

**Proponent Testimony of the National Association of Settlement Purchasers
On House Bill 223**

**Senate Judiciary Committee
September 19, 2017**

Good morning Chairman Bacon and members of the Senate Judiciary Committee. My name is Earl Nesbitt and I am the executive director of the National Association of Settlement Purchasers (NASP). I am here today to offer our support of House Bill 223.

NASP is a national trade association representing those entities and individuals that participate in the secondary market for structured settlements. Although NASP is a relatively small trade association, with 16 funding company members and approximately 80 other members, including attorneys and others who provide services to funding companies, NASP takes seriously its role in representing its members and, more importantly, our members' customers in educating and working with legislative and regulatory bodies and agencies, the public, and other interested parties relative to structured settlement transfers.

House Bill 223 is the result of a collaborative effort amongst the Ohio Judicial Conference, several individual probate judges, NASP, the National Structured Settlement Trade Association (NSSTA), a number of Ohio and national insurance trade organizations, Ohio trial lawyers and other members of the Ohio Bar, several members of the Ohio General Assembly and their staff, and other interested parties who have worked for well over a year on this effort to modernize and improve the Ohio law. You should have before you letters of support from several of those parties.

By way of background, a structured settlement is a legal instrument frequently used in product liability or injury cases whereby a plaintiff agrees to resolve their claim by receiving all or some part of the settlement in the form of periodic payments on an agreed schedule over time, rather than as a lump sum. Structured settlements provide long term financial stability and certain tax benefits for the plaintiff and defendant alike. However, sometimes a plaintiff's financial situation changes - like unexpected medical expenses or the need to send a child to college - or they simply desire or need to manage their financial affairs, assets, and lives. The secondary market for the purchase of structured settlement payments developed to provide the recipient of a structured settlement the opportunity to sell some or all of their future payments for an immediate, discounted lump sum payment. Ohio's Structured Settlement Protection Act provides the legal method for accomplishing those transfers.

In a structured settlement transfer, NASP funding company members would typically be the "transferee" (as that term is defined in the statute). The individual receiving payments from the structured settlement is the "payee." Payees typically approach funding companies to purchase some or all of their future payments. After an investigation of the payee's settlement, the funding company may make an offer to the payee to purchase the payments for a discounted lump sum. If the offer is accepted, it is the funding company's duty to file the appropriate documents and pleadings with an appropriate Ohio court in the county in which the payee lives to have the court determine whether the transfer is in the payee's best interest. These

transactions are typically not based on an impulse decision by the payee, as the court review process takes, on average, around 45 to 90 days from the time the disclosure is provided to the payee by the funding company. Although our members accept the costs and risk of this thorough and lengthy process, including securing court approval of a proposed transaction, ultimately the court's review is focused exclusively on whether the transfer is in the best interest of the payee.

Ohio first enacted its current structured settlement transfer statute, R.C. 2323.58 et seq., the Ohio Structured Settlement Protection Act (the "Current Ohio Statute") in 2000. Ohio was one of the first states to enact a structured settlement transfer act and did so before the original National Conference of Insurance Legislators (NCOIL) Model Structured Settlement Protection Act was adopted and before the enactment by Congress of 26 USC 5891, which settled issues of federal tax treatment of structured settlement payments. Additionally, the secondary market has developed and structured settlement transfers have changed over time. Thus, the Current Ohio Statute includes some provisions that have proven to be antiquated and unnecessary as our and other members of the industry have worked with these statutes in many states over the years.

The bill before you today includes revisions and amendments which are consistent with the Model Structured Settlement Protection Act which was revised and readopted recently by NCOIL. Over the years NCOIL has taken the lead relative to model legislation relating to structured settlement transfers, first enacting a model act in 2004 and readopting and/or updating said act in 2007, 2011, and most recently in November of 2016, when NCOIL unanimously approved the 2016 version of an updated NCOIL model act. House Bill 223 will conform the Current Ohio Statute to the 2016 version of the NCOIL Model Structured Settlement Protection Act (the "NCOIL Model Act"). It will also closer align Ohio to the statutes currently in place in the 48 other states that have enacted a transfer act.

