NOTES

ENFORCING AND REFORMING STRUCTURED SETTLEMENT PROTECTION ACTS: HOW THE LAW SHOULD PROTECT TORT VICTIMS

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Congress passed the Periodic Payment Settlement Act of 1982 to incentivize structured settlements. The Act sought to encourage tort victims with serious injuries to agree to settlements that offered the best prospect of long-term financial security. But Congress failed to predict the development of a robust secondary market for settlement payment streams: Since the early 1990s, factoring companies have aggressively and unscrupulously purchased billions of dollars' worth of settlement payments from tort victims, often at great profit. This massive transfer of wealth from injured victims has fundamentally undermined congressional policy and left tens of thousands of victims and their dependents without the financial security structured settlements purported to offer.

To regulate the industry, Congress and forty-nine state legislatures developed a legislative scheme that requires state court approval of settlement transfers and limits approval to those found to be in the "best interest" of the tort victim. This Note argues that this legislative scheme has fundamental substantive and procedural flaws that prevent it from achieving its purpose. As a solution, this Note suggests, based on generally accepted contract law principles, that courts recognize that insurance companies charged with dispensing settlement streams have a contractual obligation to object to transfer petitions in certain circumstances. Additionally, this Note recommends that courts and legislatures take steps to increase the transparency and quality of the secondary market. Together, these reforms will help protect tort victims from sordid factoring industry business tactics while also allowing tort victims the opportunity to sell their payment streams at substantively fair prices.

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INTRODUCTION

Before Freddie Gray died in police custody, igniting national scrutiny of law enforcement violence, he was one of thousands of victims of childhood lead paint poisoning in Baltimore.[1] In 2010, five years before his death, Gray and his sisters won a settlement against their landlord worth hundreds of thousands of dollars.[2] The settlement was representative of a significant victory for lead poisoning victim plaintiffs, who had only recently overcome considerable legal hurdles in imposing liability on landlords.[3] The tort system's apparent self-correction resulted in a structured settlement that was designed to help support Gray's family for decades through a series of periodic payments.[4] Nonetheless, within three years, Gray had forfeited his rights to the settlement. In late 2013, Gray and his siblings sold, with court approval, $435,000 of settlement payments for an immediate $54,000 lump sum, which amounted to less than twenty percent of the settlement's present value.[5]

Freddie Gray's transaction is typical of the robust but—as this Note argues—poorly regulated secondary market for structured settlements. Tort victims with long-term injuries, including childhood victims of lead poisoning, often negotiate structured settlements as opposed to settling claims with single lump-sum payments.[6] The structured settlement format

1. See Terrence McCoy, Freddie Gray's Life a Study on the Effects of Lead Paint on Poor Blacks, Wash. Post (Apr. 29, 2015), https://www.washingtonpost.com/local/freddie-grays-life-a-study-in-the-sad-effects-of-lead-paint-on-poor-blacks/2015/04/29/0be898e6-eea8-11e4-8abc-d6aa3bad79dd_story.html (on file with the *Columbia Law Review*) [hereinafter McCoy, Freddie Gray's Life] (describing Freddie Gray and his family's exposure to lead poisoning and noting that "more than 93,000 children with lead poisoning have been added to [Maryland's] Department of the Environment lead registries over the past two decades").

2. Id.; see also Terrence McCoy, How Companies Make Millions Off Lead-Poisoned, Poor Blacks, Wash. Post (Aug. 25, 2015), https://www.washingtonpost.com/local/social-issues/how-companies-make-millions-off-lead-poisoned-poor-blacks/2015/08/25/7460c1de-0d8c-11e5-9726-49d6fa26a8c6_story.html?utm_term=.5c132ee0c9f0 (on file with the *Columbia Law Review*) [hereinafter McCoy, How Companies Make Millions].

3. See Jay Romano, Lead Paint: A Ruling for Tenants, N.Y. Times (Dec. 9, 2001), https://www.nytimes.com/2001/12/09/realestate/your-home-lead-paint-a-ruling-for-tenants.html (on file with the *Columbia Law Review*) (describing previously fatal hurdles, such as causation, that childhood lead poisoning victims had recently overcome in litigation against landlords).

4. See, e.g., Daniel W. Hindert, Joseph J. Dehner & Patrick J. Hindert, Structured Settlements and Periodic Payment Judgments § 1.01 (2020) [hereinafter Hindert et al., Structured Settlements] (defining structured settlements as "the resolution of personal injury cases that are settled by payments over time rather than a single sum" and noting that "[t]hey often involve monthly payments over a claimant's lifetime").

5. McCoy, How Companies Make Millions, supra note 2.

6. See, e.g., 66 Am. Jur. Trials 47 § 211 (2020) ("Courts generally frown on lump-sum settlements in childhood lead-based paint poisoning cases, which make the parents the sole custodians of the settlement money until the child comes of age . . . . [M]ost courts will work to ensure that the method of settlement disbursement comes in the form of a structured settlement.").

surged in popularity in the early 1980s following the introduction of a complex federal tax incentive framework.[7] The incentives reflect the congressional policy concern that tort victims with serious injuries are necessarily less likely to have the ability to support themselves and that, when a lump-sum settlement is spent too quickly, support for these victims and their medical care is left to taxpayers in the form of public benefits.[8] Despite this concern for the long-term economic security of tort victims—and arguably in direct contradiction of it—the right to a structured settlement payment stream is a transferable asset.[9] And those rights present an enormous opportunity for profit for the companies—known as "factoring" companies—that purchase them.

The factoring industry, of which the most prominent player is J.G. Wentworth,[10] quickly became notorious for aggressive business practices that took advantage of the economic precarity of seriously injured tort victims.[11] By 2003, the secondary market for structured settlements had

7. See I.R.C. §§ 104, 130 (2018); see also Hindert et al., Structured Settlements, supra note 4, § 1.02 (describing the growth in structured settlement annuity premium following the enactment of the Periodic Payment Settlement Act of 1982).

8. See, e.g., Tax Treatment of Structured Settlements: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 106th Cong. 6 (1999) [hereinafter Tax Treatment Hearing] (statement of Rep. Shaw, Jr.) ("Congress enacted structured settlement tax rules as an incentive for injured victims to receive periodic payments as settlements of personal injury claims . . . . Congress was concerned that injured victims would prematurely spend a lump-sum recovery and eventually resort to the social safety net."); Karen Syma Czapanskiy, Structured Settlement Sales and Lead-Poisoned Sellers: Just Say No, 36 Va. Env't L.J. 1, 8 n.35 (2018) ("Favorable tax treatment of structured settlements is thought to encourage provident use of tort damage awards by people who might use a lump sum award unwisely, forfeit financial security and risk becoming dependent on public benefits such as Medicaid or Supplemental Security Income."); Tax Treatment of Structured Settlement Arrangements, Joint Comm. on Tax'n (Mar. 16, 1999), http://www.jct.gov/jct_html/x-15-99.htm [https://perma.cc/F25G-ZNGM] [hereinafter Tax Treatment Document] (discussing the policy foundation of the structured settlement tax subsidy).

9. See Adam F. Scales, Against Settlement Factoring? The Market in Tort Claims Has Arrived, 2002 Wis. L. Rev. 859, 860–61 ("We might question whether our society's general commitment to alienability of property extends to those rights initially conferred by the State as a matter of corrective justice, and then subsidized by the State in the name of other goals.").

10. See Patrick J. Hindert, Structured Settlements 2015 - 1, Beyond Structured Settlements (Dec. 28, 2015), https://s2kmblog.typepad.com/rethinking_structured_set/towers-watson [https://perma.cc/U9NB-RWWD] [hereinafter Hindert, 2015 Estimates] ("Industry experts estimate J.G. Wentworth currently controls between 65–72% of the U.S. secondary structured settlement market.").

11. See Daniel W. Hindert & Craig H. Ulman, Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts, Judges' J., Spring 2005, at 19, 20 (discussing the factoring industry's history of "exploit[ing]" tort victims). For a discussion of aggressive factoring industry tactics and methods used to circumvent regulatory requirements, see infra section II.A.1.

reached, by J.G. Wentworth's own estimate, $1 billion annually.[12] In response, state legislatures intervened. Since 1997, forty-nine states have passed some version of the Model Structured Settlement Protection Act (SSPA), which, among other reforms, requires state judges to approve settlement transactions only if the court finds that the transaction is in the "best interest" of the tort victim.[13]

As illustrated by Freddie Gray's case—which, again, involved a childhood lead poisoning victim with serious neurological injuries forfeiting eighty percent of his most significant asset[14]—the requirement of court approval has largely failed to accomplish its goal of "protect[ing] the recipients of long-term structured settlements from being victimized by companies aggressively seeking the acquisition of their rights."[15] Industry experts estimate judges approve at least ninety-five percent of transfer petitions[16]—and some SSPAs do not prevent factoring companies from refiling petitions until they find a cooperative judge.[17] In Maryland, for example, one factoring company filed almost two hundred petitions for structured settlement transfers in a two-year span, of which three-fourths involved childhood lead poisoning victims and of which the average transaction offered a third of the settlement's value.[18] A single judge received 160 of those petitions—nothing in Maryland's SSPA prevented factoring companies from forum shopping—and approved about ninety percent of them.[19] By 2015, an estimated 84,000 tort victims nationwide

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12. See Laura J. Koenig, Note, Lies, Damned Lies, and Statistics? Structured Settlements, Factoring, and the Federal Government, 82 Ind. L.J. 809, 813 (2007) (citing J.G. Wentworth's Assistant General Counsel's estimate "that factoring companies purchased structured settlement payment rights from approximately 4,000 claimants in 2003, totaling $1 billion in assets"). Industry estimates are necessary because industry participants are generally not required to report sales figures. Hindert et al., Structured Settlements, supra note 4, § 16.02[1]. As a result, "the percentage of structured settlements that have been liquidated is unknown and difficult to measure." Id.

13. See Hindert et al., Structured Settlements, supra note 4, § 1.02[6][b][ii] ("Starting with Illinois in 1997, 49 states have enacted some form of structured settlement protection act."); Hindert & Ulman, supra note 11, at 20 (discussing the model SSPA and its requirements).

14. See McCoy, Freddie Gray's Life, supra note 1.

15. In re J.G. Wentworth Originations, LLC, 111 N.Y.S.3d 807, 807 (Sup. Ct. 2018) (describing the policy purpose behind New York's SSPA).

16. See Jeremy Babener, Structured Settlements and Single-Claimant Qualified Settlement Funds: Regulating in Accordance with Structured Settlement History, 13 N.Y.U. J. Legis. & Pub. Pol'y 1, 40 (2010) ("Many in the factoring industry report application approvals of 95% or higher.").

17. See id. at 40–41 ("[E]ven when one's application is denied, a structured settlement owner can typically re-apply without a waiting period, or disclosing the previous denial to the subsequent court."); see also infra note 151 and accompanying text.

18. See McCoy, How Companies Make Millions, supra note 2.

19. Id. Reporting by the *Washington Post* on these transactions led to an investigation by the Maryland Attorney General, who ultimately brought suit against the factoring company, Access Funding, LLC. See infra section II.B.2.

had surrendered about $13 billion worth of settlements in exchange for $5 billion in immediate cash.[20]

The limited scholarship on secondary structured settlement market regulation acknowledges that routine court approval of structured settlement transfers demonstrates the flaws in existing state law and that the lack of adequate protection both undermines the goals of the tort system and contravenes the stated policy goals of Congress and the forty-nine state legislatures that have passed SSPAs.[21] This scholarship, however, has almost exclusively advocated for heightening the standard of scrutiny with which judges evaluate petitions.[22] While legislative reform is necessary, this Note argues that merely changing how courts evaluate individual transactions would not address the current petition process's failure to check systemic abusive practices in the secondary market and thus would not accomplish the system's goal of limiting sales to those actually in the best interest of the seller.

There are two fundamental problems underlying the current legislative scheme. First, the lack of adversarial proceedings resulting from the agreement between the factoring company and the seller forces courts into the unfamiliar responsibility of engaging in investigative factfinding and the uncomfortable role of exercising discretion on behalf of tort victims. Judges are inevitably left uninformed about the circumstances underlying individual transactions, which systemically obscures abusive factoring industry tactics that often accompany petitions. Second, while private litigation and public enforcement against factoring companies might serve an essential role in protecting vulnerable tort victims from abusive practices, litigation efforts against factoring companies have

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20. See Hindert, 2015 Estimates, supra note 10.

21. See Czapanskiy, supra note 8, at 17 (concluding that "statutes such as Maryland's Structured Settlement Protection Act do not provide a sufficient basis for justifying the sale of a structured settlement income stream by a seller who cannot generate income substitutes because of childhood lead poisoning"); Alexander L. Ash, Comment, It's Your Money and We Want It Now: Regulation of the Structured Settlement Factoring Industry in the Era of Dodd-Frank and the Consumer Financial Protection Bureau, 86 Miss. L.J. 151, 181 (2017) ("If the purpose of a structured settlement is to provide for the long-term care of the recipient through a supplemented stream of income, then allowing the person who is providing that long-term care to factor the smaller monthly installments for a large lump-sum payment creates a conflict of interest."); Michelle M. Marcellus, Note, Resolving the Modern Day Esau Problem Amongst Structured Settlement Recipients, 40 Hofstra L. Rev. 517, 542 (2011) (arguing that, despite protections in New York's SSPA, courts approve factoring transactions at an "alarmingly high rate").

