To Be Argued By:
John Neiman
Time Requested: 30 Minutes

CTQ-2022-00001

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.

On Questions Certified by the United States Court of Appeals for the Eleventh Circuit (USCOA Docket No. 21-11340)

BRIEF FOR DEFENDANTS-RESPONDENTS

LAW OFFICE OF STEPHEN HARRIS
Attorneys for Defendants-Respondents
2037 Chestnut Street, Floor 1
P.O. Box 30527
Philadelphia, Pennsylvania 19103
215-206-6485
sharris@lawofficeofstephenharris.com

On the Brief:

John Neiman (*admitted pro hac vice*)
Mary Mangan (*admitted pro hac vice*)

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CORPORATE DISCLOSURE STATEMENT

Respondent Transamerica Annuity Service Corporation n/k/a Wilton Re Annuity Service Corporation has the following parents, subsidiaries, and affiliates:

- Wilton Re U.S. Holdings, Inc.;
- Wilton Reassurance Company;
- Wilton Re US Holdings;
- Wilton Re U.S. Holdings Trust;
- Wilton Re Ltd.;
- Wilton Re Finance LLC;
- Wilton Re Services, Inc.;
- Wilton Reassurance Life Company of New York;
- Texas Life Insurance Company;
- Wilcac Life Insurance Company;
- Redding Reassurance Company 3 LLC; and
- Wilton Reinsurance Bermuda Limited.

Respondent Transamerica Life Insurance Company has the following parents, subsidiaries, and affiliates:

- Transamerica Corporation;
- Transamerica Casualty Insurance Company;
- Transamerica Financial Life Insurance Company;
- Aegon Bank N.V.;
- Aegon Cappital B.V.;
- Aegon Hypotheken B.V.;
- Aegon Levensverzekering N.V.;
- Aegon Schadeverzekering N.V.;
- Aegon Spaarkas N.V.;
- Nedasco B.V.;
- Robidus Groep B.V.;
- TKP Pensioen B.V.;
- Aegon Investment Solutions Ltd.;
- Aegon Investments Ltd.;
- Scottish Equitable plc;
- Cofunds Limited;
- Aegon Magyarország Általános Biztosító Zártkörűen Működő Részvénytársaság (Aegon Hungary Composite Insurance Co.);

- Aegon Towarzystwo Ubezpieczeń na Życie Spółka Akcyjna (Aegon Poland Life);
- Aegon Powszechne Towarzystwo Emerytaine Spólka Akcyjna, (Aegon Poland Pension Fund Management Co.);
- Aegon Emeklilik ve Hayat A.Ş. (Aegon Turkey);
- Aegon Pensii Societate de Administrare a Fondurilor de Pensii Private S.A. (Aegon Romania Pension Administrator Co.);
- Aegon España S.A.U. de Seguros y Reaseguros;
- Transamerica Life (Bermuda) Ltd.;
- Aegon USA Investment Management, LLC;
- Aegon USA Realty Advisors, LLC;
- Aegon Asset Management Holding B.V.;
- Aegon Investment Management B.V.;
- Aegon Asset Management UK plc;
- Aegon UK;
- Aegon N.V., which is publicly traded on the New York Stock Exchange under ticker symbol AEG;
- Mongeral Aegon, Seguros e Previdencia S.A.;
- AMVEST Vastgoed;

- AMVEST Living & Care Fund;
- AMVEST Development Fund;
- Santander Generales Seguros y Reaseguros, S.A.;
- Santander Vida Seguros y Reaseguros, S.A.;
- Liberbank Vida y Pensiones, Seguros y Reaseguros, S.A.;
- Aegon Santander Portugal Não Vida – Companhia de Seguros S.A.;
- Aegon Santander Portugal Vida – Companhia de Seguros de Vida S.A.;
- Aegon THTF Life Insurance Co., Ltd.;
- Aegon Life Insurance Co. Ltd.;
- Aegon Industrial Fund Management Co., Ltd.

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STATEMENT REGARDING LACK OF JURISDICTION

While the Transamerica defendants are due to prevail on the merits for reasons discussed in later sections of this brief, this Court should decline to address the merits as a threshold matter. Any ruling about Cordero's implied-covenant theory will not be "determinative of the cause . . . pending in the certifying court," as the New York Constitution requires of a certified question (NY Const, art VI, § 3 [b] [9]). For that reason, this matter does not fall within the limits of this Court's jurisdiction over certified-question proceedings.

This Court has suggested that to satisfy this jurisdictional requirement, the answers to the certifying court's question must be capable of resolving "the pending action" as a whole (*Retail Software Servs. v Lashlee*, 71 NY2d 788, 790 [1988]). That standard cannot be satisfied here because Cordero also has asserted a claim, on which the Eleventh Circuit has "defer[red]" its "decision," under Florida's Adult Protective Services Act (A-51 n 2). Moreover, as the Eleventh Circuit itself has recognized, statutory language of this type at the very least requires resolution of "a single identifiable claim" as opposed to an isolated "issue" (*Thai Meditation Assn. of Ala. v City of Mobile*, 980 F3d 821, 838 [11th Cir 2020]). And

Cordero admits that any opinion in these proceedings would not be determinative of his breach-of-contract claim. In his words, the Eleventh Circuit "did not address [his] direct-breach theory" of breach of contract and confined its question to his "implied-covenant theory" (Cordero Br 2).

But both theories are part of the same claim. New York courts have recognized that a "claim" purportedly "for breach of the implied covenant of good faith and fair dealing" is "duplicative" of a claim premised on express breach of the contract when both theories "arise from the same facts and seek the identical damages for each alleged breach" (*Netologic, Inc. v Goldman Sachs Grp., Inc.*, 110 AD3d 433, 433–34 [1st Dept 2013]). "Asserting claims for both breach of the implied covenant and breach of the underlying contract is generally redundant and courts confronted with such complaints regularly dismiss any freestanding claim for breach of the covenant" (28 NY Prac., Contract Law § 11:12 [July 2022 update]). Because the Eleventh Circuit has not resolved Cordero's direct-breach theory, any answers this Court gives to a question about the implied covenant cannot be determinative of the contract claim.

This Court's precedents show that it will decline to answer a question in these circumstances even though, as was true in this instance, it accepted the question when the certifying court first made its request. In a previous case, this Court also initially "accepted [a] question for review" but then later "decline[d] to answer" because it "conclude[d]" after the merits briefing "that the question, as proffered, does not satisfy our State constitutional requirement that the question certified "'may be determinative of the cause * * * pending in the certifying court"' (*Retail Software Servs.*, 71 NY2d at 789, quoting NY Const, art VI, § 3 [b] [9]). This Court should do the same here.

Answering the question in this posture would be especially problematic because case law shows that courts cannot determine whether plaintiffs can proceed on implied-duty theories unless it is apparent that express-duty theories are unavailable to them. That is so because "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004]). Until the Eleventh Circuit addresses Cordero's express-duty theory, questions about his implied-covenant theory will not be ripe.

So while this Court should reject Cordero's merits arguments if it reaches them, this Court should "decline to answer the question" due to this jurisdictional bar (*Retail Software Servs.*, 71 NY2d at 789).

Request to Reformulate the Question Presented

Even if the just-discussed jurisdictional problem could be overcome, this Court's precedents would at the very least call for it to reformulate the Eleventh Circuit's question, to tie it to the facts of this case. This section of the brief explains why this Court's case law requires this step and proposes a corresponding reformulation.

The Eleventh Circuit recognized that this case is important due to its specific "facts" (A-63). By that court's estimation, those facts relate to "the conduct of factoring companies as well as companies that issue and fund annuities" (A-62). Cordero has devoted most of his brief to arguments about this factual backdrop (Cordero Br 45–64). But the Eleventh Circuit certified a question that did not reference these facts in any way:

> 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?

(A-62–A-63).

That question's lack of factual grounding would make its answer unhelpful and potentially "determinative of" nothing (NY Const, art VI, § 3 [b] [9]). It is "[a]bstract" and "theoretical," so it lacks the "reasonably appropriate specificity" this Court has deemed essential to certified questions (*Yesil v Reno,* 92 NY2d 455, 457 [1998]). The question framed by the Eleventh Circuit speaks only to the sorts of "academic abstractions" this Court has said will not yield "meaningful and appropriate" resolutions (*Wildenstein & Co. v Wallis*, 79 NY2d 641, 645 [1992]). Questions framed this way, this Court has explained, "curb" its "ability to promulgate a precedentially prudent and definitive answer" (*Yesil,* 92 NY2d at 457).

But this Court can correct that problem. The Eleventh Circuit specified that in setting out the question, it did "not intend" to limit this Court's "discretion in choosing how to frame or to answer these issues in the light of the facts of this case" (A-63). When previous federal appellate courts have certified questions alongside these sorts of "invitation[s] to reframe the inquiry," this Court has not hesitated to do so (*Israel v Chabra*, 12 NY3d 158, 163 [2009]).

The Eleventh Circuit's formulation is especially problematic because it begs the very question it asks this Court to resolve. The Eleventh Circuit posited the existence of a hypothetical "defendant" that has "drastically undermined a fundamental objective of the parties' contract" (A-62–A-63). But this record gives rise to no such inference about either of these defendants. The question whether their non-objection to the applications submitted to the courts "undermined" a fundamental "objective" of a pertinent "contract" is a legal issue that is highly disputed in this case (*id.*). It is not a matter a certified question can assume into existence.

