

## **Structured Settlement Sales and Lead-Poisoned Sellers:**

### **Just Say No**

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An unexpected consequence of the tragedy surrounding the death of Freddie Gray in Baltimore in 2015 was a series of newspaper articles about Gray's sale of benefits awarded as part of his mother's suit on his behalf against a landlord in whose property Gray had been poisoned by lead paint.<sup>2</sup> Instead of accepting a lump sum damage award, Gray's mother accepted a "structured settlement" under which Gray would receive a periodic stipend.<sup>3</sup>

When Gray turned 18, he acquired the usual legal rights of adults to manage his money. When he was 24, against the advice of his mother and step-father, Gray entered into two transactions to sell parts of the income stream: one for payments totaling \$72,970.80, and one for payments totaling \$145,941.60.<sup>4</sup> The buyer paid Gray \$28,720.50 for the first and \$18,257.70 for the second. Gray's two

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<sup>2</sup> See Terrence McCoy, *Lead Poisoning is 'Toxic Legacy' that Still Haunts Freddie Gray's Baltimore*, WASHINGTON POST (5/1/2015); Terrence McCoy, *How Companies Make Millions off Lead-Poisoned, Poor Blacks*, WASHINGTON POST (8/25/2015); Terrence McCoy, *Cashing in off Poor Lead-Poisoning Victims*, Washington Post (8/26/2015); Terrence McCoy, *Tighter Rules Sought for Md. Settlement Buyouts*, WASHINGTON POST (8/27/2015); Terrence McCoy, *Crackdown on Structured-Settlement Buyouts*, WASHINGTON POST (9/14/2015); Terrence McCoy, *Md. Panel Backs Shift in Lawsuit Payouts*, WASHINGTON POST (10/10/2015); Terrence McCoy, *2 Md. Lawyers under Inquiry*, WASHINGTON POST (11/19/2015); Terrence McCoy, *Court Affirms Payout Changes*, WASHINGTON POST (11/24/2015); Terrence McCoy, *Maryland Probes Buying of Settlement Payouts by 'Unregistered Shell' Firms*, WASHINGTON POST (12/18/2015); Terrence McCoy, *Perils of Early Payoffs in Virginia*, WASHINGTON POST (12/28/2015); Deborah Bailey, *Md. Legislature Seeks Lead Protections for People Like Freddie Gray*, THE AFRO (3/9/2016).

<sup>3</sup> The exact amount and duration of the structured settlement are part of an agreement whose terms have not been made public. The suit also included claims of Gray's two sisters. Their claims were also concluded with confidential structured settlements. See *Carolina Gray et al. v. Rochkind*, Baltimore City Circuit Court, 24C08001821, filed 3/14/2008.

<sup>4</sup> Petition of Freddie Gray, Jr., CAE14-07911 (4/3/2014); State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

sisters, also lead-poisoned as children, entered into similar sales at the same time. Carolina Gray was paid \$28,578.93 for payments totaling \$72,292.80 and \$18,117 for payments totaling \$144,890.40.<sup>5</sup> Fredricka Gray was paid \$28,457.94 for payments totaling \$72,292.80 and \$18,079.00 for payments totaling 144,585.60.<sup>6</sup> Petitions for judicial approval of the sales were filed in the Circuit Court for Prince George's County,<sup>7</sup> which is about 40 miles from the Circuit Court for Baltimore, where the Grays lived. None of the Gray siblings attended the judicial hearings held on their petitions.<sup>8</sup> No notification of the hearing was sent to their mother or step-father.<sup>9</sup> Each hearing lasted under three minutes.<sup>10</sup>

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<sup>5</sup> Petition of Carolina Gray, CAE14-07910 (4/3/2014); State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

<sup>6</sup> Petition of Fredricka Gray, CAE14-07909 (4/3/2014); State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

<sup>7</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016); Terrence McCoy, *Cashing in off Poor Lead-Poisoning Victims*, WASHINGTON POST (8/25/2015).

<sup>8</sup> See Terrence McCoy, *How Companies Make Millions off Lead-Poisoned, Poor Blacks*, WASHINGTON POST (8/25/2015).

<sup>9</sup> Like other states, the Maryland statute does not include the seller's parent, dependent or other people knowledgeable about the seller's circumstances within the term "interested party," so they do not receive notice of the hearing or an opportunity to participate. See Daniel W. Hindert and Craig H. Ulman, *Transfers of Structured Settlement Payment Rights: What Judges Should Know about Structured Settlement Protection Acts*, 44 No. 2 JUDGES' J. 19, 27 (2005).

<sup>10</sup> See Terrence McCoy, *How Companies Make Millions off Lead-Poisoned, Poor Blacks*, WASHINGTON POST (8/25/2015).

The question for this article is whether courts should permit sales of periodic payments under a structured settlement when the structured settlement is compensation paid by the defendant in a tort suit brought by or on behalf of the seller for damages caused by childhood lead poisoning that left the seller incapable of self-support.<sup>11</sup> I conclude that allowing sales in this situation is unjustifiable.

My reasoning has four elements. The first is about autonomy. Respect for the personal autonomy of the seller is important, but a person who has been deprived of the capacity for self-support by lead poisoning is also unusually likely to be a person whose long-term financial decisions are self-destructive. Where the structured settlement is agreed to by a parent on behalf of a lead-poisoned child, respect for the parent's personal autonomy is also important. Current law gives the parent no opportunity to have a say about a sale of structured settlement payments, even in cases where the parent agreed to a bar on the assignment of the benefits and where the parent is likely to become responsible for the care of the seller who spends a lump sum improvidently.

The second issue is whether lead-poisoned sellers can be protected from being exploited by factoring companies that arrange for sales of structured settlement benefits without spending an undue

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<sup>11</sup> While I am arguing that sales involving lead-poisoned sellers should be prohibited, a similar argument can and possibly should be made with respect to other groups of cognitively-impaired individuals. I am limiting my argument here because so many factoring transactions involve lead-poisoned sellers and the nature of the harms inflicted by lead poisoning are well known. See Alexander L. Ash, *It's Your Money and We Want It Now: Regulation of the Structured Settlement Factoring Industry in the Era of Dodd-Frank and the Consumer Financial Protection Bureau*, 86 Miss. L.J. 151, 173-75 (2017) (arguing for barring sales of structured settlements by additional groups of sellers); *In re Riddell*, 138 Wash. App. 485 (2007), as amended on reconsideration (7/3/2007) (modification of trust to convert it to special needs trust granted where beneficiary lacked capacity to make good financial decisions because of her schizophrenia affective disorder and bipolar disorder); *Black v. Duffie*, 2016 Ark. App. 584 (voiding transfers of property made by an elderly woman with limited IQ, cognitive decline and lack of business experience). But see Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 164-67, 171-175 (2010).

amount of taxpayer resources to provide public supervision of the transactions. This is not a new concern,<sup>12</sup> but it has not been discussed before in the context of lead-poisoned sellers. Third, while converting an income stream to a lump sum is desirable in a limited number of cases, judicial procedures adequate to the task of discriminating between desirable and undesirable sales would be costly compared to the usual lack of benefit to potential sellers. Fourth, improvident sales unfairly impose costs on taxpayers, communities and parents, even though both the government and, in most cases, parents, expend resources establishing the structured settlement as a reliable source of support for the sellers.

This article will consider whether the issues raised by sales of structured settlement benefits by lead-poisoned recipients could be addressed by using one of three alternatives to a ban on sales. First, treat the sale like any other contract for the sale of an asset and eliminate both the tax benefits accorded to structured settlements and the judicial review required by federal tax law. Second, maintain the current structure under which the buyer acquires favorable tax treatment only if the sale is subject to the type of judicial approval process required by federal law and enacted in most states. Third, allow the sale only with the consent of a guardian of the seller's property. After considering each alternative in light of the harms suffered by lead-poisoned sellers, the preferences of and costs to their

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<sup>12</sup> See *In re Settlement Capital Corp.*, 1 Misc. 3d 446, 463, 769 N.Y.S.2d 817 (Sup. Ct. 2003): "The Legislative Memorandum in Support of Laws of 2002 (ch. 537) (2002 McKinney's Session Laws of NY, at 2035, 2036) relating to the enactment of the Structured Settlement Protection Act set forth the following as justification for the act:

Recently a growing number of factoring companies have used aggressive advertising, plus the allure of quick and easy cash, to induce settlement recipients to cash out future payments, often at substantial discounts, depriving victims and their families of the long-term financial security their structured settlements were designed to provide. Although transfers of structured settlement payments are generally prohibited by contract (and often prohibited under applicable state law) factoring companies have built a rapidly expanding business around circumventing these prohibitions."

parents, the practices of factoring companies, the capacities of courts, the limits of guardianships, and the costs to taxpayers and communities, I argue that none is an adequate substitute for a ban on sales.<sup>13</sup>

Section One describes the usual consequences to people who are exposed to lead poisoning as children. Section Two explains structured settlements and how benefits are sold. Section Three explains and critiques alternatives to banning sales. Section Four, explains why the better solution is to just say no.

### **Section One: Lead Poisoning**

Exposure to lead happens to thousands of children a year.<sup>14</sup> The most common sources of lead exposure are paint, water pipes and soil.<sup>15</sup> Many exposed children live in poor communities of color, such as West Baltimore, where Freddie Grey lived and died, or Flint, Michigan, where 30,000 children

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<sup>13</sup> The most attractive alternative to a ban on sales would be to incorporate into the state review process a strong presumption against approval of petitions to approve the sale of structured settlements. As discussed later, the approval process is questionable on both substantive and procedural grounds. If those could be cured, then considering incorporating a strong presumption against approval would be a useful approach. It would allow, for example, the sale of a structured settlement income stream if the seller or a member of the seller's family is close to death and needs a lump sum to access potentially life-saving medical treatment. The problem is that curing the procedural problems in the state review process is unlikely at best, because courts are unlikely to put the energy necessary for the task when the sellers are usually from poor communities of color whose petitions are usually heard in overworked and under-funded urban courtrooms.

<sup>14</sup> See CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD (April 2015) ("estimated that tens of millions of U.S. children have been adversely affected by lead over the last 20 years"); Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color* 6-7, forthcoming, HARVARD ENVIRONMENTAL LAW REVIEW, 2017, (available at SSRN: <https://ssrn.com/abstract=2977465>).

<sup>15</sup> See CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 1 (April 2015); Benfer, *supra*, at 6-7.

were exposed to contaminated water delivered by a poorly-managed municipal water system.<sup>16</sup> Others live in rural communities where lead can enter the human environment through mining.<sup>17</sup>

Lead poisoning is irreversible, and no level of lead exposure is safe.<sup>18</sup> Lead is a neurotoxin which, even at low levels, can cause damage to children in the domains of cognition, behavior and executive functioning.<sup>19</sup> The only way to protect a child from harm is to prevent exposure.<sup>20</sup>

The most common cognitive injury left by childhood lead poisoning is a decrease in IQ.<sup>21</sup> A reduced IQ “increases the need for enrollment in special education services, reduces the likelihood of

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<sup>16</sup> See Benfer, *supra*, at 6-7, 13-14; Terrence McCoy, *Lead Poisoning is ‘Toxic Legacy’ that Still Haunts Freddie Gray’s Baltimore*, WASHINGTON POST (5/1/2015) (quoting Saul E. Kerpelman, a Baltimore lawyer specializing in lead poisoning litigation as saying that “Nearly 99.9 percent of my clients were black”).

<sup>17</sup> See Benfer, *supra*, at 6-7.

<sup>18</sup> CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 1 (April 2015).

<sup>19</sup> See David C. Bellinger, *Very Low Lead Exposures and Children’s Neurodevelopment*, 20 CURR. OPIN. PEDIATR. 172 (2008); Kim M. Dietrich, Caleb M. Adler, James C. Eliassen, and Bruce P. Lanphear, *Childhood Lead Exposure Causes Permanent Brain Damage*, SCIENCE DAILY, <https://www.sciencedaily.com/releases/2009/12/091201084152.htm> (Dec. 2, 2009).

<sup>20</sup> CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 1-2 (April 2015).

