To Be Argued By:
SCOTT A. EISMAN
Time Assigned: 10 Minutes

CTQ-2022-00001
U.S. Court of Appeals, Eleventh Circuit Docket No. 21-11340

Court of Appeals

STATE OF NEW YORK

LUJERIO CORDERO,

Plaintiff-Appellant,

—against—

TRANSAMERICA ANNUITY SERVICE CORPORATION n/k/a WILTON RE ANNUITY SERVICE CORPORATION, and TRANSAMERICA LIFE INSURANCE COMPANY,

Defendants-Respondents.

ALLIANCE ASSET FUNDING, LLC,

Third-Party Defendants-Cross Defendants.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Although this case turns on allegations that Transamerica was complicit in depriving Lujerio Cordero of his bargained-for long-term income stream, Transamerica has remarkably little to say about its conduct. It barely acknowledges allegations that its own actions were in bad faith or deprived Cordero of the fruits of his contract with Transamerica—the focus of his claim for breaching the implied covenant. Instead, Transamerica levels technical arguments favoring its effort to evade liability. The Court should reject those arguments.

First, Transamerica is wrong that this Court lacks jurisdiction. Under the State Constitution, this Court has jurisdiction to answer certified questions if the answer "may be determinative of the cause." And here, the answer may determine whether the Eleventh Circuit reinstates all of Cordero's claims.

Second, Transamerica Life, one of the two Transamerica defendants, misconstrues this Court's case law in arguing that it had no contract with Cordero. Transamerica Life was party to the annuity contract funding Cordero's structured-settlement payments. That contract, together with the two contracts Cordero signed, form a single structured-settlement transaction. Under settled case law, the Court should read those contracts together. Besides, Cordero is a third-party

beneficiary of the annuity contract, and so can sue Transamerica Life in any event.

Third, Transamerica misunderstands waiver doctrine in claiming that it was entitled to waive the operative anti-assignment clauses, depriving Cordero of the implied protections those clauses provided. Because those clauses benefitted Cordero, Transamerica could not waive them without his consent. And because the parties unambiguously and preemptively stripped Cordero of the power to waive the anti-assignment clauses, he could not have consented.

Fourth, Transamerica mischaracterizes the transaction. It claims that the implied covenant required it to cooperate with Cordero, barring it from opposing what it declares to be his "wish[]" to assign. In so arguing, Transamerica overlooks the contractual cooperation that the implied covenant mandated: honoring Cordero's wish, expressed in his agreement with Transamerica, for non-waivable anti-assignment protection. More fundamentally, Transamerica mistakenly assumes that Cordero wished to make the transfers, ignoring his allegations that he lacked the mental capacity to evaluate the transfers and was hoodwinked into agreeing to them.

Finally, Transamerica errs in portraying Cordero's theory as conflicting with New York's SSPA. By its terms, New York's SSPA does

not apply to Cordero's transfers, which a Florida court approved. Nor does the SSPA cleanse insurers and annuity issuers like Transamerica of past contractual breaches. Instead, the SSPA protects vulnerable tort victims from predatory factoring companies—a goal that is furthered by allowing Cordero to pursue Transamerica for breaching its duty to deal in good faith.

Consistent with that goal, the Court should conclude that Cordero has alleged sufficient facts to have a jury consider his claim that Transamerica breached the implied covenant by being complicit in factoring abuse. Transamerica's conduct deprived him of the benefit of his bargain.

ARGUMENT

I. This Court has jurisdiction to answer the certified question, however formulated.

Not only does the Court have jurisdiction to answer the certified question, but doing so would help guide courts interpreting structured-settlement contracts governed by New York law. And this Court's guidance is sorely needed. Indeed, by seeking a jurisdictional offramp, Transamerica is the latest player in the multibillion-dollar factoring space—one dominated historically by fraudulent and otherwise-unsavory practices—to try to keep structured-settlement transfers away from New

York's appellate courts. Trial courts have bemoaned the "dearth of appellate law" in this area—a dearth caused by the factoring companies themselves, who "simply seek[] approval in another court" if one court denies a petition to transfer structured-settlement proceeds. *Matter of RSL Funding, LLC (M.G.N.)*, 2021 N.Y. Slip Op. 50279(U), *7 (Sup. Ct. Rensselaer County 2021).

This Court can fill the void here. Answering the certified question would illuminate the factoring landscape, by resolving the important issues of whether tort victims benefit from anti-assignment clauses and enjoy the freedom of contract to prospectively void transactions that would transfer their long-term income streams out from under them. The Court should therefore reject Transamerica's jurisdictional challenge.

A. The answer to the certified question "may be determinative of the cause."

This Court has jurisdiction to decide the certified question. Under Article VI, § 3(b)(9), of the State Constitution, this Court may answer certified questions that "may be determinative of the cause then pending in the certifying court." The Court typically declines to answer when doing so would be rendering an "advisory opinion[]." Arthur Karger, *The Powers of the New York Court of Appeals* § 10:13 (Westlaw ed. Aug. 2022 update). The answer here would not be advisory. Rather, it may

determine at least Cordero's breach-of-contract claim, if not also his claim under Florida's Adult Protective Services Act.

