To Be Argued By:
SCOTT A. EISMAN
Time Requested: 30 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.

BRIEF FOR PLAINTIFF-APPELLANT

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September 28, 2022

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INTRODUCTION

This case is about the duties an insurer and its affiliate owe to a cognitively impaired lead-poisoning victim with whom they have contracted. That victim is plaintiff Lujerio Cordero. When he was a small child, Cordero settled a lawsuit against the New York landlord responsible for his lead poisoning. The parties entered into a structured settlement: the landlord's insurer promised to pay Cordero in equal installments over 30 years and then assigned its payment obligations, as allowed by a federal statute governing structured settlements, to defendant Transamerica Annuity Service Corporation, which funded those periodic payments through an annuity it bought from an affiliate, defendant First Transamerica Life Insurance Company.[1] In exchange, Transamerica received tax benefits and the proceeds from the annuity sale. Transamerica and Cordero effected the structured settlement by signing two agreements governed by New York law, both of which forbade Cordero from assigning his periodic payments—one of which stripped him of any power to do so.

Years later, after he had moved to Florida, Cordero was targeted by "factoring" companies, which profit by purchasing structured settlements for a heavily discounted lump sum. Under a Florida statute, the factoring

[1] We refer to the two Transamerica entities together as "Transamerica."

companies had to have the transactions approved by a court in a proceeding in which both Transamerica entities had to be named as parties and served with detailed communications about the transactions. Despite the anti-assignment clauses in the governing documents—and actual knowledge that it was participating in sham proceedings—Transamerica consented to the factoring transactions, receiving fees from the factoring companies in return. It made no effort to determine whether the transactions were fair or whether Cordero, who has limited mental capacity, was being swindled. It did not even read the detailed communications it received.

Cordero then brought this suit in federal court. One of his claims asserts that Transamerica breached its contracts with him. In addition to a direct-breach theory, Cordero alleges that Transamerica breached the contracts' implied covenant of good faith and fair dealing by making no effort to determine whether the factoring companies were taking advantage of Cordero's cognitive impairment or otherwise using unfair tactics to coerce a transfer. The U.S. District Court for the Southern District of Florida (Gayles, J.) dismissed the operative complaint. On appeal, the U.S. Court of Appeals for the Eleventh Circuit did not address Cordero's direct-breach theory but suggested that Cordero's implied-covenant theory was viable. The Eleventh Circuit was unsure, however,

whether under New York law, the implied covenant bars contracting parties from breaching unwritten duties that undermine a fundamental contractual objective. It certified that question to this Court.

This Court should answer yes to the certified question. Since the late 1800s, this Court has reinforced a long line of unbroken case law holding that the implied covenant forbids contractual counterparties from undermining a contract's purpose, including by impairing the benefits that their counterparties expect to receive under the contract. And because the covenant is implied, rather than express, this Court has consistently invoked it to enforce unwritten duties.

Under that case law, Cordero has pleaded that Transamerica breached the implied covenant. He alleges that Transamerica denied him the fruits of the contractual arrangement by breaching unwritten duties implied in the parties' contracts. He bargained for a structured settlement with payments over 30 years. This structured settlement provided him with unique protections and long-term financial stability, along with a significant tax advantage. But when the factoring companies targeted him to sign away his payments, contrary to the anti-assignment clauses in the settlement documents, Transamerica had an implied duty to review statutorily required or court-ordered communications, respond

appropriately, and potentially refuse to consent or even object to court approval of any transfers to a factoring company.

Yet Transamerica did none of this. It did not even try to address factoring-company abuse or investigate the circumstances surrounding the transfer or Cordero's underlying injury. Had it simply reviewed its own files, read the communications from the court, or conducted a limited inquiry, Transamerica would have seen the red flags surrounding the factoring transactions: that Cordero's structured-settlement contracts stripped him of the power to assign, that the terms of the factoring transactions were abusive, and that Cordero was cognitively impaired and thus could not understand the complicated purchase agreements that he signed.

The District Court excused Transamerica's bad faith by ruling that the anti-assignment clauses existed for Transamerica's sole benefit, giving Transamerica unbridled discretion to waive those clauses. But that was not the deal the parties struck. The parties intended for the anti-assignment clauses to benefit Cordero—not least by ensuring him long-term financial stability, creditor protection, and tax benefits. Whether or not the clauses benefitted Transamerica too, Transamerica was not their sole beneficiary.

The District Court also failed to consider whether the anti-assignment clauses, at a minimum, are ambiguous about whom they benefit. Any such ambiguity creates a factual issue. So if this Court finds the clauses to be ambiguous, it should say so. A jury can then resolve any ambiguity by holding Transamerica to its duty of good faith.

Finally, even if the District Court rightly ruled that the clauses benefitted only Transamerica, it wrongly ruled that this gave Transamerica unfettered discretion. Quite the opposite: the implied covenant constrained Transamerica's discretion by requiring Transamerica to act in good faith in waiving (or refusing to waive) the anti-assignment clauses. And Transamerica did not exercise that discretion in good faith.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under Article 6, § 3(b)(9), of the State Constitution. The question presented was certified by the Eleventh Circuit, A.48–63, and accepted by this Court, A.64–65.

QUESTION PRESENTED

Does a plaintiff sufficiently allege a breach of the implied covenant of good faith and fair dealing under New York law if he pleads that the defendant drastically undermined a fundamental objective of the parties'

contract, even when the underlying duty at issue was not explicitly referred to in the writing?

STATEMENT OF THE CASE

A. Structured settlements and the factoring industry

1. Tort settlements were traditionally paid as lump sums. That posed a problem for "seriously injured" tort victims, "the great majority of whom have no experience in managing large sums for long-term income production." William L. Winslow, *Tax Reform Preserves Structured Settlements*, 65 Taxes 22, 23 (1987). "In fact, insurance industry statistics indicate that about 25 to 30 percent of all accident victims who receive lump sums completely dissipate their judgments or settlements within two months of recovery, and 90 percent of them spend it all within five years." Matthew Garretson & Guy O. Kornblum, *Negotiating and Settling Tort Cases* § 18:3 (2021–2022 ed.).

While some have questioned those statistics, *see, e.g.*, Laura J. Koenig, Note, *Lies, Damned Lies, and Statistics? Structured Settlements, Factoring, and the Federal Government*, 82 Ind. L.J. 809, 810 (2007), the concern that tort victims will squander lump-sum settlements has been frequently cited by those concerned that tort victims will end up as public charges, Ellen S. Pryor, *After the Judgment*, 88 Va. L. Rev. 1757, 1778–79 (2002). And regardless, victims whose injuries have left them with

significant cognitive damage *do* struggle to invest settlements or awards intended to cover their lifetime earnings and medical expenses. *See* Karen Syma Czapanskiy, *Structured Settlement Sales and Lead-Poisoned Sellers: Just Say No*, 36 Va. Envtl. L.J. 1, 7–12 (2018).

These concerns helped give rise to structured settlements. Structured settlements entail periodic payments, often over decades, giving settling tort victims long-term income streams to provide for their needs while mitigating the risk that the funds might all be lost in one fell swoop—whether through scams, unwise investments, impulsive spending, or otherwise. *See, e.g.*, Daniel W. Hindert et al., *Structured Settlements and Periodic Payment Judgments*, § 1.04 (release 71, 2022); Richard B. Risk, Jr., Comment, *Structured Settlements: The Ongoing Evolution from Liability Insurer's Ploy to an Injury Victim's Boon*, 36 Tulsa L.J. 865, 867 (2001).

Although that protection made structured settlements attractive, structured settlements still posed adverse tax consequences. Tort victims could traditionally exclude lump-sum settlement payments from their federal taxable income. *See* Revenue Act of 1918, Pub. L. No. 65-254, § 213(b)(6), 40 Stat. 1066. But if the parties decided to fund structured settlements using an annuity, investment income from the annuity was taxable. *See* Winslow, *supra*, at 23.

The IRS fixed that problem in 1979. In two revenue rulings, the IRS concluded that tort victims could exclude annuity-funded periodic payments from their taxable income if the victims were not the ones who received the annuity payment. *See* IRS Rev. Ruling 79-220, 1979-2 C.B. 74; IRS Rev. Ruling 79-313, 1979-2 C.B. 75. In other words, settling defendants or their insurers could buy the annuity, receive the annuity proceeds, and then make the monthly payments, and the tort victim would suffer no adverse tax consequences. *See* Winslow, *supra*, at 23.

Still, another problem remained. "[M]ost self-insured defendants and small liability insurers" were not "highly reliable long-term obligors," and so faced a risk of insolvency. *Id.* at 24. And if those defendants or insurers "became insolvent, the [tort victim] stood in line with all other general creditors to be paid from whatever assets existed, including the annuity the [defendant or insurer] had purchased." Risk, *supra*, at 875. This "reliability risk" "diminished" the "utility of the structured settlement transaction." Winslow, *supra*, at 24.

Congress soon devised a solution. Motivated by the desire "to help avoid dissipation of lump sums by injured persons," Hindert et al., *supra*, § 1.02[6][a][viii], [2] Congress in 1983 enacted the Periodic Payment

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[2] *Accord* James Gordon, Note, *Enforcing and Reforming Structured Settlement Protection Acts: How the Law Should Protect Tort Victims*, 120 Colum. L. Rev. 1549,

Settlement Act, Pub. L. No. 97-473, § 101, 96 Stat. 2605, 2605–07 (1983) (codified at 26 U.S.C. §§ 104(a), 130).

