

## Memorandum in Support

### COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #14

May 23, 2008

S. 8139  
A. 10617

By: Senator DeFrancisco

By: M. of A. Weprin

Senate Committee: Judiciary

Assembly Committee: Judiciary

Effective Date: First day of January next succeeding  
the date on which it shall have  
become a law

**AN ACT** to amend the general obligations law, in relation to court approvals of transfers of structured settlements

**LAW AND SECTION REFERRED TO:** Section 5-1705 of the general obligations law

### **THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES** **SUPPORTS THIS LEGISLATION**

This bill improves the procedure by which court approval is granted for transfer of the annuity contracts used to fund structured settlements.

Articles 50-A and 50-B of the CPLR provide in general that all payments of awards for future damages other than the first \$500,000 for pain and suffering in medical malpractice actions and the first \$250,000 for all future damages in personal injury actions be paid by the provision of an annuity contract the amount and other details of which are determined by the court pursuant to the detailed requirements of 50-A and 50-B. Structured payments also result from settlements, in which case the present value of the settlement may be less than the mandatory thresholds of Articles 50-A and 50-B. This may particularly be the case when the structured settlement is for the benefit of a minor and entered into by the minor's parents for the purpose of preserving the value of the settlement over the life of the minor.

Subsequent to the adoption of 50-A and 50-B in 1984 and 1985, an industry of structured settlement factoring companies developed for the purpose of purchasing annuity contracts from the beneficiaries thereof ("payees") in exchange for a lump sum payment from the factoring company ("transferee"). Frequently the lump sum payment reflected a deep discount in the reasonably expected present value of the annuity contract. Concern about the potential negative consequences to the plaintiffs receiving payments under the annuity contracts led to enactment of the Structured Settlement Protection Act (L. 2002, c. 537). The heart of this act is the requirement that no transfer of rights to payment under a structured settlement is effective unless a court of competent jurisdiction finds that the disclosure requirements of the act have been followed and the transfer is in the best interest of the payee. Since enactment of this 2002 legislation, it has become apparent that making this determination in the context of what is essentially an unopposed proceeding puts unusual burdens on the court charged with finding that this "best interests" standard is satisfied.

The supporting papers are typically prepared by the petitioner, which is the transferee, in boiler plate fashion and disclosing little of the personal circumstances of the payee. When brought on by notice of petition, the proceeding appears before the court for the first time in the posture of a default motion with no opposition. The payee is not a party and there is no requirement for the payee to appear, whether the proceeding is commenced by notice of motion or order to show cause. Moreover, petitioners have sometimes taken a very narrow view about whether the perfunctory statement required in all affidavits seeking ex-parte relief that there has been “no prior application for the relief requested herein” applies to a previous unsuccessful attempt in a different state or in this state where the terms were slightly different, perhaps only by the amount of further annuity payments made since the prior application. Disclosure of denials of such prior attempts would alert the court to the likely inappropriateness of the proposed transfer.

This bill addresses these potential problems in three ways. First, it requires that the proceeding be commenced by order to show cause. This greatly increases the likelihood that the case will end up being assigned to a justice with prior experience with such petitions and permits that justice to make an informed decision prior to the hearing as to what persons must appear and what additional information beyond that presented in the minimal petition may be required.

Second, the petition must disclose all prior transfers and applications for approval of same that were denied, thus avoiding any attempt to avoid a prior rebuff with a change of venue.

Third, the payee must appear before the court. Given the boiler plate nature of the supporting papers and the absence of any opposition to the petition, this will likely be the only opportunity the court will have to explore the details of the particular case crucial for a determination of how the transfer will benefit or detract from the future of the payee, the period during which the future payments under the structured settlement will not be available.

These amendments will be of great benefit in enabling the court to determine whether the proposed transfer is indeed “in the best interest of the transferee.”

For the foregoing reasons, the Committee on Civil Practice Law and Rules **SUPPORTS THIS LEGISLATION.**

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Chair of the Committee: David L. Ferstendig, Esq.