1. To start, if this Court agrees that the operative complaint pleads a cognizable breach of the implied covenant, *see* Cordero Br. 45–55, then the Eleventh Circuit would likely hold that the District Court erred in dismissing Cordero's contract claim—especially given the court's suggestion that Cordero's implied-covenant theory was "plausible," A.61. The Eleventh Circuit would then vacate the judgment dismissing the case. So the answer might well affect the outcome of Cordero's appeal.

In arguing otherwise, Transamerica disregards federal pleading standards. It claims (Br. 3) that the implied-covenant issue is not "ripe," because the Eleventh Circuit can reach Cordero's implied-covenant theory only if it first rejects his theory that Transamerica breached express contractual provisions—a theory the Eleventh Circuit has yet to consider. But Transamerica is wrong. In support of his single breach-of-contract claim, Cordero is entitled to plead "2 or more statements of a claim . . . alternatively or hypothetically . . . in a single count." Fed. R. Civ. P. 8(d)(2). The Eleventh Circuit need not consider both of Cordero's theories. It may consider only one, since a claim comprising multiple alternative theories "is sufficient if any one of them is sufficient." *Id.*

Applying that rule, federal courts allow plaintiffs to assert both direct-breach and implied-covenant theories when "there is a dispute over the meaning of the contract's express terms." *E.g.*, *Spinelli v. National Football League*, 903 F.3d 185, 206 (2d Cir. 2018). That is the case here, where the parties dispute whether the anti-assignment clauses' express terms cover Transamerica's conduct. *See, e.g.*, Brief of Appellees at 8, *Cordero v. Transamerica Annuity Serv. Corp.*, 34 F.4th 994 (11th Cir. 2021) (No. 21-11340). Given that dispute, a court or jury might eventually conclude that no express provision required Transamerica to enforce the contractual anti-assignment language in the SSPA hearings—the focus of Cordero's direct-breach claim, *see* Cordero Br. 31—but still conclude Transamerica breached the implied covenant by failing to observe safeguards against improper assignments, *see id.* at 47–49. This is therefore not a case of "duplicative" theories based on "the same facts." Transamerica Br. 2 (quotation marks omitted). It is a case of alternative theories, only one of which a federal court must reach at the pleading stage.

The Eleventh Circuit recognized as much. When certifying its question, the Eleventh Circuit "focuse[d] on" only one breach-of-contract theory, even though Cordero had "asserted multiple theories." A.57. And it went on to deny rehearing over the precise objections Transamerica

makes here. *See* Order, *Cordero*, 34 F.4th 994 (No. 21-11340); Petition for Panel Rehearing at 13–15, *Cordero*, 34 F.4th 994 (No. 21-11340). This Court should likewise reject those objections.

2. Transamerica is also wrong (Br. 1) that the Court lacks jurisdiction because the answer to the certified question will not resolve Cordero's entire Eleventh Circuit appeal. Transamerica says that even if the answer may resolve Cordero's contract claim, it will not resolve his statutory claim. Transamerica is wrong twice over.

For starters, Cordero's statutory claim rests at least in part on his contract claim. The District Court dismissed both claims based on its holding that the contractual anti-assignment clauses benefitted only Transamerica, *see* A.44, 46—an issue this Court will need to confront in answering the certified question, *see* Cordero Br. 56–63; Transamerica Br. 47–49. So Cordero's statutory claim may depend on this Court's answer to the certified question.

Regardless, this Court has never held that the answer to the certified question must affect every question on appeal. In fact, this Court has recently answered certified questions that would not affect issues that the certifying court had reserved. In *Plavin v. Group Health Inc.*, this Court decided whether the plaintiff alleged "sufficient[] . . . consumer-oriented conduct" to assert consumer-protection claims. 35

N.Y.3d 1, 5 (2020). That decision did not affect the rest of the appeal, which involved claims under the Insurance Law and for unjust enrichment that in no way hinged on the answer to the certified question. *Plavin v. Group Health Inc.*, 857 F. App'x 83, 86–87 (3d Cir. 2021). While this Court knew that the Third Circuit had not yet disposed of those "other" claims, 35 N.Y.3d at 6, it still answered the certified question.

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In sum, the answer to the certified question may resolve at least Cordero's contract claim, and potentially his entire appeal. This case is thus nothing like *Retail Software Services v. Lashlee*, 71 N.Y.2d 788 (1988). *See* Transamerica Br. 3. There, the Court lacked jurisdiction because the answer to the certified question—whether a statute provided a foothold for personal jurisdiction "in some circumstances"—did not bear on whether the defendant "in the present case" was subject to jurisdiction. 71 N.Y.2d at 790–91. Here, in contrast, the answer to the certified question may answer whether Cordero has stated a claim. That is all that is needed for certified-question jurisdiction.

B. The Court may reformulate the certified question as necessary.

As the Eleventh Circuit invited, this Court may reformulate the certified question. A.63. We would welcome the Court's doing so here.