<sup>21</sup> Bruce P. Lanphear, Richard Hornung, Jane Khoury, Kimberly Yolton, Peter Baghurst, David C. Bellinger, *Low-Level Environmental Lead Exposure and Children’s Intellectual Function: An International Pooled Analysis*, 113 ENVIRONMENTAL HEALTH PERSPECTIVES 894 (2005). The decrease can be present even when the amount of lead measured in the child’s blood is quite low. *Id.*; Centers for Disease Control, U.S. Department of Health and Human Services, Educational Interventions for Children Affected by Lead 3-4 (April 2015) (“Recent epidemiologic studies and quantitative reviews suggest that there is no discernible threshold for lead effects on IQ”). IQ scores are

high school and college graduation, [and] lowers lifetime earnings (both through educational and IQ pathways)....”<sup>22</sup> Children with low IQ usually encounter difficulty with learning to read, although literacy can be achieved literacy if they receive an unusual level of educational intervention.<sup>23</sup>

Behavioral challenges are also common among children exposed to lead, including “impulsivity, aggression, and short attention span.”<sup>24</sup> In a lawsuit filed on behalf of lead-exposed children in Flint, for example, nine of the 15 named plaintiffs were described as having symptoms of attention deficit disorder.<sup>25</sup> Eight were described as engaging in fights at school or exhibiting aggressive or disruptive behaviors, and eight had been suspended or expelled from school.<sup>26</sup> Lead poisoning is associated with increased odds of a diagnosis of conduct disorder, an increased risk of not finishing high school, and criminal behavior.<sup>27</sup> Freddie Gray and his sisters all had trouble at school and were diagnosed with

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correlated with differences in school achievement as well as, to a smaller degree, job performance. American Psychological Association Task Force, *Intelligence: Knowns and Unknowns*, 51 AMERICAN PSYCHOLOGIST 77 (1996).

<sup>22</sup> Elise Gould, *Childhood Lead Poisoning: Conservative Estimates of the Social and Economic Benefits of Lead Hazard Control*, 117 ENVIRONMENTAL HEALTH PERSPECTIVES 1162 (2009); David C. Bellinger, *Very low lead exposures and children’s neurodevelopment*, 20 CURRENT OPINION IN PEDIATRICS 172 (2008).

<sup>23</sup> See Jill H. Allor, Patricia G. Mathes, J. Kyle Roberts, Jennifer P. Cheatham and Stephanie Al Otaiba, *Is Scientifically Based Reading Instruction Effective for Students With Below-Average IQs?*, 80 EXCEPTIONAL CHILDREN 287 (2014).

<sup>24</sup> See CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 6 (April 2015).

<sup>25</sup> D.R. et al. v. Michigan Department of Education et al., ED-MI-0007, Docket / Court, 2:16-cv-13694-AJT-APP (E.D. Mich.) ¶¶90-348.

<sup>26</sup> D.R. et al. v. Michigan Department of Education et al., ED-MI-0007, Docket / Court, 2:16-cv-13694-AJT-APP (E.D. Mich.) ¶¶90-348.

<sup>27</sup> See CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 6-7, 12 (April 2015).



ADHD or ADD.<sup>28</sup> Freddie Gray did not finish high school and was involved frequently in criminal conduct.<sup>29</sup> He described one of his sisters as being “the aggressive one. She like to fight all the time.”<sup>30</sup>

Of particular importance to a person’s decision to sell periodic payments under a structured settlement are problems with executive functioning. Many lead-poisoned children experience particular problems with regard to “higher level” functions of planning and problem solving.<sup>31</sup> A Baltimore “lead kid” named Rose, profiled in an article in the Washington Post, sold structured settlement payments totaling over half a million dollars for a lump sum of \$63,000.<sup>32</sup> Her understanding of the transaction, apparently based on a brief telephone consultation with a lawyer referred to her by the factoring

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<sup>28</sup> Terrence McCoy, *Lead Poisoning is ‘Toxic Legacy’ that Still Haunts Freddie Gray’s Baltimore*, WASH. POST 4-5 (5/1/2015).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Richard L. Canfield, Matthew H. Gendle, and Deborah A. Cory-Slechta, *Impaired Neuropsychological Functioning in Lead-Exposed Children*, 26 DEVELOPMENTAL NEUROPSYCHOLOGY 513 (2004). Executive functioning, as explained by two experts in the field, has multiple aspects:

[T]here exists a relative agreement in terms of the complexity and importance of executive functioning to human adaptive behavior. In a constantly changing environment, executive abilities allow us to shift our mind set quickly and adapt to diverse situations while at the same time inhibiting inappropriate behaviors. They enable us to create a plan, initiate its execution, and persevere on the task at hand until its completion. Executive functions mediate the ability to organize our thoughts in a goal directed way and are therefore essential for success in school and work situations, as well as everyday living.

Maria Beatriz Jurado & Monica Rosselli, *The Elusive Nature of Executive Functions: A Review of our Current Understanding*, 17 NEUROPSYCH. REV. 213 (2007); CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 5, 12 (April 2015).

<sup>32</sup> Terrence McCoy, *Cashing in off Poor Lead-Poisoning Victims*, WASH. POST (8/26/2015).

company, was that she “was selling some checks in the distant future for some quick money, right?”<sup>33</sup> Rose had no plans for using the lump sum she received in exchange for the income stream, but she trusted the representative of the factoring company because he was nice to her, took her out to dinner and guaranteed a vacation for the family.<sup>34</sup>

Executive functioning problems are also likely to be among the most important areas of cognitive injury in terms of their impact on a person’s capacity to make a reasoned judgment about whether to sell benefits under a structured settlement. As explained by two experts in the field,

[T]here exists a relative agreement in terms of the complexity and importance of executive functioning to human adaptive behavior. In a constantly changing environment, executive abilities allow us to shift our mind set quickly and adapt to diverse situations while at the same time inhibiting inappropriate behaviors. They enable us to create a plan, initiate its execution, and persevere on the task at hand until its completion. Executive functions mediate the ability to organize our thoughts in a goal directed way and are therefore essential for success in school and work situations, as well as everyday living.<sup>35</sup>

Dysfunction in executive functioning, therefore, leaves a person vulnerable when confronting a new situation, making long-term plans and carrying them out, regardless of how much information or advice the person may receive. For people who suffer from impaired executive functioning, making decisions deliberately, identifying a suitable goal and accomplishing it are highly unlikely.

## **Section Two: Structured Settlements**

Injuries caused by childhood lead poisoning can affect a person’s capacity to earn a living. Therefore, when a suit for damages is filed on behalf of a lead-poisoned child, the child is examined to determine whether and by how much the child’s eventual earning capacity is likely to decline because of the lead poisoning. For example, if the lead poisoning left the child with a reduced IQ, an inability to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Maria Beatriz Jurado & Monica Rosselli, *The Elusive Nature of Executive Functions: A Review of our Current Understanding*, 17 NEUROPSYCH. REV. 213 (2007).

comprehend written material, emotional explosiveness or poor executive functioning, the child's capacity to earn a living will be diminished as compared with what the child could have earned in the absence of experiencing those types of neurological injuries. Determining the nature of the child's neurological harm and its likely impact on the child's capacities as an adult usually requires neurological, psychological, medical or vocational expertise.<sup>36</sup>

Where a tort suit on behalf of a poisoned child is successful against a landlord or other person responsible for the child's exposure, damages can be awarded for the economic loss the child will experience over a lifetime spent with a reduced capacity for self-support. Damages can be paid in a lump sum or periodically over an extended period of time. The latter is called a structured settlement.<sup>37</sup> During the child's minority, the child is entitled to support from the child's parents. Any damages awarded for lost income-earning capacity, therefore, should be invested until the child reaches the age of majority and loses the right to be supported by the child's parents. At the point when the child reaches the age of majority and becomes responsible for his or her own support, the damages awarded for lost income-earning capacity can be spent for the person's support.

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<sup>36</sup> See, e.g., *Rowhouses, Inc. v. Smith*, 446 Md. 611, 624 (2016) (quoting from report of pediatrician about impact of childhood lead poisoning on plaintiff's cognitive and educational problems resulting in probable loss of capacity for self-support); *Levitas v. Jeffers*, No. 2180 SEPT. TERM 2014, 2015 WL 9306757 (Md. Ct. Spec. App. Dec. 21, 2015), *cert. denied*, 447 Md. 299 (2016) (reliance on expert witness to establish likely economic losses that children will experience over their lifetimes because of lead poisoning); *La Fontaine ex rel. Currie v. Franzese*, 282 A.D.2d 935, 940, 724 N.Y.S.2d 514, 519 (2001) (evidence of vocational economic analyst allowed to establish future lost earnings of child with lead poisoning); *Lewin Realty III, Inc. v. Brooks*, 138 Md. App. 244 (2001), *aff'd sub nom. Brooks v. Lewin Realty III, Inc.*, 378 Md. 70 (2003).

<sup>37</sup> NATIONAL STRUCTURED SETTLEMENTS TRADE ASSOCIATION, *STRUCTURED SETTLEMENT: FINANCIAL SECURITY AFTER A CHILD'S ACCIDENT* (2011); see Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 864 (discussing history of structured settlements); Ellen S. Pryor, *After the Judgment*, 88 VA. L. REV. 1757 (2002) (discussing history of structured settlements). Other elements of damages can include the medical costs, etc., incurred by parents.

Ordinarily, once a person reaches the age of majority, any asset the person owns leaves the control of the person's parent or other guardian and comes under the control of the person. That includes an award of damages, whether that award is in the form of a lump sum or in the form of a structured settlement.<sup>38</sup>

If the award is in the form of a structured settlement, the now adult recipient will be paid a periodic stipend for a number of years or for the lifetime of the recipient. Factoring companies have an interest in buying the stream of payments for two reasons. First, the factoring company pays the recipient a sum of cash that is usually far below the value of the payments over time or even a significant percentage of the present discounted value of the payments. Second, the factoring company acquires the same favorable tax treatment for the structured settlement as that settlement had in the hands of its intended recipient; therefore, the value of the investment is higher than a similar investment which is subject to the usual taxation rules.

Congress extended favorable tax treatment to structured settlements in order to encourage tort victims to prefer them over a lump sum.<sup>39</sup> Congress may preferred the structured settlements to a lump

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<sup>38</sup> See Alanna Ritchie, *Minors and Structured Settlements*, ANNUITY.ORG, <http://www.annuity.org/structured-settlements/minors>; Ellen S. Pryor, *Liability for Inchoate and Future Loss after Judgment*, 88 VA. L. REV. 1757 (2002) (questioning appropriateness of turning over all control of a structured settlement when the payee reaches majority because the financial judgment of an 18 or 19-year old may be questionable).

<sup>39</sup> 26 U.S.C. § 5891. Favorable tax treatment of structured settlements is thought to encourage provident use of tort damage awards by people who might use a lump sum award unwisely, forfeit financial security and risk becoming dependent on public benefits such as Medicaid or Supplemental Security Income. See Kelly McGann, *It's My Money and I Want It Now, Your Honor*, 48 MD. BAR J. 36 (2015); Henry E. Smith, *Structured Settlements as Structures of Rights*, 88 VA. L. REV. 1953, 1962-1967 (2002)(explaining tax and bankruptcy benefits of the structured settlement and characterizing the favorable tax treatment as a bargain between the government and the recipient of tort damages who elects not to take the lump sum); Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 867-69 (discussing history of favorable tax treatment of structured settlements).

sum for several reasons. The most common rationale is that recipients of a lump sum are thought to be inclined toward squandering the asset, rather than providently investing it for long-term support.<sup>40</sup> Another rationale is that an injured person is likely to qualify for means-tested public benefits unless the person has an alternative source of income. Because a recipient of a lump sum settlement may use the funds improvidently, the stream of income provided by a structured settlement protects the state against the cost of means-tested public benefits, such as SSI, MA, cash assistance and SNAP. No concern seems to have been expressed for parents, but the income stream under a structured settlement can also protect the recipient's parents from having to provide financial support after the recipient reaches the age of majority. That responsibility is both moral and legal.<sup>41</sup>

Although Congress adopted favorable tax treatment in order to give tort recipients an incentive to accept a structured settlement rather than a lump sum, Congress did not prohibit tort recipients from conveying the favorable tax treatment upon the sale of a structured settlement. Instead, in 2002, Congress amended the law to explicitly permit the conveyance of the favorable tax treatment in cases where a state court must find that the sale is in the [quote exact language] best interests of the seller and the seller's dependents.<sup>42</sup>

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<sup>40</sup> The argument that structured settlement payees are likely to squander a lump sum has been viewed with skepticism. See Laura J. Koenig, *Lies, Damned Lies, and Statistics? Structured Settlements, Factoring, and the Federal Government*, 82 IND. L. REV. 809 (2007); Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 869-874; However persuasive in some circumstances, the skepticism seems misplaced with respect to a young adult who lives in poverty and whose childhood lead poisoning caused such harm in the realms of cognition, executive functioning and behavior that the payee's capacity for self-support has been severely reduced or totally eliminated.

