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I. Structured Settlements and the Factoring Industry: *Is there enough regulation in place? Or is the Judiciary unwilling to step up to the plate and correctly enforce it?*

"It's my money and I want it now!" We've all heard this familiar jingle on TV, the radio, or through some other advertising medium. To the average person, these advertisements probably seem innocent and go into one ear and out the other, but they can entice and harm the individuals they attempt to target. The companies airing these advertisements, called *factoring companies*, attempt to buy plaintiffs' structured settlements at a fraction of their true value. The intricacies of structured settlements and the confusing practices of the factoring industry complicate the analysis of whether these transactions protect the well-being of injured plaintiffs or put them in a worse situation.

Factoring companies serve a necessary purpose, which will be explained later, but these companies often prey upon the impoverished, desperate, and financially illiterate. There are a number of pertinent examples that highlight this issue. For instance, Freddie Gray, a well-known structured settlement recipient, died while in police custody. His death contributed to the controversy in Baltimore a few years ago.[1] Undoubtedly, Freddie Gray's homelessness, addiction, and diminished mental capacity all contributed to the incident that ultimately led to his death, but the fact that he sold his structured settlement, his sole source of income, perpetuated all of the previously mentioned characteristics and led to his eventual death in police custody. Bombarded by factoring companies, he sold his structure to a factoring company, piece by piece, over a span of approximately a year.[2] This part of the overall incident, perhaps rightly not as widely covered as the general outrage over his death in police custody, perpetuated Freddie's homelessness and other struggles. As a result of selling his structure he

[1] Terrence McCoy, *How Companies Make Millions off Lead-poisoned, Poor Blacks*, The Washington Post (Feb. 06, 2018), https://www.washingtonpost.com/local/social-issues/how-companies-make-millions-off-lead-poisoned-poor-blacks/2015/08/25/7460c1de-0d8c-11e5-9726-49d6fa26a8c6_story.html?utm_term=.2e00d121f32c.

[2] *Id*.

was no longer able to pay his rent or bills and he eventually lost his home- all costs which would normally have been covered by payments from his structured settlement.[3] Freddie Gray, an impoverished individual with a diminished mental capacity and victim of lead poisoning, is one of the more well-known instances of a structured settlement buyout gone wrong, but sadly there are countless other examples of this as it occurs entirely too often. [4] The state and federal government need to take action to protect individuals like Freddie, the kinds of people who primarily utilize structured settlements. Analysis of the factoring industry shows that it is an integral industry that complements structured settlements and can provide for the immediate needs of plaintiffs, but it is also clear that regulation of the industry needs to be increased and to be more uniform across states in order to adequately protect structured settlement recipients.

This paper will focus on the secondary market for structured settlements and the regulation of that market on the federal and state level. There are a number of different kinds of structured settlements and contexts in which they are utilized, but this paper will speak exclusively to structured settlements in the personal injury context rather than worker's compensation or some other situation. Examples of this will be shared later.

As stated earlier, there are a plethora of issues surrounding structured settlement buyouts. There are issues at every level of the transaction. There are ethical issues and concerns when it comes to attorneys suggesting and pushing a Plaintiff to utilize a structure for their settlement. The question arises as to whether it is true and fair to suggest that most impoverished victims will squander and mismanage their finances if awarded a large lump sum settlement? There are issues surrounding how to structure the settlement- in terms of all structure or allocating a portion of it to a lump sum, etc. Then there is an entire other bundle of issues to unpack in relation to factoring— or the sale of structured settlements. Is this practice necessary? If so, should it be regulated and how? There are issues relating to how effective current structured settlement protection legislation is at the state and federal level, and, even if effective law is in place, how effective are judges at actually implementing and fulfilling the

[3] Deborah Bailey, *Freddie Gray and Lead Poisoning?*, Public Administration Times (Feb. 06, 2018), https://patimes.org/freddie-gray-lead-poisoning/.
[4] *Id*.

letter of the law. In order to understand these issues and grasp the overarching problems, one must have a complete understanding of the history of structured settlements, the factoring industry, the legislative measures taken to protect Plaintiffs' funds, and the role the judiciary plays in enforcing the laws on the books and policing these transactions. This paper assesses whether current state and federal regulations adequately protect structured settlement recipients. Moreover, I discuss what additional steps can be taken to ensure that those individuals, those who are normally impoverished and uneducated, are protected from the predatory tactics of factoring companies.

II. **Methods Section**:

This paper seeks to inform the reader on the impact structured settlements and secondary factoring markets have on impoverished individuals, as well as speak to the effectiveness of current legislation and propose new legislation or government action in order to better protect structured settlement recipients and their funds. To do justice to this question, this paper will highlight the history of structured settlements- looking at their creation and tax preference extended by the federal government. This will be done primarily through looking at the tax code, the legislative history of the code, and legal scholarship on structured settlements broadly. Next, this paper will identify a number of the ethical tensions present with structured settlements and factoring companies. Further, the history of the factoring industry will be examined and there will be analysis of the effectiveness of two different structured settlement protections acts ("SSPAs")— highlighting New York and Kentucky's acts. This section will rely heavily on current legislation, legislative history, and interviews with individuals in the industry. Last, this paper will propose a number of suggestions for further regulation of the factoring industry.

III. **Background**:

In the 1980s, Congress codified a few new tax provisions to encourage the use of structured settlements to provide long-term financial security to injured plaintiffs.[5] 26 U.S.C. § 104 allows for damages received as a result of personal physical injury to be excluded from

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[5] Periodic Payment Settlement Tax Act of 1982, Pub. L. No. 97-473, § 101, 96 Stat. 2605 (1983).

individual income tax.[6] This section provides a tax incentive that encourages plaintiffs to structure their settlements because the interest earned by the plaintiff on the structure is tax-free.[7] Essentially, § 104 allows a plaintiff to place their settlement damages into an annuity for which all of the payout is excludable from gross income- allowing all interest received to be tax free.[8] Since structured settlements' inception in the 1980s, it has grown extensively and now there is approximately $5.5 billion put into structured settlements each year on behalf of physically injured plaintiffs.[9]

Once Plaintiffs opt for a structure, their money is more or less trapped in the settlement.[10] They can be guaranteed fixed payments for life, but the amount of money dispersed each period is essentially constant.[11] The only caveat being a court order granting a plaintiff the ability to sell some of the future payments to a factoring company in order to meet an emergency need that their fixed payments could not meet. While this is certainly a drawback, there are also a number of features that make structured settlements wise financial decisions. They provide for a steady income stream and also provide a number of tax incentives. They are beneficial for individuals who are not financial or investment savvy, or those who are myopic in their decision making. The fact that the money is "locked" into a structure prevents victims from foolishly investing or spending it all— making them unable to provide for their or their dependents' needs. Further, structured settlements are unaffected by the stock market.

