CASE NO. 21-11340-F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

LUJERIO CORDERO,

Appellant),

vs.

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

Appellee(s).

On Appeal from the United States District Court, Southern District of Florida
Case No. 1:18-cv-21665-DPG

INITIAL BRIEF OF APPELLANT

July 1, 2021

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Appellant, Lujerio Cordero, pursuant to Federal Rule of Appellate Procedure 26 and Eleventh Circuit Rule 26.1, certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. Alliance Asset Funding, LLC
2. Cole Schotz P.C.
3. Cordero, Lujerio
4. Gayles, U.S. District court Judge Darrin P.
5. Harris, Stephen R.
6. Hassebrock, Benjamin C.
7. Liberty Settlement Solutions, Inc.
8. Otazo-Reyes, U.S. District Court Magistrate Judge Alicia M.
9. Singer Asset Finance Company, LLC
10. Stahl, David M.
11. Topolski, Scott John
12. Transamerica Annuity Service Corporation
13. Transamerica Life Insurance Company
14. Ver Ploeg & Marino, P.A.
15. Ver Ploeg, Brenton N.

16. Wilton Re Annuity Service Corporation

Corporate Disclosure Statement

Upon information and belief, Transamerica Annuity Service Corporation, n/k/a Wilton Re Annuity Service Corporation, is a subsidiary owned by Wilton Re U.S. Holdings, Inc., it is not a publicly traded company on the NYSE.

Upon information and belief, Transamerica Life Insurance Company is a wholly owned subsidiary of Aegon USA Group, it is a publicly traded company on the NYSE under ticker symbol AEG.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Lujerio Cordero respectfully requests oral argument in this matter. As to Count I, this appeal will turn on the nature of defendants' contractual obligations under New York law in structured settlement agreements written to comply with I.R.C. §§ 104 & 130, 26 U.S.C. §§ 104 & 130, when participating as a party pursuant to statutory mandate in six separate Structured Settlement Protection Act ("SSPA") hearings under Fla. Stat. § 626.99296. As to Count II, this appeal will turn on whether a Florida resident is barred from raising claims under Florida's Adult Protective Services Act ("FAPSA"), Fla. Stat. § 415.102 when his contractual relationship with defendants is governed by New York law and whether FAPSA statutory claims are barred when there is allegedly no breach of contract as to the underlying relationship.

Oral argument will benefit the Court's analysis of these issues.

TABLE OF CONTENTS

TABLE OF CITATIONS

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Rules

Other Authorities

STATEMENT OF JURISDICTION

This is a timely appeal by notice dated April 22, 2021 from a final order dated March 29, 2021, granting Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Subject matter jurisdiction is based on diversity under 28 U.S.C. § 1332(a), and appellate jurisdiction is proper under 28 U.S.C. § 1291, as the order disposed of all claims.

STATEMENT OF THE ISSUES

I. Whether the trial court erred in dismissing Plaintiff's New York contract claim because Count I sufficiently alleges three independent alternative breach of contract claims?

II. Whether the trial court erred in determining that Cordero could not plead a FAPSA claim under Fla. Stat. § 415.1111?

STATEMENT OF THE CASE[1]

Plaintiff Lujerio Cordero ("Cordero") suffers from permanent cognitive impairment due to childhood lead poisoning. For this injury, Cordero obtained a structured settlement annuity issued and serviced by Defendants (collectively "Transamerica"). The settlement documentation expressly and unambiguously precluded Cordero's assignment of the annuity proceeds to a third party, yet Cordero's annuity proceeds were ultimately transferred to factoring companies in six separate transactions. Cordero was paid just $268,130 for monthly payments with a total aggregate value of $959,834.42. Despite the anti-assignment clauses, Transamerica consented to the transactions and received payment from the factoring companies to transfer the payments.

This is a case of first impression in which Cordero seeks to impose liability

[1] Pursuant to 11 Cir. R. 28-5, references to the record are to the document number and page number, as follows "D.E. [document number] at [page number]."

on Defendants for agreeing to the sale of his annuity proceeds despite (1) clear and unambiguous anti-assignment language that precluded and rendered void any such sale, (2) Transamerica's actual or constructive knowledge of his diminished mental capacity, and (3) Transamerica's actual knowledge that the proposed transactions plainly did not satisfy the statutory requirements that the sale be in his "best interest" and for an amount that was "fair, just and reasonable in the circumstances then existing." *See* Fla. Stat. § 626.99296(3)(a)(3),(a)(6). Cordero additionally seeks to impose liability for Defendants' exploitation of a disabled adult under Florida's Adult Protective Services Act ("FAPSA"), Fla. Stat. § 415.1111.

On April 26, 2018, Cordero filed an initial Complaint against Defendant Transamerica Annuity Service Corporation (Transamerica Annuity"). D.E. 1. On January 25, 2019, Transamerica Annuity filed a third-party complaint against the factoring companies that purchased the annuity payments – Alliance Asset Funding, LLC, Singer Asset Finance Company, LLC and Liberty Settlement Solutions, LLC – for indemnification against Cordero's claims. D.E. 52. Third Party Defendants filed their answer on March 18, 2019. D.E. 65. Cordero filed an Amended Complaint on February 19, 2019, raising five counts against Transamerica Annuity and Transamerica Life Insurance Company (collectively "Transamerica") for breach of contract under New York law; constructive fraud under Florida law; exploitation of a disabled adult under FAPSA, Fla. Stat. §

415.1111; and federal and state Racketeer Influenced and Corrupt Organizations Act claims. D.E. 60. On April 6, 2020, the trial court granted Defendants' Motion to Dismiss as to all counts in the Amended Complaint, but granted leave for Cordero to amend his pleading. D.E. 105.

On April 20, 2020, Cordero filed a Second Amended Complaint asserting two counts against Transamerica for (1) breach of contract under New York law (Count I) and (2) exploitation of a disabled adult under FAPSA (Count II). D.E. 106. The trial court granted Defendants' Motion to Dismiss as to both counts by Order dated March 29, 2021. D.E. 117 (the "Order"). As to Count I, the court denied the breach of contract claim on the basis that Transamerica was under no obligation to enforce the anti-assignment clauses to protect Cordero because the clauses were for Defendants' sole benefit. The court further reasoned that a contrary ruling would "imply obligations inconsistent with other terms of the contractual relationship." As to Count II, the trial court held that Cordero could not assert a FAPSA claim because the structured settlement is governed by New York law, and Transamerica could not have violated FAPSA because it had no contractual obligation to Cordero to honor the anti-assignment obligation. This appeal timely followed.

STATEMENT OF THE FACTS

This is an appeal from an order dismissing Cordero's complaint with

prejudice for failure to state a claim. The facts alleged in the complaint, as described below, must be accepted as true for purposes of this appeal.

Cordero is a cognitively-impaired victim of childhood lead poisoning from paint in his New York apartment. D.E. 106 ¶33. Subsequent litigation was resolved by a structured settlement in which the landlord's insurer made a qualified assignment to Transamerica Annuity to make periodic payments to Cordero when he reached majority. *Id.* ¶¶34, 36. The documentation, which provides for application of New York law, unambiguously prohibits the sale, assignment or other transfer of any portion of these payments. *Id.* ¶¶37, 38. Transamerica, nonetheless, allowed Cordero (who had moved to Miami-Dade County, Florida) to be systematically stripped of these protected payments in six transactions following Florida Structured Settlement Protection Act ("SSPA") hearings. *Id.* ¶¶59-67; *see* Fla. Stat. § 626.99296.

Florida's SSPA permits the sale of structured settlement proceeds provided the court finds that the sale is in the "best interests of the payee" and that the "net amount payable to the payee is fair, just and reasonable under the circumstances then existing." *Id.* ¶24; *see* Fla. Stat. § 626.99296(3)(a)(3),(a)(6). The SSPA requires Transamerica to be a party to the proceeding, served with complete detailed disclosures of the proposed transaction, and given the opportunity to object. *Id*. Such objection is dispositive, giving Transamerica complete control

over whether a sale will occur. *Id.* ¶25.

Transamerica did not object and instead, through signature of its counsel, consented to each sale despite (1) unambiguous contrary contractual language; (2) actual knowledge that any such sale would be void under New York law; (3) actual or constructive knowledge of Cordero's cognitive impairment; (4) actual knowledge that each sale was not in Cordero's "best interest"; and (5) actual knowledge that the net amount being paid to Cordero was not "fair, just or reasonable under the circumstances then existing." *Id.* ¶¶59, 63-64.

