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COURT OF APPEALS

STATE OF NEW YORK

CORDERO,

Appellant,

-against-

NO. 21

TRANSAMERICA ANNUITY SERVICE,

Respondent.

20 Eagle Street
Albany, New York
March 14, 2023

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 JUDGE RIVERA: The last appeal on today's
2 calendar, number 21, Lujerio Cordero v. Transamerica
3 Annuity Service Corporation.

4 Proceed, counsel.

5 MR. EISMAN: Good afternoon, Your Honors. Scott
6 Eisman for Lujerio Cordero. I'd like to reserve three
7 minutes for rebuttal.

8 JUDGE RIVERA: You have it. Three minutes.

9 MR. EISMAN: Transamerica breached the implied
10 covenant by blindly cooperating with factoring companies to
11 transfer away Cordero's structured settlement payment.

12 JUDGE GARCIA: Counsel, what's the breach,
13 though? Is it that they didn't object, or that they didn't
14 consider objecting?

15 MR. EISMAN: The breach is really that they
16 didn't consider anything at all. They did absolutely
17 nothing here. And to understand - - -

18 JUDGE GARCIA: So if they had looked at this and
19 said - - - there was a record and they said no, you know,
20 we think is a pretty good deal, that would be okay.

21 MR. EISMAN: There might be a factual question
22 whether they're consenting there, rather than withholding
23 approval was in good faith or not in good faith. But at a
24 minimum, they had to exercise - - -

25 JUDGE TROUTMAN: They have a contractual



1 relationship or a fiduciary relationship with Cordero?

2 MR. EISMAN: It's - - - they had a contractual
3 relationship, Your Honor. And so - - -

4 JUDGE TROUTMAN: So why were they obligated to
5 stop the sale?

6 MR. EISMAN: They were - - - they weren't
7 obligated to stop the sale because of any sort of best
8 interest determination, or because of typical fiduciary
9 duty considerations, like owing Cordero an undivided duty
10 of loyalty or prioritizing his interest. It's all about
11 what was bargained for here, an inalienability of a long-
12 term income stream was at the core of the bargain. And is
13 - - -

14 JUDGE GARCIA: Isn't that the purpose of the
15 legislation to put the role you would put on them on the
16 court, so the court acts that way. I mean, the court
17 understands that these things have non-assignability
18 clauses. The whole idea of this is you get a neutral
19 magistrate to come in and look at this thing, and if
20 there's a real hardship here, they grant it. If there
21 isn't, they don't.

22 MR. EISMAN: But the court is looking at
23 something else, which is whether the -- - - you know, the
24 deal is in Cordero's best interest, or in a payee's best
25 interest.



1 JUDGE GARCIA: And what do you want the company
2 to look at - - -

3 MR. EISMAN: We would like to - - -

4 JUDGE GARCIA: - - - stopping them from doing
5 this?

6 MR. EISMAN: Well, the company we would want them
7 to consider is the overall terms of the bargain, and
8 whether their acts destroyed the complexion - -

9 JUDGE TROUTMAN: Do you think the court's in a
10 better position with respect to these statutes? I know in
11 New York in my experience, the - - - the owner of the
12 structured settlement is brought before the court, and the
13 court is making a best interest determination based on some
14 of the complaints you have here, that his I.Q. or his
15 functionality was affected by the lead, et cetera. The
16 trial court is in a better position than a settlement - - -
17 or the company that's holding the settlement.

18 MR. EISMAN: Well, Your Honor, respectfully, the
19 SSPA court wasn't in a better position. It didn't have
20 information about Cordero's cognitive impairment.
21 Transamerica did.

22 JUDGE TROUTMAN: Who's fault is that?

23 MR. EISMAN: I mean, that is partly - - - it was
24 in the SSPA record. Cordero in three of these - - - in one
25 of them, submitted an affidavit that he couldn't even find



1 the settlement agreement. There was - - -

2 JUDGE TROUTMAN: Someone could - - -

3 MR. EISMAN: - - - missing documents and some
4 others - - -

5 JUDGE TROUTMAN: When the settlement was
6 established, it was understood that they were going to
7 insure that there was a stream of income that would come
8 available to him at the age of eighteen, and they would
9 prevent - - - that they, the holder at the time, of the
10 income stream would prevent him from doing anything to - -
11 - to not have that in existence.

12 MR. EISMAN: No, I think - - - I think that goes
13 farther than the duty we're saying exists. We're saying
14 there was a duty at a minimum to review statutorily
15 required communications because unassignability was at the
16 core to bargain here, where they were being asked - - -

17 JUDGE TROUTMAN: But was it to his benefit, or
18 was it to the company's benefit that that assignment clause
19 was there?

20 MR. EISMAN: It was for - - - for both of their
21 benefits. There were two different assignment clauses
22 here.

23 JUDGE TROUTMAN: Can you waive your right to
24 enforcement - - -

25 MR. EISMAN: So - - -



1 JUDGE TROUTMAN: - - - even if it applies to
2 both?

3 MR. EISMAN: So if it benefits both of them and,
4 you know, even if they could theoretically jointly waive,
5 at a minimum they would need to consider what they were
6 being asked to do here. They admit it's undisputed that
7 they didn't read anything. I think Dalton teaches us that
8 under the implied covenant, you're to at least exercise
9 discretion in the first instance in a - - - in a situation
10 like this. They just blindly consented in exchange for 750
11 dollars.

