

THE NY STRUCTURED SETTLEMENT PROTECTION ACT: What Is Required When Settling a Claim, and From Whom?

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In 2002, New York became one of the many states, currently 47 in all, to enact a Structured Settlement Protection Act (SSPA)¹. Although the SSPA is aimed almost exclusively at protecting structured settlement recipients who seek to transfer (*i.e.*, sell) their benefits to a third party, there is also a provision that mandates initial disclosure of the structured settlement terms at the time of settlement (GOL § 5-1702).

Unfortunately, there is almost no case law interpreting or applying the SSPA in the context of a claim settlement. The purpose of this memorandum is to use the plain words of the statute to explain what is required at the time of settlement, and from whom it is required.²

The Requirements of the SSPA

In the context of claim settlements, the SSPA largely serves to codify accepted and common sense practices regarding the disclosure of basic structured settlement terms to the intended beneficiary. In this way, the SSPA is quite similar to the scores of other financial disclosure laws and regulations that have been enacted over the past decade. The full text of GOL § 5-1702 is as follows:

¹ New York General Obligations Law (GOL) § 5-1701, *et seq.*

² This article deals solely with the provisions of the SSPA related to settlements (*i.e.*, as opposed to transfers). This includes § 5-1702, the relevant definitions in § 5-1701, and the enforcement provisions in § 5-1709. General references to the SSPA contained herein refer only to these sections.

§ 5-1702. Initial disclosure of structured settlement terms

In negotiating a structured settlement of claims brought by or on behalf of a claimant who is domiciled in this state, the defendant or defendant's legal representative shall disclose in writing to the claimant or the claimant's legal representative all of the following information that is not otherwise specified in the structured settlement agreement:

- (a) the amounts and due dates of the periodic payments to be made under the structured settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;
- (b) the amount of the premium payable to the annuity issuer;
- (c) the nature and amount of any cost that may be deducted from any of the periodic payments;
- (d) where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law; and
- (e) a statement that the claimant is advised to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences and that the defendant or defendant's legal representative may not refer any advisor, attorney or firm for such purpose.

Subsections (a) – (d) are straightforward and self-explanatory. It seems obvious that the claimant should be informed in writing of the basic terms of her structured settlement, just as she should be informed of the basic terms of any settlement into which she enters. Subsection (e), however, is more interesting, and the requirement that the defendant advise the claimant “to obtain independent professional advice,” has been the subject of some debate.

Fortunately, the SSPA specifically defines what is meant by “independent professional advice” in GOL § 5-1701(e):

(e) "independent professional advice" means advice of an attorney, certified public accountant, actuary or other licensed professional adviser:

(i) who is engaged by a claimant or payee to render advice concerning the legal, tax and financial implications of a structured settlement or a transfer of structured settlement payment rights;

(ii) who is not in any manner affiliated with or compensated by the defendant in such settlement or the transferee of such transfer; and

(iii) whose compensation for rendering such advice is not affected by whether a settlement or transfer occurs or does not occur.

It is worth noting that the SSPA, like its counterparts in most other states, is based in large part on the Proposed Model State Structured Settlement Protection Act (the Model Act), which was officially adopted by the National Conference of Insurance Legislators in 2004. However, the Model Act does not contain a provision similar to GOL § 5-1702. The Model Act does contain an identical definition of "independent professional advice," but without subsections (i) – (iii), which were added by the New York Legislature. Finally, the SSPA has an enforcement provision not included in the Model Act which provides for legal or equitable relief:

§ 5-1709. Enforcement

(a) In addition to the other remedies provided, whenever there shall be a violation of this title, application may be made by the attorney general in the name of the people of the state of New York to a court of competent jurisdiction by a special proceeding to issue an injunction....;

(b) Any payee injured by a violation of this title may bring an action for the recovery of damages. The court may award reasonable attorney's fees to the prevailing plaintiff.

The SSPA Requires Nothing of Plaintiff or Plaintiff's Counsel

In the context of settlements, the SSPA is concerned exclusively with disclosure, and all of its disclosure requirements fall squarely upon the defendant and the defendant's legal

representative. Under the plain language of the statute, the SSPA *cannot* be violated by a plaintiff or her attorney.

