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**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO ADOPT RULE
GOVERNING APPLICATION TO
TRANSFER STRUCTURED
SETTLEMENT PAYMENT RIGHTS

Supreme Court No. R-07-0027

**Reply To NASP Comments Regarding
Petition to Adopt Rule Governing
Application to Transfer Structured
Settlement Payment Rights**

The following is in Reply to the Comments of the National Association of Settlement Purchasers (NASP) filed May 20, 2008.

NASP's unsupported assumption is that payees who propose to transfer their rights to receive structured settlement payments are all mature, well-educated adults who are familiar with finance concepts such as the discounted present value of the payments to be transferred, discount rates, and the tax implications and advantages of their structured settlements. In the 17 months that I have been back on the civil bench, I have only met one payee who remotely fits that description and his application was quickly approved.

To the contrary, the payees who have come before me are generally young, poorly educated, who have no concept of what they are giving up for some immediate cash. Many of them probably have structured settlements because their lawyers or their parents recognized that they would need the long-term financial security that structured settlements offer. The proposed rule was submitted to protect these payees and to give effect to the public policy that structured settlements are designed to serve: reducing the risk that personal injury recoveries are dissipated prematurely, leaving injury victims dependent on public assistance.

My replies to some of the specific statements made by NASP are:

P. 3, line 21: "The market is highly regulated." The market is not highly regulated. It was largely unregulated until 2002, when Congress, in response to abuses

by structured settlement factoring companies (including NASP members), enacted 26 U.S.C. § 5891, an amendment to the Internal Revenue Code which imposes a 40% tax on the factoring discount for any transfer that is not approved in advance by qualified state court order. A qualified state court order must include an express finding that the transfer “is in the best interests of the payee, taking into account the welfare and support of the payee’s dependents.” The requirements of A.R.S. §§ 12-2901-2904 were enacted by our Legislature, with the support of companies that are members of NASP, to provide a basic statutory framework for applications for qualified state court orders, consistent with 26 U.S.C § 5891.

P. 4, line 10: “NASP members supported state and federal regulation.” This statement leaves out the principal reason they support it, which simply is to avoid the 40% federal tax on the factoring discount, which would make these transfers unprofitable, if not money losers.

P. 4, line 13: “Most individuals who agree to accept structured settlement payments.... are not informed that (if) they desire liquidity with respect to those future payments, they will have to go to court and prove to a judge that it is in their best interest to sell.” Never having practiced personal injury law, I cannot comment on what personal injury attorneys tell their clients about structured settlements, but I note that structured settlement agreements generally include express anti-assignment provisions. Competent personal injury lawyers negotiating structured settlements presumably explain those anti-assignment provisions to their clients. If, as NASP posits, structured settlement payees generally are competent, educated adults, they presumably can read and understand for themselves simple contract provisions that say, for example, that none of their future payments may be “accelerated, deferred, increased or decreased” or “anticipated, sold, assigned or encumbered.” In further response I have attached a letter I received from Mr. William R. Jones, Jr., one of the most respected personal injury attorneys in the state, who relates a personal story about the value of a structured settlement to one of his clients. I could not rebut NASP’s comment any better than Mr. Jones has done.

P. 5, paragraph 8: NASP fails to point out that the tax advantage to the payees is that the income on their annuities is tax-free. Congress made that tax advantage available to encourage victims of physical injuries to accept compensation in the form of assured periodic payments, rather than immediate cash that in many cases will be quickly dissipated. Offering payees what NASP characterizes as “liquidity options” exposes them to the very dissipation risk that structured settlements are intended to avoid. Hence the need for effective state court review of proposed transfers.

P. 8, paragraph A: NASP’s suggestion that the declaration be filed within 10 days of the hearing so that the application can move quite quickly does not make sense. What I have learned is that none of the factors we see in court in Arizona have offices here. Everything is done over the telephone. The attorney who represents the factor does not meet the payee until he or she arrives at the hearing. It certainly cannot take more

than 5 additional minutes to have the payee answer the questions on the declaration, and I fail to see how this will delay the court process.

