment obligation. The assignment and assumption by the assignee was a novation<sup>13</sup> that also enabled the Defendant or the Insurer to take a tax deduction. For the plaintiff, the PPSA established an alternative that permitted a substitution of obligors so that the asset used to fund the future payment obligation was not subject to the Defendant or Defendant's insurer's creditors. In order for an assignment to be qualified it must satisfy the requirements set forth in IRC §130. One of the key requirements of IRC§130, is that the periodic payments cannot be increased, decreased, accelerated or deferred<sup>14</sup>.

Despite the obvious benefits of structured settlements, life changes and events sometimes find annuitants in the need of liquidity, for a variety of reasons, which they are unable to obtain from traditional sources. Enter the structured settlement secondary market.

As it was becoming established, market conduct in the structured settlement secondary market was a bit like the Wild West. There were plenty of abusive business practices. Until 1998, structured settlement transfers were unregulated. There was aggressive advertising, a circumvention of anti-assignment provisions in most structured settlement contracts through a redirection to factoring company addresses. Settlement purchasers would then collect the

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<sup>13</sup> “an agreement made between two contracting parties to allow for the substitution of a new party for an existing one. The original contracting party who is replaced by the new party with the novation is excused by the novation, and therefore the original party who is replaced gives up any rights it has against the other original party to the contract. Both original contracting parties must agree to the novation”.-Cornell Law School Legal Information Institute

<sup>14</sup> IRC§130(c) (2)(B)

structured settlement 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 settlement purchasers 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 structured settlement transfer agreements. In some cases, settlement purchasers charged discounts equivalent to annual interest rates as high as 70 percent. In many cases, these actions commenced with entry of confessed judgments against payees. Insurers responsible for making ostensibly non-assignable settlement payments became embroiled in collection actions brought by settlement purchaser. Insurers also faced uncertain tax consequences and risks of multiple Transfers of Structured Settlement Payment Rights: payment became subject to competing claims Payees who defaulted often were sued in remote forums specified in the factoring companies' form contracts<sup>15</sup>

The first state statute regulating the transfer of structured settlement payment rights was in Illinois in 1998. Until then, such transactions were private contracts between consumer payees (as sellers) and funding companies (as buyer).<sup>16</sup> Enter the National Conference on Insurance Regulators (NCOIL). The intent of the NCOIL Model Transfer Statute was to: (1) Insure that ALL Payees had liquidity options (2) Insure that Payees received appropriate information to

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<sup>15</sup> Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts” by Daniel W. Hindert and Craig H. Ulman, published in The Judges Journal, Volume 44, No.2, Spring 2005

<sup>16</sup> Earl S. Nesbitt Executive Director National Association of Settlement Purchasers July 31, 2014 Powerpoint Structured Settlement transfers presented to the Wisconsin Legislature

make informed decisions (3) Protect Payees from overreaching<sup>17</sup> Among other objectives, IRC 5891 and the Model State Structured Settlement Protection Act (Model Act) were enacted to protect claimants from predatory secondary market business practices. The existence of the Federal law itself is an admission that such practices exist. The Federal law governing structured settlement transfers is actually a 40% excise tax on the factoring discount, levied on the settlement purchaser if a transfer is not compliant with the statute<sup>18</sup>. Both NSSTA and NASP, the structured settlement primary and secondary market trade associations, supported these statutes. Today 48 states have passed structured settlement protection acts.

How successfully these statutes have accomplished their objective to protect structured settlement recipients is open for debate. Arguably the structured settlement protection acts have provided a decent framework for a market place that has funded several billion dollars in structured settlement transfers. But they are fundamentally deficient in ways that I will examine.

Let's look "under the hood" of the structured settlement secondary and tertiary markets identify four problems in key areas where things can and should be part of a priority action plan.

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<sup>17</sup> Ibid.