As a result of the structure settlement market developing, and a desire on the part of some structured settlement recipients for the ability to obtain a substantial amount of cash immediately, a market for structured settlement buyouts emerged. These companies, such as JG Wentworth, buy structured settlements from Plaintiffs for a portion of their true value. They

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[6] 26 U.S.C. § 104 (1997).
[7] *Id.*
[8] *See* 26 U.S.C. § 130 (1997) (explaining how structured settlements are excludable from gross income).
[9] Mark Wahlstrom, *Structured Settlement Industry Production Numbers* Plunge, The Settlement Channel (Mar. 2, 2018), http://www.thesettlementchannel.com/structured-settlement-news-opinion/2018/3/2/structured-settlement-industry-production-numbers-plunge.
[10] Catherine Byerly, *Structured* Settlements, Annuity.org (Feb. 10, 2018), https://www.annuity.org/structured-settlements/.
[11] *See id* (explaining different structure options).

allow victims to get lump sums of cash after the Plaintiffs have locked their settlements into a structure. This industry was initially unregulated, but in the early 2000s almost all of the states issued Structured Settlement Protection Acts ("SSPAs") in an effort to protect victims and their money. The federal government followed suit by passing 26 U.S.C. § 5891, which imposes a 40% tax on a transaction if a factoring company fails to acquire a court order approving a transaction.[12] Aside from this one federal hurdle, regulation varies from state to state- depending solely upon the language of their SSPA.[13] SSPAs vary drastically state to state and also vary in their success at protecting victims from being preyed upon by these buyout companies.

A. Parties to a Structured Settlement Transaction:

To fully grasp these issues, it may be helpful to follow a hypothetical transaction to understand the role each individual plays, as well as the overall order these transactions occur. For example, imagine a single parent family where the mother is the sole caregiver and provider for her son, a middle school child. Each day, the son would ride his bike along the same route to school. The mother, who couldn't afford a car, would also ride her bike to work along a route that slightly overlapped the route the boy takes. One day, the son rides to school and the mother heads to work shortly thereafter. Sadly, the city constructed a new culvert like hump along the edge of the street near the sidewalk to direct water flow to a drainage ditch, but they failed to erect any signage to warn those who walk and ride by about the new obstacle. The mother unknowingly hits the obstacle and falls from her bike. Her neck catches between a collection of three mailboxes and she is instantly paralyzed from the waist down.

Fast forward a few months, this woman and her child are in a desperate financial situation, and they sue the city for causing her injuries. The family needs cash immediately to cover the mother's medical bills and to meet all of the needs of her son- who is unable to care for himself, let alone the mother. Going to trial on this personal injury cause of action could take years. The Plaintiffs, the single parent family, would be unable to sustain the litigation as

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[12] 26 U.S.C. § 5891 (1997).

[13] Alanna Ritchie, *Structured Settlement Protection Acts*, Annuity.org (Feb. 15, 2018), https://www.annuity.org/selling-payments/structured-settlement-protection-acts/ (explaining the differences between state SSPAs).

they have immediate needs that they need met and they would be unable to wait several years before receiving any funds. Therefore, a settlement discussion would most definitely be on the table for them.

At the settlement discussion, it is apparent that the city is pressed for cash and will not be able to offer a large lump sum settlement. Further, even if they were willing to do that there are concerns that the mother will be unable to manage the funds in a way that will meet their needs over the remainder of her life and her son's childhood. Therefore, a structured settlement is suggested. Essentially, the city would purchase an annuity with a future value that is much larger than what they could offer as a lump sum and they would assign all rights and payments from it to the mother.[14] This way, there is guaranteed income to the family and the money is protected from anyone who may attempt to take advantage of the family in their vulnerable state. Further, there are even tax incentives for this transaction that allow for any interest the annuity pays out to be tax free.

This is just one example of many of the situations that may arise where a structured settlement is utilized, but it is generally this structured settlement context that this paper will focus. After the family receives the structured settlement, which may or may not have been in their best interest, there are still a myriad of problems that they may face. Factoring companies have formed a secondary market for structured settlements where they purchase all or a portion of the annuity payments in exchange for a lump sum payment. Today, all of these concepts will be explained in detail later. This paper will focus on this secondary market, the regulation of it, and also propose new action that could be taken to help protect structured settlement recipients like the one from the above hypothetical.

1. **Who do Structured Settlements Truly Benefit?**:

In order to determine whether structured settlements are the best option for impoverished and catastrophically injured plaintiffs, one needs a thorough understanding of *who* the structured settlement market provide substantial benefits. § 130 clearly indicates that Congress took action to incentivize the use of structured settlements by injured plaintiffs, but

[14] *Structured Settlement Annuity*, Structures (Mar. 15, 2018), https://structures.com/structured-settlement-annuity/ (explaining how the structured settlement process works).

structured settlements also benefit a number of other individuals who are involved in the lawsuits and subsequent transactions.[15] There are benefits that extend to the brokers who set up the deals, the plaintiff's attorney, the structured settlement writers, and the party that is being sued- whether that be an insurance company, a corporation, or some small business.[16]

There are tax incentives for injured plaintiffs who choose to utilize a structured settlement.[17] The IRC explains that the total amount will be excluded from taxes and all interest gained from the annuity will also be excluded.[18] Further, Defendants who have little funds or liquid assets can utilize structured settlements to purchase a financial product that has a *future value* that far exceeds any lump sum they would be able to pay a plaintiff. This ensures that defendants are able to provide plaintiffs with much more income than they otherwise could provide.[19] Additionally, placing money in a structured settlement can protect it from creditors and unwise spending as it is essentially "locked in," but for the factoring market and a court order approving the sale or transfer of the structure. The structured settlement allows an injured plaintiff to receive periodic payments over a fixed number of years or even their lifetime with all of the income being tax-free. Clearly, plaintiffs who choose to utilize this financial product receive both financial and practical benefits as the income is tax free, the funds are sheltered and protected, and the mechanics of a structure may allow them to capture more net money than they ever could be paid if there were to have accepted a lump sum cash settlement.

As briefly touched on above, the defendant also receives a number of benefits when using a structured settlement product rather than paying a lump sum. Traditionally, the defendants in a lawsuit are the individuals or entity being sued for injuring a plaintiff as well as their insurance carrier, or carriers in some instances. First, under § 104, all damages, except for punitive, stemming from a physical injury are excludable from income.[20] Therefore, just by

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[15] 26 U.S.C. § 130 (1997).
[16] Telephone Interview with John McCulloch, Vice President, Structures (Feb. 2, 2018).
[17] 26 U.S.C. § 130.
[18] 26 U.S.C. § 130.
[19] John McCulloch, Board Member, National Structured Settlement Trade Association, Structured Settlements: New Trends & Developments 2012 Annual Conference (June 29, 2012).
[20] 26 U.S.C. § 104.

settling, rather than going to trial, defendants have some bargaining power as they are able to allocate in the settlement what amount of the total damages are apportioned to punitive[21] and to compensatory.[22] At trial, it is a guessing game as to how the judge and jury will allocate damages between punitive and compensatory. Settling allows for a higher degree of certainty on the breakdown on damages, and, accordingly, the tax-free dollars an injured plaintiff will ultimately receive. By allocating more money to compensatory damages they would be providing the plaintiff more tax-free money versus allocating money to punitive which is fully taxable as income- regardless of whether it stems from an injury.

