January 2007

Structured Settlement Update

Set forth below are summaries of several court decisions involving the creation, disclaimer, and transfer of structured settlement payment rights. Copies of the full opinions are included below. If you have any questions, comments, or additional cases or materials that you would like us to consider, please feel free to send us a reply.

In Re: Todd Steiner (2006 Mich. App. LEXIS 3389, Nov. 16, 2006)

A structured settlement payee filed with the probate court a motion to compel the annuity issuer to recognize the payee's disclaimer of structured settlement payments. The payee's disclaimer was made with the intention of placing the structured settlement payments into a special needs trust, in order to maintain the payee's eligibility for Supplemental Security Income ("SSI") and health insurance under Medicaid. The probate court denied the payee's motion to compel, but the circuit court reversed the probate court, and the reversal was upheld on appeal to the Michigan Court of Appeals.

In the Court of Appeals, the annuity issuer argued that (1) the disclaimer operated as a "transfer" under the Michigan Structured Settlement Protection Act (the "Michigan Act"), and therefore required the annuity issuer's consent in order to be effective, and (2) the disclaimer violated Michigan's Disclaimer of Property Interests Law (the "DPIL"). The appeals court rejected both arguments.

With respect to annuity issuer's first argument, the appeals court acknowledged that, because the Michigan Act required that each "protected party" must consent to a "transfer" of structured settlement payments if those payments are subject to a contractual anti-assignment provision, and because the annuity issuer qualified as a "protected party" and the underlying settlement agreement contained anti-assignment language, the annuity issuer's consent would be required if the disclaimer in fact constituted a "transfer" under the Michigan Act. However, according to the appeals court, the payee's disclaimer did not constitute a "transfer" under the Michigan Act, because it was not "made for consideration," as is required under the Michigan Act.

With respect to the annuity issuer's second argument, the appeals court opined that, although the DPIL eliminated the common law right of disclaimer, the DPIL did not "abridge the right of a person to waive, release, disclaim, or renounce property or an interest in property under another statute." Accordingly, the appeals court found that, because the payee had the right to disclaim the payments under the Michigan Act (by virtue of the absence of "legally recognizable consideration"), the DPIL did not prohibit the disclaimer.

Continental Casualty Co., et al v. United States of America, et al (2006 U.S. Dist. LEXIS 90012, November 29, 2006)

Certain personal injury plaintiffs filed a petition against the United States Department of Justice (the "DOJ"), seeking an order imposing restrictions on the DOJ's structured settlement requirements – in this particular case, and in certain other cases settled by the DOJ. The plaintiffs sought to force the DOJ to comply with the plaintiffs' structured settlement terms, which included the creation of a 468B trust and the use of the plaintiffs' agents (as opposed to the DOJ's approved agents). However, the court denied the

1. The Steiner court noted in its decision that the Michigan Act had recently been repealed in favor of the Revised Michigan Structured Settlement Protection Act (the "Revised Act"), which became effective on September 1, 2006. Although the Steiner court was applying the Michigan Act, the key statutory language (as explained below) upon which the decision is based is the same in both the Michigan Act and the Revised Michigan Act.

plaintiffs' petition, holding that the plaintiffs provided no legal basis for the court to force particular settlement conditions upon the DOJ, and finding no illegality in any of the DOJ's requirements.

By way of factual background, the plaintiffs and the DOJ had reached a preliminary settlement agreement that provided for a $1.75 million payment by the DOJ, contingent upon workers' compensation board approval. The plaintiffs' position was that the DOJ understood that the agreement was conditioned upon a structured settlement, approved by the Center for Medicaid Services. Although the preliminary settlement agreement contained no provisions for a structured settlement, the DOJ agreed to provide the plaintiffs with model language for a structured settlement (including anti-assignment language), and a choice of agents approved by the DOJ. The plaintiffs refused to comply with the DOJ's requirements, and insisted upon using the plaintiffs' agents and creating a 468B trust.

In their petition, the plaintiffs advanced a number of arguments. First, the plaintiffs argued that the agents selected by the DOJ would have a conflict of interest in violation of Model Rule of Professional Conduct 1.7(a). The court, however, held that because Rule 1.7 applies only to lawyers, and the DOJ's agents were not lawyers, the rule was inapplicable. In addition, the court observed that the plaintiffs were themselves represented by independent counsel. Second, the plaintiffs argued that the anti-assignment language proposed by the DOJ would deprive the plaintiffs of their rights under 26 U.S.C. §5891. The court rejected this argument, holding that Section 5891 does not establish a statutory right to assign structured settlement payment rights, but rather, provides for tax exemptions in connection with such assignments. Third, the plaintiffs argued that the DOJ's practice of selecting agents without advertising violated a government procurement statute, 41 U.S.C. §5. The court, however, held that Section 5 governs only services purchased for the government, not agents selected to benefit third parties such as the plaintiffs. In addition, the court noted that Section 5 exempts services "of a technical and professional manner," such as a agents' services.

