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

REPLY BRIEF OF APPELLANT

August 31, 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.

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RESPONSE TO TRANSAMERICA'S STATEMENT OF THE FACTS[1]

This is an appeal from an order granting a motion to dismiss. As a matter of settled law, the factual allegations in Cordero's complaint are deemed true and construed in a manner most favorable to the plaintiff. Transamerica Annuity Service Corporation (Transamerica Annuity") and Transamerica Life Insurance Company (Transamerica Life") (collectively "Transamerica") improperly attempt to recast—absent record support for the obvious reason—express allegations in the Second Amended Complaint concerning (1) the scope and nature of Cordero's mental handicap, Ans. Br. at 5-6, and (2) the investigative capacity and conduct of other insurance companies, Ans. Br. at 12. These departures from the record are addressed in the Argument below.

[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]." Page number references to Cordero's Initial Brief and Transamerica's Answer Brief are referenced as Init. Br. at [page number] and Ans. Br. at [page number].

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING CORDERO'S NEW YORK BREACH OF CONTRACT CLAIM.

In this appeal, Cordero urges this Court to find that the trial court (i) failed to follow settled *Erie* analysis to determine New York law on the breach of structured settlement agreements, (ii) as a consequence failed to recognize that under settled New York law, plain contractual language in the anti-assignment clauses creates a contractual duty against assignment and, particularly as to the Settlement Agreement's anti-assignment clause, renders any assignment by Cordero void, (iii) failed to recognize that the anti-assignment clauses benefit Cordero and the public by providing a brain-damaged lead poisoning victim (a "lead kid" in the lexicon, according to the Washington Post article cited in paragraph 31 of the Second Amended Complaint) with a secure income stream, avoiding the possibility that the minor victim would become a public charge if the settlement was "squandered," and (iv) consequently erred in its holding that the anti-assignment clauses were for Transamerica's "sole benefit," waivable at its absolute discretion. Because the contracts impose a duty on Transamerica to reject assignment, Cordero has *a priori* alleged that Transamerica's pre-SSPA hearing consent to assignment was a breach of contract.

Cordero has alternatively alleged that Transamerica violated both prongs of the covenant of good faith and fair dealing as interpreted in New York. Under New

York law, "[e]ncompassed 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." *Dalton v. Educ. Testing Serv.*, 633 N.E.2d 289, 291-92 (N.Y. 1995). Both Transamerica Annuity and Transamerica Life were parties in the Cordero SSPA proceedings. *See* Fla. Stat. § 626.99296(2)(i). Cordero asserts that a reasonable person would be justified in assuming that an insurance company's contractual duties include, as a direct or implied obligation, both (1) actually reading court-ordered communications to measure their content rather than disdaining an obligation to comprehend them, then (2) responding appropriately to the communications, particularly those containing false statements to the SSPA trial court, such as affirmatively representing that the Petition did not contravene state law. Init. Br. at 39-43. 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 consider that issue when taking action based on a communication from the payee. *Id.* Cordero also asserts that a rational jury would consider Transamerica's willful facilitation of factoring company fraud sufficiently "malevolent" to be an additional violation of its good faith obligations. *Id.* at 45-47.

A. Transamerica does not dispute or even discuss Cordero's primary contentions in this appeal.

Transamerica does not address an *Erie* analysis or the necessity to determine how the New York Court of Appeals would rule, preferring to cite Florida's elements of proof for a breach of contract claim arising under New York law. Ans. Br. at 7. It does not directly cite any New York appellate case. It does not dispute that the unambiguous language of the anti-assignment clauses creates a contractual duty not to assign under New York's settled principles for contract interpretation or that the no-power anti-assignment clause in the Settlement Agreement should have rendered any assignment by Cordero void under New York law. Init. Br. at 26-28. It does not address, much less dispute, that the core purpose of a structured settlement agreement, as expressed by Congress and uniformly summarized by all commentators, is to protect the tort victim by providing a secure income stream and protect the public treasury from public welfare liability if the settlement is "squandered" by the tort victim. *Id.* at 28-33; *e.g.*, D.E. 106 at 3 (citing, among others, D. Hindert, J. Dehner and P. Hindert, Structured Settlements and Period Payments Judgments, Sec. 16.01[1]. Fundamentally, Transamerica simply fails to address Cordero's core contention that the anti-assignment clauses, and particularly the anti-assignment clause in the Settlement Agreement, manifest an intent to benefit the tort victim. *See* Restatement of Contracts 2d § 322(2). These tacit concessions

are a crucial frailty to Transamerica's self-appointed role as an innocent bystander to the SSPA trainwreck.

