Department of Legislative Services

Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 535 (The Speaker)(By Request - Office of the Attorney General) and Delegate Rosenberg

Judiciary

Courts and Judicial Proceedings - Structured Settlements - Transfers

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This bill makes several changes to the procedures for filing and approving an application for a transfer of structured settlement payment rights.

The bill also authorizes the Attorney General to adopt and enforce regulations to carry out the purposes of Maryland's Structured Settlement Protection Act (Title 5, Subtitle 11 of the Courts and Judicial Proceedings Article), including regulations establishing a discount rate applicable to transfers of structured settlement payments above which a proposed transfer must be presumed to be not in the best interest of a payee.

Fiscal Summary

State Effect: The Office of the Attorney General can implement the bill with existing budgeted resources.

Local Effect: The bill's requirements can be met with existing local resources.

Small Business Effect: None, as discussed below.

Analysis

Bill Summary: Under the bill, the General Assembly finds and declares that regulation of transfers of structured settlement payment rights is necessary to (1) ensure that the transfers are effectuated on fair and reasonable terms and are in the best interests of payees and (2) protect payees against deceptive practices.

Independent Professional Advice: The bill redefines "independent professional advice" in these transfers to mean the advice of an attorney, certified public accountant, actuary, or other licensed professional adviser who is engaged by a payee to render advice concerning whether a proposed transfer of structured settlement payment rights would be in the best interest of the payee, taking into account the welfare and support of the payee's decisions. The bill retains the other existing components of this definition.

Authorizations of Transfers and Findings: The bill prohibits the direct or indirect transfer of structured settlement rights, unless the transfer is authorized in a court order based on express findings that:

- the transfer is necessary, reasonable, and appropriate and in the best interest of the payee, taking into account the welfare and support of the payee's dependents;
- the payee received independent professional advice concerning the proposed transfer; and
- the transferee disclosed to the payee the discounted present value.

Venue: An application for a transfer of structured settlement payment rights must be filed in the:

- circuit court for the county where the payee resides (if the payee resides in the State);
- circuit court for the county in which the most recent application was filed (if the payee does not reside in the State but an application 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 filed applications).

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 filed 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.

Small Business Effect: The bill alters the findings a court must make before approving a transfer of structured settlement payment rights and the definition of "independent professional advice." This analysis assumes that structured settlement purchasers are not small businesses and that the bill's provisions do not materially affect small business independent professional advisers. This analysis also assumes that factoring companies are not considered small businesses.

Additional Information

Prior Introductions: None.

Cross File: SB 734 (The President, *et al.*) (By Request - Office of the Attorney General) - Judicial Proceedings.

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

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