In Re: Settlement Funding of New York, LLC (2006 N.Y. Misc. LEXIS 3681, Dec. 4, 2006)

Settlement Funding of New York, LLC ("Settlement Funding") sought court approval of a transfer petition under the New York Structured Settlement Protection Act (the "New York Act"). The petition was the payee's third petition. The first petition had been approved, but the second petition (which also involved Settlement Funding) had been denied a year before (by the same court), because the court could not conclude that the transfer was fair and reasonable and in the best interest of the payee.

The court denied the third petition on similar grounds as those upon which the court based its denial of the second petition. Although the court concluded, as a threshold matter, that the transfer complied procedurally with the New York Act, the court ruled that the petition failed to satisfy the substantive requirements of the New York Act. Specifically, the court expressed concern as to whether the payee had received the requisite professional advice regarding the tax implications of the transfer, and whether the payee did, in fact, understand the legal, tax, and financial implications of the transfer. Moreover, the court concluded that the transfer did not satisfy the "two most important components" of the New York Act; namely, that the transfer was fair and reasonable, and that the transfer was in the best interest of the payee. The court ruled that, despite a "more reasonable" discount rate of 15.16 % (as opposed to the rate of 19.99 % associated with the previous transfer), and a waiver of Settlement Funding's processing and legal fees, the transfer was not fair and reasonable relative to what the payee would receive as a net result. The court further ruled that, because the payee already had already assigned a "sizable portion" of the structured settlement payments, the transfer was not in the payee's best interest.

Therefore, the court denied the transfer, and further decreed that the payee attach a copy of the court's decision and order to any future petition for transfer of structured settlement payment rights.

* * *

Structured Settlement Update

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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.

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In re TODD STEINER. ANN STEINER, Conservator for TODD STEINER, Petitioner-Appellee, v AUTO-OWNERS LIFE INSURANCE, Respondent-Appellant.

No. 262855

COURT OF APPEALS OF MICHIGAN

2006 Mich. App. LEXIS 3389

November 16, 2006, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Antrim Circuit Court. LC No. 04-008088-AV.

DISPOSITION: Affirmed.

JUDGES: Before: Murphy, P.J., and Meter and Davis, JJ.

OPINION: PER CURIAM.

Respondent Auto-Owners appeals by leave granted the circuit court order reversing the probate court's order and granting petitioner's motion to compel respondent to recognize the annuity payments disclaimer on behalf of Todd Steiner. We affirm.

This case arises out of respondent's refusal to recognize and abide by petitioner's disclaimer of Todd's property interest in future annuity payments that he was scheduled to begin receiving in 2003 as a result of a 1993 settlement in a civil suit that grew out of injurie she sustained in a motor vehicle accident. Petitioner's asserted motivation in doing a disclaimer and seeking recognition of the disclaimer was to maintain Todd's eligibility for Supplemental Security Income (SSI) and health insurance under Medicaid that he had been receiving as a result of a developmental disability. The issues posed to this panel are whether the disclaimer [*2] is permissible under the former Structured Settlement Protection Act (SSPA), *MCL 691.1191 et seq.*, n1 and the Disclaimer of Property Interests Law (DPIL), *MCL 700.2901, et seq.* We hold that the disclaimer is permissible and does not violate either the SSPA or the DPIL regardless of respondent's failure to consent.

> n1 The SSPA was repealed in favor of the Revised Structured Settlement Protection Act, *MCL 691.1301 et seq.*, which became effective September 1, 2006. *MCL 691.1309*; *2006 PA 296* (repealer effective October 1, 2006).

