



The sale of structured settlements

YOU'VE SEEN THE ADS ON TV. CASH NOW. YOUR FORMER CLIENT NOW WANTS ADVICE. HERE'S WHAT YOU MUST KNOW

When you settle a case for your clients with structured settlements, it can come with many benefits. It provides a final resolution of the ongoing litigation. It provides the client with guaranteed funds for now and in the future. It allows the attorney to recover fees and costs and close the case forever...or does it?

We are in unprecedented times. With Federal and State declarations of emergency, people out of work or unable to pay their bills, some of your clients may be looking for sources of money to meet their immediate needs.

Picture this scenario...nine years ago, you settled an auto collision case for a 20-year-old woman. The settlement gave her \$100,000 cash and an annuity which pays lump sums at ages 35, 45 and 55. The annuity also pays guaranteed lifetime payments of \$650 per month. Your client was injured but still able to work part time.

Three months ago, she became ill with COVID-19, was sick for four weeks and recovered, but got behind on her rent. She considered going back to work as a part-time barista but the independently owned coffee shop where she had worked closed down and won't reopen. She's been unable to find another job. She is 29 years old and \$650 per month is not covering her rent and expenses. Her next lump sum payment is not due for six years. The \$100,000 in cash is gone, having been spent supplementing her part-time income. What does she do? You get a call...it's your client. "I need help!" She saw an ad on TV. She wants to know, how can she get money out of her annuity. Can she sell her annuity? What do you tell her?

The advice you give will be between you and your client, but you should know the applicable law concerning the sale of structured settlements. Yes, there are State and Federal laws which govern the ability to sell some or all future annuity payments, the most relevant of which is

that in California the prospective sale must be approved by the court.

The California Structured Settlement Protection Act

The California Structured Settlement Protection Act (CSSPA), California Insurance Code section 10134, et seq. governs the sale of future annuity payments. Structured settlements with a defendant in a medical malpractice case or a government entity defendant are excluded. However, *all sales*, including in settlements in medical malpractice cases and with government entities, require compliance with Insurance Code section 10138, which explains what a transfer agreement shall *not* include. Similar laws exist in almost all states, generally known as structured settlement protection acts (SSPAs).

The legislative history of the CSSPA evidences the intent to protect the seller of annuity payments from predatory practices.

Beginning in the early 1990s, a secondary market, commonly referred to as structured settlement factoring companies, began to emerge. According to the sponsor, Consumer Attorneys of California (CAOC), these factoring companies aggressively advertised (and continue to do so) to convince those with structured settlements to transfer or sell future payments for present cash. 'Many sellers who dealt with factoring companies 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 sellers who were ill equipped to appreciate the value of their future payments or to understand the onerous terms of factoring agreements. In some cases, factoring companies charged discounts equivalent to annual interest rates as high as 70 percent.' (Transfers of Structured Settlement Payment Rights: What Judges Should

Know About Structured Settlement Protection Acts (Spring 2005) Number 2, Volume 44, Spring 2005, American Bar Association, the Judges Journal, 19 (Transfers of Structured Settlement Payment Rights); see also *J.G. Wentworth S.S.C. v. Jones* (2000) 28 S.W.2d 309, 315 ["[i]n the four cases here the rate of return to Wentworth varied between 36 and 68 percent per year"]; *Windsor-Thomas Group, Inc. v. Parker* (2001) 782 S.2d 478, 480 ["from a functional viewpoint" a factoring company's 'Fund Acquisition Agreement' with a seller "was a 'secured promissory note with an annual interest rate of approximately 100 percent'"].) As a result of the emergence of the secondary market and its concomitant problems and negative effects on consumers, many states, including California, enacted structured settlement transfer protection acts that require that a transfer be in the best interest of the seller, be fair and reasonable, and be approved by the court.

(SB 491 (Johnston, Ch. 742, Stats. 1999); Ins. Code Sec. 10134 et seq.)

What are the standards by which the court determines in California under its CSSPA whether to approve the sale of future payments? Insurance Code section 10139.5 sets forth the statutory requirements for transfer. Among other things, the CSSPA sets forth the written findings to be made by the court concerning the following:

- (1) That the transfer is in the best interest of the seller, taking into account the welfare and support of the seller's dependents.
- (2) That the seller has been advised in writing of the seller's right to seek independent professional advice [a defined term in Ins. Code, § 10134, subd. (f)] concerning the transfer. The court must also find that the seller has either received independent professional advice or else has *knowingly waived* the opportunity to receive such advice.

