494-5819

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

GILMORE, CHARLES E.,

Debtor.

J.G. WENTWORTH S.S.C., LIMITED PARTNERSHIP,

Plaintiff,

v.

CHARLES E. GILMORE,

Defendant,

PATRICK J. MALLOY III, TRUSTEE,

Defendant and Third Party Plaintiff,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Third Party Defendant.

Case No. 01-00571-R
Chapter 7

Adv. No. 01-0218-R

ORDER DENYING J.G. WENTWORTH S.S.C. LIMITED PARTNERSHIP'S MOTION FOR SUMMARY JUDGMENT

Before the Court is J.G. Wentworth S.S.C. Limited Partnership's Motion for Summary Judgment (Doc. 36), filed on January 17, 2002 ("Wentworth's Motion"); The Trustee's Response and Objection to J.G. Wentworth S.S.C. Limited Partnership's (Wentworth) Motion for Summary Judgment and Supporting Brief (Doc. 37), filed on February 14, 2002; Response of Third Party Defendant United States Fidelity and Guaranty Company to Plaintiff J.G. Wentworth S.S.C. Limited

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Partnership's Motion for Summary Judgment (Doc. 39), filed on February 15, 2002; Debtor's Response to Wentworth's Motion for Summary Judgment and Brief in Support (Doc. 40), filed on February 25, 2002; and J.G. Wentworth S.S.C. Limited Partnership's Reply Memorandum Supporting Motion for Summary Judgment (Doc. 41), filed on February 27, 2002 ("Wentworth's Reply").

I. SUMMARY OF THE PARTIES' CONTENTIONS

J.G. Wentworth S.S.C. Limited Partnership ("Wentworth") contends that it is entitled to a judgment declaring that Wentworth is the owner of annuity payments payable through the year 2020 that Wentworth purchased prepetition from the debtor, Charles E. Gilmore ("Debtor"), and that neither the Debtor nor the estate has any right, title, or interest in such annuity payments. Wentworth argues that (1) the provisions in the annuity that purport to restrict the Debtor from assigning the annuity payments are ineffective and unenforceable under case law and the Uniform Commercial Code; and (2) the Court should follow the reasoning set forth in a recent Oklahoma Supreme Court decision to hold that the Debtor is estopped from enforcing contractual anti-assignment provisions against his assignee, Wentworth. Wentworth also seeks a determination under 11 U.S.C. § 523(a)(2)(A) that the Debtor has incurred a non-dischargable debt to Wentworth by obtaining and retaining annuity payments that were purchased and thus owned by Wentworth.

The Debtor contends that (1) the anti-assignment provision in the annuity policy prevented him from validly assigning or pledging the annuity payments to Wentworth; and (2) funds received by Debtor from Wentworth should be treated as unsecured loans. The Debtor denies that he acted fraudulently in retaining post-assignment payments because his assignment of the payments to Wentworth was void.

The Chapter 7 Trustee, Patrick J. Malloy ("Trustee"), also asserts that the Debtor's purported sale of the annuity payments to Wentworth was void due to valid anti-assignment provisions in the relevant documents, and that the annuity payments, less the Debtor's exemption therein, are property of the estate. The Trustee argues that Oklahoma law is not applicable to the questions presented herein, and that under Texas, Arizona and Maryland law, the anti-assignment clause is valid and enforceable; that only the owner of the annuity policy, United States Fidelity and Guaranty Company ("USF&G"), had the power to assign rights under the annuity; and that USF&G has neither assigned, nor consented to the assignment of, the annuity payments. The Trustee denies that he is estopped from arguing that the Debtor's purported assignment is void. Finally, the Trustee argues that the purported assignment should be invalidated for equitable and public policy reasons.

USF&G, the Third Party Defendant and owner of the annuity, does not support or oppose Wentworth's Motion, but requests that the Court "specifically protect USF&G from double liability."

Finally, in its reply, Wentworth contends that if the anti-assignment clauses are valid and the annuity payments could not have been voluntarily assigned to Wentworth, then the anti-assignment clauses should also prohibit the estate from asserting rights in the annuity payments for the benefit of unsecured creditors of the Debtor.

II. THE SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (made applicable herein by Bankruptcy Rule 7056). Substantive law determines which facts

are material; "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. It is incumbent upon the non-movant to demonstrate that there are genuine issues of fact for trial. See Vitkus v. Beatrice Co., 11 F.3d 1535, 1539 (10th Cir. 1993). Or as the Seventh Circuit more pointedly articulated in Albiero v. Kankakee, 246 F.3d 927, 933 (7th Cir. 2001), *quoting* Schacht v. Wisconsin Dep't of Corr., 175 F.3d 497, 504 (7th Cir.1999), "summary judgment 'is the "put up or shut up" moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.'"