First, with respect to the SSPA, respondent argues that the disclaimer acts as a "transfer" under the act, where petitioner and her husband, as primary beneficiaries relative to the annuity, would receive the monthly payments originally destined for Todd. Therefore, according to respondent, the disclaimer required respondent's consent, which was not given. [*3]

An issue of statutory construction is a question of law that is reviewed de novo by this Court. *Griffith v State Farm Mut Automobile Ins Co, 472 Mich. 521, 525-526; 697 N.W.2d 895 (2005).* The primary goal of statutoryinterpretation is to ascertain and give effect to the intent of the Legislature, and the Legislature is presumed to have intended the meaning it plainly expressed. *Linsell v Applied Handling, Inc, 266 Mich. App. 1, 15; 697 N.W.2d 913 (2005).* If statutory language is clear and unambiguous, then a court is required to apply the statute as written. *Id.* Judicial construction of a statute is only appropriate when statutory language is ambiguous and reasonable minds can differ with regard to its meaning. *Yaldo v North Pointe Ins Co, 457 Mich. 341, 346; 578 N.W.2d 274 (1998).* In construing a statute, a court must give effect to every word, phrase, and clause and avoid a construction that would render any part of the statute surplusage or nugatory. *Griffith, supra at 533-534.*

Former *MCL 691.1193* provided, in part, as follows:

> (1) If a [*4] structured settlement payment right is subject to a contractual assignment restriction, a transfer of the structured settlement payment right is not effective and a structured settlement obligor or annuity issuer is not required to

> make payment directly or indirectly to a transferee of the structured settlement payment right transfer unless all of the following conditions are satisfied:
>
> * * *
>
> (b) Each protected party has given all of the following in writing:
>
> (*i*) The protected party's irrevocable consent to the transfer.

Because respondent is a "protected party" as defined in former *MCL 691.1192(h)*, and because the settlement agreement contained assignment restrictions, respondent's consent was required if indeed the disclaimer qualified as a "transfer." Former *MCL 691.1192(o)* defined "transfer" as a "sale, transfer, assignment, pledge, hypothecation, *or other form of disposition*, alienation, or encumbrance *made for consideration.*" (Emphasis added.) Assuming that the disclaimer constituted a "form of disposition," we conclude that the disclaimer was not made for "consideration," as that term is legally defined. [*5] n2 Respondent and the probate court are of the opinion that petitioner's and her husband's intention or contemplation to put the monthly proceeds into a special needs trust for Todd, thereby possibility allowing him to maintain his SSI and Medicaid benefits, constituted consideration in exchange for the disclaimer. We disagree. "To have consideration there must be a bargained-for exchange." *Gen Motors Corp v Dep't of Treasury, 466 Mich. 231, 238; 644 N.W.2d 734 (2002)*, citing *Higgins v Monroe Evening News, 404 Mich. 1, 20-21; 272 N.W.2d 537 (1978)*. The *Higgins* Court explained:

> The essence of consideration . . . is legal detriment that has been bargained for and exchanged for the promise. The two parties must have agreed and intended that the benefits each derived be the consideration for a contract.
>
> Thus, to reach the conclusion that a contract of hire existed, we must be able to state that each of the two parties . . . intended to suffer a detriment to receive a benefit, and that they agreed to exchange those detriments and benefits. [*Id.* at 20-21 (citation omitted).]

n2 The term "consideration" was not defined in the SSPA.

[*6]

Here, there is no bargained-for exchange, no contract between parties, no binding promise or agreement, and no legal obligation relative to the disclaimer and the contemplated funding of a special needs trust. Monthly annuity payments made to Todd's parents instead of Todd belong to them, and they are free to do with them as they see fit. Todd would have no legal recourse should his parents choose not to fund the trust. Moreover, if annuity payments are placed directly in a special needs trust, Todd's parents do not actually receive any benefit of personal use of the annuity payments. Further, Todd's parents incur no detriment by simply receiving the monthly payments and then passing them on to the trust. Additionally, assuming that Todd actually receives any benefit from the disclaimer in the form of continued SSI and Medicaid coverage, which is contingent on governmental approval, the benefit is conferred by the mere fact that he would not directly receive annuity payments, and not as the result of any legal detriment incurred by his parents. In sum, this is not the type of situation or event that the Legislature intended to address and prevent when it enacted the SSPA. See House [*7] Legislative Analysis, HB 5066, January 10, 2001. Accordingly, because the disclaimer was not made for legally recognizable consideration, there was no "transfer" under the former SSPA and respondent's consent was not required.

Next, we hold that the disclaimer does not offend the DPIL. The DPIL abolished the common law right of disclaimer or renunciation, but "does not abridge the right of a person to waive, release, disclaim, or renounce property or an interest in property under another statute." *MCL 700.2911*. Thus, because petitioner had a right to disclaim the annuity interest under the SSPA because it was not made for consideration, the DPIL cannot be utilized to preclude the disclaimer. No more analysis need be undertaken; however, even were we required to address other provisions contained in the DPIL, they would not serve as a basis for reversal.

