Aida S. Montano *Legislative Service Commission*

Sub. S.B. 260

123rd General Assembly
(As Reported by H. Civil and Commercial Law)

Sens. **Nein, Prentiss, Blessing, Hottinger, Cupp, Brady, DiDonato, Herington, White, Fingerhut, Drake, Mumper, Gardner, Armbruster, Johnson, Spada, Kearns, Latell, Espy, Latta, Oelslager, Hagan**

Reps. **Salerno, Jerse, DePiero**

BILL SUMMARY

- Provides that a transfer of the payment rights of a payee under a structured settlement agreement, whereby an arrangement for periodic payments of damages for injury to person was established in resolution of a tort claim, is *not* effective *unless*:

  --The transferee provides the payee and other interested parties with specified disclosures, and

  --The transfer is approved in advance by a court in a final order based on certain express findings.

- Establishes procedures regarding an application by a transferee for such court approval.

- Prohibits a waiver of the bill's provisions and makes a violation of the bill an unfair or deceptive act or practice in violation of the Consumer Sales Practices Act.

CONTENT AND OPERATION

Effective transfer of payment rights

The bill specifies what must occur for a direct or indirect transfer of structured settlement payment rights to be effective. (For purposes of the bill, a "**structured settlement**" is an arrangement for periodic payments of damages for injury to a person that is established by a settlement or a court judgment in resolution of a tort claim. "**Structured settlement agreement**" is an agreement,

judgment, stipulation, or release that embodies the terms of a structured settlement, including the rights of a payee to receive periodic payments. "**Structured settlement payment rights**" are the rights under a structured settlement agreement to receive periodic payments from a structured settlement obligor or an annuity issuer if (1) the payee, the structured settlement obligor, or the annuity issuer is an Ohio resident, or (2) the structured settlement agreement was approved by a court in Ohio. A "**payee**" is an individual who is receiving periodic payments under a structured settlement agreement that are excludable from the individual's gross income under federal income taxation laws applicable to that individual and who proposes to make a transfer of the rights to receive those payments. "**Periodic payments**" include both continuing monthly or other periodic payments and scheduled future lump-sum payments under a structured settlement. (See **COMMENT** 1.) A "**transfer**" is a sale, assignment, pledge, hypothecation, or any other form of alienation or encumbrance of structured settlement payment rights made by a payee for consideration. (R.C. 2323.58(G), (H), (L), (M), (O), and (Q).))

Under the bill, in order for a direct or indirect transfer of structured settlement payment rights to be effective, *both* of the following must occur (R.C. 2323.581):

(1) The party acquiring or proposing to acquire the structured settlement payment rights through a transfer of those rights (the "**transferee**") has provided the payee and other interested parties with the disclosures required by the bill. ("**Interested party**" includes the payee, the annuity issuer, the structured settlement agreement obligor, and any other party that has continuing rights or obligations under the structured settlement agreement.) (R.C. 2323.58(F) and (S).)

(2) The transfer is approved in advance in a final order of a court of competent jurisdiction based upon the court's express findings specified in the bill and in accordance with procedures required by the bill.

Additionally, a structured settlement obligor or annuity issuer is *not* required to make any payment directly or indirectly to a transferee of structured settlement payment rights *unless* the transfer is effective pursuant to the bill (both (1) and (2) above occur) (R.C. 2323.581). (A "**structured settlement obligor**" is the party that has the obligation to make continuing periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement. A "**qualified assignment agreement**" is an agreement that provides for a qualified assignment, as defined in the Internal Revenue Code (see **COMMENT** 2), through an assignment of the liability under a structured settlement agreement to make periodic payments as damages, on account of personal injury or sickness. An "**annuity issuer**" is an insurer that has issued an insurance contract that is used to

fund periodic payments under a structured settlement. (R.C. 2323.58(A), (I), and (N).))

Required disclosure

The bill requires the transferee, not less than ten days prior to the date on which a payee becomes obligated under a transfer agreement, to provide a disclosure statement to the payee. The disclosure statement must be in boldface type of the minimum size of 14 points and must set forth all of the following (R.C. 2323.582):

(1) The amounts and due dates of the structured settlement payments that would be transferred under the "**transfer agreement**" (defined as an agreement that provides for the transfer of structured settlement payment rights from a payee to a transferee (R.C. 2323.58(R));

(2) The aggregate amount of the payments described in (1), above;

(3) The discounted present value of the payments described in (1), above, and the amount of the applicable federal rate used in determining the discounted present value. ("**Discounted present value**" means the fair present value of the future payments under a structured settlement that is determined by discounting those payments to the present, using the most recently published applicable federal rate for determining the present value of an annuity as issued by the Internal Revenue Service (R.C. 2323.58(D)).)