P. 9, paragraph B: NASP's suggestion that the names and ages of the payee's should not be disclosed defeats an important purpose of the statute and the proposed regulation. The superior court is required to take into account the welfare and support of the payee's dependents. Most judges review their files a day or more prior to hearings and this information is essential. Allowing it to be disclosed orally on the day of the hearing puts the judge in the position of having to make a snap decision on the best interests and welfare of the payee's dependents on the spot. The purpose of the proposed rule is to give our judges more information in advance to allow them time to reflect on the applications. In any event, the requirement in paragraph (a)(3) of Proposed Rule 70.1 that a Payee's Declaration set forth the names and ages of the payee's minor children and other dependents is based directly on A.R.S. § 12-2903.B.4, which requires that notice of an application for authorization of a transfer include "[a] listing of each of the payee's dependents, together with each dependent's age." NASP cannot plausibly object to disclosure under Proposed Rule 70.1 that is already required by statute.

P. 9-10, paragraph D: Requiring payees to disclose other court orders is essential if Arizona courts are to authorize transfers of structured settlement payment rights and make express findings that proposed transfers would not "contravene . . . the order of any court," as required under A.R.S. § 12-2902.B.5 (and as contemplated by 26 U.S.C. § 5891(b)(2)(A)(i)). The judge must know whether the payee is attempting to avoid valid court orders and judgments, particularly a payee's fiduciary responsibilities in probate court and payments to victims of crimes. While child support orders are arguably the most important, other orders and judgments, including, for example, bankruptcy court orders, must be reviewed also.

NASP suggests that because a payee may have the right to exempt structured settlement payments from claims of his or her creditors it somehow is inappropriate to require that a payee disclose pre-existing court orders under which he or she is obligated to make payments to another party. This suggestion presupposes that the only court orders under which a payee may be required to make payments are money judgments in favor of unsecured creditors, to which statutory exemptions may apply. In many cases a payee's structured settlement payment rights may be the subject of a qualified domestic relations order or a bankruptcy court order – or a previous order approving a transfer under A.R.S. §§ 2901-2904 or a corresponding statute in another State – that limits the payee's rights or affects his or her ability to transfer them. Unless the payee is a lawyer, he or she cannot necessarily be expected to draw fine distinctions between different kinds of court orders. Thus, paragraph (a)(6) of proposed Rule 70.1 requires that a payee's declaration identify any orders under which the payee is required to pay money. There is no conflict with whatever exemption rights, a payee may be entitled to assert. (NASP cites an exemption supposedly codified at A.R.S. § 33-126.7; but there is no A.R.S. § 33-126.7 or even an A.R.S. § 33-1267.)

P. 10, paragraph E: Here and in its suggested revisions to proposed Rule 70.1, NASP suggests that in lieu of providing details of prior court orders and prior transfers of a payee's structured settlement payment rights, the payee and/or the transferee simply "submit copies of the orders/judgments in question." (P. 17, paragraph 7.) Supplying copies (which may not be readily available to a payee) does not give a court the information called for under paragraphs (7) and (8) of proposed Rule 70.1. Court orders approving transfers almost never state "the amount of money received from the transferee for the transfer" or "the manner in which the money was used." We have had many cases where information about prior transfers is never brought to the attention of the judge, especially if a judge with a busy calendar on the day of the hearing does not think to ask for it. We have also had a case where a payee sold the same transfer rights twice to two different factors without telling the second factor or the court and he was paid twice to the detriment of the second factor.

P. 10, paragraph F: Providing information about the payee's reasons, his or her plans, etc., at the hearing again deprives the judge of the ability to consider the application fully in advance of the hearing and puts the judge in the place of an inquisitor rather than a neutral fact finder because these applications are never contested.

