Staff Brief

Transfer of Structured Settlement Payments

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INTRODUCTION

This Staff Brief provides background information regarding the transfer of structured settlement payments, describes model legislation and approaches taken in other states, and identifies considerations that may arise in the development of a Wisconsin statute governing the transfer of structured settlement payments.

Structured settlements are settlements that include periodic payments in lieu of, or in addition to, lump sum awards in civil actions. They are most frequently utilized in personal injury cases, and are thought to be particularly appropriate in cases in which a plaintiff has been seriously injured and may have a continued need for care in the future.

Wisconsin is one of just two states that does not have a law governing the transfer of structured settlement payments. Forty-eight other states have enacted such laws over the past few decades, following the rise in the popularity of structured settlements in civil cases.

Many states' laws are based on a model act agreed to by two trade associations in 2000, or on a previous model act developed in 1998. However, a few states' laws include requirements not included in the model law. For example, some states provide a detailed list of factors that courts must consider when reviewing a structured settlement transfer agreement.

Issues for consideration in the development of a Wisconsin law include, for example: what legal standard should govern judicial review of transfers of structured settlement payments and what disclosures should be required of companies seeking to purchase structured settlement payments.

This Staff Brief includes the following sections:

- ***Part I*** summarizes the current legal situation in Wisconsin with respect to the transfer of structured settlement payments.
- ***Part II*** describes the model law and approaches taken by other states.
- ***Part III*** identifies questions for consideration in the development of a Wisconsin statute on the transfer of structured settlement payments.
- ***Part IV*** provides a glossary of terms used throughout the Staff Brief.

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Part I – Law on Transfer of Structured Settlement Payments in Wisconsin

Provisions in federal tax law play a central role in shaping the use of structured settlements across the country. Wisconsin is one of just two states without a structured settlement statute to supplement the federal law. In the absence of a state statute, transfers of structured settlements in Wisconsin are shaped by the laws of other states, which may interact with applicable federal law in a variety of ways, as described below.

Structured Settlements

When parties in a lawsuit decide to settle their dispute out of court, they must agree as to how any monetary settlement will be structured. A monetary settlement may be paid as a lump sum or structured as a series of payments. For example, in a case involving a tort or worker's compensation claim, an injured party may be provided an income stream for a fixed period of time or for the remainder of his or her life. This arrangement may be referred to as a ***structured settlement***, which is a monetary settlement paid out as a series of payments over time, in lieu of, or in addition to, an initial lump-sum payment. The party receiving the payments may be referred to as the ***payee***, and the party obligated to fund the payments may be referred to as the ***obligor***. In many cases, an obligor will purchase an annuity for the benefit of the payee in order to satisfy the obligation to fund the structured settlement.

Federal tax law provisions have influenced the use of structured settlements in civil actions. Federal law encourages the use of structured settlements at the time that the parties settle out of court by allowing the payments to be treated similarly to lump-sum payments for federal income tax purposes. That is, the law allows claimants to exclude the full amount of each structured settlement payment from gross income, even though some portion of the payment may be attributable to earnings under an annuity contract used to fund the settlement. [I.R.C. s. 104 (a) (1) or (2).]

Structured Settlement Factoring Transactions

Federal tax law also comes into play when structured settlement payments are sold to another party. Over time, a secondary market has emerged in which a payee may sell structured settlement payment rights to another party. The resulting type of transaction is known as a ***structured settlement factoring transaction (SSFT)***. A party to whom structured settlement payment rights are transferred in an SSFT may be referred to as a ***transferee***. In many cases, transferees are a type of finance company, known as a ***factoring company***, which seeks out payees from whom to purchase a structured settlement payment stream at a discount. A factoring company may pay a single lump sum to a payee, in exchange for an assignment of some or all of the structured settlement payments that are due in the future.

The emergence of the secondary market around structured settlements has led to concerns of an unequal playing field between factoring companies and individual payees. In general, an SSFT raises potential concerns because the price paid to a payee is lower, often much lower, than the value of the payment stream. The excess of the structured settlement payments due to a payee, over the amount paid by the factoring company, may be referred to as the ***factoring discount*** in an SSFT.[1] Also, to the extent an initial structured settlement agreement with an obligor included restrictions to protect the payee, those restrictions may not apply in a subsequent SSFT. [*See* Hindert and Ulman, *Transfers of Structured Settlement Payment Rights – What Judges Should Know About Structured Settlement Protection Acts*, THE JUDGES' JOURNAL (Spring 2005).]