12 Even once you exercise discretion in the first
13 instance, you have to do so in good faith. And here, they
14 could have done what all their peer companies do:
15 Berkshire Hathaway, MetLife, Independent Life. As we
16 allege in paragraphs 27 and 28 of the complaint and page 9
17 of the appendix, they all go through a simple checklist.
18 This is not a heavy burden. It's pretty minimal.

19 JUDGE SINGAS: So why not ask the Florida courts
20 to set aside the transcript?

21 MR. EISMAN: We chose to sue Transamerica for
22 something that occurred before the Florida court proceeding
23 hearing. It was an initial breach. I mean, I take it that
24 would be an option, but we think there was a separate
25 breach of contract that we can vindicate in a breach of



1 contract proceeding.

2 JUDGE SINGAS: If we agree with you, aren't we
3 just undermining the Florida courts who founded that this
4 was in the best interest?

5 MR. EISMAN: No, Your Honor, and Transamerica
6 actually raised this argument already in federal court in
7 the Rooker-Feldman challenge, and the district court
8 rejected that and said that what Cordero is challenging is
9 something different. It's at a point in time before the
10 SSPA proceeding. It's not necessarily a finding that the
11 transfer was or wasn't in his best interest. It's a
12 finding that Transamerica didn't uphold its end of the
13 bargain to exercise its discretion before consenting to
14 deviate from the court's - - -

15 JUDGE TROUTMAN: So you're saying that
16 Transamerica was essentially required to prevent Cordero
17 from breaching the contract?

18 MR. EISMAN: No, Your Honor, not that they were
19 required to prevent him from doing so. That before they
20 consented to deviate from the contract, they were required
21 to understand what they were doing and why they were - - -
22 they were deviating from the court - - -

23 JUDGE GARCIA: Cordero - - -

24 JUDGE WILSON: Is there - - - I'm sorry.

25 JUDGE GARCIA: - - - goes into court with a



1 guardian and says I need this. This is in my best
2 interest. This is what the statute is designed to do, is
3 to allow him to go to a court to have this, and you think
4 that company has to make a decision to prevent him,
5 potentially, from trying to do that?

6 MR. EISMAN: Well, Your Honor, he didn't go into
7 court with a guardian here. He wasn't even physically
8 present at any of these hearings. The factoring company
9 went in with a signed stipulation from three lawyers from
10 Transamerica who had owed a duty of candor to the court,
11 and said it was okay for this transaction to go forward,
12 knowing full well, based on what they did in the Green case
13 in the same courthouse that, you know, they - - - they
14 basically - - -

15 JUDGE TROUTMAN: But there was a court that made
16 a decision - - - I know for a fact in New York we, as
17 judges, have the owner come before the court. Inquiries
18 are made. In this particular instance, the Florida court
19 made a determination that it was in his best interest
20 without him being present. That is the fault of the
21 structured settlement company? I don't understand.

22 MR. EISMAN: The structured settlement company
23 was - - - was - - - or the insurance company was in a
24 unique position here. They had access to their own files.
25 They had access to these papers. They should have at least



1 read them and responded appropriately.

2 The statutory scheme specifically contemplates
3 that the - - -

4 JUDGE TROUTMAN: When you say it is unique, what
5 do you mean by that?

6 MR. EISMAN: They had information about Cordero's
7 underlying injury that wasn't in the record.

8 JUDGE TROUTMAN: So you're saying when they
9 entered into the structured settlement agreement, the
10 original holder to hold it, they were agreeing to be
11 responsible for him based upon their understanding of his
12 medical records?

13 MR. EISMAN: No, Your Honor, but it would have
14 been very easy for them to see this. It's - - - you know,
15 the - - -

16 JUDGE TROUTMAN: So where are you getting the
17 duty from?

18 MR. EISMAN: The duty comes from the idea that
19 the parties place unassignability, inalienability, and
20 long-term income stream at the center of the bargain here.
21 And so you couple that with the idea that Transamerica is
22 being asked to exercise some discretion to deviate from
23 these core terms, and they have to, at least understand and
24 consider what they're being asked to consent to before
25 consenting.



1 JUDGE RIVERA: So should Lujerio or his
2 representative if he has one, have gone to Transamerica, to
3 the defendants, said look, this is what I want to do?

4 MR. EISMAN: Well, Cordero - - -

5 JUDGE RIVERA: Explain why so that they can make
6 a decision?

7 MR. EISMAN: In some case that might be possible.
8 That wasn't possible here. Cordero didn't even understand
9 what he was signing. He didn't know to go to Transamerica.
10 He couldn't find the settlement agreement as he said in an
11 affidavit in one of these. Transamerica is an interested
12 party under the SSPA. They received this information - - -

13 JUDGE RIVERA: So should the question in part be
14 reformulated to address perhaps particular needs when it
15 involves someone like Mr. Cordero who has specific
16 cognitive limitations?

