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C.A. Upholds High-Interest Factoring Transactions

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Under California law, anti-assignment language in a structured settlement agreement does not prevent the beneficiary of that agreement from selling his entitlement to future payments for immediate cash, the Fifth District Court of Appeal clarified yesterday.

The court reversed Fresno Superior Court Judge Alan M. Simpson's order denying approval of eleven factoring transactions involving Henderson, Nev.-based 321 Henderson Receivables Origination LLC—an indirect subsidiary of J.G. Wentworth LLC—citing “multiple legal errors” in Simpson's analysis.

Henderson, which bills itself as the largest financier of “unique financial assets” in the country, is a factoring company which purchases future structured settlement payments from payees in exchange for an immediate lump-sum payment.

The transfer of structured settlement payments has no adverse tax impact on any of the parties to the exchange if the factoring transaction is approved by a trial court. Such court-approved transactions are encouraged by the imposition of a 40-percent excise tax on unapproved transactions.

In California, the court-approval process is governed by the Structured Settlement Transfer Act, which requires the factoring company to file a petition in the county in which the transferor resides, accompanied by certain disclosures, the transfer agreement, annuity contract, the structured settlement agreement and other information.

For the petition to be granted, the trial court must expressly find that the transaction is in the transferor's best interests and that the transferor has been advised in writing to seek independent professional advice and either has received that advice or knowingly waived it, among other considerations.

Since 2002, Henderson has obtained judicial approval of more than 2,000 structured settlement payment transfers throughout California, and between February and March 2008, filed the 11 petitions at issue. Simpson heard the petitions on various dates in March and April.

On April 29, 2008, Fresno Superior Court Judge Donald S. Black issued a tentative ruling in an unrelated pending Henderson petition proceeding denying the petition based on non-compliance with SSTA requirements.

The tentative ruling stated that Henderson had omitted material information from the petition, and found that Henderson had a pattern and practice of referring lawyers to the transferors in violation of the SSTA's independent counsel requirement.

Although the tentative order did not explicitly void prior court approvals of SSTA petitions, it stated that similar errors to those found would void any prior court approval of SSTA petitions.

Black directed that the order be served on the Attorney General and State Bar, and attached to certain future SSTA petitions. The tentative order also required Henderson to serve a copy of the order on each person who had transferred payments to Henderson in the approximately 100 Fresno and Kern County petition cases.

Henderson filed requests for voluntary dismissal with prejudice of the 11 pending petitions before Simpson on May 5, 2008, but Simpson declined to enter the dismissals.

Between May 19 and May 27, he issued virtually identical orders in 10 of the 11 cases, denying the petitions and ordering the matters dismissed with prejudice.

Simpson found that the transfers violated California's Usury Law because the effective interest rate of the transfer exceeded 10 percent, and that the petitions violated the anti-assignment provisions in their respective settlement agreements.

Henderson appealed, and the 11 cases were consolidated into one action.

Writing for the appellate court, Presiding Justice James A. Ardaiz said Simpson had erred in finding Henderson was not a plaintiff and therefore could not request dismissal of its petitions. However, he concluded such error was harmless because Henderson could not unilaterally request voluntary dismissal after the hearings on the petitions had already taken place and the cases had been submitted.

Turning to the substantive issues, Ardaiz noted that the plain language of California Uniform Commercial Code Sec. 9408 indicates that contractual restrictions on assignments of general intangibles are generally ineffective, and reasoned it evinced a public policy against anti-assignment provisions in general.

He explained that Sec. 9408 is applicable to structured settlement payments because such payments are considered general intangibles and does not exclude annuities from its reach.

Ardaiz acknowledged the possibility that the annuity issuer or settlement obligor may be able to enforce the contractual transfer restrictions in some situations, but concluded such anti-assignment provisions would not bar a factoring transaction absent an objection from an interested party.

As the transfer of a structured settlement payment is not a loan secured by the assignment of periodic payments, but a sale of certain rights, Ardaiz also concluded that usury terms were inapplicable.

The justice also disagreed with the Superior Court's findings that Henderson had violated the independent counsel requirement and that named counsel did not fulfill their fiduciary duties to the payees, noting that Simpson had erroneously considered matters that were not before him in making those findings.

Justices Dennis A. Cornell and Gene M. Gomes joined Ardaiz in his opinion.

Margaret M. Grignon, Wendy S. Albers and Zareh Jaltorossian of Reed Smith, along with James P. Wagoner and Todd W. Baxter of McCormick Barstow represented Henderson. There was no appearance on behalf of the opposing parties.

Encino attorney James R. Felton, of Greenberg & Bass, who has represented other payees as well as Henderson, said that the decision yesterday "validated the manner in which 321 [Henderson] does business," and meant that payees "can assign without worrying about usury laws and without being concerned about anti-assignment language."

Van Nuys attorney Eugene Ahtirski, who has also represented other payees as well as Henderson, suggested that the ruling would be "very helpful for this industry" because it addressed "underlying concerns that have been going back and forth regarding the validity of these transactions," and will give people involved in such transactions "some sense of security that their paper is not going to be unwound at a later date."

The case is *321 Henderson Receivables Origination LLC v. Sioteco*, 09 S.O.S. 2560.