The defenses that Transamerica did raise are addressed below.

B. The anti-assignment clauses necessarily operate to Cordero's benefit and cannot be unilaterally waived by Transamerica.

Transamerica's argument (and the trial court's finding) that the contractual anti-assignment clauses were for the "sole benefit" of Transamerica are based on the New Hampshire Supreme Court's interpretation of New York law in *Singer Asset Fin. Co., LLC v. Wyner*, 937 A.2d 303, 156 N.H. 468 (2007). Transamerica additionally supports this finding with a New York trial court sentence that cites *Wyner* and a district court decision that cites the New York state trial court. *See Matter of 321 Henderson Receivables Origination LLC (Logan)*, 856 N.Y.S.2d 817 (N.Y. Sup. Ct., Queens Co. 2008) (that no-power anti-assignment clause renders assignment void not abrogated by New York SSPA); *Settlement Capital Corp. v. Pagan*, 649 F. Supp. 2d 545, 555 (N.D. Tex. 2009).

Cordero acknowledges that other non-controlling decisions have uncritically applied Section 322 of the Restatement (Second) of Contracts to conclude that anti-assignment clauses are for an annuity issuer's sole benefit. But it is undisputed that

no New York state appellate court has considered this specific issue.[2] This is a case of first impression because none of these cases weighed – or perhaps were never presented with – interpreting the purpose and intent of a structured settlement as universally expressed by Congress, state legislatures, commentators and tort victims (or their representatives). While the anti-assignment clause in the Qualified Assignment doubtless benefits the insurance company by providing a tax subsidy under I.R.C. § 130, Congress' rationale for enacting a statutory anti-assignment requirement was not to subsidize the life insurance industry. The anti-assignment clauses serve the interests of the tort victim and society.[3] Init. Br. at 28-33. Any effort by Transamerica to confront this reality by advancing legislative authority for the position it wants this Court to embrace would suffer from the same absence of

[2] Cordero respectfully submits that, at minimum, this question should be certified to the New York Court of Appeals. 22 N.Y.C.R.R. § 500.27. This case satisfies the requirements for certification under Rule 500.27 because "determinative questions of New York law are involved" and "no controlling precedent of the Court of Appeals exists." And, as this Court has recognized, certification is the preferred method for resolving questions of state law: "Where there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary Erie 'guesses' and to offer the state court the opportunity to interpret or change existing law. *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916–17 (11th Cir. 1995).

[3] Interestingly, the court in *Taylor v. New York Life Insurance Company*, No. 19 Civ. 6830 (VM), 2021 WL 467127 (S.D.N.Y. Feb. 9, 2021), found "at least a colorable argument that the intent to benefit Plaintiffs and [their injured son] is manifest in the title of the anti-assignment provision, which [like Cordero's] reads 'Payee's Rights to Payments.'"

any citable authority. Even if this authority existed, it would only demonstrate that the clauses were ambiguous, with their interpretation a jury question. *See Western Group Nurseries, Inc v. Ergas*, 167 F.3d 1354, 1360 (11th Cir. 1999) (citing and interpreting New York Court of Appeals precedent); *Sayers v. Rochester Telephone Corp.*, 7 F.3d 1091, 1094-96 (2nd Cir.1993) (contract is ambiguous under New York law if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person"). Because the anti-assignment clauses are at the very least plausibly for Cordero's additional benefit, the trial court's determination as a matter of law that Transamerica could waive these clauses at its absolute discretion was reversible error.