MCL 700.2909(2) provides that "[a] disclaimer acts as a nonacceptance of the disclaimed interest, rather than as a transfer of the disclaimed interest. The disclaimant is treated as never having received the disclaimed interest." *MCL 700.2902(1)* allows [*8] a fiduciary who represents a person to whom a disclaimable interest devolves, such as petitioner, to "disclaim a disclaimable interest in whole or in part." Under *MCL 700.2902(1)*, a "disclaimable interest" is required, and *MCL 700.2901(2)(b)* defines the term "disclaimable interest" as follows:

> "Disclaimable interest" includes, but is not limited to, property, the right to receive or control property, and a power of appointment. *Disclaimable interest does not include an interest retained by or con-*

> *ferred upon the disclaimant by the disclaimant at the creation of the interest.* For purposes of this definition, the survivorship interest in joint property is not considered to be an interest retained or conferred upon the disclaimant even if the disclaimant created the joint property. [Emphasis added.]

Respondent relies on the emphasized language above in support of its proposition that Todd did not have a disclaimable interest. However, Todd, as the disclaimant, did not *retain* an interest when the annuity or settlement agreement interest was created as he had no prior interest, nor did Todd confer upon himself [*9] such an interest when it was created. Under *MCL 700.2901(2)(b)*, Todd plainly held a "right to receive . . . property." Finally, respondent's arguments under *MCL 700.2910* are rejected as either unpreserved, contrary to the facts and events that transpired, or both.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Alton T. Davis

CONTINENTAL CASUALTY CO, et al, Plaintiffs, v UNITED STATES OF AMERICA, et al, Defendants.

No C 02-4891 VRW RELATED TO C 02-5292 VRW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2006 U.S. Dist. LEXIS 90012

November 29, 2006, Filed

COUNSEL: [*1] For Continental Casualty Company, Plaintiff: Clark Wayneflete Patten, Laughlin Falbo Levy & Moresi LLP, Oakland, CA.

For Ute Sistrunk, Plaintiff: H. Mal Cameron, Law Offices of Alan Grossman, Pleasanton, CA.

For United States of America, Defendant: Andrew Y.S. Cheng, Katherine Burke Dowling, U.S. Attorney's Office, San Francisco, CA.

For United States Postal Service, David W. Tyler, Defendants: Andrew Y.S. Cheng, U.S. Attorney's Office, San Francisco, CA.

JUDGES: VAUGHN R WALKER, United States District Chief Judge.

OPINION BY: VAUGHN R WALKER

OPINION:

AMENDED ORDER

Plaintiffs seek to establish the Sistrunk Segregated Settlement Account as a trust responsible for allocating settlement payments among the plaintiffs. Doc # 185. Plaintiffs also seek an order imposing restrictions on the government's terms of settlement. Doc # 186. Additionally, plaintiffs request that the order impose such restrictions on all settlements by the Torts Branch of the United States Department of Justice, Civil Division. Id at 9-10. For the reasons discussed below, plaintiffs' joint petitions are DENIED.

I

The court was notified that the parties had reached a preliminary settlement agreement on [*2] January 10, 2006. Doc # 175. The settlement agreement was memorialized in a letter from the government to plaintiffs' counsel. Doc # 193 Ex A. The terms of the settlement agreement, as set forth in a letter memorializing the settlement, are:

> (1) A settlement of $ 1.75 million for all claims of all parties, which includes any and all costs and attorney's fees;
>
> (2) The settlement is contingent upon an Order Approving Third Party Compromise and Release being issued by the Worker's Compensation Appeals Board;
>
> (3) The parties will propose a protective trial date of July 10, 2006.
>
> (4) If the settlement is not finalized by June 16, 2006 or otherwise fails to occur by that date, the plaintiffs will not claim as special damages any damages incurred between the January 23, 2006 and June 16, 2006.

Id. The agreement contained no provisions for a structured settlement and the government argues it never agreed to a structured settlement. Doc # 193 at P12 (Cheng decl). Plaintiffs allege, however, that the government understood the agreement was conditioned upon a structured settlement approved by the Center for Medicaid Services (CMS). Doc # 186 at 3-4.