22. See Czapanskiy, supra note 8, at 38–39 (considering, in the context of lead poisoned sellers, increasing the standard of scrutiny, but ultimately concluding that lead poisoning victims simply should not have the ability to transfer the rights to their settlement payments); Ash, supra note 21, at 176–80 (arguing for reform of the best interest standard and arguing that the Consumer Financial Protection Bureau (CFPB) has a role to play in regulating the industry); Marcellus, supra note 21, at 545–50 (arguing for reforms to New York's SSPA, including increasing the standard of scrutiny).

historically been rare because of the market's opacity.[23] Moreover, even when illegal factoring company practices have been challenged in court, questionably applied procedural and jurisdictional barriers have frequently prevented victims from receiving a remedy.[24]

To address both of these issues, this Note recommends, based on current industry practices and basic contract law principles, that courts recognize that tort victims are direct or third-party beneficiaries of the anti-assignment clauses that accompany structured settlement agreements and, as a result, require that the insurance companies charged with dispensing structured settlement payments exercise their contractual obligation of good faith when choosing whether to enforce or waive these clauses.[25] The recognition of this claim will provide both an adverse party during the petition proceedings (when the insurance company finds that its obligation of good faith requires it to contest the petition) and, in the event that the insurance company did not exercise those obligations properly, a cause of action and potential remedy for victimized sellers.[26] Additionally, this Note suggests that legislatures take steps to improve the transparency and quality of the secondary market, either by creating a state-managed auction to serve victims who desire to sell their settlements—by, for example, modeling them after the auctions that facilitate tax deed sales in most states[27]—or by having courts funnel prospective sellers to alternative market participants, such as the list of qualified brokers that is already managed by the DOJ.[28]

This Note proceeds in three parts. Part I describes the history of structured settlements, documents the rise of the factoring industry, and provides an overview of the legislative response to the industry. In addition to offering an explanation for why this legislative response has failed to accomplish its goals, Part II surveys litigation and public enforcement efforts challenging abusive factoring industry practices and explains why litigation has historically been rare. Part III elaborates on the solutions described above.

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23. See infra section II.B.1 (describing barriers in private litigation); infra section II.B.2 (describing the history of public enforcement efforts against factoring companies).

24. See infra section II.B.1.

25. See infra section I.B.2 (describing why anti-assignment clauses are required); infra section I.C.1 (describing how factoring companies and insurance companies work together to circumvent the clause). While this Note argues that the recognition of contractual obligations is best situated under a direct or third-party beneficiary theory, another plausible theory for liability is that the insurance companies have a fiduciary duty to the tort victims. See infra note 215.

26. For a discussion of the plausible scope of insurance company obligations, see infra section III.A.2.

27. See infra note 262 and accompanying text.

28. See infra section III.B.

I. THE STRUCTURED SETTLEMENT AND SETTLEMENT FACTORING LANDSCAPE

This Part documents the history of the structured settlement secondary market and describes the legislative scheme that was designed to regulate the industry. Section I.A documents the history and purpose of structured settlements. Section I.B describes the rise of the factoring industry and controversy related to its development. Section I.C explains the legislative response to the industry's growth.

A. *History and Purpose of Structured Settlements*

Tort victims are traditionally compensated with a single lump-sum recovery.[29] While nothing prevented parties from privately contracting to a settlement based on periodic payments, structured settlements were rare until a series of IRS rulings in the late 1970s declared that periodic payments in structured settlements would not be subject to federal income tax.[30] Congress effectively codified these administrative rulings with the passage of the Periodic Payment Settlement Act of 1982.[31] This decision incentivized plaintiffs to forgo a lump-sum payment in favor of a structured settlement.[32] It also inadvertently created a multibillion-dollar secondary market for tort claims.[33]

Congress's decision to incentivize structured settlements was primarily motivated by the "image of the squandering plaintiff":[34] the fear that tort claimants who are given huge sums of money will inevitably spend it too quickly, leaving the cost of supporting them and paying for their medical care to taxpayers.[35] In theory, having tort victims receive their settlements piecemeal would neatly solve the problem. One obstacle, however, was the possibility that the defendant could become insolvent, which would leave the plaintiff as a general creditor and therefore undermine the purpose of the tax subsidy.[36] Congress desired a system in which the plaintiff could not alter the terms of a settlement with a virtually guaranteed payment stream, which in turn would guarantee that Congress was getting what was intended by the sacrifice of its tax revenue: an injured victim with long-term financial security.[37]

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29. See Hindert et al., Structured Settlements, supra note 4, § 1.02[1].

30. Id. § 1.02[4].

31. Id. § 2.02; see also I.R.C. §§ 104(a), 130(c) (2018).

32. Scales, supra note 9, at 861 (explaining that "[a] newly-generous tax code permitted tort litigants to turn less into more, and thereby improve the benefits of settlement to both parties").

33. See Hindert, 2015 Estimates, supra note 10.

34. Scales, supra note 9, at 869.

35. See supra note 8 and accompanying text.

36. See Babener, supra note 16, at 14 ("[I]f defendant becomes insolvent under these conditions, plaintiff would be forced to stand in line with other creditors.").

37. See supra note 8 and accompanying text.

Unsurprisingly, the solution involved the insurance industry. The 1982 legislation established Section 130 of the Internal Revenue Code, which, through tax incentives, encourages defendants—or their liability insurer—to pay a principal sum to a life insurer, which then assumes the defendant's liability and distributes payments periodically to the tort claimant.[38] To qualify for the tax subsidy, the periodic payments must be "fixed and determinable as to amount and time of payment" and "cannot be accelerated, deferred, increased, or decreased by the recipient of such payments."[39] Almost all structured settlements include an anti-assignment provision to satisfy this language.[40] Thus, by guaranteeing an effectively risk-free payment stream to the tort victim at a fixed rate and for a predetermined time, life insurance companies are at the center of the structured settlement ecosystem.[41]

B. *The Rise of Settlement Factoring*

1. *How Settlement Factoring Works.* — From a plaintiff's perspective, structured settlements are advantageous because they provide an income tax-free stream of payments without the pressure of money management or the potential for dissipation of funds.[42] The disadvantage, however, is that plaintiffs cannot simply change their minds and cash in their

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38. See I.R.C. § 130 (2018); Tax Treatment Hearing, supra note 8, at 10–11 (statement of Joseph M. Mikrut, Tax Legislative Counsel, Department of the Treasury) (describing the Section 130 framework for structured settlements). As an illustrative example, after agreeing to a structured settlement with the plaintiff, a defendant may pay a $100,000 lump sum to an insurance company in exchange for assuming the defendant's liability for future payments. The insurance company charges a percentage of the lump sum as a fee—for example, three percent—and then purchases a $97,000 annuity. Under Section 130, the insurance company would only pay income tax on the $3,000 fee and the defendant would be able to deduct the lump-sum payment as a "business expense." See Babener, supra note 16, at 13 (providing this example). Because the insurance company is paying the plaintiff over a period of time, it can invest the $97,000 principal to eventually provide a larger payout to the plaintiff. Id. at 13–14. Thus, the tax code allows a defendant to provide a smaller, immediately deductible payment to the insurance company to create a larger, long-term payout to the plaintiff. Id. If the plaintiff's lawyer is sophisticated, however, they can consider this benefit during settlement negotiations and spread the benefit to both sides. See id. at 49–51 (noting that defense-side savings have decreased as plaintiff lawyers have become more familiar with structured settlement tax benefits).

39. I.R.C. § 130(c)(2)(A)–(B).

40. See infra note 50 and accompanying text.

41. Structured settlement annuity sales quickly became a multi-billion dollar industry. See Richard B. Risk, Jr., Structured Settlements: The Ongoing Evolution from a Liability Insurer's Ploy to an Injury Victim's Boon, 36 Tulsa L.J. 865, 877–78 (2001) ("Structured settlement annuity sales grew rapidly to about $4 billion by 1991."). In 2018, annuity sales totaled $6 billion. Hindert et al., Structured Settlements, supra note 4, § 1.02[5][a].

42. See, e.g., Westrope v. Ringler Assocs. Inc., No. 3:14–CV–00604–ST, 2015 WL 632243, at *1 (D. Or. Feb. 12, 2015) (explaining that the advantage of structured settlements to the plaintiff is that they "receive[] spendthrift protection and guaranteed, tax-free income over an extended period of time").

remaining payments.[43] This tension ultimately sparked the factoring industry, which emerged in the early 1990s.[44]

From a broad perspective, the factoring industry business model is simple. Companies approach tort victims who have agreed to structured settlements and offer them an immediate lump sum in exchange for the right to a payment stream.[45] The factoring companies profit by offering less than the present value of the future payments—usually much less.[46] In practice, then, the transaction from the tort victim's perspective looks much like a secured loan, where the lump sum is the amount borrowed and each assigned payment pays the factoring company principal and interest.[47] Many factoring companies then bundle future payment streams into securities and sell them to investors.[48] This is how, as Professor Adam Scales has described it, "a tort claim winds up on Wall Street."[49]

2. *The Anti-Assignment Problem.* — Settlement factoring quickly became controversial for both legal and policy reasons. The legal problem was contractual: Structured settlement agreements almost always include anti-assignment provisions that, if enforced, would prevent tort victims from assigning their right to a payment stream to a third party.[50] To circumvent the problem, factoring companies simply arranged for tort victims to re-

43. I.R.C. § 130(c)(2)(A)–(B) (providing that "periodic payments are fixed and determinable as to amount and time of payment" and "such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments").

44. See Hindert et al., Structured Settlements, supra note 4, § 16.02[1]; Scales, supra note 9, at 898–900 (documenting the origins of the factoring industry).

45. See Hindert et al., Structured Settlements, supra note 4, § 16.02[1]; Babener, supra note 16, at 44 (discussing high historical discount rates).

46. See Hindert et al., Structured Settlements, supra note 4, § 16.02[1] ("Companies that purchase structured settlement payment rights pay less than the present value of the future payments they acquire and may resell those payment rights to other financial institutions."). For a discussion of how present value is calculated, see infra note 63.

47. Scales, supra note 9, at 899. As a basic illustrative example, a tort victim could sell the rights to a structured settlement that pays them $3,000 a month for ten years—which is worth $360,000 discounted to present value—for an immediate $80,000 check. The tort victim gets immediate liquidity and the factoring company profits in the long term.

48. See Babener, supra note 16, at 34 ("The factoring market has also fed into securities. In 1997, J.G. Wentworth sold over $140 million of structured settlement securities . . . .").

49. Scales, supra note 9, at 861.

50. Structured settlements must include an anti-assignment clause to retain the tax subsidy provided under Section 130 of the Internal Revenue Code. See Tax Treatment Hearing, supra note 8, at 12 (statement of Joseph M. Mikrut, Tax Legislative Counsel, Department of the Treasury) ("[A]lmost all structured settlement arrangements contain anti-assignment clauses that are intended to satisfy the section 130 statutory requirements."); see also Response to Defendants' Motion to Dismiss the Amended Complaint at 3, Cordero v. Transamerica Annuity Serv. Corp., No. 18-cv-21665-DPG, 2020 WL 1672501 (S.D. Fla. Apr. 6, 2020), 2019 WL 5626001 (providing an example of an anti-assignment clause); Settlement Funding, LLC v. Brenston, 998 N.E.2d 111, 113 (Ill. App. Ct. 2013) (same).

direct their payments to an address chosen by the company.[51] This approach was inherently risky, however, because it left the factoring company with no direct right to the payment stream.[52] When insurance companies discovered that payment streams were being covertly assigned, they often successfully litigated to enforce anti-assignment clauses.[53] Thus, prior to the development of the SSPA court approval process for settlement transfers,[54] anti-assignment provisions served as a major obstacle to factoring activity.[55]

3. *Policy Issues Associated with Settlement Factoring.* — Settlement factoring also presents a fundamental policy problem: Factoring transactions effectively dissipate settlements, which was the outcome that Congress was trying to avoid when it chose to incentivize structured settlements.[56] By transferring the bulk of settlement payouts to factoring companies, tort victims lose long-term financial security and the tax benefit is awarded to those companies without serving any public purpose. Moreover, from a tort system perspective, the surrender of the bulk of the tort victim's settlement undermines the system's goal of fairly compensating victims.[57] Financial autonomy, however, is a countervailing concern.[58] One can imagine scenarios where selling a structured settlement might be reasonable: Perhaps, for example, a tort victim has an emergency medical expense. As J.G. Wentworth famously argues: It is the tort victim's money and they want it now.[59] Why should the government interfere?[60]

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51. Hindert et al., Structured Settlements, supra note 4, § 16.02[2][c]; Scales, supra note 9, at 901.

52. Hindert et al., Structured Settlements, supra note 4, § 16.02[2][d].

53. See, e.g., Liberty Life Assurance Co. of Bos. v. Stone St. Capital, Inc., 93 F. Supp. 2d 630, 638 (D. Md. 2000) (voiding structured settlement transfers because of an anti-assignment clause); Grieve v. Gen. Am. Life Ins. Co., 58 F. Supp. 2d 319, 324 (D. Vt. 1999) (same); J.G. Wentworth S.S.C. v. Callahan, 649 N.W.2d 694, 696 (Wis. Ct. App. 2002) (same). But see W. United Life Assurance Co. v. Hayden, 64 F.3d 833, 842–43 (3d Cir. 1995) (validating an assignment of payment rights).

54. See infra section I.C.

55. Hindert et al., Structured Settlements, supra note 4, § 16.02[2][c] ("Getting around the anti-assignment language included in most structured settlements has been a major challenge facing the structured settlement transfer industry as well as structured settlement recipients who want to transfer their payment rights.").

56. See supra note 8 and accompanying text.

57. See supra note 8 and accompanying text.

58. See Czapanskiy, supra note 8, at 3 (describing autonomy, in the context of lead-poisoned sellers, as a key concern because the choice to ban structured settlement sales entirely "deprives the seller of the possibility of controlling what may be the only major asset the seller owns").

59. See, e.g., JG Wentworth—Its [sic] My Money & I Need It Now Commercial, YouTube (Jan. 14, 2008), https://www.youtube.com/watch?v=HX0fIi3H-es (on file with the *Columbia Law Review*).