Structured settlements give defendants a great deal of bargaining power as they may be able to pay a plaintiff slightly less total money if the defendants allocate the majority of damages to compensatory to allow a plaintiff to utilize the tax-free provision for damages stemming from a physical injury. Further, defendants are able to reduce the total amounts they're paying plaintiffs by even more as they are able to buy annuities that pay out way more than they could ever pay in a lump sum over a span of years, or the plaintiff's lifetime, for substantially less than what it would cost the defendant to give that total amount in one lump amount. In sum, structured settlements provide defendants a number of benefits that allow them to save money while still potentially "paying" the injured plaintiff more money than they would be able to with a lump sum- something that insurance companies appreciate as they are trying to minimize their liability as much as possible.

Besides the plaintiffs and defendants, there are a number of other parties that benefit from these transactions. It used to be that structured settlements were just something else for a plaintiff's attorney to worry about- he would have to contact a broker, speak with insurance companies, discuss the possibility of a structure with opposing counsel and connect those parties with his plaintiff. Now, Plaintiff attorneys are able to personally benefit from a structure, in addition to the benefits to their clients, in a few different ways. First, attorneys receive a benefit by providing their client with a reliable, trust worthy, and financially savvy way to invest the money that they're received as a result of being injured. This frees the attorney from feeling

[21] *Id*.
[22] *Id.*

as if he or she needs to remain directly involved with the plaintiff to aid with wealth management as the structured settlement will pay out each month and also provide for the injured victim's needs for the settlement. The attorney, but for a factoring company, doesn't need to worry that the funds will be quickly wasted, stolen, or dissipated quickly. On the financial side, attorneys are also able to take advantage of structured settlements for themselves to receive tax deferred income. This is a highly complex transaction, but the *Childs* lines of cases allows attorneys to receive their fees in the form of a structure so that the income can be deferred until a certain date.[23] This can have very beneficial tax consequences for them as they are able to defer income to a later year, effectively lowering the taxes they pay, and also invest the deferred funds in money markets. All in all, structured settlements provide huge benefits to the plaintiffs in the form of protected and guaranteed income, but other parties profit from the transactions. The attorneys themselves benefit in feeling good that they've helped a plaintiff and possibly also are able to defer their income- providing both parties a big tax benefit.

There are also a number of consultants and people who actually "write" the structured settlement products that receive a small fee. However, this fee is pretty nominal in comparison to the overall value of the structures they are writing and helping to form.

In conclusion, there are a number of other parties, aside from the injured plaintiff, that receive benefits from structured settlement use. This may beg the question of whether the *real* benefit truly goes to the injured plaintiff, but I think it is tough to argue that it does not. The primary benefit does go to the structured settlement recipient and not some other party. There are definitely incentives present for the attorneys on either side of the table as well as the defendant, but the incentives and potential benefits that they may receive are slim in comparison to those the defendant receives. Further, there are incentives for defendants to utilize structured settlements to pay for damages owed to a plaintiff, whether insurance companies or the actual party being sued. However, these incentives just allow for the defendant to pay the plaintiff substantially more than he or she would if they had to pay for a lump sum. Ultimately, the tax-free status of structured settlements as well as the tax-free

[23] *Childs v. Comm'r*, 103 T.C. 634 (1994).

treatment of any interest earned on the annuity by injured plaintiffs far outweigh any benefits given to other parties involved in these transactions. Structured settlements provide the best incentives and benefits to the party that is the most deserving- the desperate and often seriously injured plaintiff. Therefore, structured settlements are an excellent option for injured plaintiffs, and for those who are unable to manage their funds or who lack other viable options for management.

B. Dispelling Misconceptions about the Structured Settlement Industry:

The general consensus in the structured settlement industry is that the majority of impoverished plaintiffs who receive a settlement will blow it within the first few years if they receive a lump sum payment. Literature points to this assertion being true, but these sources rarely, if ever, point to any reliable data.[24] Instead, they point to anecdotal evidence, attenuated arguments, and old and unreliable data sets.[25] This position, possibly one that Congress depended upon when passing the tax incentives for structured settlements, is tough to defend with hard data. However, the vast majority of injury victims who opt for a structured settlement are people coming from lower socioeconomic backgrounds, lower education levels, and generally people with low financial IQs. Structured settlements are great financial products, but for someone who is injured and will not depend upon their settlement as their sole source of income, there are several other options that may be more viable. This begs the question of whether structured settlements are the best option for individuals who will depend on the funds for the rest of their lives, who probably are not the most financial savvy, and who are potentially seriously physically handicapped, or even mentally handicapped, as a result of their injury? For these individuals, it appears to be one of their best options.

Having established that structured settlements are a great option for plaintiffs with the above background, the next question is whether these transactions should be closely regulated. The short answer to this question is yes, but it requires a more complex explanation. Another reason a structured settlement could be a good option is that it protects people from their myopic tendencies. [26] A number of these individuals come from desperate situations and are

[24] *See* David N. Barkhausen et al., *Benefits of Structured Settlements*, 16 Family Advocate 54 (1993).
[25] *See* Charles F. Krause, *Structured Settlements for Tort Victims*, 66 ABA J. 1527 (1980).
[26] *See* Michael S. Finke et al., *Risk and Myopic Financial Decisions*, (2004).

forced to live one day at a time. When these individuals get a settlement, there will definitely be a big temptation to factor it away, not because they are irresponsible, but because they are desperate. Situations may arise where they need cash immediately to cover a medical procedure or some other unforeseen bill. There needs to be regulation in place to protect people from themselves as they think myopically out of desperation and potentially sell a portion, or all of, their settlement for pennies on the dollar. For all of these reasons, the factoring industry must be closely regulated.

C. **Factoring Industry Background**:

With the emergence of a number of factorable financial products along with structured settlements becoming viable financial products for injured plaintiffs via tax code revisions, the factoring industry began to emerge. What is meant by the term "factoring industry?" Does it only refer to the sale of a structured settlement?

Importantly, the factoring industry is not just limited to buying structured settlements. Factoring companies try to buy pension payments, and really any kind of payments that are guaranteed over a fixed period of time. Unfortunately, it would go beyond the scope of this paper to touch on all facets of the industry, but for the purposes of this paper when the term "factoring company" or "factoring industry" is used it is assumed that it is referring to specifically the structured settlement side of the industry.