When faced with similarly "pure questions of law divorced from the facts of the particular case," this Court "has reframed" the questions and given "case-specific answers" (Advisory Committee to the N.Y. State and Federal Judicial Council, *Practice Handbook on Certification of State Law Questions by the U.S. Court of Appeals for the Second Circuit to the N.Y. State Court of Appeals* 9 [3d ed Feb 29 2016]). This Court should take that path here if it exercises jurisdiction, "constru[ing]" the Eleventh Circuit's question "in the context of the real case in controversy" alleged in Cordero's Second Amended Complaint (*Wildenstein*, 79 NY2d at 645). This Court should give the question the following fact-specific framing:

> Does Cordero's allegation that the Transamerica defendants did not object to the applications submitted to the Florida courts with his approval under that state's Structured Settlement Protection Act, which resulted in those courts' validation of his sale of structured-settlement payment rights, state a claim against the Transamerica defendant for breaching an implied covenant of good faith and fair dealing with Cordero?

The answer, for reasons this brief will explain, is "no."

INTRODUCTION

Assessed in the context of this case in controversy, Cordero's implied-covenant theory cannot be reconciled with the common law, with applicable statutes, or with reasonable understandings of the judicial process. Cordero is suing the Transamerica defendants for payment rights that he sold to third parties, in transfers Florida courts approved in accordance with Florida's Structured Settlement Protection Act and statutes from other States, including New York's. His assertion that he can now hold the Transamerica defendants liable on the theory that they breached their implied covenant of good faith and fair dealing with him marks an untenable distortion of the common law and runs contrary to policy judgments made by the New York General Assembly and state legislatures throughout the country.

Not once has any court even remotely suggested that the implied covenant works this way. The implied covenant reflects the reality that when parties sign a contract, they promise that they will cooperate with each other to achieve the contract's aims. Cordero would transform that covenant into a duty of *non*-cooperation. The factoring companies and Cordero—not the Transamerica defendants—were the ones who obtained the court orders authorizing the sale of his payments. Yet he now claims that the Transamerica defendants had an implicit duty to stop those courts from doing what he, by agreeing to the factoring companies' petition, asked them to do. That would make a mess of the implied covenant. The Transamerica defendants did not consent as a matter of contract law—either implicitly or expressly—to become liable if a court ever approved a request of that sort.

While the common law forecloses Cordero's theory, statutes enacted by legislatures in New York, Florida, and throughout the country put the matter even further beyond dispute. SSPAs not only require a court to find that the transfer of structured-settlement payment rights is in the payee's "best interest" before it can be effective. These statutes and court orders issued under them also routinely provide that when a court has approved the transfer, entities like the Transamerica defendants are "released from any and all liability" to that payee "for the transferred payments" (General Obligations Law § 5-1707 [a]). Each court order approving Cordero's transfers contained language decreeing that the Transamerica defendants were "discharge[d] and immune from all liability" to Cordero in that way.

The common law and these statutes point to the same conclusion. If Cordero believes that the factoring companies deceived him when he agreed to sell them his payment rights and to support the state-court petitions, his remedy should be against the factoring companies. He should go back to the Florida courts and ask them to set aside those judgments. His remedy should not involve an unprecedented extension of the implied covenant against annuity issuers and structured-settlement obligors that have been released from liability by statutes and the courts.

Statement of the Case

This proceeding requires this Court to address whether Transamerica Annuity and Transamerica Life Insurance had an implied contractual duty to Cordero to object to transfers that he made and the courts approved. Cordero had a structured settlement with his prior landlord and its insurer, under which the parties arranged for Transamerica Annuity to assume the defendants' long-term payment obligations. To fund those payments, Transamerica Annuity purchased an Annuity Contract from Transamerica Life Insurance. Years later, Cordero sold his long-term payment rights to factoring companies, none of which are related to these Transamerica entities. Those sales did not become effective until state courts approved them under a statute, known as the Structured Settlement Protection Act, that has been adopted in some form by all 50 States.

The court orders expressly released both Transamerica entities from liability to Cordero for the payments he was selling. These releases were consistent with SSPA provisions throughout the country, including in New York. Cordero now asks this Court to overlook those orders and statutes, and to hold that the common-law implied covenant of good faith and fair dealing required the Transamerica defendants to object to the petitions the courts approved. This section of the brief describes the background circumstances that are pertinent to the issues Cordero is putting before the Court.

A. Federal tax rules facilitate structured settlements

Structured settlements are arrangements in which the defendant provides the plaintiff payments "over time" (Daniel W. Hindert et al., Structured Settlements and Periodic Payment Judgments, § 1.01 [b] at 1-4 [2022], hereinafter "Hindert treatise"). For a number of reasons, the parties typically utilize the services of an insurance company to take on the obligation to make the future payments (*id.* § 3.05 [1] at 3-15). Under what is known as a qualified assignment, the defendant pays the insurance company, which is in these circumstances referred to as the "obligor," a single premium, and the obligor "promises to make the periodic payments" to the plaintiff, known as the "payee." (*id.*, § 3.06 [2] at 3-54.32; General Obligations Law § 5-1701 [h]). The obligor uses the premium to purchase an annuity contract, often from an affiliated insurance company that in these circumstances is referred to as the "issuer" (Hindert treatise § 3.06 [1] at 3-54.31–32; General Obligations Law § 5-

1701 [a]). The annuity contracts are "held by" the obligor, which uses the revenue to pay the amounts due (Daniel W. Hindert and Craig H. Ulman, *Transfers of Structure Settlement Payment Rights: What Judges Should Know about Structured Settlement Protection Acts*, 44 Judges Journal 19, 19 [Spring 2005], hereinafter "Hindert & Ulman article").

Structured settlements became common because of federal tax law. Congress passed laws making "the full amount of each periodic payment, including the amount attributable to earnings under the annuity contract," excludable from the payee's taxable income (*id.*). Other changes to the Internal Revenue Code created incentives for issuers and obligors to participate (*see* Hindert treatise, at § 1.2 [6] [a] [i]). Obligors pay no taxes on "[a]ny amount received for agreeing to a qualified assignment" (26 USC § 130 [a]). They also pay no taxes on any interest they earn on the annuity (*see id.* § 130 [b] [2]). But the Code exempts obligors from paying those taxes only so long as the "periodic payments" under the structured settlement "are fixed and determinable as to amount and time of payment" (*id.* § 130 [c] [2] [A]). The Code likewise requires that "such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments" (*id.* § 130 [c] [2] [B]).

IRS rules make payees' tax benefits, in turn, contingent on their not being in "constructive receipt" of their future payments or having the present "economic benefit" of these annuities (Rev Rul 79-220, 1979-2 C.B. 285, 1979 WL 51028, at *2). A Treasury Regulation requires not only that third parties own and control the annuities, but also that the structured-settlement documents impose "substantial limitations or restrictions" on payees' ability to control their receipt of future payments (Treasury Regulation § 1.451-2[a]). As a result, most structured-settlement agreements have provisions prohibiting payees from assigning their payment rights to someone else (*see* Hindert & Ulman article at 19).

B. State SSPAs require courts to review all proposed transfers of structured-settlement rights

Despite the anti-assignment provisions in most of these agreements, "an active secondary market in structured settlement payment rights developed in the early 1990s" (*id.*). Before state legislatures passed the SSPAs that now regulate these transfers, obligors frequently opposed those transactions (*see id.* at 26). They did so not only out of concern that payees would seek to hold them liable for continued payments despite the purported transfers, but also due to uncertainty about whether, if payees sold their payment rights to third parties, obligors would suffer adverse tax consequences (*see* Hindert treatise § 16.02 [2] [d] at 16-17). When obligors discovered that payees were trying to transfer their payments, they often successfully litigated to enforce anti-assignment clauses so the transfers would not be made (*see C.U. Annuity Serv. Corp. v Young*, 281 AD2d 292 [1st Dept 2001]; *Singer Asset Fin. Co. v Bachus*, 294 AD2d 818 [4th Dept 2002]).

Starting in 1997, legislatures began concluding that they needed to regulate these transfers. Anecdotes about factoring companies raised serious concerns about whether some of these transactions were in the settlement payee's best interests. But a treatise cited in Cordero's brief also states that "[l]ike all stories, however, this one has two sides" (1 Negotiating and Settling Tort Cases § 18:10 [2009]). One newspaper article cited by Cordero provides an example of a payee who says she believes she "made the right decision" when she sold her long-term rights, which enabled her to "buy a car, attend cosmetology school and cover living expenses" (Jeffrey Meitrodt & Adam Belz, *Relentless Tactics Target Wary Sellers*, Minn. Star Trib. [Oct. 13, 2021]).