60. For an argument that government interference is not justified, see generally Koenig, supra note 12.

The fundamental reason that factoring is controversial, however, is what this Note refers to as the "price problem": the industry's history of charging exorbitantly high discount rates to vulnerable sellers.[61] It would be a mischaracterization to suggest that tort victims, dissatisfied with their settlement payouts and seeking immediate cash, drive the factoring industry. Instead, the factoring industry has, from the beginning of its history, aggressively sought out settlement claimants through "get cash now" advertising and telemarketing efforts.[62] Perhaps predictably, this generated enormous profits at the expense of tort victims—most of whom are ill-equipped to make complex calculations of present discounted value based on "the date to maturity, the interest rate, inflation, and the time value of money."[63] In some cases, the discount rates were equivalent to seventy percent annual interest rates.[64] If factoring transactions were recognized as loans, the average transaction terms would approach or violate the usury law interest rate limits in most states.[65]

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61. See, e.g., Leo Andrada, Note, Structured Settlements: The Assignability Problem, 9 S. Cal. Interdisc. L.J. 465, 476 (2000) ("Factoring companies are notorious for charging enormous fees and using unscrupulous business tactics in these transactions."). The discount rate in factoring transactions is analogous to an interest rate paid on a loan. Czapanskiy, supra note 8, at 16. That is, "The discount rate is the equivalent of the annual interest rate being paid by the seller applied to the lump sum of the buyer's purchase." Id. Thus, if (hypothetically) Freddie Gray's $435,000 structured settlement were to be paid out over ten years, his decision to sell the income stream for $54,000 was equivalent to an annual discount rate of just over twenty-three percent. See Structured Settlement Value Calculator, Calculator.me, https://calculator.me/planning/present-value.php [https://perma.cc/KT3G-FRSA] (last visited Aug. 19, 2020) (calculating present value where $435,000 is assigned to "future value," 10 is assigned to "years to discount," and the discount rate is adjusted to reach a present value of approximately $54,000).

62. Hindert et al., Structured Settlements, supra note 4, § 16.02[1].

63. See Czapanskiy, supra note 8, at 12 (internal quotation marks omitted) (quoting Marcellus, supra note 21, at 530) (describing the complexity of discount rate calculations as an explanation for the "[t]he buyer's temptation toward exploitation"). Determining the present value of a structured settlement payment stream is complex because it involves guessing, based on factors such as inflation and the interest rate, what principal amount today would yield the income stream payments over time. Id. The calculation is especially complex when settlement payments are irregular. See, e.g., DRB Capital, LLC v. T.M., No. FSTCV196040976S, 2019 BL 272787, at *2 (Conn. Super. Ct. June 20, 2019) (noting that the tort victim was scheduled to progressively receive payments of increasing size). In other words, a payment stream that eventually accumulates to $100,000 over ten years is worth less today because money that is available today can be invested. The *Washington Post*, for example, reported that Freddie Gray's $435,000 structured settlement had a present value of $280,000. See McCoy, How Companies Make Millions, supra note 2.

64. See Hindert & Ulman, supra note 11, at 20 & n.2 (collecting cases with high discount rates, including one case where the annual interest rate would have been equivalent to 100%); Babener, supra note 16, at 44 ("Historically, discount rates have been very high, even reaching 55%, 65%, and 75%.").

65. See Richie Bernardo, Usury Laws by State, Interest Rate Caps, the Bible & More, WalletHub (June 20, 2014), https://wallethub.com/edu/cc/usury-laws/25568 [https://perma.cc/3BHK-VHEW] (providing a map illustrating usury law interest rate limits in every state). While there is no publicly available data on the average discount rate, public estimates have consistently suggested the average rate is between fifteen and twenty percent. See

C. *Regulating the Factoring Industry*

1. *Congress's Response to the Factoring Industry*. — By the late 1990s, it was evident that Congress faced a dilemma. The structured settlement mechanism was expressly designed to provide tort victims with long-term economic security. Congress's vision did not contemplate tort victims routinely selling their valuable tax-free income stream for a comparatively small lump sum.[66] As discussed above, Section 130 requires, or has been interpreted to require, that structured settlement agreements bar assignments[67] and prevent acceleration of payments.[68] Thus, the settlement factoring industry was never supposed to exist. It did exist, however, and billions of dollars were at stake.[69] The industry, lobbying as the National Association of Settlement Purchasers, spent "huge sums" to prevent congressional action that would stymie its growth.[70] The industry argued that government interference with factoring transactions is incompatible with our society's deference to the market economy and financial autonomy.[71]

Ultimately, Congress compromised by discouraging transfers that are not subject to a state court approval process.[72] The resulting legislation amended Section 5891 of the Internal Revenue Code to impose a forty percent excise tax on any factoring transaction that is not "approved in advance in a qualified order."[73] The Section defines "qualified order" as a

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Hindert & Ulman, supra note 11, at 25 (presenting data suggesting the average discount rate is about twenty percent); Babener, supra note 16, at 45 ("[A]fter the 2008 financial crisis, average rates rose again to over 14% or 15% within the first few months of 2009, often approaching 20%."). More recently, one factoring company estimated that, in transactions observed by the company in 2020, discount rates averaged between seven and eight percent. See E-mail from Nathaniel Pulsifer, President, DCF Exch., to Jeremy Babener, Founder, Structured Consulting (Aug. 12, 2020, 10:49 PM EDT) (on file with the *Columbia Law Review*).

66. See Tax Treatment Hearing, supra note 8, at 6 (statement of Rep. Stark) (stating that factoring "completely frustrates what our Committee intended when it adopted the original legislation to encourage structured settlements"); id. at 6 (statement of Rep. Shaw, Jr.) ("The integrity of the entire system is being undone by factoring transactions. Injured victims are selling their settlements . . . at very sharp discounts, for quick cash, spending it, and eventually winding up on public assistance, leaving them in the very predicament that structured settlements were set up to avoid.").

67. See supra note 50 and accompanying text.

68. See supra note 43 and accompanying text.

69. Hindert, 2015 Estimates, supra note 10 (estimating that roughly $13 billion in assets have been purchased in the secondary structured settlement market).

70. See Babener, supra note 16, at 36 & n.207 (discussing the lobbying battle over factoring).

71. See Tax Treatment Document, supra note 8, at 6 ("Opponents . . . argue that effectively locking individuals into a previously negotiated payment stream is antithetical to the normal rules that apply in a market economy of permitting a fully informed individual to make a choice that he or she deems to be in his or her best interest.").

72. Babener, supra note 16, at 37 (describing the decision to establish Section 5891 as a "compromise").

73. I.R.C. § 5891(a)–(b) (2012).

judgment issued by a state court that finds that, first, the transaction does not contravene any federal or state statute and, second, that the transaction is in the "best interest of the payee, taking into account the welfare and support of the payee's dependents."[74]

Provided that the structured settlement agreement meets the underlying tax code requirements, a factoring transaction that is approved by a state court does not impact the tax treatment of the structured settlement payment stream.[75] To circumvent the anti-assignment obstacle,[76] factoring companies pay the insurance company to agree to waive the anti-assignment clause.[77] Typically, the insurance company, a statutorily named "interested part[y]" that must be notified of any petition,[78] "review[s]" the petition documents, agrees to assign the payments to the factoring company, and charges the factoring company a fee for its efforts.[79]

Section 5891 was a monumental victory for the factoring industry. Congress could have made the excise tax apply to all factoring transactions, regardless of the procedure they followed. Congress also could have revoked the tax subsidy associated with structured settlements if the structured settlement were assigned to a third party—that is, reinforce the legislative scheme it had initially created. Both of these outcomes would have aligned more closely with Congress's initial vision for the structured settlement system. Instead, Congress arguably implicitly approved of the factoring industry by legitimizing factoring transactions that followed Section 5891's requirements.[80]

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74. Id. § 5891(b)(2).

75. Hindert et al., Structured Settlements, supra note 4, § 16.03 ("IRC § 5891 also clarifies the federal tax treatment of the parties to a structured settlement in the event of a factoring transaction. Provided IRC §§ 72, 104(a)(1) and (2), 130 and 461(h) are satisfied when a structured settlement is consummated, a factoring transaction does not impact the application of these tax rules.").

76. See supra section I.B.2.

77. See, e.g., Complaint at 16, Cordero v. Transamerica Annuity Serv. Corp., No. 18-cv-21665-DPG, 2020 WL 1672501 (S.D. Fla. Apr. 6, 2020) [hereinafter *Cordero* Complaint] (noting that Transamerica waived the anti-assignment clause); Hindert et al. Structured Settlements, supra note 4, § 16.04[5][b] ("[S]tructured settlement obligors and annuity issuers generally do not find it necessary to insist on enforcement of anti-assignment provisions. Objections . . . are waived in most cases.").

78. See Hindert et al., Structured Settlements, supra note 4, § 16.02[2][c].

79. See Response to Defendants' Motion to Dismiss the Amended Complaint, supra note 50, at 4. This business can be profitable. Transamerica, for example, operated an office where four employees approved assignments, charging between $500 and $1,500 per transaction. See Deposition of Andrew Martin at 6, 11, *Cordero*, 2020 WL 1672501 (on file with the *Columbia Law Review*).

80. Unsurprisingly, this is the factoring industry's perspective on Section 5891. See Babener, supra note 16, at 38 n.225 ("Congress and 46 states would not have created laws specifically governing the sale of structured settlement payment rights if they did not want the sales to happen. The fact that they legislated in the area shows that they approve." (internal quotation marks omitted) (quoting Earl Nesbitt, Exec. Dir., Nat'l Ass'n of Settlement Purchasers)). But see Babener, supra note 16, at 39 n.226 ("To read [Section

Rather than assume that Congress was merely responding to lobbyist lucre, a more measured view is that Section 5891 reflects Congress's recognition that factoring may be justified in limited circumstances and that the best interest standard empowers state judges to decide when that may be the case.[81] Initially, Congress sought to limit transfers to only cases of true financial hardship. A 1998 bill before the House, for example, would have applied the excise tax to structured settlement transfers unless a state court found that "extraordinary, unanticipated, and imminent needs of the structured settlement recipient or his or her spouse or dependents render such a transfer appropriate."[82] Unsurprisingly, the factoring industry lobbied against such a restrictive standard,[83] and Congress ultimately acquiesced to merely requiring a finding that the transaction is in the best interest of the seller. But while the best interest standard has been criticized as "nebulous,"[84] it at least facially suggests the intent to restrict transactions to limited circumstances. A House report described the purpose of Section 5891 as "protect[ing] victims who sell structured settlements for a lump sum."[85]

2. *Structured Settlement Protection Acts.* — While Congress was contemplating Section 5891, states were also beginning to enact complementary legislation to guide state judges in the transfer evaluation process.[86] Since 1997, every state with the exception of New Hampshire has adopted some version of an SSPA.[87] While the laws have some differences, they were almost all based on the Model SSPA promoted by the insurance and factoring industries and reflect the same basic legislative scheme.[88]

The Model SSPA is founded on the requirement of court approval for a structured settlement transfer.[89] Every SSPA mirrors Section 5891's lan-

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5891] as implied approval of factoring is doing a grave disservice to those who passed the law." (internal quotation marks omitted) (quoting Craig H. Ulman, Couns., Nat'l Structured Settlements Trade Ass'n)).

81. See, e.g., Hindert et al., Structured Settlements, supra note 4, § 16.03[3][a][i] ("[Section 5891] recognizes that unanticipated circumstances, in some cases, justify a transfer of structured settlement payment rights.").

82. H.R. 4314, 105th Cong. § 5891(b)(2) (1998).

83. See Babener, supra note 16, at 39 n.226 ("Factoring companies are capable of lobbying just as much as anyone else. Section 5891 is the result of legislative compromise." (internal quotation marks omitted) (quoting Craig H. Ulman, Couns., Nat'l Structured Settlements Trade Ass'n)).

84. Koenig, supra note 12, at 818 (noting "the legislation said remarkably little" about how to apply the standard).

85. H.R. Rep. No. 107-801, at 5 (2003).

86. See Hindert & Ulman, supra note 11, at 20 (describing the history of state SSPAs).

87. See Hindert et al., Structured Settlements, supra note 4, § 16.04[1]. For a list of each state's SSPA, see id. at tbl.16.1.

88. See id. § 16.04[2] (describing the lobbying effort); Hindert & Ulman, supra note 11, at 20 n.4 (describing the origins of the Model SSPA).

89. See Hindert et al., Structured Settlements, supra note 4, § 16.04[3][b] ("The requirement of advance court approval is a cornerstone of each of the SSPAs, as well as IRC § 5891." (footnote omitted)).

guage requiring a finding that the transaction does not contravene applicable state or federal law and that the transfer is in the best interest of the tort victim.[90] Most SSPAs contain two additional important requirements. First, they require disclosures that highlight the value of the transferred payments—that is, their discounted present value—as compared to what the tort victim would actually receive.[91] Second, most—but not all[92]—states require either that the tort victim has actually received "independent professional advice" regarding the transfer or has been advised by the factoring company that they should seek that advice.[93]

Unlike Congress, state legislatures were not enacting these laws primarily to protect the public fisc;[94] instead, their express purpose was consumer protection. In a sponsor statement to what eventually became New Jersey's SSPA, for example, a New Jersey representative argued that "[s]tructured settlements provide strong public policy benefits," including "long-term financial protection for injury victims and their families," and found that "[f]actoring companies, commonly using phone banks, advertising and high-pressure sales . . . undermine these benefits and may exploit an injured person at a time when they need cash."[95] Similarly, a New York state court recently reiterated that its "SSPA was enacted to protect the recipients of long-term structured settlements from being victimized by companies aggressively seeking the acquisition of their rights."[96]

II. THE SSPA LEGISLATIVE SCHEME'S FAILURE TO PROTECT TORT VICTIMS

As Part I demonstrates, settlement factoring developed as an unintended side effect of a series of deliberate congressional tax policy decisions. The industry's existence complicates and undermines the reasoning underlying those decisions.[97] On one hand, the acknowledgement, and arguably legitimization, of settlement factoring in Section 5891 recognizes the tension between the paternalist vision underlying structured settlement incentives and our society's general deference to

90. Id.

91. Id. § 16.04[3][a].

92. Id. § 16.04[3][b] n.15 ("SSPAs that do *not* require any findings concerning independent professional advice include those enacted in GA, IN, KY, and WV.").

93. Id. § 16.04[3][b].

94. See supra note 8 and accompanying text.

95. Assemb. 2146, 209th Leg. 7 (N.J. 2001) https://www.njleg.state.nj.us/2000/Bills/a2500/2146_i1.pdf [https://perma.cc/ZQ34-V67G].

96. In re J.G. Wentworth Originations, No. 52903/2018, 2018 WL 6332853, at *1 (N.Y. Sup. Ct. Dec. 4, 2018) (citation omitted).

