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# Selling Structured Settlements: The Uncertain Effect of Anti- Assignment Clauses

Gregory Scott Crespi\*

## I. INTRODUCTION

It is relatively common for tort claims to be resolved through settlements under which compensation to the injured plaintiff is paid out over time in installments, rather than in a single lump sum.<sup>1</sup> Such settlements are generally termed "structured settlements"<sup>2</sup> and, for a variety of reasons, can be advantageous to both the plaintiff and the defendant.<sup>3</sup>

It has become an increasingly widespread practice in recent years, however, for plaintiffs who enter into structured settlements to later attempt to assign some or all of their deferred payment rights to a finance company in exchange for a lump sum.<sup>4</sup> In effect, those plaintiffs seek to undo the deferred payment feature of their settlements, and often such plaintiffs are willing to do this at a rate that is substantially discounted from the face value of the payment rights.<sup>5</sup> A number of

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1. Marcus L. Plant, *Ruminations on Tort Law: A Symposium in Honor of Max Malone: Periodic Payment of Damages for Personal Injury*, 44 LA. L. REV. 1327, 1327 (1984).

2. See, e.g., Allan G. King, Ph.D., *The Economics of Structured Settlements*, 45 TEX. B.J. 301 (1982); T.V. Mangelsdorf, *Structured Settlements in Review: The Fundamental Concept*, 4 AM. J. TRIAL ADVOC. 559 (1981); Jay M. Zitter, J.D., Annotation, *Propriety and Effect of "Structured Settlements" Whereby Damages are Paid in Installments Over a Period of Time, and Attorneys' Fees Arrangements in Relation Thereto*, 31 A.L.R.4th 95 (1984); Ralph R. Frasca & Thomas J. Brady, *Structuring Settlements: Who Wins?*, TRIAL, Aug. 1982, at 40; James C. Moore, *Structured Settlements: Considerations for Defense Counsel*, 17 FORUM 1335 (1982).

3. Structured settlements can provide tax advantages to both the plaintiff and the defendant, as well as sparing the defendant the need to come up with an immediate large lump sum payment and providing some protection for the plaintiff against dissipation of the award. For an extensive discussion of the characteristics of structured settlements and of their tax ramifications, see generally Leo Andrada, *Structured Settlements: The Assignability Problem*, 9 S. CAL. INTERDISC. L. J. 465 (2000).

4. Philip H. Corboy, *Structured for a Reason*, A.B.A. J., June 2000, at 116 (stating that "a new breed of aggressive hucksters known as factoring companies have recently begun buying settlement payments" in return for a lesser lump sum); Julie Gannon Shoop, *Selling Structured Settlements: Boon or Boondoggle for Injury Victims?*, TRIAL, July 1999, at 12 (stating that the "emerging 'settlement purchase' industry, barely heard of even a few years ago" is providing clients with the option of trading back a stream of periodic settlement payments for a lump sum).

5. "The industry [of firms willing to buy structured settlement payment rights] acknowledges discount rates as high as twenty-eight percent, while courts and government officials report discounts as high as seventy-two percent." Corboy, *supra* note 4, at 116; see also Shoop, *supra* note 4, at 13 (discussing typical

“factoring companies”<sup>6</sup> have come forward to accommodate this desire.<sup>7</sup> This development gave rise to some opposition calling for limitations on such assignments. This opposition is based in part upon paternalistic concern for the long-term welfare of structured settlement recipients,<sup>8</sup> but is also encountered by perceived threats to the insurance industry’s current five-billion-dollars-a-year business of selling annuities to tort defendants for the purpose of paying structured settlements.<sup>9</sup> These concerns have led to legislative enactments in a number of states that impose purchaser disclosure obligations and prior judicial consent limitations on these assignments.<sup>10</sup> They have also led to as-yet-unsuccessful federal efforts to sharply restrict such assignments through the imposition of large tax penalties on factoring companies.<sup>11</sup>

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discount rates ranging from eighteen to twenty-one percent).

6. Corboy, *supra* note 4, at 12 (defining “factoring companies” as those that buy structured settlement payments in return for a lump sum).

7. The leading company in this industry, J.G. Wentworth & Co., accounts for about seventy-five percent of structured settlement purchases. Vanessa O’Connell, *Like it or Lump it: Thriving Industry Buys Insurance Settlements From Injured Plaintiffs*, WALL ST. J., Feb. 25, 1998, at A1 (stating that J.G. Wentworth “dominates the industry”); *see also* Shoop, *supra* note 4, at 12 (stating that J.G. Wentworth & Co. is the “industry leader”). As of March 1999, J.G. Wentworth & Co. had completed over 15,000 structured settlement purchase transactions with a total value of over \$370 million and broadcasted over 90,000 television commercials since March of 1997 seeking to encourage structured settlement recipients to enter into such transactions. *See* Margaret Mannix, *Settling for Less: Should Accident Victims Sell Their Monthly Payouts?*, U.S. NEWS & WORLD REP., Jan. 25, 1999, at 63.

8. *See* Corboy, *supra* note 4; Shoop, *supra* note 4, at 12.

9. O’Connell, *supra* note 7, at A1 (stating that “insurers sell \$5 billion a year of long term savings contracts or annuities to defendants in personal injury cases for the purpose of paying structured settlements”).

10. *See, e.g.*, CAL. INS. CODE §§ 10134 to 10141 (West 2000); CONN. GEN. STAT. ANN. § 52-225f (West 2000); GA CODE ANN. §§ 51-12-70 to 73, 51-12-7 to 77 (Michie 1982); KY. REV. STAT. ANN. §§ 454.430 to 431, 435 (Banks-Baldwin 2001); ME. REV. STAT. ANN. tit. 24-A §§ 2241, 2243, 2245-46 (West 2000); MINN. STAT. ANN. §§ 549.30 to 549.33 (West 2000); MO. ANN. STAT. §§ 407.1060, .1062, .1064, .1066, .1068 (West 2000); N.C. GEN. STAT. §§ 1-394.1, 1-543.10 to .15 (West 2000); VA. CODE ANN. §§ 59.1-475 to .477 (Michie 1999); W. VA. CODE ANN. §§ 46A-6H-1 to 8 (Michie 2000).

11. On July 23, 1998, Representatives Clay Shaw (R-Fla.) and Pete Stark (D-Calif.) introduced H.R. 4314 which proposed the imposition upon factoring companies of a fifty percent excise tax on the difference between the total face value of the annuity payments purchased from a settlement recipient and the lump-sum payment made to that recipient, with some court-approved hardship exceptions from this tax penalty. 144 CONG. REC. H6281 (July 23, 1998), at H6281. That bill followed an earlier U.S. Treasury Department request that the imposition of a twenty percent excise tax on such transactions be included in the FY 1999 budget. Meg Fletcher, *Bill Targets Settlement Buyers: Companies Offering Lump Sums to Victims Would Face New Tax*, BUS. INS., Aug. 3, 1998, at 2. On October 2, 1998, Senators John Chafee (R-R.I.), Max Baucus (D-Mont.), Charles Grassley (R-Iowa), Carol Moseley-Braun (D-Ill.), John D. Rockefeller IV (D-W.Va.), and John Kerrey (D-Neb.) jointly introduced S. 2543, which proposed similar restrictions to those contained in H.R. 4314. 144 CONG. REC. S11339 (Oct. 2, 1998), at S11340-341; *see also* Structured Settlement Protection Act, S.R. 2543, 105th Cong. (1998).

It must be emphasized that both the House and Senate 1998 bills called for the imposition of the fifty percent excise tax on the gross difference between the face value of the annuity payments and the lump sum payment made, rather than on the net profits to the factoring company of the assignment transaction, which are usually much smaller. This excise tax will, in most instances, exceed the net profits to the factoring company from the transaction, and clearly seems intended to altogether eliminate such assignments except where the hardship exception criteria are met. Neither bill, however, was enacted into law during the 1998

Even apart from such statutes, however, this growing practice of assigning structured settlement payment rights raises difficult legal questions. The structured settlement agreements and subsequent annuity contracts entered into by plaintiffs, defendants, and insurance companies, involved in funding and overseeing the payment arrangements,<sup>12</sup> almost always contain provisions prohibiting the plaintiff from assigning his right to receive the payments to a third party.<sup>13</sup> The issue of the effectiveness of such assignments in the face of an explicit anti-assignment clause is currently being litigated in a number of jurisdictions, with little consistency in outcomes or rationales.<sup>14</sup> This Article will

session of Congress.

In 1999, the Treasury Department again called for an excise tax on such transactions as part of the Administration's proposed FY 2000 budget. On February 10, 1999, Representatives Shaw and Stark reintroduced their prior bill as H.R. 263, and on May 13, 1999, Senators Chafee, Baucus, Grassley, Rockefeller, John Breaux (D-La.), Kerrey, and Charles Robb (D-Va.), reintroduced their prior bill. 145 CONG. REC. S1045 (daily ed. May 13, 1999); 145 CONG. REC. S5283 (daily ed. May 13, 1999). Once again, however, neither bill was enacted into law during the 1999 session of Congress.

12. While some structured settlement payment obligations are self-funded by institutional defendants, in most instances the defendant's insurance company agrees to shoulder the defendant's payment obligations in exchange for a payment by the defendant, and then uses a portion of this payment to purchase an annuity contract from another company that specializes in such arrangements to fund the payment obligations.

13. Upon rare occasion, structured settlement agreements do not contain any explicit limitations upon the payee's right to assign their payments. Under such circumstances, courts have generally permitted assignments. *See, e.g.,* *W. United Life Assurance Co. v. Hayden*, 64 F.3d 833, 838-43 (3d Cir. 1995); *Settlement Funding, LLC v. Jamestown Life Ins. Co.*, 78 F. Supp. 2d 1349, 1365 (N.D. Ga. 1999). *See also In re Brooks*, 248 B.R. 99, 105 (Bankr. W.D. Mich. 2000) (holding that assignment was permissible where some but not all of the relevant agreements contained anti-assignment provisions). This article will focus entirely upon the much more common situation where the structured settlement agreement includes an explicit anti-assignment provision.

14. The recent case law addressing this question is extensive. A fairly large proportion of the decisions apply either Connecticut or Illinois law, but the question has arisen in a number of other jurisdictions as well. *See, e.g.,* *W. United Life Assurance Co. v. Hayden*, 64 F.3d 833, 842-43 (3d Cir. 1995) (holding that assignment was valid); *Liberty Life Assurance Co. of Boston v. Stone St. Capital, Inc.*, 93 F. Supp. 2d 630, 638 (D. Md. 2000) (holding that an assignment was void because the structured settlement's anti-assignment provision was a valid and enforceable term); *In re Brooks*, 248 B.R. at 105 (holding that assignment was permissible); *In re Terry*, 245 B.R. 422, 427-28 (Bankr. N.D. Ga. 2000) (holding that assignment was valid so that payments are no longer part of the estate for bankruptcy); *In re Cooper*, 242 B.R. 767, 772 (Bankr. S.D. Ga. 1999) (same); *In re Berghman*, 235 B.R. 683, 693 (Bankr. M.D. Fla. 1999) (denying declaratory relief to plaintiff seeking to transfer structured settlement benefits to third party); *Townsend v. Hartford Life Ins.*, No. 97-C-3232-W, 1999 U.S. Dist. LEXIS 21783, at \*4-5 (N.D. Ala. June 30, 1999) (holding that an anti-assignment provision of the settlement agreement between the parties was clear and unambiguous in precluding plaintiff from assigning her benefits); *Grieve v. Gen. Am. Life Ins. Co.*, 58 F. Supp. 2d 319, 324 (D. Vt. 1999) (holding that anti-assignment provision was an unambiguous, bargained-for term, and therefore enforceable); *In re Freeman*, 232 B.R. 497, 503 (Bankr. M.D. Fla. 1999) (holding that assignment was valid so that payments are no longer part of the estate for bankruptcy); *Wonsey v. Life Ins. Co. of N. Am.*, 32 F. Supp. 2d 939, 944 (E.D. Mich. 1998) (granting declaratory judgment to allow assignment of periodic payments under structured settlement agreement); *Johnson v. First Colony Life Ins. Co.*, 26 F. Supp. 2d 1229, 1230 (C.D. Cal. 1998) (holding that non assignability clause

review the recent case law in this area, attempt to identify the central issues that are presented by those cases, and then offer suggestions on the proper resolution of these issues.