That Act encourages settling victims and settling defendants to choose structured settlements in four ways. *First*, the Act codifies the IRS's revenue rulings excluding "periodic payments" from taxable income. 26 U.S.C. § 104(a). *Second*, because the income stream that benefits settling victims depends on specific payments over time, the Act specifies that "periodic payments" assigned under a qualified assignment must be "fixed and determinable as to amount and time of payment" and "cannot be accelerated, deferred, increased, or decreased by the recipient of such payments." § 130(c)(2)(A)–(B). *Third*, the Act allows a "qualified assignment" of payment obligations to a third party—such as a life-insurance company with good credit—which both provides the settling victim with greater assurance that the settlement will be paid and relieves the original obligor of payment liability. § 130(a), (c). *Fourth*, to increase the likelihood that the tort victim will have the benefit of a creditworthy payor, the Act encourages established insurers to participate in structured settlements by giving them a tax benefit: the

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1552 (2020); Michelle M. Marcellus, Note, *Resolving the Modern Day Esau Problem Amongst Structured Settlement Recipients*, 40 Hofstra L. Rev. 517, 519–20 (2011).

amount they receive from the settling defendant for accepting the qualified assignment does not count as income. § 130(a).

The Act thus "resol[ves]" the "reliability problem" that settling victims faced: it entices established insurers to step into the shoes of less creditworthy settling defendants and small insurers. Winslow, *supra*, at 24; Hindert et al., *supra*, § 1.04. Put another way, the Act "benefits a [tort victim]" by permitting qualified assignments, thereby "allowing [the tort victim] to rely on the assignee's superior credit." *Western United Life Assur. Co. v. Hayden*, 64 F.3d 833, 840 (3d Cir. 1995) (citing Winslow, *supra*).

After the Act took effect, the number of structured settlements skyrocketed. *See* Pryor, *supra*, at 1770. And that number has only risen since. In 2019, for instance, roughly $6.5 billion in annuities were purchased to fund 26,486 structured settlements. Hindert et al., *supra*, § 1.03. As a result of the Act, life insurers have received roughly $180 billion tax-free. *Id.* § 1.02[5][a].

2. An unfortunate side effect of the rise in structured settlements is the multibillion-dollar factoring industry.

a. A secondary market for structured settlements—the factoring market—developed in the mid-1980s. Hindert et al., *supra*, § 1.02[5][f]. Sensing the opportunity for a windfall in guaranteed income streams

that could be bought at a discount, factoring companies started approaching tort victims and buying the rights to structured-settlement payments in exchange for quick cash. *Id.* § 16.02; Gordon, *supra,* at 1558–59. Tort victims, meanwhile, would get a lump-sum payment, which Congress had sought to discourage, *supra* pp. 8–10.

Worse still, the victims typically sell the structured settlement at significant discounts. 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, 20 (2005). That is by design. By preying on tort victims who are "ill equipped to appreciate the value of their future payments or to understand the onerous terms of factoring agreements," factoring companies have long induced structured-settlement recipients to trade their long-term payments for lump sums, often at unreasonable discount rates as high as 70%. *Id.*

"In the world of purchasing payment rights to structured settlement agreements, it appears that not all the players wear white gloves." *Settlement Funding, L.L.C. v. Rapid Settlements, Ltd.*, 851 F.3d 530, 533 (5th Cir. 2017). Factoring companies achieve their predatory aims through a vast array of deceptive and fraudulent acts. A.6 (¶ 16). Sales tactics can include flyers from fictitious judges, unsolicited mail

advertisements, visits from an "independent advis[or]" who is in fact on the factoring companies' payroll, false representations that the annuity issuer is nearly insolvent, and other telemarketing scams. Gordon, *supra*, at 1567–68; Rachel Chason, *They Sought "Lead Paint Virgins" and Bought Their Settlements. It Will Be Hard for Those Victims to Get Their Money Back*, Wash. Post (Jan. 21, 2019), https://tinyurl.com/54rzba2e.

Aggressive advertising is also commonplace. Mem. to James M. McGuire, Counsel to Governor, from Kathy Bennett, Chief, Legislative Bur., N.Y. State Off. of the Atty. Gen. at 1–2, *in* Bill Jacket for ch. 537 (2002), at 5–6. Given the "lucrative" payoff they enjoy, factoring companies put "relentless pressure" on tort victims "to sell again and again," "get[ting] repeat customers to accept smaller returns on their money in subsequent sales." Jeffrey Meitrodt & Adam Belz, *Relentless Tactics Target Wary Sellers*, Star Trib. (Oct. 13, 2021), http://tiny.cc/tdxvuz. One sales manual instructed agents to "call[] [tort victims] relentlessly"—"nine to 10 times a day"—on top of text messaging, emailing, and connecting with them on social media to convince them to assign away their monthly payments. *Id.* Beyond using those tactics, some factoring-company sales representatives wine and dine structured settlement recipients at steakhouses, sporting events, and clubs; fly them to other States, where they are put up in "upscale hotel[s]"; and use cash

advances to "hook[]" them and "keep them coming back." Gordon, *supra*, at 1568 nn.122–23 (quotation marks omitted).

A core strategy for factoring companies is targeting the catastrophically injured, including the cognitively impaired, such as lead-poisoning victims, who are particularly vulnerable to predatory transactions. *See* Terrence McCoy, *How Companies Make Millions off Lead-Poisoned, Poor Blacks,* Wash. Post (Aug. 25, 2015), http://tiny.cc/1bnxuz. "Court records show that across the country factoring companies are buying up future structured settlement payments from persons who are quadriplegic, paraplegic, have traumatic brain injuries or other grave injuries." 145 Cong. Rec. S5287 (May 13, 1999) (statement of Sen. Baucus). In just one month in 2013, for instance, a factoring company posted 22 billboards throughout Baltimore, urging lead-poisoning victims to "GET CASH NOW." Chason, *supra*. When Maryland's Attorney General investigated this factoring company, it found that more than 70% of its transactions between 2013 and 2015 involved child victims of lead poisoning. *Id.*

Factoring companies target cognitively impaired victims precisely because they lack the capacity to understand what they are giving up. Some companies embrace a "head-in-the-sand approach," "ignor[ing]" or minimizing "significant facts"—such as deciding that a victim who

suffered from a "head injury" might have had only "a 'minor boo-boo'" and so must have been "mentally sound." *Wiggins v. Peachtree Settlement Funding (In re Wiggins)*, 273 B.R. 839, 863 (Bankr. D. Idaho 2001). Others have been even more explicit. The sales manual for the company that the Maryland Attorney General investigated, for example, encouraged its telephone salespeople to "take full advantage" of typical structured-settlement recipients, who have "not adapted many of the necessary basic life skills that normal people must gain to survive in the world." Jeffrey Meitrodt et al., *Desperate, Then Offered Quick Cash*, Star Trib. (Oct. 3, 2021), http://tiny.cc/wdxvuz; *see CFPB v. Access Funding, LLC*, 2021 WL 2915118, at *5 (D. Md. July 12, 2021); McCoy, *supra.*[3]

b. By the late 1990s, national media began reporting that factoring abuse had become prevalent. *See* Vanessa O'Connell, *Like It or Lump It: Thriving Industry Buys Insurance from Injured Plaintiffs*, Wall St. J., Feb. 25, 1998, at A1; Philip H. Corboy, *Structured for a Reason*, 86 ABA J. 116 (2000); Margaret Mannix, *Settling for Less: Should Accident Victims Sell Their Monthly Payouts?*, U.S. News & World Rep., Jan. 25,

[3] The manual noted that lead poisoning was one of the four most common transaction scenarios and stressed that "[i]nfants who grow up in public housing [and] contract lead paint poisoning when they consume paint chips" had "referral potential" because "[t]hey almost always have siblings or friends" with similar structured settlements. Access Funding, *Sales Manual V1*, at 8–9 (implemented June 2, 2015), https://tinyurl.com/4yuvubbz.

1999, *reprinted in* 145 Cong. Rec. S5285 (daily ed. May 13, 1999). Congress took notice of the "sharp growth" in factoring transactions, observing that factoring "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. S5283 (daily ed. May 13, 1999) (statement of Sen. Chafee). Congressional hearings also featured testimony that factoring companies targeted victims with substantial spinal injuries, believing that they could "take[] advantage" of "severely disabled persons" by "cheat[ing] [them] out of their money." *Tax Treatment of Structured Settlements: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 51–53 (1999) (testimony of Thomas H. Countee, Jr., National Spinal Cord Injury Association).

In response to the rising tide of deceptive factoring activity, States began in the late 1990s to enact versions of a Structured Settlement Protection Act (SSPA). Hindert et al., *supra*, § 1.02[6][b][ii]. Unlike the tax focus of the Periodic Payment Settlement Act, SSPAs are motivated by consumer-protection goals. *Id.* To advance those goals, SSPAs require an additional step—court approval—before tort victims can assign their structured-settlement payments. Marcellus, *supra*, at 538.

In 2002, Congress effectively mandated that States adopt SSPAs by imposing a 40% excise tax on factoring transactions made without a "qualified order," under "an applicable State statute by an applicable State court," finding that the transfer is in the "best interest" of the payee. Pub. L. No. 107-134, § 115(a), 115 Stat. 2427, 2436–39 (2002) (codified at 26 U.S.C. § 5891). State SSPAs provide the mechanism to issue such a qualified order. Today, all States have enacted SSPA legislation.

The SSPAs reflect a universal judgment that at least some cohort of tort victims cannot resist factoring-company deception. Every SSPA provides that any transaction not approved in accordance with its terms is void. *See, e.g.*, General Obligations Law § 5-1706. An SSPA court order is therefore now the only way to transfer structured-settlement payments. Hindert et al., *supra*, § 1.02. In other words, a tort victim directly, or even indirectly through a guardian or counsel, now lacks the power to independently make such a transfer.