97. See Babener, supra note 16, at 41–47 (observing that factoring can both support and undermine the goals of the tax subsidy); Koenig, supra note 12, at 810 ("[R]ather than thwarting factoring abuses, § 5891 . . . ensures that factoring transactions receive court approval, lending legitimacy to the industry's malevolence toward tort victims.").

financial autonomy.[98] On the other hand, the federal and state legislative scheme regulating the industry recognizes that aggressive and unscrupulous industry practices, and the exorbitantly high discount rates that result from them, are unacceptable.[99] The compromise underlying the legislation, then, should have resulted in a system in which transactions are approved at the margins: when competent tort victims receive a substantively fair price and have a good reason to sell their settlement.[100]

Instead, in the seventeen years since Section 5891 was amended, the system has functionally led to the opposite outcome: Transactions are routinely approved unless there is a clear reason for the judge to intervene.[101] Meanwhile, many of the aggressive practices the SSPA system was designed to prevent have continued unabated—or become more extreme.[102]

The limited scholarship recognizing the SSPA scheme's failure to accomplish its purpose has understandably argued for heightening the standard of scrutiny with which courts evaluate transfer petitions.[103] Improving the monitoring system for individual transactions, however, will not address the scheme's consistent failure to protect against the systemic abuse of consumers. This Part argues that there are two basic problems underlying the current legislative scheme's failure to protect tort victims and effectuate the congressional intent of preventing victims from becoming public charges.[104] First, the petition process is not adversarial, which both places judges in the unfamiliar role of exercising discretion on behalf of the tort victim and systemically obscures facts that should be important to deciding whether a given transaction is actually in the best interest of the seller. Second, public enforcement and private litigation against factoring companies have the potential to serve an essential role in deterring abusive industry practices, but consumer abuses have largely been hidden from state enforcement agencies and plaintiff attorneys because the market lacks transparency. Moreover, even when factoring industry practices have been challenged in court, procedural and jurisdictional hurdles have served as unreasonable barriers to litigants.

Section II.A provides examples of industry practices that have drawn scrutiny and offers an explanation for why the legislative scheme has failed to protect tort victims. Section II.B.1 analyzes the claims that have been brought against factoring companies and the barriers litigants have faced in court. Section II.B.2 documents the history of enforcement actions against factoring companies and describes recent controversy over the

98. See supra section I.C.1.

99. See supra section I.C.2.

100. In the rare instances when courts rigorously apply the best interest standard, these two factors—price and reasoning—are generally where courts focus their analysis. See infra section II.A.2 (presenting examples of cases focusing on these two factors).

101. See infra section II.A.2.

102. See infra section II.A.1.

103. See supra note 21 and accompanying text.

104. See supra note 8 and accompanying text.

Consumer Financial Protection Bureau's attempt to scrutinize J.G. Wentworth's business practices.

A. *Why the Current Legislative Scheme Has Failed to Protect Tort Victims*

1. *Examples of Abusive Practices in the Secondary Structured Settlement Market.* — Between 2013 and 2015, a Maryland factoring company, Access Funding, obtained judicial approval to purchase $32.6 million in future settlement payments in exchange for $7.5 million, roughly a third of the payment streams' cumulative present value.[105] More than seventy percent of Access Funding's transactions involved childhood victims of lead poisoning.[106] Some of these victims sold their settlements for far below a third of their value. One childhood lead poisoning victim in Baltimore, for example, sold $327,000 worth of payments for about $16,200, or nine percent of the settlement's present value.[107]

Because even low-level childhood lead exposure causes diminished intellectual and decision-making ability,[108] Access Funding considered childhood lead poisoning victims with large structured settlements to be attractive targets.[109] The company retained a research department that identified "lead paint virgins" who had not yet sold their settlements and "bombarded" them with calls and texts offering quick cash.[110] Company employees allegedly wooed victims over expensive steak dinners and promised them free vacations.[111] Although factoring companies siphoning millions of dollars from childhood lead poisoning victims seems to be exactly what Maryland's SSPA was designed to prevent, nearly every Access Funding petition involving a lead poisoning victim—119 of 121—received court approval.[112]

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105. Editorial, Righting the Wrongs of an Exploitative Industry, Wash. Post (May 14, 2016), https://www.washingtonpost.com/opinions/righting-the-wrongs-of-an-exploitative-industry/2016/05/14/b8611f98-1879-11e6-9e16-2e5a123aac62_story.html (on file with the *Columbia Law Review*).

106. Rachel Chason, They Sought 'Lead Paint Virgins' and Bought Their Settlements. It Will Be Hard for Those Victims to Get Their Money Back., Wash. Post (Jan. 21, 2019), https://www.washingtonpost.com/local/md-news/lawsuit-by-maryland-ag-sheds-new-light-on-companys-efforts-to-profit-off-victims-of-lead-poisoning/2019/01/21/9fce0ab0-14f0-11e9-b6ad-9cfd62dbb0a8_story.html (on file with the *Columbia Law Review*).

107. McCoy, How Companies Make Millions, supra note 2.

108. See Council on Env't Health, Am. Acad. of Pediatrics, Prevention of Childhood Lead Toxicity, Pediatrics, July 2016, at 1, 3 ("Low-level elevations in children's blood lead concentrations . . . can result in decrements in cognitive functions, as measured by IQ scores and academic performance."); see also Czapanskiy, supra note 8, at 6 ("Problems with executive functioning are of particular importance to a person's decision to sell periodic payments under a structured settlement. Many lead-poisoned children experience problems with 'higher level' functions of planning and problem solving.").

109. Chason, supra note 106.

110. Id.

111. McCoy, How Companies Make Millions, supra note 2.

112. Czapanskiy, supra note 8, at 14.

Factoring companies appear to regularly target and take advantage of vulnerable tort victims.[113] A childhood lead poisoning victim in Florida sold, through a series of six transfer agreements approved over a two-year span, thirty years of settlement payments.[114] In Virginia, a childhood burn victim sold, through a series of approved transactions over two years, $11 million of structured settlement payments for $1.4 million, or sixteen percent of the settlement's present value.[115] One of the approved transactions included the sale of settlement payments with a present value of $4 million for $389,000, and another included the sale of settlement payments with a present value of $844,000 for $40,000.[116] The burn victim had received diagnoses for learning and emotional disabilities, including post-traumatic stress disorder.[117]

Because of the money at stake, some factoring companies go to great lengths to attract and retain potential sellers. Companies establish contact through persistent phone calls and letters.[118] A Virginia factoring company, for example, developed a database of thousands of structured settlement recipients.[119] Its sales agents allegedly offered victims $50 to stay on the phone for five minutes and frequently lied to induce a sale; one common lie apparently involved convincing victims that the failure to make a sale would result in the forfeiture of the entire settlement.[120] Another company allegedly sent letters on behalf of a fictitious judge

113. See, e.g., 321 Henderson Receivables, L.P. v. Martinez, 816 N.Y.S.2d 298, 298–99 (Sup. Ct. 2006) (explaining that factoring transactions "have a disproportionate impact on persons of color and persons of limited income"); Czapanskiy, supra note 8, at 12 (addressing the issue of factoring companies exploiting lead poisoning victims); see also infra note 122 and accompanying text.

114. *Cordero* Complaint, supra note 77, at 5–8.

115. Terrence McCoy, The Flawed System that Allows Companies to Make Millions Off the Injured, Wash. Post (Dec. 27, 2015), https://www.washingtonpost.com/local/social-issues/the-flawed-system-that-allows-companies-to-make-millions-off-the-injured/2015/12/27/cce16434-9212-11e5-a2d6-f57908580b1f_story.html (on file with the *Columbia Law Review*) [hereinafter McCoy, The Flawed System].

116. Id.

117. Id. It is not clear whether the factoring company was aware of these diagnoses. Plainly, however, the court was not aware or did not find the information relevant to the best interest determination.

118. Id. (reporting that one factoring company allegedly called a tort victim ten times a day).

119. Id.

120. Id. ("An associate might tell a potential client 'You're owed money . . . . They might not pay you the rest of your money if you don't do this[]' . . . . The goal . . . is to ultimately build up a 'pipeline' of 'remarkets'—people who do continuous deals.").

urging tort victims to sell.[121] Companies have been accused of offering lavish gifts to potential sellers including large cash advances,[122] vacations,[123] drugs,[124] and strip club visits.[125]

After the company convinces the tort victim to do an initial transaction, the entire settlement is frequently sold within two years, which the industry refers to as the "perishable period."[126] To prevent competitors from identifying tort victims who are willing to sell their settlements—and potentially offering a better deal—companies convince judges to seal cases.[127] Indeed, the Texas SSPA was recently amended to expressly permit the redaction of sellers' names.[128]

Some factoring companies have demonstrated a willingness to violate SSPA requirements or otherwise mislead courts to secure court approval. Companies allegedly "coach" tort victims to lie about their motivations for selling their settlement; lawyers at each company apparently have a list of explanations for transfers, such as paying down a credit card debt or

121. Jean Marbella, Companies Accused of Misleading Consumers About Settlements Will Pay Restitution, Attorney General's Office Says, Balt. Sun (Jan. 8, 2018), https://www.baltimoresun.com/maryland/bs-md-structured-settlements-20180108-story.html (on file with the *Columbia Law Review*).

122. See McCoy, The Flawed System, supra note 115 ("Quick doses of cash are one of the most effective methods of attracting or retaining clients, said four people who have worked in the business . . . . [Factoring companies] 'love to [issue cash advances to] people who are mentally incompetent . . . [to] get[] their hooks into them . . . [and] keep them coming back.'" (quoting a factoring company president)).

123. See, e.g., Complaint at 7, Lafontant v. Wash. Square Fin., LLC, No 14-cv-09895 (S.D.N.Y. filed Dec. 15, 2014) [hereinafter *Lafontant* Complaint] (alleging that a factoring company employee bought a tort victim "a plane ticket to Florida and made arrangements for [him] to stay at an upscale hotel"); McCoy, The Flawed System, supra note 115 (reporting that a factoring company flew a different tort victim to South Florida).

124. *Lafontant* Complaint, supra note 123, at 7 (alleging that a factoring company employee met the tort victim "at the airport and proceeded to wine and dine him at fancy restaurants and clubs" and "even provided [him] with marijuana").

125. Scott Daugherty, Del. Stephen Heretick and Portsmouth Judges Diverted Millions Owed to Sick and Injured People, Lawsuit Claims, Virginian-Pilot (Feb. 1, 2018), https://www.pilotonline.com/government/local/article_ad04fdf9-33f2-5c5f-b659-cd01ccc2f6be.html (on file with the *Columbia Law Review*) ("Lures include gifts and cash advances . . . and even sporting events and nights at bars and strip clubs."); McCoy, The Flawed System, supra note 115 (reporting that a factoring company took a potential seller to two strip clubs).

126. McCoy, The Flawed System, supra note 115.

127. Id. (quoting an industry expert's view that companies convince judges to seal off cases "to wall off [sellers] from competitors" (alteration in original) (internal quotation marks omitted)).

128. See Tex. Civ. Prac. & Rem. Code § 141.006(d) (2017) (requiring the court to permit name redaction at the request of the tort victim); see also In re Transfer of Structured Settlement Payment Rights, No. 19-DCV-266183, 2019 Tex. Dist. LEXIS 16830 (Tex. Dist. Ct. Oct. 11, 2019) (providing an example of an approved petition with the tort victim's name redacted).

buying a house, that they know judges consider reasonable.[129] One lawsuit alleged that when a tort victim had a transfer petition denied in New York, a state known to evaluate petitions relatively stringently, a factoring company employee had the victim sign a false Florida lease in order to get the petition approved in Florida.[130] In New York, a law firm's paralegal routinely forged signatures on documents required by the state's SSPA.[131] In Maryland, in order to satisfy the SSPA requirement that structured settlement recipients receive independent financial advice prior to making a transaction, Access Funding repeatedly funneled potential sellers to the same lawyer, who in turn repeatedly certified that dozens of lead poisoning victims understood the "legal, tax and financial implications" of each transaction.[132] When one lawyer encouraged potential sellers to seek out better terms with another company, Access Funding filed a suit against him, claiming tortious interference.[133]

2. *The Current Legislative Scheme's Failure to Address Abusive Industry Practices.* — The SSPA legislative scheme was designed to protect vulnerable tort victims from aggressive and unscrupulous factoring com-pany tactics and the inequitable transactions that result from them.[134] Courts that have taken seriously the responsibility of finding that the transaction is in the best interest of the tort victim have focused on balancing two goals: ensuring that the price is fair and verifying that the tort victim has a good reason for selling the settlement.[135] In one New York case, for example, a court rejected a petition after determining that the tort victim receiving $10,000 for a payment stream with a present value of $180,350

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129. McCoy, The Flawed System, supra note 115 (quoting an industry insider's statement that "[l]awyers in each company have [a list of] reasonable explanations that companies will look at"); Leslie Scism, Firms Help Settlement Holders Cash Out Payments Meant to Last a Lifetime, Wall St. J. (Mar. 23, 2015), https://www.wsj.com/articles/firms-help-settlement-holders-cash-out-payments-meant-to-last-a-lifetime-1427145446 (on file with the *Columbia Law Review*).

130. See *Lafontant* Complaint, supra note 123, at 6–7; Scism, supra note 129.

131. See J.G. Wentworth Originations, LLC v. Hall, 983 N.Y.S.2d 394, 397 (Sup. Ct. 2014) ("Petitioner received fake documents from Paris & Chaikin, leading petitioner to believe that this court had approved the transfer . . . . The petition was never filed with this court nor did the court sign said order. In addition, the index number appearing on the documents was also fabricated.").

