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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON INSURANCE
ANALYSIS

BILL #: HB 767

RELATING TO: Transfer of structured settlements

SPONSOR(S): Representatives Brown and Ross

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIAL OVERSIGHT YEAS 10 NAYS 0
(2) INSURANCE
(3) SMARTER GOVERNMENT
(4)
(5)

I. SUMMARY:

A structured settlement provides periodic payments to a person holding a legal liability against another (e.g., as an injured claimant would against the person at fault for the injury) over a negotiated period of time. Structured settlements are used increasingly in the settlement of personal injury claims, instead of lump-sum settlements. As an alternative to continuing to receive these long-term payments, some individuals assign or sell their settlement payments to a settlement purchasing company for a discounted, lump-sum payment.

HB 767 would require court review and approval of all transfers of structured settlements. In addition, the bill would require the transfer agreements to contain specific disclosures regarding the costs of the transactions and a comparison of the amounts the claimant would receive under the structured settlement and the transfer agreement. The bill would provide for violations and penalties.

The bill would become effective on October 1, 2001.

The bill may have an indeterminate fiscal impact on the state courts.

The Committee on Judicial Oversight approved a strike-all amendment that would remove references to workers' compensation from the bill. The amendment would also increase the penalties for violation of the provisions of the bill. The amendment is traveling with the bill. Please see section VI. of this analysis.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [x]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

The bill would increase government involvement by requiring court approval of activities that do not currently require court approval.

B. PRESENT SITUATION:

What is a structured settlement?

A structured settlement is an arrangement to satisfy a legal liability, such as tort damages owed to a claimant. This generally involves the periodic payment of money through an annuity[1] (or other financial product). Under a structured settlement involving an annuity arrangement, one party pays a lump-sum premium to an insurance company to purchase an annuity in the name of the claimant. The premium varies depending on the number and length of payments. The insurance company then makes periodic payments to the claimant for the negotiated period of time.

The use of structured settlements in wrongful death or injury awards has increased in recent years. A structured settlement may be agreed to in a pre-trial settlement or it may be required by a court order, particularly in the case of judgments involving minors.

How and why are structured settlements used?

Structured settlements are commonly used as an alternative to simple lump-sum settlements. If a claimant has dependents, can no longer earn as much as they once did, or will be permanently disabled, they may need the constant source of income that a structured settlement can provide. Where a claimant suffers a property loss, such as when a home is burned or a car is totaled, a one-time cash payment can make them whole again.

Structured settlements can offer some advantages to both parties involved in the settlement. For claimants, a structured settlement can provide long-term financial protection and income, which may be necessary for claimants with long-term medical needs and dependents. Also, money paid to a claimant through a structured settlement receives more favorable federal tax treatment. Unlike investment earnings on a lump-sum payment, which are taxable, payments made under a

[1] An annuity is a life insurance contract that pays a periodic income benefit either for a specific period of time or for the annuitant's lifetime. In contrast to a life insurance policy that pays benefits upon the death of the insured, an annuity pays benefits while the annuitant is alive. Insurance Information Institute, *Handbook for Reporters*, 1993.

structured settlement are not taxable. However, claimants must weigh these advantages against the disadvantage of not having access to the entire amount of money received in the settlement.

For the paying party, structured settlements can provide a more cost effective means of extinguishing a legal liability. For example, a $2 million lump-sum payment would cost $2 million. However, $2 million paid over time through a structured settlement might be accomplished through purchasing an annuity that costs only $500,000; a savings of $1.5 million.

<u>Can a structured settlement be converted into a lump-sum payment?</u>

A market has developed for the sale and purchase of structured settlements. Companies known as factoring companies, advanced-funding companies, or settlement purchasing companies buy the remaining payments (i.e., income stream) due under the settlement in exchange for a smaller lump-sum payment. The terms of the sale or transfer are negotiable, but the purchaser, or transferee, is seeking a profit and will only pay a fraction of the total worth of the remaining structured settlement payments.

This is similar to a loan. The person giving up the structured settlement payments receives an amount of money today that is paid back, in a larger amount, by the proceeds of the structured settlement. The difference between the amount paid to the claimant in the purchase and the amount received by the purchasing company through receipt of the structured settlement payments represents the interest rate. The interest rate depends on the difference between the amounts given and received.