In 1999, the U.S. Treasury Department proposed creating a disincentive to any SSFT entered into without court approval. Congress responded by enacting I.R.C. s. 5891, which imposes a 40% excise tax on that type of transaction unless prior approval is received in state court. Specifically, it provides that a person who acquires payment rights in an SSFT on or after January 22, 2002 is assessed a federal excise tax equal to 40% of the factoring discount with respect to the transaction, unless the transfer is approved in advance by a ***qualified order***. The federal statute defines a qualified order as a final order, judgment, or decree that contains the following findings with respect to a proposed SSFT:

- It does not contravene any federal or state statute or the order of any court or responsible administrative authority; and
- It is in the best interest of the payee, taking into account the welfare and support of his or her dependents.

The federal statute specifies which state law applies and which state court has jurisdiction with respect to a proposed SSFT. In general, a qualified order must be issued by a court in the state where the payee is domiciled. However, if that state has not enacted a state statute governing structured settlement transfers, then an order may be issued by a court in the state where either the obligor or the annuity issuer has its principal place of business. Alternatively, the qualified order may be issued by a court in the state where the payee is domiciled despite the absence of a structured settlement transfer statute in that state, but the court must then apply the law from the state in which the obligor or annuity issuer has its principal place of business. In addition to the above, in a case where there is an administrative authority with exclusive

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[1] *See* I.R.C. s. 5891 (c). An audit guide published by the IRS in 2006 provides an example of factoring discount calculation, as follows:

> John Doe, the payee under a structured settlement is entitled to receive $50,000 a year in structured settlement payments for a period of 10 years. After one year, XYZ Factoring Company offers to buy the rights to the remaining 9 years of payments for $200,000.00. The Factoring Discount would be $250,000, the excess of the structured settlement payments ($450,000) due to John Doe in the transaction over the amount paid ($200,000) by XYZ.

[*Excise Tax – Structured Settlement Factoring Audit Techniques Guide* (2006), pg. 16].

jurisdiction over the underlying dispute that gave rise to the structured settlement, the federal statute also authorizes the issuance of a qualified order by the administrative authority.

The substance of the provisions described above and the circumstances surrounding their enactment suggest that the intent behind I.R.C. s. 5891 was to address concerns about unequal bargaining power of individual payees in SSFTs. The Internal Revenue Service (IRS) characterized I.R.C. s. 5891 as a protective measure in its 2006 publication, *Excise Tax—Structured Settlement factoring Audit Technique Guide*. The publication states as follows:

> The purpose of IRC section 5891, is to deter the purchasers of payment rights under structured settlements from taking advantage of recipients who are entitled to receive tax free settlement payments. ... The tax is basically a penalty tax imposed on purchasers of payment rights under structured settlements. The practical effect of section 5891 is to compel such purchasers to comply with state structured protection acts, which require that transfers of structured settlement payment rights receive advance court (or administrative authority) approval.

In addition to the provisions described above, I.R.C. s. 5891 contains miscellaneous other provisions related to tax procedure. For example, the section clarifies that the initial tax treatment of a structured settlement (i.e., between an obligor and payee), will not be altered by a subsequent SSFT between the payee and another party. Under prior law, the tax consequences on an obligor were uncertain. [*See, e.g.*, *Liberty Life Assurance Co. v. Stone Street Capital, Inc.*, 93 F. Supp.2d 630 (D. Md. 2000).]

With regard to the tax treatment of structured settlement payments in the hands of a transferee under an SSFT (a factoring company), I.R.C. s. 5891 does not have any effect. As was the case prior to passage of I.R.C. s. 5891, the payments will be subject to income tax for the transferee.