17 MR. EISMAN: Well, Your Honor, I think it informs
18 how the duty plays out in practice, right. When
19 Transamerica looks at its own files, does it withhold
20 consent. But it doesn't change the initial scope of the
21 duty of what they have to do, which is- read what is being
22 sent to them as required by statute as part of the court
23 proceeding where - - -

24 JUDGE TROUTMAN: Could they not rely on the fact
25 that there was a court that ultimately would review his



1 best interest?

2 MR. EISMAN: No, I don't think so, Your Honor.
3 Especially here. I mean, Transamerica knew that courts in
4 these situations sometimes don't have all the facts, right.
5 In the same courthouse in Green within days of this they
6 were objecting to a different transfer, because the court
7 there didn't know that there was a no-power clause in the
8 structured settlement agreement. And the SSPA is a
9 statutory mechanism that it's in place, but it - - - it is
10 considering different things. It's not necessarily
11 considering the checklist of factors that, you know, other
12 companies go through in considering whether - - -

13 JUDGE RIVERA: Did they have to take a position,
14 or did they merely have to present the court with certain
15 information?

16 MR. EISMAN: They could have - - -

17 JUDGE RIVERA: There's no position, but the court
18 may want to know this.

19 MR. EISMAN: I think that would have been an
20 acceptable response. And by - - - just depending on how
21 they reacted, it might be a fact question. But it seems
22 certain that - - - and we say this in our brief - - - that
23 a discharge of its obligation of good faith could be simply
24 to alert the court to certain key facts.

25 JUDGE WILSON: I have two questions for you.



1 They're unrelated, so let me them one at a time.

2 MR. EISMAN: Sure, Your Honor.

3 JUDGE WILSON: The first is in view of the
4 legislation that SSPA which is around the country roughly
5 the same form, right, is it possible to write a structured
6 settlement agreement so that a court could not agree to an
7 acceleration or a sale?

8 MR. EISMAN: Yes, I think theoretically - - -

9 JUDGE WILSON: Or does the legislation override
10 whatever words you could put into an agreement?

11 MR. EISMAN: No, the legislation doesn't override
12 that. I mean, I think there might be constitutional
13 avoidance issues under the contract clause if it did
14 override preexisting contractual arrangements. But even
15 putting that to the side, Your Honor, it exists - - -

16 JUDGE WILSON: Is there some way you could write
17 an agreement to prevent an SSPA court from approving a fact
18 for an arrangement?

19 MR. EISMAN: I think you could, but the agreement
20 here was written before there even was an SSPA, which is
21 why it's an unwritten duty that we're seeking to enforce
22 here.

23 JUDGE WILSON: Okay. And on the second question
24 is you said earlier, I think, that the provision question
25 was for both the - - - the benefit of both the circuit



1 settlement company, insurer essentially, and the - - - in
2 this case, Mr. Cordero. But as I read the provision, it
3 really has two very distinct pieces. One of which, I think
4 benefits one, and one benefits the other.

5 That is the IRS rule requires that the payments
6 not be accelerated, deferred, increased, or decreased; just
7 those words. And those words are part of what's in the
8 agreement, right, but it doesn't require the inability to
9 sell or assign. That's not part of the IRS requirement.
10 Those seem to me, if there is a benefit to the insurer, I'm
11 not sure what it is. Those seem to be added just for the
12 benefit of the beneficiary. Is that a fair
13 characterization?

14 MR. EISMAN: I think that's fair. I will note,
15 Your Honor, in all candor, my friend cites the treasury
16 regulation that says there need to be certain restrictions
17 on transfers. So that might also be part of the tax
18 benefit. But regardless, I mean, even if we were thinking
19 about whether the restriction on assignment provides a tax
20 benefit to the insurer, as we know, that also benefits
21 Cordero, because it solves the problem of credit worthiness
22 and encourages a credit worthy counterparty to step in and
23 decide to make these payments over thirty years.

24 That - - - that's noted in several sources,
25 including the Hinderton and Winslow article, and the



1 Western United v. Hayden case out of the Third Circuit. So
2 that's another benefit in addition to the benefit of the
3 no-power clause, which as the court's in Foreman and
4 Callahan noted protects payees like Cordero by preventing
5 them from binging away their long-term income stream that
6 is at the heart of the contract here.

7 JUDGE SINGAS: Can I ask you the, reverse? Let's
8 suppose Transamerica stepped in and said you know what,
9 we're not doing this. It's not in his best interest.
10 We're reviewing the records and we're deciding we're not
11 going to go forward. Can Mr. Cordero say, what are you
12 talking about? We're now going to sue you because it is in
13 my best interest, and the judge has already decided that.

14 MR. EISMAN: Well, Your Honor, I don't think
15 there would be a good faith claim here. Part of what's
16 happening here is Transamerica is accepting a fee from the
17 factoring companies, and essentially staying silent and
18 just finally consenting. I mean, that smacks of bad faith.

19 What - - -

20 JUDGE TROUTMAN: You do know in some instances
21 the reason that the sales are permitted is because there
22 are sometimes circumstances wherein the beneficiary needs
23 the money, faces homelessness, and other circumstances. So
24 what you're suggesting is it can't be touched no matter
25 what.



1 MR. EISMAN: That's our read of the no-power
2 clause. You know, it's - - - even if they are right, the
3 no-power clause allows joint waiver here still, there would
4 need to be a joint waiver in good faith. So maybe in a
5 circumstance like that, there could be joint waiver in good
6 faith approved by the SSPA court, but there's nothing like
7 that here. This is a case where Transamerica says it acts
8 in good faith by doing absolutely nothing.