Plaintiffs [*3] desire to structure settlement payments to establish a Medicare Set Aside Trust to fund future medical expenses and to reduce the tax liability of the injured person, Ute Sistrunk. Id. The government

provided model language for a structured settlement in an email on February 17, 2006, although the model language has not been submitted to the court. Doc # 193 P6 and Ex C. After repeated requests for structured settlement terms from plaintiff Ute Sistrunk's counsel, the government informed plaintiffs that "because plaintiffs indicated that they did not intend to comply with the DOJ's requirement for structured settlement, the only authority our office had was to consummate a cash settlement." Id at P11; see also Id Ex H.

In anticipation of the government's promise to enforce the settlement agreement, Id at Ex H, plaintiffs challenge the DOJ requirements for structured settlements. Doc # 186. Plaintiffs also seek a court order establishing a qualified settlement trust responsible for allocating settlement funds, Doc # 185, presumably to bypass the DOJ requirements and privately create a structured payment plan.

II

Plaintiffs seek to interject the court into settlement negotiations [*4] by challenging the legality of the government's terms of settlement. Plaintiffs argue that "conditions that the [government] seeks to impose on the settlement terms are overreaching, unjustified, constitute ultra vires policy making and are in violation of public policy, which causes such conditions to be illegal." Doc # 186 at 5. Specifically, plaintiffs challenge DOJ requirements that (1) the government select an annuity broker, (2) plaintiffs are offered less money for structured settlements than cash settlements, (3) annuities provide reversionary interests to the government, (4) limit available financing options and (5) prohibit assignment of the structured settlement. Id at 10-15. But plaintiffs provide no legal basis for the court to force particular settlement conditions upon the government, relying instead on equitable policy arguments. The court is not in the position to make policy decisions regarding DOJ settlement practices and finds no illegality in any of the requirements. To the extent these practices are contrary to sound or appropriate public policy, it rests with the executive or legislative branches to regulate.

The identified legal objections that plaintiffs [*5] raise are inapplicable. First, plaintiffs argue that an annuity agent selected by the government would have a conflict of interest in violation of Model Rules of Professional Conduct 1.7(a). Unless the annuity agent is a lawyer, however, the model rules are not binding for annuity brokers. Rule 1.7 applies only to lawyers with current clients who have conflicting interests. But plaintiffs are represented by independent counsel.

Second, plaintiffs argue that any condition prohibiting assignment of the structured settlement eliminates rights granted by *26 USC § 5891*. But section 5891 involves tax exemptions for transfers of structured settlement rights and does not establish a statutory right for such transfers. Plaintiffs are free to contract away any right of assignment and the government can seek such a provision.

Finally, plaintiffs argue that the government practice of selecting brokers without advertising violates the procurement law *41 USC § 5*. But section 5 governs only services purchased for the government, not brokers selected to benefit third parties - such as plaintiffs. Additionally, section 5 exempts services "of a technical [*6] and professional manner" such as an annuity broker.

The parties have an enforceable settlement agreement for $ 1.75 million, but the agreement is ambiguous regarding any structured settlement terms. If the agreement was conditioned upon a structured settlement and parties cannot agree upon the specific terms of payment, then the settlement agreements would be void. In this case, parties would be free to begin negotiations anew or continue with the underlying litigation. Alternatively, if the agreement was for a cash payment of $ 1.75 million, then the plaintiff can take the money and purchase any annuities privately without government involvement. Because the plaintiffs have failed to assert any legal authority justifying judicial intervention, the court DENIES plaintiffs' joint petition.

III

Plaintiffs also seek an order establishing a segregated settlement account defined in *26 CFR 1.468B-1*. Doc # 185. But plaintiffs fail to identify the court's authority to create such a trust fund. As a court of limited jurisdiction this court may not create a qualified settlement account merely because a tax regulation allows the creation of such settlement accounts. [*7] Rather, plaintiffs must identify some constitutional or congressional grant of authority providing this court with jurisdiction to create unilaterally qualified settlement accounts.

The federal regulation plaintiffs identify provides a mechanism whereby courts have authorized qualified settlement accounts by approving a settlement agreement. Specifically, plaintiffs may create a trust that complies with *26 CFR 1.468B-1(c)(2)* and (c)(3). The opposing party, the government in this case, and the fund administrator may later jointly make a relation-back election pursuant to *26 CFR 1.468B-1(j)(2)* when the court approves the fund as part of a settlement approval. This allows the settlement fund to be created as a trust for the purpose of settling a contested claim, but obtain court approval at a later date. See *26 CFR 1.468B-1(c) (1)* (fulfilled if a court either establishes or approves the qualified settlement fund). Of course, this would require the government's acquiescence and the government has ob-

jected to the creation of a qualified settlement account. Doc # 203.