C. Because the contracts bar assignment, Transamerica's consent to assignment was a breach of contract.

Under unambiguous contractual language, Transamerica's obligation under New York law was to refuse consent to the assignment of Cordero's interests prior to the factoring companies' SSPA petitions. Transamerica is an insurance company, indisputably capable of saying "no."

Transamerica attempts to finesse this issue by emphasizing that, under the Florida SSPA, Transamerica "may" but is not obligated to object. This ignores the obvious distinction between Transamerica initially giving **affirmative consent** in the face of a barred assignment, and the scope of its later obligation at the SSPA hearing. That same inductive leap appears in Transamerica's leading authority,

Taylor v. New York Life Insurance Company, No. 19 Civ. 6830 (VM), 2021 WL 467127 (S.D.N.Y. Feb. 9, 2021). In *Taylor*, the district court found that the Settlement Agreement's anti-assignment clause does not impose any "affirmative obligations of objecting to, investigating or otherwise intervening" in the tort victim's assignment attempts. But the court did not address or explain why a blanket prohibition against assignment does not create an initial contractual obligation under New York law to reject assignment. Cordero respectfully submits that this portion of the *Taylor* decision, if deemed to extend to Transamerica's initial consent, is simply plain error.

D. Transamerica's conduct violates the covenant of good faith and fair dealing.

Transamerica refuses to acknowledge any obligation to participate in the SSPA hearings notwithstanding its possession of actual knowledge that the Petitions contained misrepresentations in failing to disclose that the assignments violated state law and that, without even one additional element, the onerous financial terms taken alone prove the assignment contrary to Cordero's "best interest." This (in)action breaches the implied duty of good faith and fair dealing inherent in the parties' contractual relationship. Transamerica's defenses to this claim are that (1) any duty to consider or investigate the factoring company petitions is an impermissible attempt to create a new, additional or inconsistent contractual obligation, (2) Transamerica is incapable of performing such duties because it does not have all the

facts and (3) the *Brenston* holding (failing to disclose known violations of state law in a SSPA hearing is a fraud on the court) is no longer good law. *See Settlement Funding, LLC v. Brenston*, 998 N.E.2d 111 (Ill. Ct. App. 2013). These objections contradict the facts.

Transamerica voluntarily accepted a tax subsidy and entered into (or assumed) written contracts barring assignment in order to provide a tort victim with a secure income stream. When Transamerica receives a request to assign these payments, it must first decide whether to comply. Requiring Transamerica to participate in a court proceeding addressing this issue or face liability for its inattention is consistent with the "duty … created or referred to in the writing." *Compania Embotelladora Del Pacifico, S.A. v. Pepsi Cola Co.*, 976 F.3d 239, 249 (2d Cir. 2020). That requiring attention to the judicial process and respecting an obligation of candor to the courts serves public policy interests is a simple matter of definition. As previously briefed, Init. Br. at 45, the relevant question is "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." *Spinelli v. NFL*, 903 F.3d 185, 206 (2d Cir. 2018). While advising the SSPA trial court that the petition contains a false declaration that the assignment does not contravene any state law would admittedly deprive Transamerica of the fruits gained from its profitable factoring company relationships, the fruit it's been

harvesting was not bestowed by Congress, but by a wink-and-nod understanding between Transamerica and the factoring companies.

Nor could the consequence of actually participating in the proceedings be burdensome, though Transamerica advances this jury argument as additional fodder for its coziness with factoring companies. Transamerica is, for one example, certainly capable of generating a form letter for appropriate jurisdictions advising a SSPA court that any assignment would be a violation of state law, or even that it has made no inquiry and thus lacks information concerning the tort victim's injuries but that the financial terms do not appear to be in the payee's "best interest." This implied obligation is the appropriate *Erie* guess, but has been lost in the embrace of considerable "processing" fees. D.E. 106 at 17.