Correspondingly, no legislature banned these transfers outright. They opted, instead, for the statutes that became known as the Structured Settlement Protection Acts. These SSPAs "are not uniform," but they are currently all "derived from the same model legislation" (Hindert & Ulman article at 20 & n 4). Under these statutes, a structured-settlement payee's transfer of payment rights will not be effective unless a court approves it, finding that it is in the "best interest of the payee" and "will not contravene 'applicable law'" (*id.* at 20). Factoring companies cannot obtain court approval for these transfers unless they first make "a series of disclosures" to payees "designed to highlight the value of transferred payments and to contrast that value with the net amount that a payee stands to receive in exchange" (*id.*).

As the first states were adopting their SSPAs, Congress was supplying incentives for the legislative trend to continue. Federal legislation that became effective in 2002 imposes a 40 percent tax on "the factoring discount" companies derive from "acquir[ing] directly or indirectly structured settlement payment rights in a structured settlement factoring transaction," unless the transfer "is approved in advance" in what the statute calls a "qualified order" (26 USC § 5891 [a] & [b] [1]). The statute includes within the definition of "qualified order" a "final order, judgment, or decree" that, among other things, makes the key findings required by SSPAs: that the transfer "is in the best interest of the payee," and that the order issues "under the authority of an applicable State statute by an applicable State court" (*id.* § 5891 [b] [2] [A] [i] & [B] [i]). If the settlement satisfied certain conditions for favorable tax treatment at the time that it was entered into—including the conditions that are the basis for the inclusion of anti-assignment provisions in structured-settlement documents (*see supra* at 14)—the "subsequent occurrence of a structured settlement factoring transaction" does not affect that tax treatment (26 USC § 5891 [d] [1]).

1. New York's SSPA applies to settlement agreements that, like Cordero's, are governed by New York law

Eventually all 50 States and the District of Columbia adopted SSPAs supplying the "qualified order[s]" the federal tax legislation envisions (*id.* § 5891 [b] [1]). New York's SSPA is particularly relevant to this case. Cordero's contracts—and, correspondingly, the question presented—are governed by New York law, and the statute by its terms applies to transfers involving "structured settlement agreement[s]" that are "expressly governed by the laws of this state" (General Obligations Law § 5-1701 [o] [iii]).

New York adopted its SSPA in 2002, and it contains the basic provisions common to these laws. It requires factoring companies to make specific disclosures to the payee—including "the discounted present value of the payments"—at least 10 days before a payee "signs a transfer agreement" (*id.* § 5-1703 [c]). Courts must find that "the transfer is in the best interest of the payee" before they can approve the sale (*id.* § 5-1706 [b]). Factoring companies must serve the petitions on payees, obligors, and issuers, which the SSPA deems "interested parties" (*id.* §§ 5-1701 [f] & 5-1705 [c]).

Critically for present purposes, New York's SSPA also contains provisions that eliminate those issuers' and obligors' liability to payees for payments whose transfers the courts approve. The Act provides that following the court order, the "obligor and the annuity issuer shall, as to all parties except the transferee"—that is, the factoring company—"be discharged and released from any and all liability for the transferred payments" (General Obligations Law § 5-1707 [a]). The Act adds that "[c]ompliance" with statutory mandates requiring disclosures to the payee and approval from the court is "solely" the factoring company's "responsibility," and that neither the "settlement obligor nor the annuity issuer" shall bear any "responsibility" or incur any "liability" on those fronts (*id.* § 5-1708 [f]).

2. Florida's SSPA applies to transfers by payees who, like Cordero, reside in Florida

Florida's SSPA also is relevant here. Cordero resides there, and the statute applies to the sales of structured-settlement payment rights when "[t]he payee is domiciled in this state" (Fla Stat § 626.99296 [2] [p] 1). Florida's courts therefore issued the orders approving his transfers that are at issue in this case. Florida's SSPA mandates that a "transfer of structured settlement payment rights is not effective and a structured settlement obligor or annuity issuer is not required to make a payment directly or indirectly to a transferee of structured settlement payment rights unless the transfer is authorized in advance in a final order by a court of competent jurisdiction" (*id.* § 626.99296 [3] [a]). Florida's SSPA requires the court to find that the transfer "does not contravene other applicable law," that the factoring company made disclosures to the payee about the "present value" of the transferred payments, and that the "transfer is in the best interests of the payee" (*id.* § 626.9926 [3] [a] [1]–[3]). Although Florida's SSPA did not contain express language like New York's concerning issuers' and obligors' non-liability when it originally was enacted, the Florida Legislature adopted amendments in 2016 clarifying that "[f]ollowing" the court order's "issuance," the obligor and issuer "[m]ay rely on the court order" and "[a]re released and discharged from any liability for the transferred payments to any party except the" factoring company or one of its assignees (Fla Stat § 626.99296 [d] 1–2 [effective March 10, 2016]).

It was against this backdrop that the Florida courts issued the judgments at issue in this case, approving the petitions concerning Cordero's sales of his structured-settlement payment rights in exchange for the more immediate sums.

C. SSPA courts approved Cordero's transfers of his structured-settlement payment rights

The Eleventh Circuit's certified question assumes a situation in which a defendant has "drastically undermined a fundamental objective of the parties' contract" (A-63). But that assumption does not reflect any factual finding courts have made, or reasonably could make, about the allegations Cordero makes against the Transamerica defendants. Because this matter involves a certified question from a federal court in a case involving a motion to dismiss, the pertinent facts are those, as the Eleventh Circuit put it, presented by "the factual allegations" of Cordero's "second amended complaint," which are taken as true for these purposes even though eventually the evidence may prove them false (A-51 n 3). The complaint itself did not plead that the Transamerica defendants "drastically undermined a fundamental objective of the parties' contract," and the facts pleaded by Cordero would not support that legal conclusion (*See* A-1–A-23).

Instead, as detailed in the pages that follow, Cordero alleged that he—not the Transamerica defendants—entered into the transfers with the factoring companies, which submitted the petitions that the Florida courts granted under that state's SSPA. The same court orders then recognized that the Transamerica defendants would not be liable to Cordero for those transferred payments on a going-forward basis.

1. Different parties executed the Settlement Agreement, the Qualified Assignment, and the Annuity Contract

Three contracts are pertinent to Cordero's structured settlement. Different parties entered into each of them, and the two Transamerica defendants played distinct roles. So despite Cordero's suggestion to do so, these three contracts and these parties cannot be lumped "together as one" (Cordero Br 2).

The first contract was the Settlement Agreement, to which neither Transamerica entity was a party. In it, Cordero's insurer agreed to make structured settlement payments to Cordero of $3,163.94 a month for 30 years, beginning in 2008 when Cordero turned 18 and ending when he will be 48, in 2038 (A-11 ¶ 34; A-26). The Settlement Agreement explained that the landlord's insurer would satisfy this obligation through a Qualified Assignment to Transamerica Annuity, which would then purchase an Annuity Contract to cover the payments (A-26 § 2 [c]; A-27 § 6). Consistent with the federal requirements discussed above, the Settlement Agreement stated,

> Said periodic payments cannot be accelerated, deferred, increased or decreased by the Plaintiff(s) or any Payee and no part of the payments called for herein or any assets of the Insurer is to be subject to execution or any legal process for any obligation in any manner, nor shall the Plaintiff(s) have the

> power to sell, mortgage, encumber or anticipate same, or any part thereof, by assignment or otherwise.

(A-27 § 4).

The second contract was the Qualified Assignment, to which Transamerica Annuity—but not Transamerica Life Insurance—was a party. Cordero's mother, as his guardian, as well as his landlord and its insurer, all signed the document, too. In this contract Transamerica Annuity agreed to assume responsibility to make the structured-settlement payments the landlord's insurer had promised under the Settlement Agreement (A-35 § 1). The Qualified Assignment provided that "[n]one of the Periodic Payments may be accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned or encumbered" (A-35 § 3).

Transamerica Annuity then entered into the third contract, the Annuity Contract, with the other defendant in this case, Transamerica Life Insurance (A-30–A-34). That contract was the annuity Transamerica Annuity purchased to fund its obligations to Cordero under the Qualified Assignment. Neither Cordero, his landlord, nor his landlord's insurer were parties to the Annuity Contract. The Settlement Agreement, while acknowledging that Transamerica Annuity could purchase the Annuity

Contract, specified that Cordero lacked "any rights of ownership or control over" it (A-27, § 6).

2. Courts approved Cordero's transfers of his structured-settlement payment rights to the factoring companies

Beginning in 2012, Cordero—in his words—"entered into" his agreements with the factoring companies (Cordero Br 27). The Transamerica defendants were not parties to those contracts. In them, Cordero exchanged, for more immediate sums, his rights to the long-term payments he would have received under the Qualified Assignment.

The factoring companies, with Cordero's approval, submitted each of those transfers to the Florida courts, where Cordero is "domiciled" and thus where the SSPAs and the federal legislation envisioned that the petitions would be filed (26 USC § 5891 [b] [3] [A] & [4] [A]; Fla Stat § 626.99296 [2] [p] 1; General Obligations Law § 5-1705 [b] [i]). The records of these proceedings were filed in the federal courts in this case (*see* SA1–SA359). As Cordero observes, this "Court may take judicial notice" of such documents (Cordero Br 24 n 6 & 50).