Even § 5-1702(e), which is structured in a somewhat confusing manner, simply requires: 1) **a statement that** “the claimant is advised to obtain independent professional advice”; and 2) **a statement that** “the defendant or defendant's legal representative may not refer any advisor, attorney or firm for such purpose”. In other words, it is the *disclosure statement* by the defendant that satisfies these requirements. The statute does not impose any obligations other than disclosure on the defendant, or any requirements on the plaintiff in any regard.

A Plaintiff's Structured Settlement Broker Is Not an “Independent Professional Advisor”

While the SSPA does not *require* it, the statute does seem to encourage plaintiffs to seek advice regarding structured settlements from some professional who is unaffiliated with the defendant. Under the terms of the law, this professional advisor can be the plaintiff's attorney, an accountant, an actuary, etc. We have seen marketing materials, and even articles, that seem to suggest that the SSPA endorses the retention of a plaintiff's structured settlement broker (*i.e.*, separate from a broker who may be referred by the defendant or agreed upon by the parties). However, the words of the SSPA are clear that a structured settlement broker, at least in the ordinary case, cannot qualify as the independent professional advisor that the statute recommends.

In the ordinary case, the plaintiff's structured settlement broker is compensated by a commission that is dependent upon the size of the structured settlement annuity that is purchased. The broker receives nothing if: 1) the case does not settle; or 2) the case settles with a lump sum rather than a structured settlement. On the contrary, “independent professional advice” must come from an adviser “whose compensation for rendering such advice is not

affected by whether a settlement...occurs or does not occur" (§ 5-1701(e)(iii)). Clearly, a broker who is compensated by commission does not fall within this definition.

It is an important principle of statutory interpretation that the text of a law should not be construed so as to be rendered meaningless. This principle is significant in this instance because, as mentioned above, the New York Legislature affirmatively added subparagraph § 5-1701(e)(iii) to the otherwise identical definition of "independent professional advice" contained in the Model Act. The Legislature must have intended the subparagraph to mean something, and the most reasonable interpretation is that "independent professional advice" should come from somebody with no financial interest in the plaintiff's decisions regarding a structured settlement. This excludes the plaintiff's structured settlement broker, along with most other investment advisors, financial planners, etc.³

This interpretation is supported by the examples given in the statute itself. Accountants and actuaries are typically paid by the hour or by the engagement, not as a percentage of money invested or earned. Attorneys are typically paid by the hour or by a contingent fee which is unaffected by the plaintiff's decision between a lump sum settlement and a structured settlement. Once a case has been settled, and where the plaintiff's attorney is capable of giving advice regarding structured settlements, the SSPA clearly favors the attorney's advice over that of a broker compensated by commission.

³ The purpose of this article is to analyze the text and requirements of the SSPA. Arguments unrelated to the SSPA concerning the advisability of a plaintiff's structured settlement broker, and/or how that broker should be compensated, are not addressed herein.

Defendants Who Violate the SSPA Cannot Be Sued for Damages

On its face, § 5-1709(b) appears to grant a cause of action to a plaintiff who is damaged by a defendant's failure to make proper disclosure pursuant to § 5-1702. However, the definitions set forth in § 5-1701 contradict this interpretation.

To wit, the cause of action is granted to a “payee” who is injured, and the word “payee” is defined as “an individual who is receiving tax free payments under a structured settlement and proposes to make a transfer of payment rights thereunder” (§ 5-1701(h)). In other words, the SSPA’s cause of action for damages appears to relate only to an injury suffered in the context of a transfer, not in the context of a settlement.

Conclusion

Case law interpreting the SSPA in the context of a settlement is extremely scarce. However, a commonsense reading of the statute’s text leads to the conclusions that: 1) the SSPA requires only disclosure, nothing more; 2) the statute does not require anything of the plaintiff or her attorney; 3) a plaintiff’s structured settlement broker does not qualify as an “independent professional advisor”; and 4) the SSPA does not appear to establish a cause of action for damages by a plaintiff.

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