<sup>41</sup> MD. CODE ANN. FAM. LAW §§13-101 – 13-109.

<sup>42</sup> 26 U.S.C. § 5891 (in absence of a state court finding that the sale is in the best interest of the payee, the transferee is subject to a 40% excise tax on the transfer as well as the loss of favorable tax treatment for the income earned by the principal under the annuity contract); see Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 869 (discussing impact of favorable tax treatment on the value of a structured settlement to the defendant in the tort suit and to an investor; "whatever its source, the

### Section 3: Alternative Approaches to Banning Sales of Structured Settlements by Lead-Poisoned Sellers

#### *Alternative 1: Treat the Sale of a Structured Settlement the Same as Other Contracts by Eliminating the Favorable Tax Treatment and the Judicial Review*

The usual rule in contracts is that willing buyers and sellers may make whatever deals they agree to, however prudent or “im.” The limited constraints on the capacity to contract include, for example, situations where a person is deemed incapable of acting autonomously or where a party has manipulated the transaction in a manner deemed grossly unfair. For example, minors<sup>43</sup> and persons under guardianship<sup>44</sup> cannot enter into enforceable contracts, and contracts with people experiencing incapacity in some measure may be voidable.<sup>45</sup> Contracts may not be enforced where a party demands an unconscionable term,<sup>46</sup> or where one party owes the other a special duty of care.<sup>47</sup>

In the case of a sale of an income stream payable under a structured settlement, most states have an exception from the usual rule where the structured settlement was entered in a worker’s

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effect of this drive [toward structured settlements] has been a largely unacknowledged transfer of tort liability from tort defendants to plaintiffs and the federal Treasury”).

<sup>43</sup> RESTATEMENT (SECOND) OF CONTRACTS § 12(2)(a)-(b) (1981) (minors and persons under guardianship lack capacity to assent to contract).

<sup>44</sup> *Id.*

<sup>45</sup> See Samuel Williston & Richard A. Lord, 1 *Williston on Contracts* § 10:8 (4th ed. 1990); cf. RESTATEMENT (SECOND) OF CONTRACTS § 12(2)(c) (1981) (includes within category of persons incapable of entering into a contract persons who are “mentally ill or defective”).

<sup>46</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”)

<sup>47</sup> RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981) (undue influence renders contract voidable).

compensation claim.<sup>48</sup> In other words, if a seller agrees to sell an income stream awarded in a worker's compensation case, the agreement is unenforceable in most states. The question for this subpart, therefore, is whether the prohibition on sales of structured settlements arising out of worker's compensation claims is the right model for sales of structured settlements arising out of childhood lead poisoning cases.

Similarities between structured settlements in workers compensation cases and childhood lead poisoning cases are important. In both, the stream of payments is a substitute for the income that the recipient would earn but for the injury that gives rise to the settlement. Also, in the absence of the stream of income, both kinds of recipients face the risk of extreme poverty. The state, community and family, therefore, are at risk of having to provide support to the recipient if the stream of income is unavailable. In both situations, further, the possibility of acquiring a relatively secure investment with an excellent return gives the buyer a strong incentive to exploit any weaknesses of the seller.

Whether a seller is likely to be exploitable is a key distinction. A person may receive worker's compensation for any injury related to employment; the injury need not be one that affects the worker's cognition or executive functioning in a way that may reduce the worker's capacity to evaluate the costs and benefits of an offer to sell the income stream. That is not true where the seller's income stream arises out of childhood lead poisoning that left the seller incapable of self-support. That seller, as described earlier, is far less likely than most people to have the capacity to make a reasoned judgment about selling an income stream and perhaps more likely to fall for an exploitative pitch by a potential buyer. Given that reality, the case for banning the sale is even stronger in childhood lead poisoning cases than in worker's compensation cases.

Another important distinction may push in the opposite direction. The structured settlement is entered in a worker's compensation case only if the injured worker has agreed to accept a stream of payments in lieu of a lump sum. The worker, therefore, has one opportunity to take a lump sum and decides not to do so. The subsequent constraint on sale means that the worker is denied a chance to second guess the initial judgment, but the initial judgment was the worker's to be made. Where a structured settlement is entered in a childhood lead poisoning case, on the other hand, the decision is

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<sup>48</sup> See David B. Torrey, *Compromise Settlements under State Workers' Compensation Acts: Law, Policy, Practice, and Ten Years of the Pennsylvania Experience*, 16 WIDENER L.J. 199, 380-83 (2007) (discussing limits on sales of structured settlements by recipients of worker's compensation award).

typically made by a parent on behalf of a minor child. It is only when the child reaches the age of majority that the recipient has the opportunity to forego a lump sum in lieu of a regular income stream. Given the neurological harms that justified the tort judgment, however, the distinction should not be viewed as determinative. Further, allowing the now adult recipient to second-guess the judgment of the parent can have costs for the parent, including the duty, sometimes legally enforced, to provide support for the adult disabled child if that person sells the structured settlement income stream and fails to generate a substitute stream of income with the lump sum.

The buyer's temptation toward exploitation must be understood in light of the value of the purchase. The buyer is acquiring an income stream funded by a defendant who has purchased an annuity from an insurance company. The income stream is, therefore, quite secure. Some doubt is possible, of course, if the income stream terminates upon the death of the payee rather than after a period of years. If that happens, a buyer may get less than a full return on the investment. For example, if the structured settlement in the Gray case terminated upon his death, investors who bought the rights to his income streams may have lost money because he died within a year of the sale. Without more data on how many sellers die before the investor has recouped the investment, it's not known how speculative the investment is. In the meantime, buyers point to the risk of premature death of the payee as an important reason for paying a relatively low price for the payment stream.

The value of the purchase turns on two calculations: the difference between the total amount of payments and the present value of the payments over time, and the lump sum paid by the seller as a kind of loan, which can be represented by an interest rate. Maryland's Attorney General examined the interest rate on transactions between 2013 and 2015, and found a range from a low of 8.5 percent to a high of 25 percent.<sup>49</sup> During that time, banks were paying interest of less than 1 percent, so investing in the purchase of structured settlement benefits promised a good rate of return, despite the risk of premature death of the seller.<sup>50</sup>

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<sup>49</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

<sup>50</sup> A New York Court commented critically on the risk/return issue in one of the early cases involving judicial approval of a structured settlement sale in a case where the petition was denied:



Investing in a structured settlement income stream includes a third valuable feature: favorable tax treatment. During the time the money remains in the annuity, its gain is not taxed. This is an exception from the usual rule that gains made on investments are taxed in the year the gain is realized. The periodic stipend, once paid, is taxed as ordinary income. For the favorable tax treatment to accompany the sale of the structured settlement income stream, a state court must approve the transaction as being in the best interests of the seller and the seller's dependents. If the transaction is not approved, the sale is subject to an excise tax of 40 percent.

Investors who buy structured settlement benefits and the factoring companies that set up the transactions understand that much of the value of the investment turns on the favorable tax treatment. Therefore, transactions are rarely entered into without judicial approval. The reality, then, is that these transactions do not follow the usual contract rule, allowing enforcement of most provisions agreed to by a willing seller and a willing buyer. Those usual rules are bent to accommodate the buyer's need to get judicial approval, a process that should, at least in theory, provide some protection for the seller against improvidently entering into a transaction that does not serve the best interests of the seller or the seller's dependents.

Examining the deficits of the judicial approval process is the subject of the next section. What seems clear from an examination of petitions in Maryland over a three-year period is that judges do not

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[18%] is clearly a very high rate for a secured investment. The petitioner attempts to justify it through an affidavit from a senior vice president, David Reape, who compares it with credit cards charges from several banks. Credit cards, however, are unsecured. Even the minimal security provided by a motor vehicle—a depreciating asset subject to accidental damage which must be located and repossessed, often with judicial assistance—is sufficient to make car loans much less costly than credit card debt. The petitioner is buying an obligation to pay a given sum on a given date, entered into by a company previously determined to be adequately capitalized and competently managed. This is as secure as any commercial instrument can possibly be, and there is no obvious justification for treating it as equivalent to a consumer's unsecured promise to keep a revolving credit account current.

*In re* 321 Henderson Receivables Ltd. P'ship, 2 Misc. 3d 463, 465, 769 N.Y.S.2d 859, 861 (Sup. Ct. 2003).

see their role as protective.<sup>51</sup> Instead, it appears that most judges are convinced that respect for freedom of contract is the correct answer when lead-poisoned recipients of a structured settlement seek to sell their benefits, so only *pro forma* examination is needed when the court examines a petition to approve a sale.<sup>52</sup>

The Maryland Attorney General's office identified a total of 132 petitions between 2013 and 2015 in which the petitioner sought approval for the sale of all or some payments from an income stream under a structured settlement where the petitioner had a tort judgment based on settlement awarded because of childhood lead poisoning. Of these, 119 were granted, two were denied, and the remainder were dismissed by the petitioner.

The success rate might be explained by the persuasiveness of the sellers' statements about their plans for spending the lump sum to resolve debts, buy a house, get an education or open a business. Given the known cognitive, emotional and behavioral limitations of the sellers, those explanations are unlikely to be credible, even if offered. As explained below, few petitions suggest that the seller was planning to make good long-term use of the lump sum or that the seller could carry through on a long-term plan if one were made.

The success rate might also be explained by the skillful counsel for the factoring companies who made sure that the law was followed punctiliously, and that each and every petition was persuasive in every respect. That explanation also seems unlikely, however, in view of the suit by the Attorney General's office about the collusion between the companies and the theoretically independent advisor with whom the petitioners consulted. In addition, in at least one of the cases in which the petition was

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<sup>51</sup> State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

<sup>52</sup> See *In re Rains*, 473 S.W.3d 461 (Tex. App. 2015) ("A contract is a bargain struck by two or more individuals or entities. It encompasses the rights and obligations which the parties are willing to accept. And, to the extent that they struck the bargain, the bargain is theirs to modify. While a court is empowered to construe the respective rights and obligations of those parties under their agreement, it is not a party to the agreement. Nor does it have the inherent authority to modify or rewrite that agreement on behalf of the parties.")

denied, the court issued a written opinion in which the court identified multiple flaws in the petition that made granting it both technically and substantively inappropriate.<sup>53</sup>

What is more likely is that, in the 119 cases in which the petition was granted, the judge was relying on an untested allegiance to freedom of contract: regardless of the prudence of the deal, an adult should be allowed to agree to it. Prior to changes in the rules in late 2015, the judges were unlikely to meet the petitioner in the courtroom. Petitions could be filed in any circuit court and were typically filed in a jurisdiction far from the petitioner's home. Judges therefore rarely saw the petitioner and had no first-hand basis to determine whether the petitioner was capable of exercising an acceptable level of self-management and financial judgment.<sup>54</sup> Further, under the earlier version of the rules, the court was not required to consider whether any independent examination into the petitioner's cognitive capacity was necessary.

Assuming that the petitioner's capacity were not in question, freedom of contract should still be questionable because it is unlikely that petitioners could be adequately educated about the nature of the transaction. In other words, no matter what rules are in place mandating fair disclosure about terms, few petitioners with unimpaired cognitive capacity would fully understand what is being sold and how the price is determined.<sup>55</sup> It follows that even fewer petitioners with impaired capacity can fully understand the deal they are entering into.

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<sup>53</sup> *In re Wilson*, No. 310601V, 2009 WL 1569730 (Md. Cir. Ct. May 22, 2009); see Kelly McGann, *It's My Money and I Want It Now, Your Honor*, 48-JUN MD. B.J. 36 (2015).

<sup>54</sup> All but a few of the 132 petitions were filed by petitioners under the age of 30. Thirty-three petitioners were age 17, 18 or 19. Whether youthful immaturity and impulsivity, as well as the consequences of lead poisoning should be a factor in capacity in these cases is something that is intriguing, but beyond the scope of this paper.