D. **Model Structured Settlement Protection Statute Background**:

With the factoring industry rapidly growing in the late 80s and early 90s and the factoring companies' predatory tactics going largely unregulated and uninterrupted, the Structured Settlement Trade Association got together with key players in the factoring industry to draft a model structured settlement protection act that could be adopted by states.[27] The model act sought to aid states in their protection of structured settlement recipients and to legitimize the factoring industry.[28] In 2004, the SSTA released the first version.[29] It has been updated twice since its initial release.[30] Most states have fully or in part adopted the Model

[27] Model State Structured Settlement Protection Act § 4 (NCOIL Exec. Comm. 2011) (detailing the entire model act).
[28] Telephone Interview with John McCulloch.
[29] *Id*.
[30] *Id*.

Structured Settlement Protection act. The act provides sections for definitions, required disclosures, approval of transfers of payment rights, effects of transfer of rights, procedure for approval of transfers, and general provisions.[31]

IV. **Analysis of Implementation of the Model SSPA at the State Level**:

In order to illustrate the thrust of this paper, and also to limit the length of it, I have selected two states to demonstrate the implementation of an SSPA at the state level.[32] The two states that we will look at in depth are Kentucky and New York. These states were selected after speaking with several people in the settlement industry about which states had the best and worst overall implementation of a SSPA. John McCulloch explained that New York is by far the best state when it comes to implementation of an SSPA and that Kentucky is by far the worst.[33] This paper will look at each of their SSPAs to compare and contrast the two as well as look at a number of court orders and other literature to highlight the difference in enforcement that occurs. [34]

A. **New York- The Stronger SSPA**:

Across the industry it is well known that New York has one of the best SSPAs, the highest level of judicial education, and highest level of judicial enforcement in the United States.[35] A thorough understanding of New York's SSPA makes it easier to recognize what one needs to include in an SSPA and helps to highlight where Kentucky and other states can improve in their protection of structured settlement recipients from factoring companies.

1. **§ 5-1701 of New York's SSPA**:

§ 5-1701 of New York's SSPA defines all of the relevant SSPA terms in extensive detail and is an excellent example of a definition section for an SSPA. For instance, New York's act requires consultation of independent counsel.[36] In § 5-1701, the act clearly defines *independent counsel* and sets out all of the requirements necessary for a party to fulfill the statutory definition. They must not be "affiliated with or compensated by the defendant in such

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[31] *Id*.
[32] *See* KY. Rev. Stat. Ann. § 454.430-435 (West 1998) & N.Y. Gen. Oblig. Law § 5-1701 to 1708 (McKinney 2002).
[33] Telephone Interview with John McCulloch (Feb. 2, 2018).
[34] *See also* U.S.C. 26 § 5891 (providing for a 40% tax on structure transfers that fail to obtain a court order).
[35] Telephone Interview with John McCulloch (Feb. 2, 2018).
[36] N.Y. Gen. Oblig. Law § 5-1702 (McKinney 2002).

settlement or transferee of such transfer; and whose compensation for rendering such advice is not affected by whether a settlement or transfer occurs or does not occur."[37] New York's SSPA does an excellent job of not only requiring a number of procedural hurdles to be navigated to affirm a proposed transfer, but it also defines and fully explains the specifics of these requirements. This may seem like an uninteresting and unimportant section of the statute, but this section sets the stage for the remainder of the SSPA. A state could have an SSPA with a great deal of requirements but fail to define and explain all the necessary terms and requirements. This would make it difficult for judges to effectively enforce the act. Further, the lengthy explanation of all necessary terms allows for judges to fully understand the act and enforce it effectively- something that John McCulloch explains is almost as important as having an SSPA in place.[38] The impressiveness of this definition section is further highlighted when held up against Kentucky's.[39] This section serves as the base of New York's structured settlement protection act and is just the beginning of a very successful act.

2. <u>§ 5-1702 of New York's SSPA</u>:

§ 5-1702 provides a detailed explanation of the requirements for initial disclosure of structured settlement terms in New York. Parties must present a plaintiff and his or her independent counsel with extensive information regarding the specifics of the transaction such as the premium payable to the annuity issuer, etc.[40] This section is completely missing from Kentucky's SSPA.[41] This section sets the stage for structured settlement protections by ensuring that plaintiffs receive *all* the information necessary to determine whether a structure is the best option for them when they are first injured. It does not necessarily speak to the factoring industry, but it provides the groundwork for a plaintiff to be protected throughout the life of his or her structure. It should be added in Kentucky, as well as other jurisdictions that are missing it, as the increased amount of disclosures made and information given to plaintiffs helps them make an informed decision as to whether or not a structure is the best settlement option for them.

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[37] *Id*. at § 5-1701 (e)(ii-iii).
[38] Telephone Interview with John McCulloch (Feb. 2, 2018).
[39] *See* KY. Rev. Stat. Ann. § 454.430 (West 1998).
[40] *Id*. at § 5-1702.
[41] *See* KY. Rev. Stat. Ann. § 454.430-435 (West 1998).

3. § 5-1703 of New York's SSPA:

§ 5-1703 of New York's SSPA provides extensive instructions on what disclosures factoring companies must make to payees. This section is well ahead of the model act's, as well as Kentucky's. Kentucky and the model act require that disclosures be made to the payee about the amounts to be transferred, the aggregate amounts of the payments, the discounted present value of the payments to be transferred, and the amount of the fees, etc. that will be charged. New York requires that factoring companies disclose everything that the model act and Kentucky require, but it also requires a great deal of other financial information and it lays out all of these requirements in detail- explaining the heart behind several of the requests. First, it also requires a price quote from the original annuity issuer or, two others if they are unable to perform, that "reflects the current cost of purchasing a comparable annuity for the amount of the payments to be transferred."[42] This is important because it provides judges another tool that they are able to use to analyze the fairness of the transaction. In order to determine whether the deal is in the best interest of the payee, judges need the most information they can about the financial side of the deal and how the factoring company arrived at the final numbers it did. It would be clear that it is not fair and not in the best interest of the payee if the discounted amount the factoring company is willing to pay is grossly disproportionate to the amount of an annuity that could be purchased for the aggregate amount of the payments to be transferred.