Yet the question formulated by Transamerica (Br. 7) is defective. Transamerica ignores Cordero's allegations, including that Transamerica knew or should have known that:

- it was participating in an ongoing fraud, A.17 (¶ 58), 18–19 (¶ 63);
- it received payments in exchange for its stipulated cooperation in transferring Cordero's payments and participated in concealing relevant information from the courts that approved those transfers, A.17–18 (¶¶ 59–62), rendering incomplete its assertion (Br. 7) that it simply "did not object" in the SSPA hearings;
- the state-court hearings were a sham, A.17–19 (¶¶ 59–63);
- Cordero was a cognitively impaired lead-poisoning victim, *see* A.19 (¶ 66);
- the prices paid for Cordero's periodic payments were not "fair, just and reasonable under the circumstances," A.18–19 (¶ 63) (quotation marks omitted); *see* A.9 (¶ 28);
- the transfers started soon after Cordero turned eighteen, A.13 (¶ 42), 17 (¶¶ 57–58); and
- the reasons given for the transfers were "transparently inadequate," A.9 (¶ 28).

Instead, as we have argued (Br. 45–64), the Court should consider whether Cordero pleads a claim for breach of the implied covenant under New York law. And it should answer yes.

II. Transamerica fails to overcome Cordero's allegations that it breached the implied covenant.

A. The Settlement Agreement and Qualified Assignment, read together, imply an obligation for both Transamerica entities to deal with Cordero in good faith.

Transamerica Life, one of the two Transamerica entities here, cannot escape judgment by claiming (Br. 34–36) that it never signed an agreement with Cordero.

1. For starters, Transamerica Life ignores the rule that writings "executed at the same time" and "relating to the same subject-matter[] must be construed together as if they constituted but one instrument." *Meridien Britannia Co. v. Zingsen*, 48 N.Y. 247, 251 (1872). That is so even if the writings were signed by different parties and "made [on] different dates." *Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197 (1941).

That rule means that Transamerica Life is a proper defendant. Three writings here—the Settlement Agreement (between Cordero and his landlord's insurer, Continental), A.25–29; the Qualified Assignment (between Cordero, Continental, and Transamerica Annuity), A.35–37; and the annuity contract (between Transamerica Annuity and Transamerica Life), A.30–34—form a single structured-settlement

transaction. Indeed, the contracts themselves discuss how they will work in tandem:

- The Settlement Agreement contemplates that Continental "will make a Qualified Assignment to [Transamerica Annuity]," which will in turn "fund the periodic payments" to Cordero "by purchasing a 'qualified funding asset' . . . in the form of an annuity contract issued by [Transamerica Life]." A.27 (§ 6); *accord* A.26 (§ 2(c)).

- The Qualified Assignment contemplates that Transamerica Annuity "may have [Transamerica Life] send payments under [the annuity contract] directly to [Cordero]," A.36 (¶ 7).

- The annuity contract lists Cordero as the "measuring li[fe]" under the policy and contemplates making 360 monthly payments of $3,163.94, "beginning December 20, 2008," A.31 (cleaned up)—perfectly corresponding to the periodic payments referred to in the other two contracts, *see* A.26 (§ 2(b)), 37.

As the agreements explain, the parties undertook this process—agreeing to make the periodic payments, fund them through an annuity, and assign the payment obligations—so that Transamerica and Cordero could receive favorable tax treatment under the Periodic Payment Settlement Act. A.27 (§ 6), 35 (¶ B); *see* Br. 8–9, 26–27. And because those agreements "form part of a single transaction and are designed to effectuate the same purpose," they should "be considered and construed together." 11 *Williston on Contracts* § 30:26 (4th ed. May 2022 update); *see Western United Life Assur. Co. v. Hayden*, 64 F.3d 833, 840 n.11 (3d

Cir. 1995) (construing instruments in a single structured-settlement transaction together under Pennsylvania law).

These facts refute Transamerica's claim that the contracts here were not "'substantially made a part' of each other" and so should not be read together. Br. 35 (quoting *Nau*, 286 N.Y. at 197). *Nau* shows that contracts are substantially made a part of each other when, as here, they "refer[] to" each other in a way that shows that they "form[] a part of the same transaction." 286 N.Y. at 197. As this Court put it more recently, *Nau* requires courts to read contracts together when they "are inextricably intertwined." *Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC*, 20 N.Y.3d 438, 445 (2013). The touchstone, in other words, is whether the contracts work together to produce "a single transaction." *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82, 89 (2d Cir. 2005). The contracts here do.

2. Even if the contracts were not read together, Cordero could still sue Transamerica Life because—as Cordero pleaded and argued in federal court without rebuttal by Transamerica Life, *e.g.*, A.12 (¶ 40), 20 (¶ 71)—he is an intended third-party beneficiary of the annuity contract. As this Court has held, a person is a third-party beneficiary when "the language of the contract . . . clearly evidences an intent to permit enforcement by [that person]." *Fourth Ocean Putnam Corp. v. Interstate*

Wrecking Co., 66 N.Y.2d 38, 45 (1985). That is the case here. The annuity contract names Cordero and anticipates making periodic payments, in the amount he is due under the Settlement Agreement, so that Transamerica Annuity can pay him. A.31, 37. In short, the whole point of the contract was to fund the payments to Cordero. He should be able to sue the parties to it.