## II. DISCUSSION

The legal question of the effectiveness of an attempted assignment of deferred payment rights grounded in a structured settlement agreement generally is presented for court determination through one of three procedural routes. First, under some state statutes, the settlement payee must obtain prior court approval in order to assign his payment rights.<sup>15</sup> In this declaratory judgment proceeding, the insurer making the payments can challenge the validity of the proposed assignment on the basis of an anti-assignment clause either in the settlement agreement, or in the annuity contract, or both. Second, in those jurisdictions where prior court approval is not statutorily required for assignment of structured settlement payment rights, after an assignment is attempted, the insurer may, on the basis of an anti-assignment clause, refuse to forward the payments to the purported assignee. The assignee then files a declaratory judgment suit seeking to have the assignment declared effective. Third, a payee who has assigned his payment rights may subsequently enter into bankruptcy, and the bankruptcy trustee may attempt to establish, on the basis of an anti-assignment clause, that the purportedly assigned payment rights are still part of the debtor's estate. All three of these procedural routes lead to the same substantive legal question: whether the

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was enforceable); *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 528 (Conn. 2000) (holding that an assignment provision that does not limit the power to assign or expressly invalidate the assignment does not render the assignment ineffective); *McKay v. Aetna Cas. & Sur. Co.*, No. CV990590195S, 2000 Conn. Super. LEXIS 840, at \*9 (Conn. Mar. 29, 2000) (holding that declaratory judgment approval pursuant to local statute, which permitted sale of structured settlement payment rights only if court approved, was only available to payees whose contracts did not forbid transfer of rights because act would otherwise unconstitutionally impair the right to contract); *Cavallaro v. SAFECO Assigned Benefits Co.*, No. CV990362118S, 1999 Conn. Super. LEXIS 3211, at \*27-28 (Nov. 18, 1999) (denying declaratory judgment to allow assignment of periodic payments under a structured settlement that prohibited assignment); *Buchanan v. Am. Mut. Life Ins. Co.*, No. 550420, 1999 Conn. Super. LEXIS 3094, at \*8 (Nov. 15, 1999) (granting declaratory judgment allowing the transfer of structured settlement benefit rights despite anti-assignment provisions); *Bobbitt v. SAFECO Assigned Benefits Serv. Co.*, No. CV990588205S, 1999 Conn. Super. LEXIS 2347, at \*25 (Aug. 24, 1999) (denying declaratory relief to plaintiff seeking to transfer structured settlement benefits to third party); *Piasecki v. Liberty Life Assurance Co. of Boston*, 728 N.E.2d 71, 74 (Ill. App. Ct. 2000) (enforcing anti-assignment clause because it was bargained for and consistent with the intentions of the parties); *Green v. SAFECO Life Ins. Co.*, 727 N.E.2d 393, 397 (Ill. App. Ct. 2000) (enforcing clause because of the plain, ordinary and clear language of the contract); *Henderson v. Roadway Express*, 720 N.E.2d 1108, 1109-10 (Ill. App. Ct. 1999) (same); *J.G. Wentworth v. Jones*, No. 1998-CA-002237-MR, 2000 Ky. App. LEXIS 38, at \*8, \*18 (Ct. App. Apr. 14, 2000) (affirming trial court's holding that tort victims were unable to assign their rights under structured settlement because tort victims were incidental third-party beneficiaries who retained none of the incidents of ownership in the annuities); *Owen v. CNA Ins./Cont'l. Cas. Co.*, 750 A.2d 211, 218 (N.J. Super. Ct. App. Div. 2000) (remanding to determine the materiality and enforceability of non-assignment provision).

15. See *supra* note 10; see also *Andrada, supra* note 3, at 490-93.

attempted assignment is effective given the contractual anti-assignment clause contained in the settlement agreement or annuity contract.

Some of the courts that have addressed this issue have upheld the effectiveness of the attempted assignments, even though they have sometimes recognized them to constitute breaches of contract.<sup>16</sup> Other courts have ruled the attempted assignments to be ineffective.<sup>17</sup> To some extent, the opinions apply the same general analytical framework of statutory provisions and common law contract principles.<sup>18</sup> However, there is substantial variation in the number of issues considered, the accuracy and thoroughness of the analysis, and the resolutions.<sup>19</sup>

A threshold issue addressed in many of these cases is whether Article 9 of the Uniform Commercial Code ("UCC Article 9") operates to invalidate the anti-assignment clause.<sup>20</sup> Once this issue is disposed of—to date always in a manner that preserves the anti-assignment clause against the Article 9 challenge<sup>21</sup>—the courts then turn to a more general analysis of the effectiveness of the anti-assignment clause based on general common law contract principles.<sup>22</sup> The courts usually pay very little attention, if any, to potential unconscionability or usury issues in this analysis.<sup>23</sup> Finally, in those jurisdictions that have statutorily imposed purchaser disclosure and judicial consent limitations upon assignments of structured settlement payment rights, the courts have (to a limited extent, and will need to do so more extensively in the future) addressed the question of the impact of such legislation upon the effectiveness of anti-assignment clauses.<sup>24</sup> The following is a more detailed discussion of each of these issues.

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16. See, e.g., *W. United Life Assurance Co.*, 64 F.2d at 843; *In re Brooks*, 248 B.R. at 104; *In re Terry*, 245 B.R. at 428; *In re Cooper*, 242 B.R. at 772; *In re Berghman*, 235 B.R. at 691; *Wonsey*, 32 F. Supp. 2d at 944; *Rumbin*, 757 A.2d at 527-28; *Buchanan*, 1999 Conn. Super. LEXIS 3094, at \*8.

17. See, e.g., *Townsend*, 1999 U.S. Dist. LEXIS, at \*2; *Grieve*, 58 F. Supp. 2d at 324; *Johnson*, 26 F. Supp. 2d at 1230; *McKay*, 2000 Conn. Super. LEXIS 840, at \*6; *Cavallaro*, 1999 Conn. Super. LEXIS 3211, at \*27; *Bobbit*, 1999 Conn. Super. LEXIS 2345, at \*25; *Piasecki*, 728 N.E.2d at 74; *Green*, 727 N.E.2d at 397; *Henderson*, 720 N.E.2d at 1110; *J.G. Wentworth*, 2000 Ky. App. LEXIS 38, at \*12; *Liberty Life Assurance Co.*, 93 F. Supp. 2d at 638.

18. See *infra* notes 26-31.

19. *Id.*

20. See, e.g., *Grieve*, 58 F. Supp. 2d 319; *Cavallaro*, 1999 Conn. Super. LEXIS 3211, at \*1.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

## A. The Article 9 Question

Article 9 of the UCC has been enacted into law in almost all jurisdictions.<sup>25</sup> UCC section 9-318(4) declares that contract terms that prohibit assignment of an account are ineffective.<sup>26</sup> If payment rights under a structured settlement agreement qualify as an Article 9 “account,” this section would appear to render anti-assignment clauses per se ineffective to invalidate assignments. This would obviate the necessity for undertaking a more general analysis of the implications of other statutory limitations or common law principles upon the effectiveness of anti-assignment clauses.

There is, however, a real question as to whether UCC Article 9 governs assignment of payment rights under structured settlement agreements. First, it is not clear whether such payment rights qualify as “accounts” under the Article 9 definition of that term, which is primarily designed to cover payment obligations arising out of ordinary commercial transactions. This definition expressly limits the scope of the term “account” to the “right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument . . . .”<sup>27</sup> Second, while section 9-102(1)(b) declares that Article 9 generally applies to “any sale of accounts,”<sup>28</sup> it also expressly refers to the exclusion of certain accounts from Article 9 coverage that is provided by section 9-104.<sup>29</sup> Most significantly, section 9-104(g) excludes any “transfer of an interest in or claim in or under any policy of insurance, except as provided with respect to proceeds . . . .”<sup>30</sup> Section 9-104(k) excludes any “transfer in whole or in part of any claim arising out of tort.”<sup>31</sup>

Many—perhaps most—courts that have considered the assignability of structured settlement proceeds in the face of anti-assignment clauses have made no reference in their analysis to any possible Article 9 issues.<sup>32</sup> While this omission suggests that those courts found Article 9 to be inapplicable, it sheds no light upon the underlying rationale for this conclusion.

Those courts that have explicitly addressed the Article 9 question have uniformly found it to be inapplicable, although their rationales vary. One court, for example, analyzed whether structured settlement payment obligations

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25. RONALD A. ANDERSON, 8 THE UNIFORM COMMERCIAL CODE 440 § 9-101.2 (3d ed. 1985) (stating that the Uniform Commercial Code has been enacted in every state with the exception of Louisiana and has also been enacted in the U.S. Virgin Islands).

26. U.C.C. § 9-318(4) (2000).

27. U.C.C. § 9-106 (2000). “‘Account’ means any right to payment for goods sold or leased or for services rendered . . . .” *Id.*

28. U.C.C. § 9-102(1)(b) (2000).

29. U.C.C. § 9-102(1) (2000); *see also* U.C.C. § 9-104 (2000).

30. U.C.C. § 9-104(g) (2000).

31. U.C.C. § 9-104(k) (2000).

32. *See generally* Rumbin v. Utica Mut. Ins. Co., 757 A.2d 526 (Conn. 2000) (omitting Article 9 issues); Piasecki v. Liberty Life Assurance Co. of Boston, 728 N.E.2d 71 (Ill. App. Ct. 2000) (same).

constitute “accounts” under Article 9, and determined that they did not.<sup>33</sup> A significant number of courts that have considered the Article 9 issue, however, implicitly assume that structured settlement payment obligations do qualify as accounts.<sup>34</sup> At the same time, courts have concluded that structured settlement payment rights are nevertheless not governed by Article 9.<sup>35</sup> Courts have reasoned that the annuity-like character of a right to a stream of payments from an insurance company make the structured settlement economically and legally equivalent to an interest in an insurance policy which, as noted above, is specifically excluded from Article 9 coverage by section 9-104(g).<sup>36</sup> Finally, at least one court considering the question concluded that structured settlement payments were excluded from Article 9 coverage by the section 9-104(k) exclusion of “claim[s] arising out of tort” on the basis that, even though a settlement agreement is a contract, the proceeds of the settlement of a tort claim arise out of that tort claim.<sup>37</sup> However, the opinion also recognized that some authority takes a contrary position.<sup>38</sup>

This article argues that the courts are correct in their conclusion, whether implicit or explicit, that Article 9 does not govern the assignment of payment obligations under structured settlement agreements. Courts have offered three major alternative rationales to support this proposition: (1) that such payment rights are not “accounts”,<sup>39</sup> (2) that even if payment rights are deemed to be accounts they are of the nature of an interest in an insurance policy,<sup>40</sup> and (3) in any event, they arise out of a tort claim.<sup>41</sup> Any one of these rationales is

33. See *Bobbitt v. SAFECO Assigned Benefits Co.*, No. 9905882055, 1999 Conn. Super. LEXIS 3724, at \*11 (Conn. Super. Ct. Aug. 24, 1999) (relying on § 9-106 definition of “account” to find that “[t]his transaction does not involve an account”).