WISCONSIN LAW

Under Wisconsin law, as in other states, parties may stipulate or enter into a settlement of an action or proceeding. [s. 807.05, Stats.; *Laska v. Laska*, 2002 WI App 132.] If a minor or individual adjudicated incompetent is a party, the Wisconsin Statutes provide that settlement may be made by his or her guardian, if any, or a court-appointed guardian ad litem, as provided under s. 807. 10, Stats., as follows:

- If an action or proceeding has been commenced, the guardian may reach a settlement on behalf of the minor or incompetent individual, if the guardian is represented by an attorney. Alternatively, a court-appointed guardian ad litem may reach a settlement with the approval of the court in which such action or proceeding is pending.

- If no action or proceeding has yet been commenced, the guardian may reach a settlement, if the guardian is represented by an attorney, with the approval of the court appointing the guardian. Alternatively, a court-appointed guardian ad litem may reach a settlement with the approval of any court of record.

As indicated above, Wisconsin has not enacted a statute specifying the rights and obligations of parties to an SSFT. For that reason, under federal law, Wisconsin courts that review proposed SSFTs must apply the law of the state in which the obligor or annuity issuer has its principal place of business.

PART II – MODEL ACT AND APPROACHES TAKEN BY OTHER STATES

Forty-eight states have enacted laws governing the transfer of structured settlement rights. The state laws, often referred to as "structured settlement protection acts," are largely based on the Model State Structured Settlement Protection Act ("model act").

The model act was agreed to in September 2000 by two trade associations: the National Structured Settlements Trade Association (NSSTA), which represents entities that utilize structured settlements to resolve claims; and the National Association of Settlement Purchasers (NASP), which represents structured settlement factoring companies. With some revisions and additions, the model act is similar to a 1998 model law developed by NSSTA. In general, the model act provides that an SSFT must be approved by a court or other relevant administrative authority before a payee's rights under a structured settlement may be transferred. It also contains provisions requiring certain disclosures and specifying standards for approval of an SSFT. These provisions under the model act have become the basis for the structured settlement protection acts passed in numerous states.

Some states have enacted more stringent standards for disclosure and judicial review of SSFTs than are included in the model act. For example, the structured settlement protection acts enacted in California, New York, and Oregon include not only provisions similar to the model act, but numerous additional protections for transfers of structured settlement rights. Of those three states' laws, Oregon's was most recently revised, in 2013.

Key provisions of the model act and the structured settlement protection acts enacted in California, New York, and Oregon are summarized under the headings below. For ease of reference, California, New York, and Oregon are sometimes referred to as the ***protection states*** in the discussion below.

REQUIRED DISCLOSURES

The model act and the protection states' acts all require a person seeking to purchase payment rights in an SSFT to make certain disclosures to the payee, as the current holder of such rights. The protection states differ from the model act in the content required to be disclosed. Also, the protection states provide a longer timeframe for providing a disclosure statement to a payee than is required under the model act. Whereas the model act requires the disclosure statement to be provided not less than three days prior to signing of a transfer agreement, California and New York require disclosure statements to be provided not less than 10 days prior to signing a transfer agreement, and Oregon requires the disclosure statement to be provided not less than 14 days prior to signing.

Model Act

As noted above, the model act requires a person proposing to acquire payment rights under an SSFT to disclose certain information to the payee. The disclosures must be made not less than three days prior to the date on which a transfer agreement is signed, and they must be in bold type and no smaller than 14-point font.

Specifically, all of the following information must be disclosed:

- The amounts and due dates of the structured settlement payments to be transferred.
- The aggregate amount of such payments.
- The discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities."
- The method of calculating the discounted present value of the payments to be transferred.
- The gross advance amount.
- An itemized listing of all applicable transfer expenses, other than attorneys' fees and related disbursements payable in connection with the transferee's application for approval of the transfer, and the transferee's best estimate of the amount of any such fees and disbursements.
- The net advance amount.
- The amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by him or her.
- A statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed.

California

California provides the most stringent disclosure requirements of the three protection states. California law requires disclosure of various information that is not required under the model act. For example, it requires that a disclosure statement advise a payee to obtain independent legal or financial advice regarding a proposed SSFT. As described below, California's law takes the disclosure regarding independent advice a step further than other states by requiring a transferee to pay up to $1,500 toward a payee's costs in obtaining such advice.