This case involves a sordid industry comprised of so-called "factoring" companies targeting the financial assets of persons suffering from cognitive and physical impairments, financial illiteracy, and lack of legal representation. *Id.* ¶¶16-18, 26. Factoring companies, operating through a vast array of dishonest acts, persuade tort victims to relinquish the benefit of their structured settlements. While there are no reliable statistics on the size of this industry, some indication of its annual magnitude is revealed by J.G. Wentworth, the largest factoring company, estimating that "factoring companies purchased structured settlement payment rights from approximately 4,000 claimants in 2003, totaling $1 billion in assets." *Id.* ¶19. During the times relevant to this case, Transamerica employed two to four persons full-time and earned millions of dollars from fees charged to process factoring company transactions. *Id.* ¶56.

The severely limited reasoning capacity of lead poisoning victims like Cordero make them and their structured settlements favored targets of factoring companies. *Id*. ¶31. These companies, for example, track court dockets and erect billboards in neighborhoods with lead-poisoned residents. *Id*. ¶32. Their dishonest acts have been publicized by Congress, the IRS, legal commentators and newspapers of mass circulation for decades. *Id.* ¶¶16, 18, 20. The IRS Audit Guide applicable to the industry begins with a lengthy verbatim quote from a widely cited 2005 article directed to judges:

> Many payees who dealt with factoring companies were exploited. By fashioning transactions as purchases of future payment rights or as loans originated in states with generous usury laws, factoring companies often charged sharp discounts to payees who were ill equipped to appreciate the value of their future payments or to understand the onerous terms of factoring agreements. In some cases, factoring companies charged discounts equivalent to annual interest rates as high as 70 percent.

Id. ¶18 (quoting Hindert, D. & Ulman, C., *Transfers of Structured Settlement Payment Rights: What Judges Should Know about Structured Settlement Protection Acts*, 44 Judges' Journal 19 (Spring 2005)).

At least one of the factoring companies at issue in this case had actual knowledge that Cordero suffered from lead poisoning. *Id*. ¶57. All observers of the factoring industry, including Transamerica, are fully aware of the scope and prevalence of factoring company misconduct. *Id*. ¶¶16-17, 26, 58.

Transamerica is the only major life insurance company that makes no effort

during the SSPA hearing process to control abusive conduct by factoring companies *Id.* ¶56. Many other life insurance companies have programs that actively seek to protect cognitively impaired and other vulnerable tort victims. *Id*. ¶¶27-29. Numerous indicators demonstrate factoring company abuse. *Id.* ¶28. These indicators include circumstances where the tort victim's underlying injury involves cognitive impairment, where the price paid for the payment stream is disproportionate to the total amount transferred or the total amount after discount, where the applications are made shortly after the tort victim reaches majority, where the applications are made in a series in close temporal proximity (the two-year "perishable period" during which tort victims are targeted), and where the hearings are scheduled in locations distant from the tort victim's home to ensure their nonappearance at hearings and avoid the in-person exposure of their disability to state court judges. *Id*. ¶¶28, 31-32, 63. All these indicators were obvious in Cordero's six SSPA petitions but ignored by Transamerica. *Id*. ¶28. Transamerica, as a matter of company policy, makes no effort to address abusive factoring company conduct, is indifferent to the accuracy of court communications by factoring companies in cases in which it is a party, and nevertheless claims the absolute discretion to consent to sales. *Id*. ¶¶29, 56-59, 63, 66.

A. BACKGROUND OF THE PERIODIC PAYMENT SETTLEMENT ACT

The structured settlement industry is a product of The Periodic Payment

Settlement Act of 1982 (Pub. L. No. 97-473), H.R. 5470, 97th Cong., 2d Sess. (1982) (the "PPSA"), which established that periodic payments to tort victims in structured settlements would not be subject to federal income tax. D.E. 106 ¶8. The tax-free income stream made structured settlements attractive to tort victims because it could result in receipt of a larger settlement when reduced to present value than an immediate lump sum payment. *Id*. ¶9. Congress wanted to encourage structured settlements due to a concern that tort victims, and particularly children, would dissipate or "squander" lump sum settlements because of their inability to prudently manage large sums of money. *Id*. ¶¶10-11 (quoting Congressional legislative history and the IRS and citing various commentators). Structured settlements were both a means to provide injured persons with long-term financial security and to protect the public fisc from persons who might otherwise become public charges. *Id.*

Congress was also concerned that plaintiffs' payments might be threatened by a settling defendant's future insolvency. *Id.* ¶12. To address this concern and to attract participation by life insurance companies (presumably less likely to become insolvent), the PPSA further provides that a life insurance company which receives a lump sum payment from the defendant (or its liability insurer) to purchase an annuity to fund the structured settlement likewise would receive such funds tax free. *Id*. ¶¶8, 12. This massive tax subsidy was the genesis of the current

multibillion-dollar life insurance company business in structured settlement annuities. *Id*. The current IRS Audit Guide quotes a 2005 estimate that at least six billion dollars are paid each year to fund new structured settlements in the United States and at least $100 billion had been paid to fund structured settlements then currently in force. *Id*. ¶15.

The PPSA in pertinent part was codified in the Internal Revenue Code, 26 U.S.C. §§ 104, 130. In furtherance of the legislative objective of providing the tort victim with a secure fixed income stream both for his or her benefit and to prevent him or her from becoming a public charge, section 130(c)(2) requires, among other things, that "(A) such periodic payments are fixed and determinable as to amount and time of payment, (B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments . . . ." To effectuate these goals, an anti-assignment clause to prevent acceleration, deferral, increase or decrease of payments is invariably included in structured settlement documentation. *Id.* ¶14.[2]

B. BACKGROUND OF STATE STRUCTURED SETTLEMENT PROTECTION ACTS AND THE VICTIMS OF TERRORISM TAX RELIEF ACT OF 2001

[2] The allegation in the Second Amended Complaint is that anti-assignment clauses are "invariably" included in both the settlement agreement and qualified assignment. Plaintiff, however, has become aware of some instances when it appears only in the qualified assignment.

Beginning in the mid-1980's, different entities, now called factoring companies, sensed the opportunity for windfall profits and engaged in various practices to circumvent the non-assignment language and strip vulnerable tort victims of their settlements. *Id.* ¶16. In the late 1990's, to address these issues, several states adopted Structured Settlement Protection Acts ("SSPAs"). *Id*. ¶21 Congress also became involved because subsidizing tax-free income streams to factoring companies obviously served no public purpose. *Id*. ¶20 (citing legislative history). The structured settlement industry, including both the life insurance company annuity issuers and the factoring companies, responded with a massive lobbying campaign which resulted in federal legislation and a "model" SSPA. *Id.* ¶¶21-23. The federal legislation, the Victims of Terrorism Tax Relief Act of 2001 now in pertinent part codified at 26 U.S.C. § 5891, imposed a 40% excise tax on any transfer of the structured settlement payment stream unless the transfer was approved by a "qualified order" under the "authority of an applicable state statute by an applicable State court" which finds that the transfer "is in the best interest of the payee, taking into account the welfare and support of the payee's dependents." *Id*. ¶¶22-23. The SSPA, which has been adopted by forty-nine states including both Florida and New York, is the applicable state statute governing the state process for the issuance of the qualified order and the determination of the tort victim's "best interest." *Id.* ¶¶23-24.

In Florida's SSPA, court approval of a sale also requires a finding that the "net amount payable to the payee is fair, just and reasonable under the circumstances then existing." *Id*. ¶24; *see* Fla. Stat. § 626.99296(3)(a)(6). The annuity issuer is expressly designated as an "interested party" in the court approval proceeding, is served with copies of the relevant documents and is authorized to object to any proposed transfer. *See* Fla. Stat. § 626.99296(2)(i)(3),(4)(a). In Florida, like most jurisdictions, courts enforce the anti-assignment prohibition when the annuity company objects to the transfer. *See Rapid Settlements Ltd. v. Dickerson*, 941 So. 2d 1275, 1277 (Fla. 4th DCA 2006). In both a legal and practical sense, the SSPA process gives the annuity company virtually absolute authority to prohibit any transfer. D.E. 106 ¶25.

As previously stated, the SSPA was enacted in response to the predatory practices of the factoring industry and intended to protect tort victims like Cordero. *Id*. ¶24. But SSPA protections are routinely circumvented. *Id*. ¶26. The factoring industry response has been an attack on the machinery of the state courts and the subversion of SSPA hearings through the submission of inventive and fictitious filings at uncontested hearings where the only appearance is by factoring company attorneys. *Id*. ¶¶16-18, 26. The "best interests" of the tort victim are proved through factual inventions by factoring company salesmen. *Id*. Tort victims rarely appear at the hearing and the process is managed to ensure that the court will not

have the opportunity to hear adverse evidence or argument. *Id*. ¶55. Also critical to factoring company success is the willingness of the annuity issuer funding the structured settlement to assist in the SSPA deception, here purchased with factoring company payments to Transamerica totaling $4,500, by remaining silent despite knowledge of false statements to the state courts. *Id*. ¶¶59-61.