<sup>18</sup> IRC §5891(a)

## I. THE SOLICITATION AND APPROACH

PROBLEM: No regulation of participants in the structured settlement secondary and tertiary marketplace and their activities. Why is there no enforceable regulation of (1) those soliciting people receiving guaranteed income streams from structured settlements; (2) those advising annuitants about the sale of structured settlement payment rights; (3) those advising investors, whether accredited or not, about the purchase of structured settlement payment rights; (4) those dispensing financial advice about alternative investments, without a license in conjunction with any of the above and getting paid for it directly or indirectly?

The fundamental reason for government regulation of insurance is to protect American consumers. State systems are accessible and accountable to the public and sensitive to local social and economic conditions. State regulation has proven that it effectively protects consumers and ensures that promises made by insurers are kept. Insurance regulation is structured around several key functions, including company licensing, producer licensing, product regulation, market conduct, and financial regulation and consumer services<sup>19</sup>. Insurance agents and brokers, also known as producers, must be licensed to sell insurance<sup>20</sup> and must comply with various state laws and regulations governing their activities. State insurance departments oversee producer activities in order to protect insurance consumer interests in

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<sup>19</sup> National Association of Insurance Commissioners (NAIC) Consumer Regulatory Brief p2  
[http://www.naic.org/documents/consumer\\_state\\_reg\\_brief.pdf](http://www.naic.org/documents/consumer_state_reg_brief.pdf)

<sup>20</sup> A legitimate annuity, including a structured settlement annuity, is a form of insurance contract and regulated as such.

insurance transactions. The states administer continuing education programs to ensure that agents meet high professional standards. Producers who fail to comply with regulatory requirements are subject to fines and license suspension or revocation<sup>21</sup>.

Presently there is no apparent requirement for intermediaries and companies in the structured settlement secondary market or tertiary market to be licensed or certified. There are no background checks for intermediaries such as one would find with an application for an insurance license<sup>22</sup>. This raises questions over the market and its participants' legitimacy<sup>23 24 25 26</sup>. Unlike other financial services such as insurance, accounting, banking, real estate, securities and the secondary market for life insurance, there is no statutory requirement to possess a fundamental body of knowledge to be able solicit the public that a licensing standard would require, no continuing education requirement, no rules of solicitation. Alarming for sellers or investors, there is no authority with specialized knowledge in place, to set or enforce

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<sup>21</sup> National Association of Insurance Commissioners (NAIC) Consumer Regulatory Brief p3

<sup>22</sup> "Prior to license issuance, the California Department of Insurance (CDI) completes detailed background checks on all license applications" <http://www.insurance.ca.gov/0200-industry/0035-background-info/background-faq.cfm>

<sup>23</sup> "Rose, who spoke to The Washington Post on the condition that her full name not be used, had just tumbled into the little-noticed, effectively unregulated netherworld of structured settlements" *How Companies Make Millions off Lead Poisoned Poor Blacks* Terrence McCoy in The Washington Post, front page, August 25, 2015

<sup>24</sup> Indictment of the voice of Income Stream Exchange in United States of America v Todd A.Dyer, a/k/a Allen Todd (a/k/a T Allen Dyer) et al. United States District Court Eastern District of Wisconsin 2:15-cr-00115-RTR filed June 9, 2015.

<sup>25</sup> "Dyer's history of run-ins with securities regulators and law enforcement dates back to 1993 when he was ordered by officials in Wisconsin and Georgia to stop selling unregistered securities in the states. In addition to the 70-month sentence Dyer received in 1999 for running the Ponzi scheme, an Illinois judge in 2004 sentenced him to 30 months for securities fraud but allowed the time to be served concurrently with the federal sentence. Dyer still owes more than \$2 million in restitution" *Grand Jury Responds to Felon's Bravado with New Fraud Charges*, Cary Spivak, Milwaukee Journal Sentinel June 10, 2015.