Transamerica believes that opposing factoring petitions is "not feasible" because of the number of transactions (subject to processing fees of its own choice), and that Transamerica and other life insurance companies "typically lack information about the payee's original injury" and are not "equipped or qualified to conduct mental capacity, "best interest" and/or "fair, just and reasonable" evaluations." Ans. Br. at 12. Since these factual declarations directly contradict those in the Complaint, their insertion into appellate argument is in equal parts inappropriate and instructional concerning their significance. If the companies' case is as compelling as Transamerica urges, a jury would doubtless reach the same

conclusion.

As directly alleged in the complaint, however, many life insurance companies have already designed systems to address factoring company abuse and have apparently managed to succeed in acquiring information about the payee's original injury in the course of developing these policies. D.E. 106 at 9. Independent Life's Structured Settlement Payee Protection Plan, for example, provides that it will automatically object in an SSPA hearing whenever it becomes aware of issues relating to diminished capacity, traumatic brain injury, or other cognitive impairment, or when the payee is under age 25 and no independent professional advice was provided, or when the discount rate exceeds the prime rate plus five percent.[4] Put simply, the scope of what any life insurance company "typically" knows is based on what knowledge it seeks to acquire – and avoid.

Transamerica's alternate argument, that it is not "equipped or qualified" to participate in a SSPA hearing, is a bridge too far. Ans. Brief at 12. Appellees are components of a multibillion-dollar conglomerate whose website features tabs for myriad topics trumpeting their vast financial experience and expertise. *See* http://www.transamerica.com (last visited Aug. 31, 2021). In any case, their effort

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[4] *Payee Protection Policy*, https://www.independent.life/payee-protection-policy (follow "View our 2020 annual report" hyperlink) (last visited Aug. 31, 2021).

to be relieved of any obligation in a court proceeding because of their claimed incapacities, particularly as compared to a brain-damaged individual, presents factual issues not resolvable on a motion to dismiss or in this appeal.

Finally, Transamerica's attempt to evade the clear import of *Settlement Funding, LLC v. Brenston,* 998 N.E.2d 111 (Ill. Ct. App. 2013), based on a 2015 change in Illinois law is simply inaccurate. Cordero cites *Brenston* for its holding that the failure to disclose to the SSPA court that the structured settlement contained a no-power anti-assignment clause was a fraud on the court. As explained in Cordero's Initial Brief at 41, this holding was not altered by any statutory change in Illinois and continues to be cited by Illinois courts. *See Stone Street Capital LLC v. Hitchcock,* 2019 IL App (4th) 180404-U (Ill. App. Ct. 2019) (non-precedential opinion) (reversing the trial court's denial of sanctions for failing to disclose the no-power anti-assignment clause). Cordero notes that he made precisely the same response to Transamerica's similar argument in his reply to the pending Motion to

Take Judicial Notice of Transamerica's appellate brief in the *Green* appeal.[5] Transamerica's failure to dispute this conclusion is telling.

Regardless of Illinois law, the issue is plainly whether the New York Court of Appeals would similarly agree that candor with the trial court was not dispensable. Either directly, or under an implied good faith duty, Transamerica's six failures to alert Cordero's SSPA courts that the assignments contravened state law, that the amounts paid were facially inadequate, that Cordero's mental capacity was suspect, that the hearings were being held where he did not reside, and/or, at least as to all petitions following the first, that Cordero was being systematically stripped of his assets, breached the parties' structured settlement contract.

E. Transamerica's concern for the equities.

Transamerica blames the victim and spares the factoring companies,

[5] At page 23 of its brief in *Green*, [attached to Appellant's Motion for Judicial Notice], Transamerica writes that "[the factoring company] failed to disclose the existence of the contractual anti-assignment provisions that *stripped the trial court of any authority to approve the Proposed Transfer*. Accordingly, the trial court's decision to render the April 2011 Order [approving the transfer as in the payee's best interest] void *ab initio* should be affirmed." (emphasis supplied). Yet in footnote 2 of that brief Transamerica disclaims any responsibility for calling this ultimate frailty to the court's attention. If an SSPA approval was *void ab initio* because the court was not advised of the anti-assignment provision by the factoring company, it is hard to follow Transamerica's implicit argument [at page 6 of its reply to the Motion] that the court *acquired* approval power when the failure to advise was Transamerica's. The SSPA system, and with it the judicial process, is being fundamentally eviscerated by the parties' willing failure to advise the court of a known state law violation as it contemplates issuing an SSPA order.