In a non-adversarial process where the only counsel represents the factoring companies, busy state court judges rubber stamp approval orders. D.E. 106 ¶¶59-61. As a vivid example, Jose Camacho, who later pled guilty to forging more than one hundred SSPA approval orders, was the only attorney appearing on behalf of the parties in Cordero's last two SSPA hearings. His defense was that he was saving time for overworked state court judges who would otherwise have signed his submissions anyway. *Id*. ¶54.

C. PLAINTIFF LUJERIO CORDERO

Cordero's lead poisoning has caused permanent and debilitating health handicaps, particularly as to cognitive capacity. *Id*. Lead poisoning causes irreversible brain damage and Cordero's mental handicaps continued as an adult. *Id*. ¶¶30, 35. For example, he is unable to pass the General Education Development (GED) test to obtain a high school diploma equivalent. *Id*. ¶35. He has no meaningful job prospects. *Id*.

After litigation beginning in 1992, he entered into a June 25, 1996

Settlement Agreement (the "Settlement Agreement"), as a five-year old child subject to the terms of an Infant Compromise Order through his mother as guardian, with the landlord's insurer, Continental Insurance Company ("Continental"). *Id.* ¶34, D.E. 1-3. The Settlement Agreement provides, among other things, that beginning at age 18 on December 20, 2008, Cordero is entitled to receive monthly payments of $3,183.94 for a period of thirty years D.E. 1-3 at ¶2 at 4, and that the Settlement Agreement is governed by New York law. *Id*. D.E. 1-3 at 17.

The Settlement Agreement explicitly announces the intent to create a structured settlement pursuant to and in accordance with I.R.C. §§ 104 & 130 by providing that the "payments constitute damages on account of personal injuries or sickness within the meaning of [IRS Code] 104(a)2 and 130(c)" and that defendant:

> will make a qualified assignment to Transamerica Annuity Service Corporation within the meaning of Section 130(c) of the Internal Revenue Code … for its liability to make the periodic payments required in this Settlement Agreement. Such assignment, when made, shall be accepted by [Cordero] without right of rejection …. The assignee, Transamerica Annuity Service Corporation, shall fund the periodic payments by purchasing a "qualified funding asset" within the meaning of Section 130(c) of the Internal Revenue Code in the form of an annuity contract issued by First Transamerica Life Insurance Corporation.

D.E. 106 ¶36, D.E. 1-3 ¶6 at 4. The Settlement Agreement further provides in paragraph four:

> Said periodic payments cannot be accelerated, deferred, increased or decreased by [Cordero] or any Payee and no part of the payments called for herein . . . is to be subject to execution or any legal process for any obligation in any manner, *nor shall [Cordero] have the power to sell, mortgage, encumber or anticipate same, or any part thereof, by assignment or otherwise* [emphasis added].

Id. at ¶4.

On the same date, Cordero also entered into a Transamerica Qualified Assignment and Release (the "Qualified Assignment") through his mother as guardian with Continental as assignor, Transamerica Annuity as assignee, and Transamerica Life listed as the annuity issuer. D.E. 106-1. The Qualified Assignment in pertinent part repeats the payment dates and amounts, that it similarly is governed by New York law and an equally clear expression of the parties' intent to create a structured settlement. *Id.* It further provides that the "*parties desire to effect a qualified assignment within the meaning and subject to the conditions of Section 130(c) of the Internal Revenue Code* [emphasis added]," that "*Assignee may fund the Periodic Payments by purchasing a qualified funding asset within the meaning of Section 130(c) of the Code and that "in the event that Section 130(c) has not been satisfied, this Agreement shall terminate*." *Id.* Finally, it also contains a non-assignment prohibition in a clause stating that "*[n]one of the Periodic Payments may be accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned or encumbered* [emphasis added]." *Id*. In a third agreement with an application date of May 31, 1996 and an issuance date of

August 14, 1996, Transamerica Life entered into an annuity contract for the specified payments to Transamerica Annuity. D.E. 1-3.

On July 11, 2012, Cordero, then 22 years old, entered into the first of six structured settlement transfer agreements which over the next 22 months sold all of his 30 years of benefits. D.E. 106 ¶42. This first sale was arranged by a Singer salesman. *Id*. The factoring company paid $50,230 in exchange for monthly payments with an aggregate value $90,000 and a present value of $84,716.87. *Id*. The agreement claimed that Cordero needed the money to pay debts although his actual debts were miniscule compared to the payment. *Id*. The sale was approved by a Sumter County judge at a hearing of which there is no record or an appearance by Cordero or anyone acting on his behalf. *Id*. ¶44.

The second transfer, on November 24, 2012, again with the Singer salesman, had a $15,000 payment for monthly payments with a total aggregate value of $90,000 and a present value of $77,686.65. *Id*. ¶¶42, 45. The agreement claimed that the money was needed for debts (despite the $50,000 obtained four months earlier) and to pay for school expenses, though his only school expenses were associated with an unsuccessful attempt to get a GED. It was again approved by a Sumter County judge. *Id*.

The third transfer, on April 3, 2013, again with the Singer salesman, had a $50,000 payment for monthly payments with an aggregate value of $117,0000 and

a present value of $105,276.72. *Id*. ¶46. This petition claimed Cordero needed still more money for debts and school expenses. *Id.* It was again approved by a Sumter County judge. *Id*.

The fourth transfer, on August 24, 2013, again with the Singer salesman, had a $70,900 payment for monthly payments with a total aggregate value of $303,700.00 and a present value of $230,662.65. *Id*. ¶47. This petition claimed Cordero needed still more money for school expenses again without any meaningful detail or explanation. *Id*. The GED test costs $128, the cost of GED preparation classes is trivial, and there were no other school expenses. *Id*. It was again approved by a Sumter County judge. *Id*.

The fifth transfer, on October 30, 2013, had a $60,000 payment for monthly payments with a total aggregate value of $192,000 and a present value of $151,921.23. *Id*. ¶48. This petition claimed that Cordero needed the money to pay off past-due debt, purchase a "reliable" vehicle, and pay tuition for school. *Id*. This sale was approved by a court in Broward County. *Id*.

The final transfer, on May 15, 2014, extracted the last dollar from Cordero's structured settlement with a $22,000 payment for monthly payments with a total aggregate value of $167,134.42 and a present value of $108,188.27. *Id*. ¶49. The petition claimed that Cordero needed this money to purchase a new vehicle as apparently the reliable vehicle secured from the $60,000 received six months prior

was by then in "dire need of repair." *Id*. This sale again was approved by a court in Broward County. *Id*.

During the times relevant to all six SSPA hearings, Cordero lived in Miami-Dade County, Florida. D.E. 106 ¶50. He had no ties or other reason to schedule the hearings in Sumter or Broward County. *Id*. The hearings were scheduled there to reduce the chance of his appearance and the consequent disclosure of his disability to a state court judge. *Id*. ¶63. As to all six transactions, he signed agreements which he lacked the capacity to understand. *Id*. ¶¶52, 63. As to all six hearings, Cordero waived his right to "independent professional advice" on identical preprinted forms which he also had no capacity to understand. *Id*. He did not attend any of the hearings after being told that there was no need for him to do so. *Id*. ¶51. As to all six hearings, Transamerica Annuity, through the signature of its counsel, agreed to the transfer without contacting Cordero or otherwise obtaining his informed consent. *Id*. ¶59.

STANDARD OF REVIEW

The Eleventh Circuit reviews *de novo* a district court's dismissal of a complaint for failure to state a claim, applying the same standard as the district court. *Rivell v. Private Health Care Systems, Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008). The Court accepts the allegations in the complaint as true and construes the facts in the light most favorable to the plaintiff. *Id*.

To survive a motion to dismiss, a plaintiff need only plead facts sufficient to state a plausible basis for the claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). This plausibility standard is hardly a rigorous test; it is not a "probability requirement," requiring only "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft*, 556 U.S. at 678. The factual allegations need only raise a reasonable expectation that discovery will reveal evidence of the elements required to sustain the claim. *Rivell*, 520 F.3d at 1309-1310 (quoting *Twombly*, 550 U.S. at 556). This threshold permits a well-pleaded complaint to proceed "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation omitted).

