

March 2006

STRUCTURED SETTLEMENT UPDATE

Set forth below are summaries of a number of relatively recent structured settlement cases. Notwithstanding the enactment of Internal Revenue Code Section 5891 and over 40 state “transfer acts,” the volume of cases like these, and the issues addressed therein, illustrate the fact that “factoring” remains an important concern to the structured settlement industry. Copies of all of the summarized cases can be accessed by clicking on the case caption. Please feel free to reply with any comments, questions, or additional cases or materials that you would like us to consider.

[In Re: Donald Richardson to First Providen, LLC \(Superior Court of Maine\) \(2005 WL 3804993\)](#)

First Providen sought approval of a transfer of worker’s compensation structured settlement payments. In ruling on the petition, the court recognized that the Maine transfer act required that the transfer “not contravene other applicable law” and that such law included the Maine worker’s compensation statute (the “Maine WC Statute”). The court further recognized that the Maine WC Statute provided that a worker’s compensation “claim” was not assignable and that worker’s compensation “benefits” were assignable only to satisfy certain types of support obligations. Despite arguments by First Providen that the settlement payments were neither a claim nor benefits, the court relied on the references in the Maine WC Statute and denied the petition. The court also recognized the validity of the anti-assignment language in the qualified assignment agreement, which had been executed by the original payee.

This case and others like it demonstrate the willingness of many courts to interpret worker’s compensa-

tion statutes to prevent factoring. The annuity owner and issuer were represented by Stephen R. Harris and Jennifer N. Smith of our firm. Copies of the parties’ briefs are available upon request.

[321 Henderson Receivables L.P. v. Martinez \(Supreme Court of New York\) \(2006 WL 395224\)](#)

321 Henderson sought approval of a typical factoring transaction. However, like a number of courts in similar recent decisions, this court criticized the use of “aggressive advertising, and the lure of quick and easy cash, to induce [payees] to cash out future payments, often at substantial discounts . . .” After noting that the effective interest rate for the transaction was in excess of 16 percent (not counting certain other fees), and after concluding that the payee had no real plan to open a “barber shop,” the court denied the petition.

This case is a good example of how a proper application of the “best interest” and “fair and reasonable” standards can help protect the structured settlement industry. Briefly stated, if courts are willing to apply these standards (as opposed to just “rubber stamping” the petitions), the structured settlement industry can credibly maintain that periodic settlement payments indeed protect unsophisticated claimants from frittering away the lump sums that they would otherwise receive in traditional settlements.

[Pladson v. Traill County Social Services \(Supreme Court of North Dakota\) \(707 N.W.2d 473\)](#)

Although this case involves a single premium deferred annuity (that was issued for reasons other than a struc-

tured settlement), this case raises significant issues relating to the potential effect of a structured settlement on Medicaid eligibility. Briefly stated, in this case, the state Medicaid department declared the annuity payee ineligible for benefits because the annuity in question was deemed to be an asset that was subject to sale in a secondary market and that had a value that would leave the payee with assets in excess of the \$3,000 Medicaid limit.¹

Fortunately for the payee in this case, the court concluded that the existence of a secondary market for this type of annuity was not clear and that the payee in fact had made an unsuccessful but good faith attempt to accomplish the sale. Thus, the court ruled that the annuity, under these circumstances, did not render the payee ineligible for Medicaid benefits. However, as noted above, the annuity in this case was not issued in connection with a structured settlement. Indeed, an annuity issued in connection with a structured settlement (and the underlying settlement agreement and

qualified assignment agreement, if any) may be viewed quite differently by courts.

The possibility that courts may view structured settlement payments as subject to sale in a secondary market highlights the concern that individuals could be deemed ineligible for Medicaid as a result of their status as a payee under a structured settlement. Moreover, because the factoring of structured settlements has become increasingly prevalent, there may be a limit to what can be done in a typical structured settlement to address this concern. However, one helpful step is to avoid including language in the settlement agreement and qualified assignment agreement that concedes that the periodic payments in question are marketable. Additionally, in the context of a special needs trust, the parties may consider especially strong language that serves as the equivalent of a warranty (which will actually be enforced) by the annuity owner and issuer that the anti-assignment language in the underlying agreements will not be waived.

1. Like numerous other state statutes, the applicable Medicaid statute provided that, to be eligible for benefits, a claimant's assets must not exceed a certain value, here \$3,000.

* * *

Structured Settlement Update

If you have questions regarding the information contained in this publication, please contact the authors below:

Michael J. Miller	215-988-2782	Michael.Miller@dbr.com
Stephen C. Baker	215-988-2769	Stephen.Baker@dbr.com
Stephen R. Harris	215-988-2806	Stephen.Harris@dbr.com

Drinker Biddle's Insurance Practice Group is comprised of attorneys with extensive experience litigating insurance coverage issues and providing consultation on underwriting, reinsurance, regulatory matters, and corporate transactions involving insurers.

Drinker Biddle & Reath LLP, a Pennsylvania Limited Liability Partnership, is a full service law firm headquartered since 1849 in Philadelphia, PA. With more than 425 attorneys, the firm represents a broad spectrum of public and private, commercial, financial and educational enterprises, governmental authorities, charities and individuals throughout the United States and abroad.

This Drinker Biddle & Reath LLP *Structured Settlement Update* is intended to inform our clients and friends of developments in the law and to provide information of general interest. It is not intended to constitute legal advice regarding any client's legal problems and should not be relied upon as such. © 2006. All rights reserved.

Philadelphia New York Washington Los Angeles San Francisco Princeton Florham Park Berwyn Wilmington Chicago

To access and share with colleagues this and other Drinker newsletters, please visit our website at www.drinkerbiddle.com.