Further, New York's required disclosure section goes into detail regarding how the disclosed information should be presented to the payee, as well as the judge who will see it at the hearing, which is yet another factor that helps New York to protect their structured settlement recipients. For example, when making disclosures about the net advance amount New York requires the statement "[t]he net cash payment you receive in the transaction from the buyer was determined by applying the specified discount rate to the amount of future payments received by the buyer, less the total amount of commissions, fees, costs, expenses and charges payable to you," rather than just saying the disclosure needs to include the

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[42] N.Y. Gen. Oblig. Law § 5-1703(d) (McKinney 2002).

following information and providing no guidance on the specifics of the disclosure.[43] This is helpful for a couple different reasons. First, it provides information in a manner that hopefully will allow even the least educated payees to understand. Less sophisticated payees could easily be tricked if factoring companies are allowed to place this information on a sheet with little to no guiding information about what numbers are the page. Therefore, this section provides for an initial check on the transaction. The payee is able to better understand how good of a deal he or she is getting when the language around the numbers is very clear. Second, it equips the judge with far more information to rule on the deal. Not only will judges have extensive information on the numbers of the transaction, but they will also have clear statements further clarifying all of the financial disclosures that factoring companies are required to make. In the end, hopefully after both the payees and the judges have been put on notice about the intricacies of the deal they will be better equipped to cancel the deal if it is unfair and predatory.

Last, New York requires that factoring companies allow payees the right "to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee"[44] This is a requirement that the model act also requires, but Kentucky has yet to adopt. It is important to include in the disclosure section of an SSPA because after a payee has received the necessary disclosures he or she should be able to cancel the deal without consequences if they or their independent counsel find the deal to be grossly unfair or not in the best interest of the payee. The differences between Kentucky and New York's disclosure sections can best be understood by a thorough look at Kentucky's act in the next section of this paper.

4. **<u>§ 5-1704 of New York's SSPA</u>**:

§ 5-1704 is a brief section of the act that lays out prohibited provisions for structured settlement transfers. It prevents factoring companies from including provisions in an agreement that ask payees to waive their right to sue, indemnify the factoring company, require the payment of the factoring company's attorney fees if the transaction fails, or any

[43] *Id*.
[44] *Id.* at § 5-1703(i).

provision that requires the payee cover any liability arising under federal tax law that results from the transfer.[45] This section is laid out just to ensure that payees are protected from the possibility of predatory tactics from factoring companies. The protections laid out in this section are not unreasonable, but rather ensure that payees are not blindsided by one-sided terms in the transfer agreement at closing or if the deal falls apart. This section is not present in either the Model Act or in Kentucky's SSPA. Both would further the goal of protecting structured settlement recipients by adopting it.

5. <u>§ 5-1705 of New York's SSPA</u>:

§ 5-1705 specifically lays out the procedure for approval of a structured settlement transfer. The act closely mirrors the model act in this section, but Kentucky has not adopted a this detailed of a provision. In New York, the court requires that there be confirmation of all disclosures being made and received by the payee, but it also requires extensive information on the payee's dependents.[46] This extra information allows the judge to have a more holistic look at the transaction and to rule more fairly and accurately on the deal. Without knowing about the payee's dependents, they will be unable to accurately assess whether the deal is in the "best interest" of the payee. Additionally, the court requires that the payee "attend the hearing before the court unless attendance is excused for good cause."[47] This provision is not included in the model act or in Kentucky's. It will be further discussed in the next section, but all of the detailed and extensive requirements for approval for transfer in New York serve to fulfill the legislative goals of SSPAs- to protect structured settlement recipients from the predatory tactics of factoring companies. Kentucky and the model act would be well served to amend and add the above provision.

6. <u>§ 5-1706 of New York's SSPA</u>:

§ 5-1706 is one of the briefest sections of New York's SSPA, but it serves as the backbone of the act as it lays out the specifics of the "best interest" assessment courts are required to use before allowing a transaction. This mirrors the model act's transfer provision.[48]

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[45] *See Id*. at § 5-1704(a)-(d).
[46] *Id.* at § 5-1705 (d)(iii).
[47] *Id*. at § 5-1705 (e).
[48] Model State Structured Settlement Protection Act § 4.

The section explains that a transfer should be approved only when it is "in the best interest of the payee, taking into account the welfare and support of the payee's dependents" and when all of the financial details and terms are fair and disclosed appropriately.[49] It directs judges to approve a transaction only if it is in the "best interest" of the payee. Further, it also describes and details specifically what factors to weigh in determining whether a transaction is truly in the "best interest" of the plaintiff.[50] This provision is key to protect payees. When this provision isn't present, judges who are ill informed may approve transfers if factoring companies are just able to make the required disclosures and not inquire into whether it is "in the best interest" of the payee. That result would not be malice from the judge, but most likely just a lack judicial education. SSPAs should include the detailed "best interest" provision of the model act and New York in order to best protect payees.

7. <u>§ 5-1707 and § 5-1708 of New York's SSPA</u>:

§ 5-1707 and § 5-1708 detail the effects of a structured settlement payment rights and general act construction. Both sections are almost directly copied from the model act. They serve to lay out what occurs after a transaction is approved and also lay out the non-waiverability of the SSPA by any payee or factoring company. These sections ensure the SSPAs remain in full force and are in place to protect structured settlement recipients from predatory factoring companies, yet still allow transfers when in the best interest of the payee. This is another area that Kentucky could amend their SSPA, but this will be discussed in more detail below.

B. <u>Kentucky- The Weaker SSPA</u>:

Kentucky is known for having the worst SSPAs and judicial enforcement of it by most attorneys in the structured settlement industry. Is this a fair assessment? If so, why is their SSPA so bad and why is there such poor enforcement of it in Kentucky? There are a number of factors that contribute to this poor perception, but it comes down to an overall weak SSPA and poor judicial education and enforcement. The best way to recognize and understand these inadequacies is by directly looking at Kentucky's court orders, SSPA, and literature on the

[49] N.Y. Gen. Oblig. Law § 5-1706 (b).
[50] *Id*.

jurisdiction in comparison to that of New York, predominately viewed as the best jurisdiction when it comes to SSPAs and judicial enforcement of it, which was previously discussed.

1. **Key Differences between New York and Kentucky**:

Upon first glance, Kentucky's SSPA is extremely brief in comparison to that of New York. Kentucky's is consolidated into only three sections, whereas New York's is contained in closer to 8 or 9 different sections. Kentucky's SSPA is found in § 454.430, § 454.431, and § 454.435.
In order to grasp a thorough understanding of the state of the factoring industry in Kentucky it is helpful to take an in depth look at Kentucky's SSPA as well as court holdings and orders from the jurisdiction.