SUMMARY OF THE ARGUMENT

The district court erred in determining that, under New York law, Cordero could not assert a claim against Transamerica for breach of contract arising out of the sale of annuity proceeds in violation of the anti-assignment provisions contained in the structured settlement. There is no New York Court of Appeals decision construing structured settlement documentation, but the subject contracts prohibit assignment in unambiguous terms, creating a contractual duty for Transamerica to have refused any assignment. New York courts rigorously apply the "four corners" doctrine when interpreting unambiguous contract language, and

intermediate appellate decisions have uniformly held that the "no power" language in the Settlement Agreement's anti-assignment clause voids any structured settlement assignment. See *Singer Asset Fin. Co., L.L.C. v. Bachus*, 294 A.D.2d 818, 819-20, 741 N.Y.S.2d 618, 620 (N.Y. App. Div. 2002); *C.U. Annuity Serv. Corp. v. Young*, 281 A.D.2d 292, 292-93, 722 N.Y.S.2d 236, 236-37 (N.Y. App. Div. 2001). The district court was bound to follow these decisions because there is no "persuasive evidence" or "indications to the contrary" to suggest these decisions would not be followed by the New York Court of Appeals. The parties' plain contractual intent was to create an absolute prohibition against assignment and assure a guaranteed future income stream for Cordero, as a permanently brain-damaged infant, so Defendants' consent to assigning Cordero's settlement proceeds sufficiently alleges a breach of contract under New York law.

The trial court avoided this result by finding that the anti-assignment clauses were for Transamerica's "sole benefit" and could be waived at its absolute discretion. This finding was based on a truncated portion of Restatement 2d Contracts § 322(2) and omits the introductory phrase "unless a different intention is manifested." Here a different intention--to create a structured settlement for the long-term benefit of the minor tort victim--is clearly manifested. While no New York appellate law has considered this perspective, legislative history and commentators agree that the clauses are also a protective measure for the tort

victims' benefit. This common sense observation constitutes "persuasive" evidence that the New York Court of Appeals would find that the anti-assignment clauses also benefit tort victims, and under New York law, a party cannot unilaterally waive a contract provision benefiting both sides.

The district court also failed to consider that Cordero's breach of contract claim arises in the context of a federal tax subsidy and paternalistic state Structured Settlement Protection Act ("SSPA") consumer protection framework premised on a legislative determination that cognitively impaired, catastrophically injured, and financially unsophisticated tort victims are incapable of resisting factoring company abuse. Defendants' actual knowledge that the transaction was void under New York law, actual or constructive knowledge of Cordero's diminished mental capacity, and actual knowledge of the oppressive terms in these factoring transactions provide further factual support for a breach of contract claim because the transactions fail to satisfy the statutory standards that they "[do] not contravene other applicable law," that the "net amount payable to the payee is fair, just and reasonable" and that they are in Cordero's "best interest."

These factual allegations alternatively establish Cordero's claims for breach of the covenant of good faith and fair dealing inherent in the structured settlement, even without the direct breach. Transamerica exercises its claimed discretion to waive anti-assignment clauses through the signature of its counsel. Its blanket

refusal to consider the information already in its hands violates Transamerica's obligation to not "do anything" which will have the effect of destroying Cordero's right to receive the fruits of his contract and is sufficiently arbitrary and irrational to allege a breach of the good faith covenant. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389, 633 N.E.2d 289, 291-92, (N.Y. 1995). Cordero also sufficiently alleged that Transamerica subverted the anti-assignment clause "malevolently, for its own gain as part of a purposeful scheme designed to deprive plaintiffs of the benefits of [their contractual rights]," which states a cause of action to create a duty to "eschew this type of bad-faith targeted malevolence in the guise of business dealings." *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 302765 N.Y.S.2d 575, 586-87 (N.Y. App. Div. 2003). Transamerica, with conscious indifference to the Congressional and state SSPA effort to protect vulnerable tort victims, collects millions of dollars in fees to process transfers for the factoring industry.

The trial court also erred in dismissing Cordero's FAPSA claim because the structured settlement is governed by New York law. Cordero was a Florida resident at the time of the transactions, and all of the challenged actions occurred in Florida. Florida has the sovereign authority and legitimate state interests to enact laws protecting its residents and regulating abusive conduct. FAPSA's statutory elements are independent of any contractual relationship. Cordero is entitled to

FAPSA's protection with respect to these transactions and he has adequately alleged this statutory cause of action.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S NEW YORK CONTRACT CLAIM BECAUSE COUNT 1 SUFFICIENTLY ALLEGES THREE INDEPENDENT BREACH OF CONTRACT CLAIMS.

The trial court committed clear error in failing to follow settled *Erie* analysis to predict applicable New York law construing structured settlement documents, relying instead on a New Hampshire case, *Singer Asset Fin. Co., LLC v. Wyner*, 156 N.H. 468, 474-76 (2007), construing New York law. *See Erie v. Tomkins*, 304 U.S. 64 (1938). The fundamental error is its failure to recognize New York's rigorous adherence to the long-applied "four corners" doctrine in requiring enforcement of unambiguous contract language and the parties' contractual intent. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 573, 780 N.E. 2d 166, 174 (N.Y. 2002) (citing *Benedict v. Cowden*, 49 N.Y. 396 (1872)). "A federal court's goal in deciding a state law issue is to resolve it in the same way the state's highest court would." *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294, 1302 (11th Cir. 2017). When, as here, there is no decision by the state's highest court addressing structured settlement documentation, "[a]s a general matter," decisions by intermediate appellate courts are followed unless "persuasive evidence demonstrated that the highest court would determine otherwise." *Turner v. Wells*,

879 F.3d 1254, 1262 (11th Cir. 2018). It is "generally presume[d] that [state] courts would adopt the majority view on a legal issue in the absence of indications to the contrary." *Bobo,* 855 F.3d at 1304 (adopting "minority" view based on contrary indications).

The Order on appeal (the Order") abrogates these guidelines in several respects. The subject contracts prohibit assignment in unambiguous terms, creating a contractual duty prohibiting assignment. New York intermediate appellate courts have established that the absolute "no power" form of contractual language used here renders any transfer void. The Order's assertion that there is no affirmative contractual obligation against assignment is thus plain error. While Transamerica obviously will claim that Cordero's SSPA applications are waivers or estop him from recovery for this breach, such claims are affirmative defenses which must address his limited mental capacity and other defenses under New York law and cannot be resolved on a motion to dismiss. As discussed *infra*, such defenses are also subject to Transamerica's lack of candor in the SSPA proceedings, which is either an independent breach or an avoidance which bars it from raising these affirmative defenses.

The Order avoids these issues by finding that the anti-assignment clauses are for the "sole benefit" of Transamerica and that they can waive such clauses at their absolute discretion without regard for Cordero's interests. D.E. 117 at ¶7. That

finding was based on the New Hampshire court's reliance on a portion of Restatement 2d Contracts § 322(2)(c) which states an anti-assignment clause is "for the benefit of the obligor." *Wyner*, 937 A.2d at 310. *Wyner* mentions, but does not analyze, and the trial court does not even mention, the introductory phrase in § 322(2) "unless a different intention is manifested." A different intention, the intention to create a structured settlement for the long-term benefit of the tort victim in accordance with the Periodic Payment Settlement Act ("PPSA), is clearly manifested here by express contractual language. The anti-assignment clauses are derived from the PPSA and include a benefit to the tort victim by providing a secure source of future income and support.

No appellate New York court has considered the import of the PPSA's goals in the context of Restatement 2d and, as in *Wyner*, the few cases seem to view the anti-assignment clauses solely as language for a life insurance company tax subsidy. That the purpose of the PPSA also includes intended benefits for the tort victim, however, is supported by legislative history and unanimously recognized by commentators considering the issue. This common sense view demonstrates that the anti-assignment clauses are not for Transamerica's "sole benefit." In resolving the "*Erie* guess," this obvious observation is sufficient to determine that the New York Court of Appeals, on proper briefing, would reject the trial court's "sole benefit" analysis and find that the clauses benefit both parties.

These issues are each addressed in more detail below.

A. New York's highest court would find that the subject agreements create a contractual duty to prohibit assignment, that any assignment is void and that Transamerica's subsequent assignment of annuity proceeds comprised a breach of contract

The Order correctly recites the allegations required to state a claim for breach of contract under New York law: "the complaint must allege: (i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages." *Edwards v. Sequoia Fund, Inc.*, 938 F.3d 8, 12 (2d Cir. 2019) (quoting *Orlander v. Staples, Inc.*, 802 F.3d 289, 294 (2d Cir. 2015)). In considering breach of contract claims, New York courts *strictly* adhere to the "four corners" doctrine in requiring enforcement of unambiguous contract language. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 573, 780 N.E. 2d 166, 174 (N.Y. 2002).

> The fundamental neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. . . . A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.

98 N.Y.2d at 569-70, 780 N.E.2d at 169-71 (internal quotation marks and citations omitted). *See Lockheed Martin Corp. v. Retail Holdings N.V.*, 639 F.3d 63, 69 (2d

Cir. 2011) (similarly summarizing New York law).

The Settlement Agreement in paragraph 4 provides in unambiguous language:

> Said periodic payments cannot be accelerated, deferred, increased or decreased by [Cordero] or any Payee and no part of the payments called for herein . . . is to be subject to execution or any legal process for any obligation in any manner, *nor shall [Cordero] have the power to sell, mortgage, encumber or anticipate same, or any part thereof, by assignment or otherwise* [emphasis added].