<sup>55</sup> See Michelle M. Marcellus, *Resolving the Modern Day Esau Problem Among Structured Settlement Recipients*, 40 HOFSTRA L. REV. 517, 541 (2011) (opacity of financial concepts in structured settlement sales makes them close to impossible to understand); Daniel W. Hindert and Craig H. Ulman, *Transfers of Structured Settlement Payment Rights: What Judges Should Know about Structured Settlement Protection Acts*, 44 No. 2 JUDGES' J. 19, 24-25 (2005) (explaining the complex information and calculations necessary for a court to evaluate whether a price is fair).

The first step in determining the value of the sale is to determine how much principal would be needed to generate the promised payments over the term of the payout. That amount is called the “discounted present value.” Whether that amount is accurate in any particular case is problematic. Some settlements promise payments for life, which is an undeterminable period of time, and others promise payments for a period of years, so identifying the amount of principal differs depending on the terms of the structured settlement. Nor is it possible to know exactly how much income a particular amount of principal will earn in the future, since interest rates vary from time to time. Using standardized projections created for other transactions may be helpful, but those projections may not be pertinent to the situation of a young person living in inner-city Baltimore.

The second step is identifying the discount rate the investor will charge. In other words, investors do not pay the seller the “present discounted value” of the payments that are being sold. Instead, that amount is further discounted. The Attorney General’s study revealed discount rates ranging from a low of 8.5 percent to a high of 25 percent.<sup>56</sup> The discount rate is the equivalent of the annual interest rate being paid by the seller on the lump sum paid by the buyer.

People with significant education and investment experience may find this explanation difficult to follow. The petitions described in the Attorney General’s docket study demonstrate that calculations of the “present discounted value” and the “discount rate” are subject to considerable differences that may lack any explanation other than what a particular seller will accept. For example, two sellers petitioned to sell payments worth approximately \$500,000. In one case involving a 23-year-old seller in 2013, the present discounted value of the payments was \$350,399.80, the discount rate was 8.47% and the cash paid to the seller was \$63,935.04.<sup>57</sup> In the second, involving a 24-year-old seller in 2014, the present discounted value of the payments was \$290,909.38, the discount rate was 9.86% and the cash

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<sup>56</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

<sup>57</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016) at 1 (Petition of Christopher Green).

paid to the seller was \$46,510.05.<sup>58</sup> Three cases involving payments worth approximately \$300,000 showed similar variability. In one, involving an 18-year-old seller in 2014, the present discounted value of the payments was \$243,843.78, the discount rate was 11.44% and the cash paid to the seller was \$33,000.00.<sup>59</sup> In the second, involving a 19-year-old seller in 2014, the present discounted value of the payments was \$229,748.83, the discount rate was 15.59% and the cash paid to the seller was \$64,000.<sup>60</sup> In the third, involving a 19-year-old seller in 2015, the present discounted value was \$198,167.16, the discount rate was 11.82% and the cash paid to the seller was \$16,000.00.<sup>61</sup> Transfers of payments worth \$100,000 or less are also common and show similar variability. In one sale, involving a 20-year-old in 2014, the present discounted value was \$83,424.98, the discount rate was 25.22% and the cash

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<sup>58</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016) at 5 (Petition of Michael Barber).

<sup>59</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016) at 3 (Petition of Brian Stokes).

<sup>60</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016) at 5 (Petition of Tyrell Dowery). Interestingly, the petitioner's twin, whose payments were worth \$500 more, ended up with the same cash payment. *Id.* at 5 (Petition of Tyree Dowery).

<sup>61</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016) at 8 (Petition of Tyrell Dowery). The amount of payments sold at the same time by Tyrell Dowery's twin was worth approximately \$500 less, but both ended up with the same cash payment. *Id.* at 8 (Petition of Tyree Dowery).

paid to the seller was \$36,400.00.<sup>62</sup> In another, involving a 20-year-old in 2015, the present discounted value was \$75,758.91, the discount rate was 16.58% and the cash paid to the seller was \$31,681.77.

Revisions in 2016 to Maryland's Structured Settlement Protection Act support consumer protections by requiring additional disclosures and adding provisions for enhancing the independence of the financial advice offered to petitioners.<sup>63</sup> Given the complexity of the transactions and the vulnerability of lead-poisoned petitioners, however, whether such provisions will help petitioners better protect their interests unclear. Further, consumer protection is about protecting the ideal of freedom of contract, making sure that both parties to the transaction have access to important information and can use that information to make choices. The relevance of that ideal is limited where the seller has known limitations, the buyer is subject to a temptation toward exploitation is predictable, and taxpayers, communities and families are stuck with the bill if the seller fails to use the lump sum to generate an alternative source of support.

Traditional freedom of contract turns on respect for the right of the individual to exercise his or her autonomy, regardless of whether one party is exercising great judgment and, within limits, regardless of whether the party is tempted to engage in unscrupulous conduct. What is important in the context of the sales at issue here is that a key to the benefit the buyer wants is favorable tax treatment for the investment. So taxpayers subsidize the transactions even though, after the transaction, taxpayers may also subsidize the seller through the provision of public benefits. Once the favorable tax treatment feature is removed from the transaction, fewer buyers, if any, would be tempted to exploit the seller's weaknesses in order to obtain the seller's consent. Even if the seller's

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<sup>62</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016) at 4 (Petition of Jassmyn Chase).

<sup>63</sup> Consumer protection provisions appear in statutes in other states as well. The California statute, for example, requires that the petitioner be advised about how to make a report if the petitioner believes he or she was "treated unfairly or misled as to the nature of the obligations you assumed upon entering into this agreement. CAL. INS. CODE §10136(c)(12). Also, a copy of the petition must be filed with the Attorney General. CAL. INS. CODE §10139(a).

autonomy were constrained by a prohibition on sales, the constraint is no greater than what occurs in worker's compensation cases. Further, the parent's effort to assure that the child enjoys some financial security as an adult would be actualized. Finally, banning sales would also protect the community and the taxpayer from having to support a seller who enjoys the benefits of a regular income stream.

*Alternative 2: Allow a Lead-Poisoned Recipient of a Structured Settlement to Sell Income Stream and Favorable Tax Treatment after Review by a State Court*

The argument that the recipient of a structured settlement should have the usual freedom of contract was rejected by Congress when it amended the tax law in 2002 to deny recipients the right to transfer the favorable tax treatment of the structured settlement unless a state court found the sale to be in the best interest of the payee and the payee's dependents.<sup>64</sup> Justifying this constraint on freedom of contract of a lead-poisoned recipient of a structured settlement depends, in part, on whether the state protective statutes in fact protect a lead-poisoned recipient against deals that do not serve the best interests of the seller or the seller's dependents. The Maryland Structured Settlement Protection Law and the pertinent sections of the state's procedural rules are typical in many ways of state statutes adopted to comply with the federal tax law and will be the focus of the analysis here.

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<sup>64</sup> See Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 920-21 (describing the tension between the paternalism goal of Congress in enacting favorable tax treatment versus the "traditional respect for individual autonomy" of the seller); Daniel W. Hindert and Craig H. Ulman, *Transfers of Structured Settlement Payment Rights: What Judges Should Know about Structured Settlement Protection Acts*, 44 No. 2 JUDGES' J. 19, 20 (2005) (describing early adoptions of states "Structured Settlement Protection Act"); Michael Charles Sullivan, *Exemption from the Common Fate: Refuge for Individual Debtors Trapped by Structured Settlements, Factoring Companies, and the Bankruptcy Code In Georgia*, 49 GA. L. REV. 576, 586-87 (2015) (describing development and terms of state Structured Settlement Protection Acts); Jeremy Babener, *Justifying the Structured Settlement Tax Subsidy: The Use of Lump Sum Settlement Monies*, 6 N.Y.U. J.L. & Bus. 127 (2009) (same).

When favored tax treatment of structured settlements was first adopted in 1982, Congress appears to have had two goals.<sup>65</sup> First, Congress wanted to encourage tort claimants to accept payments over time rather than a lump sum to avoid the temptation of “prematurely dissipating” the funds.<sup>66</sup> Second, it wanted to avoid providing means-tested public benefits for tort claimants who would have been able to support themselves had they not prematurely dissipated a lump sum award.<sup>67</sup> In other words, Congress appears to have decided to forego tax revenue in order to avoid a predictable demand for tax-funded benefits later on. When Congress agreed to allow the transfer of favorable tax treatment in 2002, there was no indication that the goals underlying the favorable tax treatment had changed. Instead, Congress apparently decided to rely on state courts to prevent transfers in situations where the seller’s best interests were not protected, such as in cases where premature dissipation would occur.<sup>68</sup>

A tort claimant whose childhood lead poisoning results in the loss of all or some of the capacity for self-support is a poster child for the arguments in favor of a structured settlement. At the time the tort claim is settled with a structured settlement, the parent, acting for the minor, can predict with a

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<sup>65</sup> The legislative history is obscure, but it is fair to deduce these goals. See Jeremy Babener, *Structured Settlements and Single-Claimant Qualified Settlement Funds: Regulating in Accordance with Structured Settlement History*, 13 LEG. & PUB. POL. 1 (2010); Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859.

<sup>66</sup> Babener, *supra* note \*\*, at 3.

<sup>67</sup> Babener, *supra* note \*\*, at 3.

<sup>68</sup> See *In re Settlement Capital Corp. (In re Richard C. Ballos)*, 769 N.Y.S.2d 817, 1 Misc.3d 446 (Sup. Ct. 2003) (“[T]his Court finds that the ‘best interest’ standard under the SSPA requires a case by case analysis to determine whether the proposed transfer of structured settlement payments, which were designed to preserve the injured person’s long-term financial security, will provide needed financial rescue without jeopardizing or irreparably impairing the financial security afforded to the payee and his or her dependents by the periodic payments.”); Corrie Erickson, *Chapter 593: A Structure for the Transfer of Structured Settlements*, 41 MCGEORGE L. REV. 667 (2010).



high degree of confidence that, when the child reaches adulthood, he or she will lack the usual degree of judgment about financial matters because of low IQ, coupled with full or partial illiteracy. Further, the predictable impulsivity and poor executive functioning that result from lead-poisoning mean, in all likelihood, that the adult will be unable to turn a lump sum into an investment that supports financial security. Instead, the payee is likely to spend the lump sum on plans that cannot be realized and on other goods and services that will not yield a source of ongoing support.<sup>69</sup> If the parent wants the child to have a source of financial security during adulthood, therefore, the best solution is a structured settlement or some other arrangement that prevents access to the principal, such as a trust.<sup>70</sup> The alternative is to allow the child, as an adult, to use up the principal and become dependent on public benefits, coupled with parental support.

Judicial concern about premature dissipation of a lump sum payment is a common theme in cases that deny petitions for the sale of structured settlement payments.<sup>71</sup> In Maryland, the only published opinion of a court denying a petition for approval of a sale details the experience of Quintel Wilson who, over the course of four years, in multiple transactions, sold payments totaling close to

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<sup>69</sup> Cf. *In re Riddell*, 138 Wash. App. 485, *as amended on reconsideration* (2007) (parent attempted to protect child from herself by modifying trust into a special needs trust instead of directly giving the child the principal because daughter was bipolar and schizophrenic and could not make her own financial decisions or live unassisted).

<sup>70</sup> Ellen S. Pryor, *Liability for Inchoate and Future Loss after Judgment*, 88 VA. L. REV. 1757, 1774-75 (2002).

<sup>71</sup> Empirical evidence for the squandering plaintiff claim may be problematic. See Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859; Ellen S. Pryor, *Liability for Inchoate and Future Loss after Judgment*, 88 VA. L. REV. 1757, 1779-81 (2002); Jeremy Babener, *Justifying the Structured Settlement Tax Subsidy: The Use of Lump Sum Settlement Monies*, 6 N.Y.U. J.L. & BUS. 127 (2009) (examining data about dissipation of lump sum judgments and concluding that evidence is incomplete and unpersuasive). But see Scott Hankins, Mark Hoekstra and Paige Marta Skiba, *The Ticket to Easy Street? The Financial Consequences of Winning the Lottery*, 93 REV. ECON. & STAT. 961 (2011) (lottery winners went bankrupt only a few years after others in poor economic conditions and most did not use winnings to pay off debt or increase equity in secured assets).