While the revisions appear extensive, it is our belief that Ohio judges and practitioners will find that the proposed legislation is not drastically different from current procedures. The proposed revisions and amendments in House Bill 223 include all of the main concepts of the Current Ohio Statute with the appropriate NCOIL updates. Both require court approval of the transfer, submission to the payee of a detailed disclosure statement before the payee signs a transfer agreement, include a definitions section, describe the procedure for pursuing court approval, and address the impact of a transfer on the obligors/issuers. The bill also continues the underlying purpose of focusing on the best interest of the payee.

Representative Dever provided an overview of the key changes and retentions in his testimony last week. I've attached to my testimony today a similar list with more detail as to why NASP supports each of these changes and why we believe they benefit payees, our members and judges. In short, this bill will make it less cumbersome and less expensive for a payee and a funding company to accomplish a transfer while maintaining all consumer protections and providing more information for judges. NASP asks for your support of this important legislation.

Thank you for allowing me to appear today. I would be happy to answer any questions from the committee.

For further information, please contact:

Leah Pappas Porner
Maryellen Corbett
Calfee, Haller & Griswold LLP
1200 Huntington Center
41 South High Street
Columbus, OH 43215-3465
Ph. 614.621.1500
e-mail: lpappas@calfee.com
mcorbett@calfee.com
Ohio counsel for NASP

Earl S. Nesbitt
Executive Director, National Association of Settlement Purchasers
c/o Nesbitt, Vassar & McCown, LLP
15851 Dallas Parkway, Suite 800
Addison, Texas 75001
Phone: (972) 371-2411
Fax: (972) 371-2410
Cell: (214) 995-5384
E-Mail: enesbitt@nvmlaw.com

Tricia LaBorde
President, National Association of Settlement Purchasers
c/o Stone Street Capital, LLC
7316 Wisconsin Avenue, Suite 500
Bethesda, MD 20814
Phone: (301) 951-2130
E-Mail: plaborde@stonestreet.com

Summary of Proposed Revisions in House Bill 223

The principal changes made to the current Ohio Structured Settlement Protection Act by House Bill 223 would be:

1. Removal of Dual Court Approval: The bill eliminates the unique and problematic requirement of the Current Ohio Statute that “Any court or responsible administrative authority that previously approved the structured settlement, other than the court from which the approval of the transfer is sought . . . , has expressly approved the transfer in writing.” (Lines 270-274.)
 - a. The Current Ohio statute provides that any court that previously approved the structured settlement must also approve a transfer, in addition to the Ohio court where the transfer is pending.
 - i. An example of when that would be required would be a minor received a settlement that was approved in a court in Texas in a case that was closed decades ago. If that minor moves to Ohio and as an adult seeks to transfer some payments, the Current Ohio statute requires approval by both a Texas and an Ohio court.
 - ii. This is often impossible as there is typically no procedure to secure approval of a transfer in the old court.
 - b. Ohio is the only state in the country that has this provision and it has never been part of the NCOIL Model, in any of its versions.
 - c. This provision is difficult, if not impossible, to comply with and precludes some payees from ever having any liquidity relative to their structured settlement payments and could put the final order transferring the payments at risk. This provision also doubles the costs of a transaction, which costs are ultimately borne by the payee.
2. Eliminates Mandatory Independent Professional Advice: HB 223 does not mandate that payees proposing to transfer structured settlement payment rights obtain independent professional advice. Instead the proposed bill would require, as one of the conditions for an effective transfer, that the court that rules on an application for approval of a transfer of structured settlement payment rights make an express finding that the payee “has been advised in writing . . . to seek independent professional advice . . . and has either received that advice or knowingly waived in writing the opportunity to seek and receive that advice.” (Lines 167-170; 257-258.)
 - a. This is often a time-consuming, expensive, and unnecessary requirement for an adult that is presumed to know how they wish to handle their financial affairs and assets.
 - b. The payee will be present at the hearing and will be able to answer any questions posed by the court, should the judge be concerned about the payee’s understanding of the transaction.
 - c. The judge retains the discretion to require independent professional advice on a case-by-case basis, as circumstances warrant.
3. Adds Disclosure of Effective Annual Interest Rate: The bill would eliminate the requirement that the disclosure statement provided to a payee include the “quotient . . . obtained by dividing the net amount payable to the payee . . . by the discounted present value of the

payments” Instead the amendments would require that the disclosure statement specify the effective annual interest rate implied in the transaction. (See lines 208-216.)