Because plaintiffs have failed to [*8] demonstrate that this court has authority to create a qualified settlement fund, plaintiffs' joint petition to establish the Sistrunk Segregated Settlement Account is DENIED.

The parties are directed to appear on January 2, 2007, at 9:00 am to report on the status of the case and for further scheduling, if necessary.

SO ORDERED.

VAUGHN R WALKER

United States District Chief Judge

[*1] In the Matter of the Petition of Settlement Funding of New York, LLC, Petitioner, against Allstate Settlement Corporation ("Settlement Obligor") and Allstate Life Insurance Company of NY (the "Annuity Issuer"), Respondents.

20357/06

SUPREME COURT OF NEW YORK, BRONX COUNTY

2006 NY Slip Op 52346U; 2006 N.Y. Misc. LEXIS 3681

December 4, 2006, Decided

NOTICE: [**1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION.

THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

COUNSEL: Attorney for Petitioner: Cathy S. Chester, Esq.

JUDGES: Alexander W. Hunter, J.

OPINION BY: Alexander W. Hunter

OPINION: Alexander W. Hunter, J.

Upon the foregoing papers, the motion by petitioner, by order to show cause, for an order [*2] pursuant to *General Obligations Law (GOL) § 5-1706*, approving the transfer of structured settlement payment rights of Eric Saxton to petitioner is denied.

The structured settlement that is the subject of this application was obtained on February 1, 1994 as a result of a personal injury action involving Eric Saxton. Under the terms of said structured settlement, Mr. Saxton was to receive a lump sum payment of $ 166,666 held in various savings account, payable to Mr. Saxton upon his eighteenth (18th) birthday; 360 monthly payments each in the amount of $ 4,500 commencing on August 18, 1997 and increasing 3.00% every twelve (12) payments through and including July 18, 2027, continuing for life thereafter. In addition [**2] Mr. Saxton was to receive lump sum payments as follows: $ 50,000 on August 18, 1997; $ 50,000 on August 18, 2000; $ 60,000 on August 18, 2004; $ 75,000 on August 18, 2009; $ 100,000 on August 18, 2014; $ 125,000 on August 18, 2019; $ 150,000 on August 18, 2024 and $ 200,000 on August 18, 2029.

Pursuant to an order of the Superior Court of Bergen County New Jersey, dated November 22, 2002, Mr. Saxton previously assigned his interest in monthly payments in the amount of $ 3,939.75 commencing on November 18, 2002 through and including July 18, 2003, monthly payments each in the amount of $ 4,370 commencing on August 18, 2003, increasing 3% every year through and including September 18, 2022 and the following lump sum payments: $ 50,000 due on August 18, 2004; $ 75,000 due on August 18, 2009; $ 50,000 of the $ 100,000 due on August 18, 2014. The current petition does not disclose what purpose those funds were used for.

Mr. Saxton previously made an application in Supreme Court Bronx County to transfer additional settlement payments to the petitioner. That petition was denied by Judge Yvonne Gonzalez in a decision dated February 22, 2006. In his previous application before Judge Gonzalez, [**3] Mr. Saxton sought to transfer sixty (60) monthly payments, each in the amount of two hundred dollars ($ 200), commencing on January 18, 2007 through and including December 18, 2011; one hundred and sixty-six (166) monthly payments, each in the amount of three hundred and fifty dollars ($ 350) commencing on January 18, 2012 through and including October 18, 2025, in addition to lump sum payments of $ 50,000 due August 18, 2014 and $ 125,000 due August 18, 2019. His purported purpose for said transfer was first to purchase a four story building in Bronx County to use as a day care center. However, his business plan indicated an interest in purchasing a UPS or Jackson Hewitt franchise in Ohio. After a hearing before Judge Gonzalez, Mr. Saxton indicated that his proposed purpose for said transfer was to pay child support arrears. Judge Gonzalez found that petitioner failed to show that the transfer was fair and reasonable and she decided that the transfer was not in the best interest of Mr. Saxton. (Petitioner's Exhibit A).