\$700,000 in exchange for lump sums totaling less than \$200,000. According to his petitions, one purpose for selling his benefits was to invest in a parking lot business, but no progress seems to have been made on that goal. Mr. Wilson also said that he needed money for daily living, including paying tuition and rent, buying furniture and a used car, paying off debt and having an emergency fund. In another petition, his plan was to buy a house. When questioned by the Court considering the next petition, Mr. Wilson said that all of the money had been spent on other things and that he still needed money for a business now described as including parking lots and used car sales.<sup>72</sup>

A 21-year-old petitioner in New York, according to the court that denied the petition, wanted the money to open a barber shop. However, he had no knowledge of the licensing requirements for a barber shop, had not investigated the cost of the necessary merchandise, and had not located a suitable space. The figures which Mr. Martinez had included in his affidavit had no basis in fact, and he himself had little more than an acquaintance who was a barber. That person, while identified by Mr. Martinez by name, declined to appear in court to discuss the potential of a business opportunity. Nor was Mr. Martinez able to develop a concrete plan or even locate a viable storefront, despite repeated adjournments and some assistance from counsel.”<sup>73</sup>

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<sup>72</sup> *In re* Petition of Quintel Wilson, 2009 WL 1569730 (Md. Cir. Ct.).

<sup>73</sup> *Petition of 321 Henderson Receivables, L.P. v. Martinez*, 11 Misc. 3d 892 (N.Y. Sup. Ct. 2006). Whether Mr. Martinez was lead-poisoned was not revealed in the opinion, but it is a possibility since the structured settlement arose out of a suit brought by his mother during his minority. *See also Matter of J.G. Wentworth Originations, LLC v. Hall*, 43 Misc. 3d 837 (N.Y. Sup. Ct. 2014) (20-year old recipient of a structured settlement received an initial payment of approximately \$200,000, which she spent in a little over a year in a variety of ways, none of which contributed to her capacity to earn a living. She loaned \$15,000 to people who never paid her back, spent \$60,000 on the purchase of four cars, lost \$5,000 to theft by her boyfriend, and consumed \$14,980 in monthly expenses over 14 months. She could not account for \$19,534. She also paid \$88,000 for a house subject to a mortgage, but she had no source of regular income to pay the mortgage. She sought to use the house as a source of income by means of some kind of sale that she could not describe to the court, but the buyer failed to make payments. As a result, she was left with a mortgage on a house she could not occupy. The court denied a petition to sell future

The combination of the favorable tax treatment and the relatively low purchase price for a secure income stream appears to have made investing in structured settlement benefits irresistible to some investors, no matter what practices are used to achieve the deal. In Maryland, the practice of factoring companies appears to be to approach “lead kids” shortly after they reach the age of majority, which explains why all but six of the sales in the Attorney General’s study involved sellers under the age of 30.<sup>74</sup> The only source of protection is the state court’s review of proposed sales.

Given the apparent congressional goal of encouraging people to accept a structured settlement to prevent dissipation of a lump sum and to decrease the need for means-tested public benefits, one would think that state court review statutes would focus on the economic security question. That is, approval of a sale of a structured settlement should turn on whether the lump sum paid to the seller will be used to create a similar level of economic security. For example, if a seller wants to use the lump sum to buy a house or open a business, approval should depend on whether the plan enhances the seller’s economic well-being. If buying a house is likely to expose the seller to additional liabilities or responsibilities that are beyond the seller’s means, or if the business is likely to fail, then the plan should not be found to be in the seller’s best interests.

Rather than focusing on economic security, however, the standard in most state statutes is vague.<sup>75</sup> Like many, the Maryland Structured Settlement Protection Act adopts the federal standard: the court is authorized to approve the sale of benefits under a structured settlement upon a finding that

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structured settlement payments on the basis, in part, that the recipient “shows a lack of the level of financial sophistication necessary to make good decisions about her finances.”).

<sup>74</sup> See State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

<sup>75</sup> Michigan’s statute provides an exception applicable in limited circumstances. In cases where the structured settlement obligor, *i.e.*, the annuity company, objects to the sale on the basis of a restriction on assignment, the sale can be approved only if the seller “will suffer imminent financial hardship” and the sale “will not render the payee unable to pay current or future normal living expenses.” Mich. Comp. Laws Serv. §691.1304(e) (LexisNexis 2006).

the sale is “in the best interest of the payee, taking into account the welfare and support of the payee’s dependents.”<sup>76</sup> Maryland’s relatively new language has not been the subject of interpretation as yet, and the term “best interests” is notoriously elastic. Maryland courts may interpret it consistently with the more expansive statutory language adopted in California, which requires the court to consider whether the transfer is “fair, reasonable, and in the payee’s best interest” in light of the “totality of the circumstances,” including the seller’s “age, mental capacity, legal knowledge and apparent maturity level.”<sup>77</sup> New York courts have interpreted the “best interests” language as including consideration of characteristics of the seller that might make it more or less likely that the seller would put the purchase price to good use, such as the seller’s mental capacity and the seller’s ability to earn a living and support dependents.<sup>78</sup> Courts applying these standards can focus on many things, including economic security, but economic security is not necessarily determinative.

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<sup>76</sup> See MD. CODE ANN., CTS. & JUD. PROC. § 5-1102(b)(1) (West 2016) (“[I]n the best interest of the payee, taking into account the welfare and support of the payee’s dependents”); cf. 215 ILL. COMP. STAT. ANN. 153/15 (West 2015) (best interest of the payee); FLA. STAT. ANN. § 626.99296(a)(3), (6) (West 2016) (“net amount payable to the payee is fair, just, and reasonable under the circumstances then existing;” “transfer is in the best interests of the payee, taking into account the welfare and support of the payee’s dependents”).

<sup>77</sup> CAL. INS. CODE § 10139.5 (West 2010) (totality of the circumstances includes seller’s “financial and economic situation,” the need of the seller for the future payments to “pay for future care and treatment” related to the underlying injury and the need of the seller for the payments “to pay for future necessary living expenses” along with multiple additional factors); CAL. INS. CODE § 19137(a) (West 2010); see Corrie Erickson, *Insurance: Chapter 593: A Structure for the Transfer of Structured Settlements*, 41 MCGEORGE L. REV. 667 (2010) (statute requires that best interests of the petitioner be determined based on the “totality of the circumstances”).

<sup>78</sup> N.Y. Gen. Oblig. §5-1706(b) (West 2004); see *Petition of 321 Henderson Receivables, L.P. v. Martinez*, 11 Misc. 3d 892 (N.Y. Sup. Ct. 2006) (although court found it likely that petitioner would squander the lump sum, petition was granted); *Settlement Funding of N.Y. LLC v. Kiezel*, 12 Misc. 3d 1155 (N.Y. Sup. Ct. 2006) (seven factors to be considered in determining best interests include the “beneficiary’s capacity to earn a living and support his or her dependents” and “the beneficiary’s intended usage of the proceeds”). One New York court listed eight factors to

Even if the best interests standard plainly and narrowly focused on economic security, its usefulness as a filtering device turns on a court having adequate information to apply the standard to the situation of the petitioner. In Maryland, as in other states, the court's information about the "best interests" of the payee and the payee's dependents is provided through the contents of the petition and a hearing. The petition is nominally filed by the payee, but typically the buyer prepares and files it. The petition must include, among other things, information about the terms of the sale, a listing of the payee's dependents, a copy of disclosures about the transaction made to the payee, and a copy of the structured settlement agreement if available.<sup>79</sup> It must be served on the payee and other "interested parties," which typically means the insurance company with the annuity.<sup>80</sup>

Even under a vague best interests standard, a court cannot determine whether the standard is met without some level of investigation. Generally, states do not make a full investigation a prerequisite for the approval of a sale, which suggests that most states have decided that the cost of a full investigation outweighs the benefit. For example, state laws do not require notice to or participation in the hearing by the seller's dependents<sup>81</sup> or by other parties who could shed light on the situation of the seller or the seller's dependents, such as parents or other caregivers. Further, none of the states provides for notice to or participation in the hearing by any government agency which may provide or be subject to providing support for the seller if the seller should dissipate the lump sum. While

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consider in determining best interests; none of them related to the use of the payment for the purpose of ensuring the seller's economic security. *In re Settlement Capital Corp.*, 1 Misc. 3d 446, 455 (N.Y. Sup. Ct. 2003).

<sup>79</sup> MD. CODE ANN., CTS. & JUD. PROC. § 5-1102(b)(1) (West 2016); *cf.* CAL. INS. CODE § 10139(f)(2) (A-H) (West 2010) (same).

<sup>80</sup> See note \*\*, *supra*.

<sup>81</sup> It is not impossible, of course, for a court to conclude that the sale is not in the best interests of the seller without hearing from the seller's dependents. See *In re Settlement Capital Corp.*, 1 Misc. 3d 446, 463 (N.Y. Sup. Ct. 2003). Unless the dependent and/or the dependent's guardian is notified about the petition and permitted to testify at the hearing, however, the court's only source of information about the existence and needs of the dependent and the history of the seller's level of responsibility toward the dependent is the seller. In the absence of first-hand information, a court can be misled by simple mistakes, as well as efforts to mislead the court.

California and New York point to the seller's mental health as a circumstance to be considered on the question of best interests, neither state has a procedure other than the hearing for the court to gather information on the subject. One court in New Jersey took the novel step of adopting a questionnaire to gather information and analyze the likelihood of a potential seller adequately investing a lump sum payment, which may be a quick way of assembling information but provides no assurance of accuracy.<sup>82</sup>

An unusual feature of the Maryland procedure is its attention to alerting the court that a case may involve lead poisoning or other sources of cognitive issues and a means for the court to become informed about the pertinence of those issues to the decision to sell the income stream. First, the petition must include an affidavit from an independent financial advisor that includes information on whether the structured settlement arose from a claim by the seller of lead poisoning in which a mental or cognitive impairment was alleged and why the advisor concluded that the seller's mental capacity was sufficient to understand the transaction.<sup>83</sup> Second, where cognitive injuries may be present, the court must consider whether to appoint a guardian ad litem for the payee or to have the payee examined by an independent mental health specialist.<sup>84</sup> If the court decides to exercise its discretion to engage in the fuller inquiry, the investigation could be extensive and, as a corollary, expensive and time-consuming.

Maryland law uses the term "guardian ad litem" (GAL) in two ways. The first is apparently what is intended in the context of the sale of a structured settlement: a person who conducts an investigation for the purpose of advising the court. The second, more common meaning is a person appointed as an advocate for someone who lacks capacity to act in a judicial proceeding, such as a minor, an adult under guardianship, or a person whose judgment is suspect.<sup>85</sup> If the court should conclude, based on the report of the mental health specialist or the GAL, that the payee lacks capacity, the second type of GAL should come into play.

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<sup>82</sup> *In re Keena*, 442 N.J. Super. 393 (Law. Div. 2015). The court said it approved transactions which "yield long-term benefits or address an urgent need." Only one of the ten listed examples, however, was for an expenditure that would allow the seller to get employed and improve the seller's economic security.

<sup>83</sup> Md. R. Rules Civ. P. §15-1304.

<sup>84</sup> MD. CODE ANN., CTS. & JUD. PROC. §5-1104 (West 2016).

<sup>85</sup> *See Fox v. Wills*, 390 Md. 620 (2006); *In re Lee*, 132 Md. App. 696 (2000).

The statute provides that, rather than appointing a GAL, the court may appoint a mental health specialist. It appears, therefore, that the investigation to be conducted by a GAL should focus on subjects other than the payee's mental health. Instead, the GAL's investigation should provide the court with a broad perspective on the payee's situation and whether the sale would result in the loss of a regular source of support or an enhanced life. A complete GAL investigation may include interviews with people such as the seller's dependents, the caregivers of any minor dependents, the seller's parents and siblings, and the seller's potential business partners, all of whom are likely to have significant information about the seller's capacities to decide about and carry through on plans involving substantial amounts of money. For example, if a seller like Mr. Martinez says that the lump sum is needed to open a barber shop,<sup>86</sup> a guardian ad litem could investigate whether the business is one that is likely to yield a good living for the seller in light of the seller's work experience, licensure, financial judgment, temperament and education.<sup>87</sup> A home purchase may be an advisable investment, as Mr. Wilson thought, but only if the purchaser has the expertise and resources to maintain the home, pay the mortgage and property taxes, and so on.<sup>88</sup>

In 2013, a seller who had been poisoned by lead as a child told the court that he wanted to buy a car.<sup>89</sup> A GAL might have discovered, however, that the seller lacked a driver's license and that having a car would not improve the seller's access to a job or any other source of regular income. In the absence of a GAL, the court approved the seller's petition for the sale of \$90,074 in payments in exchange for a lump sum in the amount of \$26,194, some of which was used to buy a car. After the seller was ticketed on four occasions for driving without a license, he permanently parked the car.<sup>90</sup> A GAL's investigation

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<sup>86</sup> See note \*\*, *supra*.