9 JUDGE TROUTMAN: So it's all on Transamerica?

10 MR. EISMAN: No, it's not all on Transamerica,
11 Your Honor. There's, of course, still the SSPA process.
12 We're saying that this is a complementary duty to the SSPA.

13 JUDGE GARCIA: As a policy, what would happen if
14 we impose this duty? So now, in the future they get these,
15 so are they going to say come in and - - - as Judge
16 Troutman's suggesting, just say no. No, we don't think
17 this is a good idea. In which case, if the court agrees,
18 you'll sue them and say that was bad faith to stop me from
19 doing that. Or they'll say yes, you should go ahead and do
20 this. Then you sue them and said you said that this was
21 okay, and I - - - you know, now that was - - - that was bad
22 faith and I don't have any money now. So what's the win -
23 - - what's the policy outcome?

24 MR. EISMAN: Well, I don't think that someone
25 like Cordero would come in and sue them if they withheld



1 consent and the court ultimately approved it and the
2 transfer went through anyway. I don't see what the damages
3 are there, Your Honor.

4 JUDGE GARCIA: You know, you made a bad faith
5 representation to the court, you know. You're doing that
6 to protect yourself.

7 MR. EISMAN: But I don't see the harm there. I
8 also - - - we don't see cases like that with Berkshire
9 Hathaway, MetLife, and Independent Life who have this
10 policy in place.

11 Independent Life has a guide on its website about
12 how it goes through this checklist in all cases. I don't
13 think that the policy implications that you're envisioning,
14 Judge Garcia, would come to pass given that they haven't so
15 far and this goes on in the industry.

16 JUDGE WILSON: What is in the SSPA proceeding?
17 They simply tendered their file to the court, a copy of it
18 and said this is everything we know; is that enough?

19 MR. EISMAN: That might be enough, Your Honor.
20 Again, there might be factual questions. It depends on
21 what's in the file. But - - - but yes, that - - - that is
22 - - -

23 JUDGE WILSON: Well, I guess what I'm getting at
24 is, are you trying to impose on the insurer a duty to find
25 out some new facts?



1 MR. EISMAN: No. Absolutely not. They don't
2 need to find out any new facts. This is a minimal burden
3 based on papers that they already have. So what they
4 receive as part of the SSPA process and what's in their own
5 files. They don't need to go out and do any sort of
6 independent investigation.

7 JUDGE RIVERA: So you see it as a duty of
8 disclosure of that information that may be of assistance to
9 the court in making a best interest determination, not a
10 duty to advocate a particular position. Am I understanding
11 you correctly now?

12 MR. EISMAN: Well, we see disclosure as one
13 possibility. We characterize it as responding
14 appropriately. So it might be informing the court of facts
15 that the court doesn't have. It might be withholding
16 consent, just based on, you know, its own view of the
17 facts. It might be advocating a position as to the - - -

18 JUDGE RIVERA: When is it one of those might
19 be's?

20 MR. EISMAN: It depends what the appropriate
21 response would be and the circumstances. I think actually
22 any of those would be appropriate here.

23 JUDGE WILSON: That turns on what kind of duty
24 you're trying to impose on them, right. I mean, which is
25 unclear.



1 MR. EISMAN: Well, the duty - - -

2 JUDGE WILSON: Is it simple enough to say they
3 have to turn over what they have. They don't have to do
4 anything else. They don't have to take a position. But
5 they at least hand the court the information they have.
6 That I understand.

7 MR. EISMAN: Yeah. So again, Your Honor, we
8 think that that would satisfy the duty here. But what
9 doesn't satisfy the duty is blindly consenting, not even
10 looking at their own files, understanding what they have.
11 I think turning this information over to the court would
12 satisfy.

13 JUDGE RIVERA: You're saying in your view, the
14 duty of disclosure is the floor, but in a particular case
15 it might require more? And in this case, did it require
16 more?

17 MR. EISMAN: I think in this case it's - - - it
18 probably didn't require more had they turned over
19 information that said look, this is somebody who's severely
20 cognitively impaired. He entered into the original
21 structured settlement, you're a guardian, you know, here's
22 our information on this. That probably wouldn't discharge
23 the duty. Obviously, we're at the motion to dismiss phase,
24 so I'm saying this necessarily as a matter of fact that
25 that wouldn't discharge their good faith obligation is a



1 little premature, but I think that likely would have, Your
2 Honor.

3 JUDGE RIVERA: Thank you, counsel.

4 You have your rebuttal.

5 MR. EISMAN: Yes.

6 JUDGE RIVERA: Thank you, sir.

7 MR. NEIMAN: Thank you. May it please the court,
8 John Neiman here for respondents.

9 In light of the arguments my friend made during
10 his opening, it may be helpful to circle back to the issue
11 of who my clients are and what role they played.

