



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 2

TO: MEMBERS OF THE STUDY COMMITTEE ON TRANSFER OF STRUCTURED SETTLEMENT PAYMENTS

FROM: Anna Henning and Brian Larson, Staff Attorneys

RE: Potential Governmental Interests in Structured Settlement Factoring Transactions

DATE: September 4, 2014

During the July 31, 2014 meeting of the Study Committee on Transfer of Structured Settlement Payments, committee members and presenters mentioned several scenarios, discussed below, in which the state or federal government may have a particular interest in a proposed transfer of structured settlement payments. This Memo provides background information and considerations relating to those scenarios. The Memo is not intended to be an exhaustive list of all situations in which there may be a special governmental interest in such transfers.

CHILD SUPPORT

In Wisconsin, a court must order a parent to make child support payments in certain circumstances. Court-ordered child support obligations are generally based on a percentage of a parent's gross income and assets. [s. 767.511, Stats.] Net proceeds resulting from worker's compensation or other personal injury awards are included within the definition of "gross income" for purposes of calculating child support obligations if the proceeds are intended to replace income. [s. DCF 150.02 (13) (a) 4., Wis. Adm. Code.] Child support payments are made to the Wisconsin Support Collections Trust Fund, which disperses funds to custodial parents and guardians. Among other enforcement mechanisms, a person who violates a child support order may be subject to liens on property, seized bank accounts, and proceedings for contempt of court.

At the July 31, 2014 meeting, committee members mentioned that it might be in the state's interest to be notified regarding any structured settlement factoring transaction (SSFT) entered

into by a person who is subject to a child support order. Presumably, such notification would be triggered by a disclosure regarding a person's child support obligations.¹

Questions that the committee may wish to consider relating to that suggestion include:

- *Disclosure of child support obligations.* Should a person seeking court approval of an SSFT be required to disclose any child support obligations as part of the petition?
- *Notification.* Should the state be notified of a pending SSFT in which a party is subject to a child support order? If so, how and when should the state be notified?
- *State role.* Should the state have a statutory right to become a party to an action for court approval of an SSFT in which child support obligations are implicated, or is notification sufficient?
- *When triggered.* Should requirements for disclosure and notifying the state be triggered when any person subject to a child support order seeks court approval of an SSFT, or only if the person is delinquent in child support payments?
- *Effect on judicial standard.* Should child support obligations be included as a factor that a court must consider when reviewing an SSFT?

RESTITUTION

In a criminal case, a Wisconsin court may order a defendant to make full or partial restitution to a victim who has sustained personal injury or property damage as a result of the defendant's actions. [s. 800.093, Stats.] Depending on a defendant's financial situation, a court may order restitution to be paid over time, for example, in a series of periodic payments.

At the July 31, 2014 meeting, it was mentioned that the state may have an interest in SSFTs in which the sellers are subject to restitution orders. The committee could choose to include in a bill a provision requiring that the state be notified of actions for the approval of SSFTs involving persons who are subject to a restitution order. Similar questions arise in this context as apply in the context of child support obligations:

- *Disclosure of restitution owed.* Should a person seeking court approval of an SSFT be required to disclose any restitution orders as part of the petition?
- *Notification.* Should the state be notified of a pending SSFT in which a party is subject to a restitution order? If so, how and when should the state be notified?

¹ There are examples of such disclosure requirements in other states' structured settlement transfer laws. For example, under Oregon law, if a person seeking to transfer rights to payments under a structured settlement has minor children, then the person must include in the petition for court approval a statement regarding whether the person is currently obligated to pay child support under any child support order, and whether the person is current or in arrears under any child support order.

- *State role.* Should the state have a statutory right to become a party to any action for court approval of an SSFT in which a party is subject to an order for restitution, or is it sufficient to notify the state of the pending transaction?
- *When triggered.* Should a requirement to notify the state be triggered when any person subject to a restitution order seeks court approval of an SSFT, or should the requirement be triggered only if the person is delinquent in paying the ordered restitution?
- *Effect on judicial standard.* Should restitution be included as a factor that a court must consider when reviewing an SSFT?

MEDICARE

Under federal law, Medicare may make “conditional payments” for items or services received by a Medicare beneficiary, in connection with an injury for which the beneficiary later receives a settlement, judgment, award, or other payment from a primary payer. In that instance, Medicare is required to seek reimbursement, including reimbursement directly from primary payers, for the conditional payments. Primary payers may include a liability insurance policy or workers’ compensation insurance policy with coverage of items and services related to the underlying injury. [42 U.S.C. s. 1396y (b).]