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(3) That the seller (at least 10 days prior to signing the transfer agreement) has received a disclosure statement that complies with Insurance Code section 10136. The disclosure statement has very specific statutory notice requirements. This includes the size of typeface, specific information about the amount of the total payments being sold, the present cash value of the future payments and the discount rate used, if the discount rate is higher than that used by the IRS, that needs to be included in the form, what a comparable loan would cost, the total amount of expenses [a term that is expansively defined in Ins. Code, § 10134, subd. (e)] being charged, the need for (“you should get”) independent professional advice about whether the sale is a good idea for the seller and the seller’s family, that if the seller seeks professional independent advice the buyer will pay up to \$1,500 of the cost of that advice, the limitations on who can give the seller advice, the need for court approval of the sale, the right to cancel and advice on where to seek relief for being treated unfairly or being misled (the state Attorney General or the local district attorney).

(4) Additionally, there are requirements for the transfer agreement included in Insurance Code section 10136, including the size of typeface, no blank spaces, a statement that the agreement is not effective until court approval, the amount and the due dates of the structured settlement payments being transferred, the total amount of the payments being transferred, the aggregate amount of expenses to be deducted from the purchase price, the net amount to be paid to seller, the discounted present value of all payments being transferred which include the words:

YOU WILL BE PAYING THE EQUIVALENT OF AN INTEREST RATE OF ___% PER YEAR.

Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, if the transferred structured

settlement payments were installment payments on a loan, with each payment applied first to accrued unpaid interest and then to principal, it would be as if you were paying interest to us of ___% per year, assuming funding on the effective date of transfer.

(5) The transfer agreement must also include the quotient, expressed as a percentage, obtained by dividing the net payment amount by the discounted value of the payments, a statement that the court will retain continuing jurisdiction to interpret and monitor the implementation of the agreement, a notice to contact the state Attorney General or the local district attorney’s office if seller feels that the treatment received was unfair or seller feels there were misleading statements made, and finally:

The following statement printed in 14-point type, circumscribed by a box with a bold border, and set forth immediately above or adjacent to the space reserved for the seller’s signature: ‘You have the right to cancel this agreement without any cost or obligation until the date the court approves this agreement. You will receive notice of the court hearing date when approval may occur. You must cancel in writing and send your cancellation to [insert buyer’s name and address].’

Cancellation without cost or further obligation may occur anytime before the date on which the court enters a final order approving the agreement.

Insurance Code section 10138 also specifies *what cannot be included in the transfer agreement*. These restrictions cannot be waived by the seller and include, but are not limited to, an agreement that (a) waives the seller’s right to sue, (b) requires the seller to indemnify buyer, (c) requires confidentiality, (d) includes a provision by the seller to a confession of judgment, (e) assesses attorney’s fees and costs to buyer if seller does not complete the agreement, (f) includes a provision for seller to pay tax liability for the buyer, (g) has a decision for choice of law provision other than California, (h) includes an agreement to give buyer the right of first refusal in the

prospective sale of other future payments, or (i) grants a security interest in excess of the actual dollar amount of the transfer.

Insurance Code section 10134 et. seq. includes the requirement to file copies of all of the relevant documents and notice of hearing with the state Attorney General’s office pursuant to Insurance Code section 10139, subdivision (a).

The “best-interest” determination by the court

Written findings by the court are to include a best-interest determination, which requires the court to look at various issues, including the seller’s age, mental capacity, legal knowledge and maturity level, what the seller plans to do with the money and the seller’s “financial and economic situation.” The court is also required to consider whether there have been previous sales of future rights, whether the seller has received “independent financial advice,” whether sale of the future rights to payment may affect seller’s financial obligations to seller’s own family, especially minor children, whether the future payments were intended to cover future medical bills from the injury which was the subject of the settlement and how those bills will be paid in the future, and whether the seller has tried to make a sale in the past but the court denied approval of the sale and why.

With the goal of protecting the rights of sellers of future payments, California’s Structured Settlements Protection Act sets forth required findings by the court in granting the sale of a structured settlement. Attorneys who settle cases with structured settlements may, from time to time, be called upon to render advice to clients who are interested in selling some or all of their future payments. The CSSPA provides protections for your clients who may find that they have need for money, because of their circumstances, and understanding the legal requirements is an important step in deciding how to handle your client’s call for advice.

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Judge Watkins was appointed to the Los Angeles Superior Court (LASC) by Governor Brown in November 2014. She is assigned to Civil Independent Calendar (IC) court, Department T, in Van Nuys. Her previous assignments include Civil Trials, Family Law and

Unlawful Detainers. She is an Emeritus Board Member of CAALA, holds the rank of Associate in ABOTA, is a Life Sustaining Member of the Japanese-American Bar Association, and is a Life Sustaining Member of Women Lawyers Association of Los Angeles. She received the

"Administration of Justice Award" from the San Fernando Bar Association in February 2019. She has served on several LASC committees including Diversity, Community Outreach, Access and Fairness, and Ethics. She has been a frequent speaker and author on civil litigation.