2. **§ 454.430 of Kentucky's SSPA**:

The first section of Kentucky's SSPA, § 454.430, is very brief in comparison to New York's.[51] New York's definition section defines over twenty relevant terms, while Kentucky only defines ten. This needs to be remedied as this section can be incredibly important at the trial level as courts attempt to reason through what situations a structured settlement may be factored and what action a structured settlement must stem from in order to fall under the protections offered by the SSPA. This paper focuses primarily on the personal injury context rather than worker's compensation or something else, but there are a number of other situations where a structured settlement may be used outside of personal injury lawsuits. For example, may a structured settlement stemming from a worker's compensation issue be factored? What about when an attorney receives his legal fees as a structured settlement? Even if these transactions are factorable, does the state's SSPA apply to this secondary transaction? Courts rely heavily on this section when their SSPAs is leaner and there is little to no case law governing factoring transactions. This section provides the tools and language necessary for Courts to handle these kinds of questions as they arise. Without the State's legislature providing adequate terminology and guidance, the courts will be ill prepared to answer these questions as they appear for the first time in their jurisdictions and as the structured settlement industry creates even more products and uses for structured settlements that go beyond their traditional uses.

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[51] KY. Rev. Stat. Ann. § 454.430.

3. <u>§ 454.431 of Kentucky's SSPA</u>:

The next relevant portion is § 454.431 of Kentucky's SSPA. It details the requirements for court approval of a structured settlement.[52] It requires notice of the amounts to be transferred, the amount of the payments being sold, the discounted present value of the payments (with discount rates), the gross amount payable to the payee, a listing of all fees, and the amount of liquidated damages payable if the payee breaches the agreement. It also requires that there be proof that the transfer is necessary to avoid financial hardship, there needs to be evidence of sufficient notice to the annuity issuer, and the payee needs to consent to the transfer in writing. The Kentucky SSPA mirrors this section of the model statute except for a few minor differences. Kentucky's SSPA is notably different than that of New York.

New York and Kentucky's statutes differ for a number of the reasons that will be detailed below, but one main difference is the lack of requirement that structured settlement recipients be present at their hearing for approval of the sale. Currently, all that Kentucky requires is the signature of the individual seeking to sell his or her structure. This is an integral provision that is not currently present in the model statute.[53] Without requiring them to appear in person, the SSPA only functions as a procedural gatekeeper on these kinds of transactions. It does not seek to take a full look at the transaction and protect the best interests of the plaintiffs, but instead it just serves as a small hindrance to factoring companies. If factoring companies are willing jump through these hoops, convince a plaintiff that the transaction is a good idea, and get them to sign the necessary paperwork, then they will be able to get the transaction approved. This is problematic and something that needs to be remedied in Kentucky and a number of other states. The heart behind adopting a structured settlement protection statute is to protect settlement recipients from being taken advantage of by factoring companies and the absence of this requirement defeats this purpose. Kentucky needs to amend its SSPA in order to better protect structured settlement recipients and a personal showing requirement is an essential element to achieve their goals. New York has this requirement in place and it greatly aids judges in determining whether a transaction is in the

[52] *Id.* at § 454.431.
[53] *See* Model State Structured Settlement Protection Act § 3.

best interest of a structured settlement recipient. Judges may directly question payees about their financial situation and the status of their dependents to determine whether the deal is in the payee's best interest.

Second, there is no explicit "best interest" of the payee test in Kentucky's SSPA. Instead, Kentucky has a provision that just says the "transfer must be necessary to enable the payee to avoid imminent financial hardship."[54] This needs to be altered for a few reasons. First, the general scope of Kentucky's clause is much narrower than that of the model act and New York's act. The broader language of the model act and New York's SSPA, to be "in the best interest" of the payee, better conveys the heart behind the enactment of SSPAs. Legislators intended to create an act that would protect payees from the predatory tactics of factoring companies, while still allowing the factoring companies to operate- just giving them a system of rules and regulations to follow. Judges are required to proceed over these hearings with very little judicial education on the transactions. Judges are able to justly preside over these matters when the statute explicitly states that transactions should only occur when it is in the best interest of the payee. With the "best interest" test in mind, the judge may probe further into the specifics of the situation and possibly even require the payee to be present at the hearing before he or she would approve a transaction- even if a state didn't have that requirement in the statute. It makes senses that if a judge is attempting to act "in the best interest" of the payee that he or she will be forced to make an in-depth inquiry into the transaction- something that legislators hoped would happen. The narrow language of Kentucky and several other states' SSPAs does not fulfill this purpose and should be amended or altered.

Third, there is no requirement of independent counsel for a factoring transaction in Kentucky. This is an important procedural hurdle that a SSPA should contain to appropriately protect structured settlement recipients. There are a number of other procedural safeguards in place, but without the requirement of consulting independent counsel on the transaction a judge who is not well informed on these types of deals may be fooled by a clever factoring company. Kentucky's SSPA needs to be updated for a number of different reasons, but the fact that it does not require an individual to be present for the hearing and does not require

[54] KY. Rev. Stat. Ann. § 454.431.

independent counsel to consulted is very problematic. It would be very easy for factoring companies to take advantage of plaintiffs and the courts if a state just required that independent counsel be consulted and not that plaintiffs need to be present for the hearing. It is plausible, and common practices in some places to have a go to "independent financial advisor" that a factoring company will repeatedly use that basically automatically approves deals. Schemes like this can better be combatted when a state's SSPA provides for a detailed inquiry into the transaction as well as providing extensive instructions on how judges should evaluate these transactions. States need both a showing requirement and requirement of consultation of independent counsel in order to successfully protect structured settlement recipients.

4. § 454.435 of Kentucky's SSPA:

§ 454.435 of Kentucky's SSPA dictates notice and hearing requirements, jurisdiction of the Circuit Court, and the non-waiverability of the SSPA.[55] This section is similar to that of New York, although it is slightly less detailed. The first section attempts to eliminate forum shopping by factoring companies by requiring actions for transfer to occur only in the county where the settlement recipient resides or where the original action was filed. The remaining sections detail the specifics of notice such as timing, its contents, etc. This section would be better served with more specific detail on what needs to be contained in the notice. It points back to § 454.431, but does not instruct the judges on how to weigh the various parts of the application that the parties are required to submit.

In sum, Kentucky and other states with SSPAs similar to it have a long way to go before they are able to adequately protect structured settlement recipients from factoring companies. They need to require payees attendance in transfer hearings, amend their statutes to dictate a "best interest test" rather than a narrower one, and require consultation of independent counsel. These changes will help to position Kentucky to fulfill the heart of its SSPA rather than allowing it to just function as an inconvenient hurdle for factoring companies.

[55] *Id*. at § 454.435.