"[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Liberty Lobby, 477 U.S. at 249. Reasonable inferences that may be made from the proffered evidentiary record should be drawn in favor of the non-moving party. See Adams v. American Guarantee and Liability Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000). However, "[i]f the [non-moving party's] evidence is merely colorable or is not significantly probative, summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations omitted).

III. JURISDICTION

The Court has jurisdiction of this "core" proceeding by virtue of 28 U.S.C. §§ 1334, 157(a), and 157(b)(2)(A), (B), (C), (K), (I), and (O); and Miscellaneous Order No.128 of the United States District Court for the Northern District of Oklahoma: Order of Referral of Bankruptcy Cases effective July 10, 1984, as amended.

IV. THE RECORD ON SUMMARY JUDGMENT

A. The Requests for Admissions

The Trustee objects to deeming as "uncontroverted facts" the unanswered requests for admissions that Wentworth had directed to the Debtor because Wentworth failed to serve the requests upon the Trustee. Indeed, Local Rule 7005 requires that requests for admissions "shall be served on all parties to the adversary proceeding." LR 7005. The Trustee also contends that the requests for admission should have been addressed to the Trustee, not the Debtor, because the estate owns the annuity payments.

The Court concludes that the deemed admissions are binding on the Debtor to the extent that Wentworth seeks a judgment of nondischargability against the Debtor. Having had an opportunity to contradict or withdraw the admissions in his response to Wentworth's Motion, the Debtor has not done so. See e.g., Rule 36(b) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Bankruptcy Rule 7036. The deemed admissions are not binding on the Trustee *per se*, because the Trustee was not requested to admit or deny the statements. The Debtor's admissions, however, do provide an evidentiary basis upon which Wentworth may support its factual contentions, just as if Wentworth had supported the statements with an affidavit of a competent witness. The Trustee had an opportunity to oppose Wentworth's evidentiary materials with admissible contravening evidence, and create an issue of fact, but did not do so.

In light of the absence of contravening evidence, the deemed admissions, to the extent that they constitute admissions of *fact* and not conclusions of law, will be considered as part of the

factual record in connection with Wentworth's Motion.[1] Thus, the record on summary judgment will include the following facts as a result of the Debtor's failure to deny the Requests for Admission attached to Wentworth's Motion as Exhibit A:

> On or about June 12, 1997, the Debtor executed a document entitled "Purchase Agreement," which purported to grant certain rights to Wentworth. (Request No. 1)
>
> Attached to Plaintiff's Complaint as Exhibit "A" is a true and correct copy of the Purchase Agreement (the "Original Purchase Agreement"). (Request No. 2)
>
> The Debtor's signatures on pages 11 and 13 of the Original Purchase Agreement are genuine. (Request No. 3)
>
> The Debtor initialed pages 1-10 of the Original Purchase Agreement. (Request No. 4)
>
> The Debtor was represented by an attorney in connection with the execution of the Original Purchase Agreement. (Request No. 5)
>
> At the time he executed the Original Purchase Agreement, the Debtor understood that he was transferring to Wentworth his rights to receive 60 monthly payments of $1,695.60 each increasing 3% annually, with Wentworth retaining $750.00 monthly and returning the remainder to the Debtor beginning on July 31, 1997, and ending on June 30, 2002. (Request No. 6)
>
> Between the dates of October 24, 1997, and March 9, 1999, the Debtor executed eight documents entitled respectively: "First Amendment to Purchase Agreement," "Second Amendment to Purchase Agreement," "Third Amendment to Purchase Agreement," "Fourth Amendment to Purchase Agreement," "Fifth Amendment to Purchase Agreement," "Sixth Amendment to Purchase Agreement," "Seventh Amendment to Purchase Agreement," and "Eighth Amendment to Purchase Agreement" (the "Amendments"), which purported to transfer additional rights to Wentworth. (Request No. 7)
>
> Documents attached to Plaintiff's Complaint as Exhibits "B" through "I" are true and correct copies of the Amendments. (Request No. 8)
>
> The Debtor's signatures on the Amendments are genuine. (Request No. 9)

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[1]Request Nos. 14 and 17 state a conclusion of law; Request Nos. 12, 15 and 16 characterize parts of a document which is otherwise before the Court and which the Court will interpret in light of the whole document.