In addition, whereas the model act describes the components that must be included in a disclosure statement, California's law provides a template with the precise words required to be included with blanks included only for specific dollar amounts applicable to a given transaction. The template includes various plain language warnings to payees. For example, it states that "A sale of future structured settlement payments will mean that you will no longer receive the future

payments that are sold. You are advised to enter into this transaction only after you have carefully considered the consequences of the transaction."

California's law also requires certain statements to be included in the transfer agreement. For example, it requires the agreement to state, in capital letters, "YOU WILL BE PAYING THE EQUIVALENT OF AN INTEREST RATE OF __% PER YEAR."

Oregon

Oregon's law requires a disclosure statement to include the following information, in addition to information that is substantially similar to that required under the model act:

- A statement that the payee is entitled to, and should, seek independent professional advice regarding the proposed transfer.
- A statement that transferring payment rights may or may not be financially appropriate for the payee and that the payee should not proceed without first weighing and considering other offers and alternate means of obtaining funds through borrowing or the sale of other assets.
- A statement that the transferee's attorney does not represent the payee in connection with the proposed transfer.
- A statement that the court or responsible administrative authority may require the payee to seek independent professional advice and that the expenses for the independent professional advice may be paid out of the amount paid by the transferee to the payee.

New York

In New York, a transferee must provide both an initial disclosure of terms and a separate disclosure statement. The initial disclosure must include all of the following information:

- The amount of any premium payable by the transferee.
- The nature and amount of any cost that may be deducted from any of the periodic payments.
- Where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law.
- A statement that the payee is advised to obtain independent professional advice relating to the legal, tax, and financial implications of the settlement.

The separate disclosure statement must include information similar to the information required to be disclosed under the model act, with a few modifications. An example of a modification is a requirement that the following statement be given together with information regarding the net advance amount: "The net cash payment you receive in this transaction from the buyer was determined by applying the specified discount rate to the amount of future

payments received by the buyer, less the total amount of commissions, fees, costs, expenses and charges payable by you."

PROCEDURE FOR APPROVAL

Model Act

The model act specifies procedures regarding the venue and timeline for judicial and administrative agency review of SSFTs. The model act does not require a court to hold a hearing on a proposed SSFT, nor does it require a payee to appear in any hearing that is held.

Venue

The model act requires applications for the transfer of structured settlement payment rights to be brought in the county in which a payee resides, the county in which the structured settlement obligor or annuity issuer maintains its principal place of business, or in the court or responsible administrative authority that approved the original structured settlement agreement.

Timeline

Under the model act, a transferee must provide notice of the application, together with certain documents, to the court or administrative authority and all interested parties not less than 20 days prior to the scheduled hearing on the application for approval of an SSFT. The model act requires responses to the application to be filed no sooner than 15 days after the transferee notifies interested parties of the application.

California

In addition to notice requirements provided under the model act, California's law requires notice to be provided to the state attorney general. In addition, if a transfer is proposed within five years of the creation of a structured settlement, California's law requires notice of a proposed transfer to be provided to a payee's attorney.

California's law also includes unique provisions regarding specific costs that must be borne by a transferee. Specifically, a transferee must pay all court costs and filing fees for the action to obtain approval of a structured settlement transfer agreement. In addition, a transferee must pay up to $1,500 for the cost of retained counsel, a licensed certified public accountant, or a licensed actuary who advises a payee in connection with such an action.

Oregon

Oregon's law does not include the county in which a structured settlement obligor or annuity issuer has its principal place of business as an option for venue. Thus, an SSFT must be reviewed in the county in which the payee is domiciled.

Oregon's law also specifies certain information that a court or administrative authority may request at a hearing regarding a proposed transfer, such as the amounts and sources of a payee's monthly income and certain information regarding a payee's familial status and financial obligations.

New York

The venue and timeline provisions under New York's law mirror those in the model act, except that a structured settlement obligor or annuity issuer's principal place of business is not an option for venue. In addition, responses to petitions for approvals of transfer must be filed no sooner than seven days, rather than 15 days, after a transferee notifies interested parties of the application. Finally, New York's law requires that a payee attend the hearing before the court unless the payee's attendance is excused for good cause.