V. Further Proposals for Change:

A. Judicial Application and Education:

Another factor that escapes the scope of even the most sophisticated SSPAs is guidance on judicial oversight. Even the most detailed SSPAs will fail their purpose if the judges only enforce the letter of the law and do not look to the heart of it- protecting individuals from predatory factoring transactions. Upon interviewing several knowledgeable people in the industry, it quickly became clear that this was the number one issue for regulation of the factoring industry. John McCulloch explained that the greatest barrier to successful implementation of SSPs and protections of plaintiffs is diligent judicial oversight.[56] He felt that in all but a few jurisdictions judges were not stepping up to the plate and fulfilling the heart of the statute- to protect structured settlement recipients.[57]

Ultimately, judges need to get involved and invested in the enforcement of SSPAs. John McCulloch stated that it doesn't necessarily come down to who has the best SSPA, but rather what judges are using the highest degree of oversight in relation to these transactions.[58] Basically, it comes down to the judges, not the SSPAs. Regulation can only happen when judges are truly informed about the laws on the books. This could be accomplished through continuing education courses, required judicial training on structured settlements, or even a requirement that knowledgeable independent counsel be consulted and present at an approval hearing in order for a transfer to be allowed.

B. Court Scraping:

Structured Settlement Protection Acts would also benefit from more specific legislation on "court scraping," a tool commonly utilized by factoring companies to find individuals to offer their services. While the factoring industry is admittedly necessary for situations where structured settlement recipients need cash immediately for unforeseen emergencies for which the fixed payments they receive will be insufficient, there still need to be controls in place to protect injured plaintiffs from the predatory tactics of factoring companies. Currently, factoring companies are utilizing court scraping in primarily a predatory manner to find structured

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[56] Telephone Interview with John McCulloch.
[57] *Id*.
[58] *Id*.

settlement recipients. Court scraping is "the practice of factoring brokers obtaining annuitant contact information either by going through court records or buying the information from someone who has already done so, and making contact with these annuitants without a referral or previous business relationship."[59] Put simply, factoring brokers search through public court databases, or pay someone who has already done so, to obtain annuitant's contact information. They then proceed to cold call and try to convince them to sell their annuity payments.

The Model Structured Settlement Protections statute served to protect structured settlement recipients from the predatory tactics of factoring companies, but methods like court scraping largely fall under the radar and outside the scope of SSPs. Court scraping is the use of court records by factoring companies to find potential structured settlement recipients to solicit their services. In practice, factoring companies run in depth searches of public court records to find individuals who have factored part of their structured settlements. They then search for personal information and proceed to reach out to the individual via the telephone, email, mail, door to door sales, etc. to market their factoring services. Sources explain that the factoring companies then bombard the individual until they agree to "sign the dotted line" and sell a portion of their settlement.

There is currently no reliable data on "court scraping rates" and how many annuitants are contacted as a result of this method, but according to key players in the industry this is beginning to become a big issue.[60] For example, John McCulloch stated that court scraping was one of the biggest factors contributing to predatory sales of annuity payments besides basic judicial application and education.[61] Further, there are countless blog posts online telling the stories of these plaintiffs who are enticed into selling their structure payments at steep discounts and then are left without enough money to pay their bills and cover the costs of necessities in their lives.

This practice is problematic for a few reasons. First, public records are being misused by factoring companies to solicit their services to Plaintiffs. The records are not meant to be used

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[59] *What is Scraping?*, Factoring Ethics (2015), https://www.factoringethics.com/scraping.
[60] Telephone Interview with John McCulloch.
[61] *Id*.

for solicitation of services, yet these factoring companies are utilizing this publicly available information to find Plaintiffs who they know to be vulnerable. A publicly available Court order detailing a factoring transaction may not have a ton of personal information, but often there is enough for a factoring company to run a few simple searches to find all the information they need to make contact with a Plaintiff. For example, an individual may sell a portion of their settlement and the court order would briefly detail why they need to factor their settlement as well as some simple personal information. This equips factoring companies with knowledge that they may then use to take advantage of a Plaintiff. One can imagine a scenario where a factoring company court scrapes, finds a potential plaintiff, and then calls them saying, "we know you are suffering from financial hardship and we can help you" in order to make a sale and help their overall bottom line. Public court records were not meant to be used to help companies with their sales. There needs to be something done in order to protect Plaintiffs from the factoring companies court scraping.

Second, court scraping is very difficult to regulate. There is a tension present between the need to regulate these transactions in court and the consequences of doing so. When a plaintiff comes into court to attempt to sell part of their settlement there is a public court record of it. Perhaps the order is even denied, but the individual's information is now publicly available for other factoring companies to solicit their services and attempt to get a plaintiff who may not need to utilize factoring to sell a portion or all of their settlement. This issue may be remedied by courts ordering the records to be sealed or by proactively censoring all of the personal information of the plaintiff. At this time, the SSPAs do not speak to how a judge should handle this situation and, without explicit instructions to act in a particular way, judges will most likely not take action to shield plaintiffs from this solicitation of factoring companies.

Additionally, there are a few legislative tools in place that are meant to indirectly protect injured plaintiffs from the effects of court scraping, but more direct measures need to be taken. The Telephone Consumer Protection Act (TCPA) is meant to protect injured plaintiffs from incessant calls and contact from factoring companies, but from speaking to key players in the industry and from looking at a wide array of forum and blog posts on the issue it is clear that it is flagrantly being violated and is not protecting these plaintiffs.[62] Effective regulation of this practice, whether through the form of penalties or bounties, would greatly benefit structured settlement recipients.

C. Statutorily Prescribed Discount Formulas:

Another useful provision would be one that imposes limits on the discount rate a factoring company may apply to structured settlement payments that they hope to buy. This idea has been discussed by judges in New York, but the court rejected the idea because they felt there was no way to apply a uniform rule to the transactions.[63] These transactions are highly complex and very diverse, in term of the amounts being structured, etc., but there has to be some room to create some sort of ground rules for discount rates on these transactions. Judges, many of whom are not very financially savvy, would benefit greatly from having a general bright line test to evaluate whether the discount rates used by factoring companies are in bounds and fair, or wildly unfair and ridiculous. The judge in New York makes some great points about why this may be difficult to do, but imposing at least a floor on discount rates should help to better protect plaintiffs who are considering entering into these types of transactions.

VI. Normative Analysis:

John Rawls, a renowned philosopher on issues of justice and fairness, in his book *Theories of Justice*, lays out a unique argument that helps to illuminate these tough ethical choices surrounding structured settlements and the regulation of the secondary factoring market.[64] Are practices surrounding structured settlements and regulation of the factoring industry fair and just? Rawls states, "the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[65] Further, he asserts that, because the

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[62] 47 U.S.C. § 227.
[63] *See In re Settlement Funding of NY, LLC*, 2 Misc. 3d 872, 877 (Sup. Ct. 2003) (explaining that rigid discount formulas are not a viable option for regulation of structured settlement transfers).
[64] *See* Brian Duignan, *John* Rawls, Encyclopedia Britannica (Feb. 14, 2018), https://www.britannica.com/biography/John-Rawls (providing biography on John Rawls).
[65] John Rawls, *Theory on* Justice, 207 (1971).