These records show that Florida courts approved each transfer, and in so doing specified that the Transamerica entities would not be liable to Cordero for the payments he was selling the factoring companies. Each order found that the transfers were in Cordero's "best interests" and did not "contravene any applicable federal or state statute" (SA50–SA51 ¶¶1 & 3; SA124–SA125 ¶¶1 & 3; SA199–SA200 ¶¶1 & 3; SA272–SA273, ¶¶1 & 3; SA308–SA309, ¶¶1 & 3; SA346–SA347, ¶¶1 & 3). Each order stated that, "Pursuant to the Act, the Structured Settlement Obligor and the Annuity Issuer," meaning the Transamerica entities, "are hereby discharged and immune from all liability to: a) the Payee," meaning Cordero, "b) anyone claiming through the Payee; and c) to any other person or entity, for i) the Transferred Payments" (SA52 ¶2; SA126 ¶2; SA201 ¶2; SA275 ¶2; SA310 ¶2; SA349 ¶2).

The result of the proceedings was that, in addition to receiving the monthly payments for the first four years the Settlement Agreement went into effect, Cordero—in exchange for assigning his remaining long-term payment rights to the factoring companies—obtained approximately $270,000 (SA30; SA106; SA180; SA253; SA295; SA331). Those companies received, or will receive, the payments remaining on the Annuity Contract, which will be $3,163.94 per month until 2038 (*see* SA52;

SA126; SA201; SA274; SA310; SA348). The Transamerica parties received one-time administrative fees of $750 per transfer for the costs associated with them (*see* A-18 ¶ 60).

3. Cordero sued the Transamerica defendants rather than the factoring companies

Despite the court orders releasing the Transamerica defendants, Cordero later filed this lawsuit seeking to recover his transferred payments from them, not the factoring companies (A-1–A24). He asserted that these defendants were liable for breach of contract under various theories (A-19–A-21). He sought damages "for the difference between the amount of the present value of the monthly payments surrendered and the immediate payments he received," which he calculates as $490,322.39 (A-21 ¶76). He separately asserted claims under Florida's Adult Protective Services Act, which bars exploitation of vulnerable adults (*see* A-21–A-22).

The Transamerica entities moved the District Court to dismiss the case (DE108). They also filed a third-party complaint against the factoring companies, seeking indemnification if the court found them liable to Cordero for the payments he sold those companies (DE52).

The District Court dismissed the entire case (*see* A-38). The court reasoned that Cordero's breach-of-contract claim marked "nothing more than attempts to 'imply obligations inconsistent with other terms of the contractual relationship'" (A-44, quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]]). The court concluded that the Settlement Agreement "only required Defendants to provide Plaintiff with monthly payments and permitted Defendants to enforce the anti-assignment clause at their discretion" (A-44). The court also held that Cordero "fail[ed] to bring forth a viable claim" under the Florida Adult Protective Services Act (A-46).

On Cordero's appeal, the Eleventh Circuit issued an opinion reserving judgment on many of the issues in the case. The opinion "defer[red] . . . decision on Cordero's claim under Florida's Adult Protective Services Act" (A-51 n 2). As to the "breach of contract claim," the opinion observed that "Cordero asserted multiple theories of liability in his briefing," but the court "focuse[d] on whether Transamerica breached the covenant of good faith and fair dealing" (A-57). The Eleventh Circuit then certified its question to this Court (*see* A-56–A-63).

ARGUMENT

In this case Cordero seeks damages corresponding with the structured-settlement payments he assigned to factoring companies. He is proceeding on the premise that his contracts memorialize the Transamerica defendants' implied promise to stop him from selling his payment rights if he ever sought to do so, including in circumstances when he and the other party submitted their proposed transfer to a court statutorily charged with determining whether it was in his best interests. Two sources of law make that theory implausible through and through.

The first is New York common law governing the implied covenant of good faith. This doctrine recognizes that when parties agree to a contract in which they make express promises to each other, they also implicitly agree to cooperate as they perform that contract. Cordero would have this doctrine create a duty with the opposite effect, in which the parties will be deemed to have implicitly agreed to refuse to cooperate with each other's future requests regarding how the contract will be performed. That theory is especially untenable in this case because the requests Cordero made of the Transamerica defendants, involving his proposal to transfer his payment rights to the factoring companies, were about transactions for which he and the factoring companies ultimately obtained court approval. The common law provides no support for Cordero's theory that the implied covenant made the Transamerica entities responsible for stopping any transfer he proposed to make—let alone the judicial-review process that was set in motion due to his own agreement to make these transfers.

Legislative policy judgments reflected in the SSPAs make Cordero's arguments all the less justified. When the General Assembly enacted New York's SSPA, it determined that issuers and obligors should be "discharged and released from any and all liability" to the original structured-settlement payee "for the transferred payments" courts approve under the statute's provisions (General Obligations Law § 5-1707[a]). Cordero's theory that the common law nonetheless creates an implied duty imposing a "liability" on issuers and obligors like the Transamerica defendants to payees like him for the "discharged and released" payments is incompatible with this legislative choice (*id.*). So, too, is Cordero's theory incompatible with the corresponding judgments rendered by the Florida courts, which are entitled to comity and respect.

As this brief observes at the outset, this Court should decline to exercise jurisdiction because any answer to the Eleventh Circuit about the implied-covenant theory cannot be "determinative of the cause" pending in that court (*see supra* at 1–3, quoting NY Const, art VI, § 3 [b] [9]). If this Court determines that it has jurisdiction, it should reformulate the question so it encompasses the facts of this case. The Court should answer by holding that, for reasons elaborated upon below, Cordero does not have a viable theory that the implied covenant imposes this duty and corresponding liabilities on these defendants.

A. The Transamerica defendants made no implied promise to Cordero to object to his transfers of payment rights during the court proceedings that approved them

Put to the side—for the moment—the reality that Cordero's theory would impose a liability on issuers and obligors that cannot be squared with the legislative judgments embodied in the SSPAs. Even if the SSPAs did not exist, New York's preexisting common law would refute Cordero's theory that the implied covenant foists this duty on these defendants. No reasonable person would understand these settlement-related contracts as promising Cordero that the Transamerica defendants would conduct investigations of any attempts he made to transfer his payment rights to third parties in exchange for more immediate lump sums. Nor would any reasonable person understand these contracts to promise Cordero the Transamerica defendants would object—in situations in which his actions suggest he does not want them to—in judicial proceedings that condition the transfer's approval on a court's determination that it is in his best interests. Any such theory is incompatible with the common-law principles that have long animated this Court's implied-covenant jurisprudence, and four of them loom large in this regard.

The first is that the implied covenant does not exist in a vacuum. Any theory that the implied covenant imposes a particular duty on a particular defendant must rest on a specific underlying contract between that plaintiff and that defendant. It is true that "[i]n New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002], hereinafter "*Jennifer Realty*"). But there still must be an actual contract, between that plaintiff and that defendant, into which the implied covenant can be read.

The second key principle is that the question whether that particular contract creates any particular implied duty is, like any question of whether a duty exists, “a pure question of law, to be decided by a court” (*Transit Funding Assoc., LLC v Cap. One Equip. Fin. Corp.*, 149 AD3d 23, 30 n * [1st Dept 2017]). It is not, as Cordero suggests, a “factual issue” for a “jury” to “resolve” (Cordero Br 5, 63). The court must determine, based on the contractual language and surrounding circumstances, whether the implied covenant that is read into every contract creates the specific duties and liabilities the plaintiff seeks to impose.

The third critical principle is that this judicial determination will be driven by an assessment of the parties’ specific intent as to that specific contract. The covenant cannot “imply obligations ‘inconsistent with other terms of the contractual relationship’” (*Jennifer Realty,* 98 NY2d at 153, quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). The “‘promises’” the implied covenant encompasses are instead those “‘which a reasonable person in the position of the promisee would be justified in understanding were included’” in light of the duties and liabilities the contract’s express terms provide (*id.*, quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978], in turn quoting 5 Samuel Williston, Contracts § 1293, p 3682 [rev ed 1937])).

The fourth key principle is that the overarching determinant of whether the parties understood their contract to include the promises at issue is the implied covenant's fundamental assumption that the parties will cooperate with each other as the contract is performed. The implied covenant does not create an obligation for the parties to stand in each other's way, or to object to actions the other party takes. The implied covenant does the opposite. It precludes the parties from "intentionally and purposely do[ing] anything to *prevent* the other party from carrying out the agreement *on his part*" (*Patterson v Meyerhofer*, 204 NY 96, 100 [1912], emphasis added).

These principles, taken together, repudiate Cordero's theory. He did not even have a contract with Transamerica Life Insurance. The contracts he did have, moreover, cannot be read as requiring either Transamerica defendant to object to the assignments he made of his payment rights or the court proceedings that approved them.

1. Cordero has no contract with Transamerica Life Insurance and thus no implied covenant with it

While Cordero's brief tries to blur these lines, it is important to delineate, at the outset, the two defendants in this case and the three contracts that are at issue. Transamerica Annuity, the structured-settlement obligor, was a party to the Qualified Assignment with Cordero (*see* A-36). But Transamerica Life Insurance, the annuity issuer, was not a party to that contract, or any other, with him. The Annuity Contract was between Transamerica Life Insurance and Transamerica Annuity—not Cordero—and it listed Transamerica Annuity as the sole "Owner" (A-30). The Settlement Agreement, to which Cordero was a party, represented that Transamerica Annuity would obtain an annuity from Transamerica Life Insurance, but also stated that "[a]ll rights of ownership and control of such annuity contract will remain vested with" Transamerica Annuity "exclusively" (A-27 § 6). The Qualified Assignment, which Cordero's guardian signed for him, said the same thing (*see* A-36 § 6).