Mr. Saxton once again seeks to transfer certain payments to the petitioner. Specifically, Mr. Saxton seeks to transfer three (3) future lump sum payments as follows: [**4] $ 50,000 due on August 18, 2014; $ 125,000 due on August 18, 2019; $ 150,000 due on August 18, 2024. The total payments sought to be transferred are $ 325,000 and the net advance to be given to Mr. [*3] Saxton in exchange is $ 46,080.80. In his affidavit attached to the petition, Mr. Saxton states that he intends to use $ 21,000 of that money to pay off all of his child support arrears and $ 25,000 to put a down payment on a house "in the Columbus, Ohio area." He states that the price of the house is $ 90,000. (Petitioner's Exhibit D).

Petitioner states that the aggregate amount of the structured settlement payments to be transferred is $ 325,000. The discounted present value of the payments to be transferred at a discount rate of 6.00% is $ 46,080.80. (Disclosure Statement, Exhibit C). According to the Disclosure Statement which was signed by Mr. Saxton, the discounted present value is "...the calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities..." (Exhibit B). The gross advance amount payable to Mr. Saxton is $ 46,080.80 and the annual discount rate, compounded monthly, used to determine the gross advance [**5] amount is 15.16%. Said discount rate differs vastly from the discount rate of 19.99% that was used in Mr. Saxton's previous application before Judge Gonzalez in February of 2006. In addition, the petitioner has agreed to waive the processing and legal fees which were included in the previous application before Judge Gonzalez.

In his affidavit, Mr. Saxton states that he "carefully reviewed" the Disclosure Statement and he "fully and completely" understands all of the terms of the Disclosure Statement. He further states that he has "thoroughly considered this transaction" and his alternatives and the use to which he will put the proceeds of this sale. (Exhibit D). Mr. Saxton is twenty-six (26) years old and currently resides in Columbus, Ohio. He is employed at "The Limited" and earns $ 18,000 per year. In addition, he states that he will continue to receive $ 1,096.26 per month increasing 3% every August from the portion of the settlement payments that he is not transferring to the petitioner. He has one dependent, an eight year-old son for whom he pays child support in the amount of $ 75 per month. He wishes to improve his standard of living as well as that of his son and believes [**6] that this proposed transfer will allow him to do that.

The Structured Settlement Protection Act (SSPA) codified under General Obligations Law, Title 17, was enacted in July of 2002 because of the concern that "...a growing number of factoring companies have used aggressive advertising, plus the allure of quick and easy cash, to induce settlement recipients to cash out future payments, often at substantial discounts, depriving victims and their families of the long-term financial security their structured settlements were designed to provide. Although transfers of structured settlements payments are generally prohibited by contract...factoring companies have built a rapidly expanding business around circumventing these prohibitions." (*NY Spons. Memo., 2002 Ch. 537).* A determination would be made by a Supreme Court judge as to whether the transfer is "in compliance with applicable law, that key terms have been disclosed, that the transfer meets a hardship standard, and that independent professional advice has been obtained." (NY Bill Jacket, 2002 A.B. 6936, Ch. 537). In 2004, the SSPA was amended in that the hardship requirement was "eliminated as a precondition to transfers [**7] and the requirement that disclosures be made at the front end' was added." (*NY Spons. Memo., 2004 Ch. 480).* [*4]

The procedural requirements that must be met for approval of a transfer are found under *General Obligations Law § 5-1705*. The requirements are that a copy of the notice of petition and petition by order to show cause be served upon all interested parties at least twenty days before the time at which the petition is noticed to be heard, the petition must include a copy of the transfer agreement, a copy of the disclosure statement and proof of notice of that statement as well as a listing of each of the payee's dependents along with the dependents' age. Procedurally, the petitioner herein has met the aforementioned requirements.

Pursuant to *General Obligations Law § 5-1706*, the court must make the following findings before a transfer can be effectuated. These are that: "(a) the transfer complies with the requirements of this title; (b) the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependants; and whether the transaction, including [**8] the discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount, are fair and reasonable. Provided the court makes the findings as outlined in this subdivision, there is no requirement for the court to find that an applicant is suffering from a hardship to approve the transfer of structured settlement payments under this subdivision; (c) the payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived such advice in writing; (d) the transfer does not contravene any applicable statute or the order of any court or other government authority; and (e) is written in plain language and in compliance with section 5-702 of this article."