New York enacted its version of the SSPA in 2002, *see* Ch. 537, 2002 N.Y. Laws 1336, 1336–41 (codified at General Obligations Law art. 5, tit. 17), seeking to protect tort victims, who are "particularly vulnerable to the overbearing sales tactics of structured settlement purchasers," Bennett Mem., *supra*, at 2, *in* Bill Jacket for ch. 537, *supra*, at 6. The law

requires that courts hold a hearing and that they approve a transfer of a structured settlement only "upon express findings" that "the transfer is in the best interest of the payee," that the transaction's terms are "fair and reasonable," and that "the transfer does not contravene any applicable statute [or court order]." General Obligations Law § 5-1706(b), (d). And it requires that the factoring company serve this detailed disclosure of the transaction's terms "upon all interested parties," § 5-1705(c), including "the annuity issuer" and "the structured settlement obligor" (i.e., the qualified assignee), before the petition is heard, § 5-1701(f).

Florida has a substantially similar statute. It requires that any transfer be in the payee's "best interest"; that the price paid be "fair, just, and reasonable"; and that the transfer "does not contravene other applicable law [defined to include the law applicable to the structured settlement agreement]." Fla. Stat. § 626.99296(1)(c), (3)(a). Like the New York statute, the Florida statute requires the factoring company to serve "interested parties" with a detailed disclosure of the transaction's terms. § 626.99296(2)(i)(1), (2)(i)(3), (4)(a).

c. Although SSPAs protect tort victims in theory, "[i]n practice" they "offer only very limited protection." *Matter of Settlement Funding of N.Y.*, 195 Misc. 2d 721, 723 (Sup. Ct. Rensselaer County 2003). Indeed,

factoring companies continue to prey on unwitting tort claimants, using the SSPA process as a roadmap to evade the tort victims' "best interest." A.9 (¶ 26). In some extreme, headline-grabbing cases, attorneys and legal staff for factoring companies have forged judges' signatures on documents submitted to courts in SSPA proceedings. One factoring-company lawyer was convicted of forging court orders in more than 100 other SSPA hearings; his defense was that he was saving the court time, since the approval orders would be rubber-stamped anyway. *See* A.16 (¶ 54); Debra Cassens Weiss, *Lawyer Who Forged Judges' Signatures on More Than 100 Documents Is Sentenced*, ABA J. Online (Aug. 4, 2017), https://tinyurl.com/yc8hvsw8; *see also* Stewart Bishop, *Paralegal Can't Dodge Charges of Forging Judges' Signatures*, Law360 (Dec. 22, 2015), https://tinyl.io/6vjv.

Other instances are equally troubling. They reflect the same sorts of abusive tactics that led Congress and States to pass protective legislation. In one example, Freddie Gray and his siblings—all lead-poisoning victims—were pressured by factoring companies into selling their structured-settlement payments for less than a fifth of their value. Gordon, *supra*, at 1551. In another, Stanley Turner, who suffered permanent brain damage as a child, received just $12,001 in exchange

for "more than half a million dollars in future payments." Meitrodt et al., *supra*.

Freddie Gray's story triggered a series of *Washington Post* articles exposing unflattering details about the factoring industry. *See, e.g.*, A.6, 10 (¶¶ 16, 31). And a more recent investigative series in Minneapolis's *Star Tribune*, which examined more than 2,400 transactions, confirms that nothing has changed. *See, e.g.*, Meitrodt & Belz, *supra*; Meitrodt et al., *supra*. As this reporting shows, almost all factoring transactions are routinely approved after short hearings.

The factoring companies so often succeed because the SSPA process is generally non-adversarial. The only participant is the factoring company's lawyer, who presents an agreed-upon order. *See e.g.*, *Matter of 321 Henderson Receivables L.P. v. Martinez,* 11 Misc. 3d 892, 894–95 (Sup. Ct. N.Y. County 2006). That lawyer, whose client wants to "make the most money," must proceed in good faith "to avoid fraud on the court." *Barber v. Stanko*, 257 A.3d 156, 160 (Pa. Super. Ct. 2021). And yet this lawyer, who may be paid only if the petition is approved, will "tell the court that every proposed transfer is in the payee's best interest and . . . that court approval . . . won't contravene any statute, order or applicable law." Hindert et al., *supra*, § 16.05[1].

The result is that tort victims who agree to factoring transactions end up selling at a "punishingly high" discount. *Matter of 321 Henderson Receivables Ltd. Partnership*, 2 Misc. 3d 463, 465 (Sup. Ct. Monroe County 2003). Judges who have scrutinized factoring transactions have repeatedly found "that all of these transactions are economically unwise" for the tort victim. *Matter of Seneca One, LLC v. D.C.*, 2012 N.Y. Slip Op. 50388(U), *3 (Sup. Ct. Bronx County 2012) (quoting *Matter of 321 Henderson Receivables, L.P.*, 13 Misc. 3d 526, 533 (Sup. Ct. Erie County 2006)).[4]

New York is hardly immune to factoring abuse. The documents that factoring companies present to New York SSPA courts are often ones that victims were enticed or deceived into signing. For instance, because tort victims can "knowingly" waive their right to "independent professional advice regarding the transfer," General Obligations Law § 5-1706(c), factoring companies may convince the tort victim to sign a waiver, *see, e.g.*, A.13 (¶ 44). Alternatively, factoring companies can represent that the victims have consulted with counsel and are "aware of the legal, tax and financial implications of the proposed transfer" but do not disclose that counsel advised against consummating the transaction. *Settlement*

[4] *Accord, e.g.*, *Matter of Special Asset Placement Advisors, LLC v. J.Q.*, 2011 N.Y. Slip Op. 51760(U), *4 (Sup. Ct. Bronx County 2011); *Matter of Novation Capital, LLC v. D.M.C.*, 2009 N.Y. Slip Op. 52041(U), *3 (Sup. Ct. Bronx County 2009).

Funding, 195 Misc. 2d at 723.[5] Those documents, such as affidavits of consent, are typically forms that factoring-company salespeople fill out and get tort victims to sign. A.9 (¶ 26).

Factoring companies often present this information to New York SSPA courts through motions on default, making the process non-adversarial. *See e.g.*, *Martinez,* 11 Misc. 3d at 894–95. And factoring companies avoid creating bad law by refusing to appeal denied petitions, opting instead to refile them in another court. *See Matter of RSL Funding, LLC (M.G.N.)*, 2021 N.Y. Slip Op. 50279(U), *7 (Sup. Ct. Rensselaer County 2021).

This one-sided process makes it "eas[y]" for factoring companies to "tender[]" "inaccurate information" to SSPA courts, causing those courts "great concern." *Matter of Settlement Funding of N.Y., LLC v. Utica Mut. Ins. Co.*, 2007 N.Y. Slip Op. 51563(U), *5 (Sup. Ct. Suffolk County 2007). For instance, factoring companies have represented that it is in a victim's "best interest" to sell $153,000 worth of payments to fund the purchase of a $2,500 "kitchen appliance," *Matter of J.G. Wentworth Originations LLC v. McDonald*, 2020 N.Y. Slip Op. 50790(U), *3 (Sup. Ct. Warren

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[5] In States that do not allow tort victims to forgo independent professional advice, factoring companies solve the problem by funneling victims to lawyers who will certify that the victims understand the transactions—whether or not they do. *See* McCoy, *supra*.

County 2020), or to exchange future payments for a lump sum in order to pay for the anticipated funeral expenses of an in-law who had not yet died, *Matter of Settlement Capital Corp. (Ballos)*, 1 Misc. 3d 446, 455–56 (Sup. Ct. Queens County 2003).

These examples are part of a broader pattern. Factoring companies and their lawyers have prepared lists of explanations that judges will find reasonable to support "best interest" claims—explanations that they then coach tort victims to provide. Gordon, *supra*, at 1568–69 & n.129. And insurance companies, including Transamerica, know well that factoring companies seek to bypass the SSPA process through such "factual inventions." A.9 (¶ 26).

d. Factoring remains a booming business. In 2009, for instance, the largest factoring company, J.G. Wentworth, was buying structured settlements worth $728 million annually. *See* Disclosure Statement for JGW Holdco et al. at 15, *In re JGW Holdco, LLC*, No. 09-11731-CSS (Bank. D. Del. May 19, 2009), ECF No. 9. By 2010, factoring companies were closing thousands of factoring transactions—worth hundreds of millions of dollars—each year. Marcellus, *supra*, at 529, 538 n.214. By 2015, an estimated 84,000 tort victims had surrendered $13 billion worth of structured settlements for $5 billion in cash. Gordon, *supra*, at 1553–54.

Insurance companies, meanwhile, handsomely profit by collecting fees for processing the transfers. Transamerica, for example, employs two to four people full time just to change the address on annuity payments to factoring companies. A.17 (¶ 56).

Through this incestuous relationship, insurance and factoring companies collectively rake in hundreds of millions of dollars a year off the backs of tort victims and pervert the incentives and protections that Congress and the States have provided.

B. Factual background

1. Lead poisoning affects millions of children nationwide. Czapanskiy, *supra*, at 5 n.12. It is a "continuing threat to the health of young children," *Juarez v. Wavecrest Mgt. Team*, 88 N.Y.2d 628, 641 (1996), including in New York, where 6.7% percent of tested children outside of New York City recently had elevated lead levels in their bloodstreams, Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*, 41 Harv. Envtl. L. Rev. 493, 498 (2017). Childhood exposure to lead can irreversibly impair cognitive functioning. A.10 (¶ 30). So lead-poisoning victims often sue their landlords for their reduced future earning capacity, medical costs, and living expenses. Czapanskiy, *supra*, at 11–12.

Lujerio Cordero was one of New York's many victims of childhood lead poisoning. Exposed to lead-based paint in his mother's New York City apartment, Cordero suffers from permanent cognitive impairment, leaving him unable to attain a GED and without any serious long-term employment prospects. A.11 (¶¶ 33, 35).

In 1992, Cordero (through his mother, as his guardian) sued his mother's landlord. *Id.* (¶ 33). He ultimately settled with the landlord's insurer, Continental Insurance Company. *Id.* (¶ 34). He was just five years old at the time. *Id.* (¶ 35).