- a. The effective annual interest rate is designed to provide payees with information that they are likely to be able to readily understand (i.e. interpreting the discount rate as an interest rate, which consumers/payees can typically understand and relate to other transactions in which they have been involved).
 - b. The existing “quotient” calculation is generally acknowledged to be confusing, inapplicable and not particularly helpful. It is used in very few states.
4. Requires In-person Hearing: The bill requires that courts hold hearings on transfer applications and require that the payee “appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing” (Lines 319-324.)
- a. This codifies common practice in Ohio and ensures that judges have an opportunity to assess the payee’s understanding of the transfer.
5. Clarifies Standard of Review: The bill conforms the “best interest” standard of review to the Federal Tax Statute by requiring that transfer be in “the best interest of the payee, taking into account the welfare and support of the payee’s dependents” (Lines 162-166) and by also eliminating the requirement “that the transfer is fair and reasonable and in the best interests of the payee and the payee’s dependents.” (Lines 250-253).
- a. The new language exactly tracks with the findings required by federal tax law to ensure that the transfer does not incur the 40% federal excise tax.
 - b. The current finding that the transfer is “fair and reasonable” is inherent in the requirement that the transfer be in the payee’s best interest and thus is unnecessary.
 - c. This change also ensures that the payee’s best interests are not superseded by the best interests of their dependents. The dependents interests are considered in the new standard but cannot outweigh the interests of the payee.
6. Adds Disclosure of Prior Transfers and Attempted Transfers: The bill requires that any application for court approval of a transfer include summaries of prior transfers and proposed (but not completed) transfers of the same payee’s payment rights. (Lines 346-364.)
- a. This addition ensures that the judge has relevant information necessary to evaluate whether the transfer is in the payee’s best interest.
7. Clarifies Impacts of and Liabilities for a Transfer: The bill makes several clarifications regarding the rights and responsibilities of the parties involved in the original settlement and the transfer.
- a. Expressly provide that following a transfer of payment rights the transferee is liable to the annuity owner and annuity issuer for “liabilities or costs, including reasonable costs and attorneys’ fees, arising from compliance . . . with the court order approving the transfer or from the failure of any party to the transfer to comply with” the statute. (Lines 229-234, 259-260, 274-279.)
 - b. Confirms that following an approved transfer of payment rights the annuity issuer and owner are “discharged and released from any and all liability for the redirected payments,” except liability to the transferee (or its assignee). (Lines 229-234, 243-249.)

- c. Confirms that neither an annuity issuer nor an annuity owner “may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees.” (Lines 292-295.)
- d. Confirms that compliance with the statutory requirements for an effective transfer of payment rights is “solely the responsibility of the transferee” and that neither the annuity owner nor the annuity issuer bears “any responsibility for, or any liability arising from, non-compliance with . . . or failure to fulfill” the statutory requirements. (Lines 435-448.)

The bills also maintain two provisions that are unique to Ohio and not part of the NCOIL Model.

- 8. The bills maintain jurisdiction for the approval of transfers with the Probate Division of the Court of Common Pleas. (Lines 300-314)
 - a. Though the NCOIL Model and all other states place jurisdiction in the general division of the state trial court, given that Ohio’s probate courts have a history with these transactions, it was felt that it was best to maintain jurisdiction in the Probate Division.
- 9. A violation of or failure to comply with HB 223, like the Current Ohio Statute, is an unfair or deceptive practice or act in violation of R.C. 1345.02.