The Debtor was represented by an attorney in connection with the execution of the Amendments. (Request No. 10)

At the time that the Debtor executed the Amendments, he understood that he was transferring to Wentworth his rights to receive additional payments, as set forth on Exhibit A to each Amendment. (Request No. 11)

Contemporaneously with the execution of the Original Purchase Agreement, the Debtor executed a letter addressed to F&G Life, the annuity company, in which the Debtor directed that future annuity payments be addressed to a Post Office Box address provided by Wentworth. (Request No. 13)

At some time after execution of the Original Purchase Agreement, the Debtor instructed F&G Life, the annuity company, to change the address for payments, from the Post Office Box address provided by Wentworth to the Debtor's address. (Request No. 18)

Between the June 1, 1999, and December 1, 2000, the Debtor received and retained several annuity payments which are referenced in the Original Purchase Agreement and/or the Amendments. (Request No. 19)

At the time he received and retained the annuity payments between June 1, 1999, and December 1, 2000, the Debtor was aware that the annuity payments were the subject of the Original Purchase Agreement and Amendments. (Request No. 20)

It is the Debtor's intention to receive and retain some or all of the remaining annuity payments referenced in the Original Purchase Agreement and Amendments. (Request No. 21)

The Court also concludes that the record on summary judgment shall include the portions of the annuity policy attached to the Answer and Counterclaim of the Debtor and to the Trustee's Response as Exhibit B, as Wentworth has never controverted the authenticity thereof and has in fact referred to, recognized and relied upon the document by contending, *inter alia*, that "the Debtor's rights under the Settlement Agreement were reduced to an annuity contract, which extinguished the Debtor's rights under the Settlement Agreement, and which contains no choice of law provision." Wentworth's Reply at 3.

B. **Uncontroverted Material Facts**

On or about May 28, 1996, the Debtor settled a personal injury action by entering into a Settlement Agreement and Release of All Claims (the "Settlement Agreement")[2] with the defendant, El Paso Natural Gas Co. ("El Paso"), and its insurer, USF&G. In exchange for the Debtor's release of claims against El Paso, USF&G agreed to pay the Debtor a lump sum of $750,000 and future payments of "$1,695.60 monthly for life with a minimum of 30 years payable beginning on July 31, 1996, increasing by 3% annually." Settlement Agreement ¶ 2(B). The Settlement Agreement provides that the Debtor was and is "a general creditor to [El Paso]." Settlement Agreement ¶ 3. The Debtor, El Paso and USF&G agreed that the Debtor would have no "power to sell, mortgage, encumber or anticipate the future payments, or any part thereof by assignment or otherwise." Settlement Agreement ¶ 3.[3] The Settlement Agreement further provides that it is binding on the Debtor, El Paso, and USF&G and "shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each." Settlement Agreement ¶ 11.

The parties agreed that USF&G would finance the future periodic payments (the "Periodic Payments") by purchasing a "qualified funding asset" within the meaning of Section 130(d) of the Internal Revenue Code in the form of an annuity policy purchased from F&G Life Insurance Company ("F&G"). Settlement Agreement ¶ 4. The Settlement Agreement further provided that–

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[2]The Settlement Agreement is attached as an exhibit to the Purchase Agreement; the Purchase Agreement is attached to the Complaint as Exhibit A. No one disputes the authenticity of the Settlement Agreement.

[3]Herein, the Court may refer to this clause and the anti-assignment clause contained in the Annuity Contract, set forth below, collectively as the "Anti-Alienation Provisions."

> All rights of ownership and control of such annuity policy shall be vested in [USF&G]. [USF&G] will have the Annuity Issuer mail payments directly to the [Debtor]. [USF&G] will own the annuity purchased from [F&G] and will guarantee the payments. [The Debtor] shall be responsible for maintaining and providing the current and proper mailing address to [USF&G] and [F&G].

Settlement Agreement ¶ 4. Finally, the Settlement Agreement states that it "shall be construed and interpreted in accordance with the laws of the State of Texas." Settlement Agreement ¶ 13.

The annuity policy arises from a contract entered into by USF&G and F&G, wherein USF&G paid a single premium of $500,000 to F&G in exchange for F&G's promise to pay the Debtor $1,695.60 per month beginning on July 31, 1996 (increasing 3% annually), for thirty years or for the life of the Debtor, whichever is longer (the "Annuity Contract," a partial copy of which was attached to the Debtor's Answer, and which is attached to the Trustee's Response as Exhibit B). USF&G is the owner of the policy. The Debtor is the payee and the measuring life of the annuity. Annuity Contract at B1 and B5; Answer of USF&G. The Annuity Contract contains the following material provisions:

> THIS POLICY IS OWNED BY USF&G AND AS OWNER ALL RIGHTS UNDER THIS CONTRACT ARE VESTED WITH USF&G. ANY PAYMENT(S) PAYABLE WITH THIS CONTRACT CANNOT BE ALTERED, ASSIGNED, MORTGAGED, ADVANCED OR ENCUMBERED BY THE PAYEE.