B. Transamerica's waiver arguments do not shield it from liability.

The anti-assignment clauses in the Settlement Agreement and Qualified Assignment express the parties' understanding that Cordero bargained for an unassignable income stream. The implied covenant, in turn, requires Transamerica to make a good-faith effort to preserve the fruits of that bargain. *See* Cordero Br. 62–63. It imposes on Transamerica a duty to review correspondence about its contract with Cordero—instead of establishing a side business to assist fraudulent activity, A.17 (¶ 56)—and to respond appropriately, including by refusing to participate in assigning away Cordero's contractual rights, Cordero Br. 47–48.

Transamerica objects that it had no such duty, because the anti-assignment clauses did not benefit Cordero, allowing Transamerica to unilaterally waive them. But its arguments fall short.

1. a. The Settlement Agreement's no-power clause protected Cordero by stripping him of the power to assign away the long-term

income stream he had bargained for and rendering any assignment void. Cordero Br. 46, 57–58. Transamerica protests (Br. 47) that Cordero did not need the Settlement Agreement's no-power clause to protect him, since he could have protected himself by "not agree[ing] to any transfers."

But Transamerica overlooks the "surrounding circumstances" that show what "the parties sought to accomplish" through the no-power clause. *Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519, 524 (1927) (quotation marks omitted); *accord* E. Allan Farnsworth, *Farnsworth on Contracts* § 7.11 (4th ed. December 2022 update). When Cordero settled with his mother's landlord, he was a cognitively impaired five-year-old. A.11 (¶¶ 33–34). It would have made sense for him; his mother, who sued on his behalf; his lawyer; or the judge charged with determining his "best interest" in an infant's compromise order to want a clause that would protect him from being swindled out of or dissipating his periodic payments. *See* Cordero Br. 58; A.12 (¶ 39).

Indeed, courts and commentators have observed that tort victims include no-power clauses in their structured-settlement agreements for just that reason. Those clauses "assur[e] . . . a continuing cushion of income, preventing [them] from binging away the asset" or "accepting offers of ready, but deeply discounted, cash in exchange for their" periodic payments. *Foreman v. Symetra Life Ins. Co. (In re Foreman)*, 365 Ill. App.

3d 608, 615 (App. Ct. 2006) (quotation marks omitted); *accord J.G. Wentworth S.S.C. Ltd. Partnership v. Callahan*, 2002 WI App 183, ¶ 16; Daniel W. Hindert & Craig H. Ulman, *Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts*, 44 Judges' J. 19, 19 (2005).

Transamerica never acknowledges these cases and commentary. Rather than respond to their commonsense conclusions, Transamerica claims (Br. 49) that even if Cordero benefitted from the no-power clause, he could always waive that benefit by agreeing to a transfer. But accepting that argument would mean that no-power clauses provide no benefit at all. Those clauses protect structured-settlement recipients only if they permanently strip recipients of the power to assign. Otherwise, recipients could just sign an assignment and give up the "continuing cushion of income" that the clauses ensure. *Foreman*, 365 Ill. App. 3d at 615. Put differently, no-power clauses would give recipients only illusory benefits if recipients could sidestep them by doing exactly what the clauses are designed to prevent: signing away their periodic payments.

Transamerica fails to grapple with this point. It instead invokes the common-law rule that obligors are free to "unmake" any agreement, including one not to assign. Br. 52 (quotation marks omitted). While true as a general matter, that argument ignores the circumstances

surrounding structured settlements. Again, that context matters. *See supra* p. 14. It underscores why structured-settlement recipients would want a non-waivable no-power clause—one that prevents them from "unmaking" their agreement.

The context here also distinguishes this case from *Allhusen v. Caristo Construction Corp.*, 303 N.Y. 446 (1952). *See* Transamerica Br. 52. While *Allhusen* held that a no-power clause made assignments "'void' as against the obligor," 303 N.Y. at 452, *Allhusen* never suggested that the clause there benefitted anyone but the obligor, and the obligor was the one that challenged it. So *Allhusen* had no reason to consider whether the clause invalidated assignments in all events. The clause here, by contrast, does benefit someone other than the obligor—Cordero—and does so by removing his power to assign. A.12 (¶ 39).

If anything, *Allhusen* supports Cordero. The Court there grounded its holding that parties were free to contractually divest themselves of the power to assign on the "freedom to contract." 303 N.Y. at 452. Freedom of contract includes the freedom the parties exercised here: protecting a brain-damaged minor—who predictably might be incapable of resisting overtures to transfer away his structured settlement—by including a clause that makes him powerless to waive contractual anti-

assignment language. The Court should enforce that clause as the parties intended.

b. Transamerica also fails to acknowledge that the no-power clause is in the Settlement Agreement's "Payee's Rights" section. *See* Cordero Br. 58–59. It would have been odd for the parties to include the no-power clause in a section guarding *Cordero's* rights unless the clause benefitted him in some way. Transamerica has no answer.

c. Transamerica does address our argument that including anti-assignment language in both the Settlement Agreement and Qualified Assignment would have been surplusage unless the two clauses served different ends. *See* Cordero Br. 59–60. But its arguments are unavailing.