Standards for Approval of Transfers of Structured Settlement Payment Rights

Model Act

The model act requires every transfer of structured settlement payment rights to be approved in a qualified order issued by a court or a responsible administrative authority. The model act specifies that such orders be based on the following findings regarding the transfer:

- The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.
- 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.
- The transfer does not contravene any applicable statute or the order of any court or other government authority.

California

California's law requires a court to make several findings in addition to those required under the model act. Specifically, in order to approve a proposed transfer of structured settlement rights, a court in California must make the following findings:

- The payee understands the terms of the transfer agreement, including the terms set forth in the disclosure statement.
- The payee understands and does not wish to exercise the payee's right to cancel the transfer agreement.

In addition, California's law requires a finding that a transfer is "fair and reasonable." California's law sets forth the following 15 criteria that a court must consider when determining whether a transfer is fair, reasonable, and in a payee's best interest:

- The reasonable preference and desire of the payee to complete the proposed transaction, taking into account the payee's age, mental capacity, legal knowledge, and apparent maturity level.
- The stated purpose of the transfer.

- The payee's financial and economic situation.
- The terms of the transaction, including whether the payee is transferring monthly or lump sum payments or all or a portion of his or her future payments.
- Whether, when the settlement was completed, the future periodic payments that are the subject of the proposed transfer were intended to pay for the future medical care and treatment of the payee relating to injuries sustained by the payee in the incident that was the subject of the settlement and whether the payee still needs those future payments to pay for that future care and treatment.
- Whether, when the settlement was completed, the future periodic payments that are the subject of the proposed transfer were intended to provide for the necessary living expenses of the payee and whether the payee still needs the future structured settlement payments to pay for future necessary living expenses.
- Whether the payee is, at the time of the proposed transfer, likely to require future medical care and treatment for the injuries that the payee sustained in connection with the incident that was the subject of the settlement and whether the payee lacks other resources, including insurance, sufficient to cover those future medical expenses.
- Whether the payee has other means of income or support, aside from the structured settlement payments that are the subject of the proposed transfer, sufficient to meet the payee's future financial obligations for maintenance and support of the payee's dependents, including any child support obligations. The law requires the payee to disclose to the transferee and the court his or her court-ordered child support or maintenance obligations for the court's consideration.
- Whether the financial terms of the transaction, including the discount rate applied to determine the amount to be paid to the payee, the expenses and costs of the transaction for both the payee and the transferee, the size of the transaction, the available financial alternatives to the payee to achieve the payee's stated objectives, are fair and reasonable.
- Whether the payee completed previous transactions involving the payee's structured settlement payments and the timing and size of the previous transactions and whether the payee was satisfied with any previous transaction.
- Whether the transferee attempted previous transactions involving the payee's structured settlement payments that were denied, or that were dismissed or withdrawn prior to a decision on the merits, within the past five years.
- Whether, to the best of the transferee's knowledge after making inquiry with the payee, the payee has attempted structured settlement payment transfer transactions with another person or entity that were denied, or which were dismissed or withdrawn prior to a decision on the merits, within the past five years.
- Whether the payee, or his or her family or dependents, are in or are facing a hardship situation.

- Whether the payee received independent legal or financial advice regarding the transaction. The court may deny or defer ruling on the petition for approval of a transfer of structured settlement payment rights if the court believes that the payee does not fully understand the proposed transaction and that independent legal or financial advice regarding the transaction should be obtained by the payee.
- Any other factors or facts that the payee, the transferee, or any other interested party calls to the attention of the reviewing court or that the court determines should be considered in reviewing the transfer.

Oregon

In addition to the findings required under the model act, Oregon's law requires a court to find all of the following criteria in order to approve a proposed transfer of structured settlement rights:

- The payee understands the transfer agreement, disclosure statement, and financial terms of the transfer.
- The payee understands the payee's right to cancel the transfer agreement and knowingly elected not to cancel the transfer agreement.
- The payee confirmed to the court or responsible administrative authority at the hearing that the payee wanted the court or authority to approve the proposed transfer and understood that the court or authority would not approve the transfer if the payee did not want the court or authority to do so.