132. McCoy, How Companies Make Millions, supra note 2.

133. Id.

134. See supra section I.C.

135. See, e.g., Symetra Life Ins. Co. v. Rapid Settlements Ltd., No. H-05-3167, 2007 WL 114497, at *2 (S.D. Tex. Jan. 10, 2007) ("The purpose of the 'best interests' finding is to make sure that the payee does not give up his or her right to the future-income stream in exchange for a much smaller present payment, unless there is good reason for the transaction."); 321 Henderson Receivables, L.P. v. Martinez, 816 N.Y.S.2d 298, 300–01 (Sup. Ct. 2006) ("The primary reasons for . . . [petition] denials are twofold. First, the discount rate . . . is so significant that the payee is oftentimes selling his payment rights for a fraction of their value . . . . Secondly, the payee . . . lacks a . . . plan for the use of the funds, or a more viable alternative exists.").

was not "fair and reasonable."[136] In another New York case, the court, in addition to finding that the price was unfair, found that the tort victim's expressed reason for the sale—opening a barber shop—did not justify the transaction because the tort victim "had no knowledge of the licensing requirements for a barber shop, had not investigated the cost of the necessary merchandise, and had not located a suitable space."[137]

Cases in which courts engage in rigorous scrutiny, however, are uncommon. As illustrated above,[138] factoring companies have become highly sophisticated at ensuring that individual transfer petitions "look good on paper."[139] When judges are presented with petitions that seemingly adhere to the SSPA's procedural requirements, they often approve them regardless of how exorbitantly high the discount rate is or whether the transaction is justified.[140] Industry experts estimate that state courts approve transfer petitions at a roughly ninety-five percent rate.[141] In some jurisdictions, the rate is even higher.[142] Even in New York, which is understood by industry experts to be a "scrupulous" jurisdiction, transactions are approved at about a seventy-five percent rate.[143]

In 2013, for example, a single lawyer filed 594 transfer petitions in the Portsmouth, Virginia courthouse.[144] Ninety-five percent of the petitions were approved.[145] Petitions were handled in bulk during a monthly two-hour window.[146] Once, fifty-two petitions were approved in one hour.[147]

These transactions were facially legal and illustrate SSPA loopholes that factoring companies have consistently exploited. First, many SSPAs do

136. See In re J.G. Wentworth Originations, LLC, No. 52903/2018, 2018 WL 6332853, at *1–2 (N.Y. Sup. Ct. Dec. 4, 2018). While the court rejected the petition, it is telling that J.G. Wentworth evidently thought it was worth the attorneys' fees to petition the court to approve a transaction offering the tort victim about five percent of the payment stream's present value.

137. *Martinez*, 816 N.Y.S.2d at 302.

138. See supra section II.A.1.

139. McCoy, The Flawed System, supra note 115.

140. See, e.g., In re W.M., No. 2019-CA-003400, 2019 Fla. Cir. LEXIS 3426, at *5 (Fla. Cir. Ct. Sept. 19, 2019) (approving a petition without explanation); In re Johnson, No. 2018-CA-003239, 2019 Fla. Cir. LEXIS 106, at *4–5 (Fla. Cir. Ct. Jan. 23, 2019) (same). In *W.M.*, the stated purposes underlying the petition were to pay off a debt, remodel a house, and pay for cosmetology school, none of which were scrutinized by the court. See Application for Court Approval of a Transfer of Structured Settlement Payment Rights at *3, *W.M.*, 2019 Fla. Cir. LEXIS 3426, FL Cir. Ct. Pleadings LEXIS 3905.

141. Babener, supra note 16, at 40.

142. Id.

143. McCoy, The Flawed System, supra note 115.

144. Id.

145. Id.

146. Id.

147. Id.

not prevent forum shopping.[148] The Portsmouth courthouse had a reputation in the industry for "rubber-stamp[ing]" transfer petitions, so factoring companies filed their petitions there.[149] Second, while some SSPAs now require petitioners to inform the court about previous transactions,[150] many SSPAs do not prevent factoring companies from simply refiling a new petition until they find an amenable judge.[151] Third, some SSPAs do not require the tort victim to be present at hearings.[152] Indeed, in states that allow forum shopping, petitioners often live hours away from the court where their petition is evaluated.[153]

Scholarship critiquing the effectiveness of state SSPAs has focused on closing these loopholes[154] and modifying the best interest standard to heighten the scrutiny with which courts evaluate transactions.[155] Proposals have included, for example, only allowing a sale if the economic security of the seller is not imperiled[156] or if the sale is justified by a "compelling and reasonably informed necessity."[157]

It is clearly necessary to close exploitable loopholes in the legislative scheme. Merely changing how courts evaluate individual transactions, however, will not address underlying substantive and procedural flaws with the petition process. Judges have limited time and resources with which to evaluate transactions, and, given how aggressively factoring companies have sought and will continue to seek to circumvent SSPA requirements, it is difficult to frame a standard that would capture problematic circum-

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148. Id. Some states have addressed this problem by requiring the petition proceeding to be held in the county in which the tort victim resides. See, e.g., N.Y. Gen. Oblig. Law § 5-1705 (McKinney 2011).

149. McCoy, The Flawed System, supra note 115.

150. Terrence McCoy, Maryland Court Approves New Rules on Firms that Buy Rights to Settlement Payouts, Wash. Post (Nov. 23, 2015), https://www.washingtonpost.com/local/social-issues/maryland-court-approves-new-rules-on-firms-that-buy-rights-to-settlement-payouts/2015/11/23/400392ce-91f6-11e5-b5e4-279b4501e8a6_story.html (on file with the *Columbia Law Review*) [hereinafter McCoy, Maryland Court Approves New Rules].

151. Babener, supra note 16, at 40–41. The idea is that the factoring company can simply increase their offer—by, say, $100—and then the petition is effectively new. See, e.g., In re Peachtree Settlement Funding, LLC, No. 52020/18, 2018 N.Y. Misc. LEXIS 7922, at *3 (N.Y. Sup. Ct. Aug. 22, 2018) ("The court notes that the petitioner submitted an almost identical application that was denied by this court on May 29, 2018. The only difference in the present application and the former application is a slight increase in the purchase price of the purchased payments . . . .").

152. See, e.g., Czapanskiy, supra note 8, at 26–27 (describing Maryland's former SSPA).

153. McCoy, The Flawed System, supra note 115.

154. See Marcellus, supra note 21, at 546–50 (proposing reforms including requiring that the tort victim actually receive independent professional financial advice and limiting how many petitions a tort victim can initiate).

155. See supra note 22 and accompanying text.

156. See Czapanskiy, supra note 8, at 18–28 (considering and rejecting this standard for lead poisoning victims in favor of a complete prohibition on sales).

157. Ash, supra note 21, at 176 (quoting Hindert & Ulman, supra note 11, at 23).

stances or illegal activity underlying a transaction in an often short, minutes-long hearing. Moreover, monitoring individual transactions fails to capture systemic abusive practices or SSPA violations employed by the factoring industry. Judges evaluating individual transactions, for example, are not in a good position to determine whether a factoring company is regularly coaching tort victims to lie on their petitions[158] or whether a factoring company is funneling potential sellers to the same financial adviser.[159]

Fundamentally, the substantive and procedural problems that have manifested in the petition process are a result of the process not being adversarial. The American adjudication system relies on an adversarial clash where a judge serves as a neutral arbiter between two opposing parties.[160] When state legislatures chose, as a result of lobbying from the factoring industry,[161] to instruct courts to evaluate whether a sale is in the tort victim's best interest without assigning any party to contest the petition, they deviated from the adversarial tradition, resulting in two important consequences that undermine the system's efficacy.

The first consequence is that judges have insufficient information with which to make a judgment. A signature purpose of the adversarial system in American litigation is that the parties—not the judge—are responsible for fact development.[162] Under the SSPA system, in contrast, judges are presented with two parties—of which, some of the time, only one is actually present—who seemingly both want the court to approve the transaction.[163] When judges are told that petitioners want to pay off a credit card debt or buy a house, they have limited ability, resources, and time to scrutinize that explanation.[164] In addition to concealing facts that are relevant to evaluating an individual petition—for example, whether a petitioner actually has a credit card debt—the information deficiency is

158. See supra section II.A.1.

159. See supra section II.A.1.

160. See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282–83 (1976) (describing the traditional conception of a lawsuit in American law as adversarial).

161. See supra section I.C.1 (documenting the history of the current legislative scheme).

162. See Chayes, supra note 160, at 1283.

163. McCoy, Maryland Court Approves New Rules, supra note 150 (quoting a judge's statement that "judges were left with whatever the [company] was telling them, which was next to nothing," and that because "the [settlement recipient often] wasn't there in court," it was not clear "whether the judges . . . even knew what kinds of findings they had to make" (first alteration in original) (internal quotation marks omitted) (quoting Judge Alan M. Wilner)).

164. Scism, supra note 129 (quoting a judge's statement that he "accept[s] these affidavits [from sellers] on their face" because "[i]t is sworn testimony" (internal quotation marks omitted) (quoting Judge James Hawks)).

problematic because it systemically obscures factoring company abuses that are pervasive in the market.[165]

The second consequence is that it forces judges into the unfamiliar and uncomfortable role of operating as paternal guardians. Rather than serving as a neutral arbiter between two clashing parties, judges who reject a petition under the SSPA system must affirmatively decide that an adult tort victim does not know what is in their own best interest.[166] The routine approval of transfer petitions suggests this is not something judges are frequently willing to do. Professor Karen Czapanskiy has speculated that judges who routinely approve petitions are primarily motivated by traditional principles of freedom of contract—that is, they are unwilling to prevent two parties who wish to engage in a transaction from doing so merely because the transaction is inequitable, regardless of background policy considerations.[167] This problem is also exacerbated by the information deficiency problem: When judges burdened with a heavy caseload are told, based on sworn testimony,[168] that a petitioner wants to open a small business, it is difficult, absent more information, to decide that a sale is not in the victim's best interest.

B. *Private Litigation and Public Enforcement Efforts Challenging Factoring Industry Practices*

1. *Structural and Procedural Barriers Faced by Litigants.* — The SSPA petition process does not exist in isolation. As in other market contexts—

165. See supra section II.A.1 (providing examples of abusive and illegal factoring company activity).

166. See supra section I.C.2.

167. See Czapanskiy, supra note 8, at 13 ("[J]udges do not see their role as protective. Instead . . . most judges are convinced that respect for freedom of contract is the correct answer when lead-poisoned recipients of a structured settlement seek to sell their benefits, leading to only *pro forma* examination before a court approves a sale."). This perspective is problematic for two reasons. First, Congress and state legislatures intended judges to adopt a protective role; when judges fail to adopt a protective stance when evaluating petitions, they thwart legislative intent. See supra section I.C. Second, this approach assumes that tort victims are fully aware of the terms of the transaction. In a petition involving an unsophisticated party—particularly those with cognitive deficiencies—that awareness should not be assumed. The statutory scheme is designed to protect unsophisticated parties. Moreover, recent psychology literature has attacked the notion that disclosure meaningfully changes behavior, which Professor Cass Sunstein has argued should be considered by courts when disclosure of information or the provision of warnings is driving judicial decision-making. See Cass R. Sunstein, Ruining Popcorn? The Welfare Effects of Information, 58 J. Risk & Uncertainty 121, 140 (2019) (arguing that "whenever a court is mandating some kind of warning or testing the adequacy of such a warning," such as in the product liability context, "it makes sense to have, at the very least, a rough-and-ready sense of what the warning will achieve").

168. See supra note 164 and accompanying text.

for example, the securities market[169]—a realistic threat of litigation is necessary in the secondary structured settlement market to ensure the market's integrity, deter consumer abuse, and provide relief to victims of abuse. Private litigation challenging factoring company activity, however, has historically been "rare" and largely unsuccessful.[170]

Broadly, there are two reasons for the paucity of litigation challenging the validity of transfer orders. First, claims that could directly target factoring company activity—such as fraud and RICO[171]—are generally fact intensive. Because the market lacks transparency, potential claims and the facts needed to support them have been systemically hidden from plaintiff attorneys. Factoring companies target unsophisticated and vulnerable tort victims, such as childhood lead poisoning victims, who are by definition unaware that they are being preyed upon and are unlikely to independently seek legal relief.[172] Several recent suits against factoring companies[173] were initiated following newspaper articles highlighting abuses against tort victims,[174] which suggests that litigation would be more common if plaintiff attorneys were more familiar with the industry and facts indicating possible abuse were readily accessible.

Second, factoring companies have vigorously opposed suits by raising, with some success, a variety of procedural and jurisdictional defenses. One pervasive barrier to challenging approved transfers, at least in federal court, has been the Rooker–Feldman doctrine, which bars lower federal courts from exercising subject matter jurisdiction over claims that would function as an appeal of a state court judgment.[175] Using the Rooker–

169. See, e.g., John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1536 (2006) (arguing that securities litigation serves an important deterrence function in the securities market).

170. McCoy, The Flawed System, supra note 115 (quoting an industry expert).

171. See, e.g., Dockery v. Heretick, No. 17-4114, 2019 WL 2122988, at *15–18 (E.D. Pa. May 14, 2019) (assessing a RICO claim against defendants who initiated and executed structured settlement transfers).

172. See supra section II.A.1; see also Myriam Gilles, Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket, 65 Emory L.J. 1531, 1536–37 (2016) (discussing obstacles to legal relief faced by economically disadvantaged groups).

173. See *Dockery*, 2019 WL 2122988, at *1; Consumer Prot. Div. v. Linton, No. 2609, 2019 WL 1770524, at *2 (Md. Ct. Spec. App. Apr. 22, 2019) (describing two recent suits initiated against Access Funding, one of which was on behalf of one hundred victims); *Lafontant* Complaint, supra note 123, at 1.

174. McCoy, The Flawed System, supra note 115 (describing lawyer Stephen E. Heretick's business practices, which led to multiple lawsuits against him on behalf of tort victims); McCoy, How Companies Make Millions, supra note 2 (profiling Rose's history of transactions with Access Funding, which eventually led to multiple lawsuits against the company); Scism, supra note 129 (profiling Michael Lafontant's history of transactions with a factoring company).

175. See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005) (holding that the Rooker–Feldman doctrine bars federal courts from exercising subject matter jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-

Feldman doctrine, factoring companies sued by tort victims have consistently argued that any federal court review of their actions would functionally operate as an appeal of the state court's approval of a structured settlement transfer petition.[176]

Two federal courts, however, have recently held that claims against factoring companies alleging injuries that occurred prior to state court approval do not necessarily trigger Rooker–Feldman.[177] In *In re JGWPT Holdings*, the Seventh Circuit held that tort victims could not directly seek to overturn transfer orders in federal court, but the suit's allegations of fraud against J.G. Wentworth—which included being "duped about the effect of . . . anti-assignment clauses" and being "induced to sell contracts for far too little"—involved injuries that were "broader than the transfer orders."[178] Similarly, in *Dockery v. Heretick*, a Pennsylvania district court held that RICO claims against members of the factoring industry did not "concern the state-court orders themselves"[179] but rather "independent torts . . . committed to obtain them."[180] Together, these cases suggest that plaintiffs, at least in some jurisdictions, can avoid Rooker–Feldman jurisdictional issues when claims allege injuries that are "broader" than merely the execution of a transfer order, which will allow federal courts to address the merits of underlying claims.