D.E. 1-3 at 4.The Qualified Assignment in paragraph 3 similarly states:

> *None of the Periodic Payments may be accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned or encumbered.*

Id.

This language unambiguously creates a contractual duty against assignment. Both New York appellate courts which have considered this language in structured settlement documentation did not even question that issue and instead examined whether the contractual language "renders the subsequent assignment [to the factoring company] void or [instead was] the breach of a personal covenant not to assign." Both courts further found that the "no power" language in the Settlement Agreement rendered the tort victim "powerless" to effectuate an assignment so that the assignment to the factoring company was consequently void. *Singer Asset Fin. Co.*, L.L.C., 294 A.D.2d at 819-20, 741 N.Y.S.2d at 620 (assignment barred by no power language); *C.U. Annuity Serv. Corp.*, 281 A.D.2d at 292-93, 722 N.Y.S.2d

at 236-37 (without power to contract, "no basis ... to assert any purported sale could have any legal effect"). *See Pac. Life Ins. Co. v. Rapid Settlements, Ltd.*, No. 06-CV-6554L, 2007 WL 2530098 (W.D.N.Y. Sept. 5, 2007), *aff'd*, 309 F. App'x 459 (2d Cir. 2009) (finding structured settlement transfer with no power language void under New York law).[3]

There is no "persuasive evidence" suggesting that these intermediate appellate decisions on the interpretation of "no power" language should be rejected in an *Erie* analysis. They are expressly based on earlier established New York law confirming the right to bar assignment by express contractual language. *See Allhusen v. Caristo Const. Corp.*, 303 N.Y. 446, 450-52, 103 N.E. 2d 891, 892-93 (N.Y. 1954) (freedom to contract includes freedom to bar assignment). Other jurisdictions have considerable variation with Illinois as the jurisdiction most focused on the enforcement of clear contractual language. *See In re Foreman*, 365 Ill. App. 3d 608, 613-16, 850 N.E.2d 387, 390-94 (Ill. App. Ct. 2006) (unambiguous no power language renders transfer void even after 26 U.S.C. § 5891 resolved annuity issuers' tax issues, anti-assignment clause protects tort

[3] Other New York appellate decisions are not informative. In *Singer Asset Fin. Co. , L.L.C. v. Scott*, 38 A.D.3d 1120, 832 N.Y.S.2d 326 (N.Y. App. Div. 2007), Singer apparently carefully did not file the structured settlement documentation and the transaction was voided based on suspicion of what it probably said. In *Singer Asset Fin. Co., LLC v. Melvin*, 33 A.D.3d 355, 822 N.Y.S.2d 68 (N.Y. App. Div. 2006), the tort victim did not file an appellate brief, failed pro se to raise triable issues below and any anti-assignment language is not addressed.

victim from "binging away" the asset and becoming indigent and is not waivable by tort victim); *see also Short v. Singer Asset Fin.*, 107 F. App'x. 738 (9th Cir. 2004) (voiding assignment based on "no power" language; citing Congressional legislative history and New York caselaw stating that "these [factoring] purchases have not been looked upon favorably by courts or legislatures"). The trial court should have found under *Erie* that the parties' intent was to create an absolute prohibition against assignment and left intact the secure income stream awarded a brain-damaged infant.

The trial court avoided addressing the textual issues raised by unambiguous contractual language by holding that the anti-assignment clauses were for Transamerica's "sole benefit." The cited authority for this determination was *Wyner*, which in turn relies on a portion of Restatement 2d Contracts §322(2)(c) stating that an assignment clause is for the "benefit of the obligor." *Wyner*, 937 A.2d at 310, 156 N.H. at 474-75. The complete phrase contains an important qualifier:

> (2) A contract term prohibiting assignment of rights under the contract, **unless a different intention is manifested**, …(c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition [emphasis added].

The contract language here manifests a contractual intent to create a structured settlement for the long term benefit of the infant Cordero in conformity

with the PPSA and anti-assignment clauses serve that interest. The Settlement Agreement expressly references I.R.C. §§ 104 &130 and requires Cordero to enter into a qualified assignment pursuant to §130. A qualified assignment was signed on the same date. Both agreements entered into on the same date for the same purpose, together with the referenced annuity as to which Cordero is the beneficiary, are interpreted together under standard contract interpretation and can only be viewed as a structured settlement. The statutory language of § 130 which requires, among other things, that "(A) such periodic payments are fixed and determinable as to amount and time of payment, (B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments ...." bears unmistakable congruence with the anti-assignment clauses. There is no appellate New York case which considers the import of the actual purpose of the PPSA in the interpretation of structured settlement documents. Applying *Erie*, it seems overwhelmingly likely that the New York Court of Appeals would agree that these documents can only be viewed as evincing a contractual intent to create a structured settlement under the PPSA.

While there are many cases that then reference § 130 to determine that the anti-assignment clause in the Qualified Assignment is required to provide the life insurer tax subsidy, the reason for making non-assignability the condition for the tax subsidy was not to give money to life insurance companies. Legislative history

and commentators are unanimous in stating that the PPSA's primary purpose was to encourage structured settlements to address the concern that tort victims, particularly younger ones, would dissipate or "squander" lump sum settlements because of their inability to prudently manage large sums of money and to protect the public from persons who might otherwise become public charges. As stated by Senator Baucus when introducing legislation that became the PPSA, "many of these successful litigants, particularly minors, have dissipated their awards in a few years and are then without means of support" whereas "[p]eriodic payment settlements, on the other hand, provide plaintiffs with a steady income over a long period of time and insulate them from pressures to squander their awards." 127 Cong. Rec. 30462 (daily ed. Dec 10, 1981). *See*, *e.g.*, Staff of Joint Comm. on Taxation, 106th Cong., Tax Treatment of Structured Settlement Arrangements 4–5 (1999), http:// www.jct.gov/jct_html/x- 15-99.htm [https://perma.cc/F25G-ZNGM] (discussing the policy foundation of the structured settlement tax subsidy); Tax Treatment of Structured Settlements: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 106th Cong. 6 (1999) (statement of Rep. E. Clay Shaw, Jr.) ("Congress enacted structured settlement tax rules as an incentive for injured victims to receive periodic payments as settlements of personal injury claims . . . . Congress was concerned that injured victims would prematurely spend a lump-sum recovery and eventually resort to the social safety net.").

Senator Chaffee made similar comments with specific reference to the factoring industry when introducing predecessor legislation which became 26 U.S.C. § 5891:

> Structured settlements have proven to be a very valuable tool. They provide long-term financial security in the form of an assured stream of payments to persons suffering serious, often profoundly disabling, physical injuries. These payments enable the recipients to meet ongoing medical and basic living expenses without having to resort to the social safety net.
>
> Congress has adopted special tax rules to encourage and govern the use of structured settlements in physical injury cases. By encouraging the use of structured settlements Congress sought to shield victims and their families from pressures to prematurely dissipate their recoveries. Structured settlement payments are non-assignable....
>
> I am very concerned that in recent months there has been sharp growth in so-called structured settlement factoring transactions. In these transactions, companies induce injured victims to sell off future structured settlement payments for a steeply-discounted lump sum, thereby unraveling the structured settlement and the crucial long-term financial security that it provides to the injured victim.

145 Cong. Rec. S5281-01 (daily ed. May 13, 1999).

Commentators agree. *See, e.g.*, Jeremy Babener, Structured Settlements and Single-Claimant Qualified Settlement Funds: Regulating in Accordance with Structured Settlement History, 13 N.Y.U. J. Legis. & Pub. Policy 1, 2, 25-29 (2010) (purpose was to deter "squandering plaintiffs"); James Gordon, Note-Enforcing and Reforming Structured Settlement Protection Acts: How the Law Should Protect Tort Victims, 120 Colum. L. Rev. 1549, 1552; (2020) (provide

long-term economic security and protect public from having to support tort victims); Daniel W. Hindert, Joseph J. Dehner and Patrick J. Hindert, Structured Settlements and Periodic Payment Judgments, § 1.02 [viii] ("stated public purpose was to help avoid dissipation of lump sums by injured persons"), § 16.01 (avoiding dissipation is the public purpose that continues to underlie the tax rules) [hereinafter "Hindert et al.]; Michelle Marcellus, Resolving the Modern Day Esau Problem Amongst Structured Settlement Recipients, 40 Hofstra L.Rev. 517, 519-20 (2011) (same).