Oregon's law also enumerates the following, non-exclusive list of information that a court or administrative authority may consider when determining whether to approve a given structured settlement transfer agreement:

- The reasonable preference and desire of the payee to complete the proposed transfer, taking into account the payee's age and apparent maturity level.
- The purpose of the transfer and the intended use of the proceeds by the payee.
- The payee's financial situation.
- Whether the payee depends on the structured settlement payments for the payee's necessary living expenses or required medical care and treatment.
- Whether the payee is employed or employable.
- The terms of the transfer agreement, including whether the payee is transferring monthly or lump sum payments or all or a portion of the payee's future payments, the size of the transaction and the financial alternatives available to the payee to achieve the payee's stated objectives.
- Whether the payee has experienced a change in personal, family, or financial circumstances.

- Whether the payee has income or support other than the future periodic payments sufficient to meet the payee's future financial obligations for support of the payee's dependents, including child support obligations.
- Whether the terms of the proposed transfer agreement, including the amount to be paid to the payee and the expenses and costs of the transfer for the payee and the transferee are fair and reasonable.
- Whether the payee has completed or attempted previous transfers of payment rights.
- Whether the payee, or the payee's family or dependents, may suffer personal, family or financial hardship if the transfer is not approved.
- Whether the payee received independent professional advice regarding the transaction.

New York

New York's law includes the standards for approval that are provided under the model act, with a few additional findings required. Like California's law, New York's law requires a court to find, in addition to the best interest standard under the model act, that a proposed SSFT is "fair and reasonable." It specifies that the discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount must be included in the review regarding whether an SSFT is fair and reasonable. New York's law does not provide specific criteria to guide that determination as California's law provides.

PROHIBITED PROVISIONS

Model Act

Unlike the approaches in California and New York, described below, the model act does not contain a specific section enumerating prohibited provisions. However, in a section regarding "general provisions," the model act prohibits SSFTs from creating a judgment against the payee.

California

California's law specifies certain types of provisions that are prohibited in an SSFT. Examples of prohibited provisions include certain provisions governing civil suits that might arise between the parties, such as provisions specifying the choice of law governing such a suit and provisions specifying that a payee agrees not to sue.

Oregon

Oregon's law contains the same prohibition that is included in the model act. Specifically, it prohibits transfer agreements from creating a judgment against the payee.

New York

The following types of provisions are prohibited in an SSFT under New York law:

- Any provision that waives the payee's right to sue under any law, or where the payee agrees not to sue, or which waives jurisdiction or standing to sue under the transfer agreement.
- Any provision that requires the payee to indemnify and hold harmless the transferee, or to pay the transferee's costs of defense, in any claim or action brought by the payee on or the payee's behalf contesting the transfer for any reason.
- Any provision that requires the payee to pay the transferee's attorney's fees or costs if the transfer contemplated by the transfer agreement is not completed.
- Any provision that requires the payee to pay any tax liability arising under federal tax laws, other than the seller's own tax liability, if any, that results from the transfer.

Effects of Transfer of Structured Settlement Payment Rights

The model act and the three protection states' laws contain substantially similar provisions regarding various parties' rights and liabilities under an SSFT. Each of them specifies all of the following:

- The obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments.
- The transferee shall be liable to the structured settlement obligor and the annuity issuer if the transfer contravenes the terms of the structured settlement and for any other liabilities and costs arising from compliance by the parties with the order of the court or arising as a consequence of the transferee's failure to comply with the model act.
- Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees.
- Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of the model act.

Cancellation

The model act and the protection states' laws allow a person to cancel a structured settlement transfer agreement for a limited time period even after it is signed. In California and Oregon, the cancellation period is any time before the agreement is approved by a court or administrative authority. In contrast, the time period for cancellation under the model act and under New York law is three days after an agreement is signed.

PART III – ISSUES FOR CONSIDERATION

ADOPTION OF A STATE LAW GOVERNING THE TRANSFER OF STRUCTURED SETTLEMENTS

As described in Part I, federal law imposes a punitive tax on SSFTs that lack court approval. Federal law also generally designates a payee's home state as the preferred judicial forum for such approvals.

As noted above, Wisconsin does not have a statute to guide courts faced with reviewing SSFTs, and, for that reason, a Wisconsin court must apply the law of the state where the obligor or annuity issuer for a particular transaction has its principal place of business. Enactment of a structured settlement protection act in Wisconsin would require consideration of the particular provisions that should be included, and whether, and how, such a statute should differ from the model act described in Part II.