12 Here, my clients are financial services companies
13 whose role here was to simply do two things that from a
14 distance may seem relatively mundane: issue an annuity,
15 and then administer the payments paid under it. Their role
16 here was simply not to be a guardian ad litem for Mr.
17 Cordero. These contracts con - - -

18 JUDGE TROUTMAN: What about the claim that other
19 companies do what they're asking?

20 MR. NEIMAN: As Mr. Eisman suggested, this case
21 is at the motion to dismiss phase. We had allegations in
22 the complaint concerning those things. They're the sorts
23 of things that we would dispute as a - - - as a factual
24 matter. At least we don't - - - we certainly don't concede
25 as a factual matter are going on currently. But regardless



1 of what other companies are doing, the fundamental question
2 for the court is what does the law actually require my
3 clients to do? The - - - and there are really three
4 sources of law on that front.

5 One's the contract. The second is the implied
6 covenant. And third, importantly, are the Structure
7 Settlement Payment Acts that have been enacted by fifty
8 states in this country.

9 Now, those particular statutes - - -

10 JUDGE GARCIA: So counsel, what was your - - -
11 what was your company's role in this court proceeding in
12 Florida? What did you do?

13 MR. NEIMAN: So as was suggested at the outset,
14 my cl - - - my company's role in this entire matter was
15 simply to administer the annuity at issue.

16 JUDGE GARCIA: But what did you say to the court?

17 MR. NEIMAN: So in each of those proceedings, my
18 clients signed a stipulation saying that they did not
19 object to Mr. Cordero's petition. They didn't encourage
20 the petition. They didn't solicit the petition. And in
21 terms of their role, the role that the SSPA - - -

22 JUDGE WILSON: Well, has your client - - - has
23 your client ever objected in a proceeding like that?

24 MR. NEIMAN: My clients - - - there's evidence in
25 the record that my clients have objected in certain



1 proceedings. But when they do, for example in the Green
2 case, the objections tend to turn on the things that - - -
3 that relate to my client's role in this process. In other
4 words, the financial details concern the annuity and
5 whether the transfer is, for lack of a better term, going
6 to mess up the financial administration of the annuity,
7 their role is not to play guardian ad litem.

8 JUDGE WILSON: That's not clear enough for me to
9 understand what that is. Messing up the financial.

10 MR. NEIMAN: So - - - when it - - - when a
11 petition comes in the door, what my client needs to know in
12 order to make sure that the financial administration is
13 going to not be interfered with by the transfer of things,
14 like is the - - - is the person who is making this request
15 actually the payee under the original qualified assignment,
16 or - - - and under the original settlement agreement is the
17 money there. In other words, is the payee asking for a
18 transfer of money that has already been transferred to some
19 other company, or has simply already - - - it simply isn't
20 there under the annuity. Are there competing claims by
21 different companies for a transfer. Those are the sort of
22 things - - -

23 JUDGE RIVERA: So it doesn't - - - so it doesn't
24 include a time whether or not they have the capacity to
25 reach an informed decision?



1 MR. NEIMAN: It does not, because that's not my
2 client's role here. Now, there are parties who in the
3 statute envisions having that role. One is the factoring
4 company itself, because unlike my clients, the factoring
5 company actually will have direct interaction with the - -
6 -

7 JUDGE RIVERA: But they have no incentive to do
8 so, because they want the money.

9 MR. NEIMAN: Well, they - - -

10 JUDGE RIVERA: And Mr. Cordero or someone like
11 Mr. Cordero doesn't have the capacity to fully appreciate
12 the consequences of this choice. Aren't your clients the
13 only ones who have the information that a court would need
14 to make a proper best interest determination?

15 MR. NEIMAN: No. I mean, I don't think that's
16 the case. I think the factoring companies are going to
17 have to direct interactions with the payees that my clients
18 won't have. Because again, my clients are playing this
19 role of financial administrator not - - - they don't have
20 access to information about Cordero's employment history,
21 his health history, his education.

22 JUDGE RIVERA: You don't have on record these
23 cognitive limitations?

24 MR. NEIMAN: Well, I cannot represent what my - -
25 - what information my clients have either on this record or



1 in the general mine run of cases. But I do think that the
2 role that these sorts of entities play is much more along
3 the lines of financial administrator, not fiduciary, not
4 guardian - - - not guardian ad litem, not trustee for the
5 payee in these circumstances.

6 JUDGE RIVERA: So then why are you invited - - -
7 why are your clients invited to address the court? It
8 sounds like for your purpose there's no reason to address
9 the court.

10 MR. NEIMAN: Well, the reason why my clients are
11 invited to address the court is that they have this
12 enforceable right against nonassign - - - against
13 assignment of the policies, precisely because assignment of
14 the policies could, in theory, require - - - entail these
15 sorts of financial problems that would - - - again, for
16 lack of a better term - - - mess up the administration of
17 the annuity, could have tax consequences or could otherwise
18 lead to a situation where the annuity isn't being processed
19 properly.

20 My clients have the right - - -

21 JUDGE SINGAS: You're not there to - - - you're
22 not there to advocate for the best interest of someone like
23 Mr. Cordero. You're looking out for the best interest of
24 your company?

25 MR. NEIMAN: Well, at least for the best interest



1 of the - - - of the continued administration of the
2 annuity; that's exactly right. And the reason - - - and
3 the SSPA is - - -

4 JUDGE RIVERA: There may not be a continued
5 administration, right. That's the point. He's selling it
6 out for way below what it's worth.