The Rooker–Feldman argument is representative of a variety of defenses employed by factoring companies that attempt to take advantage of courts' discomfort with revisiting an agreement that was expressly approved by a state court. In one case, for example, a factoring company argued that a plaintiff's claim that they were defrauded should be barred under the equitable doctrine of judicial estoppel,[181] which prevents a party from changing positions in subsequent legal proceedings "simply because

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court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments").

176. See, e.g., Sanders v. JGWPT Holdings, Inc., No. 14 C 9188, 2016 WL 4009941, at *6 (N.D. Ill. July 26, 2016) (holding that Rooker–Feldman prevents federal courts from voiding state court transfer approvals); Hartford Life Ins. Co. v. Solomon, 910 F. Supp. 2d 1075, 1082 (N.D. Ill. 2012) (holding that the court lacks subject matter jurisdiction under Rooker–Feldman over the plaintiff's claim that an insurance company improperly assigned structured settlement payments to a factoring company); Myers v. Gen. Motors Corp., No. 11 C 8703, 2012 WL 3062013, at *3 (N.D. Ill. July 25, 2012) (same); Capela v. J.G. Wentworth, LLC, No. CV09-882, 2009 WL 3128003, at *6 (E.D.N.Y. Sept. 24, 2009) (explaining that Rooker–Feldman would apply to all claims involving the rescission of state court approval, but holding that Rooker–Feldman was inapplicable because the plaintiff's alleged injuries occurred prior to the state court judgment).

177. In re JGWPT Holdings, Inc., No. 15-8005, 2015 U.S. App. LEXIS 23203, at *3 (7th Cir. Apr. 9, 2015); *Dockery*, 2019 WL 2122988, at *10.

178. 2015 U.S. App. LEXIS 23203, at *4.

179. 2019 WL 2122988, at *10.

180. Id. (internal quotation marks omitted) (quoting Williams v. BASF Catalysts LLC, 765 F.3d 306, 315 (3d Cir. 2014)).

181. *JGWPT Holdings*, 2016 WL 4009941, at *10 (rejecting this argument).

his interests have changed."[182] In another case, a district court held that a claim that the factoring company failed to make disclosures required by the federal Truth in Lending Act at the time of the SSPA proceeding was precluded.[183] While procedural and jurisdictional arguments have had mixed success under existing doctrine, it is notable that courts appear to be treating them as if the underlying petition was adversarial. Res judicata doctrine that is properly applied in traditional litigation is not necessarily applicable to nonadversarial SSPA proceedings.[184] Conducting a claim preclusion analysis that focuses on whether a claim could have been made during an SSPA proceeding fails to recognize that arguments are not raised at all in SSPA proceedings.

Factoring companies employ two additional strategies to protect themselves from litigation. First, some SSPA approval orders include release agreements.[185] Second, some companies insert arbitration requirements into transfer agreements.[186] In *Sanders v. JGWPT Holdings, Inc.*, for example, when plaintiffs initially brought fraud and RICO claims against a factoring company, the district court held that it did not have jurisdiction to hear the claims under Rooker–Feldman.[187] After the Seventh Circuit reversed on the Rooker–Feldman issue,[188] the factoring company successfully argued on remand that the claims should be arbitrated.[189] Both release and arbitration agreements serve to prevent courts from protecting victims from abusive factoring company tactics and should be scrutinized by legislatures and courts as a matter of public policy.[190]

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182. In re Cassidy, 892 F.2d 637, 641 (7th Cir. 1990).

183. See Capela v. J.G. Wentworth, LLC, No. CV09-882, 2009 WL 3128003, at *7–11 (E.D.N.Y. Sept. 24, 2009) (holding both that the claim was precluded because the issue of TILA disclosure could have been raised during the petition process and, alternatively, that the transaction was not a "loan" covered by TILA).

184. See, e.g., Yuval Sinai, Reconsidering Res Judicata: A Comparative Perspective, 21 Duke J. Compar. & Int'l L. 353, 354 (2011) (noting some commentators' view that res judicata doctrine is the product of our adversarial system). Additionally, the Second Restatement notes that claim preclusion should not apply when "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory . . . scheme." Restatement (Second) of Judgments § 26(1)(d) (1982).

185. See, e.g., In re Robertson, No. CV-2018-01418, 2018 Okla. Dist. LEXIS 4251, at *4–5 (D. Ct. Okla. Dec. 19, 2018) (releasing the factoring company "from any and all manner of actions and causes of action").

186. See, e.g., Sanders v. JGWPT Holdings, LLC, No. 14 C 9188, 2017 U.S. Dist. LEXIS 158138, at *25 (N.D. Ill. Sept. 27, 2017).

187. 82 F. Supp. 3d 767, 775 (N.D. Ill. 2015).

188. In re JGWPT Holdings, Inc., No. 15-8005, 2015 U.S. App. LEXIS 23203, at *3–5 (7th Cir. Apr. 9, 2015).

189. See *Sanders*, 2017 U.S. Dist. LEXIS 158138, at *25.

190. For many years, factoring companies sought to circumvent SSPA proceedings by effectively conducting the transfer process under arbitration. See, e.g., Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 599 F. Supp. 2d 809, 813 (S.D. Tex. 2008). The Fifth Circuit, however, upheld a nationwide injunction against this tactic. See Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 567 F.3d 754, 755 (5th Cir. 2009) (confirming that "a sham

2. *Public Enforcement Efforts Against the Factoring Industry.* — Historically, there have been few state enforcement efforts against the factoring industry. In 1999, the New York Attorney General investigated J.G. Wentworth and entered into a settlement agreement that required all of the company's New York transactions to receive a discount rate of no more than twenty-five percent.[191] The settlement demonstrates that the enforcement approach can provide some degree of protection for tort victims.

Until recently, however, other states have not pursued this approach. In 2016, spurred by a series of *Washington Post* reports,[192] the Maryland Attorney General filed a lawsuit against Access Funding alleging "unfair and deceptive trade practices" in violation of Maryland consumer protection laws.[193] In 2017, the Minnesota Attorney General filed suit against two factoring companies for pressuring senior citizens and military veterans into selling their pension funds for lump sums.[194] While the Minnesota case focused on pension fund streams rather than tort settlements, it is illustrative of the type of state government enforcement efforts that may deter exploitative business practices.

At the federal level, the Consumer Financial Protection Bureau (CFPB) began to investigate the factoring industry soon after its formation in 2011. In addition to bringing its own suit against Access Funding,[195] the CFPB began to issue Civil Investigative Demands (CIDs) against J.G.

arbitration cannot be used as a device to bring about an otherwise unlawful transfer"). While the injunction only applies to arbitration efforts that seek to directly usurp the state court transfer process, see id., release agreements and arbitration clauses preventing tort victims from litigating claims surrounding the circumstances of the transaction achieve a similar result by preventing courts from protecting tort victims. Nonetheless, the Texas Supreme Court recently upheld an arbitration clause involving a post-transfer dispute. See RSL Funding, LLC v. Newsome, 569 S.W.3d 116, 122–23 (Tex. 2018) ("While the [SSPA] requires a court to approve a settlement-payment transfer, it is silent as to who should decide disputes that arise after such approval . . . . In the face of such silence, we must apply the general rule that arbitrators are competent to decide any type of dispute.").

191. Hindert et al., Structured Settlements, supra note 4, § 16.02[2][a].

192. See, e.g., McCoy, How Companies Make Millions, supra note 2.

193. Complaint at 2, 5, Maryland v. Access Funding, LLC, No. 24C16000524 (Md. Cir. Ct. filed May 10, 2015), https://www.oag.state.md.us/Press/AG_v_Access_Funding_Complaint.pdf [https://perma.cc/4AN7-6PP6]. Soon after the complaint was filed, Access Funding negotiated a settlement with the victims in a concurrent private class action that would pay victims just four cents for every dollar of financial harm they suffered. See Consumer Prot. Div. v. Linton, No. 2609, 2019 WL 1770524, at *1 (Md. Ct. Spec. App. Apr. 22, 2019). The settlement required victims to transfer back to Access Funding any recoveries that were awarded to them under any governmental action. See id. at *7. The state successfully intervened to object, and further proceedings are pending. Linton v. Consumer Prot. Div., 225 A.3d 456 (Md. Ct. App. 2020).

194. Complaint at 1–2, Minnesota v. Future Income Payments, LLC, No. 27-CV-17-12579 (Minn. Dist. Ct. filed Aug. 16, 2017), https://www.courthousenews.com/wp-content/uploads/2017/08/MinnFIP.pdf [https://perma.cc/YG8V-SMEJ].

195. See Consumer Fin. Prot. Bureau v. Access Funding, LLC, 270 F. Supp. 3d 831, 835 (D. Md. 2017) (alleging that Access Funding violated various provisions of the Consumer Financial Protection Act).

Wentworth beginning in 2014.[196] After initially complying with two CIDs,[197] J.G. Wentworth refused to comply with a third CID that was expressly issued to determine whether the company or other members of the factoring industry were violating the Consumer Financial Protection Act (CFPA).[198]

J.G. Wentworth's principal argument was that the CFPB does not have the authority to investigate the factoring industry.[199] The CFPA gives the CFPB authority to investigate "any person that engages in offering or providing a consumer financial product or service,"[200] which includes, most relevantly, companies that extend credit, service loans, or provide "financial advisory services."[201] The company argued that purchasing the rights to a structured settlement is not the same as servicing a loan or extending credit.[202]

In response to J.G. Wentworth's refusal to comply, the CFPB initially filed a petition to enforce the CID in a federal district court,[203] but subsequently dismissed the CID and its petition to enforce it before the district court issued its ruling.[204] It is unclear why the CFPB chose to withdraw its petition. Regardless, whether the CFPB can exercise jurisdiction over settlement factoring activity—and therefore whether federal enforcement

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196. See Decision and Order on Petition by J.G. Wentworth, LLC to Modify or Set Aside Investigative Demand at 1 n.1, CFPB No. 2015-MISC-J.G. Wentworth, LLC-0001 (Feb. 11. 2016), https://files.consumerfinance.gov/f/201602_cfpb_decision-and-order-on-petition-by-jg-wentworth-llc-to-modify-or-set-aside-civil-investigative-demand.pdf [https://perma.cc/4CM7-B6SC] (providing the history of CFPB actions against J.G. Wentworth).

197. Id.

198. Id. at 1. The CFPA prohibits "covered person[s]" from engaging in "unfair, deceptive, or abusive acts." See 12 U.S.C. § 5531 (2018).

199. See Decision and Order on Petition by J.G. Wentworth, LLC to Modify or Set Aside Investigative Demand, supra note 196, at 2.

200. See 12 U.S.C. § 5481(6)(A) (defining what constitutes a "covered person" for purposes of the CFPA); id. § 5531(a) (authorizing the CFPB to investigate covered persons).

201. See 12 U.S.C. § 5481(15)(A) (defining "financial product or service").

202. See Petition to Set Aside Civil Investigative Demand, J.G. Wentworth, LLC at 8–9, CFPB No. 2015-MISC-J.G. Wentworth, LLC-0001 (Oct. 2, 2015), https://files.consumerfinance.gov/f/201602_cfpb_petition-to-set-aside-civil-investigative-demand-jg-wentworth-llc.pdf [https://perma.cc/6V7N-ACGS].

203. See Memorandum in Support of Petition to Enforce Civil Investigative Demand at 1, Consumer Fin. Prot. Bureau v. J.G. Wentworth, LLC, No. 16-cv-02773-CDJ (E.D. Pa. filed June 7, 2016), https://buckleyfirm.com/sites/default/files/Buckley%20Sandler%20InfoBytes%20-%20CFPB%20v.%20J.G.%20Wentworth,%20LLC%20%20Memo%20in%20Support%20of%20Petition%20to%20Enforce%20CID%202016.06.07.pdf [https://perma.cc/HW7G-U25F].

204. See Notice of Consumer Financial Protection Bureau's Withdrawal of the Civil Investigative Demand Issued to J.G. Wentworth at 1, *J.G. Wentworth, LLC*, https://buckleyfirm.com/sites/default/files/Buckley%20Sandler%20InfoBytes%20-%20CFPB%20v.%20J.G.%20Wentworth%2C%20LLC%20-%20Notice%20of%20CFPB%27s%20Withdrawal%20of%20CID%202017.06.05.pdf [https://perma.cc/E4PY-6VKE].

can effectively deter consumer abuse in the secondary structured settlement market—remains an open question.[205]

III. ENFORCING AND REFORMING STRUCTURED SETTLEMENT PROTECTION ACTS

Litigation challenging the validity of transfer orders has understandably focused on factoring company activity.[206] This Part argues that attention should shift to another actor in the structured settlement ecosystem: the insurance companies that agree to dispense payments to the tort victim.[207] These companies, which are statutorily named interested parties that participate in every structured settlement petition, must exercise discretion when they choose to enforce[208] or waive[209] the anti-assignment clauses that accompany structured settlement agreements.[210] As Part I describes, factoring companies work with insurance companies prior to petitioning a court to approve a transfer. Although the insurance companies occasionally contest petitions when the transaction terms are especially egregious,[211] they almost always agree, after receiving an "administrative fee,"[212] to waive the anti-assignment clause and assign the payments to the factoring company upon court approval.[213] In other

205. The CFPB can argue that settlement factoring is equivalent to extending credit or, alternatively, that factoring companies are providing financial advisory services in states with SSPAs that require factoring companies to refer tort victims to independent financial advisers. See 12 U.S.C. § 5481(15)(A) (defining "financial product or service" to include those categories). Congress could, of course, clarify any ambiguity by amending the definition of "financial product" in the CFPA to include structured settlement transfers. Id.

206. See supra section II.B.1.

207. This Note refers to these companies as "insurance companies," but they are often referred to as "annuity issuers" or "annuity obligors." See, e.g., Hindert et al., Structured Settlements, supra note 4, § 8.03 (referring to the entity that distributes payments to the tort victim as the "annuity issuer").

208. See, e.g., Johnson v. J.G. Wentworth Originations, LLC, 391 P.3d 865, 869–70 (Or. Ct. App. 2017) (holding that the insurance company "was entitled to enforce the anti-assignment clause in the structured settlement agreement, barring the transfer").