Those considerations mean that—even looking past the reality, discussed below, that the conduct Cordero attributes to the Transamerica defendants does not fit within this Court's implied-covenant jurisprudence at all—his theory against Transamerica Life Insurance cannot get out of the starting gate. As to Transamerica Life Insurance, Cordero did not have the underlying "contract[]" New York law requires before the covenant can arise (*Jennifer Realty*, 98 NY2d at 153). Courts routinely dismiss theories asserting "breach of an implied duty of good faith and fair dealing" when the parties entered no "valid and binding contract from which such a duty would arise" (*American-European Art Assoc. v Trend Galleries*, 227 AD2d 170, 171 [1st Dept 1996]). A court "supplies a term" for a contract under the implied covenant due to the perceived need to deal with circumstances the parties have "omitted from their agreement," so the covenant can operate "only if an agreement is already in existence" (E. Allan Farnsworth, Contracts § 7.17 at 552 [2d ed 1990]).

Cordero's assertion that the settlement-related documents must "be read together as one" does not change these conclusions (Cordero Br 26). In the decision Cordero cites for that proposition, the contracts at issue were "substantially made a part" of each other (*Nau v Vulcan Rail & Constr. Co.*, 286 NY 188, 197 [1941]). That did not happen here, and both the Settlement Agreement and Qualified Assignment stated that the Annuity Contract's ownership and control would be vested in Transamerica Annuity "exclusively" (A-27 § 6; A-36 § 6). The black-letter rule is that “[t]here can be no breach of contract claim against a non-signatory to the contract” (*Randall’s Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 463 [1st Dept 2012]). Cordero offers no persuasive reason why Transamerica Life Insurance can be deemed to have been in privity with him in the circumstances of this case. For this reason alone, he has no viable implied-covenant theory against this defendant at all.

2. Cordero’s implied-covenant theory is incompatible with the common law in any event

Regardless, the common law would not read, into any of these contracts, the implied duties and liabilities Cordero is claiming the Transamerica defendants had. No reasonable person would have understood these agreements to make implicit promises that if Cordero ever chose to sell his long-term payment rights to third parties in exchange for more immediate sums, the Transamerica defendants would seek to stop him from doing so—especially in situations in which courts, with Cordero’s assent, were to determine whether those transactions were in his best interests.

The starting point for this analysis requires the Court to determine whether "a reasonable person in" Cordero's "position . . . would be justified in understanding" that the "promises" he attributes to the Transamerica defendants were implicitly "included" in these contracts (*Rowe*, 46 NY2d at 69). The answer depends on the "terms of the contractual relationship" (*Murphy*, 58 NY2d at 304). The terms of these contractual relationships, as it turns out, work decidedly against Cordero's arguments.

These contracts did not, as an initial matter, create any express duty for the Transamerica defendants to object to any assignments Cordero might eventually make. He has not argued otherwise in this Court, with good reason: he acknowledges that the Eleventh Circuit "did not address" his "direct-breach theory," and he has not asked this Court to expand the certified question to include this issue (Cordero Br 2). That is a problem, however, of jurisdictional dimensions. As precedents show, it is impossible to assess whether a contract imposes an "implied obligation" to do something unless the court first assesses what direct obligations the "terms of the contractual relationship" create (*Murphy*, 58 NY2d at 304). For that reason—among others—the Eleventh Circuit's exclusive focus on the implied-covenant theory has put this Court in a position in which it cannot issue an opinion that is "determinative of the cause" (NY Const, art VI, § 3 [b] [9]). This Court, as this brief has noted, should decline to issue an answer as a result (*see supra* at 1–4).

Regardless, no reasonable reading of those contracts could suggest that they imposed an express duty on the Transamerica defendants to object to those assignments. The provisions on which Cordero has premised his direct-breach theory—the two anti-assignment clauses—speak only to things Cordero, not the Transamerica defendants, might do. The Settlement Agreement states that "nor shall the Plaintiff(s) have the power to sell, mortgage, encumber or anticipate" the periodic payments "by assignment or otherwise" (A-27 § 4). The Qualified Assignment likewise states that those payments "may not be anticipated, sold, assigned or encumbered" (A-35 § 3). The rights to receive those payments belonged to Cordero; they did not belong to the Transamerica defendants. So these provisions created direct limitations only on the actions Cordero, not the Transamerica defendants, could take.

The upshot is that no express contractual provision required the Transamerica defendants to take any particular action in these circumstances, and the key language in the contracts is all directed at Cordero. The question presented, then, is whether this same language can be read as implying that when Cordero does what it says he cannot—and a petition is made to a court, with his approval, asking that court to validate his sale or assignment of those periodic payments—the Transamerica defendants have a duty, stemming from the covenant of good faith and fair dealing, to object to what Cordero has done. For at least two independent reasons, the common law's answer is no.

a. Cordero's theory is incompatible with the common law because it calls for the parties to obstruct each other during contract performance

The first is that Cordero's theory turns the implied covenant on its head. The covenant of good faith and fair dealing marks the contracting parties' implicit promise that they will "cooperate" with each other as the contract is performed (Farnsworth on Contracts § 7.17 at 551; *Black Horse Lane Assoc., L.P. v Dow Chem. Corp.*, 228 F3d 275, 288–89 [3d Cir 2000], quoting Restatement [Second] of Contracts § 205 cmt d [1981]). Never once does a court appear to have construed the implied covenant, as Cordero now advocates, to require one of the contracting parties to interfere with the other, and to prevent him from doing what he says he wishes to do. Cordero says that under his theory the Transamerica defendants had a duty to "refuse to cooperate with the factoring compan[ies]" in these circumstances (Cordero Br 47). But because Cordero manifested his own approval of those transactions, what he is actually arguing is that the Transamerica defendants had a duty to refuse to cooperate with him.

That argument is at war with the premises undergirding the implied covenant, and each precedent Cordero cites in his brief proves the point. The implied covenant required the defendant in *Ashland Management v Janien* to enter into a nondisclosure agreement because that was what the plaintiff, in this Court's words, "wanted" (82 NY2d 395, 402 [1993], cited at Cordero Br 38). The implied covenant required the defendant in *ABN AMRO v MBIA Inc.* to not fraudulently transfer funds because the transfers "exposed" the plaintiffs "to potentially billions of dollars in losses" they desired to avoid (17 NY3d 208, 220 [2011], cited at Cordero Br 39). The implied covenant required the defendant in *Dalton* *v Educational Testing Service* to consider certain information the plaintiff submitted because, this Court explained, it was "reasonable" for that plaintiff to "expect" the defendant to honor his request (87 NY2d 384, 390 [1995], cited at Cordero Br 40–41).

This list of cases could go on and on. Each of them affirms the defendant's duty to do something that, in the course of the contract's performance, the plaintiff "wanted." (*Ashland Mgt.,* 82 NY2d at 402). Cordero does not cite a single precedent—and the Transamerica defendants know of none—in which a court held that the covenant required the defendant to stand in the plaintiff's way.

This Court's various statements of the doctrine provide no basis for the transformation of the common law that Cordero now is trying to effectuate. This Court's initial framing was that the covenant reflects each party's implicit promise that "he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part" (*Patterson*, 204 NY at 100). This Court has also grounded the covenant in the principle that "'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]). Nothing about the Transamerica defendants' alleged conduct implicated these concepts. These defendants did not "prevent" Cordero from "carrying out" the agreement "on his part"—because he himself made the transfers of which he now complains (*Patterson*, 204 NY at 100). The Transamerica defendants cannot be said to have been the ones who "destroy[ed]" or "injur[ed]" his "rights"—not when he himself approved the sales of the payment rights he now claims should not have occurred (*Kirke La Shelle*, 263 NY at 87). The Transamerica parties did not force him to engage in these transactions. They are not even alleged to have *encouraged* him to do so.

Those factors distinguish this case from *Jennifer Realty*, the decision that prompted the Eleventh Circuit to certify its question. The plaintiffs there, tenant-owners in a cooperative, did not sue the defendant for allowing them to engage in transactions they themselves had initiated. They sued the defendant for *preventing* them from engaging in those transactions. The "purpose of the contract" had been to put the plaintiffs in a position where they could "resell their shares" if they wished (98 NY2d at 152). But the cooperative manager precluded them from doing so by "keep[ing] a majority of shares for itself," impairing their "ability to resell" (*id.* at 152–53). Those sorts of cases, in which the defendant's actions "have the effect of destroying or injuring" the plaintiff's ability "to receive the fruits of the contract," give rise to a "valid cause of action" under an implied-covenant theory (*id.* at 153–54). In cases in which the plaintiff's conduct is what caused the injury alleged, on the other hand, an implied-covenant theory makes no sense.