7 MR. NEIMAN: But - - - but the - - - in
8 circumstances where the annuity is sold.

9 JUDGE RIVERA: And your client could get some
10 payment nevertheless.

11 MR. NEIMAN: Payments will continue under the
12 annuity. They're just going to someone else. But I think
13 that we can tell from the structure of the SSPAs that
14 that's exactly the role that the legislatures envisioned my
15 clients having in this process. How do we know that?

16 JUDGE RIVERA: The person is not injured, not
17 getting the full benefit of the bargain.

18 MR. NEIMAN: I - - -

19 JUDGE RIVERA: Or the entities - - - these
20 entities are not injured. They're just companies, right,
21 the factoring entities. Whereas, Mr. Cordero, at least, is
22 the injured party. The settlement exists for his benefit.

23 MR. NEIMAN: The - - -

24 JUDGE RIVERA: Everybody else seems to be making
25 some nice money there.



1 MR. NEIMAN: The settlement no doubt exists for
2 Mr. Cordero's benefit, but the question here is whether my
3 clients have a - - - have an obligation under either the
4 common law or the SSPAs to make disclosures or to take - -
5 - take measures that would result in the enforcement of the
6 nonassignment provisions against Cordero.

7 The common law doesn't provide that.

8 JUDGE RIVERA: So when you're invited - - - let
9 me go back to this issue about what - - - what - - -
10 invited to respond to the court, you're saying that - - -
11 well, that would be to say well, look, this is how it will
12 muck up the whole annuity process. That's all the
13 responsibility that your client had.

14 MR. NEIMAN: We really don't even that
15 responsibility. The responsibility is simply to say yes or
16 no, we are - - - we object to this assignment, or we don't
17 object to this assignment. If my clients had a deeper
18 responsibility to look into Mr. Cordero's health condition
19 or his economic condition, one would think the SSPAs would
20 read differently, right. One would think that the SSPAs
21 would say that it's on - - - it's on my clients.

22 JUDGE RIVERA: Let's say this is not about
23 selling his rights to it. It - - - do you have at all any
24 duty or responsibility otherwise to be up to speed on his
25 health conditions, for purposes of the administration of



1 the annuity? Did the defendants ever do that kind of
2 investigation or scrutiny?

3 MR. NEIMAN: I can't make representations on the
4 record about whether defendants ever engage in that sort of
5 scrutiny. There are sort - - - certain kinds of annuities
6 that are based on the life of the annuitant, and it's often
7 very important for the annuity company to be aware of
8 whether the annuitant is still alive in order to administer
9 the annuity correctly. But in order to administer the
10 annuity, one need not know things about the health - - -
11 the general health of the annuitant or their situation - -
12 - their financial situation or the like. One just needs to
13 continue paying the annuity to the person who - - - to who
14 - - - to whom the rights have been assigned, whether it's
15 the original - - -

16 JUDGE WILSON: It was a little - - - I'm not
17 asking about knowledge about the - - - Mr. Cordero, or
18 anybody like him, for a moment. Assume you don't know
19 anything about that. It still strikes me it's a little
20 unusual to be a party to an agreement that says it can't be
21 assigned and then to be asked by a court about assigning
22 it, right? I mean, in a different context at least, if I
23 were a party in agreement like that, I would say wait a
24 minute; the contract says it can't be assigned. So do you
25 read - - - do you understand the SSPAs to overrule that



1 language in the contract?

2 MR. NEIMAN: Not necessarily, Your Honor. The
3 reason why that language in the contract can be overwritten
4 is that that - - - the enforcement of those provisions lies
5 in the obligor. In other words, here, Transamerica annuity
6 such that it - - - if a petition wants to go and transfer
7 payments under the settlement agreement, if my client
8 doesn't raise an objection, if my client doesn't seek to
9 enforce the nonassignment provision sort of on the theory
10 that it will be okay for the financial administration of
11 the annuity if - - - if the the payment does - - -
12 transfers go through - - -

13 JUDGE WILSON: So it's a mutual - - -

14 MR. NEIMAN: - - - there's no problem.

15 JUDGE WILSON: - - - a mutual wavier of a
16 contractual provision is what you're saying.

17 MR. NEIMAN: That's correct.

18 JUDGE GARCIA: In the past you could do that, but
19 now you can't, because of the law. Now, the court has to
20 approve that.

21 MR. NEIMAN: That's correct, Your Honor, but it's
22 - - - and it's telling, I think, in terms of what my
23 client's responsibilities are there that the law for
24 example in New York expressly says that once the transfer
25 happens, my clients are released and discharged from any



1 liability - - - any and all liability to someone like Mr.
2 Cordero for the transferred payments. If it were on my
3 clients to look into Mr. Cordero's economic, educational,
4 and occupational conditions, then one would expect - - -
5 number one, the statute to say so and the statutes to say
6 that my clients have agreed to come forward.

7 JUDGE RIVERA: Yeah, but the judicial
8 determination about the best interest turns on the court
9 having all the information it needs to be able to - - - to
10 make that decision. So to the extent that you have some of
11 that information in the records, why isn't there at a
12 minimum a duty to disclose?