To ensure that Cordero would have long-term financial stability, the parties entered into a standard structured settlement, approved by an infant's compromise order, which found that the structured settlement was in Cordero's "best interests." Order at 2, *Cordero v. Borrani*, No. 15042-1992 (Sup. Ct. Westchester County June 14, 1996).[6] Continental agreed to make periodic payments to Cordero. A.11 (¶ 34). Transamerica then stepped into Continental's shoes, released Continental from liability, and committed to make the periodic payments that Continental had pledged to Cordero. A.12 (¶ 38). Cordero, meanwhile, would enjoy the tax-free growth of his settlement proceeds

[6] The Court may take judicial notice of court records. *E.g.*, *Long v. State of New York*, 7 N.Y.3d 269, 275 (2006).

through the annuity that Transamerica bought to fund the payments. *See* 26 U.S.C. § 104(a). He also got the peace of mind that Transamerica, a large insurance company practiced in structured settlements, would be able to make the periodic payments for three decades. And he received that benefit—a creditworthy counterparty—because the Periodic Payment Settlement Act gave Transamerica tax benefits for assuming Continental's role. *See* § 130(a).

The parties simultaneously signed two documents, both governed by New York law, to effect the structured settlement. A.28 (§ 12), 35 (¶ 5). The first document is the Settlement Agreement. That Agreement entitles Cordero to roughly $3,000 a month for 30 years, starting when he turned 18. A.26 (§ 2(b)). The Settlement Agreement provides that Continental, in accordance with 26 U.S.C. § 130, would be making a "Qualified Assignment" of its liability to Transamerica to make the monthly payments to Cordero. A.27 (§ 6); *see supra* p. 9. The second document is the Qualified Assignment itself. That document transfers Continental's payment obligations to Transamerica and releases Continental from liability. A.35 (¶ 1). It also contemplates that Transamerica would "fund the Periodic Payments by purchasing a qualified funding asset"—an annuity—from its affiliate First Transamerica Life Insurance Company. A.36 (¶ 6).

Through these two documents—signed "at substantially the same time," concerning "the same subject-matter," and therefore "read together as one," *Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197 (1941)—the parties ensured that this complex structure would receive favorable tax treatment. Because the assignment to an insurance company qualifies under the Periodic Payment Settlement Act only if the "periodic payments," 26 U.S.C. § 104(a)(2), are "fixed and determinable . . . [and] cannot be accelerated, deferred, increased or decreased by the recipient of such payments," § 130(c)(2), the parties included language in the Qualified Assignment requiring that "[n]one of the Periodic Payments . . . be accelerated, deferred, increased, or decreased," A.35 (¶ 3). And to further the purposes of the Act, the same sentence provides that such payments could not be "anticipated, sold, assigned or encumbered." *Id.*

The Settlement Agreement adds different language. There, the parties included a "no-power" clause, agreeing that Cordero would have no "power to sell, mortgage, encumber or anticipate [the periodic payments], or any part thereof, by assignment or otherwise." A.27 (§ 4). That clause appears in a section called "Payee's Rights to Periodic Payments" and is part of the sentence shielding Cordero's periodic payments from creditors and forbidding the "periodic payments" from

"be[ing] accelerated, deferred, increased or decreased." *Id.* The parties intended the no-power clause "to protect [Cordero] by guaranteeing him long-term economic security." A.12 (¶ 39). If Cordero could assign away his guaranteed long-term income for a lump-sum payment, he would be at risk of "squander[ing]" his settlement "because of [his] inability to prudently manage large sums of money." A.4 (¶ 10).

2. Unfortunately, that is exactly what happened. Cordero began receiving his periodic payments as planned, but after he turned 18, factoring companies convinced him to sign away what he had bargained for.

a. In 2012, at 22 years old, Cordero entered into his first structured settlement transfer agreement with an affiliate of Singer Asset Finance Company. *See* A.13 (¶ 42). Cordero was told to sign papers already filled out by the factoring salesman. This agreement was accompanied by a complicated purchase agreement that Cordero lacked the capacity to understand and that he was told he did not need to read. *Id.* (¶ 43). These papers falsely claimed that the lump sum was needed to pay off outstanding debts, even though Cordero's debts were a fraction of the lump sum. *Id.* Under the first agreement, Cordero received roughly $50,000 in cash in exchange for payments worth $90,000. *Id.* (¶ 42).

Just months later, Cordero entered into a second transfer agreement, again with Singer. Under this agreement, Cordero received $15,000 in exchange for payments worth $90,000. A.14 (¶ 45). This agreement claimed that Cordero needed money to pay for school and outstanding debt, even though he had received $50,000 just four months earlier and the only school expenses were from his unsuccessful attempt to pass the GED. *Id*. The same salesman "assisted" Cordero in completing the paperwork and accompanied Cordero to the notary. *Id.*

Five months after the second agreement, Cordero entered into his third transfer agreement, again with Singer, receiving $50,000 in cash in exchange for $117,000 worth of payments. *Id.* (¶ 46). As with the prior two agreements, the same salesman "assisted" Cordero and accompanied him to the notary, and the agreement again claimed Cordero needed more money for debts and school. *Id.*

That same year, Cordero entered his fourth transfer agreement with Singer, under which Cordero received roughly $70,000 in exchange for $303,700 in monthly payments. A.14–15 (¶ 47). This time, the agreement alleged that Cordero needed immediate funds to pay for school, without providing any details or explanation. *Id.* The GED, his sole school expense, cost $128, and the expenses for its preparation

classes were trivial. *Id.* The paperwork was delivered by the same salesman, who again accompanied Cordero to the notary. *Id.*

Two months later, Cordero entered his fifth transfer agreement, under which he received roughly $60,000 cash for $192,000 in monthly payments. A.15 (¶ 48). The agreement claimed that Cordero needed the money to pay off past-due debt, buy a reliable vehicle, and pay school tuition. *Id.* The papers were provided by a different salesman, who was accompanied by a notary public. *Id.*

Finally, a mere 22 months after the first factoring agreement was signed, Cordero entered into his sixth and final transfer agreement, under which he received $22,000 cash in exchange for over $160,000 in monthly payments. *Id.* (¶ 49). The sixth agreement claimed that Cordero needed this money to buy a new vehicle because the one he owned was in "dire need of repair." *Id.* The agreement nowhere mentioned that Cordero had just received $60,000 so that he could buy a reliable vehicle. *See id.* As with the prior transactions, a salesman delivered the paperwork to Cordero and "assisted" in completing the forms. *Id.* This time, no notary was present. *Id.*

In each factoring transaction, Cordero was told only to sign and initial the documents before him. A.16 (¶ 52). He was not told, nor did he understand, the nature or contents of the documents he was signing. *Id.*

b. Although a court approved each transfer under the Florida SSPA, the circumstances surrounding those approvals were suspect. The hearings were held in counties distant from Cordero's Miami-Dade County residence. The first four hearings were in rural Sumter County, more than 200 miles from Miami. A.13–15 (¶¶ 44–47); A.56 n.5. The last two hearings were in Broward County, where the only person appearing was the factoring company's counsel, who later pleaded guilty to forging SSPA approval orders (though he did not do so for Cordero's hearings). A.15 (¶¶ 48–49). The hearings were not recorded, and were not attended by Cordero or anyone acting on his behalf. A.13 (¶ 44). At each hearing, the factoring company submitted a written waiver of Cordero's entitlement to independent legal advice. *Id.*

Despite the anti-assignment clauses in the Settlement Agreement and Qualified Assignment, Transamerica—which received a $750 "administrative fee" from the factoring companies for each transfer—consented to the transfers. A.18 (¶ 60). It did so blindly. Transamerica has admitted that it did not investigate Cordero's injuries when the factoring companies asked it to consent, and has claimed that it did not know that Cordero suffered serious cognitive impairment. A.17 (¶¶ 57–58). Yet it could have easily learned that information by asking Cordero; by asking the factoring company, which had been told about the lead

poisoning, *id.* (¶ 57); by requiring such information to be included on the forms submitted by the factoring company, *id.*; or by collecting the information as part of its underwriting process when it originally entered into the transaction (assuming it did not), *id.* Transamerica's inaction is especially notable given that factoring companies' targeting of people with catastrophic injuries, including cognitively impaired lead-poisoning victims, has been widely publicized and litigated, *see, e.g.*, Mannix, *supra*, and that some of Transamerica's competitors have programs designed to root out such "factoring abuse," A.9 (¶ 27), 17 (¶ 56).

c. All told, Cordero received just a quarter of his structured settlement of almost $1 million dollars. Cordero no longer has any of the funds from the factoring transactions and can no longer receive any of the structured-settlement payments. *Id.* (¶ 53).

C. Procedural background

In 2018, Cordero sued Transamerica. In his operative complaint, A.1–24, he alleges, among other claims, that Transamerica breached its contract with him. A.20–21 (¶¶ 68–76). In support of that claim, he alleges that Transamerica breached the anti-assignment clauses in the Settlement Agreement and Qualified Assignment and, alternatively, that Transamerica breached the implied covenant of good faith and fair dealing by failing to take steps to give those clauses teeth. A.19 (¶ 65), 20

(¶¶ 70–73). Transamerica, in turn, filed third-party indemnification claims against the factoring companies.

The District Court dismissed Cordero's operative complaint. A.38–47. In dismissing the breach-of-contract claim, the court concluded that Transamerica had unlimited discretion to consent to the transfer because the anti-assignment clauses existed solely for Transamerica's benefit. A.44. In other words, the court held that no express contractual provision constrained Transamerica in consenting to the assignments. *Id.* Based on that determination, the court ruled that no implied contractual provision constrained Transamerica either. *Id.*

Cordero appealed to the Eleventh Circuit. The Eleventh Circuit did not rule on Cordero's direct-breach theory. As to his implied-covenant theory, the court acknowledged that the covenant of good faith and fair dealing could impose an unwritten duty on Transamerica not to "drastically undermine[] a fundamental objective of the parties' contract": giving Cordero a structured settlement. A.61. The Eleventh Circuit was unsure, however, whether such a theory was viable under this Court's case law. It thus certified the question to this Court. A.62–63.