34. See, e.g., *Cavallaro v. SAFECO Assigned Benefits Co.*, CV 9903621185, 1999 Conn. Super. LEXIS 3211, at \*8-11 (Conn. Super. Ct. Nov. 18, 1999) (analyzing Article 9 issues as though “account” section applied).

35. See *id.* at \*10 (holding Article 9 inapplicable on grounds that the transaction did not “seek to create a security interest in the payment right”).

36. See *Wonsey v. Life Ins. Co. of N. Am.*, 32 F. Supp. 2d 939, 942 (E.D. Mich. 1998) (because settlement obligor funded payments with annuity and because annuity contracts and insurance policies are governed by the same statute, Article 9 is inapplicable).

37. *Ins. Co. of N. Am. v. Della Indus.*, 998 F. Supp. 159, 162-64 (D. Conn. 1998), *vacated by* 229 F.3d 1135 (2d Cir. 1999); *Owen v. CNA Ins./Cont’l Gas Co.*, 750 A.2d 211, 214-15 (N.J. Super. Ct. App. Div. 2000).

38. See *Owen*, 750 A.2d at 214-15; *Della*, 998 F. Supp. at 164 (quoting Amanda K. Esquibel, *An Article 9 Primer Regarding Uninsured Collateral Destroyed by a Tortfeasor*, 46 U. KAN. L. REV. 211, 215 (1998) (“[T]he [U.C.C.] drafters intended no exception for proceeds of tort claims.”)).

39. See *supra* note 33 and accompanying text.

40. See *supra* notes 34-36 and accompanying text.

41. See *supra* notes 37-38 and accompanying text.



reasonable and, alone, is a sufficient basis for this conclusion.<sup>42</sup> Therefore, the Article 9 invalidation of restrictions on the assignment of accounts is not properly relevant to the issues arising in the structured settlement assignment context.

### *B. The Effectiveness of Anti-Assignment Clauses.*

The greatest variation in these cases is in their application of general common law contract doctrines to the question of the effectiveness of the attempted assignment. In American law, there is a basic tension between freedom of contract principles and concerns about restraints on alienation.<sup>43</sup> This tension has become sharper in recent years as the adverse consequences of restraints on alienation have become better appreciated.<sup>44</sup> This tension is evidenced in the present context as well as elsewhere in the law by inconsistent rulings and conflicting rationales.

#### 1. The Available Interpretive Options

As a general matter, there are at least four different ways that courts could reasonably construe anti-assignment clauses in contracts, each resulting in a different balance between freedom of contract principles and restraint on alienation concerns.<sup>45</sup>

First, courts could regard anti-assignment clauses as wholly ineffective to impose any duties on the obligee or to bar assignments, in which case an attempted assignment would be effective if it satisfied any non-materiality limitations or other applicable criteria for effective assignments, and would also

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42. *But see* Am. Bank of Commerce v. City of McAlester, 555 P.2d 581, 584-85 (Okla. 1976) (finding a legislative purpose in adopting UCC section 9-318 to bar all anti-assignment clauses, even in situations not subject to Article 9).

43. *See, e.g.*, JOHN MURRAY, JR., MURRAY ON CONTRACTS 807 (3d ed. 1990).

To what extent the parties to a contract can, by agreement, effectively prohibit or restrict the assignment of rights or duties created by the contract that would otherwise be assignable is a question upon which the courts, over the years, have demonstrated some confusion. . . . The conflict between the policy of freedom of contract and the policy precluding restraints upon alienation is painfully obvious.

*Id.*

44. Compare MURRAY, *supra* note 43, at 807 and FARNSWORTH, *infra* note 51, at 713 with the following quote from a 1954 *American Law Reports Annotated*: “[N]onassignment provisions of bilateral contracts . . . have almost invariably been upheld as fully valid . . . . [However, a few] cases more or less distinctly adhere to the proposition that contracting parties cannot by a mere nonassignment provision prevent the effectual alienation of the right to money which becomes due under the contract.” W.W. Allen, Annotation, *Validity of Anti-Assignment Clause in Contract*, 37 A.L.R.2d 1251, 1253-58 (1954).

45. Other sources and commentators advance similar discussions of anti-assignment provision effectiveness. *See* Cedar Point Apartments v. Cedar Point Inv. Corp., 693 F.2d 748, 754 & n.4 (8th Cir. 1982) (discussing with approval the analyses in JOHN MURRAY, JR. MURRAY ON CONTRACTS § 306 (2d rev. ed. 1974) and Grover Grismore, *Effect of a Restriction on Assignment in Contract*, 31 MICH. L. REV. 299 (1933)).

not constitute a breach of contract.<sup>46</sup> This interpretation would not only completely eliminate the restraint on alienation features of such clauses, but would also completely override the parties' freedom to contract for assignability restrictions.

Second, the courts could also regard anti-assignment clauses as enforceable promises made by the obligee, but not as bars to effective assignments.<sup>47</sup> In this case, an attempted assignment would be effective if it satisfied any non-materiality limitation or other applicable criteria for effective assignments, but would still constitute a breach of contract.<sup>48</sup> The obligor's remedy would be limited to a suit for damages,<sup>49</sup> largely (but not completely) restricting the parties' freedom to contract for assignability restrictions.

Third, courts could regard anti-assignment clauses as making attempted assignments ineffective, rendering an attempted assignment of payment rights ineffective and not a breach of contract.<sup>50</sup> Such an interpretation would allow the parties full freedom to contractually impose restraints on alienation.

Finally, courts could regard anti-assignment clauses as making an attempted assignment an act that terminates the entire contract, in which case the attempted assignment would be ineffective, would constitute a breach of contract, and would discharge the obligor from his remaining obligations. Such an interpretation, as a practical matter, would completely preclude assignments, effectively allowing the parties to contractually impose restraints on alienation.

Although all of the above general interpretive approaches have been followed upon occasion, most courts addressing the question of the effectiveness of anti-assignment clauses have utilized either the second or third interpretation to strike what they regard as the appropriate balance between the conflicting policy objectives.<sup>51</sup> Probably the most substantial body of authority is in favor of applying

46. This approach essentially disregards the anti-assignment provision, leaving the court to consider the attempted assignment under generally applicable contract principles. See generally MURRAY, *supra* note 43, at §§ 135-42.

47. See MURRAY, *supra* note 43, at 807. This alternative corresponds to (1) in his discussion. See also Grismore, *supra* note 45, at 300. This alternative corresponds to (1) there also.

48. See Grismore, *supra* note 45, at 300.

49. See *id.*

50. See MURRAY, *supra* note 43, at 807. This alternative corresponds to Murray's (3). See also Grismore, *supra* note 45, at 300. This alternative corresponds to Grismore's (2).

51. See E. ALLAN FARNSWORTH, CONTRACTS 717 (Richard A. Epstein et al. eds., 3d ed. 1999). Sometimes parties include in their contract a term prohibiting assignment. Absent statute, most courts have upheld such terms as precluding effective assignment, favoring freedom of contract over free assignability. However, such anti-assignment clauses have been narrowly construed where possible. Thus they are often read as imposing a duty on the assignor not to assign, but are not read as making an assignment invalid.

*Id.* (footnotes omitted); see also JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 684

the second interpretation to enforce anti-assignment clauses but minimizing their restraint on alienation consequences by interpreting them whenever reasonably possible as only imposing a duty not to assign and not also rendering this attempted assignment ineffective.

## 2. The Restatement Approach

Turning to the structured settlement assignment cases, the courts here clearly recognize the basic principle that contract provisions should generally be enforced in some fashion,<sup>52</sup> including anti-assignment provisions.<sup>53</sup> There is, however, also fairly broad acceptance of the competing principle that anti-assignment clauses constitute impediments to the free alienability of contract rights, and, therefore, should be construed narrowly to limit their adverse economic effects.<sup>54</sup> In attempting to balance freedom of contract principles with restraint on alienability concerns, most courts have applied sections 317 and 322 of the Restatement (Second) of Contracts<sup>55</sup> in structured settlement assignment cases.<sup>56</sup> A smaller but

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(4th ed. 1998) (“[Courts] have often emasculated the [anti-assignment] provision by holding it to be merely a promise not to assign. Under such a construction an assignment is effective, but the obligor has a cause of action against the assignor for breach of contract.”) (citations omitted).

52. See *Johnson v. First Colony Life Ins. Co.*, 26 F. Supp. 2d 1227, 1229 (C.D. Cal. 1998) (stating that it is well settled that courts should strive to adhere to terms agreed upon by the parties in a contract); see also *Grieve v. Gen. Am. Life Ins. Co.*, 58 F. Supp. 2d 319, 322-24 (D. Vt. 1999) (stating that enforcement of contractual terms as written is important as a matter of public policy).

53. See *Townsend v. Hartford Life Ins.*, No. 97-C-3232-W, 1999 U.S. Dist. LEXIS 21783, at \*5 (N.D. Ala. June 30, 1999) (holding that the anti-assignment provision is “clear and unambiguous,” and enforceable under state law); see also *Johnson*, 26 F. Supp. 2d at 1229 (stating that an anti-assignability clause is routinely enforced).

54. See *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 531 (Conn. 2000) (stating that, because free assignability is important, anti-assignment clauses should be construed narrowly whenever possible); see also *In re Cooper*, 242 B.R. at 771 (S.D. Ga. 1999) (stating that the *modern trend* is to interpret anti-assignment clauses narrowly); *Wonsey v. Life Ins. Co. of N. Am.*, 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998) (“[T]he modern trend with respect to contractual prohibitions on assignments is to interpret these clauses narrowly . . . .”) (emphasis in original).

55. RESTATEMENT (SECOND) OF CONTRACTS: ASSIGNMENT OF RIGHTS § 317 (1981); RESTATEMENT (SECOND) OF CONTRACTS: PROHIBITION OF ASSIGNMENT § 322 (1981).

56. See, e.g., *In re Terry*, 245 B.R. 422, 426-27 (Bankr. N.D. Ga. 2000) (declaring the assignment effective); *In re Cooper*, 242 B.R. at 771 (declaring the assignment effective); *In re Berghman*, 235 B.R. 683, 690-91 (Bankr. M.D. Fla. 1999) (declaring the assignment effective); *In re Freeman*, 232 B.R. 497, 503 (Bankr. M.D. Fla. 1999) (declaring the assignment effective); *Liberty Life Assurance Co. of Boston v. Stone St. Capital, Inc.*, 93 F. Supp. 2d 630, 637 (D. Md. 2000) (declaring the assignment ineffective); *Wonsey*, 32 F. Supp. 2d at 944 (declaring the assignment effective); *Grieve*, 58 F. Supp. 2d at 324 (declaring the assignment ineffective); *Rumbin*, 757 A.2d at 531 (declaring the assignment effective); *Cavallaro v. SAFECO Assigned Benefits Co.*, No.990362118S, 1999 Conn. Super. LEXIS 3211, at \*25-\*26 (Nov. 18, 1999) (declaring the assignment ineffective); *Bobbitt v. SAFECO Assigned Benefits Serv. Co.*, No. 990588205S, 1999 Conn. Super. LEXIS 2347, at \*25 (Aug. 24, 1999) (declaring the assignment effective); *Piasecki v. Liberty Life Assurance Co. of Boston*, 728 N.E.2d 71, 73-74 (Ill. App. Ct. 2000) (declaring the assignment ineffective); *Henderson v. Roadway Express*, 720 N.E.2d 1108, 1113 (Ill. App. Ct. 1999) (declaring the assignment ineffective); *Owen v. CNA Ins./Cont'l Cas. Co.*, 750 A.2d 211, 218 (N.J. Super. Ct. App. Div. 2000) (remanding for further inquiry).

still significant proportion of the cases, however, resolve the issue of the effectiveness of the attempted assignment without reference to Restatement sections 317 or 322. Some of these rulings find the attempted assignment effective, while others find it to be ineffective.<sup>57</sup>

These Restatement provisions are unfortunately not models of clarity, and their application in this area has been inconsistent. While the Restatement provisions together appear to rule out the blanket disregard of anti-assignment limitations noted above as the first possible interpreting option, the provisions' broad phrasing and gaps in coverage leave available all of the other three interpretive options with their very different consequences.<sup>58</sup> Some of the cases that apply those provisions uphold the effectiveness of the attempted assignment, while other cases hold the attempted assignment ineffective under virtually identical factual circumstances.<sup>59</sup> This Article will first summarize Restatement sections 317 and 322, highlight their gaps and ambiguities, and suggest their proper application. The Article will then consider the judicial application of those provisions in this particular context.