<sup>26</sup> "Recently, Dyer — who has gone by the name Allen Todd and now goes by T. Allen Dyer in his business ventures — created a company designed to purchase "structured settlements," Wall wrote. A structured settlement is a court awards and settlements to be paid out over years that investors purchase immediately at a discount." He is almost certainly running a new fraud scheme," (Asst US attorney Joseph ) Wall wrote" *Judge Bars Indicted Lake Geneva Man from Taking Client Cash* Cary Spivak, Milwaukee Journal Sentinel July 16, 2015

regulations or standards of participants in the structured settlement secondary market or tertiary market, or to whom consumers can seek redress. Yet arguably, individuals and companies in the structured settlement secondary market are providing financial advice concerning insurance products and/or investment products. And it doesn't end there.

Once the structured settlement payment rights are sold to the settlement purchaser they may be "recycled" and sold/assigned to investors in the tertiary market. Structured settlement payment rights are often traded by individuals and companies who have no insurance licenses, securities licenses or financial advisory licenses, but falsely label these payment rights "annuities". Some purveyors of recycled structured settlements go so far as to discuss insurance guaranty funds, which would be illegal for the sale of the insurance product whose label they've "borrowed"<sup>27 28</sup> and imply that statutory protections available to insurance buyers are available to investors in structured settlement payment rights which are labeled "annuities"<sup>29 30 31</sup> Eugene C Ahtirski, a Van Nuys, CA lawyer who provides Independent Professional Advice to investors in structured settlement payment rights, opines that by the time a structured settlement payment stream

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<sup>27</sup> "Discussing the state guaranty funds with consumers during the sale process is not allowed". National Association for Fixed Annuities, *State Guaranty Fund Directory* p3

<sup>28</sup> National Organization of Life & Health Guaranty Associations (NOLHGA) State Laws and Provisions Report on Advertising Prohibitions, as of January 1, 2015  
<http://www.nolhga.com/factsandfigures/main.cfm/location/lawdetail/docid/18>

<sup>29</sup> Michael Kitces Reston, VA "Generally the sale of a structured annuity results in the transfer of the actual annuity contract. As a result, the new owner would have all the same rights and protections of any annuity owner. There is no "void if transferred" attached to state guaranty funds; they exist to back annuities, not annuity owners per se, and it's still an annuity" . <https://www.kitces.com/blog/is-structured-settlement-annuity-investing-a-good-deal-yes-but/>

<sup>30</sup> Secondary Market Income Annuities 2011 Buyer's Guide Somerset Wealth Strategies "SMIAs...may be partially guaranteed by State Guaranty Associations..."retrieved August 31, 2015

<sup>31</sup> Genex Capital *Fixed Term Annuities* April 2, 2010 p6 "Fixed Term Annuities...may be partially guaranteed by State Guaranty Associations, but Genex Capital makes no representations or warranties in this regard"  
<http://www.legacynh.com/files/24440/Buyer%20Guide.pdf> , retrieved August 31, 2015

reaches the tertiary market, chances are you've lost the "specialized state guaranty funds" backing, unless you can meet the 60 day requirement [IRC Section 130(d)] that maintains the annuity as a qualified funding asset, thereby protecting the "annuity" from being taxed upon your purchase<sup>32</sup>

Some of these individuals and entities may be operating from outside of the United States soliciting both American and foreign investors and/or through a complex labyrinth of entities and layers of concealment to make it difficult for the average investor to discover their true ownership or location. A number of the entities fail to register to do business with the Secretaries of State where they do business; ostensibly to make it more difficult for consumers to serve process in the event of unresolvable disputes, but also depriving the states of much deserved revenue.

In one matter that at the time of publication was the subject of a state attorney general investigation in the Southeastern United States, 3 structured settlement transfers were approved from the trust of a beneficiary with special needs, to Florida limited liability entities that were administratively dissolved shortly thereafter for failure to file annual reports a short time after the transactions were approved. All of the entities operated out of a UPS store mailboxes.

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<sup>32</sup> Eugene C Ahtirski, Esq. Independent Professional Adviser Counsels on Recycled Annuities August 6, 2014 <http://structuredsettlementexpert.co/purchasing-recycled-annuities/>

A number of secondary market participants market websites as if they were companies. At the time of publication, one Maryland “website company” has taken the outrageous step of claiming that it is licensed and qualified to purchase payments in all 50 states<sup>33</sup> when no such licensing exists.