<sup>87</sup> See note \*\*, *supra*.

<sup>88</sup> *In re Wilson*, No. 310601-V310601V, 2009 WL 1569730 (Md. Cir. Ct. May 22, 2009).

<sup>89</sup> *In re* Petition of Vincent Maurice Jones, Jr., CAE 3-27280 (9/18/2013); Terrence McCoy, *Cashing in off Poor Lead-Poisoning Victims*, WASH. POST, Aug. 26, 2015 (Jones was poisoned by lead as a young child; psychologist examination during lawsuit against landlord estimated Jones' lifetime economic loss "at more than \$1.5 million").

<sup>90</sup> See Terrence McCoy, *Cashing in off Poor Lead-Poisoning Victims*, WASH. POST, Aug. 26, 2015.

could identify solutions other than a sale where the petitioner faces other problems, such as paying for a medical emergency or to pay off debts.<sup>91</sup>

If the court decides to appoint an “Independent Mental Health Specialist,” it appears that the person’s role should be to examine the seller’s capacity to bring ordinary reasoning to long-term financial decisions and plans. Such information would be important if the focus of a court’s inquiry is whether a seller has the capacity to enter into a contract, but, as discussed earlier, Congress rejected freedom of contract as the right way to think about these transactions. If the pertinent question is, as it should be, whether the seller’s plans for the lump sum will result in financial security similar to the existing income stream, the capacity inquiry is important only if the seller plans to use the money for a business or an investment. If the plan is to pay off debts, which is a common refrain in petitions, the seller’s capacity is not the key. Instead, the key is whether the income stream produces greater financial security by being converted into a lump sum to satisfy a debt, a question better addressed by a GAL.

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<sup>91</sup> See *Petition of 321 Henderson Receivables, L.P. v. Martinez*, 816 N.Y.S.2d 298 (Sup. Ct. 2006) (describing *In re Hall*, Index No. 120232/03, the court said,

the payee was an African American male in his early twenties who had received a structured settlement as an infant plaintiff in a lead poisoning case. The lead poisoning had left Mr. Hall with limited abilities. The well-intentioned Mr. Hall sought to sell his future structure payments for a fraction of their value to help his mother, who had fallen behind on her rent and been sued for nonpayment. Upon inquiring into whether the transfer was in Mr. Hall's best interest, this Court concluded that it was not. Mr. Hall's mother had fallen behind in her rent because she had become unable to manage her affairs. Protective Services for Adults assisted Mrs. Hall in the nonpayment proceeding, a guardian was appointed, and the rent arrears were paid through public assistance. In sum, the problem which was the stated justification for the proposed sale of payments was resolved without jeopardizing any of Mr. Hall's structured settlement rights.



Assuming that a capacity inquiry is pertinent, a thorough examination should include psychological testing.<sup>92</sup> Some psychological testing is likely to have been done during the underlying lawsuit to determine whether and to what degree the seller's capacity to earn a living has been affected by the childhood lead poisoning.<sup>93</sup> The specialist is likely to conduct additional testing of the seller, especially in situations where testing using different methods was done for the underlying tort suit or where the underlying tort suit was settled many years earlier. Like the GAL investigation, a thorough examination will be expensive and time-consuming.

While the Maryland statute seems to insure that the court's approval will be based on a full investigation, the statute falls short of making this a reality. A court is not required to appoint a GAL or a mental health specialist; instead, the court is given discretion to do so. It seems unlikely that either a GAL or a mental health specialist will be appointed in cases where judges think the cost is not worthwhile or where a judge is convinced that autonomy and freedom of contract are the keys to determining whether a petition should be granted, regardless of the Congressional intent or the statute's investigation opportunities.

Even if the court declines to appoint a GAL or mental health specialist, it still must hold a hearing before deciding whether to grant the petition.<sup>94</sup> A hearing can provide significant information for a court that is tasked with determining whether the petition should be granted, as seems clear from the fact that courts rely heavily on facts deduced during hearings when they decide not to grant petitions. Prior to changes in the pertinent rules at the end of 2015, however, Maryland petitioners rarely attended the hearing. In part, this happened because the statute allowed forum shopping. Even though the bulk of the petitioners lived in Baltimore City,<sup>95</sup> petitions were routinely filed in Prince George's

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<sup>92</sup> See Theodore I. Lidsky, Agnes T. Heaney, Jay S. Schneider and John F. Rosen, *Neurodevelopmental Effects of Childhood Exposure to Heavy Metals: Lessons from Pediatric Lead Poisoning*, in *NEUROGENETIC DEVELOPMENTAL DISORDERS: VARIATION OF MANIFESTATION IN CHILDHOOD* (Michele M.M. Mazzocco and Judith L. Ross eds., 2007).

<sup>93</sup> See note \*\*, *supra*.

<sup>94</sup> MD. R. CIV. P. RULE §15-1305(a).

<sup>95</sup> See State of Maryland Office of The Attorney General Consumer Protection Div. vs. Access Funding, LLC, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

County and other counties far from the city. Further, no rule required the petitioner to attend the hearing. Under the new rules and amended statute, petitions must be filed where the petitioner lives, and the petitioner generally must attend the hearing.<sup>96</sup>

In sum, statutes such as Maryland's Structured Settlement Protection Act do not provide a sufficient basis for justifying the sale of a structured settlement income stream where the income substitutes for the income the seller cannot generate because of childhood lead poisoning. First, the focus of the best interests test should be on protecting the economic security of the seller and the seller's dependents, not on other factors such as whether the seller has the capacity to enter into a contract. Second, because the judicial review is not focused exclusively on the economic security of the seller, taxpayers provide a subsidy to the buyer that sacrifices revenue without achieving any public purpose. Even worse, when a sale does not produce an alternative source of economic security for the seller, taxpayers may also pay a subsidy to the seller in the form of public benefits.<sup>97</sup>

Third, unless the procedure includes an opportunity for the parent to be heard, a decision to allow a sale of structured settlement benefits denies the decisional autonomy of a parent who accepted a structured settlement on behalf of a minor child to ensure some economic security once the child became an adult. The parent should also be heard because of the potential legal and moral responsibility the parent bears for supporting the adult disabled child,<sup>98</sup> a duty the parent attempted to satisfy by accepting a structured settlement to settle the tort suit rather than a lump sum.

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<sup>96</sup> Forum shopping by factoring companies is discouraged by the law of other states as well. See 215 ILL. COMP. STAT. ANN. 153/25 (West 2015); Terrence McCoy, *Cashing in off Poor Lead-Poisoning Victims*, WASH. POST, AUG. 26, 2015.

<sup>97</sup> See Ellen S. Pryor, *Liability for Inchoate and Future Loss after Judgment*, 88 VA. L. REV. 1757, 1789 (2002) (justifiable to shift some of the cost of the judgment to taxpayers via favored tax treatment of structured settlement because alternative may be misuse of funds by a plaintiff who then becomes "dependent on the tax and welfare system").

<sup>98</sup> In Maryland, the duty of support to an adult child is limited to those adult children who lack a means of subsistence so long as the reason the child cannot be self-supporting as a result of a mental or physical infirmity. A parent cannot be charged with the duty of support unless the parent has or is able to earn sufficient means. Failure to provide support is a misdemeanor punishable by a fine or imprisonment. Support can also be pursued in

Community interests in these cases generally align with the interests of taxpayers and parents. Since “lead kids” tend to live in areas of concentrated poverty, their communities may suffer an increase in poverty when multiple residents lose access to a reliable stream of income.<sup>99</sup> When the income stream is gone and the lump sum is spent, further, the seller’s dependent child also loses access to parental support, and impoverishment is allowed to affect the next generation. The possibility that some sellers might use a lump sum to invest in a business or a home in the community is too speculative to offset the loss unless the judicial process carefully considers which petitions are most likely to create substitute income streams.

Factoring companies and investors have cause to complain if investments in structured settlements are closed off for invalid reasons. Given that one feature of the investment is the favorable tax treatment, investors cannot complain about being denied the opportunity for the investment in cases when the congressional goals for the favorable tax treatment cannot be met. Knowing whether a petitioner’s decision to sell will result in financial security, as discussed earlier, is a difficult question to answer and requires a full record. Investors might be given a choice, therefore: subsidize the costs of providing a court with sufficient information for it to make the requisite decision, including paying the GAL and any other consultants, or give up the investment. If the investment is still worthwhile given the

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a civil action. See Md. Code ANN., Fam. Law § 13-109; Trembow v. Schonfeld, 393 Md. 327 (2006) (barring action by mother to establish duty after child reaches majority); Corby v. McCarthy, 154 Md. App. 446 (2003) (not unreasonable for adult child to live separately from mother, even though that increased mother’s expenses); Presley v. Presley, 65 Md. App. 265 (1985) (adult child employed, but earnings were insufficient to permit the adult child to live separately from her mother or to have a car; father ordered to pay a share of the adult child’s expenses).

<sup>99</sup> See Lawrence O. Gostin, *Lead in the Water: A Tale of Social and Environmental Injustice*, THE JAMA FORUM (May 17, 2016), <http://jamanetwork.com/journals/jama/fullarticle/2521956> (discussing high degree of exposure to environmental toxins like lead in poor communities and communities of color); Benfer, *supra*, at 64-69 (describing interests of communities in eliminating exposure to lead and in fair treatment of people exposed to lead); Ashley M. Drexel, *Supported Decision-Making and the Sale of Structured Settlements* (paper submitted to Families with Special Needs Seminar, University of Maryland Carey School of Law, 4/18/2016, on file with author).

costs of the litigation and the likelihood that fully-informed courts will deny many more petitions, then sales could continue. The chance is miniscule, however, that investments would be lucrative in that environment, given that factoring companies complain about the costs of litigating petitions under the current permissive procedure in which nearly all petitions are approved.

*Alternative 3: Prohibit the sale of structured settlement payments without the consent of a guardian of the property*

A guardianship of the property is a longstanding and well-tested method for preventing a person with capacity issues from having control of his or her property.<sup>100</sup> When a court finds that a person lacks capacity to manage the property, the court takes control of the property and appoints a guardian to act for the court on behalf of the owner of the property, the person under guardianship or ward.<sup>101</sup> The guardian's duty has been described as similar to that of a trustee and includes the usual fiduciary duties.<sup>102</sup> In the case of a person under guardianship who owns rights under a structured settlement, a guardianship of the property would transfer to the guardian the exclusive power to decide about all of the person's property, including whether to sell any part of the structured settlement benefits and how the periodic payments will be spent. The nominal recipient of benefits under the structured settlement,

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<sup>100</sup> See MD. CODE ANN., EST. & TRUSTS §13-201(c) (West 2010) ("A guardian shall be appointed if the court determines that (1) the person is unable to manage his property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance, and (2) the person has or may be entitled to property or benefits which require proper management).

<sup>101</sup> See MD. CODE ANN., EST. & TRUSTS §13-201 (West 2010). The Uniform Act does not require a finding of incapacity. See Robert B. Flemming and Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275, 1280. See also *Third National Guardianship Summit Standards and Recommendations*, 2012 Utah L. Rev. 1191, 1191 (definition of guardian and conservator).

<sup>102</sup> See *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1195 (duty to avoid conflicts of interest and self-dealing); Robert B. Flemming and Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275, 1277-78.

now a person under guardianship, would have no right to control the disposition of the property or any expenditures.

At the theoretical level, a guardianship seems like a good idea, at least when compared with the way that structured settlement transactions occur now. No sale could be approved unless the factoring company convinced the guardian to approve the sale. Unlike the usual seller, especially one with a history of lead poisoning, a person named as guardian of property should have experience and understanding in financial transactions to make well-considered decisions on behalf of the person under guardianship. The guardian is also under a duty of loyalty, which should preclude the guardian from making a sale for reasons other than the well-being of the person under guardianship. Finally, guardians are subject to judicial supervision and other protections such as bonding and liability for failure to act properly.

At the practical level, however, the guardianship alternative is less impressive.