Applying *Erie*, it again seems overwhelmingly likely that New York's Court of Appeals would agree that anti-assignment clauses also benefit tort victims. This is particularly the case as to the settlement agreement anti-assignment clause which is not required to provide the annuity issuer with the tax subsidy. In the settlement agreement and particularly as to a more stringent no power anti-assignment clause, they serve as a material inducement to a guardian to choose a structured settlement over a lump sum recovery. See *In re Wiggins*, 273 B.R. 839, 846-47, 849 (Bankr.D.Idaho 2001) (anti-assignment clauses "very important" to mother of tort victim, anguished statement that assignment "illegal" in futile attempt to dissuade factoring salesman, vivid illustration of factoring industry practice directed at the cognitively impaired). Under New York law, "[a] party cannot unilaterally waive a contract provision that benefits both sides." *Citadel Equity Fund Ltd. v. Aquila*,

Inc., 168 F. App'x 474, 476 (2d Cir. 2006) (citing *Praver v. Remsen Assocs.*, 150 A.D.2d 540, 541, 541 N.Y.S.2d 440 (N.Y. App. Div. 1989)), and Transamerica accordingly lacks absolute discretion to waive these clauses. If the contracts impose a duty on Transamerica to not assign, Cordero has *a priori* alleged that Transamerica's consent to each assignment was a breach of contract.

Importantly, this breach arises in the context of a federal tax subsidy and a state SSPA consumer protection framework premised on the determination that vulnerable tort victims are not capable of adequately protecting their interests. As quoted in *Petition of 321 Henderson Receivables, L.P. v. Martinez*, 11 Misc. 3d 892, 893-94, 816 N.Y.S.2d. 298, 299 (Sup. Ct. 2006), the New York SSPA legislative history shows that the bill sponsors shared this perspective:

> Recently a growing number of factoring companies have used aggressive advertising, plus the allure of quick and easy cash, to induce settlement recipients to cash out future payments, often at substantial discounts, depriving victims and their families of the long-term financial security of their structured settlement payments were designed to provide . . . This market in the buying and selling of injured individuals' payment streams can pose a hazard to existing recipients of structured settlements and to the public assistance programs on which recipients must often rely, once they have traded away secure income from structured settlements.

(Sponsor's Mem, Bill Jacket, L 2002, ch 537).

Recognition that an annuity issuer breaches the anti-assignment clause by remaining silent despite actual knowledge of SSPA violations thus would serve New York's legislative purpose. For example, an explicit focus of a SSPA hearing

is whether the transfer contravenes any applicable state law. See Fla. Stat. § 626.99296(a)(1). Transamerica is a party in the SSPA hearing that, like Singer, has remained silent despite actual knowledge that the transfers are void under New York law and any waiver by Cordero is ineffective. *See Settlement Funding, LLC v. Brenston*, 998 N.E.2d 111, 122, 375 Ill. Dec. 819, 830 (Ill. App. 2013) (failure to disclose no power anti-assignment clause is fraud on the SSPA court).

Transamerica additionally has actual knowledge of the abusive practices of the factoring industry (i) from its own cases, for example *In re Approval for Transfer of Structured Settlement Payment Rights w/a/b RSL Funding LLC v. Green*, No. 2011-CA-321, 2013 WL 6697803 (Fla. Cir. Ct. Sumter County 2013), where Transamerica is litigating abusive factoring practices in Sumter County, including the failure to disclose a no power anti-assignment clause and engaging in motion practice within a day of Cordero's third Sumter County SSPA hearing, from reported caselaw, including many cases in which Singer was a party, from national media[4] and Congressional hearings (which it undoubtedly monitored in that they concerned the profitability of its annuity business); (ii) that the hearings are being set far from Cordero's residence; and (iii) that Cordero recently reached

[4] *See e.g.*, Margaret Mannix, Settling for Less: Should Accident Victims Sell Their Monthly Payouts?, U.S. News & World Rep., Jan. 25, 1999, at 62; Vanessa O'Connell, Like It Or Lump It: Thriving Industry Buys Insurance From Injured Plaintiffs, Wall St. J., Feb. 25, 1998, at A1 (between 1996-98, J.G. Wentworth ran more than 90,000 30-second commercials).

age of majority. D.E. 106 ¶¶42-50. Transamerica further has actual knowledge that the SSPA hearing is focused on determining whether the transaction is in Cordero's "best interest" and the "net amount payable to the payee is fair, just and reasonable." *See* Fla. Stat. § 626.99296(3)(a)(3),(a)(6). It has actual knowledge that the first transfer was sold for 59% of the present value of what was received by the factoring company ($50,230 ÷ $84,716.87) D.E. 106 ¶42; that the second transfer was sold for 19% of present value ($15,000 ÷ $77,686.65), *Id*. ¶45; that the third transfer was sold for 47% of present value ($50,000 ÷ $105,276.72) *Id*. ¶46; that the fourth transfer was sold for 31% of present value ($70,900 ÷ $230,662.65) *Id*. ¶47; that the fifth transfer was sold for 39% of present value ($60,000 ÷ $151,921.23) *Id*. ¶48; and that the sixth transfer was sold for 20% of present value ($22,000 ÷ $108,188.27). *Id*. ¶49. There are many New York trial court SSPA decisions refusing to approve transactions with these discount rates. See *Petition of 321 Henderson Receivables, L.P.*, 11 Misc. 3d at897, 816 N.Y.S.2d at 301 (disapproving 55.7 %).

It has actual knowledge of the reality of the SSPA hearing process graphically described in Hindert et al, § 16.05[1] as:

> Typically, there is a structured settlement recipient (referred to under the SSPAs as the payee) who is in financial hardship, who wants to sell some or all of his or her future settlement payments out of financial necessity, and who is no longer represented by counsel. Typically, and without any competitive bidding, this person enters into a transfer agreement with a factoring company for the purchase

> and sale of some portion of those future payments. The factoring company then applies for court approval of this transfer of future payment rights. Typically, the only attorney involved with this transfer is an attorney retained by the factoring company, who works for that company on a repeat basis and who (depending on the particular fee arrangement) may not be paid on a given case unless that transfer receives court approval. This is the same attorney who is going to tell the court that every proposed transfer is in the payee's best interest and, for example, that court approval of these transfers won't contravene any statute, order or applicable law.

All of these circumstances, taken together with the mumbling boilerplate of the supposed reasons for sale, should have caused Transamerica to consider whether Cordero lacked the mental capacity required to determine whether to enter into these transactions. The simplest of investigations would have revealed Cordero's cognitive impairment, the absence of meaningful employment prospects, and that in those circumstances retaining his only future income stream was invariably in his best interests.

The Florida SSPA expressly furnishes Transamerica with the opportunity to object, Florida Stat. § 626.99296(3)(b), and such objections are enforceable under Florida law. *Rapid Settlements, Ltd.*, 941 So. 2d at 1276-77. As an *Erie* guess, Cordero respectfully submits that the New York Court of Appeals would have little difficulty in finding these allegations sufficient for a breach of contract claim.

B. Cordero has sufficiently alleged breach of the covenant of good faith and fair dealing based on Transamerica's refusal to consider any evidence that might inform its exercise of discretion or otherwise meaningfully participate in the SSPA hearings.

As set forth above, Cordero is alleging breach of anti-assignment clauses voiding any assignment by Cordero in the Settlement Agreement and barring assignment by all parties in the Qualified Assignment. Alternatively, Cordero has sufficiently alleged a breach of the covenant of good faith and fair dealing. As the trial court acknowledged, under New York law:

> Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This 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.* Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion. The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship [citations and quotation omitted][emphasis supplied].

Dalton, 87 N.Y.2d 384, 389, 633 N.E.2d 289, 291-92. The trial court, however, found the covenant of good faith to be inapplicable based on its conclusion that the anti-assignment clauses were for the sole benefit of Transamerica and could be waived at their absolute discretion. Transamerica's Motion to Dismiss, ignoring its contractual obligation, expressly claims that "Defendants had the discretion

whether or not to seek enforcement of that language [in the anti-assignment clauses]." D.E. 108 at 10. Under New York law, in every exercise of discretion, regardless of the scope of that discretion, there is a consequent obligation to not "do anything" which will have the effect of destroying Cordero's right to receive the fruits of his contract and to "not to act arbitrarily or irrationally."

The SSPA in Florida and each of the 49 states provides that any transfer of proceeds not approved through the SSPA process is void and has no effect.[5] Fla. Stat. § 626.99296(3)(5). The SSPA accordingly is now the sole means (outside New Hampshire) to accomplish a transfer or sale of structured settlement proceeds. Transamerica is exercising its claimed discretion through the signature of its counsel approving each transfer at the SSPA hearings at which it is a party. D.E. 106 ¶59. It exercises that discretion after receipt of statutorily mandated disclosures of each transaction, provided for the purpose of informing its decision to agree or object to the transaction. Fla. Stat. § 626.99296(4). It is, however, indifferent to the accuracy of communications made to the SSPA court. D.E. 106 ¶56. It claims absolute discretion to approve assignments, disdains any contractual duty to not assign, and pockets the proceeds gained from its indifference. An exercise of discretion should be made of sterner stuff.