Annuity Contract at B1 (emphasis in original).

> Assignment. We will not be responsible for the validity or sufficiency of any assignment. To be binding on us, an executed assignment or certified copy must be received at our Home Office. The Owner's rights and any Beneficiary's interest will be subject to the assignment.

Annuity Contract at B3.

> Owner. The Annuitant is the Owner of this policy, *unless otherwise provided.* While the Annuitant is alive, the Owner may exercise any of the rights of the policy. We may agree with the Owner to change or amend the policy. The Owner may assign

the policy. Some or all of the Owner's rights will be subject to those of any assignee or Irrevocable Beneficiary or other interested party.

Annuity Contract at B3 (emphasis added).

The Annuity Contract indicates that it was "[s]igned for the Company [F&G] at Baltimore, Maryland, on the Date of Issue." Annuity Contract at B1 and B4. The "Date of Issue" was May 29, 1996. Annuity Contract at B2. F&G's Home Office is in Baltimore, Maryland. Annuity Contract at B1. At the time the annuity was purchased by USF&G, the Debtor lived in Arizona. Annuity Contract at B5.

On or about June 12, 1997, the Debtor entered into the Original Purchase Agreement with Wentworth in which the Debtor agreed to assign his right to receive a part of some of his Periodic Payments in exchange for an immediate discounted lump sum payment. On eight occasions thereafter, the Debtor entered into the Amendments wherein the Debtor assigned additional Periodic Payments in exchange for additional discounted lump sums. (The Original Purchase Agreement and the Amendments are collectively referred to herein as the "Purchase Agreement.") Provisions of the Original Purchase Agreement dated June 12, 1997, material to consideration of Wentworth's Motion are recited as follows:

1. Purchase and Sale.

a. You [Debtor] now sell, transfer and assign to Us [Wentworth] all of Your rights in the "Assigned Assets." As used in this Agreement, the term "Assigned Assets" means (1) all of Your rights to receive all or a portion of the Payments under the Release,[4] (2) the Payments listed in Exhibit "A", (3) the right to receive all or a portion of the "qualified funding asset" defined in the Qualified Assignment described in Exhibit "C" and any interest in the proceeds of the qualified funding asset related to the Assigned Assets, (4) all

[4] The document referred to as the Settlement Agreement in this Order is defined as the "Release" in the Purchase Agreement.

of Your other rights (but none of Your obligations) under the Release and the Qualified Assignment related to the Assigned Assets, and (5) all of Your present or future rights to sell, assign, transfer, cause an early termination of, modify, waive, settle, or receive value for, the Payments on Exhibit "A." By Our signing this Agreement, We are hereby purchasing and accepting the sale and assignment of all of the Assigned Assets described above.

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2. Grant of Security Interest to Us. The transaction described in this Agreement is intended to constitute a purchase and sale of all of the Assigned Assets. This transaction is not a loan or other financing transaction or intended to be regarded as a loan or such financing transaction. If a court ever finds that the sale was ineffective or that this Agreement created a loan from Us to You and not a purchase and sale from You to Us, then this Agreement will serve as a security agreement under the Uniform Commercial Code or similar law of the state in which You reside. . . .

3. Instructions to Annuity Company; Acknowledgment of Beneficiary

a. When this Agreement is signed by You and Us, You will deliver to Us a letter, addressed to the Annuity Company, stating that all payments to be made relating to any of the Assigned Assets will be sent to Us (the "Notice of Direction of Payment"). . . .

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4. Your Representations and Warranties. You now represent and warrant to Us that:

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c. The signing and performance of this Agreement by You and the transactions described in this Agreement:

i. do not conflict with any other obligations of Yours;

ii. will not cause a violation under (or create any right of termination, cancellation or acceleration or similar right under) any contract or agreement by which You or Your assets, including the Release, are bound or may be affected.

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g. This Agreement is a valid sale, transfer and assignment to Us of the Assigned Assets.

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i. No representation or warranty of Yours in this Agreement or in any of the documents delivered in connection with this Agreement or in any agreement required by this Agreement, is inaccurate or contains any untrue or misleading statement.

j. . . . . **You understand that any violation of any of Your representations in this agreement will result in an act of fraud by You which could result in You being held responsible for damages in favor of Us, with money to be paid by You to Us.** [Emphasis in original].

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l. The signing by You of this Agreement and the other documents will not violate the Release, the Annuity, or any other agreements you have signed. The signing will also not violate any other promise you have made to anyone else. The signing will also not violate any law or create any tax on the Assigned Assets or their sale.

m. You understand that one reason it is difficult to sell the Payments is because it is intended to help you with your income taxes. You also understand that this transaction could increase Your income taxes or require You to pay Your income taxes sooner. You now give up forever all Your rights in any agreement that says that You cannot assign or sell Your rights in the Assigned Assets to Us. . . .