<u>How does the sale or transfer work?</u>

After negotiating a purchase price, the claimant executes an instrument assigning the right to the proceeds of the structured settlement to the settlement purchasing company, in exchange for cash. The structured settlement payments are then redirected to the purchasing company. If the agreement was for only a portion of the structured settlement payment, the purchasing company deducts its share and forwards the balance to the claimant.

Although, insurance companies sometimes include language in the original structured settlement agreement that prohibits transactions such as the sale of structured settlements, the claimant and the purchasing company may take actions to conceal the sale from the insurance company.

<u>When do problems arise?</u>

If the claimant does not understand the terms or consequences of such a financial transaction, the long-term financial security of the injured claimant can be at risk. The claimant might not consult an attorney or financial professional, might not understand the transaction, or might not receive a disclosure of material information. Although the individual is provided with a lump-sum payment, the amount of the payment may not meet the long-term medical costs, living expenses, and dependent financial support the individual ultimately needs. The money may run out before the claimant's needs do. However, due to changes in an individual's circumstances, a sale of the structured settlement payments may actually meet their current needs.

Purchasing companies sometimes require the claimant to sign a confession of judgment[2] when the structured settlement is transferred. A confession of judgment is an agreement to entry of judgment upon the happening of some event; the right to defend oneself is waived. If for some reason the

[2] Although confessions of judgment are generally prohibited by s. 50.55, F.S., an out-of-state court order based upon a confession of judgment has effect in Florida. This is because of the operation of the full faith and credit clause of the U.S. Constitution.

payments to the purchasing company cease, either through inadvertence, action by the insurance company, or action by the claimant, the purchasing company will use the confession of judgment to collect the full amount due. A number of lawsuits may result; the purchasing company could sue for garnishment of the structured settlement payments, the claimant could sue to void the transfer and recover the transferred payments, and the insurance company could be a named defendant in any suit over the transfer and be exposed to significant liabilities and costs.

<u>Are there any restrictions on the sale or transfer of structured settlements?</u>

Chapter 440, F.S., regulates workers' compensation in Florida. The assignment, release, or commutation of workers' compensation benefits due or payable under that chapter, except as provided by that chapter, and are prohibited.[3] The employer or carrier may make lump-sum payments in exchange for the employer's or carrier's release from liability for future medical and indemnity benefits.[4] The lump-sum payment is authorized at any time if the employer or carrier has filed a written notice of denial within 120 days after the date of injury and the judge finds a justiciable controversy as to the compensability of the injury. Upon joint petition of all interested parties and after considering the interests of all interested parties, a judge of compensation claims may enter a compensation order approving the lump-sum settlement and discharging the employer's liability for workers' compensation benefits arising from the injury. The judge of compensation claims may also approve lump-sum payments, at any time, in any case after the injured worker has reached maximum medical improvement (i.e., the injured worker has recovered to the point that no further improvement could be anticipated).

At least sixteen states have a provision requiring either judicial review or approval of transfers of structured settlements.[5]

C. EFFECT OF PROPOSED CHANGES:

The bill would regulate all transfers of structured settlements. The bill would require judicial oversight of transfers of structured settlements; create statutory requirements for transferring or assigning structured settlements; provide statutory definitions; and enact penalties for non-compliance.

<u>Requirements for court approval of transfers of structured settlements</u>

A transfer of a structured settlement agreement would not be effective unless the transfer is authorized in advance in a final order by a court of competent jurisdiction or judge of compensation claims. Among other things, the judge would be required to find:

- that the transfer is legal;
- that certain material information was disclosed to the claimant[6];
- that the transfer is in the best interests of the claimant and the claimant's dependents; and

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[3] Section 440.22, F.S.
[4] Section 440.20(11)(a), F.S.
[5] NAIC's *Compendium of State Laws on Insurance Topics*, 2000. These states include: Connecticut, Delaware, Illinois, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia.
[6] The bill refers to this person as the "payee." The bill would define "payee" as "an individual who is receiving tax-free damage payments under a structured settlement and proposes to make a transfer of payment rights under the structured settlement." The "payee" receives a cash payment in exchange for the right to the proceeds of the structured settlement; this is the transfer of the structured settlement.

- that the net amount payable to the claimant is fair, just, and reasonable.

If the proposed transfer contravenes the terms of the structured settlement, upon the filing of a written objection by any interested party[7], the court or judge of compensation claims would be able to grant, deny, or impose conditions upon the proposed transfer. Any order approving a transfer would require the transferee to indemnify the annuity issuer and the structured settlement obligor for any liabilities, including reasonable costs and attorney fees, which arise from compliance by the issuer or obligor with the order of the court.