Contrast the purchasers and traders of structured settlement payment rights with those that work with injured parties, insurers and their counsel to place structured settlements. The latter ARE licensed for insurance; ARE subject to continuing education requirements, and if securities licensed, ARE subject to FINRA and/or SEC regulations which include fingerprinting and background checks, and ARE subject to fines, suspension or revocation of licenses for non-compliance. A life settlement authority on your New York insurance license requires fingerprinting.

Thirteen years following the passage of the Victims of Terrorism Tax Relief Act of 2001, it is evident that the structured settlement secondary market is not able to self-regulate. It’s time to do something about it.

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<sup>33</sup> <http://annuitysold.com/about-us/> at time of publication.

## SOLUTION

Implement a robust licensing standard, which includes background checks and provides for regulatory oversight with the power to fine, suspend or revoke licenses and mandatory continuing education for licensees. In my opinion, the structured settlement secondary market will never achieve a level of legitimacy beyond the investors or buyers of its securitizations without it. The life settlement industry has achieved greater legitimacy due to regulation that includes licensing<sup>34 35</sup>. The cost of regulation can be covered by the licensing fees with regulation provided within existing regulatory structures given additional responsibilities. Given the parallels between the life insurance secondary market and the structured settlement secondary market it is logical that the insurance regulator should be the regulator of choice.

Another commentator has suggested that the Consumer Financial Protection Board (“CFPB”) is an option should a substantial amount of consumer complaints arise. He opines that the CFPB has the ability and resources to study more financial products and industries, especially the structured settlement industry because of its economic size, the general financial illiteracy among financial consumers and claimants, and the ineffective ex. ante judicial and legislative action<sup>36</sup>.

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<sup>34</sup> “No More Wild Wild West”7 Positive Trends for life settlements Robin S. Weinberger and Peter N. Katz Life Health Pro July 25, 2013

<sup>35</sup> “Confirm the life settlement broker is licensed in the appropriate state” Adam Meltzer Life Health Pro May 9, 2013

<sup>36</sup> Stradling p24.

As part of the solution state structured settlement protection acts should require that any company engaged in structured settlement factoring transactions, with residents of any State, be actively registered with the applicable Secretary of State and have all filings current. Said requirement would include a disclosure of all DBAs, including websites.

PROBLEM: INTERSTATE FORUM SHOPPING

HOW IT WORKS

- I. Settlement purchaser plants seed that Alternative Designation of Domicile will work due to reality or perception that home state will deny transfer, or that discount rates in another state or county are better, or where a judge performs less scrutiny, or is perceived to be more friendly [e.g. Sumter County Florida ]
- II. Settlement Purchaser makes one or more financial inducements to annuitant to make false designation of domicile, sometimes concealed in gift cards.
- III. Settlement Purchaser facilitates the fake “storybook”.
- IV. Settlement Purchaser coaches annuitant, to make petition with false designation to the Court.

In the complaint filed by Michael Lafontant against a Florida settlement purchaser, he alleged that Defendants prepared the Plaintiff, and coached the Plaintiff on how to submit false affidavits so they could profit at Plaintiff's expense. Defendants chose the venues they would use, secured a false lease for Plaintiff and coached and cajoled Plaintiff into faking his relocation to Florida".<sup>37</sup>

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<sup>37</sup> Michael Lafontant v Washington Square Financial LLC d/b/a Imperial Structured Settlements, Imperial Finance & Trading, LLC; Imperial Holdings Inc.; and Andrew Levine United States District Court SDNY Case 7:14 cv-9895-CS

"Defendants solicited Plaintiff in New York, mailed and wired funds to Plaintiff in New York, phone calls, faxes, emails and text messages to Plaintiff in New York, convincing Plaintiff to withdraw a (transfer) petition that had been pending in New York for many months because they wanted to poach him from Peachtree when they knew he was under contract with that company; disregarding the best interest standard; sending stored value cards or cash advance checks to Plaintiff in New York; changing the terms of the December 2011 transaction without informing Plaintiff; failing to send proper disclosure notices as required by law; falsifying documents and encouraging Plaintiff to waive independent financial advice; steering Plaintiff into bad investments, including but not limited to a Maserati; and grooming and coaching Plaintiff about how to misrepresent his residence<sup>38</sup>.