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5. **You understand that any violation of any of Your representations to Us in this Agreement will result in an act of fraud by You, which could result in You being held responsible for damages in favor of Us.** [Emphasis in original].
Your Promises to Us. You promise to Us that:

a. You will not, and will not allow any other party (except Us or Our assignee, if applicable) to take funds away from the Assigned Assets. You will not do anything else to affect the Assigned Assets. You will not say You still own the Assigned Assets. You will not do anything or allow anyone else to do anything that could in any way interfere with or lessen Our rights in the Assigned Assets.

b. You will not do anything that will, or could in the future, violate the Release, or any of the agreements required to be executed by this Agreement. . . . You will not tell anyone, including the Annuity Company, that You have sold the Assigned Assets to Us.

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d. You will not make any change in Your instructions to the Annuity Company regarding payments to be made to You. **You understand that any violation of this promise will result in an act of fraud by You which could result in You being held responsible for damages in favor of Us, with money to be paid by You to Us.** [Emphasis in original].

e. You understand that the Annuity and the Release may say that You agree not to sell Your rights to the Assigned Assets. You also understand that You have . . . (1) agreed not to say that We cannot say that the Assigned Assets were not assignable; (2) agreed to protect Us from (and agreed to defend Us in any lawsuit about) any claim that the Assigned Assets were not assignable; and (3) agreed never to sue Us about the assignability of the Assigned Assets. . . .

f. You agree to continue to cooperate with Us by providing to Us the rights that We expect to get under this Agreement. This includes Your obligation to immediately deliver to Us any checks, funds or other form of Payment received after the date of this Agreement by You or anyone other than Us. If any Payment is ever denied, delayed, or withheld from Us because of any act by You or any person acting for You, then You promise to pay promptly when We demand it from You, the entire amount of such Assigned Assets, ...

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k. As described in the Notice of Direction of Payment, You will tell the Annuity Company (1) to mail all future Annuity payments for the Assigned Assets to the address We suggest and to change the mailing address of the primary and contingent beneficiaries to that address; (2) to ignore all future requests, demands, and instructions received from You . . . about the Assigned Assets; and (3) to accept and honor future requests, instructions, and orders about the Assigned Assets only from Us.

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> 13. Controlling Law. This Agreement shall be governed, construed and enforced in accordance with the internal laws of the State of New Jersey . . . without regard for the conflicts of law rules thereof or elsewhere.

Original Purchase Agreement. Attached as exhibits to the Original Purchase Agreement are a "Disclosure for Confession of Judgment" (not relevant here), a schedule listing the payments purchased (originally $750 of each of the next 60 monthly annuity payments of $1,695.60), a copy of the Settlement Agreement, and a letter from F&G Life Service Center confirming amount of the Debtor's Periodic Payments as of June 19, 1997. Contemporaneously with the execution of the Original Purchase Agreement, the Debtor executed a letter addressed to F&G in which the Debtor directed that future annuity payments be addressed to a Post Office Box address provided by Wentworth. Request for Admission ¶ 13.

In connection with each Amendment, the Debtor purported to assign additional payments to Wentworth.[5] Ultimately, the Purchase Agreement encompassed all Periodic Payments due to the Debtor under the Settlement Agreement through the year 2020.

At some time after execution of the Original Purchase Agreement, the Debtor instructed F&G to redirect his Periodic Payments from the Post Office Box address provided by Wentworth to the Debtor's address. Request for Admission ¶ 18. Between the June 1, 1999, and December 1, 2000, the Debtor received and retained the annuity payments. Request for Admission ¶ 19. At the time he received and retained the Periodic Payments between June 1, 1999, and December 1, 2000, the Debtor was aware that they were the subject of the Purchase Agreement. Request for Admission ¶

[5]The Purchase Agreement was also amended substantively in ways that are not material to the questions before the Court.

20. The Debtor intends to receive and retain some or all of the remaining Periodic Payments. Request for Admission ¶ 21.

On February 14, 2001, the Debtor filed a Voluntary Petition under chapter 7 of the Bankruptcy Code. In his Schedule D, the Debtor lists Wentworth as a secured creditor in the amount of $63,000.