[5] The SSPA's nationwide have some variations. For a survey of state variations, *see* Hindert, et al. § 16.04.

Transamerica's indifference violates its obligation under *Dalton* to not "do anything" which will have the effect of destroying Cordero's right to receive the fruits of his contract and is sufficiently arbitrary and irrational to allege a breach of the good faith covenant. See *1-10 Industry Associates, LLC v. Trim Corp. of America*, 297 A.D.2d 630, 630, 747 N.Y.S.2d 29, 31 (N.Y. App. Div. 2002) (although contract did not limit discretion to approve relocation sites, a cause of action stated against tenant who claimed absolute discretion to decide where or even whether to relocate and continuously refused to relocate). While the parties in 1996 contracts could not have contemplated the 2002 New York SSPA, a reasonable person would be justified in assuming, as a direct or implied obligation, that an insurance company's contractual obligation includes responding to a court inquiry rather than claiming the discretion to ignore it, disclosing known violations of state law, and actually reading court-ordered communications to measure their content. Finally, a reasonable person would also be justified in assuming that an insurance company, alerted to the probability that its payee had limited mental capacity, would undertake some process to address that issue when taking action based on a communication from the payee.

A required component of every SSPA approval is the finding that the "transfer … does not contravene other applicable law." Fla. Stat. § 626.99296(3)(a)(1). "Applicable law" is defined to include the "laws of any other

jurisdiction…under whose laws a structured settlement agreement was approved by a court." Fla. Stat. § 626.99296(2)(c)(3)(b). Each of the Cordero petitions contravened "other applicable law" because the attempted assignments were void under New York law. There are no useful New York appellate decisions addressing this issue or any other aspect of the SSPA process,[6] apparently because nothing prohibits refiling a denied petition in the hope of obtaining a more amenable trial judge and avoiding appellate scrutiny. *Matter of RSL Funding, LLC*, 71 Misc. 3d 1205(A), 142 N.Y.S.3d 779 (N.Y. Sup. Ct. 2021). Illinois, however, which like New York voids attempted assignment when structured settlement agreements contain "no power" language, has addressed this precise issue.

In *Settlement Funding, LLC v. Brenston*, 998 N.E.2d 111, 122, 375 Ill. Dec. 819, 830 (Ill. App. 2013), the court found the factoring company's failure to disclose the terms of the anti-assignment clause to be a fraud on the SSPA court.

> In this case, Settlement Funding was aware that Brenston had a structured settlement agreement. Given the legal precedents and counsel's experience, Settlement Funding was charged with knowledge that anti-assignment clauses were often included in structured settlement agreements. Through reasonable inquiry, Settlement Funding could have obtained a copy of the settlement [documents]… In addition, Settlement Funding knew the identities of the owners and issuers of the annuities, and it could have requested copies from those sources. In summary, Settlement Funding knew or

[6] *DRB Capital, LLC v. Hilario*, 192 A.D.3d 506, 140 N.Y.S.3d 402 (Mem) (N.Y. App. 2021) is an unopposed factoring company appeal to correct the form of an approval order.

> should have known that the structured settlement contained an anti-assignment clause, and knew or should have known that if the settlement did contain such a clause, the payments could not be assigned. In abandoning or ignoring this nondelegable obligation, Settlement Funding fraudulently concealed this issue from the trial court and affirmatively alleged that its petitions for approval of the transfers were in compliance with the law.
>
> Fraud has been said to comprise anything calculated to deceive, including all acts, omissions, and concealments resulting in damage to another. Silence accompanied by deceptive conduct or suppression of material facts results in active concealment and amounts to fraud. Here, Settlement Funding's suppression of the true facts of the settlement was an affirmative falsehood and a fraud upon the trial court. …The omissions and misrepresentations were common threads throughout each petition, and they were tightly woven to create a cloak of fraud upon the court [citations omitted].

Brenston apparently has had limited impact on factoring company conduct. In *Stone Street Capital LLC v. Hitchcock*, 2019 IL App (4th) 180404-U (Ill. App. Ct. 2019) (unpublished with no precedential value under Illinois court rules), the court reversed the denial of sanctions. The court found dispositive that the factoring company had represented in its petition that the transfer did not contravene any state law when there was an undisclosed anti-assignment clause.

The trial court's earlier Order on this issue asserts that "requiring Transamerica to analyze each proposed transfer would create new duties not required by the Settlement Agreement." D.E. 105 at 10. That is not the case. Transamerica signed a contract barring assignment and its contractual obligation includes responding to a court inquiry. Transamerica is a multi-billion-dollar

corporation with established systems for processing thousands of contracts and communications. It can and does set the fee it charges the factoring company to change the address for its payments and can increase the fee if needed for some imagined expense. Unlike in *Brenston*, Transamerica does not need to contact the annuity issuer to get copies of the structured settlement documents or learn that they provide that Cordero has no power to assign his payments. It has actual knowledge from published caselaw that the transactions are prohibited in New York (with the prohibition enforceable in Florida under *Rapid Settlement Ltd v. Dickerson*) and the Florida SSPA expressly provides Transamerica the opportunity to object "[i]f a proposed transfer would contravene the terms of the structured settlement." Fla. Stat. § 626.99296(3)(a). It doesn't strain rational thought to say that a life insurance company should be aware of the ethical standards inherent in advising the court of an existing no power to assign clause, but it also was careful – as demonstrated in its Third Party Complaint – to protect itself by indemnity agreements if something went awry.

As one recent state appellate decision explains, courts must rely on parties in Transamerica's position to act in good faith in SSPA hearings because judges cannot independently investigate and evaluate these transactions:

> Requiring a judge to serve as guardian to protect the interests places the judge in unfamiliar territory. Generally, the petition to transfer payment is unopposed with plaintiff-payee wanting to transfer payments so that it can receive payments for what he or she considers

> in its best interests, whether it is or not, and the factoring company wanting it approved so it can make the most money. That requires the trial judge to make an independent determination of whether the sale is in the best interests of the plaintiff-payee based on economic factors that it is not within its ken and with parties who are not that forthcoming. Moreover, this determination is made even more difficult because the proceedings are non-adversarial, with no factual development and competing positions to inform its judgment as would be the usual. It depends on the forthrightness and good faith of counsel to provide all the information available for the judge to make an informed decision on what is in the best interests of the plaintiff-payee to avoid fraud on the court.

Barber v. Stanko, 2021 PA Super 97 (May 14, 2021).

As a consequence of its receipt of the detailed disclosures of the transactions in each proceeding, Transamerica also had actual knowledge that the prices paid by the factoring companies are not "fair, just and reasonable under the circumstances then existing" and were so inadequate as to be contrary to Cordero's "best interests." To repeat, the percentage discount from the present value of the funds sold by Cordero to the amount paid by the factoring company on each transaction is 59%, 19%, 47%, 31%, 39%, and 20%. If not unfair, unjust and unreasonable and contrary to Cordero's best interest as a matter of law, these transactions certainly fall within an arguable range of oppression presenting a jury question. They also further a need to investigate the tort victim's background—an investigation that with a telephone call would have revealed a lead poisoning impairment and the lack of a high school diploma and employment prospects. Cordero has sufficiently alleged a breach of the implied covenant of good faith and fair dealing.

C. Cordero has sufficiently alleged breach of the covenant of good faith and fair dealing based on Transamerica's malevolent refusal to honor its anti-assignment contractual duty.

The trial court, citing *Spinelli v. National Football League*, 903 F.3d 185, 205 (2d Cir. 2018), found insufficient Cordero's allegations that Transamerica acted arbitrarily or irrationally with malevolent intention and, citing *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153, 773 N.E.2d 496, 500-01 (N.Y. 2002), asserted that any claim that Transamerica should have prevented the transfers "imply obligations inconsistent with other terms of the contractual relationship." D.E. 117 at 7. These findings misconstrue both the caselaw and plaintiff's allegations. Both decisions found plaintiffs' allegations sufficient to state a claim for breach of the implied covenant of good faith. Cordero seeks recognition of an unambiguous contractual duty that Transamerica improperly ignored in the context of a SSPA proceeding. This is hardly an inconsistent obligation – he is suing over Transamerica's conscienceless determination to waive its contractual obligations in order to streamline factoring company abuse and collect a fee.

Jennifer Realty generically supports reversal. It concerned a rental apartment building to cooperative conversion in which the developer, after selling some units (as co-op shares), instead maximized its profits by keeping the remainder as rental units to the detriment of the minority co-op unit owners. The New York Court of

Appeals, citing *Dalton, supra*, found the pleadings sufficient to assert there was an implied obligation to continue to sell units in an offering which did not set a timeframe for the sale of the co-op shares. *Id*. It did so in the special circumstances of co-op consumer law regulation, while Cordero's claims arise in the special circumstances of the SSPA consumer protection laws.