(4) The gross amount payable to the payee in exchange for or as consideration for the transfer of the structured settlement payments;

(5) An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, administrative fees, legal fees, notary fees, and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee as described in (4), above;

(6) The net amount payable to the payee after deducting all commissions, fees, costs, expenses, and charges described in (5), above, from the gross amount payable to the payee;

(7) The quotient, expressed as a percentage, obtained by dividing the net amount payable to the payee as described in (6), above, by the discounted present value of the payments described in (3), above;

(8) The amount of any penalty and the aggregate amount of any liquidated damages, including penalties, payable by the payee in the event of any breach of the transfer agreement by the payee.

Court approval

Under the bill, in order for a court to approve a transfer of structured settlement payment rights to render the transfer effective, a person must file an application for the approval in advance of the transfer in either the court of common pleas of the county in which the payee, the structured settlement obligor, or the annuity issuer resides, or in the Ohio court that approved the structured settlement agreement (R.C. 2323.584(A)).

Upon the filing of the application, the court must set a date and time for a hearing and must notify the transferee of the date, time, and place of the hearing (R.C. 2323.584(B)(1)). The transferee, not less than 20 days prior to the hearing date, must file with the court and serve on the court or any "**responsible administrative authority**" that previously approved the structured settlement (defined as any government authority of another state vested by the law of that state with the original exclusive jurisdiction over the "**settled claim**," which means the original tort claim resolved by the structured settlement (R.C. 2323.58(J) and (K)), on all interested parties, and on the annuity issuer and the structured settlement obligor, in the manner prescribed in the Rules of Civil Procedure for service of process, a notice of the proposed transfer and the application for its approval in advance. The notice must include all of the following (R.C. 2323.584(B)(2)):

--A copy of the application and the transfer agreement;

--A copy of the disclosure statement provided by the transferee in accordance with the bill and signed by the payee;

--Notification of the date, time, and place of the hearing on the application;

--Notification that any interested party may support, oppose, or otherwise respond to the application, either in person or by counsel, by submitting to the court a written response containing the interested party's support of, opposition to, or comments on the application or by participating in the hearing;

--Notification of the manner of filing a written response to the application and the time within which the response is required to be filed in order for the court to consider it.

Within 15 days after receipt of the notice, any interested party who wishes to respond to the application must file a written response with the court personally or by certified mail, return receipt requested (R.C. 2323.584(B)(3)).

At the conclusion of the hearing on an application, the court may grant or deny the approval of the transfer and must enter its order accordingly. If the court denies the approval, it must include in its order the reasons for the denial. If the court grants the approval, it must include in its order the following *express findings* (R.C. 2323.584(B)(4) and 2323.583):

(1) The transferee has provided to the payee a disclosure statement that complies with the bill (see "***Required disclosure***," above), and the payee has confirmed the payee's receipt of the disclosure statement, as evidenced by the payee's notarized signature on a copy of the statement.

(2) The payee has established that the transfer is fair and reasonable and in the best interests of the payee and the payee's dependents. However, if a federal hardship standard exists on the effective date of the transfer agreement, the payee instead must establish that the transfer meets that hardship standard. ("**Dependent**" means a spouse of a payee, a minor child of a payee, or any other member of the family of a payee or other person whom, by law or by court order or decree, the payee is legally obligated to support. (R.C. 2323.58(C).))

(3) The payee has received independent professional advice regarding the legal and other implications of the transfer. ("**Independent professional advice**" means the advice of an attorney, a certified public accountant, an actuary, or any other licensed professional adviser if (a) the payee has engaged the services of the adviser to render advice concerning the legal and other implications of the transfer, (b) the adviser has signed a statement to the effect that the adviser rendered advice to the payee concerning those implications, (c) the adviser is not affiliated in any manner with, referred by or compensated in any manner by, the transferee, *and* (d) the adviser's compensation is not affected by whether or not the transfer occurs (R.C. 2323.58(E)).)

(4) If the transfer contravenes the terms of the structured settlement involved ("**terms of a structured settlement**" includes the terms of a structured settlement agreement, an insurance contract, a qualified assignment agreement, and any order or approval by a court, a responsible administrative authority, or other government authority authorizing or approving the structured settlement (R.C. 2323.58(P)), all of the following have been complied with: (a) each dependent whom the payee is legally obligated to support by court order or decree, in a written approval and waiver, approves the transfer and waives the right to require that the structured settlement payments be made to the payee in accordance

with the terms of the structured settlement, (b) any court or responsible administrative authority that previously approved the settlement, other than the court from which the approval of the transfer is sought, has expressly approved the transfer in writing, (c) the transferee has provided to the court in which the application for approval of the transfer was filed all of the signed original copies of the approvals required under (a) and (b), above, and (d) the transferee has furnished each interested party copies of the approvals required under (a) and (b), above.