V. CONCLUSIONS OF LAW

A. Choice of Law

Initially, the Court must determine what state's law governs the substantive issues arising in this proceeding. The validity and interpretation of the Anti-Alienation Provisions contained in the Settlement Agreement and the Annuity Contract are dispositive, and thus the Court will focus on what law governs those agreements. The general rule is that federal courts determine which state law applies by referring to the choice of law principles that exist in the states in which the federal court sits. See Dang v. UNUM Life Ins. Co., 175 F.3d 1186, 1190 (10th Cir. 1999), *citing* Klaxon Co. v Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).[6] Under Oklahoma law, unless the contract otherwise specifies the governing law, "a contract is to be interpreted according to the law and usage of the place where it is to be performed, or if it does not indicate a place of performance, according to the law of the place it was made." Id., *quoting* Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 727 (10th Cir. 1991); see also 15 O.S.2001, § 162.

The Settlement Agreement, which states that the Debtor lacks the "power" to alienate his Periodic Payments, provides that Texas law shall govern its interpretation. The Purchase

[6]But see In re Gaston & Snow, 243 F.3d 599, 605-07 (2d Cir. 2001) (bankruptcy courts may ignore such choice of law rules when federal policy so requires).

Agreement, in which the Debtor purports to assign rights in the Periodic Payments, states that New Jersey law governs its construction and interpretation. The Annuity Contract, of which neither the Debtor nor Wentworth are a party, and which also provides that the Debtor cannot assign payments generated by the annuity, does not clearly indicate a place of performance, but does indicate that the Debtor resided in Arizona at the time and that the contract was signed and issued by F&G in Baltimore, Maryland.

Giving effect to the parties' contractual selection of applicable law, Texas law governs issues arising under the Settlement Agreement, and New Jersey law governs issues arising under the Purchase Agreement. Applying Oklahoma's choice of law principles to the Annuity Contract, the Court concludes that Maryland law should govern its interpretation, as Maryland is both the place of performance and the place that the contract was made.[7] However, the validity of the Anti-Alienation Provision contained in the Settlement Agreement is the paramount concern of the Court because the Debtor's rights to payments arise under the Settlement Agreement, and such rights are those that the Debtor purported to assign to Wentworth. The Annuity Contract was merely a means by which USF&G performed El Paso's obligation to make the Periodic Payments required under the Settlement Agreement.

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[7]Although Wentworth urges the Court to follow the result announced by the Oklahoma Supreme Court in the recent case of In re Kaufman, 2001 OK 88, 37 P.3d 845, the only relationship Oklahoma has with this matter is that the Debtor currently lives in Oklahoma and his bankruptcy case is pending in Oklahoma. The Court finds that the state of the Debtor's residence is largely irrelevant to its consideration of what state law should apply in interpreting the Annuity Contract, which is the only contract that does not specifically choose its governing law. Although the Debtor is the third party beneficiary of the Annuity Contract, the Debtor is neither the owner of the Annuity Contract nor the performer of any obligations under it; thus the Debtor's domicile, which has in fact changed since the commencement of the parties' performance under the Annuity Contract, should not be given great weight in determining the law applicable in connection with that contract.

B. **The Anti-Alienation Provisions are not invalidated by the UCC**

Wentworth argues that Section 9-318(4) of the Uniform Commercial Code (the "UCC") renders anti-assignment clauses ineffective. Section 9.318(d) of the Texas Business and Commerce Code states–

> (d) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

Tex. Bus. & Com. Code Ann. § 9.318 (Vernon 1996). An "account" is defined as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance." Tex. Bus. & Com. Code Ann. § 9.106 (Vernon 1996). The right to receive future annuity payments does not create an "account"as these payments are not for "goods sold or leased" or "for services rendered." [8] Further, Article 9 itself does not apply at all "to a transfer of an interest or claim in or under any policy of insurance, except as provided with respect to proceeds (Section 9.306)[9] and priorities in proceeds (Section 9.312)." Tex. Bus. & Com. Code Ann. § 9.104(7) (Vernon 1996). Nor does Article 9 apply "to a

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[8]Although the Periodic Payments might fall within the definition of a "general intangible," Wentworth has not sought summary judgment on its alternate claim that it has a security interest in the Periodic Payments. Thus, the Court will not address whether Wentworth is a secured creditor at this time.

[9]Section 9.306 refers to insurance proceeds paid for injury to collateral.

> (a) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. . . .