notwithstanding its contractual entitlement (papered in its third-party complaint) to collect from those entities should it be held accountable here. This forum does not seem the right spot to debate these factual questions, so Cordero rests on the Complaint's citation of news articles and commentaries detailing industry practices perfected in the eager embrace of the profits to be reaped from lead victims in particular, D.E. 106 at 3-4, and would expect that a jury should weigh Transamerica's claimed role as an innocent holder of funds. Transamerica's unsupported theory that it is free to regard any citizen not subject to a guardianship as one capable of unraveling the gilded promises of short term money is, however, not the law. The SSPA itself is a legislative determination that structured settlement tort victims may lack sufficient mental capacity, and Transamerica was or should have been aware of Cordero's diminished mental capacity D.E 106 at 22.

Transamerica's snide efforts to restate Cordero's cognitive impairments are another violation of appellate practice. Ans. Br. at 6. Cordero's diminished capacity is directly alleged , D.E. 106 at 5 and 8, and Appellees indifference to his impairment is something it may properly embrace on appeal once a jury has shared its disdain.

II. CORDERO HAS SUFFICIENTLY PLED A FAPSA CLAIM UNDER FLA. STAT. § 415.1111.

Transamerica makes no effort to defend the trial court's stated reasons for dismissing Cordero's FAPSA claim. There is neither citation of authority nor

argument to support the trial court's one-sentence assertion that the "Florida law claim fails" because the parties' Settlement Agreement is governed by New York law. D.E. 117 at 8. Transamerica similarly does not defend the trial court's unexplained theory that the viability of a Florida statutory FAPSA claim on behalf of a then-Florida citizen is dependent on a New York law breach of contract claim. D.E. 117 at 9. The question here is simply whether a "vulnerable adult" has been "exploited." Fla. Stat. § 415.1111. It is the abuse directed at a Florida resident "vulnerable adult," not the terms of an underlying contract, that is the basis for liability.

Transamerica's primary defense of the trial court's dismissal of Cordero's FAPSA count argues that Cordero has failed to allege the "requisite fiduciary relationship." Ans. Br. at 15-17. This is an inaccurate portrayal of both FAPSA and Cordero's claim. Cordero does not allege a fiduciary relationship *because a fiduciary relationship is not required for his FAPSA claim.*

Transamerica additionally claims that "all Defendants are alleged to have done is exercise their discretion not to object to the transfers and let the Florida courts make the determinations that the Florida SSPA requires them to make," Ans. Br. at 18, and that Cordero's purported inability to "truthfully" allege that Transamerica "actually knew" of his mental impairment should implicitly defang FAPSA liability, Ans. Br. at 17-18. Transamerica's self-absolution based on a good-faith reliance on

the courts echoes the apocryphal parent murderer seeking mercy based on his orphan status. The core allegations of this claim concern Transamerica's affirmative consent to the transaction and subsequent knowing joinder in sham SSPA proceedings, despite its knowledge—undisclosed in the petitions but second nature to Appellees–that Cordero lacked power to assign his interest, together with its studiedly willful ignorance about Cordero's lead-impaired status, the gross inadequacy of the proposed payments, and, under it all, financial transactions from which it profited by remaining mute about the violation of state law inherent in the proposed transfer. Transamerica's joinder in this attack on the machinery of the court process bars its reliance on that process as a defense. This claim is based on Florida law, victimizing a then Florida resident, independent of whatever rights the parties may have as to their New York contracts.

A. Unambiguous statutory language demonstrates that a fiduciary relationship is not a FAPSA claim prerequisite.

Transamerica imagines that a fiduciary relationship is a prerequisite for a FAPSA claim but provides no analysis or argument to support its position, and clear statutory language establishes that FAPSA claims can arise in both fiduciary and nonfiduciary contexts. Section 415.1111 provides a cause of action for a "vulnerable adult who has been . . . exploited as specified in this chapter . . . ." The chapter, in section 415.102, contains detailed definitions for this statutory claim:

> (8)(a) "Exploitation" means a person who:
>
> 1. Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or
>
> 2. Knows 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(8)(a).