Restatement section 317 endorses the free assignment of contractual rights<sup>60</sup> unless: under section 317(2)(a), the assignment "would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract"; under section 317(2)(b), "the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy;" or under section 317(2)(c), the "assignment is validly precluded by contract."<sup>61</sup>

The general character of the section 317(2)(a) materiality limitation seems clear, yet difficulties inhere in its application. The "forbidden by statute"

57. See, e.g., *W. United Life Assurance Co. v. Hayden*, 64 F.3d 833, 842-43 (3d Cir. 1995) (declaring the assignment effective); *Townsend*, 1999 U.S. Dist. LEXIS 21783, at \*4 (declaring the attempted assignment ineffective under Connecticut law because the anti-assignment provision was "clear and unambiguous."); *Johnson*, 26 F. Supp. 2d at 1230 (declaring the attempted assignment ineffective, stating that "[t]he nonassignability clause is simply a condition of the contract, for which the parties bargained, and upon which defendants have a right to rely."); *In Re Brooks*, 248 B.R. 99, 105 (Bankr. W.D. Mich. 2000) (declaring the assignment effective because of the narrow scope of the anti-assignment clause); *McKay v. Aetna Cas. and Sur. Co.*, No.990590195S, 2000 Conn. Super. LEXIS 840, at \*8-10 (Mar. 29, 2000) (declaring the assignment ineffective because of the presence of an anti-assignment clause); *Buchanan v. Am. Mut. Life Ins. Co.*, No. 550420, 1999 Conn. Super. LEXIS 3094, at \*8 (Nov. 15, 1999) (declaring the assignment effective because of an applicable Connecticut statute); *Green v. SAFECO Life Ins. Co.*, 727 N.E.2d 393, 397 (Ill. App. Ct. 2000) (declaring the assignment ineffective); *Wentworth v. Jones*, No. 1998-CA-002237-MR, 2000 Ky. App. LEXIS 38, at \*10-17 (Apr. 14, 2000) (declaring the assignment ineffective based on applicable federal and Kentucky statutes, and public policy considerations).

58. See *supra* Part II.B.1.

59. See generally cases cited *supra* note 56.

60. RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981).

61. *Id.* at § 317(2)(a)-(c).

provision of section 317(2)(b) is primarily intended to recognize statutory limitations placed upon the assignment of a letter of credit rights, wages, or government contracts,<sup>62</sup> none of which are implicated in the structured settlement context. Here, the only potentially applicable statutory limitations are the Article 9 issues previously discussed<sup>63</sup> and the purchaser disclosure and prior judicial consent statutes that will be discussed later.<sup>64</sup>

The primary purpose of the public policy provision in section 317(2)(b) is to provide courts with a basis for invalidating assignments on the paternalistic grounds that they are unconscionable or usurious to the assignor.<sup>65</sup> Normally the unconscionability or usury defenses would be raised by a party to the agreement being challenged, but in this context, both parties to the assignment agreement wish it to be given effect, and it is the third party obligor who seeks to have it invalidated.<sup>66</sup> Such a third party would arguably lack standing to raise an unconscionability or usury defense to enforcement of an agreement to which it is not a party.<sup>67</sup> Therefore, the public policy provision of section 317(2)(b) is principally necessary to give proper consideration to paternalistic concerns for the long-term welfare of the structured settlement payment recipients, as some commentators argue is crucially important in this context.<sup>68</sup>

To determine when a contract validly precludes assignment as required by section 317(2)(c), one must turn to section 322.<sup>69</sup> Under section 322(2)(a), “unless a different intention is manifested,” an anti-assignment clause “does not forbid assignment of a right . . . arising out of the assignor’s due performance of his entire obligation.”<sup>70</sup> Furthermore, section 322(2)(b) “gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective.”<sup>71</sup> Also, under section 322(2)(c), such an anti-assignment clause “is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.”<sup>72</sup>

The framework created by sections 317 and 322, taken together, leaves many issues unresolved. First, it is unclear whether section 317(2) makes effective all

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62. *Id.* at § 317 cmt. e.

63. *See supra* notes 25-42 and accompanying text.

64. *See infra* notes 188-90 and accompanying text.

65. *See Grieve v. Gen. Am. Life Ins. Co.*, 58 F. Supp. 2d 322, 327 (D. Vt. 1999) (noting that assignment threatens “the injured person’s long-term financial security” as part of its analysis under the Restatement framework).

66. *See, e.g., id.* at 320.

67. *But see Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 529 n.4 (Conn. 2000) (acknowledging this argument but finding obligor’s standing to have been provided by statute).

68. *See Corboy, supra* note 4; Shoop, *supra* note 4.

69. RESTATEMENT (SECOND) OF CONTRACTS § 317 cmt. f (1981) (“The effect of a term in a contract forbidding the assignment of rights arising under the contract is the subject of § 322.”).

70. *Id.* at § 322(2)(a).

71. *Id.* at § 322(2)(b).

72. *Id.* at § 322(2)(c).

attempted assignments that do not materially and adversely impact the obligor or conflict with applicable statutes or public policy concerns, even where anti-assignment terms exist in the contract.<sup>73</sup> The policy of minimizing restraints on alienation suggests that such an interpretation would be desirable.<sup>74</sup> However, the disjunctive language of that provision itself suggests that the materiality criterion is properly applicable only when assignment is not barred on statutory or public policy grounds, or validly precluded by the contract, and that the presence of a valid contractual preclusion ends the inquiry and any attempted assignment is ineffective.<sup>75</sup>

However, as noted above, anti-assignment clauses are not per se valid preclusions of assignments under section 322(2). Rather, anti-assignment clauses only have the lesser effect of conferring a right to damages upon the obligor, and do not also render the assignment ineffective “unless a different intention is manifested.”<sup>76</sup> It is unclear what kind of evidence should be required to demonstrate the manifestation of a different intention. In particular, a question exists whether attention should be focused primarily on the precise language of the clause at issue—drawing very fine distinctions among, for example, clauses that merely state that assignments are “prohibited,” clauses that instead describe assignments as “void” or “invalid,” and clauses which may specify that non-assignment is a condition precedent of the obligor’s duties<sup>77</sup>—or instead should be

73. See *id.* at § 317(2) and § 317 cmt. f.

74. See *id.* at § 317 cmt. f.

75. See *id.* However, this seemingly straightforward understanding of the drafters’ intent is somewhat compromised by the extraordinarily confusing language of comment f to section 317:

The effect of a term in a contract forbidding the assignment of rights arising under the contract is the subject of section 322. Such a term may resolve doubts as to whether an assignment violates paragraph (2)(a) of this Section. Where it seems to forbid an assignment clearly outside the scope of paragraph (2)(a), it may be read restrictively to permit the assignment, or to give the obligor a claim against the assignor rather than a defense against the assignee, or the term may be invalid by statute or decision.

*Id.*

76. *Id.* at § 322. It is also unclear whether section 317 has any bearing on whether an effective assignment done in the face of an anti-assignment clause that is not a valid preclusion under section 317(2)(c) is nevertheless a breach of contract. Section 322(2)(b) would suggest that it would be a breach. Presumably, if it was a breach of contract the required showing of non-materiality to make the assignment effective under Section 317(2)(a) would also prevent that breach from justifying the obligor’s subsequent non-performance. See *id.* at § 322.

77. *Id.* “If, however, the [anti-assignment] provision expressly states that any assignment shall be void, or uses other equivalent language, the courts have generally held that the purported assignment is ineffective, unless the obligor consents to the assignment.” CALAMARI & PERILLO, *supra* note 51, at 684-85; see also *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 531-34 (Conn. 2000). But see MURRAY, *supra* note 43, at 807-08 (“Many of the decided cases have not differentiated between [different kinds of prohibitory language in anti-assignment clauses] . . . and have assumed that, whatever the form, the stipulation either did or did not invalidate the assignment depending upon the court’s view of public policy

focused more upon the circumstances surrounding negotiations and the light they shed upon probable intentions of the parties.<sup>78</sup>

Section 322(2) also fails to address the possibility that a statute may be in force which limits the effectiveness of anti-assignment clauses regardless of the intention of the parties.<sup>79</sup> This is a somewhat surprising omission given that section 317(2)(b) expressly addresses the opposite possibility of statutory limitations on assignability.<sup>80</sup> It is reasonable to read the section 322(2) specification of the consequences of anti-assignment clauses as subject to any applicable statutes that would further reduce their effect. However, given the explicit inclusion of statutory impacts in section 317(2)(b), the proper interpretation of section 322(2) is open to some question.<sup>81</sup>

Even if section 322(2)(a) or (b) apply to make a particular assignment in the face of an anti-assignment prohibition not “forbidden” or “ineffective,” hence not “validly precluded by contract” under section 317(2)(c), questions remain.<sup>82</sup> First, does this determination alone make the assignment effective, or must the non-materiality and statutes/public policy criteria be satisfied as well?<sup>83</sup> Neither section 317 nor section 322 address the obligor’s right to treat a material violation of an anti-assignment clause as a basis for justified non-performance, rather than merely as a basis for the award of damages.<sup>84</sup> This suggests that the Restatement drafters intended to subject all attempted assignments to the non-materiality criterion, not allowing assignments whenever it would have material adverse consequences for the obligor such as would justify non-performance,<sup>85</sup> and that the review of the effect of contractual prohibitions on assignment under section 322 was not intended to preclude this subsequent materiality inquiry (nor the statute/public policy inquiry) where those prohibitions are ineffective to preclude assignment.<sup>86</sup>

Second, it is not clear from the sparse “public policy” language of section 317(2)(b) how aggressive the courts should be in over-riding assignors’ decisions as to the acceptability of assignment terms on the basis of paternalistic concerns for assignors’ long-term welfare.<sup>87</sup>

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...”); see generally Grover C. Grismore, *Effect of a Restriction on Assignment in a Contract*, 31 MICH. L. REV. 299 (1933).

78. See Grismore, *supra* note 45, at 318 (favoring a focus upon the wording of the particular clause). But see RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. c (1981) (“The rules stated in this Section do not exhaust the factors to be taken into account in construing and applying a prohibition against assignment. . . . Where there is a promise not to assign but no provision that an assignment is ineffective, the question whether breach of the promise discharges the obligor’s duty depends on all the circumstances.”).

79. See RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(1981).

80. See *id.* at §§ 317(2)(b), 322(2).

81. See *id.*

82. *Id.* at §§ 317(2)(c), 322(2)(a).