Tex. Bus. & Com. Code Ann. § 9.306 (Vernon 1996).

transfer in whole or in part of any claim arising out of tort." Tex. Bus. & Com. Code Ann. § 9.104(11) (Vernon 1996).[10]

The vast majority of courts that have addressed whether the UCC is applicable to sales of rights to periodic payments resulting from a structured settlement of a personal injury tort claim have concluded that it is *not*. See, e.g., CGU Life Ins. Co. v. Metropolitan Mortgage & Securities Co., 131 F. Supp. 2d 670, 676-77 (E.D. Pa. 2001) (Article 9 does not apply to transfer of annuity payments because it does not apply to the transfer of an interest in any policy of insurance, citing UCC 9-104 and 9-306, applying Pennsylvania law); Liberty Life Assurance Co. v. Stone Street Capital, Inc., 93 F. Supp. 2d 630, 638 (D. Md. 2000) (applying Missouri law); Grieve v. General American Life Ins. Co., 58 F. Supp. 2d 319, 323 (D. Vt. 1999) (Article 9 does not apply to transfer of annuity payments because it does not apply to transfer of interest in any policy of insurance, citing UCC 9-104(g), applying Vermont law); Wonsey v. Life Ins. Co., 32 F. Supp. 2d 939, 941-42 (E.D. Mich. 1998), *overruled on other grounds*, Riley v. Hewlett-Packard Co., 2002 WL 1272121 (6th Cir.) (same, applying Michigan law); Singer Asset Finance Co. v. Bachus, 741 N.Y.S.2d 618, 620 (N.Y. App. Div. 2002) (UCC 9-318 does not apply because annuity payments are not "accounts," applying New York law); CGU Life Ins. Co v. Singer Asset Finance Co., 553 S.E.2d 8, 15 (Ga. Ct. App. 2001) (holding, without analysis, that the UCC did not apply to the assignment of structured settlement payments, applying Georgia law); In re Kaufman, 37 P.3d 845, 850 n.13 (Okla. 2001) (Article 9 does not apply because it excludes transfers of interests in claims under insurance policies; annuities are inverse life insurance policies, applying Oklahoma law); In re Nitz, 739 N.E.2d 93,

[10] Maryland law is substantially similar to Texas law on this proposition. See Md. Code Ann., Com. Law §§ 9-104; 9-106; 9-318(4) (Michie 1996).

101-02 (Ill. Ct. App. 2000) (annuity was a policy of insurance and thus purported transfer of periodic payments was excluded from Article 9, applying Illinois law); J.G. Wentworth S.S.C. Ltd Partnership v. Capital Assignment Corp., 2000 WL 1682515 * 5 (Ky. Ct. App. 2000) (applying Kentucky law) (not released for publication); Henderson v. Roadway Express, 720 N.E.2d 1108, 1113 (Ill. App. Ct. 1999) (relying on exclusion from Article 9 of transfers of interests in policies of insurance, applying Illinois law). But see Lustig v. Peachtree Settlement Funding, L.L.C. (In re Chorney), 277 B.R. 477, 488 (Bankr. W.D.N.Y. 2002) (finding that anti-assignment clause in annuity contract was ineffective under UCC 9-318).

This Court agrees with the majority. The Debtor's right to the Periodic Payments is not an "account" and in any case, the Periodic Payments constitute a claim of a third party beneficiary under a policy of insurance,[11] which excludes the transaction from the scope of the commercial code. Accordingly, the UCC does not render the Anti-Alienation Provisions ineffective.

C. The Debtor lacked the power to assign the annuity payments

The Settlement Agreement and the Annuity Contract both contain clear, unambiguous provisions depriving the Debtor of the power to assign the Periodic Payments. The Debtor, El Paso and USF&G bargained for the provision that the Debtor would have no "*power to sell*, mortgage, encumber or anticipate the future payments, or any part thereof by assignment or otherwise." Settlement Agreement ¶ 3 (emphasis added). Further, the Annuity Contract provides –

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[11]Annuity contracts and their proceeds fall under the jurisdiction of the Texas Insurance Code. See, e.g., Tex. Ins. Code Ann., Art. 21.22 (Vernon 2002) ("Unlimited Exemption of Insurance Benefits and Certain Annuity Proceeds From Seizure Under Process").

> This policy is owned by USF&G and as owner all rights under this contract are vested with USF&G. Any payment(s) payable with this contract cannot be altered, *assigned*, mortgaged, advanced or encumbered *by the payee* [the Debtor].

Annuity Contract at B1 (emphasis added). Only the owner of the policy was expressly permitted to assign rights under the policy. Annuity Contract at B3.

Under Texas law, while contracts and rights thereunder are generally assignable, the parties can agree that "a money claim arising under the contract is unassignable." Cloughly v. NBC Bank-Seguin, N.A., 773 S.W.2d 652, 655 (Tex. App. 1989).

> [W]here a contract expressly states that a right to payment arising under it is non-assignable, full force and effect must be given to this provision. See Island Record Development Corporation v. Republic of Texas Savings Association, 710 S.W.2d 551, 556 (Tex. 1986) (attempted assignment of loan commitment letter providing that commitment unassignable without bank's consent held invalid); Reef v. Mills Novelty Co., supra, (attempted assignment of salesman's commission account held not binding on employer where the contract prohibited assignment without employer's consent).