## SOLUTION

- (1) Require that petitions for structured settlement transfers be filed in the jurisdiction in which the annuitant resides as opposed to any court in the State. All states should be consistent;

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<sup>38</sup> Ibid.

- (2) Require proof that the petitioner/seller has resided in that county for a minimum of 6-12 months. A time limit needs to be set far enough out so that someone can't come down to Florida, or any other forum shopping state, for a couple of days or weeks and create the illusion of domicile with the assistance of the settlement purchaser.
  
- (3) Documentation of domicile should include more robust documents than a voter registration card. Must show proof of having resided in state for at least 6 months (have acceptable proof standard e.g. electric bills, auto registration, where children go to school)
  
- (4) Require an in-person review by a judge. Judges must take the responsibility to review documentation and question the proposed seller on domicile if warranted.
  
- (5) Impose stiff punishment for anyone who is caught violating the law.
  
- (6) The creation of a mandatory standardized "Seller's Guide" to be handed/emailed to all sellers on the approach, addressing, among other things, the issue of forum shopping and the potential consequences. A signed acknowledgment of delivery endorsed by both the buyer and seller should accompany any transfer petition and buyers should be required to maintain record of the delivery acknowledgment in their permanent files.

## II PROBLEMS WITH THE STRUCTURED SETTLEMENT TRANSFER PROCESS

### PROBLEM: INCONSISTENT REQUIREMENT FOR IN-PERSON TRANSFER HEARING

Mainstreet Structured Settlement Funding says "One of the courts that hear these cases is the Sumter County Florida court. Sometimes that particular court does not require that you appear before the judge in person". The statement is made in the context of Mainstreet comparing Florida to West Virginia and Maryland where an "in person" hearing IS required. It's a problem that could be exploited and result in a slip through of a structured settlement transfer that was not in fact in the seller's best interest or his or her dependents, because there was no in person hearing. I know of at least one such Florida case where I was contacted by a seller shortly after a structured settlement transfer had been completed.

Many annuitants waive or are encouraged to waive independent professional advice. That leaves it all on the judge who should question this. A lump sum may not be the answer.

## SOLUTION

- (1) Seller must appear at transfer hearing. Judge must question the seller and exercise the same level of scrutiny as they would with approving an infant settlement. Sudden wealth syndrome is in play as well. A lump sum changes the picture. But when it comes to the sale of a structured settlement, it is somewhat of a “trompe l’oeil”. The Sudden Money® Institute describes Money Shock™ as the reaction to abrupt financial change; where fear and anxiety replace our normal rational thinking and creative problem solving abilities. Missing in impulsive cash now actions are important steps such as (1) Financial Triage to restore the capacity for clear and stable decision making. (2) Choices and change management for appropriate financial adjustments to the new financial reality.
  
- (2) Certified information about prior transfers to accompany petition to transfer submitted for court approval.
  
- (3) Confirm delivery and reading of mandatory standardized “Seller’s Guide” to be handed to all sellers on the approach. The acknowledgment should be signed by both the agent of the buyer who presented it and the seller.