Nor is there foundation for Cordero's suggestion that, "if [the parties'] attention had been drawn" to the issue when these contracts were executed, the expectations wrapped up in their obligation of good faith would have included an understanding that the Transamerica defendants were promising to keep him from selling his payment rights if he ever demanded to do so in the future (Cordero Br 35, quoting *Wilson v Mechanical Orguinette Co.*, 170 NY 542, 550–51 [1902]). That would amount to a promise to save the other contracting party from its own choices, and that is not what the implied covenant does. As Judge Posner has suggested, it is "unlikely" that any State has, "in the name of" the implied covenant, made "every contract signatory his brother's keeper" (*Mkt. St. Assocs. v Frey*, 941 F2d 588, 593–94 [7th Cir 1991]). Judge Easterbook has added that this covenant does not make the parties "each others' fiduciaries" (*Kham & Nate's Shoes No. 2 v First Bank of Whiting*, 908 F2d 1351, 1357 [7th Cir 1990]). This Court, for its part, has hesitated to "transport" contracting parties "to the higher realm of [a fiduciary] relationship and fashion the stricter duty for them" when they have not "create[d] their own relationship of higher trust" in the contract's express terms (*Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162 [1993]).

It would make especially little sense to convert the implied covenant into a full-fledged fiduciary duty in the statutory and regulatory context in which these transactions occurred. The legal system gave another, separate decisionmaker—a court, no less—responsibility to determine whether Cordero's transfers were in his "best interests" and therefore whether they would go into effect (Fla Stat § 626.99296 [3] [a] 3). Cordero is now critical of the Florida proceedings, but it would be contrary to New York's "practice" of "comity" if the common law required the Transamerica defendants to say "no" when a coordinate state's courts had said "yes" in this way (*Ehrlich-Bober & Co. v University of Houston*, 49 NY2d 574, 580 [1980]). The New York General Assembly has adopted an SSPA of its own, and Cordero acknowledges that Florida's is "substantially similar" (Cordero Br 17). If the common law is ever to be extended to impose an implied duty on parties to refuse requests they make of each other during the contract's performance, that extension should not come in a context in which statutes provide for those requests to be approved or disapproved by the courts.

b. Cordero's theory also is incompatible with the common-law rule allowing obligors to waive anti-assignment clauses

Beyond its inherent mismatch with the implied covenant's most fundamental assumption, there is a second, independent reason Cordero's theory cannot be reconciled with the common law: the same ground upon which the District Court relied in dismissing Cordero's complaint (*see* A-44). As the District Court reasoned, Cordero's theory that the Transamerica defendants had an implied duty to enforce the anti-assignment clauses against him is at odds with New York precedent holding that a "prohibition against assignment . . . may be waived" by the obligor (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 402 [1957]).

The rule that an obligor is free to not enforce an anti-assignment clause is not a new one, and it is not unique to New York. It springs, as treatises explain, from the understanding that an "antiassignment clause" will "ordinarily be interpreted as being for the obligor's benefit only" (Farnsworth on Contracts § 11.4 at 796). "Because the restriction protects the obligor, the obligor can dispense with it" (*id.* at 792). It is therefore an uncontroversial proposition that any "prohibition against assignments or transfers may be waived by the obligor" (*Matter of 321 Henderson Receivables Origination LLC*, 19 Misc3d 504, 507 [Sup Ct, Queens County 2008], citing *Singer Asset Finance Co., LLC v Wyner*, 156 NH 468, 475 [2007]).

Cordero's theory would impose an implied duty on the Transamerica defendants that erases this "term[] of the contractual relationship," and for that reason it does not square with this Court's precedents on the implied covenant of good faith (*Murphy*, 58 NY2d at 304). On much the same premises, this Court has held that it would be "incongruous" to understand the implied covenant as requiring employers to exercise good faith when they fire employees whose contracts make their employment terminable at-will (*id.*). "[T]o imply such" an only-in-good-faith "limitation from the existence of an unrestricted right," this Court reasoned, "would be internally inconsistent" (*id.* at 305). The same is true of the situation at hand. Because New York law gives obligors an unrestricted right to waive anti-assignment provisions, the District Court correctly concluded that the implied covenant cannot be read as imposing a duty that restrains obligors in this way.

Cordero's brief offers three responses, but none has any basis in the law.

i. Cordero had no right to compel the Transamerica parties to enforce anti-assignment clauses against assignments he approved

Cordero first posits that the parties intended these particular "non-assignment clause[s] to benefit the obligee too," such that the District Court was wrong to say that Transamerica Annuity had the ability to waive their enforcement against the transfers he wanted to make (Cordero Br 34, 56). But that argument makes no sense. To the extent that structured-settlement payees like Cordero might be better off retaining rights to their future payments, they do not need anti-assignment clauses to make that happen. They simply need to not agree to any transfers. When Cordero says he also "benefited" from these clauses' presence in the contracts, he is referring to certain practical considerations—that they ensured that he received his payments "tax-free" under federal law, and that they "induc[ed]" Transamerica Annuity "to enter into" the Qualified Assignment with him in the first place—that have nothing to do with whether he needs a legal right to enforce these clauses against someone else (Cordero Br 60–61). For all practical purposes, the only party to a structured settlement that needs an anti-assignment clause in this sense—and, thus, the only party that "benefits" from the clause's presence in the contract in the way that matters—is the obligor. That is why structured-settlement obligors, not payees, are the parties courts previously have recognized as having the right to either enforce or waive these provisions (*see 321 Henderson Receivables Origination*, 19 Misc3d at 507; *Singer Asset Finance*, 156 NH at 475 [2007]).

But even if these clauses' presence could be said to have "benefited" Cordero in some way that is meaningful for these purposes, the end conclusion would not change. Structured settlements are not "trusts," and obligors are not "trustees" (*Owen v CNA Ins./Cont'l Cas. Co.*, 167 NJ 450, 466 [2001]; *In re Robbins*, 211 BR 2, 4 [Bankr D Conn 1997]; *In re Kent*, 396 BR 46, 52 [Bankr D Ariz 2008]).). Structured settlements are, instead, contracts between two parties. So even if their anti-assignment provisions could have been said to have "benefited" Cordero in some legally important respect, it would not have meant that the Transamerica defendants would have had an obligation to enforce these clauses against him. It would have meant, at most, that *he* would have had the power to enforce them—or, correspondingly, to "dispense with" their enforcement—if *he* so chose. (Farnsworth on Contracts § 11.4 at 792). The latter route, for all practical purposes, is the one Cordero took. Having agreed to the transfers and eschewed any "benefit" the anti-assignment clauses might otherwise have provided him, he could not turn around and maintain that the Transamerica defendants should have enforced the clauses against him and were liable for the transfers as a result.

Little needs to be said, moreover, about Cordero's suggestion that the Transamerica defendants do not actually "benefit" from these sorts of anti-assignment clauses anymore because, as of 2002, New York had enacted its SSPA "allowing for court-approved factoring sales" and Congress had passed legislation making clear that court-approved transfers generally would have "no tax consequence" (Cordero Br 61). These developments have reduced the frequency with which structured-settlement obligors have needed to enforce these provisions, but the possibility remains in any given case that due to uncertainty about "accounting implications," "administrative costs," or other dynamics, obligors may sometimes wish to exercise their rights to object (*Singer Asset Fin. Co. v. CGU Life Ins. Co. of Am.*, 275 Ga 328, 330 [2002]). And the fact remains that the only parties that can possibly enforce these anti-assignment provisions, by these agreements' plain terms, are the structured-settlement obligors, not the payees. Regardless, it is unclear how Cordero believes that his argument that the Transamerica defendants no longer "benefit" from these clauses—however erroneous that argument may be—could somehow translate into a rule under which these defendants have an obligation to enforce these clauses against him.

ii. The law gives obligors the right to not enforce anti-assignment clauses that say obligees have no "power" to make assignments

Cordero's second response to the District Court has equally little merit. He posits that the even if the Transamerica defendants had the right to waive the anti-assignment clause in the Qualified Assignment, they had no similar right to waive the anti-assignment clause in the Settlement Agreement. The basis for his argument is the latter contract's wording, which—unlike the Qualified Assignment—provided that he had no "power" to transfer his payment rights (Cordero Br 57, citing A-27 ¶4).

But this sort of language is common in anti-assignment clauses, and it has settled legal meaning that has nothing to do with whether obligors can waive their enforcement. This language speaks only to the *remedy* obligors have if they want anti-assignment provisions enforced. If a contract bars assignments without making them "void" or depriving the obligee of "power" to make them, then the "now-majority rule," memorialized in the Restatement (Second) of Contracts, is that the obligor's sole remedy is to sue the obligee for damages. (*Owen*, 167 NJ at 467; *accord Rumblin v Utica Mut. Ins. Co.*, 254 Conn 259, 268–77 [2000]; *Allhusen v Caristo Const.,* 303 NY 446, 450 [1952]; Restatement [Second] Contracts § 322 [2] [b]). When the contract says assignments are "void" or that obligees have no "power" to make them, the obligors' remedy is more robust. This language gives them an "enforce[a]ble contractual prohibition" against obligees, this Court has held, that allows them to have courts set the assignments aside (*Allhusen*, 303 NY at 450).