ARGUMENT

CORDERO HAS PLEADED THAT TRANSAMERICA BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Eleventh Circuit has asked this Court whether the implied covenant of good faith and fair dealing bars a contractual party from breaching unwritten duties in a way that undermines the parties' bargain. The answer is yes. For more than a century, this Court has applied the implied covenant to prevent contracting parties from taking actions that the contract does not expressly bar but that would defeat their counterparties' reasonable contractual expectations. Granted, contracting parties often have some discretion in how they carry out their good-faith obligations. But they cannot exercise that discretion arbitrarily. Nor can they refuse to exercise their discretion altogether.

The contracts here show how the implied covenant works in practice. The whole point of these contracts was for Cordero to receive tax-free periodic payments for 30 years. The contracts reflected that intent many times over, including through clauses forbidding Cordero from assigning the payments. Consistent with that intent, the implied covenant required Transamerica to review—and, as needed, respond to—communications showing that the bargained-for payments were being diverted. Doing so would have required minimal effort from

Transamerica and would have preserved the parties' deal. Yet Transamerica did not do so. And while Transamerica had discretion in how it carried out its good-faith obligations, it did not have unlimited discretion. It therefore had to take at least some action to discharge its implied duties. It took none. Instead, in exchange for payment, it cooperated with the factoring companies to eliminate the benefits that Cordero could expect to receive from his structured settlement.

The District Court based its contrary conclusion on the general common-law rule that anti-assignment clauses benefit only the obligor, who presumptively bargained for that provision, and so Transamerica, as the sole beneficiary, could freely waive that provision. But that general rule must yield when the parties intended for the anti-assignment clause to benefit the obligee too or when tax law, congressional intent, and a statutory anti-assignment requirement renders the common-law obligor–obligee framework strained or inapplicable. And here, the contracts' language and context show that the parties intended for the anti-assignment clauses to benefit Cordero by preserving his right to tax-free periodic payments over the life of the agreements. Regardless, the implied covenant limited Transamerica's discretion to waive. Transamerica thus lacked the free option that the District Court believed it had. It was still bound by an implied duty of good faith.

A. The implied covenant of good faith and fair dealing forbids parties from undermining the purpose of the contract in breach of unwritten duties.

1. Since the late 1800s, this Court has recognized a covenant of good faith and fair dealing. *See, e.g.*, *Dermott v. State*, 99 N.Y. 101, 109 (1885). That covenant, the Court explained in one early case, "is implied in every contract." *New York Cent. Ironworks Co. v. United States Radiator Co.*, 174 N.Y. 331, 335 (1903).

From the outset, this Court has used the covenant to enforce unwritten promises. Indeed, because the covenant is implied, the contract necessarily "lack[s]" any express reference to what it requires. *Wood v. Duff-Gordon*, 222 N.Y. 88, 90–91 (1917). This Court has consistently observed that the covenant requires the parties to perform under the contract "in a reasonable way." *New York Cent. Ironworks*, 174 N.Y. at 335. In discerning what is "reasonable," the Court looks to what the parties would have expected under the contract: the Court will infer that contracts contain unwritten "promise[s]" that "would have been made if [the parties'] attention had been drawn to [them]." *Wilson v. Mechanical Orguinette Co.*, 170 N.Y. 542, 550–51 (1902). The Court has thus long understood that contracts will not expressly contain every promise needed to fulfill the contract's purpose. The implied covenant helps fill in the gaps.

Wood illustrated this principle early on. There, a fashion designer granted a salesman the exclusive right to market her designs. The designer later sought to market those designs herself and argued that a contract never existed, since the exclusive-marketing agreement gave the salesman a right to market the designs but did not expressly obligate him to do anything. This Court disagreed. It explained that, by giving the salesman the exclusive right to market the designer's product, the exclusive-marketing agreement "impli[ed]" "that the [salesman's] business organization w[ould] be used for th[at] purpose." 222 N.Y. at 91. The agreement thus required the salesman to use "reasonable efforts" to market the designer's products. *Id.* at 92. Although the agreement nowhere referred to that requirement, the requirement was implied. Without it, the Court explained, "the transaction" would have lacked "such business efficacy as both parties must have intended." *Id.* at 91 (quotation marks omitted).

As the law developed, the Court continued to expound on the unwritten promises that the implied covenant embodies. In *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79 (1933), the Court held for the first time that the covenant comprises an unwritten promise not to do anything to impair the other party's contractual benefits. The contract there entitled the plaintiff to half the receipts from the production of a

play and gave the plaintiff the right to veto any contracts affecting the play's ownership. The defendant later sold MGM the right to make the play into a "talkie" movie—a right not contemplated by the parties, who contracted in the silent-film era—without obtaining the plaintiff's approval. In doing so, the Court held, the defendant breached the implied covenant by "diminsh[ing] the value" of the plaintiff's one-half interest in the receipts from the play. *Id.* at 90. Put another way, the defendant broke its implied promise to refrain from "do[ing] anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* at 87. That formulation has become hornbook law.[7]

The Court has also observed that the implied covenant embodies unwritten promises in contracts giving one of the parties discretion. In such circumstances, the Court has held, the implied covenant forbids the discretion-wielding party from "exercis[ing] its discretion in an arbitrary or irrational fashion." *Matter of Olsson v. Board of Higher Educ. of City of N.Y.*, 49 N.Y.2d 408, 413–14 (1980); *see Smith v. Robson*, 148 N.Y. 252,

[7] *See, e.g.*, 23 *Williston on Contracts* § 63:22 (4th ed. May 2022 update) (implied covenant "embraces . . . an implied obligation that neither party will do anything to injure or destroy the right of the other party to receive the benefits of the agreement"); Glen Banks, *New York Contract Law* § 11:14 (2d ed. 28 West's N.Y. Prac. Series July 2022 update) (similar).

255 (1896) (noting that contractual pledge of "good faith" embodies promise not to act "arbitrar[ily]").

From these cases, three basic principles emerge. *First*, the implied covenant enforces unwritten promises that a reasonable promisee would expect the contract to contain. *Second*, the implied covenant thus forbids one party from undermining the benefits that the other party would expect to receive under the contract. *Third*, the implied covenant often works by ensuring that parties exercise their discretion in good faith.

2. This Court's more recent cases underscore these principles.

Reasonable expectations. The Court has applied the covenant to protect contracting parties' reasonable but unwritten contractual expectations. In *Ashland Management v. Janien*, for instance, an investment firm and its employee agreed that the employee would design, and the firm would use, a financial-investment model. 82 N.Y.2d 395, 400–01 (1993). The agreement, the Court noted, did not expressly require the firm to sign a nondisclosure agreement. But the implied covenant did. As the Court observed, the agreement "ma[d]e clear that the parties considered confidentiality and determined that [the employee] was to retain some of the benefits of his work." *Id.* at 402. And given those expectations, the Court held, the employee "understandably" believed that the firm would honor his request to keep confidential the "detailed

information" he provided about his model. *Id.* The Court thus concluded that by refusing to honor that reasonable expectation, the firm "failed in its implied duty of acting to implement [the agreement] in good faith." *Id.* at 403.

Contractual benefits. The Court has also applied the covenant to prevent one party from destroying the other party's right to receive the fruits of the contract. In *ABN AMRO Bank, N.V. v. MBIA Inc.*, this Court ruled that an insurer breached the implied covenant by making fraudulent transfers that undermined its ability to meet its obligations under financial guarantee insurance policies. 17 N.Y.3d 208, 228–29 (2011). Nothing in the contract expressly barred the insurer from transferring its assets. But the implied covenant did. The Court explained that the transfers "substantially reduc[ed] the likelihood" that the plaintiffs would receive what they bargained for: insurance proceeds. *Id.* By making the transfers, the Court concluded, the insurers flouted their unwritten "pledge" that they would do not "do anything which will have the effect of destroying or injuring" the plaintiffs' right "to receive the fruits of the contract." *Id.* at 228 (quotation marks omitted).

A similar theory drove the result in *511 West 232nd Owners Corp. v. Jennifer Realty Co.* There, the Court held that the plaintiffs—purchasers of shares in a cooperative apartment building—adequately

pleaded that the sponsor of the cooperative breached the implied covenant by failing to honor an unwritten promise to sell the majority of the cooperative shares. 98 N.Y.2d 144, 152–54 (2002). By instead "keeping a majority of the shares" for itself, the Court explained, "the sponsor defeated the purpose of the contract": "to create a fully viable cooperative," in which the units are owned by cooperators, rather than rented by tenants. *Id.* at 152–53.

Discretion. Finally, the Court has applied the covenant to guard against improper exercises of discretion. In *Dalton v. Educational Testing Service*, the Court held that when a contract grants a party discretion and that party "refuses to exercise its discretion in the first instance," the party breaches the implied covenant. 87 N.Y.2d 384, 392 (1995). The contract there—between a standardized test-taker and the test administrator—invited the test-taker to submit exculpatory materials if the administrator believed that the test-taker had cheated. The contract did not expressly require the administrator to consider the materials. But the implied covenant did. The Court concluded that the test administrator, "[h]aving elected to offer" the test-taker "the option to provide [the administrator] with relevant information," made it "reasonable to expect that [the administrator] would" consider that information. *Id.* at 390. The Court thus held that the covenant implicitly

"require[d]" the administrator to "consider any relevant material that [the test-taker] supplied." *Id.*

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These cases, like the Court's early implied-covenant cases, show that the implied covenant continues to (1) protect the parties' reasonable expectations under the contract; (2) prevent one party from impairing the other's right to receive the fruits of the contract; and (3) bar parties from arbitrarily exercising discretion—or wrongfully failing to exercise discretion. And in all these cases, the Court held that the breaching party was bound by an unwritten duty.

