

VIRGINIA ACTS OF ASSEMBLY -- 2001 SESSION

CHAPTER 537

An Act to amend and reenact §§ 8.9A-408, 59.1-475, 59.1-476 and 59.1-477 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 59.1-475.1, 59.1-476.1 and by adding in Chapter 41 of Title 59.1 a section numbered 59.1-477.1, and to repeal the second enactment of Chapter 993 of the Acts of Assembly of 1999, relating to the transfer of structured settlement payments; Structured Settlement Protection Act.

[H 1810]

Approved March 23, 2001

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.9A-408, 59.1-475, 59.1-476 and 59.1-477 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 59.1-475.1, 59.1-476.1 and by adding in Chapter 41 of Title 59.1 a section numbered 59.1-477.1 as follows:

§ 8.9A-408. Restrictions on assignment of promissory notes, health-care-insurance receivables, and certain general intangibles ineffective.

(a) Term restricting assignment generally ineffective. Except as otherwise provided in subsection (b), a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the promissory note, health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

(1) would impair the creation, attachment, or perfection of a security interest; or
(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(b) Applicability of subsection (a) to sales of certain rights to payment. Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note.

(c) Legal restrictions on assignment generally ineffective. A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or creation of a security interest in, a promissory note, health-care-insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation:

(1) would impair the creation, attachment, or perfection of a security interest; or
(2) provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health-care-insurance receivable, or general intangible.

(d) Limitation on ineffectiveness under subsections (a) and (c). To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a rule of law, statute, or regulation described in subsection (c) would be effective under law other than this title but is ineffective under subsection (a) or (c), the creation, attachment, or perfection of a security interest in the promissory note, health-care-insurance receivable, or general intangible:

(1) is not enforceable against the person obligated on the promissory note or the account debtor;
(2) does not impose a duty or obligation on the person obligated on the promissory note or the account debtor;
(3) does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party;

(4) does not entitle the secured party to use or assign the debtor's rights under the promissory note, health-care-insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health-care-insurance receivable, or general intangible;

(5) does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor; and

(6) does not entitle the secured party to enforce the security interest in the promissory note, health-care-insurance receivable, or general intangible.

(e) Inapplicability of ~~subsections~~ *subsection (a) and (e)* to certain payment intangibles. ~~Subsections (a) and (e) do~~ *does not apply to:*

(1) the sale of a claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104 (a) ~~(1) or~~ (2), as amended from time to time, provided that no inference shall be drawn regarding the enforceability or nonenforceability under other law or any term in an agreement which prohibits, restricts, or requires consent to the sale of such claim or right described in 26 U.S.C. § 104 (a) (2);

(2) *a claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104 (a) (1), as amended from time to time; or*

(3) a claim or right to receive benefits under a special needs trust as described in 42 U.S.C. § 1396p (d) (4), as amended from time to time.

(f) Inapplicability of subsection (c) to certain payment intangibles. Subsection (c) does not apply to:

(1) a claim or right to receive compensation for injuries or sickness as described in 26 U.S.C. § 104

(a) (1) or (2), as amended from time to time; or

(2) a claim or right to receive benefits under a special needs trust as described in 42 U.S.C. § 1396p

(d) (4), as amended from time to time.

§ 59.1-475. Definitions.

For purposes of this chapter:

"Annuity issuer" means an insurer that has issued ~~an insurance~~ *a contract used* to fund periodic payments under a structured settlement.

"~~Applicable law~~" means the federal laws of the United States; the laws of Virginia; and the laws of any other jurisdiction which is the domicile of the payee, the annuity issuer or the structured settlement obligor, ~~or under whose laws a structured settlement agreement was approved by a court or responsible administrative authority.~~

"Dependents" include a payee's spouse and minor children and all other family members and other persons for whom the payee is legally obligated to provide support, including alimony.

"Discounted present value" means the ~~fair~~ present value of future payments, as determined by discounting such payments to the present using the most recently published ~~applicable federal rate~~ *Applicable Federal Rate* for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

"Federal hardship standard" means a federal standard applicable to transfers of structured settlement payment rights regarding the payee's needs, as enacted by Congress and contained in the United States Internal Revenue Code, United States Code Title 26, as amended from time to time.

"Gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration.

"Independent professional advice" means advice of an attorney, certified public accountant, actuary or other licensed professional adviser.

"Interested parties" means, with respect to any structured settlement, the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under such structured settlement.