In *Spinelli*, 903 F.3d at 206, the Second Circuit applying New York law bluntly rejected the interpretation of inconsistent contractual obligations apparently adopted by the trial court below.

> [Defendant] argues that "the implied covenant cannot be used to impose a contractual duty on a party that would be inconsistent with a right the party holds under the express terms of the contract." [Defendant] understands the notion of "inconsistent" duties too broadly. *It cannot be that anytime a contract is silent on a specific right, implying a term limiting that hypothetical right is inconsistent with the "express terms of the contract."* If that were the case, the very concept of implied terms would collapse. Instead, we must ask whether a proposed implied term defeats a right that a party actually bargained for — in other words, whether the implied term that might preserve the fruits of the contract for one party spoils the fruits for another [emphasis supplied].

Id.

Neither case, however, addresses New York law on the "malevolence" prong of the covenant of good faith cause of action. *See Lehman Bros. Intern. (Europe) v. AG Financial Products, Inc.*, 38 Misc. 3d 1233, 969 N.Y.S. 2d 804, (N.Y. Sup. Ct. 2013) (surveying N.Y. law). As explained in *Richbell Information Services*, a claim that a party is exercising a contractual "right malevolently, for its

own gain as part of a purposeful scheme designed to deprive plaintiffs of the benefits of [their contractual rights]" states a cause of action to create a duty to "eschew this type of bad-faith targeted malevolence in the guise of business dealings." 309 A.D.2d at 302, 765 N.Y.S.2d at 586-87.

Historically, factoring companies in the pre-SSPA era became notorious for their focus on the vulnerable. For example, 1999 Congressional hearings contained testimony about controlling factoring company advertising directed at those with spinal cord injuries.[7] It is unfortunately reasonable to assume that factoring companies will focus on the cognitively impaired, catastrophically injured and financially illiterate tort victims because others will realize that the transactions are not in their best interests. *See* Hindert, et al. § 16.02 (persons receiving structured settlements often are persons who were severely injured). This abuse was checked to some degree by annuity issuers generally unwilling to permit sales because of concern that they could lose the tax subsidy provided by I.R.C. §130. *E.g.*, *Singer Asset Fin. Co. v. CGU Life Ins. Co of America*, 275 Ga. 328, 329-30, 567 S.E.2d 9, 10-11 (Ga. 2002) (possibility that "CGU might suffer adverse tax consequences" sufficient to bar assignment). This concern was ended by the 2002 enactment of 26

[7] Tax Treatment of Structured Settlements, Hearing before the Subcommittee on Oversight of the Com. On Ways and Means, House of Representatives March 18, 1999 https://www.govinfo.gov/content/pkg/CHRG-106hhrg58892/html/CHRG-106hhrg58892.htm (testimony of Thomas H. Countee, Jr., National Spinal Cord Injury Association).

U.S.C. § 5891 which confirmed that the tax subsidy would not be affected by a subsequent factoring transaction. *See* Hindert et al., § 16.03.

Transamerica apparently views this new era as a bonanza. It employs two to four people full time to process assignments and earns millions of dollars in fees. D.E. 106 ¶56. Factoring transactions are frequently securitized. See *Gordon, supra* 120 Columbia L. Rev. at 1558 & n.48, Hindert et al., § 16.08. Although the record is silent on this issue, these transactions could continue to spray fees from future ownership changes. Transamerica makes no effort to address factoring company abuse and by intentional inattention directly assists the factoring scheme, causing the tort victim to lose the security of their income stream. *Id.* ¶¶29, 56, 61. It has become complicit in a nationwide enterprise directed at the cognitively impaired, catastrophically injured and financially illiterate victims of the factoring industry—the persons who Congress and the states are attempting to protect through tax policy and the SSPA consumer protection process. Transamerica is the recycle center, located next to the crack house, disclaiming knowledge as to the proffered copper wire's source. Cordero's allegations of self-dealing sufficiently allege "targeted malevolence in the guise of business dealings." *Richbell Information Services*, 309 A.D.2d at 302, 765 N.Y.S.2d at 586-87.

II. THE TRIAL COURT ERRED IN DETERMINING THAT CORDERO COULD NOT PLEAD A FAPSA CLAIM UNDER FLA. STAT. § 415.1111.

The trial court dismissed Cordero's FAPSA claim on two grounds. In a one-sentence statement without supporting authority, and in a matter of first impression, the court asserted that the "Florida law claim fails" because the parties' Settlement Agreement explicitly states that it shall be governed by New York law. D.E. 117 at 8. Alternatively, based on its rulings as to the New York contract claims in Count I, the court held Defendants could not have liability under FAFSA because they "had no affirmative obligations to prevent Plaintiff from assigning his annuity benefits to factoring companies." Id. at 9. Both rulings are erroneous.

Section 415.1111 provides a cause of action for a "vulnerable adult who has been . . . exploited as specified in this chapter . . . ." The chapter contains detailed definitions for this statutory claim:

- A "vulnerable adult" is defined as "a person 18 years of age or older whose ability . . . to provide for his or her own care or protection is impaired due to . . . brain damage . . . ." *Id.* at § 415.102(8)(a)(2).

- "Exploitation" means a person who "[k]nows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult." *Id.* at § 415.102(15).

- "Lacks capacity to consent" is defined as a "mental impairment that causes a vulnerable adult to lack sufficient understanding to make or

communicate responsible decisions concerning persons or property . . . .” *Id.* at § 415.102(17).

- “Obtains or uses” is defined as “any manner of: (a) [t]aking or exercising control over property” or “[m]aking any use, disposition, or transfer of property . . . .” *Id.* at § 415.102(28).

Cordero has pled each of these statutory elements of the FAPSA cause of action. D.E. 106 ¶78-85 passim. Further, Cordero is entitled to the protection FAPSA affords because at all relevant times he was domiciled in Miami-Dade County, Florida. D.E. 106 ¶50. All of the wrongful transfers initiated in Sumter County or Broward County, Florida as a result of communications by Transamerica to those Florida counties. Id. ¶59. The FAPSA cause of action is independent, so it can hardly be extinguished by contract provisions. Florida has both inherent sovereign authority and legitimate state interests to regulate abusive practices within its borders and against its residents, regardless of a contractual choice of New York law, and public policy mandates that Cordero have access to this remedy regardless of a choice of law provision. The statute requires only that the victims’ property be taken for the benefit of someone else, and Transamerica’s role in facilitating this scheme was indispensable.

Similarly erroneous is the trial court’s determination that an alleged lack of affirmative contractual obligations by Transamerica to prevent the assignment of Cordero’s annuity benefits bars recovery. This is a statutory cause of action predicated on Transamerica’s “obtaining and using,” as defined by statute,

Cordero's annuity payments "for the benefit of someone other than the vulnerable adult" when Transamerica knew or should have known that he was a "vulnerable adult." It is the abuse directed at a vulnerable adult, not the terms of a contract, that is the basis for liability. That Transamerica did have a contractual duty to refuse to assign and instead pocketed $4500 to change addresses on Cordero's payments as part of a business in which it is earning millions of dollars of fees transferring the assets of tort victims to factoring companies is relevant but not necessary to the cause of action. D.E. 106 ¶¶56, 60.

Cordero has alleged more than sufficient factual detail to support his FAPSA allegations, and the Orders' holding to the contrary neither adapts to the statutory language nor cites any Florida authority suggesting that the Complaint's allegations do not trigger a jury's resolution. Cordero suffers from lead poisoning, a "mental impairment that causes a vulnerable adult to lack sufficient understanding to make or communicate responsible decisions concerning persons or property." *Id*. ¶¶30,33,35. Transamerica is on notice that vulnerable adults are specially targeted in this marketplace. *Id*. ¶¶31-32. It possessed other information such as knowledge that the hearings were being scheduled in forums distant from his residence, creating a reasonable suspicion of exploitation. *Id*. ¶50. The terms of the transactions are sufficiently exploitative without more as to create a jury issue whether Transamerica "should know" that Cordero lacks the capacity to consent.

Id. ¶¶42-49, 58, 63-64. The trial court's dismissal of this count should be reversed.

CONCLUSION

The tools are in place to prevent factoring companies' bald-faced theft from cognitively impaired tort victims, and other annuity issuers have used them to forestall this abuse. Transamerica chose another path, profiting from its studied indifference to locating readily available facts while simultaneously protecting itself at the scale's other end by requiring factoring companies to fully indemnify it should a court someday hold it accountable. This Court can reverse the great injustice generated when laws originally designed to protect tort victims and society are, through industry subterfuge, rendered unresponsive to those goals. If Transamerica feels itself wrongly at the cross-hairs of this remedy, it has but to prove the merits of its Third Party Complaint.

Or it could have done the right thing in the first place. This Complaint should be reinstated.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 12471words. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

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