83. See *id.* at § 317(2)(a)-(b).

84. See *id.* at §§ 317, 322.

85. See *id.*

86. See *id.*

87. See *id.* at § 317(2)(b).

Finally, under section 322(2)(c), it is not entirely clear that when an assignment is “not . . . ineffective” under section 322(2)(b), the assignee then has a right to enforce it against the obligor, rather than merely to seek damages from the assignor for the obligor’s unwillingness to cooperate.<sup>88</sup> Section 322(2)(c) specifically preserves assignee rights against the assignor (unless a different intention is manifested), but does not discuss assignee rights against the obligor to enforce the obligor’s continuing performance.<sup>89</sup> However, the thrust of the provision merely allows the obligor to waive an anti-assignment clause at his election and proceed as though no contractual limitations existed.<sup>90</sup> Section 322(2)(c) does not appear to limit in any way assignee enforcement rights against the obligor following “not . . . ineffective” assignments that violate anti-assignment provisions.<sup>91</sup>

Thus, the Restatement framework established by sections 317 and 322 is more complex and subtle than it first appears, and leaves open great flexibility with its materiality, public policy, and “different intention manifested” provisions. The logical analytical sequence the courts should follow in applying these Restatement provisions in this context is to first determine whether, in light of the “different intention is manifested” language of section 322(2),<sup>92</sup> the anti-assignment clause of the structured settlement agreement at issue has “validly precluded” assignment under section 317(2)(c).<sup>93</sup> If so, the assignment would be ineffective. The court would then neither inquire into the materiality of the burden that an assignment would impose upon the payment obligor under section 317(2)(a), nor inquire into the existence of conflicts with statutes or public policy concerns under section 317(2)(b).

If the court concludes that the section 322(2) “different intention is manifested” requirement for an anti-assignment clause having preclusive effects is *not* met, then section 317(2)(c) would not apply. The key issues would become whether the assignment imposes a material burden or risk upon the obligor under section 317(2)(a), and whether it conflicts with applicable statutes or public policies under section 317(2)(b). If either is the case, the assignment should be ruled ineffective. If neither is the case, the assignment should be ruled effective, and the assignee should have full rights to enforce the assignment against both the assignor and the obligor, and the obligor should be limited to damages for breach of the anti-assignment clause, if any can be shown.

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88. *Id.* at § 322(2)(b)-(c).

89. *See id.* at § 322(2)(c).

90. *See id.*

91. *See id.*

92. *See id.* at §§ 317, 322.

93. *See id.* at § 317(2)(c).



### 3. Judicial Application of the Restatement Approach

Having discussed the underlying policy concerns and various interpretive options available for construing anti-assignment clauses, and having examined the Restatement provisions that most courts favor in interpreting such clauses in the structured settlement context, this Article will now consider more than a dozen recent court opinions in this area that have applied these Restatement provisions.<sup>94</sup>

While some of the court opinions that have invoked Restatement sections 317 and 322 have done so only in passing and without engaging in significant analysis of their application,<sup>95</sup> a number of cases have carried out a more complete analysis. One such case is *Grieve v. General American Life Insurance Co.*,<sup>96</sup> a federal District Court opinion which has subsequently been cited by a number of other cases decided in this area.<sup>97</sup> In *Grieve*, the plaintiff entered into a structured settlement agreement of her tort claim with Concord Group Insurance Company, the tortfeasor's primary insurer.<sup>98</sup> Under this agreement, Concord assigned its obligation to General American Life Insurance Company, which then purchased an annuity from Integrity Life Insurance Company to fund the payment obligations, with Integrity to mail the payments directly to Grieve.<sup>99</sup>

Grieve later attempted to assign a portion of her payment rights under the settlement to Singer Asset Financial Company in exchange for a discounted lump sum.<sup>100</sup> Integrity, however, refused to forward the payments to Singer, citing the express prohibition of the assignment of Grieve's payment rights contained in the

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94. See *supra* note 56.

95. See, e.g., *In re Terry*, 245 B.R. 422, 426 n.9, 427 (Bankr. N.D. Ga. 2000) (briefly discussing section 317(2) and 322(1), but finding assignment effective); *In re Cooper*, 242 B.R. 767, 771 n.4 (S.D. Ga. 2000) (providing some limited discussion of section 322, but finding assignment effective); *In re Berghman*, 235 B.R. 683, 690-91 (Bankr. M.D. Fla. 1999) (providing some limited discussion of section 322, but finding assignment effective); *In re Freeman*, 232 B.R. 497, 502 (Bankr. M.D. Fla. 1999) (providing some limited discussion of section 322, but finding assignment effective); *Bobbitt v. SAFECO Assigned Benefits Co.*, No. 990588205S 1999 Conn. Super. Lexis 2347, at \*4 (Conn. Super. Ct. Aug. 24, 1999) (providing some limited discussion of section 317(2), but finding assignment ineffective).

96. 58 F. Supp. 2d 319 (D. Vt. 1999).

97. See, e.g., *Settlement Funding v. Jamestown Life Ins. Co.*, 78 F. Supp. 2d 1349, 1359-60 (N.D. Ga. 1999); *In re Cooper*, 242 B.R. at 772; *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 533 n.9 (Conn. 2000); *Cavallaro v. SAFECO Assigned Benefits Co.*, No. 990362118S, 1999 Conn. Super. LEXIS 3211, at \*22-23 (Conn. Super. Ct. Nov. 18, 1999); *Buchanan v. Am. Mut. Life Ins. Co.*, No. 550420, 1999 Conn. Super. LEXIS 3094, at \*5 (Conn. Super. Ct. Nov. 15, 1999); *Bobbitt*, 1999 Conn. Super. LEXIS 2347 at \*5-12; *Piasecki v. Liberty Life Assurance Co. of Boston*, 728 N.E.2d 71, 73 (Ill. App. Ct. 2000); *Henderson v. Roadway Express*, 720 N.E.2d 1108, 1112 (Ill. App. Ct.); *Wentworth v. Jones*, No. 1998-CA-002237-MR, 200 Ky. App. LEXIS 38, at \*10 (Ky. Ct. App. Apr. 14, 2000); *Owen v. CNA Ins. Co.*, 750 A.2d 211, 215 (N.J. Super. Ct. App. Div. 2000).

98. *Grieve*, 58 F. Supp. 2d at 320-21.

99. *Id.* at 321.

100. *Id.* Under this agreement, Grieve was to receive the sum of \$39,682 in exchange for giving up a total of \$104,800 in 180 monthly payments and several deferred lump sum payments, which was equivalent to an interest rate of 18.8% compounded daily on the sum advanced to her. *Id.*

settlement agreement.<sup>101</sup> Grieve, in turn, filed a motion for declaratory judgment seeking to establish the effectiveness of the assignment.<sup>102</sup>

The District Court applied Vermont law to decide the case.<sup>103</sup> It first stated that while debts were generally assignable under Vermont law,<sup>104</sup> the limitations on assignments imposed by Restatement section 317(2) were applicable.<sup>105</sup> The court then concluded that each of the three limitations upon assignability set forth in section 317(2)(a), (b), and (c) were present.<sup>106</sup> Although, the court did not expressly recognize that under the disjunctive language of section 317(2) any one of those limitations alone would have been sufficient to render the assignment ineffective, this interpretation of the provision appears to be implicit in the opinion.<sup>107</sup>

With regard to the “validly precluded by contract” limitation of section 317(2)(c), the *Grieve* court failed to conduct an analysis of the effectiveness of the anti-assignment provision under section 322(2).<sup>108</sup> Instead, the court simply assumed, without discussion, that such a provision would generally have preclusive effect, rather than merely conferring a right to damages upon the obligor unless the parties showed a different intent.<sup>109</sup> This assumption, however, is in direct conflict with the more pro-assignment premise of section 322(2).<sup>110</sup> The court did address the potential statutory preclusion issue presented by Article 9,<sup>111</sup> and concluded after some analysis that the anti-assignment provision was not invalidated by Article 9 because structured settlement payments may be properly regarded as insurance policies, which are excluded from the scope of Article 9 by section 9-104(g).<sup>112</sup>

With regard to the materiality limitation of section 317(2)(a), the *Grieve* court recognized an important tax law issue.<sup>113</sup> Under section 104(a)(2) of the Internal

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101. *Id.* at 321-22. The anti-assignment clause in the *Grieve* settlement agreement stated that “periodic payments cannot be accelerated, deferred, increased or decreased by [Grieve] or any Payee; nor shall [Grieve] or any Payee have the power to sell, mortgage, encumber, or anticipate the periodic payments, or any part thereof, by assignment or otherwise.” *Id.* at 321.

102. *Id.*

103. *Id.* at 322 n.2 (parties agreeing that Vermont law was controlling).

104. *Id.* at 322. *See also* *Herbert v. Jarvis, Rice & White Ins.*, 365 A.2d 271, 272 (Vt. 1976) (discussing issuance of assignment order by bankruptcy court).

105. *Grieve*, 58 F. Supp. 2d at 322-23.

106. *Id.* at 323-24.

107. *See id.* at 324 (finding that change of recipient materially increases risk).

108. *Id.* at 322-24 (noting that there was no mention of section 322(2) in the assignability analysis).

109. *See id.*

110. *See supra* notes 63-64 and accompanying text.

111. *See supra* notes 26-42 and accompanying text.

112. *Grieve*, 58 F. Supp. 2d at 323-24.

113. *See id.* at 323.

Revenue Code,<sup>114</sup> a recipient of structured settlement payments of personal injury damages can exclude those payments from gross income.<sup>115</sup> Under section 130 of the Internal Revenue Code,<sup>116</sup> “an entity who undertakes the responsibility for making periodic payments” under a structured settlement may also “exclude from its gross income the amount received for doing so, to the extent that the amount does not exceed the cost of the funding asset, typically an annuity contract.”<sup>117</sup> Among the limitations for this benefit are that the periodic payments cannot be “accelerated, deferred, increased or decreased by the recipient,” and that they must be “excludable from the gross income of the recipient under section 104(a).”<sup>118</sup>

The defendant in *Grieve*, General American, argued that if assignment was permitted, the assignee, Singer, might “not be entitled to exclude the sums received from its gross income under section 104(a),” and consequently the IRS could challenge General American’s eligibility for favorable tax treatment under section 130.<sup>119</sup> The court concluded that while the possibility of such an adverse consequence for General American was “open to speculation,” the assignment would nevertheless impose a material risk upon General American and was, therefore, ineffective under Restatement section 317(2)(a).<sup>120</sup>

Finally, with regard to the public policy concerns noted in section 317(2)(b), the *Grieve* court concluded that allowing assignment of structured settlement payments would permit factoring companies such as Singer to take advantage of individuals such as Grieve by purchasing their payment rights for “a deeply discounted lump sum payment.”<sup>121</sup> Such practices would imperil the assignor’s long-term financial security and consequently subvert the Congressional policy underlying the tax advantages accorded structured settlements.<sup>122</sup> The court did not, however, specifically link its concerns about abuse to traditional unconscionability or usury principles.<sup>123</sup>

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114. 26 U.S.C. § 104(a)(2) (1988).

115. *Grieve*, 58 F. Supp. 2d at 323.

116. 26 U.S.C. § 130 (1988).

117. *Grieve*, 58 F. Supp. 2d at 323. See also 26 U.S.C. § 130 (1988).

118. *Grieve*, 58 F. Supp. 2d at 323 (quoting 26 U.S.C. § 130(c)(2)(B), (E) (1988)).

119. *Id.* For an extensive discussion of this tax issue, see generally Andrada, *supra* note 3, at 481-90. Andrada regards the risk of adverse IRS action on this question as “extremely small.” *Id.* at 487.

120. *Id.* (“[T]he change of recipient materially increases a risk to General American, and as a result materially reduces the value of the contract.”).