PROBLEM: “BEST INTEREST” STATUS QUO IS TOO VAGUE AND NOT BEING ENFORCED CONSISTENTLY

In general, federal law and state structured settlement protection acts require that a state court judge must, among other things in a qualified order, approve the transfer, of structured settlement payment rights, as being in the best interest of the payee, taking into account the welfare and support of the payee’s dependents<sup>39</sup>. Unfortunately there have been a number of cases where the application of the best interest standard could, in my opinion, could best be described as farce. From just scratching the surface, it is clear that things need to be tightened up, a lot. The inconsistent application of the best interest standard has the potential to affect the primary structured settlement market as well. How many structured settlement brokers and settlement planners use the existence of the best interest standard to diffuse concerns that plaintiff lawyers or judges reviewing an infant compromise, may have about the ease of structured settlement transfers.

- A. T.D., an unemployable Florida resident aged 29 with infants 4 and 1 who had been living comfortably on over \$60,000 annually-over \$108,000 annually, with a 3% COLA from his structured settlement, before being “tag-teamed”, by a Florida structured settlement intermediary and a financial adviser with a large publicly traded bank, to sell in excess of \$2 million in future payments for less than \$600,000, for alternative investments. A Florida judge approved the 2013 transaction as being in the 29 year old’s best interest without meeting T.D. It took me only minutes of telephone conversation to observe that T.D. had cognitive deficits and that the T.D. did not fully understand the transaction, that

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<sup>39</sup> IRC §5891(b)(2)(ii)

the transaction was neither in T.D.'s best interest, nor his two toddler dependents, and that alternative investments discussed such as mutual funds were not suitable, having given up his primary source of income that supported him and his two young dependents for a discounted lump sum of \$600,000, bearing a effective discount rate of 14.27%<sup>40</sup>. The notice to parties about the transfer hearing on December 17, 2013 stated only 5 minutes were reserved for the case. How could a judge have given adequate consideration to T.D.'s case and approved this given her responsibilities under the law? **Had there been an in-person hearing in T.D.'s case. I am confident that the judge would have immediately seen that the structured settlement transfer was not in T.D.'s best interest.** The affidavit accompanying the transfer petition said that T.D. was supporting himself, but didn't say how. In reality he was supporting himself and his family with the structured settlement payments! Fortunately the story had a happy ending for T.D. He retained legal counsel right away, did not spend all the money he received from the transfer and in the end, the transfer parties were able to get the original transfer order vacated so the structure payments and T.D.'s income tax free "job that you cannot be fired from" income was restored<sup>41</sup>.

- B. The Terrence Taylor Case involves an African-American burn victim amputee, whose structured settlement was systematically destroyed in 11 structured settlement transfers within a 2 year period. All transfers were submitted by the same lawyer on the

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<sup>40</sup> Copy of original Florida Disclosure statement bearing a disclosure receipt date of November 14, 2013, faxed to me by T.D. on December 31, 2013 at 9:58am, along with other transfer documentation that was submitted to the Circuit Court of Indian River County in Vero Beach, Florida.

<sup>41</sup> Based on my personal recollection of a multiple conversations I had with T.D. on December 31, 2013 and other times, a copy of the original transfer paperwork faxed to me by T.D. on December 31, 2013 and at other times as well as phone conversations with his counsel for both sides, the principal of the intermediary and the financial adviser prior to the settlement date and vacating of the transfer order. The settlement is believed to be subject to a confidentiality agreement to which I am not a party.

Portsmouth, Virginia Circuit. Eight of the 11 transactions were approved by the same judge. According to a sampling of published records, judges typically allocate 1-2 minutes per case with no in-person appearance in Portsmouth<sup>42 43</sup>. Taylor has a dependent child. I can see a judge approving one transaction, but what's going on with transaction 6.7, 8, 9 and beyond, in such a short time window? Where is the best interest being considered? It's hard to see where there was any interest, let alone best interest. One of the Terrence Taylor deals involved the same combination of settlement purchaser and the same financial adviser associated with a well-known publicly traded bank as T.D.'s case. Taylor's suit against 123 Lump Sum et al was voluntarily dismissed without prejudice and at the time of publication, was in the process of being re-filed in Portsmouth, VA.