Transamerica first says (Br. 52) that the two anti-assignment clauses provide "distinct remedies." As Transamerica admits, however, the no-power clause gives a "more robust" remedy than the Qualified Assignment's anti-assignment clause: it allows lawsuits to void any assignment. So including only that more robust remedy would have fully guarded against assignments. The parties would not have also needed the less robust protection that a second anti-assignment clause offered.

Transamerica then claims (Br. 53) that the two clauses were included in "separate contract[s]"—again disregarding bedrock law

requiring the Settlement Agreement and Qualified Assignment to be construed "as one," *Nau*, 286 N.Y. at 197.

Finally, Transamerica contends (Br. 53) that it was "prudent" to include anti-assignment language twice so that the parties could be extra sure that they would enjoy "favorable tax treatment." Yet there is no belt-and-suspenders exception to the canon against surplusage. Quite the contrary, this Court "avoid[s]" construing provisions as "mere surplusage" even when they concern important topics, such as whether an insurer must cover serious bodily injuries. *Westview Assoc. v. Guaranty Natl. Ins. Co.*, 95 N.Y.2d 334, 339 (2000).

The Court should follow that path here. It should construe the two different anti-assignment clauses as offering different benefits: the Qualified Assignment's anti-assignment clause ensures tax benefits and guarantees Cordero a creditworthy counterparty; the Settlement Agreement's no-power clause separately protects Cordero from creditor claims and from assigning away the long-term income he bargained for.

2. As just discussed, the Qualified Assignment's anti-assignment clause benefitted Cordero by letting him receive the periodic payments tax-free and inducing Transamerica, a reliable counterparty, to backstop those payments. *See* Cordero Br. 9–10, 60–61. While Transamerica tries (Br. 47) to minimize those "practical considerations," it cannot deny that

Cordero benefitted from them. Indeed, the anti-assignment clause gave him "favorable consequences under" the tax code, *Shaffer v. Liberty Life Assur. Co. of Boston (In re Shaffer)*, 319 Ill. App. 3d 1048, 1058 (App. Ct. 2001), and "allow[ed] [him] to rely on [Transamerica's] superior credit," *Hayden*, 64 F.3d at 840. And because he benefitted from the clause, Transamerica could not "unilaterally waive" it. *Citadel Equity Fund Ltd. v. Aquila, Inc.*, 168 F. App'x 474, 476 (2d Cir. 2006); Cordero Br. 57. That would ordinarily mean, as Transamerica points out (Br. 49), that Transamerica and Cordero could jointly waive the clause. But the parties curbed any such joint-waiver by including a no-power clause. *See supra* pp. 13–17.

3. As we explained (Br. 63), if the Court finds the contracts ambiguous about who benefits from the anti-assignment clauses, it should leave that question for a factfinder. It is no answer to say that the scope of the implied covenant is "a pure question of law, to be decided by a court." Transamerica Br. 32 (quoting *Transit Funding Assoc., LLC v. Capital One Equip. Fin. Corp.*, 149 A.D.3d 23, 29 n.* (1st Dep't 2017)). We do not claim that the implied covenant's *scope* is ambiguous—only that the separate question whether the anti-assignment clauses benefit Cordero may be ambiguous. And any such ambiguity would present a

"question of fact." *Newin Corp. v. Hartford Acc. & Indem. Co.*, 62 N.Y.2d 916, 919 (1984).

4. Even if Transamerica could have unilaterally waived the anti-assignment clauses and obligations consistent with them, it could not exercise its discretion "malevolently" by participating in a "scheme" to destroy the fruits of the bargain. *Richbell Info. Servs. v. Jupiter Partners*, 309 A.D.2d 288, 302 (1st Dep't 2003); *see* Cordero Br. 55, 63–64. Transamerica's refusal to observe the ethical guidelines followed by its peers, A.9 (¶ 27); its willingness to actively join in concealing no-power clauses, A.17 (¶ 56), 19 (¶ 63); and its refusal even to consider the indicia of fraud here, A.18 (¶ 63), raise jury issues.

Transamerica tries to dodge this outcome by claiming (Br. 46–47, 55–56) that *Moran v. Erk*, 11 N.Y.3d 452 (2008), and *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293 (1983), gave it boundless discretion to waive. But those cases do not apply here.

In *Moran* and *Murphy*, the defendants did not breach the implied covenant, because their conduct did not affect the plaintiffs' contractual rights. The real-estate contract in *Moran* conditioned closing on attorney approval. Citing the time-honored rule that "real estate contracts" made "'subject to' or 'contingent upon' [attorney] approval" create "no vested rights" until "the expiration of the contingency period," this Court

declined to require that the attorneys exercise their discretionary approval rights in good faith. 11 N.Y.3d at 456. Thus, before the attorneys approved, either side could exit the deal, meaning that there were not yet "'fruits' of the contract" for either party to destroy. *Id.* at 456–57; *see U.S. Bank Natl. Assn. v. Goldman Sachs Mtge. Co., L.P.*, 2020 WL 6873413, at *4–5 (S.D.N.Y. Nov. 23, 2020) (distinguishing *Moran*).

Murphy, too, was a case of equal footing. It involved at-will employment—a contractual relationship that "may be freely terminated by either party at any time for any reason or even for no reason." 58 N.Y.2d at 300. Because the contract gave the employee no vested right to work for any duration, the employer did not destroy the fruits of the contract by firing the employee in bad faith. *See id.* at 304–05.