But the distinction this language draws between obligors' available remedies does not affect the rule that obligors also can choose to waive enforcement of anti-assignment clauses altogether. Structured settlements are contracts, and, as Justice Cardozo once observed, "[t]hose who make a contract, may unmake it" (*Beatty v Guggenheim Exploration Co.*, 225 N.Y. 380, 387 [1919]). Any contractual "prohibition" on "waiver" thus "may itself be waived" (*id.*). That is why, when this Court addressed a contractual provision stating that assignments "shall be void," this Court held that this language made the assignment void "*as against the obligor*" (*Allhusen*, 303 NY at 452, emphasis added). This Court did not suggest that this language precluded the obligor from waiving the prohibition's enforcement if it wanted to do so. Regardless of an anti-assignment clause's language, basic contract principles still leave the obligor free, in the Restatement's words, to "discharg[e] his duty to the assignee as if there were no such prohibition" (Restatement [Second] Contracts § 322 [2] [c]).

Cordero is wrong when he asserts that if obligors can waive enforcement of both these clauses, then the "no-power" language in his Settlement Agreement would be mere "surplusage" (Cordero Br 59). Even looking past the distinct remedies these clauses provide and thus the distinct roles they would play if Transamerica objected to a given transfer of payment rights, it makes perfect sense that each contract contained its own anti-assignment clause. Each is, after all, a separate contract. To the extent that favorable tax treatment depended on the contracts placing "substantial limitations or restrictions" on Cordero's ability to control his receipt of future payments (*see supra* at 14, quoting Treasury Regulation § 1.451-2[a]), it was prudent to include the limitations and restrictions in both documents.

Cordero contends that decisions from other jurisdictions show that obligors cannot waive the enforcement of clauses that speak of the obligee's "power" to make assignments in this way, but he is wrong about that. In the Florida litigation that he cites, the Transamerica entities did not argue that the court had no power to approve a transfer due to the anti-assignment clauses' language (*see* Cordero Br 50). They instead argued that the court's order was void because the factoring company's petition had not "disclose[d]" those clauses to the court (C-28). The extraordinary circumstances of that case, in which it "became clear" that the factoring company was attempting to "circumvent the requirements of" the Florida SSPA by forcing the matter into "extrajudicial" arbitration, led the Transamerica parties to seek the anti-assignment provisions' enforcement there (C-14–C-21). Likewise, among the multitude of problems that were present in an Illinois case Cordero cites was the factoring company's omission of "any reference" to the anti-assignment clauses in its petition and its failure to challenge those provisions' "enforceability" (*Settlement Funding, LLC v Brenston*, 2013 ILApp4th 120869 ¶¶37 & 39). Other cases applying Illinois's SSPA suggest that this decision could have come out differently if the "evidence" had "demonstrate[d]" that the issuer and obligor had "waived" the anti-assignment provisions' enforcement (*Sanders v JGWPT Holdings, Inc.*, 2016 WL 4009941, at *7 [ND Ill. July 26, 2016, No. 14 C 9188]).

The bottom line is that Cordero has cited no decision, from New York or elsewhere, that makes the obligor's right to waive these clauses turn on whether they speak of the obligee's "power" to make assignments. The string-cite in his brief encompasses cases in which courts declined to approve transfers because issuers' and obligors' non-objections to the "attempted assignment" were not clear—or because their positions were clear and they had chosen to object (*see* Cordero Br 57–58 & nn 11–12, quoting *C.U. Annity Serv. Corp. v Young*, 281 AD2d 292, 292–93 [1st Dept

2001]). As one treatise explains, because insurers "may no longer find it necessary to insist on enforcement of anti-assignment provisions" due to "protections now available under the SSPAs" and federal tax law, these provisions' enforcement is "an issue that will effectively be waived in most cases" (Hindert treatise § 16.05 [4] [v] at 16-99). So the rule remains that a contractual "prohibition on assignment," including a prohibition with the no-power wording, "may be waived" (*Sillman*, 3 NY2d at 402).

iii. Cordero has no viable theory that the Transamerica defendants' non-enforcement of these clauses was an abuse of discretion

Cordero's final response is to assert that, even if the District Court was correct when it reasoned that the law generally allows obligors to waive these clauses' enforcement, the implied covenant still can prohibit them from doing so "arbitrarily or irrationally" (Cordero Br 64, quoting *Dalton*, 87 N.Y.2d at 389). That argument is equally unsound.

This Court's decision in *Moran v Erk*, 11 NY3d 452 [2008], shows why this implied-covenant theory cannot operate against a backdrop of this kind. The contract in *Moran* made a real-estate deal contingent on the "approval" of both parties' attorneys (*id.* at 454). When one of those attorneys exercised that contingency to disapprove the contract, the other party sued, alleging that the attorney's actions had been "in bad faith" (*id.* at 455). This Court rejected the theory, reasoning that it could not reconcile the plaintiffs' premise that "the implied covenant of good faith and fair dealing implicitly limits an attorney's ability to approve or disapprove" these transactions with the contract's plain statement that "any 'fruits' of the contract were contingent on attorney approval" (*id.* at 456–58). The Court also emphasized the need to avoid rules under which "'question[s] of fact precluding summary judgment'" could be "'raise[d]'" any time "an attorney disapproved a real estate contract" in a way the other party did not like (*id.* at 457–58, quoting *McKenna v Case*, 123 AD2d 517, 517 [4th Dept 1986]).

The context here is different, but the same considerations apply. The law provides no exception to the rule that an obligor may waive an anti-assignment clause when it is meant for that obligor's benefit. Cordero's implied-covenant theory, under which a payee could challenge an obligor's decision not to enforce one of these clauses in a particular case, would leave the obligor's exercise of this power subject to the "chanciness" this Court in *Moran* suggested was incompatible with an unqualified contractual right (*id.* at 458). Cordero would make an obligor's ability to waive an anti-assignment clause contingent upon what he calls its "investigation" into matters that are outside its then-current knowledge and control—such as whether the payee had "limited mental capacity," whether the payee was being "taken advantage of" by third parties, and whether the "courts" deciding whether to approve the assignments will utilize procedures the payee deems suspect (Cordero Br 47–49). In this area no less than the one in *Moran*, the interests of "clarity" and "predictability" make Cordero's proposed "bad faith exception" contrary to law (11 NY3d at 458).

The other decisions Cordero invokes, which recognize that the implied covenant includes "a promise not to act arbitrarily or irrationally" when the "contract contemplates the exercise of discretion," have no bearing here (*Dalton*, 87 NY2d at 389). The cases from which Cordero has drawn that principle involve the obligation of "an academic institution" to "act in good faith in its dealings with its students" (*Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 414 [1980]). But this is not a case about whether a school must allow a student "the opportunity to retake his comprehensive examination" (*id.*). It is not even a case about a contract that contemplates that one of the parties must exercise discretion in its performance more generally—such as an output contract that makes a producer's revenues depend on the "efforts" a merchant puts into selling the product (*Wood v Duff-Gordon*, 222 NY 88, 90–92 [1917]). It is, instead, a case about whether anti-assignment clauses benefiting an obligor "may be waived" (*Sillman*, 3 NY2d at 402). Because New York precedents provide that the answer is yes, Cordero's theory that the implied covenant placed limits on Transamerica Annuity's ability to waive these clauses is inconsistent with other terms of the contractual relationship.

B. Cordero's implied-covenant theory is incompatible with policy choices embodied in state SSPAs

The foregoing analysis shows that Cordero's implied-covenant theory cannot coexist with two independent common-law principles, either one of which is reason enough, by itself, to reject Cordero's theory. But the common law is not the only relevant authority here. Cordero himself argues that the "standards" the common law requires of annuity issuers and structured-settlement obligors depend on "the unique context of the SSPA" (Cordero Br 53). He acknowledges that the controlling "rule" turns on this "statutory" backdrop and the legislative "intent" (Cordero Br 34). He concedes that these statutes reflect a legislative choice to leave transfer-related decisions "solely to SSPA judges" (Cordero Br 53). But he ignores other legislative judgments that are crucial to the matter at hand.

This brief has already touched on one of these points, noting that it would be anomalous for the common law to impose implied duties on issuers and obligors to object to proposed transfers when the SSPAs leave the determination of whether they are in payees' "best interests" to the courts (*see supra* at 44–45, quoting Fla Stat § 626.99296 [3] [a] 3). But the SSPAs also reflect other legislative determinations about the responsibilities of issuers and obligors in particular, and those determinations are incompatible with the obligations and liabilities Cordero would impose on these defendants now.

1. New York's SSPA reflects the General Assembly's judgment that issuers and obligors should not be liable for court-approved transfers

Start with the legislative judgment reflected in the statute that establishes the public policy of New York. The New York SSPA makes manifest the General Assembly's determination that the pertinent duties and liabilities relating to these transfers rest with factoring companies and the courts, not issuers and obligors.