New York courts appear to have a better handle on the best interest standard. The payee's inability to demonstrate an adequate appreciation of the proposed transaction, as well as the failure to support or document the payee's need for the advance amounts continues to be the principal causes for a finding that the transaction is not in the payee's best interest<sup>44</sup>. Whether the payee intends to pay for school, home repairs, purchase a vehicle, pay off debts, or otherwise, a petition's likelihood of success can only be reduced by the failure to produce detailed information about the payee's alleged needs, as evidenced by a sampling of 2010 cases.

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<sup>42</sup> Portsmouth Circuit Court Docket for January 7, 2014 Judge Dean W. Sword, Jr. <http://structuredsettlements.typepad.com/files/2014-01-07-portsmouth-circuit-court-dean-sword-jr.-steophen-heretick-transfer-petitions.pdf>

<sup>43</sup> Portsmouth Circuit Court Docket for June 8, 2014 Judge James C Hawks 25 hearings scheduled in 50 minutes

<sup>44</sup> Recent Decisions Considering the "Best Interests" of the Payee David K. Hou Esq. Boylan Code LLP Rochester NY <http://www.boylancode.com/news-knowledge/articles/60-transferring-structured-settlement-rights-case-law-update#i>

(1) In Williams, the payee was an eighteen year old full time student, residing with her parents, who wanted the advance to rent an apartment, prepay utilities, college tuition not covered by financial aid, and to pay past court fines. The payee had no other sources of income. The aggregate payments were \$40,452.00; the advance, including \$2000.00 for legal fees and \$200 for "processing fees", was \$19,657.00. The annual discount rate was 14.99%. The Court determined both that the 14.99% discount rate was not fair and reasonable, and that facts demonstrated the payee did not appreciate the consequences of the transfer, given her age, irresponsibility with the law, and her failure to consult with an advisor<sup>45</sup>.

(2) In Crotty, the payee was an unemployed full-time student who lived at home with other unemployed family members. The aggregate of the payments was \$120,000, and the advance amount was \$40,496.22. The payee sought the funds to pay back rent and for anticipated college tuition. The Court noted that the payee had not submitted proof that she had been accepted to college, and her payments were the primary source of income for the payee's entire household. **The payee had recently received a substantial periodic payment and yet could not account for it**<sup>46</sup>. The Court further noted that the payee did not have the maturity, sophistication or intelligence to appreciate the transaction, given her failure to seek independent financial advice, and the Court's view that adequate planning of the periodic payments would satisfy her stated goals and needs<sup>47</sup>.

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<sup>45</sup> Ibid.

<sup>46</sup> Emphasis added.

<sup>47</sup> Ibid.

If only Portsmouth judge Dean W. Sword, Jr. devoted more time and applied the best interest standard with more thorough consideration, as New York judges clearly do<sup>48</sup>, perhaps he would have stopped the extraordinary amount of follow-on deals in two years and Terrence Taylor would not now be destitute

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<sup>48</sup> Bronx NY Judge Hunter Stops “Vulture” Snack on Structured Settlement Carcass Structured Settlements 4Real@ January 19, 2009 [http://structuredsettlements.typepad.com/structured\\_settlements\\_4r/2009/01/bronx-new-york-judge-hunter-prevents-vulture-snack-on-structured-settlement-carcass.html](http://structuredsettlements.typepad.com/structured_settlements_4r/2009/01/bronx-new-york-judge-hunter-prevents-vulture-snack-on-structured-settlement-carcass.html)

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STRUCTURED ASSET FUNDING, LLC d/b/a 123 LUMP SUM a/k/a 123 LUMP SUM, LLC;  
BLAZINGSTAR FUNDING, LLC; JAY GEE, LLC; BEXHILL, LLC; iSETTLEMENTS LLC  
d/b/a 123 LUMPSUM; HPF CAPITAL d/b/a HIGHPOINT FUNDING and RHETT  
WADSWORTH United States District Court Eastern District of Virginia Case 1:15-cv-00271-  
TSE-TCB Amended Complaint. Matter was voluntarily dismissed without prejudice and in  
process of being re-filed in Portsmouth VA.

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