209. See, e.g., id. at 869 (noting that "a contractual anti-assignment clause will not bar court-approved transfers of structured settlement rights[] if no interested party objects to the transfer" (citing 321 Henderson Receivables Origination LLC v. Sioteco, 93 Cal. Rptr. 3d 321 (Ct. App. 2009))); *Cordero* Complaint, supra note 77, at 16 (noting that Transamerica waived the anti-assignment clause).

210. See supra note 50 and accompanying text.

211. See, e.g., In re Peachtree Settlement Funding, LLC, No. 1376-2017 CV, 2018 BL 152644, at *2–3 (Pa. Ct. Com. Pl. Jan. 2, 2018) (noting that Berkshire Hathaway objected to the transfer on the grounds that the tort victim had agreed to settle a "mere five months ago" and the victim was being offered a "sharp" discount rate).

212. See supra note 79 and accompanying text.

213. See Hindert, 2015 Estimates, supra note 10 (estimating that in 2012, insurance companies contested fewer than 120 out of 12,000 transfer petitions nationwide—that is, just one percent of the time). Insurance companies, however, have recently begun to object more frequently. See infra section III.A.2.

words, insurance companies are facilitating and profiting from these transactions because, as Transamerica's former Assistant General Counsel has acknowledged, they have "no reason" not to.[214]

Section III.A argues that, because the anti-assignment clauses exist for the benefit of the tort victim, courts should recognize that tort victims are direct or third-party beneficiaries of the clause. Consequently, when insurance companies choose to waive the clause when they are aware, or should be aware, that a transaction is inequitable, they are breaching their contractual duty of good faith.[215] Insurance companies are fully capable of evaluating—and, indeed, have incentives to evaluate[216]—the merit of petitions and potentially contest them.[217] Berkshire Hathaway, for example, regularly contests petitions and offers tort victims superior terms when a victim insists on selling.[218] In addition to serving as a cognizable claim under generally accepted contract law principles, the recognition of a contractual duty would have important ex ante effects on the secondary structured settlement market that would address fundamental substantive and procedural flaws in the petition process.

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214. See Deposition of Andrew Martin, supra note 79, at 86.

215. See infra notes 235–238 and accompanying text. Alternatively, tort victims can argue they are owed a fiduciary duty under the anti-assignment clause. One court, however, recently rejected this claim. See Cordero v. Transamerica Annuity Serv. Corp., No. 18-cv-21665, 2020 WL 1672501, at *6 (S.D. Fla. Apr. 6, 2020) (holding that no fiduciary duty exists).

216. The insurance industry has always expressed deep skepticism with settlement factoring and (understandably) worries that its existence threatens its profits by making structured settlements less attractive to plaintiffs. See Patrick Hindert, The 2018 Structured Settlement Production Report—Part 4, Indep. Life (Feb. 23, 2019), https://www.independent.life/blog/2018-structured-settlement-production-report-part-4-0 [https://perma.cc/J6P5-L77B] [hereinafter Hindert, Structured Settlement Report] (describing the history of the insurance industry's uneasy relationship with factoring companies in the secondary structured settlement market and explaining that "[s]econdary market bad business practices . . . continue with some resulting negative impact on primary market sales").

217. See, e.g., Independent Life Payee Protection Policy, Indep. Life, https://www.independent.life/sites/default/files/ilic_-ppp_3.1.19.pdf [https://perma.cc/A854-872M] (last visited Jan. 8, 2020) (announcing Independent Life's policy that it "will review the terms of the proposed transfer and will object to" transfers involving high discount rates, minors who have not received financial advice, and tort victims with cognitive impairments).

218. See John Darer, Berkshire Hathaway Structured Settlements Expands Hardship Exchange Program, Structured Settlements 4Real Blog (Feb. 13, 2018), https://structuredsettlements.typepad.com/structured_settlements_4r/2018/02/berkshire-hathaway-structured-settlements-expands-hardship-exchange-program.html [https://perma.cc/HWH3-5TSH] [hereinafter Darer, Berkshire Hathaway Program] (explaining the scope of Berkshire Hathaway's "Hardship Exchange Program" and noting that Berkshire offers to purchase its clients' payment streams at a 6.5% discount rate when they insist on selling); see also Protecting a Great Decision, Berkshire Hathaway Life Ins. Co. of Neb., https://structuredsettlements.typepad.com/files/berkshire-hathaway-life-hep-notice-to-payees-2-2018.pdf [https://perma.cc/GBK5-N4FE] (last visited Aug. 19, 2020) (issuing a warning letter to tort victims who receive payments from Berkshire Hathaway about factoring company tactics and noting that Berkshire may be able to offer a "better alternative" to clients who wish to sell).

Section III.B offers solutions to the price problem—that is, the reality that factoring companies generally offer tort victims substantively unfair deals for their settlements.[219] Courts typically passively evaluate the petition's terms rather than actively ensuring, in the instances in which a sale is justified, that the tort victim received a fair offer.[220] Instead of this passive approach, courts should take affirmative steps during the petition process to ensure that the tort victim receives a fair offer by, for example, directing the victim to alternative market participants. In addition to providing tort victims with better terms, increasing the transparency of the market would disincentivize aggressive factoring tactics and systemically protect victims from abuse.

A. *Insurance Companies' Contractual Duty to Evaluate Transfer Petitions*

1. *Tort Victims as Direct or Third-Party Beneficiaries.* — As Section I.A explains, a structured settlement agreement is a contract between a tort victim, a defendant, and an insurer.[221] The insurance company agrees to assume the defendant's liability and administer payments to the plaintiff on behalf of the defendant.[222] To receive the tax subsidy that makes structured settlements attractive to all three of these parties,[223] the structured settlement agreement must comply with Section 130 of the tax code, which has been interpreted to require an anti-assignment clause.[224] The insurance company's motivation to include the clause in the structured settlement agreement is to receive a lucrative tax benefit, but the *purpose* of the anti-assignment clause is to benefit the tort victim, who is guaranteed long-term economic security by the inclusion of the clause.[225]

In dicta, courts have regularly described tort victims as the intended beneficiaries of structured settlement agreements.[226] The Ninth Circuit, for example, recognized that "the tort defendants . . . do the buying" and the "tort plaintiffs . . . are the beneficiaries."[227] And in *Westrope v. Ringler*

219. See supra section I.B.3.

220. See supra section II.A.2.

221. See supra note 38 and accompanying text.

222. See supra note 38 and accompanying text.

223. See supra note 38 and accompanying text.

224. See supra note 50 and accompanying text.

225. See supra section I.A; see also Westrope v. Ringler Assocs. Inc., No. 3:14–CV–00604–ST, 2015 WL 13679859, at *4 (D. Or. Feb. 20, 2015) ("[T]he annuity . . . provide[s] insurance intended to benefit Plaintiffs with secure annuity payments for life.").

226. See, e.g., Legal Econ. Evaluations, Inc. v. Metro. Life Ins. Co., 39 F.3d 951, 952 (9th Cir. 1994) ("A structured settlement takes place when a tort defendant or its liability carrier purchases an annuity, with the tort plaintiff as the beneficiary, to settle a civil lawsuit."); Settlement Cap. Corp. v. BHG Structured Settlements, Inc., 319 F. Supp. 2d 729, 731 (N.D. Tex. 2004) ("Structured settlements involve agreements to make future payments in exchange for a release of liability, whereby a tort defendant or its liability carrier purchases an annuity from a life insurance company, with the tort plaintiff as the beneficiary.").

227. *Legal Econ. Evaluations, Inc.*, 39 F.3d at 955.

Associates, an Oregon district court expressly held that tort victims were third-party beneficiaries of a structured settlement agreement.[228]

This recognition matches the articulation of who qualifies as a third-party beneficiary under the Restatement (Second) of Contracts, which defines a third-party beneficiary as any person who acquires a right by virtue of an intended promise.[229] For example, in New York, which follows the Restatement,[230] courts recognize a third party's right to enforce a contract in either of two circumstances: first, if "no one other than the third party can recover if the promisor breaches the contract," or, second, if "the language otherwise evidences an intent to permit enforcement by the third party,"[231] which can be satisfied by "showing that the contracting parties intended to benefit the [third party]."[232] Tort victims meet either prong of this test because no one other than the tort victim is injured by the breach of the anti-assignment clause and, as described above, the purpose of the clause is to benefit the tort victim.[233]

Moreover, the Restatement recognizes third-party contractual rights when "an overriding policy, which may be embodied in a statute"—such as the SSPA legislative scheme—"requires recognition of such a right."[234] As Part I describes, the history of the SSPA legislative scheme makes abundantly clear that the structured settlement mechanism was designed to benefit the tort victim.

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228. *Westrope*, 2015 WL 13679859, at *3–4 (finding that the brokers who arranged the annuity purchase from the insurance company "owed Plaintiffs a legal duty of care as third-party beneficiaries of the contracts between" the defendants and the insurance companies and that the plaintiffs are "third-party beneficiaries to all of [the brokers'] . . . contracts with the [companies]").

229. See Restatement (Second) of Contracts § 302 (1981). The agreement may be documented in a form in which the anti-assignment clause is agreed to by the tort victim, in which case the right is direct and a third-party beneficiary analysis is unnecessary. Alternatively, if settlement terms are reflected in a second agreement between a defendant and insurer, it seems plain that the tort victim is the third-party beneficiary of that second agreement.

230. See E.G.L. Gem Lab Ltd. v. Gem Quality Inst., Inc., 90 F. Supp. 2d 277, 302 (S.D.N.Y. 2000) ("New York follows the Restatement formulation in determining when contracting parties intend to benefit a third party and thus to give that third party the right to enforce the contract.").

231. Id. at 299 (internal quotation marks omitted) (quoting Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 485 N.E.2d 208, 212 (N.Y. 1985)).

232. Id.; see also *Fourth Ocean*, 485 N.E.2d at 212 (interpreting the Restatement to create this test). Other states do not necessarily consider the first prong of the test but instead focus the analysis on the intent of the parties. See, e.g., Burgoyne v. Calegari & Morris, No. A146746, 2018 WL 1312392, at *6 (Cal. Ct. App. Mar. 14, 2018) (explaining that, in California, "[t]he test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract" (internal quotation marks omitted) (quoting Souza v. Westlands Water Dist., 38 Cal. Rptr. 3d 78, 88 (Ct. App. 2006))).

233. See supra note 225 and accompanying text.

234. See Restatement (Second) of Contracts § 302 cmt. d.

The duty of good faith and fair dealing that is implied in every contract[235] generally extends to third-party beneficiaries.[236] Courts should recognize that insurance companies violate this duty when they are paid a substantial administrative fee[237] by a factoring company to waive the anti-assignment clause—that, again, exists for the benefit of the tort victim and was only included by the insurance company so that it could receive a tax benefit—to facilitate a transaction that they are aware, or should be aware, is inequitable.

Insurance companies will inevitably argue that they should not have the burden of participating in the SSPA transfer process. But these companies are participating in a multibillion-dollar market fueled by massive tax subsidies. Under a statutory scheme drafted and promoted by them, they are "interested parties" that are served and provided all papers in the SSPA proceeding with the attendant obligations to the court. Congress and forty-nine states certainly contemplated, and the insurance companies appear to have accepted, that the companies should have a role beyond serving as a mailbox. Their participation is even potentially cost free in that they can adjust the transfer fees charged to the factoring companies to address any anticipated expense. It accordingly does not seem unreasonable to recognize that the life insurance companies have some obligation to meaningfully consider the merits of an assignment in the context of an SSPA proceeding.

2. *Insurance Company Obligations.* — Generally, a party's specific contractual good faith duties depend on the circumstances.[238] Four of the nine

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235. Id. § 205.

236. See, e.g., Lumpkins v. Balboa Ins. Co., 812 F. Supp. 2d 1280, 1282 (N.D. Okla. 2011) ("A third-party beneficiary of an insurance contract may also sue for breach of the duty of good faith and fair dealing inherent in insurance contracts."); Baker v. Goldman Sachs & Co., 656 F. Supp. 2d 226, 236 (D. Mass. 2009) (applying New York law and holding that "[s]ince the Court has found that Janet Baker has sufficiently alleged that she was a third-party beneficiary of the contract between Dragon and Goldman, she may proceed with her claim for breach of the implied covenant of good faith and fair dealing"); Rymes Heating Oils, Inc. v. Springfield Terminal Ry., Inc., 265 F. Supp. 2d 147, 151 (D. Mass. 2003) (similarly explaining that a third-party beneficiary is owed a duty of good faith under Massachusetts law).

237. See supra note 79 and accompanying text.

238. See, e.g., Dotcom Assocs. I, LLC v. United States, 112 Fed. Cl. 594, 599 (2013) ("[T]he specific duties of parties under the implied covenant of good faith and fair dealing depend on the particular circumstances of the case."). Only one court has considered whether an insurance company should have had a good faith obligation to object to a transfer petition. See Cordero v. Transamerica Annuity Serv. Corp., No. 18-cv-21665, 2020 WL 1672501, at *5 (S.D. Fla. Apr. 6, 2020). The court held that, under New York law, Transamerica had no good faith duty to object on behalf of the tort victim "because the anti-assignment provision did not require Transamerica to exercise its discretion for Cordero's benefit; it exists to protect Transamerica." Id.

This holding is vulnerable to criticism. First, it ignores the history of the legislative scheme, which makes clear the congressional intent that the anti-assignment clause benefits the tort victim. See supra sections I.A–.C (providing the history of structured settlements and explaining the purpose of the anti-assignment clause). Second, and relatedly, the court major players in the market[239] have already established transfer petition objection policies that both illustrate how these duties could manifest and demonstrate that insurance companies are fully capable of investigating whether a tort victim is being abused.[240] Berkshire Hathaway—the largest company in the primary market[241]—actively discourages tort victims from factoring and formally objects to sales unless the victim is experiencing financial hardship.[242] When Berkshire objects, it provides the court with information relevant to the best interest determination, such as whether

assumed that the anti-assignment clause is *only* for the benefit of the insurance company. While there is abundant case law correctly holding that only the insurance company can waive the anti-assignment clause, see supra note 53, that case law has apparently never addressed the argument that the clause also exists for the benefit of the tort victim. Moreover, while much of this case law relies on the general Restatement principle that "[a] contract term prohibiting assignment of rights under the contract . . . is for the benefit of the obligor," the Restatement also states that the rule is inapplicable when "a different intention is manifested," as it is here by the legislative scheme. See Restatement (Second) of Contracts § 322(2). Third, because the anti-assignment clause plainly exists for the benefit of the tort victim, the decision ignores established New York law that "[a] party cannot unilaterally waive a contract provision that benefits both sides." Citadel Equity Fund Ltd. v. Aquila, Inc., 168 F. App'x 474, 476 (2d Cir. 2006) (citing Praver v. Remsen Assocs., 150 A.D.2d 540, 541 (N.Y. App. Div. 1989)).