New York's SSPA does so in two significant ways. It first makes "[c]ompliance" with its core requirements—that disclosures be made to the payee, and that court approval be obtained before the transfer is effective—"solely" the factoring company's responsibility (General Obligations Law § 5-1708 [f]). "[N]either the structured settlement obligor nor the annuity issuer," the SSPA specifies, "shall bear any responsibility for, or any liability arising from, non-compliance" with those requirements (*id.*). Even more critically, the SSPA states that once the court approves the "transfer of structured settlement payment rights under this title," then "[t]he structured settlement obligor and the annuity issuer shall, as to all parties except" the factoring company to which the payment rights have been sold, "be discharged and released from any and all liability for the transferred payments" (General Obligations Law § 5-1707 [a]). The General Assembly is far from alone in that judgment: "most of the SSPAs" provide that "the structured settlement obligor and the annuity issuer" are "discharged and released" in this way (Hindert treatise

§16.05 [6] at 16-105). Cordero hints at this very point without acknowledging it in his brief, when he argues that "with the SSPA," an obligor will "kn[o]w" that it cannot "be subject to 'multiple liability'" for transferred payments (Cordero Br 61).

While the first of these SSPA provisions is in serious tension with Cordero's theory of the implied covenant, the second reflects a judgment that is irreconcilable with it. To quote Cordero's complaint, the damages he seeks from the Transamerica defendants are "the difference between the amount of the present value of the monthly payments surrendered and the immediate payments he received" (A-21 ¶76). So he is trying to use the implied covenant to impose, in the words of the SSPA, a "liability for the transferred payments" from which the General Assembly envisioned these defendants being forever "discharged and released" (General Obligations Law § 5-1707 [a]).

The dissonance between that legislative judgment and that damages request is all the more reason to decline Cordero's invitation to extend the implied covenant's reach. The orders at issue were rendered by courts in Florida rather than those in New York. But the New York SSPA by its terms extends to "structured settlement payment rights" involving an "agreement," like Cordero's, that is "governed by the laws of this state" (General Obligations Law § 5-1701 [o] [iii]). The Florida courts found that Cordero's transfers not only complied with the Florida SSPA, but also did not contravene "any other applicable" state "statute" (*see supra* at 25). And no common-law regime that "encourage[s] harmony among participants in a system of co-operative federalism," as New York's does, can make issuers' and obligors' liabilities turn on the state in which the payee happens to reside (*Ehrlich-Bober*, 49 NY2d at 580). Because "[f]reedom to contract itself is deeply rooted in public policy," the General Assembly's determination that the policy of this State favors the release and discharge of these liabilities for issuers and obligors cements the conclusion to which the common law points (*New England Mut. Life Ins. Co. v Caruso,* 73 NY2d 74, 81 [1989]).

2. The other states' SSPAs operate in a manner that is inconsistent with Cordero's implied-covenant theory

Cordero's common-law theory also is antagonistic, for similar reasons, to the judgments reflected in the system of SSPAs covering the country more broadly. As Cordero's case shows, structured-settlement agreements that are governed by the law of one state can be the subject of SSPA proceedings in another. The critical federal legislation provides that the "qualified order" that approves the transfer will often come from a court in "the State in which the payee of the structured settlement is domiciled" (26 USC § 5891[b] [3] [A] & [4] [A]). So in numerous cases involving structured-settlement agreements that are governed by New York law, a court from another state will ultimately determine whether the transfer is to be approved.

Yet Cordero's implied-covenant theory would call for the judgments of those courts to be disregarded. When each of the Florida courts issued its order finding that the proposed transactions were in Cordero's "best interests" and due to be approved, it also released the "the Structured Settlement Obligor and the Annuity Issuer"—namely, the Transamerica defendants—from "all liability to" Cordero for "the Transferred Payments" (*see supra* at 25). These provisions are common in SSPA court judgments, and they are consistent with the statutory provisions adopted by New York and "most" other states (Hindert treatise § 16.05 [5] at 16-105). Yet Cordero's theory would allow him to contravene those judgments and seek to hold the Transamerica defendants liable for the payments from which courts have declared them released.

That result would circumvent not only these States' decisions to leave these issues to SSPA courts, but also basic principles of federalism embedded in the U.S. Constitution. Under the Full Faith and Credit Clause, a "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land" (*Baker v Gen. Motors Corp.,* 522 U.S. 222, 233 [1998], citing US Const, art IV, § 1). Cordero cannot, by way of the implied covenant, ask a New York court to "disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits" (*V.L. v E.L.*, 577 U.S. 404, 407 [2016]). "On the contrary," the Supreme Court has held, "'the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based'" (*id.,* quoting *Milliken v Meyer,* 311 U.S. 457, 462 [1940]).

No sensible understanding of the implied covenant would put it on that collision course with those constitutional assumptions. This consideration, too, confirms that Cordero cannot be correct in urging the Court to fashion this particular remedy, against these defendants, for him.

But the reality that each State relies on court judgments to effectuate the SSPAs' goals—and that the Florida courts issued judgments in Cordero's case, at the factoring companies' request—also points to the remedy he *does* have, against defendants he has thus far chosen not to pursue. The Full Faith and Credit Clause does not preclude a court from reconsidering its own judgments. Every state has laws, like Rule 1.540 of the Florida Rules of Civil Procedure, allowing parties to ask courts to "relieve" them from a "final judgment" entered due to "fraud" or the "misconduct of an adverse party" (Fla R Civ P 1.540 [b] [3]; *accord* CPLR 5015 [a] [3]). And Cordero now alleges that the factoring companies—not the Transamerica defendants—made "false[]" statements to induce him to endorse their petitions with the Florida courts (Cordero Br 27, citing A-13 ¶42). He alleges that he "was not told" by those companies of, and did not understand, "the nature of the contents of the documents he was signing" that made those court proceedings possible (Cordero Br 29, citing A-16 ¶52).

If Cordero believes that the factoring companies procured those Florida court judgments through their own fraud or misconduct, then he should return to those courts and ask them to set those judgments aside. That is his remedy. His remedy is not in this unprecedented extension of the implied covenant of good faith and fair dealing, against defendants that did not receive the payments, in a lawsuit that runs contrary to the common law and the statutes regulating these transfers throughout the United States.

* * *

These considerations show why the Court should answer the Eleventh Circuit's question, properly reformulated to encompass the "context of the real case in controversy," in the negative (*Wildenstein*, 79 NY2d at 645). Cordero's allegation that the Transamerica parties did not object to the application submitted to the courts with his approval did not state a claim against either of these defendants for breaching any implied covenant of good faith and fair dealing they had with him.

But the specific facts of this case also show why the answer to even the Eleventh Circuit's formulation of the question—however "theoretical" and "generalized" it may be—must also be "no" (*Yesil,* 92 NY2d at 457). A plaintiff does not adequately allege a breach of the implied covenant, despite a conclusory allegation "that the defendant drastically undermined a fundamental objective of the parties' contract" (A-62–A-63), if the plaintiff's real claim is that the defendant did not prevent *him* from taking the action he claims undermined the contract's objectives—which, here, was Cordero's assignment of his future payments. A plaintiff also does not adequately allege a breach of the implied covenant, despite a conclusory allegation that the defendant "undermined" a contract "objective" (*id.*), if the facts show that the plaintiff's real claim is that the defendant exercised a right that the law deems unrestricted—which, here, was Transamerica Annuity's right to waive the anti-assignment clauses. And a plaintiff does not adequately allege a breach of the implied covenant, despite a conclusory allegation that the defendant undermined a contractual objective, if the law provides that the defendant is "discharged" and "released" from "any and all" liability the plaintiff's theory would impose (General Obligations Law § 5-1707 [a]).

No matter how the question is formulated, the answer is the same. Whether or not Cordero has a remedy against the factoring companies, his theory under the implied covenant of good faith and fair dealing, as applied to the different defendants here, cannot be maintained.

CONCLUSION

Because no answer to the Eleventh Circuit can be "determinative of the cause" before that court, this Court should not exercise jurisdiction here (NY Const, art VI, § 3[b] [9]). But if this Court exercises jurisdiction, it should answer the question, whether reformulated to encompass this case's facts or in the Eleventh Circuit's formulation, "no."

Respectfully submitted,

One of the Attorneys for Respondents

OF COUNSEL:

Stephen R. Harris
LAW OFFICE OF STEPHEN HARRIS
2037 Chestnut St. Floor 1
Philadelphia, PA 19103
T: 215.206.6485
sharris@lawofficeofstephenharris.com

John C. Neiman, Jr.
Mary K. Mangan
MAYNARD COOPER & GALE P.C.
1901 Sixth Ave. N., Ste. 1700
Birmingham, AL 35203
T: 205.254.1000
F: 205.254.1999
jneiman@maynardcooper.com
mmangan@maynardcooper.com

Attorneys for Respondents Transamerica Annuity Service Corporation, n/k/a Wilton Re Annuity Service Corporation, and Transamerica Life Insurance Company

STATEMENT OF WORD COUNT AND FORMATTING COMPLIANCE

This brief complies with the applicable type-volume limitation under Rule 500.13(c) of the Rules of Practice (22 N.Y.C.R.R.). According to the word count in Microsoft Word 2016, the body of this brief—inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, and certificate of compliance—contains 13,157 words.

This brief complies with the applicable type-style requirements limitation under Rule 500.1(j) of the Rules of Practice (22 N.Y.C.R.R.). I prepared this brief in a proportionally spaced Century Schoolbook font, sized 14 point, double spaced.