3. These cases answer the certified question. The Eleventh Circuit asked whether a contractual party breaches the implied covenant by "drastically undermin[ing] a fundamental objective of the parties' contract, even when the underlying duty at issue was not explicitly referred to in the writing." A.62–63.

This Court has repeatedly said that the answer is yes. As discussed above, the contract in *Ashland* did not refer to the duty to sign a nondisclosure agreement. 82 N.Y.2d at 402. Nor did the agreements in *ABN AMRO* discuss the duty not to fraudulently transfer assets. 17 N.Y.3d at 228–29. So too in *Jennifer Realty*, where the contract nowhere mentioned how many cooperative shares the sponsor needed to sell. 98

N.Y.2d at 151. And in *Dalton*, the contract said only that the test-taker could submit materials, but did not expressly require the test administrator to review them. 87 N.Y.2d at 390.

The Eleventh Circuit acknowledged much of this case law in finding it "plausible" that, under New York law, the implied covenant bars objective-defeating behavior based on an unwritten underlying duty. A.61. The court believed that *Jennifer Realty*, in particular, supported this rule. *Id.* Still, the Eleventh Circuit was unsure whether this Court "intended *Jennifer Realty* to apply narrowly to cases dealing with similar subject matter or only to cases where the law related to the contract at issue was well-settled when the parties executed the contract." A.62.

Yet this Court expressed no such intention in *Jennifer Realty*. True, the Court looked to the context of "cooperative conversions" in ruling that the plaintiffs stated a claim for breach of the implied covenant. 98 N.Y.2d at 153–54. But the Court did so to honor the century-old rule that the implied covenant includes unwritten promises that "would have been made" had the problem at hand been brought to the parties' attention. *Wilson*, 170 N.Y. at 551. Or, as the Court put it in *Jennifer Realty*, the covenant "encompass[es] any promises which a reasonable person in the position of the promisee would be justified in understanding were included." 98 N.Y.2d at 153 (quotation marks omitted).

The Court thus had to consider the case from the viewpoint of a reasonable cooperative-share purchaser, just as it considers the viewpoint of "a reasonable insured" in deciding what the implied covenant means in an insurance policy, *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995). And that is precisely what the Court did. Given the context in *Jennifer Realty*, the Court held that the plaintiffs "reasonably understood the offering plan to state a duty, at the very least, to sell a sufficient number of shares in a timely manner so as to create a viable cooperative." 98 N.Y.2d at 154.

This Court's other implied-covenant cases confirm that this Court did not intend for *Jennifer Realty* to apply narrowly. Take *ABN AMRO*. There, the Court applied the same implied-covenant theory as in *Jennifer Realty*: it held that an insurer breaches its "pledge" to refrain from "destroy[ing] or injur[ing]" the insured's right "to receive the fruits of the contract" when it violates an unwritten duty not to "substantially reduce the likelihood that it will be able to meet its obligations under the terms of [an] insurance polic[y]." 17 N.Y.3d at 228–29 (cleaned up). The case arose outside the cooperative context. And the Court did not rest its decision on "well-settled" case law. *See* A.62. In fact, it based its holding solely on the dissent below and a lone trial-court case. *See ABN AMRO*, 17 N.Y.3d at 228–29 (citing *ABN AMRO, N.V. v. MBIA Inc.*, 81 A.D.3d

237, 254 (1st Dep't 2011) (Abdus-Salaam, J., dissenting in part), and *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 2009 N.Y. Slip Op. 31527(U), *19 (Sup. Ct. N.Y. County 2009)).

Nor did the Court suggest in *Jennifer Realty* that it was fashioning a new rule that would apply only to contracts concerning well-settled areas of the law. It instead hewed to the implied-covenant case law that it had developed since 1933, when it first held that a party breaches the implied covenant when it destroys the fruits of the contract. *Supra* pp. 36–37. And the Court did not then, and has not since, limited the implied covenant to cases where the law surrounding the contract at issue is settled.

If anything, this Court has signaled that the opposite is true. *Kirke La Shelle* is a case in point. The defendant there breached the implied covenant by selling the rights to produce a "talkie"—a type of film that was "unknown commercially and w[as], therefore, not in contemplation of the parties" when they contracted. 263 N.Y. at 83. The law governing talkies was thus far from well settled when the Court decided *Kirke La Shelle*. And yet the implied covenant barred the defendant from undermining the plaintiff's expected benefit. *Id.* at 87.

The same rule obtained decades later in *Ashland*. There, the Court, citing *Kirke La Shelle*, held that the refusal to sign a nondisclosure

agreement would defeat one of the benefits the employee had bargained for: to get paid for creating an investment model while ensuring that he would retain the rights to "all [of his] research." 82 N.Y.2d at 402. The Court based that decision not on settled law governing inventions or investment modeling—none of which the Court even considered—but instead on what a promisee in the employee's position would have "understandably" believed that the contract required. *Id.*[8]

This unbroken line of pre- and post–*Jennifer Realty* case law underscores that *Jennifer Realty* was neither novel nor narrow. That case law reflects an age-old view that the implied covenant bars contracting parties from impairing the fruits of the contract. And that case law dictates the outcome here.

B. Transamerica's alleged conduct falls squarely within this Court's implied-covenant jurisprudence.

Cordero's allegations pass this Court's test for pleading an implied-covenant claim. As the Eleventh Circuit recognized, Cordero's theory is that Transamerica denied Cordero the fruits of the parties' contractual arrangement—and thus defied his reasonable contractual expectations—

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[8] As further evidence that *Jennifer Realty* applies broadly, judges on this Court have since cited it as an "[o]rdinar[y]" application of the implied covenant, which "is breached where a party has complied with the literal terms of the contract, but has done so in a way that undermines the purpose of the contract and deprives the other party of the benefit of the bargain." *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 198 (2008) (Smith, J., dissenting, joined by Read, J.).

by breaching an unwritten duty. *See* A.57. That is all that Cordero must plead to state an implied-covenant claim under New York law.

1. Transamerica deprived Cordero of the fruits of his bargained-for benefit.

a. Start with the fruits of the contract. Cordero bargained for a structured settlement—one that would give him financial support over 30 years. As explained above (pp. 7–10), structured settlements provide unique protections for infant tort victims like Cordero, who suffer cognitive impairments that make it uncertain whether they can earn a steady living throughout their lives and generally lack the experience and judgment to ensure that a large lump sum will last as long as they need it to. Hindert et al., *supra*, § 1.04[2]. A structured settlement also entitled Cordero to a significant tax advantage: the tax-free growth of the settlement amount. *Id.* § 2.01. Assigning away the periodic payments that Transamerica agreed to pay Cordero would destroy the guaranteed tax-free income stream that Cordero bargained for.

b. The parties understood as much. They thus included provisions in both the Settlement Agreement and Qualified Assignment barring Cordero from assigning the periodic payments owed to him, A.27 (§ 4); A.35 (¶ 3), and, through the Settlement Agreement's no-power clause, even provided that any assignment would be void. *See, e.g.*, *Singer Asset Fin. Co. v. Bachus*, 294 A.D.2d 818, 820 (4th Dep't 2002). By expressly

barring Cordero from assigning those payments, the Settlement Agreement and Qualified Assignment implicitly obligated Transamerica to scrutinize—and potentially object to—communications in the SSPA proceeding showing that Cordero was transferring away the payments he had bargained to receive. And they certainly barred Transamerica from accepting funds to cooperate with a factoring company and thereby destroy Cordero's interests. Those broader obligations give rise to at least three distinct but related implied duties rooted in good faith.

First, Transamerica had to read any statutorily required or court-ordered communications affecting its contractual arrangement with Cordero, including the detailed disclosures about the transaction.

Second, Transamerica had to respond appropriately to any such required communications. Thus, if records that Transamerica received as part of an SSPA proceeding showed that its counterparty was being defrauded or otherwise taken advantage of, Transamerica, at a minimum, had to refuse to cooperate with the factoring company or alert the court.

Third, if Transamerica had reason to believe that its counterparty had limited mental capacity, it had to consider that fact when evaluating records showing that the counterparty was assigning away contractual rights.

Putting these duties together: a reasonable person in Cordero's position would have expected that when his contractual counterparty was served with papers about proceedings that could alter the parties' contract, the counterparty would review the communications, respond appropriately, and, in doing so, consider any extenuating circumstances that might affect the proceedings.

Most contracting parties would expect as much. Contracts routinely become subject to legal proceedings—such as bankruptcy proceedings, where trustees may assume or reject executory contracts, 11 U.S.C. § 365(a), or probate proceedings, where wills may be probated in ways that affects a prior agreement, *see Anderson v. Anderson*, 37 N.Y.3d 444, 455–56 (2021). Contracting parties must therefore read and respond to communications in good faith, lest court proceedings impair the contracts.

Transamerica did none of this. It made "no effort to address factoring abuse": it admitted that it did "absolutely nothing to investigate the nature of [Cordero's] injuries" or the facts surrounding the transaction, all of which were either disclosed in statutorily required communications that Transamerica received or known to Transamerica from its own records. A.9, 17–18 (¶¶ 29, 57–59). Had Transamerica conducted even a rudimentary investigation, it would have seen multiple red flags—that Cordero suffered from lead poisoning, that lead-poisoning

victims are cognitively impaired, and that factoring companies often take advantage of that cognitive impairment. A.17–18 (¶¶ 57–59). And it would have seen the signs of that abuse here, where Cordero accepted a fraction of the money he was owed, gave up important rights, and completed forms that gave facially suspect reasons for needing lump sums, such as needing tens of thousands of dollars to take a test that costs less than $150, A.14–15 (¶ 47). It would also have seen that the "best interest" hearings were scheduled in courts distant from Cordero's home, the obvious rationale being the factoring company's desire to avoid any chance of a personal appearance in which the court could observe Cordero's condition. A.13–16, 18–19 (¶¶ 42–52, 63).