OPTIONS FOR PROVISIONS IN A STATE STATUTE

The following list of considerations is not exhaustive. It discusses points of decision based on a review of model laws and relevant laws in other states.

Disclosure Requirements

Questions that may arise with respect to disclosure requirements include:

- Should any information be required to be disclosed other than what is required under the model act? Examples of additional disclosures include a statement that a payee is entitled to professional advice and certain "warning statements" regarding the financial implications of a transaction.
- Should Wisconsin law enumerate a list of information subject to disclosure, or should it require any template language, as California's law requires?

Procedural Requirements

Questions for consideration with respect to the procedure for judicial review of proposed SSFTs include:

- Should judicial review of SSFTs be authorized only in the county where the payee resides, or should it also be authorized in counties in which the obligor or annuity issuer has its principal place of business?
- Should a reviewing court or administrative authority be required to hold a hearing? In SSFTs, it is typical that neither party to the transaction opposes the transfer. A hearing would be an opportunity for a judge to ask questions of a payee, for example, to gauge the payee's understanding of the financial implications of a transaction.

- Should a payee generally be required to appear in person at a hearing to review a SSFT?
- Should a judge be required to ask any specific questions of a payee at the hearing?
- Should a transferee be required to provide notice of the proceeding to the attorney who represented the payee in the original structured settlement negotiation?
- Should a transferee be required to pay any portion of a payee's court costs, or any costs for a payee to retain counsel or seek financial advice?

Standard of Review

As mentioned above, federal law requires a court to find that a given SSFT is in a payee's best interest, taking into account the welfare and support of the payee's dependents. The model act incorporates that standard.

Questions that might arise with respect to the standard of review for SSFTs include:

- Should state law provide specific factors that a court must consider when determining whether a best interest standard has been satisfied?
- Should state law require a court to make any finding other than those included in the model act? Examples of possible findings include unforeseen change in circumstances; financial hardship of the payee; whether the transaction is fair and reasonable; and the payee's actual understanding of certain information.

Prohibited Provisions

One option for consideration is whether certain types of provisions should be prohibited in SSFTs. Examples of such provisions are included in California's and New York's laws, described above.

Time Period for Cancellation

The model act provides that a payee may cancel an SSFT no later than three business days after the agreement is signed. The California and Oregon laws provide that a payee may cancel an SSFT any time before the agreement is approved by a court, as long as the cancellation is in writing. Either of those approaches, or an alternative approach, could be chosen.

Other Possible Provisions

Types of provisions other than those discussed above might also be considered. Examples of specific provisions for possible consideration include:

- A cap on high discount rates.
- A waiting period between attempts to have an SSFT approved.
- A limit on the number of times that a payee may appear before a Wisconsin court to attempt to have an SSFT approved.
- Protections for SSFTs involving a payee who is a minor or incompetent individual.

PART IV - GLOSSARY OF TERMS

"Factoring company" means a finance company that purchases a structured settlement payment stream from a payee in an SSFT.

"Factoring discount" means the excess of the structured settlement payments due to a payee, over the amount paid by the factoring company, in an SSFT.

"Obligor" means a party to a structured settlement who is obligated to make future settlement payments to a payee.

"Payee" means a party to a structured settlement who receives payments funded by an obligor.

"Protection states" means California, New York, and Oregon.

"Qualified order" means a final order, judgment, or decree, which is issued by one of several parties specified in I.R.C. s. 5891, and which contains the following findings with respect to an SSFT: (a) it does not contravene any federal or state statute or the order of any court or responsible administrative authority; and (b) it is in the best interest of the payee, taking into account the welfare and support of his or her dependents.

"Structured settlement" means a monetary settlement that is paid out as a series of payments over time, and treated similarly to a lump sum payment for federal income tax purposes.

"Structured settlement factoring transaction (SSFT)" means a transaction in which a payee transfers payment rights under a structured settlement to another person in exchange for consideration, such as a single lump sum payment.

"Transferee" means a party to whom structured settlement payment rights are transferred in an SSFT.