Here, though, Cordero's right to receive his periodic payments vested in 1996, when the parties signed the contracts and a court entered an infant's compromise order approving the structured settlement. *See* Cordero Br. 24–27. So unlike in *Moran* and *Murphy*, there were fruits of the contract for Transamerica to destroy. And that is precisely what Transamerica did. A.9, 13–20.

C. Transamerica misunderstands its implied duties under the parties' contracts.

As for the scope of Transamerica's implied duties, Transamerica agrees (Br. 41) that the implied covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 228 (2011) (quotation marks omitted); *see* Cordero Br. 36–37, 39–40. But the agreement ends there. Transamerica first claims that Cordero's implied-covenant theory would flout settled law because it would require Transamerica to thwart Cordero's wishes—an argument that ignores both what the contracts require and what Cordero alleges. Transamerica next claims that Cordero's implied-covenant theory would introduce uncertainty into its business dealings—an argument that ignores the realities of the federal and state laws that regulate the factoring industry and were enacted to protect tort victims, not insurers and factoring companies. Once the Court places the anti-assignment clauses in their proper context and interprets them according to their unambiguous language, Cordero's implied-covenant theory follows naturally from settled law.

1. Transamerica starts with an illogical leap. Observing that the implied covenant sometimes requires contracting parties to cooperate

with each other, Transamerica resists Cordero's implied-covenant theory because, in Transamerica's view (Br. 39–43), that theory would have required Transamerica to do the opposite: obstruct Cordero's "wish[]" to transfer his periodic payments to a factoring company.

Yet Cordero's "wishes" at the time of the transfer are irrelevant. Because the implied covenant preserves the benefits that each party "reasonably understood" the contract to provide, *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 154 (2002), the wishes that matter are the ones expressed in the contract. And Cordero's wish, as expressed in the Settlement Agreement, was to rid himself of the power to make a later transfer, thereby guaranteeing himself long-term income. *Supra* Point II.B.1. Thus, refusing to cooperate in a transfer would honor Cordero's contractual wishes, not frustrate them.

At any rate, Transamerica misunderstands Cordero's allegations. Cordero does not allege that he wished to transfer his payments after competent consideration. On the contrary, he alleges that the factoring companies bilked him into signing paperwork he did not understand—to make it look as though he wanted to transfer his payments. A.11–16; Cordero Br. 27–31. He also alleges that Transamerica would have easily discovered that the factoring paperwork did not reflect Cordero's true

intent had it erected basic guardrails to detect factoring abuse, as its peers do. A.9, 17–19; Cordero Br. 48–49, 52.

Those allegations describe Transamerica's bad faith. As we explain (Br. 47–48), Transamerica blinkered itself to what Cordero's wishes were. That was the opposite of what good faith required: (1) reading communications from the court, or mandated by statute, relating to its contract with Cordero; (2) responding appropriately; and (3) considering Cordero's mental capacity when doing so. *Id.* Had Transamerica taken these rudimentary steps—now routine among structured-settlement insurers such as Berkshire Hathaway and MetLife—it would have at least suspected that Cordero did not *actually* intend to transfer the periodic payments. And if necessary, Transamerica could have alerted the court before Cordero's payments were transferred out from under him, or at no cost refused to sign the stipulated consent that helped effect the transfers. *See* S.A.61, 135, 209, 284, 319, 357.

That timing point undermines Transamerica's comity argument. Under Cordero's theory, the implied covenant required Transamerica to act *before* the reviewing court ruled on the transfer. *See* Cordero Br. 47–48. So endorsing Cordero's theory would not require insurance companies to sit in judgment of other States' courts—or as Transamerica puts it (Br. 44), to "say 'no' when a coordinate state's courts had said 'yes.'" Instead,

companies like Transamerica must read their mail, review their files, and decide whether to say no, or simply refuse to provide a stipulated consent, before the reviewing court acts. Cordero Br. 47–48.

That is what "a reasonable person in [Cordero's] position"—who "lack[ed] equal bargaining power"—would have expected Transamerica to do. *Jennifer Realty*, 98 N.Y.2d at 153–54 (quotation marks omitted). Contrary to what Transamerica posits (Br. 43–44), refusing to cooperate with factoring companies when becoming aware of irregularities or even alerting a court when it is being misled would not morph Transamerica into Cordero's "fiduciar[y]," *Kham & Nate's Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990), to whom it would "owe[] a duty of undivided and undiluted loyalty," *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989). Transamerica would simply be complying with contractual terms and honoring an obligation of candor to a court. Had it made that minimal effort, Transamerica could have preserved Cordero's bargained-for contractual benefits, consistent with the contractual obligation of non-assignability.

This view of the implied covenant is hardly novel. Courts have long held that parties breach the implied covenant through "lack of diligence and slacking off." Restatement (Second) Contracts § 205 cmt. d (1981). In *South Dakota Trust Co. v. American General Life Insurance Co.*, for

instance, the plaintiff accused an insurer of breaching the implied covenant by loaning money against an insurance policy despite red flags suggesting fraud. 2017 WL 4098861, at *6 (N.D. Cal. Sept. 15, 2017). The court allowed the implied-covenant claim to go to a jury because the evidence showed that the insurer had "st[uck] its head in the sand" by "fail[ing] to conduct any due diligence," which would have easily uncovered the warning signs. *Id.* (quotation marks omitted).