13 MR. NEIMAN: The reason - - - there are really
14 two reasons. One is the common law doesn't create that
15 duty. But the second, and I think the clearer answer is in
16 the SSPAs itself - - - or the SSPAs themselves. If the
17 SSPAs make - - - impose that requirement on my clients,
18 they would say so. The SSPAs impose all sorts of
19 requirements on the other parties to the structured
20 settlement transfer transaction. They don't impose that
21 requirement on my clients. And then they say - - - the New
22 York statute says expressly that once the transfer happens,
23 once the judge makes their determination of best interest,
24 my clients are not - - - are released and discharged from
25 any and all liability - - -



1 JUDGE TROUTMAN: So are you saying - - -

2 MR. NEIMAN: - - - for the transfer of payments.

3 JUDGE TROUTMAN: - - - at the time that the
4 structured settlement was entered into, Cordero was five
5 years old. Other than that information, and the term and
6 conditions of the - - - how it's to be paid out in the
7 future, there's no requirement that your client get any
8 updates as to the status of the - - - the beneficiary?

9 MR. NEIMAN: That's correct. Except to say that,
10 you know, if Mr. Cordero had moved, my client would need to
11 know where the - - - where the checks were to go on a
12 continuous basis. But otherwise no. That was not the role
13 my clients were playing in - - - in either - - - in the
14 original settlement transaction, and certainly in the
15 process that led to the Florida court's approval of the
16 structured settlement transfers in this case.

17 JUDGE RIVERA: Excuse my ignorance with this
18 question. Once Mr. Cordero sells the rights to the
19 factoring entity, can that factoring entity negotiate with
20 you to avoid the installments and just get a lump sum if
21 you waived - - - if your clients, excuse me, waived the
22 anti - - - well, not the anti-assignment, not that
23 provision, but agreed to a lump sum as opposed to an
24 installment, or it will always be satisfied, this
25 assignment, this sale through the installments? They can



1 never accelerate.

2 MR. NEIMAN: I believe, Your Honor, the - - - and
3 this is me speaking completely off the cuff - - - but I
4 believe the problem, in that circumstance with accelerating
5 - - -

6 JUDGE RIVERA: Yeah.

7 MR. NEIMAN: - - - payments would be, as I
8 mentioned earlier, it would mess up the administration of
9 the annuity all of a sudden the tax benefits, I imagine - -
10 -

11 JUDGE RIVERA: Yes. I see the tax issue for
12 sure.

13 MR. NEIMAN: The annuity would go away.

14 JUDGE RIVERA: All right.

15 MR. NEIMAN: So perhaps there would be a right to
16 accelerate the payments. But - - - if so, it would involve
17 - - -

18 JUDGE RIVERA: Well, how - - -

19 MR. NEIMAN: - - - small numbers of collateral
20 consequences that - - -

21 JUDGE RIVERA: How many payments are left, and
22 whether or not any - - - and its more beneficial to end the
23 installment process as opposed to have a lump sum, correct?
24 Isn't that part of what - - - isn't that part of your
25 answer that maybe you only have the con - - - collateral



1 consequences, but of course, your client might actually go
2 through that analysis and conclude that it makes sense now
3 not to continue with the installment.

4 MR. NEIMAN: I suppose. I don't know of any - -
5 - any examples of that sort of thing happening, Your Honor.

6 JUDGE RIVERA: Fair enough. Thank you, counsel.

7 MR. NEIMAN: Thank you.

8 MR. EISMAN: Thank you, Your Honors.

9 I'd like to start with a point about the other
10 companies and what they do.

11 We're on a motion to dismiss. We're all bound by
12 our allegations. The other companies do that. And that
13 fact is important because it is powerful evidence that
14 insurers and annuity issuers understand that they were
15 operating in a market that is riddled with factoring abuse.
16 And so - - -

17 JUDGE GARCIA: Those other companies. Do they
18 take a position, or do they do what I understand now you're
19 saying should be done, which is disclose to the court
20 information they have about the cognitive abilities of the
21 petitioner?

22 MR. EISMAN: My understanding is sometimes they -
23 - - they take a position. I know Independent Life for one
24 will object if it sees certain things like someone with a
25 cognitive impairment who is waiving the right to



1 independent professional advice. I'm not - - -

2 JUDGE GARCIA: In that case, do they have to
3 weigh - - - waive the needs of the petitioner? So let's
4 say that this case, but the person needed a life saving
5 surgery they couldn't afford. Should the company come in
6 and object, or do they need to weigh the need?

7 MR. EISMAN: I don't think that they weigh the
8 need just based on - - - on what I've read about it. But
9 look, I think if they actually weighed the need and - - -
10 and undertook some good faith analysis here - - -

11 JUDGE GARCIA: That may be required then to weigh
12 the need in your view of the duty?

13 MR. EISMAN: Well, I don't think they would be
14 required to weigh the need. I think they are required to
15 go through, like, a very minimal checklist to look for
16 obvious signs of sort of factoring abuse here. You know,
17 all of which were obvious on - - - on the face - - -

18 JUDGE TROUTMAN: So was this company supposed to
19 get health updates? The agreement was originally entered
20 into when the beneficiary was five. So is - - - does the
21 contractual agreement provide that they're going to get
22 these updates?