P. 11, paragraph G: The transferees, highly sophisticated financial organizations, are making large, if not huge, profits from these transactions that essentially involve no risk to them. Allowing them to hide behind the representations they solicit from highly unsophisticated payees, when a simple computer search would verify the information sought is not unreasonable. I am advised that NASP itself maintains a database that its members can check in order to determine whether a payee has previously transferred any of his or her payment rights to any other NASP member. I also am advised that many transfers of structured settlement payment rights are a matter of public record by reason of UCC filings, which can readily be searched online. Transferees presumably check these sources anyway, in order to avoid purchasing rights that have already been sold, as has happened in Arizona. Proposed Rule 70.1 will not impose any hardship on transferees by requiring them to make and disclose the results of "reasonable inquiries" that they already have every reason to make.

P. 11, paragraph H: The proposed language would add nothing to the process and would conflict with the statute. A.R.S. § 12-2902.B.3 conditions the effectiveness of **any** transfer of structured settlement payment rights on a finding that the transfer is in the best interest of the payee, taking into account the welfare and support of his or her dependents. The statute does not set a lower standard for some payees than for others, nor does it recognize any presumption that some payees and their dependents deserve less protection than others. If a transferee or payee wants to make a court aware of the facts to which NASP suggests that a court should "give significant weight," the transferee or payee is free to do so. Making this a requirement in Proposed Rule 70.1 is both superfluous and inconsistent with A.R.S. § 12-2902.B.3.

In conclusion I support the adoption of the amended rule proposed by the State Bar of Arizona.

Respectfully submitted, July 7, 2008.

Edward O. Burke, Superior Court Judge

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February 26, 2008

Hon. Edward O. Burke
Maricopa County Superior Court
Old Court House
125 W. Washington Street, #101
Phoenix, AZ 85003

Re: Arizona Attorney Article

Dear Judge Burke:

Congratulations on the very meaningful article that appeared in the March 2008 Arizona Attorney regarding the factoring of structured settlements. As you may or may not know, I have followed the development of that article with great interest because I believe it is a matter of substantial public policy importance. On those few occasions when I have had the privilege of representing plaintiffs in very large cases, I have insisted that we use structured settlements. My recommendations have been accepted in all of the cases to varying degrees. In those cases where it was only partially accepted, I have invariably had those people come back to me and say that they wished they had listened to my recommendations because they were broke except for the income they were receiving from their periodic payments.

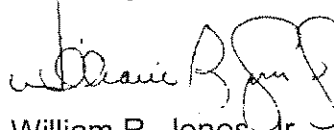
A couple of years ago, I was in Tucson at the Ventana Canyon Resort and I saw a young woman with a baby on her hip who I thought I recognized. She walked over to me and acknowledged that she was, indeed, a Plaintiff that I had represented more than a decade ago. We chatted for a moment about how she was doing and I asked her, "Geraldine, how old are you?" She said that she was 42. I asked her what she got for her 40th birthday and she looked at me with a smile on her face and said, "A check for \$500,000." I said, "Geraldine, what are you going to get for your 50th birthday?" She indicated that she would get a check for \$750,000 and I asked about her 60th birthday and she responded that she would receive a check for \$1,000,000. She continues to receive very significant monthly checks which increase in value each year and all of which are tax-free. She would not relinquish that structure for anything on earth. Every time I have one of those successes, I am so thankful we have this law. I abhor the idea of someone being silly enough to give up those rights for 50¢ on the dollar or less. Hopefully, you have gotten the message across to the bar that they have an obligation to protect their clients against themselves.

JONES, SKELTON & HOCHULI, P.L.C.

Hon. Edward O. Burke
February 26, 2008
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I know that a tremendous amount of effort went into this article and it is greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "William R. Jones, Jr.", with a stylized flourish at the end.

William R. Jones, Jr.
For the Firm

WRJ/clz