There are, in short, two distinct types of FAPSA claims: a claim by a vulnerable adult against a fiduciary who engages in "deception or intimidation" under § 415.102(8)(a)(1), *or* a claim against a person who "knows or should know" that the vulnerable adult lacks the capacity to consent under § 415.102(8)(a)(2), and allows someone else to secure the victim's assets. The latter, a Section 8(a)(2) claim, requires no fiduciary relationship and is the claim Cordero pled in Count II. D.E. 106 at 21-22.

Remedial statutes are "liberally construed in favor of granting access to the remedy provided by the legislature" with "statutory limitations on remedial statutes . . . narrowly construed." *Golf Channel v Jenkins*, 752 So. 2d 561, 565-66 (Fla. 2000), and there is no basis to believe that Florida intended to leave vulnerable adults

without a remedy if abused by a nonfiduciary. A plain reading of the statute demonstrates a responsibility sensibly imposed on the Transamericas of the world not to stand by, claiming to be an innocent victim, when they could protect a true victim by the most basic of efforts. That Appellees actively participated by silence in the face of a duty to speak serves only to punctuate that responsibility. Cordero has sufficiently alleged Transamerica's "exploitation."

Transamerica acknowledges that Cordero has sufficiently alleged exploitation by the factoring companies. Ans. Br. at 18. It follows this truth, however, with the peculiar claim that no alleged facts show Appellees had actual knowledge of Cordero's lack of capacity to consent to the sale, and there are no allegations of abuse or exploitation by Transamerica. *Id.* at 17-18. The SSPA, however, a statutory scheme of which Transamerica has obvious knowledge, is a legislative determination that Cordero lacks the capacity to consent to the sale of his structured settlement payments and indeed provides that any sale made by him is void. *See* Fla. Stat. § 626.99296(3)(a). Transamerica also has actual knowledge that the terms of the Settlement Agreement likewise deprive Cordero of the power to assign. Equally fundamentally, FAPSA does not require actual knowledge by Transamerica, only that Transamerica "[k]nows or should know" that Cordero lacks the capacity to consent. *See* Fla. Stat. § 415.102(8)(a)(2). Whether it should know is not a judgment capable of any resolution short of one based on the facts.

The allegations at issue describe in detail how Transamerica, both as to Cordero and other tort victims, is a critical and knowing participant in a sham SSPA process that exploits the mentally disabled, catastrophically injured and/or financially illiterate targets of the factoring industry. D.E. 106 at 6, 9, 13-20, 22. Transamerica, which had virtually absolute authority to block the transfer, D.E. 106 at 8; Init. Br. at 11-12, exercised control over Cordero's property by agreeing to the transfers in exchange for a fee, and transferred Cordero's property and otherwise engaged in exploitation in violation of FAPSA when it failed to object or withhold consent.

Cordero in his Init. Br. at 34-36 lists numerous facts—none of which are contested by Transamerica--which describe why Transamerica "should know" that Cordero "lacks sufficient understanding to make . . . responsible decisions." *See* Fla. Stat. § 415.102(15). Among them are the staggeringly inadequate compensation, in two instances payments of less than 20% of the dollar amounts sold, the distant venues scheduled for the SSPA hearings and the Congressional and state legislative judgments that he lacks such understanding as a matter of law. Transamerica, with actual knowledge of the factoring industry's endemic fraud, both generally and with respect to lead damaged victims, knows or should know that both circumstances are glaring indicators of predatory practices targeting persons with limited mental capacity. The trial court's dismissal of this count should be reversed.

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the type-volume limitation set forth in Fed. R. Appr. P. 32(a)(7)(B). This reply brief contains 4483 words. This reply 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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United States Court of Appeals for the Eleventh Circuit

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