121. *Id.* at 324. The court seemed particularly incensed by the implicit 18.8% interest rate Singer intended to charge Grieve for the advance: “[T]his court will not lend its approval to the voiding of unambiguous, bargained-for contract terms in order to enable Singer to profit, at an exorbitant rate of interest, from Grieve’s [current] financial distress.” *Id.* One should note that the 18.8% discount rate offered by Singer for this assignment is significantly lower than that often demanded by factoring companies for purchasing structured settlement payments. See Corboy, *supra* note 4, at 116.

122. *Grieve*, 58 F. Supp. 2d at 324 (finding rates anywhere from twenty-eight to seventy-two percent).

123. See *id.* at 322-24.

*Wonsey v. Life Insurance Co. of North America*<sup>124</sup> is another opinion that utilized the Restatement framework, though it reached the opposite result. That case has also been cited extensively.<sup>125</sup> Wonsey, a minor, was injured in an automobile accident. In 1983, his parents, on his behalf, entered into a structured settlement agreement with the defendant's insurer, Insurance Company of North America ("INA").<sup>126</sup> INA funded its payment obligations to Wonsey by purchasing an annuity from one of its affiliates, Life Insurance Company of North America.<sup>127</sup> In 1998, Wonsey, now an adult, entered into an agreement with Singer Asset Financial Company to assign to Singer several of his future payment rights in exchange for a lump sum payment.<sup>128</sup> As in *Grieve*, the insurance company refused to honor the assignment, citing the anti-assignment provision of the settlement agreement,<sup>129</sup> and Wonsey filed a motion for declaratory judgment seeking to have the assignment upheld.<sup>130</sup> The *Wonsey* court decided the case according to Michigan law.<sup>131</sup> It first considered whether Article 9 applied to invalidate the anti-assignment clause. It concluded that Article 9 did not invalidate the clause because the annuity obligation constituted a "policy of insurance." As such, section 9-104 excluded the obligations from Article 9 coverage.<sup>132</sup>

The court then turned to both Restatement section 322 and related case law on the question of the general validity and effect of anti-assignment clauses.<sup>133</sup> It interpreted section 322 as generally calling for narrow construction of anti-assignment clauses so that they do not necessarily invalidate assignments, in order to minimize unfair restraints on alienation.<sup>134</sup> Without flatly declaring that the

124. 32 F. Supp. 2d 939 (E.D. Mich. 1998).

125. See, e.g., *Liberty Life Assurance Co. of Boston v. Stone*, 93 F. Supp. 2d 630, 634 (D. Md. 2000); *Grieve*, 58 F. Supp. 2d at 324; *In re Brooks*, 248 B.R. 99, 104 (W.D. Mich. 2000); *In re Terry*, 245 B.R. 422, 427 (N.D. Ga. 2000); *In re Cooper*, 242 B.R. 767, 771 (S.D. Ga. 1999); *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 532 (Conn. 2000); *Henderson v. Roadway Express*, 720 N.E.2d 1108, 1112 (Ill. App. Ct. 1999).

126. *Wonsey*, 32 F. Supp. 2d at 939-40.

127. *Id.* at 940.

128. *Id.*

129. *Id.* The *Wonsey* settlement agreement stated in part: "[T]he Insurance Company of North America shall be the owner of the aforesaid annuity policy and the Plaintiffs [Wonsey] should have (1) no right to change the beneficiary of the policy . . . [and] (5) no right to assign the policy." *Id.* (quoting Exhibit A to Plaintiff's motion).

130. *Id.* at 939.

131. See *id.* at 942.

132. *Id.* at 941-42 (holding that an annuity contract does come within the definition of 'policy insurance').

133. *Id.* at 942-44.

134. *Id.* at 943 (following modern trend).

anti-assignment clause before it was not preclusive, the court acted on this implicit premise and conducted an analysis of whether allowing assignment would impose a material burden upon the obligor.<sup>135</sup> Interestingly, it did not invoke Restatement section 317(2)(a) as a basis for its analysis.<sup>136</sup> The court concluded that the only burden that assignment would impose upon the insurance company would be the “necessary administrative tasks associated with the assignment’s implementation,” and that this burden was not sufficiently material to justify invalidating an assignment in the face of the narrow approach endorsed by section 322.<sup>137</sup>

In response to the insurance company’s argument that the potential for increased exposure to tax liability under section 130 of the Internal Revenue Code was material<sup>138</sup>—a consideration that was influential in the later *Grieve* court’s finding that the attempted assignment was ineffective—the *Wonsey* court concluded that the anti-assignment clause was included as a protective measure for the benefit of *Wonsey*, and that “[t]here has been no showing or suggestion that the anti-assignment clause in this case was designed as a tax benefit for [the] defendants.”<sup>139</sup> By doing so, the *Wonsey* court, in effect, added a pro-assignment gloss to the materiality criterion; the further requirement that to bar assignment, any material increase in risk to the obligor resulting from the assignment must have been anticipated, and at least in part the basis for the original inclusion of the anti-assignment clause in the agreement.<sup>140</sup>

Another opinion heavily cited for its Restatement analysis is *Henderson v. Roadway Express*.<sup>141</sup> This case involved another structured settlement agreement containing an anti-assignment provision substantively identical to the clause presented in *Grieve*.<sup>142</sup> *Henderson* attempted to assign a portion of his future payments to Singer Asset Finance Corporation, and filed a petition to obtain approval of this assignment as required by the governing Illinois law.<sup>143</sup> The trial court refused to approve the assignment, citing the anti-assignment provision, and *Henderson* appealed.<sup>144</sup> He argued that under Restatement section 322(2), anti-assignment clauses should not be read as barring assignments “unless they explicitly state that any attempted assignment is ‘void,’ or ‘invalid,’ or ‘otherwise

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135. *See id.*

136. *Id.* at 943-44.

137. *Id.* at 943.

138. The insurance company cited *Johnson v. First Colonial Life Ins. Co.*, 26 F. Supp. 2d 1227 (C.D. Cal. 1998), in support of its position. *Id.* at 944.

139. *Wonsey*, 32 F. Supp. 2d at 944.

140. *See id.*

141. 720 N.E.2d 1108 (Ill. App. Ct. 1999).

142. *Id.* at 1109. *See also supra* note 75 and accompanying text.

143. *Id.* at 1109-10 (“Section 155.34 of the Illinois Insurance Code prohibits [the] assignment of structured settlement benefits without court approval.”).

144. *Id.* at 1111.

ineffective.”<sup>145</sup>

After reviewing prior case law, including the *Grieve* and *Wonsey* decisions, the Illinois Appellate Court rejected Henderson’s argument and affirmed the lower court ruling.<sup>146</sup> The court distinguished *Wonsey* (while implicitly accepting the “anticipated risk” principle articulated in that case) by concluding that the anti-assignment clause here had been included, at least partly, for the tax liability benefit of the insurer, and therefore the risk that assignment would impose upon the obligor rendered the assignment ineffective.<sup>147</sup>

The *Henderson* court did not explicitly apply Restatement section 317(2)(a) in assessing the consequences of the tax law aspects of the assignment, and strongly suggested that the materiality of those consequences was not essential to the determination of the effectiveness of the assignment if the parties had such consequences in mind when they included the anti-assignment provision in the agreement.<sup>148</sup> If one reads *Henderson* as following *Wonsey*, at least to the limited extent that it agreed that anti-assignment clauses of the sort present in the two cases were not per se preclusive of assignments, the opinion adds a “potential adverse consequences of assignment envisioned” limitation on the effectiveness of assignments to the other limitations presented in Restatement sections 317(2)(a), (b), and (c).<sup>149</sup>

The *Henderson* ruling was followed by two other Illinois appellate cases, both of which also included some discussion of the applicable Restatement provisions. In *Green v. SAFECO*,<sup>150</sup> the trial court ruled an assignment of structured settlement proceeds to be effective, and the insurer appealed.<sup>151</sup> The Illinois Appellate Court reversed, explicitly following the rationale of *Henderson* and holding the assignment ineffective.<sup>152</sup> Green made an argument not presented in *Henderson* that while under Restatement section 317(2) the assignment should be ruled ineffective if it is “validly precluded by contract,”<sup>153</sup> under section 322 a

145. *Id.* at 1110-11. This is presumably the basis that such language was needed to satisfy the “unless a different intention is manifested” clause of that provision. See RESTATEMENT (THIRD) OF CONTRACTS § 322(2) (1981).

146. *Henderson*, 720 N.E.2d at 1112-13 (reasoning that because anti-assignment provision was bargained for with intent of benefitting all parties, it was, therefore, enforceable).

147. See *id.* at 1112-13.

148. *Id.* at 1113 (“[m]ore important than whether these [section 130] tax concerns are real or will actually arise is the fact that the parties implemented the anti-assignment provisions with these concerns in mind.”).

149. See *supra* notes 59-64 and accompanying text.

150. 727 N.E.2d 393 (Ill. App. Ct. 2000).

151. *Id.* at 395.

152. *Id.* at 396-97.

153. RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(c) (1981).

“term prohibiting assignment of ‘the contract’” bars only delegations of duties and not assignments of rights.<sup>154</sup> The *Green* court, however, rejected this argument, noting that the anti-assignment provision referred to payment rights and not to the assignor’s duties.<sup>155</sup>

The other Illinois Appellate Court case following *Henderson* was *Piasecki v. Liberty Life Assurance Co. of Boston*.<sup>156</sup> As in *Green*, the trial court had allowed the assignment, and the insurer appealed.<sup>157</sup> The appellees argued that the anti-assignment clause should be ruled unenforceable under Illinois law because it conflicted with Restatement section 317(2), which generally permits assignments unless a specific showing can be made under 317 (2)(a), (b), or (c).<sup>158</sup> The insurer countered that under section 317(2)(a), the assignment should be precluded because of the potential material adverse tax consequences under Section 130 of the Internal Revenue Code.<sup>159</sup> The Illinois Appellate Court again reversed, following *Henderson*’s recognition of the insurer’s material increase in tax risk. The court noted that, in the present case, the parties had clearly contemplated those tax benefits when they entered into the contract.<sup>160</sup>

In *Owen v. CNA*,<sup>161</sup> a New Jersey appellate case, the plaintiff sought to have her assignment ruled effective. She was awarded summary judgment in her declaratory action, and the insurer appealed.<sup>162</sup> The clause at issue stated that the structured settlement payments “shall not be subject to assignment.”<sup>163</sup> The New Jersey Appellate Court first ruled that the anti-assignment provision was not invalidated by Article 9. The court reasoned that the payments arose out of the settlement of a tort claim and, therefore, were excluded from Article 9 coverage by section 9-104(k).<sup>164</sup>

The *Owen* court then discussed and applied Restatement sections 317(2)(a) and 322(2), showing an unusually clear understanding of their meaning and import.<sup>165</sup> The court noted that the Restatement’s provisions in conjunction with relevant New Jersey case law favored allowing assignments unless it would have material adverse consequences for the obligor, or unless the parties’ intentions indicated otherwise.<sup>166</sup> Accordingly, the case was remanded for “further proceedings relating to the materiality and enforceability of the provision

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154. *Green*, 2000 Ill. App. Ct. LEXIS at \*18.

155. *Id.*

156. 728 N.E.2d 71 (Ill. App. Ct. 2000).

157. *Id.* at 72.

158. *Id.* at 73.

159. *Id.*

160. *Id.* at 73-74 (finding the assignment ineffective).

161. 750 A.2d 211 (N.J. Super. Ct. App. Div. 2000).

162. *Id.* at 212.

163. *Id.*

164. *Id.* at 214-15 (finding Article 9’s express exclusion of tort claims includes the proceeds of such a claim).

165. *See id.* at 217-18.