"veil of ignorance" so pervades peoples' decision making, this original position is the only place one can start to get a fair analysis of ethical issues.[66] Rawls engages every ethical question, or every question relating to justice and fairness, from this starting point. He considers these questions from a clean slate- asking what people would agree to as a social contract that roots a society in fairness and equality.[67] He advances two main principles to analyze issues from this starting point.

First, Rawls asserts that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[68] Second, "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all…"[69] He explains "[these principles] are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages."[70] Rawls thinks that a proper analysis of ethical issues relating to justice and fairness must be assessed by applying these two principles in the order they are presented.[71]

In relation to this paper, one must first analyze whether structured settlements, and the tax incentive the government provides for using them, are fair and just. To do this ethical dilemma justice, we ask how structured settlements, and the tax incentives that come with them, stand up to Rawls' two principles. Rawls claims that "each person is to have an equal right to the most basic liberty compatible with a similar liberty for others."[72] The basic liberty at stake here is freedom to contract. In our society, this liberty possesses a great deal of respect-garnering deference from courts in all but the most polarizing instances. All people are free to utilize structured settlements, but only the injured are able to benefit from the tax incentives that the government offers. All parties have an equal right to the basic liberty of freedom to

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[66] *Id.* at 217.
[67] *Id*. at 207.
[68] *Id*. at 213.
[69] *Id*.
[70] *Id*. at 214.
[71] *Id*.
[72] *Id.* at 213.

contract, and specifically use of a structured settlement in this case, but the tax incentives present several social and economic inequalities into the analysis that need to be considered.

Rawls argues that "social and economic inequalities need to be arranged so that they are reasonably expected to be to everyone's advantage and are attached to positions and offices open to all."[73] The first portion of this principle is more applicable to structured settlements than the second. Rawls admits that situations will arise where these inequalities cannot be equally distributed, but he states that when this occurs it can still be "just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society."[74] Further, he explains "there is no injustice in the greater benefits earned by a few provided that the situation of persons not so fortunate is thereby improved."[75] While access to the tax incentives that structured settlements afford individuals is not universally available, the it provides incentives to the marginalized, the severely injured and financially desperate, and often the poorest and least educated individuals. Therefore, even while not offered to all peoples, the tax incentives attached to structured settlement recipients still result in benefits to everyone and especially the least advantaged members of society. Access to structured settlements and the tax incentives they provide help impoverished families, like the one in the hypothetical offered in the introduction, to secure more money to provide for their immediate and long-term needs, to have their money protected from unwise spending and predatory tactics, and to retain more of the money they are being paid than otherwise would be possible because of taxes. However, even in the face of these advantages to a small class of people, the majority of people whom this benefit is withheld still benefit from its existence. Structured settlements help society as a whole because it helps keep families together by providing them a consistent income, it keeps people off welfare and dependence on the state and those around them, and it creates a market where those who do not receive the tax incentives still benefit from the other parts of the transaction. In sum, structured settlements, and the tax incentives that accompany them, stand up against Rawls economic analysis. The

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[73] *Id*. at 217.
[74] *Id*. at 210.
[75] *Id*.

question still stands of whether regulation of the factoring industry can withstand Rawls scrutiny.

In relation to regulation of the factoring industry, Rawls analysis looks a little bit simpler. Again, similarly to structured settlements, the basic right at stake is freedom to contract. Rawls' philosophy asks that each person have an equal right to basic liberty compatible with a similar liberty for others.[76] Regulation of the factoring industry complicates this analysis because it limits parties' freedom to contract. Factoring regulation, as detailed above, puts hurdles and requirements in place that prevent some transactions from taking place- thereby removing equal access to the basic right of freedom to contract. However, almost all people would agree to regulation of the factoring industry, even in the face of inequality to the basic right of freedom to contract, if parties analyzed this situation from the perspective of an initial position of equality. Individuals want to protect the impoverished, uneducated, and desperate from the predatory tactics of factoring companies and to protected them from their own lack of education or financial literacy.

Second, in relation to Rawls' last principle, there are social and economic inequalities present when regulation of the factoring industry occurs. Although, similar to the analysis for structured settlements, the inequalities present do not dictate a failure under Rawls' fairness analysis. The inequalities present still provide a benefit to everyone, as well as to the least advantaged members of society.[77] Regulation aids those whose freedom to contract it stifles. It protects them from unfair factoring transactions and from the predatory tactics of factoring companies. Further, it provides advantages to the least advantaged people in the society- the same people whose contracting liberty is being limited. Additionally, regulation also limits the factoring companies' freedom to contract, but they and the structured settlement owners still receive enormous benefits from the limiting of their right. The factoring companies benefit from the legitimization of their industry, consistency of the process for purchase of structured settlement payments, and positive perception of their practices in the eyes of the public. The structured settlement owners benefit from the increased protection regulation offers.

[76] *Id*. at 213.
[77] *Id*. at 210.

Admittedly, there are some negative consequences of the inequalities present from regulation, but the benefits far outweigh any of the negative effects. In conclusion, structured settlements and regulation of the factoring industry pass Rawls' fairness analysis because they provide benefits to the majority and the disadvantaged, and more or less provide everyone access to the most basic liberties and rights.

VII. **Conclusion**:

Structured settlements provide great financial benefits to injured plaintiffs. They provide a reliable and trustworthy source of income, protection from predators or unwise spending, and simplicity of life. They may not always be the best option for an injured plaintiff, but may be a great option for those who are catastrophically injured, less educated, or more prone to myopic decision making. That being said, these individuals need to be better protected after receiving their structures. The secondary factoring market is alive and well and is constantly seeking new clients and repeat clients. This industry was largely unregulated, but over the last 10-15 years it has been subject to varying levels of regulation. This is a step in the right direction, but SSPAs still need to greatly improve in order to effectively protect structured settlement recipients.

Factoring industry regulation varies at the state and Federal level. At the federal level, regulation is guided solely by § 5891. It explains that all transaction that do not receive a court order are subject to a 40% tax.[78] At the state level, regulation varies greatly. In some states, the requirements for approval of a transaction are much more rigorous than other states. This is very problematic as the states with weaker SSPAs fail to protect their structured settlement recipients. Structured settlement recipients would benefit greatly from increased regulation and uniformity of regulation across state lines. New York is a phenomenal example of a state whose SSPA adequately protects the structures within its borders. If states adopted the SSPA of a state like New York, regulation would be more than sufficient to protect plaintiffs. Further efforts need to be made to protect impoverished, and often myopic individuals, through increased judicial education and enforcement, court scraping regulation, court mandated appearance on the part of the potential payee, and standardized discount formulas. Ultimately,

[78] 26 U.S.C. § 5891.

structured settlements are a great financial product for injured plaintiffs and it is up to the states and the federal government to maintain the integrity of this financial product through prudent regulation of the factoring industry. Without more action being taken, severely impoverished and injured individuals will be placed in even worse social and economic positions than they already are.