Federal law may also require an individual who receives a settlement, judgment, award, or other payment from a primary payer to take future Medicare interests into account under certain circumstances. Generally, this requirement applies when the individual is a Medicaid beneficiary, or it applies when the award is of a certain size and there is a reasonable expectation of Medicare enrollment within the next 30 months. Typically, the requirement to take future Medicare interests into account is satisfied through the creation of a “Medicare set-aside” (MSA) arrangement under the applicable federal regulations. [See 42 U.S.C. 1395y (b) (2).]

At the July 31, 2014 meeting, committee members raised concerns about protection of structured settlements that may be used for reimbursement of conditional payments made by Medicare or as a source for a Medicare set-aside arrangement. Federal law gives Medicare extensive enforcement powers with respect to these requirements after it appears that a violation has occurred. However, when parties are considering an SSFT, it may be difficult to know ahead of time whether it may impact Medicare’s interests in a given case.

Questions that the committee may wish to consider include:

- *Disclosure of medical information.* Should a person seeking approval of an SSFT be required to disclose medical care or medical insurance information of the payee and his or her dependents, which might include information regarding structured settlement payments and other sources used or anticipated to be used to meet medical expenses?

- *Medicare information.* Should any required disclosure include specific information concerning conditional payments or future Medicare interests that should be taken into account?
- *Inclusion as factors.* Should medical expenses, conditional payments, or future Medicare interests be included as factors that a court must consider when reviewing an SSFT?
- *Prohibition.* Should an SSFT be prohibited in cases where a court determines it will inhibit the payee's ability to meet medical expenses, the reimbursement of conditional payments, or the requirement to take future Medicare interests into account?
- *Notice requirement.* Should the federal government have a right to receive notice of a pending SSFT, in order to facilitate reimbursement of conditional payments or protection of future Medicare interests in appropriate cases?
- *Limitation to MSAs.* In any of the above in which future Medicare interests are taken into account, should consideration be limited to cases in which an MSA or similar arrangement has been already established?

MEDICAID

With respect to the state-administered Medicaid program, some considerations may apply that are similar to those arising in the Medicare context. At times, structured settlements may be used to fund a "special" or "supplemental" needs trust (SNT) for an individual who is or may become eligible for Medicaid. These trusts are structured so that generally they will be considered a "non-countable asset" and thus not taken into account for Medicaid eligibility purposes.

In addition, state and federal law restrict a person's ability to sell or reduce his or her assets for less than fair market value, if he or she is or later becomes eligible for Medicaid. When this occurs, it may be considered a "divestment," which may trigger a penalty resulting in ineligibility for the benefits for a specified period of time.

At the July 31, 2014 meeting, and in subsequent discussions, some committee members and other observers have raised concerns about the potential ramifications of SSFTs involving SNTs. First, there is a risk that by allowing assets in an SNT to be sold on the secondary market, the status of the SNT as a non-countable asset may be placed in jeopardy. [See, e.g., *Estate of Deloris Pladson*, 2005 ND 213.] Second, there is an argument that an SSFT involving a sale or reduction of SNT assets by a payee who is or later becomes eligible for Medicaid would constitute a divestment under state or federal law.

Questions that the committee may wish to consider include:

- *Disclosure of medical information.* Should a person seeking approval of an SFST be required to disclose medical care or medical insurance information of the payee and his or her dependents, which might include information regarding structured

settlement payments and other sources used or anticipated to be used to meet medical expenses?

- *Medicaid information.* Should any required disclosure include specific information concerning past or anticipated Medicaid eligibility or enrollment of the payee or any dependents?
- *Existence of SNT.* Should any required disclosure include information concerning the existence of an SNT for the payee or any dependents?
- *Inclusion as factors.* Should Medicaid interests and the existence of an SNT be included as factors that a court must consider when reviewing an SSFT?
- *Prohibition.* Should an SSFT be prohibited in connection with assets in an SNT, in order to safeguard the status of the SNT as a non-countable asset for Medicaid eligibility purposes?
- *Notice requirement.* Should the state have a right to receive notice of a pending SSFT, and/or the statutory right to join as a party, so that it may protect Medicaid interests in cases in appropriate cases?
- *Limitation to SNTs?* In any of the above in which Medicaid interests are taken into account, should consideration be limited to cases in which an SNT has been already established?

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