(5) The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of that notice with the court in which the application for approval of the transfer was filed.

(6) The transfer complies with all of the requirements of the bill and does not contravene any applicable law. ("**Applicable law**" is defined as any of the following, as applicable in interpreting the terms of a structured settlement agreement: (a) the laws of the United States, (b) Ohio law, including principles of equity that are applied in Ohio courts, or (c) the laws of any other jurisdiction if (i) the laws of that other jurisdiction govern the structured settlement, (ii) a court or a responsible administrative authority approved the structured settlement agreement under those laws, or (iii) the transfer of payments under the structured settlement is subject to those laws (R.C. 2323.58(B)).)

An order of the court made in accordance with the bill is a final and appealable order (R.C. 2323.584(B)(5)).

Miscellaneous provisions

Liability of the payee

Under the bill, a payee who proposes to make a transfer of structured settlement payment rights is not subject to any penalty, does not forfeit any application fee or other payment, and cannot otherwise be held liable to the proposed transferee, on the basis that the transfer fails to comply with the bill (R.C. 2323.585(A)).

Waiver of provisions

The bill prohibits the waiver of any of its provisions pertaining to the transfer of structured settlement payment rights, the required disclosures and notices, and the court procedures regarding a transferee's application for court approval of the transfer (R.C. 2323.585(B)).

Immunity from liability

The bill grants to a structured settlement obligor and an annuity issuer under a transfer or transfer agreement immunity from liability based upon any claim by the payee, or any party, other than a transferee, claiming through the payee, as to any structured settlement payment rights or periodic payments that are the subject of the transfer or transfer agreement (R.C. 2323.586).

Violations

A violation of the bill is deemed an "unfair or deceptive act or practice" in violation of R.C. 1345.02 of the Consumer Sales Practices Act (Chapter 1345. of the Revised Code). This has the effect of subjecting the violator to civil penalties and remedies that are presently available to the Attorney General and the courts under R.C. 1345.05 to 1345.07. The Consumer Sales Practices Act also creates a private cause of action in R.C. 1345.09. (R.C. 2323.587.)

Application and effect of the bill

The bill applies to a transfer of structured settlement payment rights under a transfer agreement entered into on or after the bill's effective date. It states that it does not authorize any transfer of structured settlement payment rights in contravention of applicable law or give effect to any transfer of such rights that is void under any applicable law. (R.C. 2323.585(C); Section 2.)

COMMENT

1. Under current law, R.C. 2323.56 (not in the bill), a court in certain tort actions for damages for injury to person, excluding tort actions upon a medical claim, dental claim, optometric claim, or chiropractic claim, may approve a plan for the periodic payment of future damages exceeding $200,000.

R.C. 2323.57 (not in the bill) applies to tort actions upon a medical claim, dental claim, optometric claim, or chiropractic claim and requires a trial court upon motion of a party to order that any future damages award in excess of $200,000 be paid in a series of periodic payments. In *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 421, the Ohio Supreme Court held that "R.C. 2323.57, which requires a trial court upon motion of a party to order that any future damages awarded in excess of $200,000 be paid in a series of periodic payments, is unconstitutional in that it violates the Right to Jury Trial Clause (Section 5, Article I) and the Due Process Clause (Section 16, Article I) of the Ohio Constitution." (Paragraph 1 of the syllabus.)

2. The relevant definition of "qualified assignment" in the Internal Revenue Code is any assignment of a liability to make periodic payments as damages (whether by suit or agreement), on account of personal injury or sickness, if the assignee assumes that liability from a person who is a party to the suit or agreement and if (a) those periodic payments are fixed and determinable as to amount and time of payment, and cannot be accelerated, deferred, increased, or decreased by the recipient of the payments, (b) the assignee's obligation on account of the personal injuries or sickness is no greater than the obligation of the person who assigned the liability, and (c) the periodic payments are excludable from the gross income of the recipient (26 U.S.C.A. 130(c)).

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	03-07-00	p.	1441
Reported, S. Insurance, Commerce & Labor	03-28-00	p.	1528
Passed Senate (32-1)	03-28-00	pp.	1530-1531
Reported, H. Civil & Commercial Law	05-10-00	p.	1938

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