In the case at bar, Mr. Saxton was advised in writing to seek independent professional advice, which he sought from an attorney by the name of Craig Allen, Esq., in Steubenville, Ohio. A statement from Mr. Allen, annexed to the petition as Exhibit E, states that Mr. Allen rendered advice to "Mr. Saxon" [sic] concerning the legal and "basic financial implications" of the transfer and [**9] "Mr. Saxon" [sic] stated to him that he understood the financial implications involved and he wishes to sell the future rights to the payments in exchange for receiving $ 46,080.80. However, there is no indication that the attorney discussed any tax implications of the proposed transfer with Mr. Saxton. Moreover, nowhere in his affidavit does Mr. Saxton indicate his awareness and understanding of any legal, tax and financial implications that may be involved in the transfer.

The two most important components of the SSPA are whether or not the transaction, including the discount rate and the amount of fees and expenses, is fair and reasonable and whether the transaction is in the best interest of the payee. The trial courts have ruled on what is determined to be fair and reasonable and whether the transfer is in the best interest of the payee on a case by case basis viewing the totality of the circumstances. ***Matter of Settlement Capital Corp. v. Yates, 12 Misc 3d 1198*(A) [2006]**.

In the case at bar, the discount rate of 15.16% is significantly less than the 19.99% rate offered in Mr. Saxton's previous application before Judge Gonzalez in February of 2006. [**10] The affidavit of Anthony Mitchell, the Chief Operating Officer of Peachtree Settlement Funding, [*5] LLC, annexed to the petitioner's papers, points out the differences between structured settlement transfers and loan transactions. Mr. Mitchell states that "a comparison of discount rates to mortgage rates or similar loans is not a fair comparison." (Mitchell Affidavit, p. 2, para. 7). He states *inter alia* that a typical seller has poor credit quality which is a risk borne by the petitioner and a factor considered when setting the discount rate. He further discusses the factors that influence discount rates and states that "Currently in the marketplace the discount rate for transfers range from 15.5% - 25% per annum, with the majority of transactions falling within the range of 18% - 23% per annum." (Mitchell Affidavit, p. 3, para. 7-8).

Mr. Mitchell states that the discount rate used to calculate the purchase price that petitioner has offered Ms. Saxton is fair, reasonable and consistent with the market rate applicable to these assets. The discount rate offered to Mr. Saxton of 15.16% is more reasonable than the 19.99% rate previously offered to him in February of 2006. In [**11] addition, it is laudable that petitioner has agreed to waive all processing and legal fees. However, even though that rate is considerably low, it is not fair and reasonable when taking into account the fact that the net advance amount payable to Mr. Saxton represents only 32.90% of the present value of the payments to be sold. Courts have found that discount rates of as low as 15.16% where the consumer would be receiving 58.94% of the discounted present value of the payments (***Matter of 321 Henderson Receivables, 13 Misc 3d 526* [2006]**) and 15.46%, where the consumer would be receiving 47.95% of the discounted present value (***Matter of Settlement Funding of NY (Cunningham), 195 Misc 2d 721* [2003]**) were unreasonable. Accordingly, this court does not find that the proposed transaction is fair and reasonable.

Moreover, when determining whether or not the transfer is in the best interest of the payee, the court must consider the totality of the circumstances including what the payee proposes to use the funds for. This court does not find that the proposed transfer is in the best interest of Mr. Saxton or his son. Mr. Saxton has thus far [**12] received considerable sums of money from the settlement, including monthly payments from the settlement. Even more disturbing is the fact that Mr. Saxton already transferred a sizeable portion of his future settlement payments to the petitioner in 2002 to his detriment and that of his son and it is not known what he did with the money he received from that transfer.

Furthermore, Mr. Saxton contends that he wants to use a portion of the money he receives to put a large down payment on a $ 90,000 house which would allow him to build equity and permit him to save money on taxes. However, other than informing the court that the house is in the Columbus, Ohio area, Mr. Saxton does not provide the court with any information with respect to the house he has located nor has he determined whether or not he can even obtain a mortgage for the purchase of said house, which may be difficult if he has poor credit. The transfer of $ 325,000 from Mr. Saxton's future settlement payments in exchange for only $ 46,080.80 is not in the best interest of Mr. Saxton or his son.

Since this court finds that the proposed transfer is not fair and reasonable and would not be in the best interest of Mr. Saxton, [**13] taking into account the welfare and support of his son, the [*6] motion for this court's approval of the proposed transfer of a portion of Mr. Saxton's future lump sum payments, is hereby denied.

A copy of this decision and order shall be attached to any future applications by Mr. Saxton to transfer his structured settlement funds.

This constitutes the decision and order of the court.

Dated *December 4, 2006*