"Net advance amount" means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under subdivision 5 of § 59.1-475.1.

"Payee" means an individual who is receiving tax free ~~damage~~ payments under a structured settlement and proposes to make a transfer of payment rights thereunder.

"Periodic payments" includes both recurring payments and scheduled future lump sum payments.

"Qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of § 130 of the United States Internal Revenue Code, United States Code Title 26, as amended from time to time.

"Responsible administrative authority" means, with respect to a structured settlement, any governmental authority vested by law with exclusive jurisdiction over the settled claim resolved by such structured settlement.

"Settled claim" means the original tort claim or workers' compensation claim resolved by a structured settlement.

"Structured settlement" means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim or for periodic payments in settlement of a workers' compensation claim.

"Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement ~~(including the rights of the payee to receive periodic payments).~~

"Structured settlement obligor" means, with respect to any structured settlement, the party that has the continuing ~~periodic payment~~ obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.

"Structured settlement payment rights" means rights to receive periodic payments ~~(including lump~~

~~sum payments~~) under a structured settlement, whether from the *structured* settlement obligor or the annuity issuer, where the payee is *domiciled in, or the domicile or principal place of business of the structured settlement obligor or the annuity issuer is domiciled located in, this state Commonwealth*; or the structured settlement agreement was approved by a court or responsible administrative authority in this ~~state~~ Commonwealth; *or the structured settlement agreement is expressly governed by the laws of this Commonwealth.*

"Terms of the structured settlement" include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement, and any order or *other* approval of any court; *or* responsible administrative authority or other government authority ~~authorizing that authorized or approving~~ *approved* such structured settlement.

"Transfer" means any sale, assignment, pledge, hypothecation, or other ~~form~~ of alienation or encumbrance of structured settlement payment rights made by a payee for consideration; *however, the term "transfer" shall not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the structured settlement payment rights.*

"Transfer agreement" means the agreement providing for transfer of structured settlement payment rights ~~from a payee to a transferee.~~

"Transfer expenses" means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorneys' fees, escrow fees, lien recordation fees, judgment and lien search fees, finders' fees, commissions, and other payments to a broker or other intermediary; *however, "transfer expenses" shall not include preexisting obligations of the payee payable for the payee's account from the proceeds of a transfer.*

"Transferee" means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

§ 59.1-475.1. Required disclosures to payee.

Not less than three days prior to the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type no smaller than fourteen points, setting forth:

1. The amounts and due dates of the structured settlement payments to be transferred;
2. The aggregate amount of such payments;
3. 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," and the amount of the Applicable Federal Rate used in calculating such discounted present value;
4. The gross advance amount;
5. 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;
6. The net advance amount;
7. The amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and
8. 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 by the payee.

§ 59.1-476. Approval of transfers of structured settlement payment rights.

~~A.~~ No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been authorized in advance in a final court order of a court of competent jurisdiction or order of a responsible administrative authority based on express findings by such court or responsible administrative authority that:

1. The transfer ~~complies with the requirements of this chapter and will not contravene other applicable law~~ *is in the best interest of the payee, taking into account the welfare and support of the payee's dependents*;
2. Not less than ten days prior to the date on which the payee first incurred any obligation with respect to the transfer, the transferee has provided to the payee a disclosure statement in bold type, no smaller than fourteen points, setting forth:
 - a. The amounts and due dates of the structured settlement payments to be transferred;
 - b. The aggregate amount of such payments;
 - c. The discounted present value of such payments, together with the discount rate used in determining such discounted present value;

d. The gross amount payable to the payee in exchange for such payments;
 e. A good faith itemized estimate of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, administrative fees, legal fees, notary fees and other commissions, fees, costs, expenses and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

f. The net amount payable to the payee after deduction of all commissions, fees, costs, expenses and charges described in subdivision e;

g. The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments; and

h. The amount of any penalty and the aggregate amount of any liquidated damages (inclusive of penalties) payable by the payee in the event of any breach of the transfer agreement by the payee;

3. The best interests of the payees and the payees' dependents render the transfer appropriate; provided, however, that if, at the time of the effective date of the transfer agreement, there exists a federal hardship standard, then in lieu of the foregoing finding, the court or responsible administrative authority shall make an express finding that the transfer qualifies under such federal hardship standard; and

4. The transferee has given written notice of the transferee's name, address and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of such notice with the court or responsible administrative authority.