First, many people with the deficits typical of lead poisoning may not meet the criteria for the appointment of a guardian. In Maryland, for example, guardianship of the property is permissible when a person is “unable to manage his property and affairs effectively because of physical or mental disability...”<sup>103</sup> A person who has been awarded a structured settlement due to lead poisoning is not likely to be capable of self-support, but that same person may have no problem handling a paycheck, paying rent, or buying food. Property management issues are likely to become acute only when the person is facing longer-term and more complex decisions, such as those involving the sale of a structured settlement. Since most people do not confront such issues on a routine basis, a court could find that a guardianship of the property is not justified.<sup>104</sup>

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<sup>103</sup> MD. CODE ANN., EST. & Trusts, §§13-201 – 13-221 (West 2010); MD. RULE 10-202; MD. RULE 10-301 et seq.; *see In re Rosenberg*, 211 Md. App. 305 (2013); *James B. Nutter & Co. v. Black*, 225 Md. App. 1 (2015); Meta S. David, *Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?*, 45 SUFFOLK U. L. REV. 465 (2012); Ellen A. Callegary, *Guardianship and Its Alternatives in the 21<sup>st</sup> Century*, 47 No. 3 MD. B.J. 18 (2014). Several lawyers in Baltimore have advised the author that they do not suggest that parents of lead-poisoned children seek guardianship when the child turns 18 because courts are unlikely to grant the petition.

<sup>104</sup> Petitions may not be filed for some people who might qualify for the appointment of a guardian of the property because of the expense and other practical difficulties. In Maryland, for example, the court must be provided with

Second, guardianship of the property may impinge further on the autonomy of the seller than necessary. In Maryland, as in most states, guardianship of the property is an all or nothing proposition: where a guardianship is deemed necessary, the court enters a plenary order placing all of the property under the management of the guardian.<sup>105</sup> The court is not required to consider a less restrictive alternative.<sup>106</sup> A lead-poisoned recipient of benefits under a structured settlement is likely to have two categories of property: the promised income stream and the payments after they are in the hands of the recipient. Guardianship is only important with respect to the promised income stream because that is the asset for which there is a market and because the decision about whether to sell or retain that income stream is both complex and important for the future economic security of the potential seller. Without the income stream, the recipient ordinarily has no source of regular support and risks becoming dependent on government benefits and/or family support.

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two certificates of competency completed by health care providers, and one of those must have examined the person within 21 days before the petition is filed. See *James B. Nutter & Co. v. Black*, 225 Md. App. 1 (2015); Ellen A. Callegary, *Guardianship and Its Alternatives in the 21<sup>st</sup> Century*, 47 No. 3 MD. B.J. 18, 21 (2014). Where the structured settlement is based on childhood lead poisoning, neurological examination is done on the plaintiff, but that examination may occur long before the plaintiff turns 18 or considers selling benefits payable under the structured settlement. The second examination probably cannot be performed without input from the potential seller. The seller has little reason to cooperate, so a petition for guardianship and motion for examination must be filed before the examination occurs. Concerned parents might be persuaded not to initiate the petition because of the family conflict, the expense, and the possibility that the petition would be unsuccessful in any event.

<sup>105</sup> See A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1545; Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 164-67, 171-75 (2010) (guardianship generally is plenary even when court is authorized to enter a more limited order and involves “supplanting, rather than assisting the decision-making process” of the person under guardianship).

<sup>106</sup> See *In re Rosenberg*, 211 Md. App. 305 (2013).

A guardianship should not be essential with respect to the periodic payments and other income acquired by the recipient because the recipient's decisions about expenditures, whether provident or improvident, have little impact on the person's long-term financial security or dependency on family support or public benefits. Even where a recipient spends all of his or her income frivolously, the next periodic payment can be spent differently. Further, a person who is entitled to an income stream under a structured settlement is not likely to establish eligibility for public benefits based on the loss of one payment to improvident expenditures. Once a person's property is under guardianship, however, all decisions are under the control of the guardian, whether the decision affects the long-term economic security of the ward or the short-term impact of improvidence in the use of a particular periodic payment. The guardian is empowered to decide whether and how much money will be spent on rent, on food, on support of or gifts to family and friends, on clothing, and so on.

Depriving the recipient of autonomy with respect to spending a periodic payment is unwarranted outside of the rare situation where the recipient's cognitive capacities are so severely impaired that no financial decision is within his or her ken. Even a severely-impaired person can make sensible decisions, such as paying rent and child support or buying a gift for a friend or a loved one.<sup>107</sup> Further, having control over the periodic payments gives the recipient opportunities to learn how to manage financial responsibilities. Bad decisions are not avoided, but they can be the source of relatively little harm.<sup>108</sup> When a recipient fails to pay rent and gets evicted, for example, the recipient will be homeless for a period of time, but the next periodic payment should help the recipient pay for the next

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<sup>107</sup> See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 168-170 (2010)

(deprivation of right to make financial decision impacts the social relationships of the person under guardianship, as well as that person's "functional abilities and general well-being—an impact which itself has further isolating effects" at social, physical and emotional levels).

<sup>108</sup> See Robert B. Flemming and Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275, 1294 (inappropriate for a guardian to deny decision-making authority to a person under guardianship as to some of the estate where a relatively small risk of mismanagement is offset by the benefits of autonomy and self-management and the reduction of fees payable to the guardian).

home. A recipient who fails to pay child support can be placed under an order requiring the annuity company to remit the child support directly to the child's household.

If the guardian of the property in the case of a structured settlement is limited to the decision about whether the asset should be sold, however, the job of the guardian would be quite different from the job of a most guardians. Usually, a ward needs to have someone make decisions about all of the property, and the guardian has multiple opportunities to learn who the ward is and what the ward needs. Further, the ward may have family and friends – and even heirs or devisees – who may keep an eye on the guardian. Where the guardian's main job is to decide whether a structured settlement should be sold and where the ward is a person from a poor neighborhood and a poor family, there may be no adequate input or watchdog. Cases of guardians failing to comply with their duties toward wards in such circumstances are not infrequent.<sup>109</sup>

Third, the guardian may be a family member rather than a person with professional training or expertise in complex financial transactions.<sup>110</sup> A family member may be appointed to avoid the expense of a professional serving as guardian. Training may be made available to a family guardian, but judicial supervision may be less rigorous.<sup>111</sup> A family member, however, may have a greater likelihood of confronting a serious conflict of interest, because the family member may get to control the use of all or part of the lump sum received in exchange for the stream of payments.

Fourth, judicial supervision of the guardian is mandated in the Maryland statute and in other statutes, which means that the guardian is required to file periodic reports, justify decisions and

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<sup>109</sup> See Sally Hurme and Erica Wood, *Introduction, Symposium Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157, 1160-62 (recounting evidence of malfeasance by guardians).

<sup>110</sup> See Robert B. Flemming and Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275, 1284.

<sup>111</sup> See Robert B. Flemming and Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275, 1325-26 (recommending that states reject practice of applying lower standards to family guardians).



expenses about matters such as fees, etc.<sup>112</sup> Where the guardian's role is exclusively about whether a particular asset should be sold, however, the periodic reporting would be ineffective and costly.<sup>113</sup> A different system would be necessary, therefore, to monitor the work of a guardian whose sole responsibility is to decide whether a particular asset should be sold. Finally, the guardian's fee is, in many cases, dependent on the value of the assets the guardian is managing. If the only asset is the structured settlement and it is in the best interests of the ward for it to be sold, the guardian may be placed in a conflict of interest with the ward.

Guardianship has been the subject of criticism by scholars. The principal goal of reformers is to enhance the respect accorded the person under guardianship and to require that the person have more control over decisions or, at least, more input.<sup>114</sup> A reformed guardianship that is more "person-

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<sup>112</sup> See *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1193 (duty of guardian to keep court informed); Robert B. Flemming and Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275, 1324; Sally Hurme and Erica Wood, *Introduction, Symposium Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157, 1175-78 (judicial supervision of fees, along with other guardianship matters, inconsistent and often unsatisfactory).

<sup>113</sup> See Sally Hurme and Erica Wood, *Introduction, Symposium Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157, 1175-76.

<sup>114</sup> See Nina A. Kohn, et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. ST. L. REV. 1111 (2013); Mary Jane Ciccarello and Maureen Henry, *Person-Centered Planning and Supported Decision-Making*, 27 UTAH B.J. 48 (2014); A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541 (2012); Soumitra Pathare and Laura S. Shields, *Supported Decision-Making for Persons with Mental Illness: A Review*, 34 PUB. HEALTH REV. 1 (2012); Leslie Salzman, *Substituted Decision-Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010); Robert B. Fleming and Rebecca C. Morgan, *Standards for Financial Decision-Making: Legal, Ethical, and Practical Issues*, 2012 UTAH L. REV. 1275; Erica Wood, *Guardianship and Supported Decision-Making*, 37 No. 2 BIFOCAL 44 (2015); Catherine

centered”<sup>115</sup> might be a better fit for a guardianship of the property in structured settlement cases because the focus is on who the person under guardianship is and what that person wants to accomplish. A person-centered guardianship shifts the focus away from what a guardian believes to be a prudent path. If a person wants to sell some of the stream of payments in order to buy a car, for example, a person-centered guardianship process might begin with a meeting in which the person and the guardian discuss why a car is important to the person and some of the specifics about driving a car, types of cars and so on. The next step might be a meeting with others who may have an interest in whether benefits are sold in order to obtain the car, such as family members, dependents, caregivers, counselors, and friends. Reasons that the person wants a car can be disclosed and discussed, and transportation and financing options can be developed. The final decision, depending on the type of person-centered system that is in play, rests with the person under guardianship or the guardian. In

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A. Seal and Michael A. Kirtland, *Using Mediation in Guardianship Litigation*, 24 No. 3 EXPERIENCE 16 (2015); Sally Hurme and Erica Wood, *Introduction, Symposium Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157; *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1192, 1194 (guardian’s plans “shall emphasize a ‘person-centered philosophy’”; conservator’s property management shall “maximize the dignity, autonomy, and self-determination of the person”); Stanley S. Herr, *Self Determination, Autonomy, and Alternatives for Guardianship*, in THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES 429 (Stanley S. Herr et al. eds., 2003).

<sup>115</sup> See A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1547-48 (2012) (no unitary or precise definition of person-centered guardianship exists; “key elements ... include person-directed preferences and establishing a vision based on network building, which requires collaborative teamwork with the use of a facilitator...individual[] the center of planning and decision making, while ... family members [are treated] as partners.”); Sally Hurme and Erica Wood, *Introduction, Symposium Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157, 1172 (“Person-centered planning is a process that is directed by the individual as much as possible, with assistance or support as chosen by the individual.”).

either event, the process fully involves the person under guardianship and consideration of his or her goals and capacities.<sup>116</sup>

Changing guardianship into a person-centered system is not feasible at this time, even if it is desirable in many cases. First, guardianship law in every state would require significant statutory reform.<sup>117</sup> Second, funding sources would have to be found because person-centered guardianship requires a higher degree of consultation with the person under guardianship, as well as with family, friends and professionals who might have information about what is the best decision in the circumstances and whether the person under guardianships wants to follow that advice.<sup>118</sup> In the case of the sale of a structured settlement, a full consultation process could include people with expertise into financial planning, business development, cognitive and behavioral capacity, family responsibility, and government benefits. As with the judicial process to consider petitions to approve the sale of structured benefits, the question is whether the additional cost is worthwhile<sup>119</sup> when the benefits to the recipient of the structured settlement might be small. Third, person-centered guardianship appears

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<sup>116</sup> See A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1549-55 (case study examples of person-centered planning).

<sup>117</sup> See A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1544 (“no statutes, regulations, or standards mandate person-centered guardianship”).

<sup>118</sup> See Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN. ST. L. REV. 1111 (2013); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 227-31 (2010) (supported decision-making likely to be more expensive, and underfunding is already the norm in state-run guardianship systems).

<sup>119</sup> Concern about the expenses associated with guardianship are particularly acute when a person under guardianship has few assets to begin with. See *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1202 (need to provide public funding for guardianship services).

to focus more on personal decision-making than on financial decision-making, so it is less clear that the concept would be meaningful in the context of the sale of a structured settlement.<sup>120</sup>

#### **Section 4: The Sale of Structured Settlements Should be Banned Where Lead-Poisoning Has Deprived the Recipient of the Capacity for Self Support**

As suggested at the beginning of the article, whether sales of structured settlement benefits should be allowed turns on four criteria:

1. The autonomy of the potential seller must be respected to the extent appropriate given the nature of the irreversible damage caused by lead poisoning in cases where the person is left without the capacity for self-support.
2. The nature of the factoring market must be taken into account in determining whether lead-poisoned sellers can be protected from exploitation at a reasonable cost.
3. The cost of providing judicial oversight of sales or sellers must be measured against the likely effectiveness of the oversight in terms of protecting potential sellers and their dependents against an unjustifiable loss of financial security.
4. The costs that sales may impose on third parties, including taxpayers, parents, dependents, and communities.