23 MR. EISMAN: It does not, Your Honor. The point
24 is that the underlying injury involved cognitive
25 impairment. It was lead poisoning. That was information



1 that we alleged that they would have had in their files,
2 and wouldn't think - - - they would have been easily able
3 to detect. Just take into - - -

4 JUDGE TROUTMAN: But they're different - - -
5 they're varying degrees of how it affects individuals. It
6 doesn't affect all the same.

7 MR. EISMAN: Sure. But so even if they brought
8 that information to the court's attention and said look,
9 this is a cognitively impaired individual, the court is
10 then going to play its role and hold a hearing, as you
11 said, Your Honor. And so - - - so can inquire into this.
12 That's what the - - - the court didn't have this
13 information at all.

14 And just to take your position to its logical
15 extreme, I mean, they're saying they have a right to waive
16 without even looking at their own - - -

17 JUDGE TROUTMAN: So the court didn't even have
18 the original agreement that said this was a structured
19 settlement that was established based on lead poisoning?

20 MR. EISMAN: So the - - -

21 JUDGE TROUTMAN: This would make it clear
22 arguably that impairment might be an issue for the court.

23 MR. EISMAN: Well, so the agree - - - the
24 agreement itself doesn't make any underlying injury, and
25 the court in three of the SSPA proceedings didn't have the



1 agreement at all, and had no information about Cordero's
2 underlying injury. And, you know, if it was even worse, so
3 let's say it was dementia, it was - - - and, you know, the
4 person had no capacity to consent, Transamerica's position
5 would still be that it could blindly sign on the dotted
6 line.

7 JUDGE TROUTMAN: So all of these state
8 regulations don't matter. It's the holder of the
9 settlement agreement who is responsible?

10 MR. EISMAN: The state regulations matter in
11 setting forth a regime for a court to judge best interest.
12 We say that there's a complementary contractual regime here
13 that requires a different but complementary duty on the
14 insurance company to read statutorily required
15 communications, and respond in good faith.

16 JUDGE TROUTMAN: And one can't substitute for the
17 other?

18 MR. EISMAN: One doesn't substitute for the
19 other. I think they - - - they work in tandem. And, you
20 know, we're not asking Transamerica to step in and exercise
21 its discretion in place of the court. We are asking it to
22 exercise some discretion in the first instance. It
23 admittedly exercised none here.

24 JUDGE SINGAS: Well, what if there's a difference
25 in opinion. Then who wins? I mean, aren't we enabling



1 courts to do this, and shouldn't be - - - the courts be the
2 ones who are making these decisions? I mean, you're
3 absolving the court of it, saying they didn't have this
4 information, and then imposing upon Transamerica this duty
5 to get the information, which seems unfair, frankly.

6 MR. EISMAN: Well, Transamerica has the
7 information and could give it to the court. I don't think
8 it's a question of who wins. If Transamerica withhold - -
9 - withholds its consent, it's, you know, up to the court to
10 decide what to do in that situation. If Transamerica gives
11 additional information to the court, it's ultimately may
12 factor into the court's best interest determination. It's
13 not saying that Transamerica is the - - - is the ultimate
14 gatekeeper here. That is the court. Transamerica has a
15 duty before court approval to read what it is required to
16 receive under the statute, to read its own files, and then
17 decide how to respond in good faith.

18 JUDGE WILSON: Well, wait. To read its files or
19 just to turn to files over?

20 MR. EISMAN: Well, I mean, it could do either, we
21 think, Your Honor, but I think reading its files would have
22 accomplished the same end here. Other - - - other
23 companies do that.

24 JUDGE RIVERA: Let's say the decision from this
25 Court is not favorable to your client. Let's just say



1 that. And you lose in the Eleventh Circuit. Case ends.
2 Is there any obstacles for you to go - - - I know you made
3 this choice - - - is there any obstacle for you to go to
4 Florida courts?

5 MR. EISMAN: We may be out of time there, Your
6 Honor.

7 JUDGE RIVERA: Okay.

8 MR. EISMAN: So I think there might be an
9 obstacle there.

10 JUDGE RIVERA: Okay.

11 MR. EISMAN: But regard - - - I mean, the reason
12 we chose Transamerica as a defendant is we think
13 Transamerica did something wrong. It wasn't - - - it
14 wasn't - - -

15 JUDGE GARCIA: But you also thought the factoring
16 company did something wrong here.

17 MR. EISMAN: The factoring company did something
18 wrong, and it's not as though the factoring company is
19 getting away scot-free. They're subject to Transamerica's
20 third-party complaint - - -

21 JUDGE GARCIA: Why didn't you sue?

22 MR. EISMAN: - - - in indemnification in this
23 action.

24 Frankly, Your Honor, we wanted to vindicate our
25 rights against Transamerica. We've seen situations like



1 this happen. We thought with Transamerica - - -

2 JUDGE GARCIA: Why can't you sue both of them?

3 MR. EISMAN: I - - - Transamerica was, you know,
4 sort of a reliable established defendant. Factoring
5 companies sort of come and go in the night. And so - - -
6 but, you know, it was - - - that wasn't really the driving
7 force to sue Transamerica that might have affected the
8 decision not to sue the factoring companies also.

9 JUDGE RIVERA: Thank you, counsel.

10 MR. EISMAN: Thank you, Your Honors.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Cordero v. Transamerica Annuity Service, No. CTQ 22-01 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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