So it is here. Transamerica betrayed its lack of diligence by declining to implement any safeguards when operating in a marketplace of pervasive deception. It thus ignored facts showing that it was consenting to fraudulent transactions in exchange for administrative fees. A.16–18.

At bottom, Transamerica had to honor the implied covenant by taking reasonable steps to avoid depriving Cordero of his periodic payments. Had Transamerica done so, it would have seen that factoring companies were exploiting Cordero, robbing him of what he had bargained for.

2. Transamerica tries to shirk these duties by claiming that imposing them would undermine "clarity and predictability" for insurance companies, which will not know whether they have adequately investigated potential factoring abuse. Br. 57 (quotation marks omitted).

But the duty is not only clear—it is indistinguishable from what other insurance companies do when they receive transfer applications. A.9 (¶¶ 27–28); Cordero Br. 52. That Transamerica's peers do this belies Transamerica's claim that the duty is unmanageable.

So does Transamerica's own conduct. As our opening brief noted (at 49–50), Transamerica has alerted an SSPA court to factoring abuse in the past. Transamerica says (Br. 53) that "extraordinary circumstances" in that case compelled it to alert the court that the factoring company had tried to "'circumvent'" Florida's SSPA by failing to disclose a no-power clause that barred the transfer. But that is beside the point. We cited Transamerica's prior litigation conduct to show that it knows how to object, and could do so when appropriate if it implemented the most basic of systems to review and respond to factoring-related communications. Transamerica lacks any such system. Cordero Br. 48, 53.

Nor could Transamerica deny at the pleading stage that such a system would have preserved the benefit of Cordero's bargain. In fact, Transamerica acknowledges that it was a "problem[]" in another factoring-abuse case that a factoring company "omi[tted] . . . 'any reference' to the anti-assignment clauses in its petition" to the court. Br. 54 (quoting *Settlement Funding, LLC v. Brenston*, 2013 IL App (4th)

120869, ¶¶ 37, 39, *abrogated in part on other grounds by People v. Castleberry*, 2015 IL 116916). And Transamerica has acknowledged elsewhere that failing to disclose a no-power clause to an SSPA court is more than just problematic—it is material because it fails to alert the court that the court lacks "the power to approve" the transfer. Brief of Appellees at 13, *RSL Funding, LLC v. Green*, 162 So. 3d 1038 (Fla. Dist. Ct. App. 2013) (No. 5D14-0328).

Yet that is what happened here. Cordero did not have and could not locate a copy of the Settlement Agreement. S.A.20. Still, Transamerica's attorneys consented to the first transfer. S.A.61. For the next three transfers, the SSPA court received a copy of the Settlement Agreement, but apparently overlooked its no-power clause. Transamerica's attorneys signed off on those as well, S.A.135, 209, 284, even while successfully urging the same judge to enforce a no-power clause in *Green*, Cordero Br. 49. And for the final two transfers—before a different judge—the factoring company apparently neither submitted the Settlement Agreement and Qualified Assignment to the court nor included any reference to those agreements' anti-assignment clauses in its petitions. *See* S.A.286–359. Once again, Transamerica's attorneys signed off on the transfers. S.A.319, 357. Had Transamerica reviewed what was being submitted to the court and its own files, it could have alerted the court to

the language of the relevant contracts, giving Cordero a chance to retain the benefit of his bargain. Transamerica instead chose to remain silent. *See* A.17–19.

Transamerica's concealment smacks of bad faith. So do the numerous other indicators of factoring-company fraud. Of course, a court evaluating whether Transamerica acted in good faith would need to decide whether Transamerica made a reasonable effort. Yet reasonableness is already baked into the implied-covenant test: courts must ask whether a party acted as its counterparty would have "reasonably understood" it to act. *Jennifer Realty*, 98 N.Y.2d at 154. Parties have honored such reasonable obligations for more than 100 years. *See* Cordero Br. 35. Transamerica should have done the same.

D. Cordero's implied-covenant theory accords with the SSPAs.

Cordero's theory here furthers the purpose of the SSPA regime. Contrary to what Transamerica suggests (Br. 60), the SSPAs are not designed to immunize insurance companies and annuity issuers. They are designed to protect vulnerable tort victims from factoring companies seeking to swindle them out of their structured settlements. *See* Cordero Br. 15–16. They do so by requiring courts to determine the tort victim's "best interest," and as part of the process require that the annuity issuer and insurance company receive notice of the contemplated transaction.

See General Obligations Law § 5-1706; Fla. Stat. § 626.99296. Under Cordero's theory, annuity issuers and insurers would have to read and respond appropriately to statutorily required communications under their structured-settlement contracts, including SSPA communications. As a result, the insurer or annuity issuer might uncover (and then disclose) facts from its own files—for instance, that the tort victim is cognitively impaired or that her agreement contains a no-power clause. And those facts would better enable SSPA courts to determine whether a transfer is "in the best interest of the payee." General Obligations Law § 5-1706(b); Fla. Stat. § 626.99296(3)(a)(3).