Prohibiting sales has a direct and unmistakable impact on the autonomy of the seller. While the received wisdom is that economic security is more important than the seller's other goals, sellers may disagree. Sellers have indicated a preference for a variety of other goals, including paying off debt, buying a car, impressing friends and potential romantic partners, giving gifts, buying a house, starting a business, and paying medical expenses.

Justifying the "parentalism" of denying the opportunity to sell structured settlement benefits begins with an examination of what happens to children when they are exposed to lead. As described earlier, the neurological impacts tend to be strongest in exactly the areas a person relies on when making important life decisions, such as trading economic security to accomplish short-term goals. In the case of a seller whose childhood lead poisoning was substantial enough to justify a prediction of a

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<sup>120</sup> See note \*\*, *supra*. See generally Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010) (principal example is one involving guardianship of the person, not of the property).

permanent full or partial loss of the capacity for self-support, problems are undeniable in the realms of cognition, executive functioning and behavior. Exercising reasonable levels of judgment as to long-term planning and execution cannot be expected.

A second consideration is the degree of loss of autonomy. Banning the sale of structured settlement benefits does not deny the seller the right to use the stipend, once received, in any way the seller wants. If the seller wants to buy a house or a car or start a business, the seller can use the right to the monthly benefits to persuade a lender to take the risk of making funds available. If the seller's goals are to buy gifts or to use money to help or impress friends or relatives, the regular stipend can be used, even though the amounts are smaller than a lump sum. Satisfying debt, a common goal of petitioners, can be accomplished over time. The seller's interest payments to creditors will be higher, but probably lower than the discount rates charged by buyers of structured settlement benefits.

A third consideration is that the structured settlement itself is the product of a tort system whose principal purposes include compensating the plaintiff for the injuries experienced because of the tort.<sup>121</sup> In the case of childhood lead poisoning, the economic loss caused by the defendant's tort is the inability of the plaintiff to earn a living. While money alone cannot make the plaintiff whole, a regular stipend is more like a paycheck than a lump sum, unless the plaintiff can use the lump sum to generate a flow of income, something that is unlikely to occur in the circumstances.<sup>122</sup>

At least at least 70 percent of the petitions for sales of structured settlement benefits filed between 2013 and 2015 in Maryland involved lead-poisoned sellers. A ban on sales, therefore, would sharply reduce the number of investment opportunities available in this market. Justifying the loss turns

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<sup>121</sup> See Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 875; Ellen S. Pryor, *After the Judgment*, 88 VA. L. REV. 1757, 1776-78 (2002) (discussing usefulness of structured settlement for loss minimization).

<sup>122</sup> See Ellen S. Pryor, *Liability for Inchoate and Future Loss after Judgment*, 88 VA. L. REV. 1757, 1778 (2002) (arguing that a structured settlement should be preferred to a lump sum when "the plaintiff's ability to manage the lump sum in a way that promotes this match [between the plaintiff's needs and the tort payments that the plaintiff recovers] and the accuracy with which any fixed schedule of payments matches the plaintiff's future needs").

on the nature of the factoring business that makes the investment possible. As described earlier, factoring companies appear to have targeted “lead kids” in Baltimore to persuade them to sell structured settlement benefits, which accounts for the fact that the Attorney General’s research disclosed that at least 70 percent of the petitions over a two-year period involved lead poisoned sellers, and that 112 of the 132 lead-poisoned petitioners were under the age of 30 and residents of Baltimore City or the nearby suburbs.<sup>123</sup> All but two of the “independent” professional advisors involved in the 112 petitions were the same person, a person who appears to have had a close relationship with at least one of the most active factoring companies.<sup>124</sup>

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<sup>123</sup> *State of Maryland Office of the Attorney General Consumer Protection Div. v. Access Funding, LLC*, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016); see Kelly McGann, *It’s My Money and I Want It Now, Your Honor*, 48 No. 3 Md. B.J. 36, 41 (2015) (evidence is strong that buyers prey on categories of sellers who are least able to protect themselves from bad deals and fraudulent practices); *United States Consumer Financial Protection Bureau v. Access Funding et al.*, Case 1:16-cv-03759-JFM Document 1 Filed 11/21/16 (complaint alleging that 1) many of the consumers who sold settlements to Access were lead-paint poisoning victims with cognitive impairments, and that such consumers received “a steeply discounted lump sum in return for signing away their future payment streams,” 2) defendant Access steered petitioners to another defendant, a cooperative attorney who would satisfy the requirement of Maryland law for a consumer to submit a letter stating that he or she consulted with an independent financial advisor and get paid \$200 for each letter; and 3) that, while petitions were pending, defendant Access provided advances to many petitioners and then told them that they would have to repay the advance if the sale were not completed).

<sup>124</sup> *State of Maryland Office of the Attorney General Consumer Protection Div. vs Access Funding, LLC*, Circuit Court for Baltimore City, Case Number 24C16002855, Complaint Exhibit A, Access Funding Structured Settlement Spreadsheet (2016).

Maryland's experience is not unique, but it indicates the type of problems that regulators face when trying to keep the industry within consumer-friendly limits.<sup>125</sup> The expense is worthwhile if the transactions offer enough residents a benefit that can be obtained at a reasonable cost. What appears to be the case, however, is that the buyer gains far more than the seller in these transactions, since the seller is giving up financial security at a high cost, while the buyer is gaining a nearly guaranteed regular income stream accompanied by favorable tax treatment. The temptation for the buyer to overstep the boundaries of good practices is strong, and the existence of a vulnerable group of sellers makes it unusually difficult to rely on the usual consumer protections to regulate the market.

As explained earlier, the state court judicial review mandated under the tax law or, in the alternative, a guardianship of the property are expensive ways to impose an additional level of judgment to the decision to sell structured settlement benefits. The cost would be worthwhile if either were to do a better job than a ban, in terms of balancing the seller's autonomy against protecting the seller's economic security. The number of cases in which a sale protects or advances the seller's economic security are few, however, given the realities of neurological damage to lead poisoned people. The court's job, as well as the guardian's job, therefore, would be to identify those rare cases and distinguish them from all the others where the seller has other goals or where the seller has economic security goals that the seller cannot realistically achieve. Perhaps that sifting could be done if there were resources for a full investigation by a GAL and a mental health professional in every case or if every seller had a close relationship with a guardian who had access to financial expertise. Otherwise, both the court and the guardian come close to flying blind and the process of summarily approving petitions is likely to continue.

The interests of third parties, including taxpayers, parents, dependents and members of the community are the final issue. Their concerns appear to be relevant to recipients of structured settlements in workers compensation cases. As discussed earlier, most states ban sales of this stream of income even though a workers compensation award can be based on physical harm where the person

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<sup>125</sup> See Daniel W. Hindert and Craig H. Ulman, *Transfers of Structured Settlement Payment Rights: What Judges Should Know about Structured Settlement Protection Acts*, 44 No. 2 JUDGES' J. 19, 20 (2005) (history of exploitation by factoring companies).

has suffered no cognitive or other neurological harm.<sup>126</sup> Since the rationale for restricting autonomy in these cases does not seem to turn on the likelihood that sellers have impaired judgment, the likely rationale is the secondary costs of a sale on third parties, such as taxpayers and families, who would bear the cost of a sale if the seller used the lump sum for something other than self-support and family support.<sup>127</sup>

Lead poisoning is not an isolated event; it tends to affect people throughout entire communities, particularly poor communities and, in urban areas, poor communities of color. When many residents have been harmed, as in Baltimore, they even acquire a name – “lead kids.” If enough lead kids sell their income stream and then fail to use the payment to acquire a different source of economic security, the entire community may pay the price of having even more residents who experience long-term and inter-generational poverty.<sup>128</sup>

Banning sales could be done directly or indirectly. Indirect means, as suggested earlier, include removing the favorable tax treatment when the income stream is transferred. Without the extra value, investors may lose interest. Alternatively, factoring companies may make the deals sweeter by increasing the discount rates. This may result in fewer sales, but some people may still be willing to sell.

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<sup>126</sup> See, e.g., *Rapid Settlements, Ltd. v. United States Fid. & Guar. Co.*, 672 F. Supp. 2d 714 (D. Me 2009); *Rapid Settlements, Ltd. v. United States Fid. & Guar. Co.*, 672 F. Supp. 2d 714 (D. Me 2009); *In re Dunn*, 848 N.E.2d 310 (Ind. Ct. App. 2006); Cal. Lab. Code §4900; Colo. Rev. Stat. §13-23-108; Fla. Stat. Ann. §440.22; 820 Ill. Comp. Stat. ann. 305/21; Md. Code, Lab. & Emp. Art. §9-732; Md. Code, Cts. & Jud. Proc. Art. §5-1106; Me. Rev. Stat. tit. 39-A, §106; Mass. Ann. Laws ch. 231C, §5; Mich. Comp. Law. Ann. §418.821; Minn. Stat. Ann. §549.34; N.Y. Workers’ Comp. Law §33; Pa. Stat. Ann. §4003; Va. Code Ann. §59.1-477.1.

<sup>127</sup> See *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 271, 294 (1911) (in sustaining constitutionality of worker’s compensation statute as proper exercise of state’s police power, court said “the loss falls immediately upon the employee who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent”).

<sup>128</sup> See Benfer, *supra*; Ashley M. Drexel, *Supported Decision-Making and the Sale of Structured Settlements* (paper submitted to Families with Special Needs Seminar, University of Maryland Carey School of Law, 4/18/2016, on file with author).



Unfortunately, the most likely pool of potential sellers would probably continue to be people with the least capacity for self-protection, and that includes people with childhood lead poisoning. Unless enforcers of consumer protection laws are highly vigilant, exploitation of sellers seems inevitable. The record of enforcers has not been robust, and there is no reason to believe that will change.

The second indirect means would be to define “best interests” in the pertinent federal and state statutes to mean economic security for the seller and the seller’s dependents, except in cases of extreme hardship or emergency. The state court review and approval process would continue, but it would be significantly more comprehensive and expensive, and the standard for approval would be harder to meet. Discerning which transactions might qualify would require, at a minimum, an investigation by a GAL, notice to and an opportunity to be heard by appropriate third parties, and advice from experts into the circumstances of the financial hardship or emergency issues.

This alternative has the advantage of respecting the decisions made by the parents and the taxpayers about the importance of economic security of the seller. The communities in which “lead kids” are well-known also benefit because more residents will have access to economic stability. The biggest downside is the high cost. If the costs of this investigation is borne by the buyer, the value of the investment would decrease unless the buyer could pass the costs on to the seller by means of a higher discount rate. If courts are reviewing deals in detail, few should be found to meet the more stringent standard. Alternatively, investors could try to persuade states to pay the costs. Given that taxpayers already subsidize purchases through the tax break, it seems unlikely that many states will see the need to say yes.

A third indirect method is to require that every seller be evaluated to for the appointment of a guardian of the property should be appointed. In cases where the seller becomes a person under guardianship, the sale could occur only with the guardian’s consent. Unless the guardianship system is reformed, however, a guardianship is a deep and unnecessary invasion into the seller’s autonomy. Finding a competent and incorruptible guardian would be difficult, at best. Even if the system is reformed to value more highly the autonomy of the seller, the process will be too expensive to make the investment worthwhile.

The simplest, most direct and least expensive route to a solution, then, is to follow the example of worker’s compensation: ban the sale of structured settlements. If injured workers can be required to sacrifice autonomy in exchange for a reliable alternative source of economic security, people injured by lead as children probably have no room for complaint. Investors who want to continue to have access to the investment opportunities represented by structured settlement income streams will be

disappointed, of course, but their sacrifice is justified by the benefits to injured sellers, the families of sellers and communities where sellers live. Taxpayers may gain the most in several ways. First, the favorable tax treatment accorded to structured settlements does not result in less tax revenue unless the favored taxpayer makes enough money to pay taxes. Few sellers have that kind of income and resources, but many investors do. Second, taxpayer-funded public benefits will not need to be paid to sellers who do not sell their income stream. Third, public funding for judicial oversight and consumer protection enforcement can be put to other uses. In short, banning sales of structured settlement benefits that result from a tort suit for childhood lead poisoning is pretty much a win-win.