166. *Id.* at 218.

governing the non-assignability of the structured settlement.”<sup>167</sup>

In the recent federal District Court case of *Liberty Life Assurance Co. of Boston v. Stone Street Capital, Inc.*,<sup>168</sup> the court, following Missouri law, upheld an anti-assignment clause, thereby rendering the attempted assignment of structured settlement proceeds ineffective.<sup>169</sup> The insurer made the now-familiar argument under Restatement section 317(2)(a) that allowing assignment would expose them to the material risk of the loss of their tax benefits under section 130 of the Internal Revenue Code.<sup>170</sup> The assignor attempted to counter this argument creatively by citing both an IRS private letter ruling in which the IRS had given “no action” assurances to an individual that assignment by him of his structured settlement payment rights would not affect his tax status under section 104(a)(2),<sup>171</sup> and an opinion letter prepared by Pricewaterhouse Coopers to the same effect.<sup>172</sup> The court, however, rejected the assignor’s argument, noting that the IRS private letter ruling had specifically declined to address the section 130 issue. Moreover, the ruling was addressed only to the taxpayer who had requested it and had no legal standing as precedent in other matters.<sup>173</sup> The court also rejected the authority of the Pricewaterhouse Coopers letter as a definitive resolution of the section 130 issue.<sup>174</sup>

The *Liberty Life* court also addressed the question of whether the attempted assignment was validly precluded by contract under Restatement section 317(2)(c), without regard to its materiality.<sup>175</sup> The court considered section 322(2)(b), and recognized that this section required that the parties’ intention to bar assignment, rather than merely allow damages for breach, had to be shown to preclude assignment under section 317(2)(c).<sup>176</sup> The court concluded that the particular language of the anti-assignment provision sufficiently demonstrated such an intention.<sup>177</sup> This conclusion, however, is suspect because the language at issue was not unusually precise or restrictive, but rather was the conventional anti-

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167. *Id.*

168. 93 F. Supp. 2d 630 (D. Md. 2000).

169. *Id.* at 638.

170. *Id.* at 634-35.

171. *Id.* at 635-36 (citing Priv. Ltr. Rul. 119273-97 (June 10, 1999)).

172. *Id.* at 636.

173. *Id.* at 636-37.

174. *Id.* at 636 (stating that opinion letter was just that—an opinion).

175. *Id.* at 637.

176. *Id.*

177. The anti-assignment provision stated in part: “nor shall [the assignor] have the power to sell, mortgage, encumber, [or anticipate the periodic payments,] or [sic] any part thereof, by assignment or otherwise.” *Id.*



assignment phrasing of the “shall not assign” variety,<sup>178</sup> such as was the focus of the *Grieve* and *Wonsey* cases.<sup>179</sup>

Another case involving the Restatement principles is *Cavallaro v. SAFECO*.<sup>180</sup> Cavallaro filed a motion for declaratory judgment seeking to effectuate his attempted assignment of a portion of his annuity payments under a structured settlement agreement to Stone Street Capital, Inc., against the resistance of the insurance company that had issued the annuity contract.<sup>181</sup> The trial court first ruled that Article 9 did not invalidate the anti-assignment clause of the settlement agreement because the payments arose out of the settlement of a tort claim.<sup>182</sup> The court then reached the rather dubious conclusion that, because under section 322(2)(c) an anti-assignment clause is generally “for the benefit of the obligor,”<sup>183</sup> not only should the clause be read to allow the obligor to waive it, but the section also confers upon the obligor the right to nullify the assignment prior to its taking place.<sup>184</sup>

Finally, on August 15, 2000 the Connecticut Supreme Court issued its opinion in *Rumbin v. Utica Mutual Insurance Co.*<sup>185</sup> (hereinafter “*Rumbin II*”), a case that will likely become quite influential in this area. Rumbin attempted to assign his right to the stream of proceeds under a structured settlement agreement, and Utica Mutual Insurance Company sought to block the assignment on the basis of the anti-assignment clauses in both its settlement and annuity contracts.<sup>186</sup> The trial court<sup>187</sup> (hereinafter “*Rumbin I*”) upheld the assignment, holding that the Connecticut statute, which imposed purchaser disclosure and prior judicial consent limitations on the assignment of structured settlement proceeds, should be read to substitute those protections for the protection previously accorded obligors by anti-assignment clauses.<sup>188</sup>

Both the majority and dissenting opinions in *Rumbin II*; however, rejected the lower court’s interpretation of the applicable Connecticut statute, concluding that it should be construed narrowly and consequently had no bearing upon the effectiveness of anti-assignment clauses.<sup>189</sup> Yet, the court ultimately affirmed the *Rumbin I* ruling that rather than rendering the assignment invalid, the particular anti-assignment clauses in that case only allowed the obligor to seek damages for

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178. *Id.*

179. *See supra* notes 75 and 91 and accompanying text.

180. 1999 Conn. Super. LEXIS 3211 (Nov. 18, 1999).

181. *Id.* at \*1-3.

182. *Id.* at \*10.

183. *Id.* at \*13 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(c) (1981)).

184. *Id.* at \*14.

185. 757 A.2d 526 (Conn. 2000).

186. *Id.* at 529.

187. 1999 Conn. Super. LEXIS 472 (Mar. 2, 1999), *aff’d*, 757 A.2d 526 (Conn. 2000).

188. *See id.* at \*12.

189. *Infra* notes 191-202 and accompanying text.

breach of those clauses.<sup>190</sup>

The *Rumbin II* court's decision to allow assignment by application of *Restatement* sections 317 and 322 is matched in thoroughness and sophistication perhaps only by *Owen*,<sup>191</sup> discussed above. The court first noted that section 317 generally favors free assignability, even though 317(2)(c) allows for assignments to be validly precluded by contract.<sup>192</sup> The court further noted that, given the pro-assignment thrust of section 317 and the section 322(2) "unless a different intention is manifested" clause, anti-assignment clauses should be narrowly construed to limit their preclusive effects.<sup>193</sup> Next, the court distinguished anti-assignment clauses that merely limit or prohibit assignments from those that go further and limit the "power to assign" or declare assignments to be "void" or "invalid."<sup>194</sup> The court regarded the latter phrasing of anti-assignment restrictions as sufficient to satisfy section 322(2), thereby rendering an attempted assignment ineffective.<sup>195</sup> On the other hand, the former, more general phrasing would not satisfy section 322(2), and assignments done in the face of prohibitions so worded would therefore be effective, albeit constituting a breach of contract entitling the obligor to any damages that could be proven.<sup>196</sup>

*Rumbin II* was likely regarded as a critical test by the "repeat players" that regularly litigate this structured settlement assignability issue, and the Connecticut Supreme Court was no doubt presented with very comprehensive briefings of the issues raised. The *Rumbin II* opinion reflects this extensive argumentation by citing a large number of cases raising assignment issues in various contexts—including the *Liberty Life Assurance*,<sup>197</sup> *Wonsey*,<sup>198</sup> *Grieve*,<sup>199</sup> *Johnson*,<sup>200</sup> and *Henderson*<sup>201</sup> cases discussed above—as well as extensive secondary treatise authority in support of its decision.<sup>202</sup>

Both the proponents and the opponents of free assignment of structured settlement proceeds declared the *Rumbin II* decision to be a victory for their

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190. *Rumbin*, 757 A.2d at 530.

191. *Owen v. CNA Ins.*, 750 A.2d 211 (N.J. Super. Ct. App. Div. 2000).

192. *Rumbin*, 757 A.2d at 531.

193. *Id.*

194. *Id.*

195. *Id.* at 533.

196. *Id.* at 534.

197. *Piasecki v. Liberty Life Assurance Co. of Boston*, 728 N.E.2d 71 (Ill. App. Ct. 2000).

198. *Wonsey v. Life Ins. Co. of N. Am.*, 32 F. Supp. 2d 939 (E.D. Mich. 1998).

199. *Grieve v. Gen. Am. Life Ins. Co.*, 58 F. Supp. 2d 319 (D. Vt. 1999).

200. *Johnson v. First Colony Life Ins. Co.*, 26 F. Supp. 2d 1227 (C.D. Cal. 1998).

201. *Henderson v. Roadway Express*, 720 N.E.2d 1108 (Ill. App. Ct. 1999).

202. *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526 (Conn. 2000).

cause.<sup>203</sup> The opponents' claim seems more plausible for two reasons. First, the opinion unanimously rejected the argument (discussed in the following section of this article) that the applicable statutory purchaser disclosure and prior judicial consent provisions limited the effectiveness of anti-assignment clauses.<sup>204</sup> Second, while the court upheld the assignment in the face of that particular anti-assignment clause, it provided insurers with detailed instructions on how to reword those clauses so that in the future they would be upheld to bar assignments.<sup>205</sup> From a more disinterested and academic perspective, the court's careful and systematic application of the Restatement section 317/322 framework to the question is to be applauded. However, the decision to make the section 322(2) "unless a different intention is manifested" determination solely on the basis of the particular language of the anti-assignment clause alone is open to question.<sup>206</sup> The two dissenters heavily criticized this aspect of the decision, preferring to bar the assignment on the basis of a more particularized inquiry into the intentions of the parties.<sup>207</sup>

Three broad generalizations emerge from the cases considered above. First, while some courts appear to clearly understand the underlying intent and analytical complexities of the Restatement sections 317 and 322 framework—as evidenced by the *Owen* and *Rumbin II* opinions—most courts unfortunately overlook or misunderstand key aspects of those provisions when attempting to apply them. Second, while the Restatement framework apparently encourages courts to find assignments effective unless (1) the parties' intentions otherwise are clear; (2) material adverse consequences for the obligor will result; or (3) there are statutory or public policy impediments,<sup>208</sup> most of the courts seem more inclined to apply those provisions to affirm the power of anti-assignment clauses to bar assignments,<sup>209</sup> although *Rumbin II* could be regarded as an important exception to this general assessment.<sup>210</sup> Judges appear more eager to embrace freedom of contract principles and less fearful of imposing undue restraints upon alienation

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203. Thomas Scheffey, *Selling Settlements: Getting Less, Faster*, CONN. L. TRIB., Aug. 21, 2000. Representatives of the settlement purchasing industry claim the decision will "force the insurance industry to prove . . . damages," while insurers predict the decision "will eventually doom the settlement-buying business in Connecticut." *Id.*

204. *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526, 530 (Conn. 2000).

205. *Id.* at 531-36 (explaining that it would uphold anti-assignment clauses that eliminate the recipient's power to assign).

206. *Id.* at 537 (Norcott, J., dissenting) (arguing that the majority's standard for determining whether an anti-assignment clause hinders the right to assign or the power to assign "illogical and arbitrary").

207. *Id.* at 539-40 (Norcott, J., dissenting).

208. See RESTATEMENT (SECOND) OF CONTRACTS § 322 cmt. a (1981) ("But as assignment has become a common practice, the policy which limits the validity of restraints on alienation has been applied to the construction of contractual terms open to two or more possible constructions.").

209. It should be noted, however, that of the five cases not discussed in this section that briefly referred to the relevant Restatement provisions, four of them ruled the assignments effective. *Supra* note 70.

210. Although, perhaps not because its ultimate impact is likely to be the broader use of the anti-assignment language it declares effective to bar assignments, a point that the justices upholding the assignment before them could not have overlooked.

than are the Restatement drafters.

Finally, despite some commentators' expressed outrage with the practice of the assignment of settlement payments at steep discounts and their calls for greater legal intervention to protect structured settlement recipients from exploitation,<sup>211</sup> very few judges choose to utilize the public policy provision of section 317(2)(b) to aggressively and paternalistically police these assignments for unconscionability or usury.