Transamerica knew that it should have done more. It knew that factoring companies engage in pervasive fraud and abuse, targeting victims "unable to understand the consequences of their actions." A.6, 17 (¶¶ 17, 58). Indeed, Transamerica has invoked that knowledge to block at least one other factoring transaction. In *RSL Funding, LLC v. Green*—a Florida SSPA proceeding occurring at the same time as one of Cordero's SSPA hearings, in the same rural courthouse—Transamerica notified the SSPA court that the tort victim's settlement agreement contained no-power "anti-assignment language," which, according to both Transamerica and the trial court, meant that the court lacked "authority

to approve a transfer of structured settlement payment rights." Order ¶ 2, *RSL Funding, LLC v. Green*, No. 2011-CA-321 (Fla. Cir. Ct. Dec. 18, 2013), *aff'd without op.*, 162 So. 3d 1038 (Fla. Dist. Ct. App. 2015) (table). In urging the appellate court to uphold the decision invalidating the assignment, Transamerica, represented by its counsel here, asserted that the original approval order was "void *ab initio*" because the factoring company had "failed to disclose to the Trial Court contractual anti-assignment language that strips from the Trial Court the power to approve the Proposed Transfer." Brief of Appellees at 13, *Green*, 162 So. 3d 1038 (No. 5D14-0328) (*Green* Brief); *see supra* p. 24 (addressing judicial notice).[9] The appeals court accepted Transamerica's argument. 162 So. 3d 1038.

Green is not an outlier. In fact, other courts have gone further. One court, in a decision that Transamerica relied on in *Green*, *see Green* Brief at 20–21, held that a factoring company committed fraud on the court by failing to disclose a no-power clause—not least because it would have been so easy for the factoring company to contact the annuity issuer in

[9] Transamerica also suggested that it did not need to disclose the anti-assignment language "to any party"—or even the court—because there, the original insurer, not Transamerica, had "negotiated the terms of the structured settlement agreement." *Green* Brief at 17 n.2. Here, though, Transamerica *did* negotiate the terms of the Settlement Agreement and Qualified Assignment, which are read together as an integrated document, *see Nau*, 286 N.Y. at 197; *supra* p. 26.

order to determine whether the clause was in the settlement agreement. *See Settlement Funding, LLC v. Brenston*, 2013 IL App (4th) 120869, ¶¶ 39–43, *abrogated in part on other grounds by People v. Castleberry,* 2015 IL 116916. And another court ruled that a structured-settlement qualified assignee and annuity issuer, Symetra, engaged in "intentionally deceptive" conduct by "omitt[ing] any mention of" a no-power clause when asking a court to approve the sale of a structured settlement to itself. *White v. Symetra Assigned Benefits Serv. Co.*, 2021 WL 3472408, at *8 (W.D. Wash. Aug. 5, 2021). The court grounded that holding on Symetra's efforts to "enforce such anti-assignment language in other proceedings," which reflected Symetra's understanding that "contractual anti-assignment provisions render [factoring transactions] ineffective." *Id.*

As these cases show, insurers and annuity issuers, including Transamerica, know how to read communications from an SSPA court, how to determine whether a factoring company is seeking an approval order in a sham proceeding through incomplete disclosures to a court, and how to speak up when they want to. Transamerica just opted not to do so here. And it chose not to do so when it believed and understood that the no-power anti-assignment clause in Cordero's Settlement Agreement

would have prevented a Florida SSPA court from approving the transactions.

Its own prior conduct aside, Transamerica knew that good faith required it to read and possibly respond to SSPA communications because that was industry best practice. Indeed, "[m]any life insurance companies," including Berkshire Hathaway, MetLife, and Independent Life, "have established programs to identify potential impropriety, trigger objections and thus address factoring abuse." A.9 (¶ 27). Those companies check court documents for "indicators of factoring company abuse," such as when:

- "the tort victim's underlying injury involves cognitive impairment";
- "the price paid for the payment stream is disproportionate to the total amount transferred or the amount after discount";
- "the [SSPA] applications are made shortly after the tort victim reaches majority";
- "the applications are made in a series in close temporal proximity"; or
- "the reasons provided for the sale appear transparently inadequate."

Id. (¶ 28). With the minimal effort needed to bring Transamerica in line with its peers, Transamerica would have seen all these indicators here. And with minimal effort, Transamerica could have communicated the

import of the anti-assignment clauses in the Settlement Agreement and Qualified Assignment contracts maintained in its own files.

But Transamerica chose to exert no effort. Its conduct accordingly dipped below what a reasonable counterparty would expect it to exert in carrying out the contracts. And that conduct was especially deficient in the structured-settlement context, where insurance companies must "meet high standards of fair dealing and good faith toward [tort victims]," who have inferior "access to information or business acumen," and thus "often lack equal bargaining power." *Jennifer Realty*, 98 N.Y.2d at 154 (quotation marks omitted).[10]

In fact, standards are especially high in the unique context of the SSPA. In passing SSPAs, state legislatures have recognized that tort victims are frequently so vulnerable that they cannot make decisions about their money. Legislatures have thus left those decisions solely to SSPA judges. *See, e.g.*, General Obligations Law § 5-1706. That legislative determination, which stems from pervasive fraud in the factoring marketplace, *see supra* pp. 10–23, is especially important when

[10] *Jennifer Realty* made this point in discussing cooperative conversions, where "purchasing tenants and sponsors do not deal with each other as equals." 98 N.Y.2d at 153–54. The same principle holds true here. Cordero, a cognitively impaired lead-poisoning victim targeted by factoring companies precisely because of his cognitive impairment, did not stand on equal footing with Transamerica. This dynamic plays out in practice when insurance companies like Transamerica protect tort victims by objecting to factoring transactions—a practice in which Transamerica itself has engaged.

tort victims suffer from catastrophic injuries that may deprive them of the mental capacity to contract, *see Ortelere v. Teachers' Retirement Bd. of City of N.Y.*, 25 N.Y.2d 196, 202–06 (1969).

Even with the SSPAs' legislative protection, many tort victims are still at risk of factoring abuse. In non-adversarial SSPA hearings, an insurer's objection may be the only way that a trial court receives crucial information. In Florida, as in most States, an insurer's objection that an anti-assignment clause bars the transfer is nearly invariably honored by the courts—even when the victim is not mentally impaired. A.8 (¶ 25) (citing *Rapid Settlements Ltd. v. Dickerson*, 941 So. 2d 1275 (Fla. Dist. Ct. App. 2006)). So insurers like Transamerica know that if they do not receive and respond appropriately to official SSPA communications, tort victims are likely to have the structured settlements that they bargained for transferred out from under them on unfair terms.

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The parties here understood that assigning the periodic payments would undermine Cordero's bargained-for right to a structured settlement. To prevent that outcome, they included anti-assignment clauses in the governing contracts. When the SSPA court received a petition to assign Cordero's annuity payments, Transamerica had to at least review and, if necessary, respond to statutorily requited

communications about that transfer. Although the contract left Transamerica discretion in whether and how to respond, the implied covenant forbade Transamerica from exercising that discretion "arbitrar[ily] or irrational[ly]." *Olsson*, 49 N.Y.2d at 414. It likewise forbade Transamerica from "refus[ing] to exercise its discretion in the first instance." *Dalton*, 87 N.Y.2d at 392. So Transamerica had to take *some* action to honor its implied good-faith duty to prevent Cordero's payments from being assigned away.

Transamerica instead did nothing. At most, Transamerica opted to bury its head in the sand while accepting payment to transfer Cordero's funds. Thus, if it exercised its discretion at all, it did so "malevolently, for its own gain as part of a purposeful scheme designed to deprive [Cordero] of the benefits" of his structured settlement. *Richbell Info. Servs. v. Jupiter Partners*, 309 A.D.2d 288, 302 (1st Dep't 2003). And in actively or passively subverting Cordero's bargain, Transamerica breached the implied covenant of good faith and fair dealing.

2. The District Court erred in concluding otherwise.

In reaching the opposite conclusion here, the District Court misunderstood the parties' contractual arrangement. It started from the mistaken premise that the Settlement Agreement's anti-assignment clause "exists" solely "for [Transamerica's] benefit," giving Transamerica

the unilateral "discretion" to waive the implied protections that clause provides. A.44. Yet that clause benefits both parties, as does the Qualified Assignment's anti-assignment clause. Besides, even if the anti-assignment clauses benefit only Transamerica, the implied covenant still constrains Transamerica's discretion—an argument the District Court overlooked.

a. In ruling that Transamerica had unfettered discretion to waive the Settlement Agreement's anti-assignment clause, the District Court relied on *Singer Asset Finance Co. v. Wyner*, which concluded that an anti-assignment clause in a structured-settlement agreement governed by New York law protected only the payor. 156 N.H. 468, 475 (2007). The *Wyner* court—which was not presented with and apparently did not consider any issues relating to the import of the Periodic Payment Settlement Act—reasoned that because anti-assignment clauses are generally "for the benefit of the obligor" "unless a different intention is manifested," the obligor in a structured settlement (the insurance company) enjoys boundless discretion to waive those the anti-assignment clause. *Id.* (quoting Restatement (Second) of Contracts § 322(2)(c) (1981)).

But *Wyner* does not control here. The parties here *did* manifest their intention that Cordero would benefit from the anti-assignment language they agreed on—not only in the Settlement Agreement but also

in the Qualified Assignment. And because the parties intended that the anti-assignment language would not be "solely for the benefit of the obligor, waiver by the obligor [could] not validate the assignment." Restatement, *supra*, § 322 cmt. d.