Despite all this, Transamerica says that Cordero's theory clashes with *New York's* SSPA—even though Cordero's SSPA hearings occurred in Florida, where Cordero lived at the time—because it risks posing inconsistent liability and seeks to undo final SSPA judgments. Once again, Transamerica is wrong.

1. Cordero's theory does not violate New York's SSPA. Transamerica grounds its theory (Br. 60–61) on SSPA provisions stating that once a New York SSPA court approves a transfer, the "obligor [Transamerica Annuity] and the annuity issuer [Transamerica Life] shall, as to all parties except [the factoring company], be discharged and released from any and all liability for the transferred payments." General

Obligations Law § 5-1707(a). According to Transamerica (Br. 61), Cordero seeks to bypass that provision by claiming as damages the periodic payments that he assigned away.

But New York's SSPA does not apply by its own terms. The statute releases obligors and annuity issuers "[f]ollowing a transfer of structured settlement payment rights under" New York's SSPA. General Obligations Law § 5-1707(a). A "transfer of structured settlement payment rights," in turn, is "effective" only upon a "final order of a court of competent jurisdiction" finding that the transfer is in the tort victim's best interest. § 5-1706. The only courts authorized to make such orders are "the supreme court of the county in which the payee resides" and "any court which approved the structured settlement agreement." § 5-1705(b). Such a court must hold a "hearing," which the victim "shall attend . . . unless attendance is excused for good cause." § 5-1705(e).

None of that applies to Cordero. The Florida courts that presided over his SSPA proceedings were neither a New York Supreme Court in a county where Cordero resides nor the court that approved the Settlement Agreement, which was also in New York, *see* Cordero Br. 24. And Cordero did not attend his SSPA hearings, none of which was held in the county where he resided. A.13–16 (¶¶ 44–50).

The Florida court orders approving the transfers do not change those facts. *See* Transamerica Br. 25, 62. Those orders find that the transfers "do[] not contravene any *applicable* federal or state statute." *E.g.*, S.A.50 (emphasis added). But as just explained, New York's SSPA does not apply to Cordero's transfers. So New York's SSPA is not an "applicable" law.

2. Transamerica cannot fall back on the Full Faith and Credit Clause, U.S. Const. art. IV, § 1. Under that clause, the courts of one State will "giv[e] res judicata effect" to another State's judgments. *Matter of Luna v. Dobson*, 97 N.Y.2d 178, 183 (2001). And Transamerica says (Br. 63) that Florida, through the SSPA proceedings here, already made a judgment releasing Transamerica from liability.

But Cordero is not trying to relitigate the SSPA proceedings here. In fact, the District Court has already held as much. When deciding a motion to dismiss a prior version of Cordero's complaint, the court held that the *Rooker-Feldman* doctrine—which bars lower federal courts from hearing challenges to state-court decisions—did not bar Cordero's claims, including his contract claim. *Cordero v. Transamerica Annuity Serv. Corp.*, 452 F. Supp. 3d 1292, 1299–1300 (S.D. Fla. 2020). As the court recognized, Cordero "does not challenge the propriety of the state court final orders that authorized [the transfers]"; he challenges only

Transamerica's "course of conduct related to the approval of the transfers." *Id.* at 1300. That should end the matter.

If Transamerica disagrees, it can plead preclusion as an affirmative defense, *see* Fed. R. Civ. P. 8(c)(1), and move for summary judgment. This Court, however, is the wrong forum for Transamerica to litigate its preclusion arguments.

E. Cordero pleads facts to support his claim.

Transamerica concludes by suggesting (Br. 66–68) that Cordero has not stated an implied-covenant claim regardless of waiver, preclusion, or any other defense Transamerica might raise. Transamerica's tack is to paint all of Cordero's allegations as "conclusory."

But Cordero alleges much more than unsupported legal theories. He alleges facts showing how Transamerica undermined the parties' bargain. To that end, he pleads that he bargained for a long-term income stream of periodic payments, that the Settlement Agreement and Qualified Assignment contained anti-assignment clauses designed to protect that income stream and thus his "long-term economic security," and that Transamerica, which "makes no effort to address factoring abuse," did not read or respond appropriately to correspondence directly affecting the long-term income Cordero bargained for. A.9 (¶ 29), 11–18 (¶¶ 36–40, 42–54, 56–59).

Those allegations, in the context of the whole complaint, show that Transamerica breached the implied covenant by "slacking off," Restatement, *supra*, § 322 cmt. d; "sticking its head in the sand," *South Dakota Trust Co.*, 2017 WL 4098861, at *1; or acting "malevolently," *Richbell*, 309 A.D.2d at 302. No more is needed.

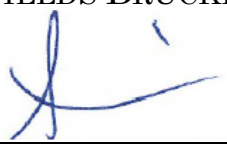
CONCLUSION

The Court should answer the certified question in the affirmative.

Dated: February 16, 2023
New York, New York

Respectfully submitted,

FRESHFIELDS BRUCKHAUS DERINGER US LLP

By: 

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