B. The provisions of this chapter may not be waived.

C. No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee based on any failure of such transfer to satisfy the conditions of this section.

D. The provisions of this chapter shall not be applicable to payments made pursuant to § 65.2-522. Nothing contained in this chapter shall be construed to authorize any transfer of any structured settlement payment rights, or of any other payment rights arising under a tort claim or a workers' compensation claim, in contravention of applicable law or to give effect to any transfer of such rights that is invalid under applicable law.

2. 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; and

3. The transfer does not contravene any applicable statute or the order of any court or other government authority.

§ 59.1-476.1. Effects of transfer of structured settlement payment rights.

Following a transfer of structured settlement payment rights under this chapter:

1. The structured settlement 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;

2. The transferee shall be liable to the structured settlement obligor and the annuity issuer:

a. If the transfer contravenes the terms of the structured settlement, for any taxes incurred by such parties as a consequence of the transfer; and

b. For any other liabilities or costs, including reasonable costs and attorneys' fees, arising from compliance by such parties with the order of the court or responsible administrative authority or arising as a consequence of the transferee's failure to comply with this chapter;

3. 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; and

4. Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this chapter.

§ 59.1-477. Procedure for approval of transfers.

A. An application under this chapter for authorization under ~~§ 59.1-476~~ approval of a transfer of structured settlement payment rights shall be made and prosecuted by the transferee and may be brought:

1. in the circuit court for a Virginia city or county state in which the payee resides, in the state in which the structured settlement obligor, or the annuity issuer or the transferee resides maintains its principal place of business, or in any court or before any responsible administrative authority that approved the structured settlement agreement. Applications brought in Virginia shall be brought in circuit court, and such court may refer the matter to a commissioner of accounts for a report to such court and a recommendation on the findings required by subsection A of § 59.1-476. Such report and recommendation shall be filed with the court and mailed to all interested parties served under subsection B of this section, and such report and recommendation and any exceptions thereto shall be examined by the court and confirmed or corrected as provided in § 26-33; or

2. In any court which approved the structured settlement agreement or before any responsible administrative authority which approved the structured settlement agreement; or

3. In any other court of general jurisdiction which has jurisdiction to issue a final order pursuant to subsection A of § 59.1-476.

B. Not less than twenty days prior to the scheduled hearing on any application for ~~authorization~~ *approval* of a transfer of structured settlement payment rights under § 59.1-476, the transferee shall file with the court or ~~the~~ responsible administrative authority and serve on all interested parties; a notice of the proposed transfer and the application for its ~~authorization~~ *approval*, including ~~in~~ *with* such notice:

1. A copy of the transferee's application ~~to the court or the responsible administrative authority~~;
2. A copy of the transfer agreement;
3. A copy of the disclosure statement required under § ~~59.1-476~~ *59.1-475.1*;
4. *A listing of each of the payee's dependents, together with each dependent's age;*
4. 5. Notification that any interested party is entitled to support, oppose or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or ~~the~~ responsible administrative authority or by participating in the hearing; *and*
5. 6. Notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed (which shall be not less than fifteen days after service of the transferee's notice) in order to be considered by the court or the responsible administrative authority; *and*

6. Once a transfer of structured settlement payment rights is approved by a final order pursuant to this chapter, no party to the proceeding shall thereafter refuse to honor the approved transfer.

§ 59.1-477.1. *General provisions, construction.*

A. *The provisions of this chapter may not be waived by any payee.*

B. *Any transfer agreement entered into on or after the effective date of the act of the General Assembly enacting this section by a payee who resides in this Commonwealth shall provide that disputes under such transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of this Commonwealth. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.*

C. *No transfer of structured settlement payment rights shall extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for periodically confirming the payee's survival, and giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee's death.*

D. *No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on any failure of such transfer to satisfy the conditions of this chapter.*

E. *Nothing contained in this chapter shall be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into prior to July 1, 2001, is valid or invalid. The provisions of this chapter shall not be applicable to payments made pursuant to § 65.2-522.*

F. *Compliance with the requirements set forth in § 59.1-475.1 and fulfillment of the conditions set forth in § 59.1-476 shall be solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor nor the annuity issuer shall bear any responsibility for, or any other liability arising from, non-compliance with such requirements or failure to fulfill such conditions.*

2. That the second enactment of Chapter 993 of the Acts of Assembly of 1999 is repealed.