Required disclosures

Specific disclosures would be made by the transferee to the claimant and reviewed by the court. In order to approve the transfer, the court would be required to find that the transferee provided a disclosure statement to the claimant. Among the elements of the required disclosure are:

- the amounts and due dates of the structured settlement payments to be transferred;
- the aggregate amount of the payments and their discounted present value;
- the purchase amount;
- associated costs payable by the claimant;
- the net amount payable to the claimant;
- the net value received;
- the effective annual interest rate; and
- the amount payable by the claimant in the event of a breach.

The bill would limit the ability of the transferee to confess judgment[8] against a claimant to the amount paid by the transferee to the claimant, less any payments received from the structured settlement agreement. The bill would require the obligor to disclose in writing that any transfer of the periodic payments by the claimant may subject the claimant to serious adverse tax consequences.

The bill would require the transferee to file with the court and all interested parties a notice of the proposed transfer and the application for its authorization. The notice would include certain specified attachments and information. A written response to an application would be required to be filed within 15 days after service of the transferee's notice.

Violations and penalties

The bill would prohibit the waiver of any of its provisions. In the event the transfer fails to meet court approval, the claimant would not any liability to the proposed transferee.

In the event that a transferee or assignee violates the requirement regarding stipulation of the discount or finance charge, the transferee would be able to recover any amount in excess of the net advance. (Please see section V.C., of this analysis.) In that same event, the claimant would be able to recover any excess amounts paid, reasonable costs and attorney's fees, and a penalty up to twice the amount of the discount and finance charge.

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[7] Under the bill, "interested party" means: the payee, irrevocable beneficiaries of the payee, the annuity issuer, the structured settlement obligor, or any other party with rights or obligations under the structured settlement.
[8] Confession of judgment is the agreement to the entry of a judgment upon the happening of a specified event. Black's Law Dictionary, 7th Edition (1999).

If transferees violate the disclosure requirements, they would be liable for costs, attorney fees, and a penalty, to be determined by the court, but not in excess of two times the amount of the discount and finance charge.

The bill would establish a statute of limitations for actions based upon the transfer. The state attorney would be authorized to bring a civil action for injunctive relief, penalties, and any other relief that is appropriate to secure compliance with this section.

The bill would provide definitions.

This bill would take effect October 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Parties who wish to make transfer agreements regarding structured settlements will incur costs in presenting these settlements to the courts. It is unknown how much the cost of court proceedings will impact the transfer of structured settlements.

D. FISCAL COMMENTS:

The fiscal impact on the state is indeterminate. The bill would require judicial review of all transfers of structured settlements. It is unclear how many transfers occur and how much time the courts will require to review transfers and issue orders. There could be increased costs depending upon the volume of transfers and the amount of time that court review requires.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds, or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce that revenue raising authority of any city or county.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the amount of state tax shared with any city or county.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

Throughout the bill, there are references to workers' compensation settlements and the restrictions placed on structured settlements involving workers' compensation payments or benefits. Subsection 7 of the bill seems to contradict those statements by stating that the section does not authorize the transfer of payment rights to workers' compensation benefits that contravenes applicable law. Section 440.22, F.S., specifically states that only assignments of compensation or benefits permitted under chapter 440 are valid. It is unclear whether the provisions of this bill, or the provisions of chapter 440, would control transfer of settlements relating to workers' compensation benefits.

On page 11, line 1, the bill authorizes transferees and assignees who violate the bill's disclosure provisions to collect excess amounts that result from the non-disclosure. This would appear to reward non-disclosure. If this provision read in the negative (i.e., "neither the transferee nor any assignee may collect" excess payments resulting from the non-disclosure), non-disclosure would be penalized by the provision. This appears to be an inadvertent drafting error. The strike-all amendment, by Representative Brown, adopted by the Committee on Judicial Oversight corrects this inadvertent error.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 20, 2001, the Committee on Judicial Oversight approved a strike-all amendment, by Representative Brown, that would remove references to workers' compensation from the bill. The workers' compensation statute prohibits the transfer of structured settlements. The amendment would also increase the penalties for violation of the provisions of the bill. It would provide that the transferee or assignee may be penalized three times the amount of the discount and finance charge for noncompliance with the requirements for stipulating the discount and finance charge or for noncompliance with the disclosure requirements.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
L. Michael Billmeier	Lynne Overton

AS REVISED BY THE COMMITTEE ON INSURANCE:

Prepared by:	Staff Director:
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