The court also rejected the plaintiff's good faith and fair dealing claim because "the covenant of good faith and fair dealing . . . does not permit imposing additional obligations on parties." *Cordero*, 2020 WL 1672501, at *4. But, for the reasons described in section III.A, these obligations already exist.

The plaintiff—a childhood lead poisoning victim who sold his settlement to a factoring company—made some of these arguments in opposition to the defendant's motion to dismiss in response to the plaintiff's motion to amend the complaint. See Response in Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint at 8–15, *Cordero*, 2020 WL 1672501 (S.D. Fla. filed June 29, 2020), 2020 WL 4746251. The motion is currently pending.

239. See Hindert et al., Structured Settlements, supra note 4, § 1.02[5][a].

240. See John Darer, Independent Life Structured Settlement Payee Protection, 4Structures (Feb. 23, 2019), https://www.4structures.com/independent-life-structured-settlement-payee-protection [https://perma.cc/PP98-AJK9] (describing Independent Life's policy and noting that it "builds on the leadership that Allstate, AIG/American General and Berkshire Hathaway have already started in this area"). These companies have financial incentives to prevent abusive transactions. See supra text accompanying note 216; see also Hindert, Structured Settlement Report, supra note 216 ("In retrospect, some additional (or alternative) strategy was/is needed by [insurance companies] to protect [their] payees, reduce secondary market bad business practices and improve sales by focusing primary market resources on more positive objectives than fighting with the secondary market.").

241. See Hindert et al., Structured Settlements, supra note 4, § 1.02[5][a] (noting that the four largest producing companies for structured settlement annuity sales in 2018 were Berkshire Hathaway, Pacific Life, MetLife, and Prudential Life, in that order).

242. See supra note 218 and accompanying text; see also Deposition of Karen Syma Czapanskiy at 28–29, *Cordero*, 2020 WL 1672501 (on file with the *Columbia Law Review*) ("Berkshire Hathaway's practice is to reach out to [tort victims] and to offer them assistance in determining whether the deal is a good one for them . . . and if all else fails and the payee insists on going forward . . . offer a deal at a lower discount rate.").

the tort victim filed previous petitions.[243] When a victim insists on selling, Berkshire offers them a relatively low 6.5% discount rate.[244] Similarly, Independent Life has committed to objecting to transfer petitions when the transaction involves, among other things, a high discount rate or a cognitively impaired tort victim.[245] MetLife also regularly objects to petitions and effectively operates as an adversary during the petition process by arguing that the transaction is not in the best interest of the seller.[246]

Insurance companies could therefore satisfy their contractual obligations by engaging in an evaluation process that some of the leaders in the market have already begun to perform.[247] These obligations plausibly could include evaluating the fairness of transaction terms; ensuring that a tort victim is fully aware of the terms of the transaction and capable of understanding those terms; encouraging the tort victim not to sell; assisting the tort victim with receiving alternative offers; potentially offering the tort victim superior terms; and, in the event the sale is not in the tort victim's best interest, formally objecting on those grounds and providing relevant information to the court.

A potential objection to the scope of these duties is that the threat of liability will result in the insurance company objecting in all cases, even when a sale is justified. The Michigan legislature responded to this problem directly by instructing courts to allow a sale over the insurance company's objection when the tort victim will suffer "imminent financial hardship."[248] Other legislatures could adopt this provision. Even without legislative guidance, however, courts could find that the insurance company has a duty to waive the clause when their investigation suggests a sale is justified. While courts generally do not require parties to take action that is inconsistent with the express terms of a contract, the anti-assignment clause is ambiguous to the extent that the tax code both requires the anti-assignment clause to satisfy Section 130 while permitting

243. Deposition of Karen Syma Czapanskiy, supra note 242, at 28–30.

244. See Darer, Berkshire Hathaway Program, supra note 218; see also DRB Capital, LLC v. T.M., No. FSTCV196040976S, 2019 BL 272787, at *1 (Conn. Super. Ct. June 20, 2019) (providing an example of Berkshire offering the tort victim superior terms).

245. See Independent Life Payee Protection Policy, supra note 217.

246. See Johnson v. J.G. Wentworth Originations, LLC, 391 P.3d 865, 869–70 (Or. Ct. App. 2017) (providing an example of a Met Tower objection); Deposition of Karen Syma Czapanskiy, supra note 242, at 29–30 (describing MetLife's practice of objecting to petitions).

247. In other legal contexts, courts recognize good faith obligations that are satisfied by engaging in reasonable procedures. See, e.g., Stone ex rel. AmSouth Bancorp. v. Ritter, 911 A.2d 362, 373 (Del. 2006) (holding that a corporation satisfied its good faith duty to shareholders by ensuring a "reasonable information and reporting system" existed for assuring compliance with federal regulations).

248. Mich. Comp. Laws Ann. § 691.1304 (West 2006) (instructing courts that, if "the structured settlement obligor objects to the transfer based on the restriction against assignment," a sale should be allowed if the tort victim will suffer "imminent financial hardship" and it "will not render the [tort victim] unable to pay current or future normal living expenses").

assignments through Section 5891,[249] which suggests that the duty to waive or enforce the clause should vary depending on the circumstances. Alternatively, courts could hold that the clause is unenforceable when a sale is justified because it conflicts with the goals of the legislative scheme.

3. *Ex Ante Effects of Finding a Contractual Duty.* — Recognizing that insurance companies have a contractual duty to the tort victim is thus both legally cognizable and administrable. It would also have critical ex ante effects that would address substantive and procedural flaws in the petition process and therefore serve to effectuate the intent underlying the current legislative scheme.

First, in the event the insurance company convinces a tort victim not to sell, it would prevent petitions that lack merit from ever reaching the court, conserving judicial time and resources that could be spent more carefully evaluating other petitions. Second, in the event the insurance company objects to the petition, it would provide an adverse party during the petition process. Adversarial proceedings would, in turn, provide the court with information relevant to determining whether the sale is actually in the best interest of the seller and thus solve the information deficiency problem that currently plagues the petition process.[250] Unlike courts, the insurance companies that distribute payments demonstrably have the resources, competence, and sophistication to evaluate whether a factoring company's offer is substantively fair and whether the transaction is in the tort victim's best interest. Importantly, the mere existence of the life insurance company as an engaged participant could cause factoring companies to propose more equitable terms in order to avoid insurance company opposition.

Third, recognizing a contractual duty would provide tort victims with a straightforward cause of action that would present a realistic threat of litigation. Provided that state courts do not facilitate factoring company abuse by agreeing to seal cases,[251] a public record of an inequitable transaction, or a series of them, would suggest to plaintiff attorneys that litigation against an insurance company might be fruitful. Moreover, the claim allows victims to avoid the procedural and jurisdictional hurdles that have accompanied litigation against factoring companies.[252] In the event the insurance company does not exercise its good faith obligations, it would provide a potential remedy to victims.

Together, these effects would serve to "protect the recipients of long-term structured settlements from being victimized by companies

249. See supra sections I.A–.C.

250. See, e.g., In re Peachtree Settlement Funding, LLC, No. 1376-2017 CV, 2018 BL 152644, at *2–3 (Pa. Ct. Com. Pl. Jan. 2, 2018) (noting that Berkshire Hathaway provided the court with information including that the tort victim had agreed to the structured settlement a "mere five months ago" and the victim was being offered an inequitable discount rate).

251. See supra note 127 and accompanying text.

252. For a discussion of these hurdles, see supra section II.B.1.

aggressively seeking the acquisition of their rights" in accordance with the legislative intent of SSPAs.[253]

B. *Market Solutions*

As Part II describes, the factoring industry thrives on aggressive advertising and telemarketing efforts. Once a factoring company secures a client, it zealously conceals the tort victim's identity by, for example, encouraging victims to request that courts redact their name from the public record[254] and suing competitors for tortious interference.[255] These practices allow factoring companies to keep discount rates high. There is no justification for states and courts to permit—or actively encourage[256]—the market to operate this way. Tort victims unsurprisingly receive better offers when there is competition.[257] Moreover, there is less incentive for a factoring company to aggressively seek out victims when the profit may go to someone else. The more transparent the market, the more it should function in a way that aligns with the SSPA system's goal of having only the tort victims who need to sell their settlement—and therefore independently seek to sell it, rather than being tricked or coerced to sell it—ultimately engage in a transaction.

One solution is to require insurance companies, based on the contractual analysis described above, to approach factoring companies on behalf of the tort victim and secure better terms when a sale is inevitable.[258] Alternatively, insurance companies could adopt Berkshire Hathaway's practice of directly offering better terms.[259] It is not necessary, however, for courts to work with the insurance companies; courts can funnel tort victims to market participants themselves. The DOJ currently maintains a list of qualified structured settlement brokers.[260] These brokers help

253. In re J.G. Wentworth Originations, LLC, No. 52903/2018, 2018 WL 6332853, at *1 (N.Y. Sup. Ct. Dec. 4, 2018) (citation omitted).

254. See supra note 128 and accompanying text.

255. See, e.g., Settlement Funding LLC v. RSL Funding, LLC, 3 F. Supp. 3d 590, 606 (S.D. Tex. 2014).

256. See supra note 128 and accompanying text.

257. See, e.g., *Settlement Funding LLC*, 3 F. Supp. 3d at 599 (noting that RSL's "competing bid was a 'substantial amount' more than what Settlement Funding was offering" (quoting Nicole Parenti's deposition)); In re Advance Funding LLC, No. EFCA2016000055, 2016 WL 1705643, at *1 (N.Y. Sup. Ct. Apr. 26, 2016) (quoting a tort victim's statement that, after first initiating a petition with Advance Funding, she called J.G. Wentworth and received a better offer, which led to Advance Funding substantially increasing its offer twice and ultimately resulting in an offered discount rate of about six percent).

258. See supra section III.A.

259. See supra note 218 and accompanying text.

260. See Memorandum from James G. Touhey, Jr., Dir., Torts Branch, Civ. Div., to All U.S. Att'ys (Sept. 2, 2020), https://www.justice.gov/civil/page/file/1227971/download (on file with the *Columbia Law Review*) (providing a list of dozens of qualified brokers); Structured Settlement Brokers, DOJ, https://www.justice.gov/civil/structured-settlementbrokers [https://perma.cc/QL5D-NHHV] (last visited Aug. 19, 2020) (providing links with relevant

defendants arrange structured settlement agreements and are familiar with the market.[261] Courts could direct tort victims who are petitioning for a transaction with unreasonable terms to these brokers, who in turn could solicit competing bids from factoring companies on behalf of the tort victim. Because the broker would charge a commission, they would have an incentive to find an alternative buyer.

Another solution is to create a state-managed auction through which tort victims can publicly solicit bids for a payment stream. For example, state and local governments currently manage auctions for tax deed sales[262] and mortgage foreclosures.[263] A significant benefit of this solution is that it would encourage additional investors to enter the market by eliminating the cost of entry—that is, factoring companies are currently the only market participants because soliciting tort victims requires heavy advertising costs.[264] The investment itself—a virtually guaranteed income stream—is attractive. Indeed, the factoring company business model currently involves selling acquired payment streams to investors.[265] Supplementing the existing legislative scheme with a public auction would eliminate the factoring company intermediary and result in tort victims receiving better terms. Moreover, this approach would entirely eliminate the incentive to aggressively seek out victims.

CONCLUSION

Congress and forty-nine state legislatures have expressed the need to protect tort victims from factoring company abuse in the secondary structured settlement market. The legislative scheme they adopted, however,

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information, including the broker list). Some experts have criticized the DOJ for its management of the broker list. See Patrick Hindert, The Gargan Case: Is the U.S. Government a Victim or a Perpetrator?, Indep. Life (June 22, 2020), https://blog.independent.life/chronicle/is-the-u.s.-government-a-victim-or-a-perpetrator [https://perma.cc/YCS6-8FXT] (arguing that the U.S. government bears some responsibility for an embezzlement scheme perpetrated by a settlement broker on the list).

261. See 28 C.F.R. § 50.24 (2019) (listing the qualifications necessary to be included as a listed broker, including a requirement that the "broker must have had substantial experience in each of the past three years in providing structured settlement brokerage services to or on behalf of defendants").

262. See, e.g., Fla. Stat. § 197.542 (2019) (creating a public auction, including an online sale process, for tax deeds); Tax Deeds/Auctions, Clerk of the Ct. Brevard Cnty., Fla., http://brevardclerk.us/tax-deeds [https://perma.cc/CU2B-T3LG] (last visited Aug. 19, 2020) (providing an example of an online tax deed sale); see also Frank S. Alexander, Tax Liens, Tax Sales, and Due Process, 75 Ind. L.J. 747, 774 (2000) ("The public sale of a tax lien, or sale of the property itself, is conducted in three different ways across the country. The predominant approach is to offer the property at public auction to the highest bidder . . . .").

263. See Grant S. Nelson & Dale A. Whitman, Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act, 53 Duke L.J. 1399, 1416 (2004) (describing foreclosure auctions).

264. See Hindert et al., Structured Settlements, supra note 4, § 16.02.

265. See supra note 48 and accompanying text.

has patently failed to protect injured victims, with tragic human costs for these victims and their dependents. To correct the substantive and procedural flaws that prevent the system from functioning, courts should require, based on generally accepted contract law principles and current industry practices, that insurance companies that dispense settlement payments to victims screen petitions and formally object when a sale is not in the tort victim's best interest. Additionally, courts and state legislatures should take steps to increase the transparency of the secondary structured settlement market, which will help ensure that victims receive fair terms when a sale is justified.