### C. *The Impact of Disclosure and Consent Statutes.*

One final issue to consider is the impact of the statutes recently adopted in a number of jurisdictions imposing purchaser disclosure and judicial consent limitations on the assignment of structured settlement payment rights.<sup>212</sup> It is unclear what effect, if any, these statutes should have upon the effectiveness of anti-assignment clauses to bar assignments. Under one reasonable textual interpretation, these statutes purport only to impose additional restrictions on assignments that are otherwise effective, and thus should have no bearing upon whether an anti-assignment clause precludes effective assignment. However, given that virtually all structured settlement agreements include anti-assignment clauses,<sup>213</sup> one might suspect that these statutes were intended to have some bearing upon the effectiveness of assignments attempted in the face of such clauses, and not intended only to apply to the very few (if any) assignments not limited by contract.<sup>214</sup> It is therefore necessary to review the legislative histories of these statutes for evidence of the drafters' intentions.

The only jurisdiction having such a statute where this issue has been litigated is Connecticut. On June 8, 1998, Connecticut adopted Public Act 98-238,<sup>215</sup> which imposes substantial disclosure obligations on purchasers of structured settlement payments and also requires the assignor of such payments to seek a prior declaratory judgment that the assignment is in his best interest and is fair and reasonable to all concerned.<sup>216</sup> In *Rumbin II*, the Connecticut Supreme Court unanimously ruled that this statute had no effect on the enforceability of anti-

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211. *E.g.*, Corboy, *supra* note 4, at 116 (describing the transactions as "usurious" and calling for consumer protection legislation); Shoop, *supra* note 4, at 12-14 (quoting one opponent calling the transactions "loan-sharking" and describing efforts to pass legislation requiring judicial review of proposed sales of settlement payments).

212. *See supra* note 10.

213. 1999 Conn. Super. LEXIS 472, at \*12-13 (Conn. Mar. 2, 1999).

214. *Id.* at \*9, \*12.

215. Conn. Pub. Act 98-238, 1998 Conn. Legis. Serv. 5 (codified at CONN. GEN. STAT. ANN. § 52-225f (2000)).

216. CONN. GEN. STAT. ANN. § 52-225f (West Supp. 2000).

assignment clauses.<sup>217</sup>

The *Rumbin II* decision on this issue is best understood against the background of the extensive lower court litigation concerning the implications of this statute for assignability. In *Rumbin I*,<sup>218</sup> a Connecticut court first considered the effect of Public Act 98-238 upon the effectiveness of assignments made in the face of an anti-assignment clause.<sup>219</sup> The trial court determined that the legislature had intended the statutory provisions to apply not only in those rare situations where the structured settlement agreement permits assignment, but also to allow assignments satisfying the statutory criteria even where the settlement agreement includes an anti-assignment clause.<sup>220</sup> That court, therefore, read the statute as effectively substituting a disinterested court review for the protection otherwise accorded the obligor by an anti-assignment clause.<sup>221</sup> The *Rumbin I* court declared the assignment effective, noting that the insurer had not offered any evidence of adverse tax effects or other detriment by virtue of the assignment.<sup>222</sup>

*Bobbitt v. SAFECO Assigned Benefits Company*<sup>223</sup> revisited this question. After a full analysis of Public Act 98-238 and the *Rumbin I* precedent, the *Bobbitt* court concluded that the statute applied only to assignments that were otherwise permitted, and had no bearing upon the enforceability of anti-assignment clauses.<sup>224</sup> After expressly declining to follow *Rumbin I*'s interpretation of the statute, the court ruled that the anti-assignment clause in the dispute before it barred the attempted assignment.<sup>225</sup>

In *Buchanan v. American Mutual Life Insurance Company*,<sup>226</sup> the court again considered the impact of Public Act 98-238.<sup>227</sup> After citing and briefly reviewing both the *Rumbin I* and *Bobbitt* precedents, the *Buchanan* court embraced the *Rumbin I* interpretation and declared the assignment effective.<sup>228</sup> *Cavallaro v. SAFECO Assigned Benefits Co.*<sup>229</sup> similarly embraced the *Rumbin I* position and rejected the *Bobbitt* interpretation.<sup>230</sup> Finally, in the last pre-*Rumbin II* trial court case addressing the question, the court in *McKay v. Aetna Casualty and Surety*

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217. *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526 (Conn. 2000). See *supra* notes 176-77 and accompanying text.

218. 1999 Conn. Super. LEXIS 472 (Mar. 2, 1999).

219. *Id.*

220. *Id.* at \*9.

221. *Id.*

222. *Id.* at \*13-14.

223. 1999 Conn. Super. LEXIS 2347 (Aug. 24, 1999).

224. *Id.* at \*23. ("The most reasonable interpretation of the language of P.A. 98-238 is that it imposes the requirement of court approval only upon proposed assignments of structured settlements which are otherwise allowed.")

225. *Id.* at \*24-25.

226. 1999 Conn. Super. LEXIS 3094 (Nov. 15, 1999).

227. *Id.*

228. *Id.* at \*5-8.

229. 1999 Conn. Super. LEXIS 3211 (Nov. 18, 1999).

230. *Id.* at \*18-19, n.8.

*Co.*,<sup>231</sup> followed *Bobbitt* and invalidated the assignment before it, thereby rejecting the *Rumbin I* interpretation.<sup>232</sup>

This issue was finally addressed by the Connecticut Supreme Court in *Rumbin II*.<sup>233</sup> The court unanimously, and rather summarily, rejected the *Rumbin I* rationale and embraced the *Bobbitt* position.<sup>234</sup> The court strongly endorsed the principle that statutes in derogation of the common law are to be strictly and narrowly construed.<sup>235</sup> The court then determined that, because the statute at issue did not expressly address the effectiveness of anti-assignment clauses, there was no clear indication of legislative intent to alter the common law of assignability that would justify giving it that effect.<sup>236</sup> The issue now appears settled in Connecticut, but the effect of comparable statutes in other jurisdictions remains unclear. Given the variations in construction, legislative intent, and lack of precedent in many of those jurisdictions, the impact of statutes calling for purchaser disclosure and prior judicial consent upon the effectiveness of anti-assignment clauses to bar assignment of structured settlement payments cannot be predicted with any certainty.

### III. CONCLUSION

This article has reviewed in some detail the numerous recent cases addressing the effectiveness of anti-assignment clauses in structured settlement agreements, and the issues these cases present. It has also noted with approval the widespread application of sections 317 and 322 of the Restatement to the central question presented, and described the inadequacies of many courts' utilization of those provisions. In closing, this author would like to offer some thoughts concerning the proper application of this Restatement approach to these questions.

Courts should start their analyses with Restatement section 322(2), and first determine whether the anti-assignment provision at issue demonstrates the parties' intent to preclude assignment, rather than the intent to merely confer a right to seek damages upon the obligor.<sup>237</sup> They should not, however, follow the *Rumbin II* approach and make this determination solely on the basis of fine verbal distinctions concerning the language of the anti-assignment clause. These clauses generally appear to be standard "boilerplate" provisions drawn from a form book

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231. 2000 Conn. Super. LEXIS 840 (Mar. 29, 2000).

232. *Id.* at \*9.

233. *Rumbin v. Utica Mut. Ins. Co.*, 757 A.2d 526 (Conn. 2000).

234. *Id.* at 530.

235. *Id.*

236. *Id.*

237. *See supra* notes 63-64 and accompanying text.

and not individually tailored to the parties, particular circumstances, or concerns to any meaningful extent. Instead, courts should consider the entire conduct of the settlement negotiations and the extent to which the obligor has evidenced a concern with adverse tax or other implications of an assignment. If, after this broader inquiry, they find that an intent to preclude assignment was present, they should hold the preclusion valid under section 317(2)(c) and find the attempted assignment ineffective.

If there is no determination of a valid preclusion of assignments by the anti-assignment clause, the section 317(a) and (b) criteria for the validity of the assignment should be examined. Starting with section 317(2)(a), the court should consider whether the obligor will experience material adverse effects. The only potentially material impact that might exist beyond the minimal administrative processing requirements of an assignment is the risk inherent in the Internal Revenue Code section 130 tax question.<sup>238</sup> This is a difficult issue because the significance of the risk of loss of tax benefits is unclear.<sup>239</sup> However, this materiality inquiry should be rendered moot if any evidence was presented in the earlier section 322(2) inquiry that the anticipation of this tax risk was a factor in the inclusion of the anti-assignment provision. Where an inquiry into the materiality of this risk is called for, because this risk has never materialized in a loss of tax benefits for an insurer, it should probably be determined that the tax and other consequences of an assignment of payment rights are non-material and do not bar its effectiveness.

After the court has determined that the consequences of an assignment are not material, the final step should be a search under section 317(2)(b) for any applicable statutory or public policy restrictions on assignment. Because Article 9 does not apply to these assignments,<sup>240</sup> the only potentially applicable statutory restrictions on assignability are the recent statutes imposing purchaser disclosure and prior judicial consent limitations.<sup>241</sup> As previously noted, however, while the question has been resolved under Connecticut law, it is still somewhat unclear what impact those statutes enacted in other jurisdictions will have upon the effectiveness of anti-assignment clauses.<sup>242</sup> The clauses may be construed *Rumbin II*-style, as merely imposing additional limitations on otherwise-permitted assignments, or they may be regarded *Rumbin I*-style, as permissive provisions

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238. See *supra* notes 113-120 and accompanying text.

239. Compare *Grieve v. Gen. Am. Life Ins. Co.*, 58 F. Supp. 2d 319, 323 (D. Vt. 1999) (finding that an assignment would create a material risk of loss of section 130 tax benefits), and *Henderson v. Roadway Express*, 720 N.E.2d 1108 (Ill. App. Ct. 1999) (in accord with *Grieve*), with *W. United Life Assurance Co. v. Hayden*, 64 F.3d 833, 842 (3d Cir. 1995) (finding that the section 130 tax benefits probably vest once the payment obligation is undertaken), and *In Re Cooper*, 242 B.R. 767 (S.D. Ga. 1999) (in accord with *W. United Life Assurance Co.*). See also *Andrada*, *supra* note 3, at 481-90 (characterizing the risk of adverse IRS action as "extremely small").

240. See *supra* notes 26-42 and accompanying text.

241. See *supra* note 10.

242. See *supra* notes 161-77 and accompanying text.

that will supersede otherwise valid contractual preclusions of assignability to allow assignments.

Finally, the public policy provision of Restatement section 317(2)(b) provides an opportunity for courts to ensure that unfair advantage is not taken of impecunious payment recipients. Respect for freedom of contract does not require courts to ignore situations where substantial long-term payment streams are being assigned at discount rates of twenty percent to thirty percent or higher.<sup>243</sup> It is entirely appropriate for judges to exercise a little paternalistic oversight to prevent this type of exploitation, particularly given the adoption of statutes in a number of jurisdictions requiring prior judicial approval of such assignments as being fair and reasonable to all involved.

As noted earlier in this article, Representative Shaw and Senator Chaffee have in recent years made unsuccessful legislative proposals calling for the imposition of very large excise taxes on factoring companies in connection with most structured settlement assignments.<sup>244</sup> If such legislation is ever adopted at the federal level, it would drastically curtail this practice, if not eliminate it altogether<sup>245</sup>—which seems its clear intention—and thus render moot the question of the enforceability of anti-assignment provisions in settlement agreements. However, in the absence of such preclusive federal legislation, the issues addressed in this Article will likely continue to be actively litigated.

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243. Corboy, *supra* note 4, at 116.

244. *Supra* note 10. Neither the text of the legislative proposals nor the limited legislative history available indicates the primary motive for these efforts. They may have been fueled by the paternalistic concern for the long-term welfare of settlement recipients, or instead by insurance industry lobbying efforts seeking to bolster the viability of the industry's settlement annuity business. The latter factor could have played a covert but significant role in overcoming legislative inertia at both the state and federal levels.

245. *Id.*