Settlement Agreement. Exercising their "freedom" to "prohibit" an "assignment[] of money due under [a] contract[]," *Allhusen v. Caristo Constr. Corp.*, 303 N.Y. 446, 452 (1952), the parties, through the Settlement Agreement's anti-assignment clause, stripped Cordero of "the power to sell, mortgage, encumber or anticipate" the "periodic payments" he was due, A.27 (§ 4). In specifying that Cordero "expressly, clearly, and unequivocally surrendered not only the right but the power to assign his rights under the structured settlement agreement," the parties showed that they intended to prospectively void *any* assignment of the periodic payments. *Bachus*, 294 A.D.2d at 820.[11] In other words, because the parties agreed that Cordero "was powerless" to assign the periodic payments, they signaled that they wished to make any purported

[11] *Accord, e.g.*, *Pacific Life Ins. Co. v. Rapid Settlements, Ltd.*, 2007 WL 2530098, at *2 (W.D.N.Y. Sept. 5, 2007), *aff'd on op. below*, 309 F. App'x 459 (2d Cir. 2009); *Foreman v. Symetra Life Ins. Co. (In re Foreman)*, 365 Ill. App. 3d 608, 613–16 (App. Ct. 2006). *Short v. Singer Asset Fin. Co., LLC*, 107 F. App'x 738, 739 (9th Cir. 2004); *Liberty Life Assur. Co. of Boston v. Stone St. Capital, Inc.*, 93 F. Supp. 2d 630, 637 (D. Md. 2000).

assignment by him “ineffectual.” *C.U. Annuity Serv. Corp. v. Young*, 281 A.D.2d 292, 292–93 (1st Dep’t 2001).[12]

In stripping Cordero of his assignment power, the parties showed that they wanted him to benefit. Indeed, parties include anti-assignment clauses in structured-settlement agreements to “assur[e] continuing income to injury victims and minimiz[e] the risk that lump sum recoveries will be dissipated,” “[c]onsistent with the congressional policy favoring use of structured settlements.” Hindert & Ulman, *supra*, at 19; *accord Foreman*, 365 Ill. App. 3d at 615. And that is why the parties included the no-power clause here. A.12 (¶ 39).

Contextual clues support that reading. Those clues are important, for the Court “consider[s]” contractual provisions “not as if isolated from context, but in light of the obligation as a whole.” *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998) (quotation marks omitted). The context here shows that the parties intended the no-power clause to benefit Cordero. Indeed, they placed that clause in the section entitled “Payee’s Rights to Periodic Payments.” A.27 (§ 4). And they used that “Payee’s Rights” section to give

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[12] *Young* did not mention the statutory regime governing the assignment of structured settlements or the potential for factoring abuse. So although *Young* noted that the annuity issuer had not “consent[ed] or ratif[ied] th[e] attempted assignment,” 281 A.D.2d at 292–93, it did not address whether doing so, at least in circumstances like those here, would have breached the implied covenant of good faith and fair dealing.

Cordero creditor protection, specifying that "no part of the [periodic] payments . . . or any assets of [Continental] shall be subject to execution or any legal process for any obligation in any manner." *Id.* In fact, they included that creditor protection in the same sentence as the no-power clause. All of this reinforces that the parties had *Cordero's* interests in mind when drafting the no-power clause.

While Transamerica might have believed that it needed to forbid assignments in order to ensure that Cordero could not deprive it of tax benefits by transferring his periodic payments, the Qualified Assignment's anti-assignment clause already achieved that aim. That clause bars Cordero from assigning his payments and thus, standing alone, ensures Transamerica favorable tax treatment under the Periodic Payment Settlement Act. *See supra* pp. 7–8.

And yet the parties went further. In addition to the Qualified Assignment's anti-assignment clause, the parties added the Settlement Agreement's no-power clause. Treating those two clauses as indistinguishable would thus "render[]" the no-power clause "surplusage—a construction that cannot be countenanced under [this Court's] principles of contract interpretation." *Matter of Viking Pump, Inc.*, 27 N.Y.3d 244, 261 (2016). The Court should avoid that reading and instead conclude that the parties intended the no-power clause to

accomplish a distinct goal: "guaranteeing [Cordero] long-term economic security." A.12 (¶ 39).

Qualified Assignment. Although the District Court considered only the Settlement Agreement's anti-assignment clause, *see* A.44–45, the Qualified Assignment's anti-assignment clause also benefitted Cordero. It did so by preserving the tax benefits of the Periodic Payment Settlement Act, which Congress enacted to help tort victims, *supra* pp. 8–9. The victim receives the "periodic payments" tax-free if they are "fixed and determinable" and cannot be "accelerated, deferred, increased or decreased by the recipient." 26 U.S.C. § 130. To avoid potential adverse tax consequences of such an assignment, qualified-assignment agreements typically included anti-assignment language. *See* Hindert & Ulman, *supra*, at 19; A.5 (¶ 14). The Qualified Assignment's anti-assignment language thus ensured that Cordero received "*periodic* payments as opposed to any other form of receipt," meaning that those payments would "not be treated as taxable income" under the Periodic Payment Settlement Act. *J.G. Wentworth S.S.C. Ltd. Partnership v. Callahan*, 2002 WI App 183, ¶ 16 (quotation marks omitted); *see* 26 U.S.C. § 104(a).

The Qualified Assignment's anti-assignment clause helped Cordero in another way too. It gave Transamerica favorable tax treatment,

inducing it to enter into the structured-settlement transaction—an inducement that ultimately benefitted Cordero, who was guaranteed that a creditworthy counterparty would be the one making payments to him for three decades. *See Hayden*, 64 F.3d at 840; *supra* pp. 8–9.

What is more, though the Qualified Assignment's anti-assignment clause may have once protected Transamerica, since 2002 it has protected only Cordero. That year, New York enacted its SSPA, allowing for court-approved factoring sales. That same year, Congress addressed factoring company abuse by (a) imposing a 40% excise tax on all assignments unless they were approved by a qualified order from a state court and (b) providing that such a transaction had no tax consequence for the annuity issuer. *See* 26 U.S.C. § 5891; *supra* pp. 16–17. This made it "clear that insurers involved in structured settlements will suffer no adverse tax consequences as a result of structured settlement factoring transactions." IRS, *Excise Tax on Structured Settlement Factoring Transactions Audit Technique Guide* (rev. Mar. 2019), http://tiny.cc/w8nxuz. So after 2002, Transamerica could rest assured that an assignment would not affect its tax benefits. And with the SSPA—which made factoring transactions contingent on court orders—Transamerica knew that it would not be subject to "multiple liability" or other "administrative risks and burdens," *Foreman*, 365 Ill. App. at 615,

resulting from uncertainty about who should receive periodic payments. *See* Hindert et al., *supra*, § 16.02.

Nor would an assignment otherwise affect Transamerica, which does not care "whether it pays the settlement monies to [Cordero] or to a third party." *Martinez*, 11 Misc. 3d at 895. The only conceivable person the anti-assignment language benefits is Cordero, whose "long-term economic security" would be—and indeed has been—jeopardized by dissipating his recovery. A.12 (¶ 39). Had Transamerica acted in good faith, the anti-assignment language would have served as a bulwark against factoring-company abuse and ensured that Cordero would receive tax-free periodic payments. Transamerica undermined those objectives.

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The "context" of the anti-assignment clauses, "in the light of the obligation as a whole and the intention of the parties manifested thereby," *Donohue v. Cuomo*, 38 N.Y.3d 1, 18 (2022) (quotation marks omitted), shows that the parties intended them to benefit Cordero—even if they benefitted Transamerica too. And because Transamerica was not the sole beneficiary, it did not have limitless discretion to waive those clauses. It instead had to make a good-faith effort, consistent with the anti-

assignment clauses and the parties' overall contractual arrangement, not to undermine the parties' bargain. It failed to do so.

b. It is not Cordero's burden on a motion to dismiss to show conclusively that the anti-assignment clauses are not for Transamerica's sole benefit. He must show only that his alternative construction is reasonable. If the Court has any doubt about whom the clauses benefit, a jury should resolve that doubt. As the Court has long held, contractual language that "is susceptible of two reasonable meanings" presents "a material question of fact as to the parties' intent." *Newin Corp. v. Hartford Acc. & Indem. Co.*, 62 N.Y.2d 916, 919 (1984); *accord, e.g.*, *Piedmont Hotel Co. v. Nettleton Co.*, 263 N.Y. 25, 29–30 (1933). Resolving "th[at] ambiguity is for the trier of fact," not a court on a dispositive motion. *State of New York v. Home Indem. Co.*, 66 N.Y.2d 669, 671 (1985); *accord Western Group Nurseries, Inc. v. Ergas*, 167 F.3d 1354, 1360 (11th Cir. 1999).

c. Even if the District Court correctly concluded that the Settlement Agreement's anti-assignment clause benefitted only Transamerica, giving Transamerica the sole discretion to waive it, the District Court incorrectly concluded that this discretion was boundless. Transamerica was constrained by the implied covenant. Transamerica thus, at a minimum, had to refrain from "malevolence in the guise of business

dealings." *Richbell*, 309 A.D.2d at 302. And in all events, it could not "act arbitrarily or irrationally in exercising [its] discretion." *Dalton*, 87 N.Y.2d at 389. Yet Transamerica's conduct in consenting to the transfers of Cordero's structured-settlement payments, in exchange for fees, smacks of bad faith. *See supra* pp. 30–31.

Thus, if this Court believes that the anti-assignment clauses benefit only Transamerica, the Court should still recognize the limitations that the implied covenant imposes. And it should conclude that Transamerica's alleged conduct transgressed the limits of whatever discretion it had.

CONCLUSION

The Court should answer the certified question in the affirmative.

Dated: September 28, 2022
New York, New York

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Uniform Practice Rules of the Court of Appeals (22 NYCRR) § 500.13(c)(1), the foregoing brief was prepared on a computer (on a word-processing program). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 13,660.