Id. In Cloughly, the annuity contract provided that Cloughly did not have the right to assign or transfer rights under the annuity without the consent of the other party to the contract. Id. The Court found that the attempted assignment of annuity payments without consent was *invalid*. Id.[12]

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[12]Texas's policy of declaring assignments in violation of contractual anti-assignment clauses is further implemented by Section 5 of Texas Insurance Code Article 21.22, which provides–

> Wherever any policy of insurance, annuity contract, or plan or program of annuities and benefits mentioned in Section 1 of this article shall contain a provision against assignment of commutation by any beneficiary thereunder of the money or benefits to be paid or rendered thereunder, or any rights therein, any assignment or commutation or any attempted assignment or commutation by such beneficiary of such money or benefits or rights in violation of such provision shall be *wholly void*.

Tex. Ins. Code Ann., Art. 21.22, § 5 (Vernon 2001). Section 1 of the Article states–

> Notwithstanding any provision of this code other than this article, all money or

Other courts concur with this analysis in the context of attempted transfers of structured settlement periodic payments.

> [C]ourts generally uphold non-assignment provisions of structured-settlement agreements when they include language stating that a plaintiff or payee shall not "have the power to sell, mortgage, encumber, or anticipate the Periodic Payments." Liberty Life Assurance Co. v. Stone Street Capital, Inc., 93 F. Supp. 2d 630, 637 (D. Md. 2000); Grieve v. General Am. Life Ins. Co., 58 F. Supp. 2d 319, 321 (D. Vt. 1999); Henderson v. Roadway Express, 308 Ill.App.3d 546, 242 Ill.Dec. 153, 720 N.E.2d 1108, 1109 (1999). But see Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748 (8th Cir.1982) (construing non-assignment clause limiting "right to assign" agreement as not demonstrating intent to eliminate power to assign).

Owen v. CNA Insurance/Continental Cas. Co., 771 A.2d 1208, 1215 (N.J. 2001). In Owen, a case cited by Wentworth, the New Jersey Supreme Court, applying the Restatement (Second) of Contracts §§ 317(2)[13] and 322,[14] concluded that —

> benefits of any kind, including policy proceeds and cash values, to be paid or rendered to the insured or any beneficiary under any policy of insurance or annuity contract issued by a life, health or accident insurance company, . . . or under any plan or program of annuities and benefits in use by any employer or individual shall: [be exempt].

Tex. Ins. Code Ann., Art. 21.22, § 1 (Vernon 2001). Although the parties did not address this statute in their briefs, it is arguable that the Settlement Agreement, as implemented by the Annuity Contract, provides for the payment of "policy proceeds" "to be paid or rendered to . . . [a] beneficiary under . . . [an] annuity contract issued by a life . . . insurance company" and is a plan of "annuities and benefits" that falls within the statute. See, e.g., In re Alexander, 227 B.R. 658 (Bankr. N.D. Tex. 1998) (periodic payments made pursuant to a Settlement Agreement that created a structured settlement arrangement fell within the purview of Article 21.22, and thus were exempt).

In any event, the Court finds that Texas law favors invalidating transfers of insurance or annuity proceeds in violation of anti-assignment clauses rather than treating such transfers as a breach of a covenant, as argued by Wentworth.

[13]Restatement (Second) of Contracts § 317(2) provides in relevant part—

> A contractual right can be assigned unless
>
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or

> contractual provisions prohibiting or limiting assignments operate only to limit the parties' right to assign the contract, but not their power to assign, unless the parties manifest with specificity an intent to the contrary. In the absence of such a manifestation, a non-assignment provision is interpreted merely as a covenant not to assign, the breach of which renders the assigning party liable in damages. The assignment, however, remains valid and enforceable.

Id. at 1218. The "non-assignment" provision of the settlement agreement in the Owens case stated "to the extent provided by law, the aforesaid deferred lump sum payments shall not be subject to assignment, transfer, commutation, or encumbrance, except as provided herein." Id. In that court's view–

> that language merely constitutes a covenant not to assign. It contains no specific prohibition on the power to make an assignment, and it does not specifically state

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> materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.

[14]Restatement (Second) of Contracts § 322 states, in relevant part—

> (2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,
>
> (a) does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation;
>
> (b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;
>
> (c) 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.

> that the assignments are "void," "invalid" or "that the assignee shall acquire no rights or the nonassigning party shall not recognize any such assignment." Bel-Ray [Co. v. Chemrite (Pty) Ltd.], 181 F.3d [435,] 442 [(3d Cir. 1999)]. Therefore, the non-assignment provision does not "reveal the intent necessary to preclude the power to assign, or cause an assignment violative of contractual provisions to be wholly void." Garden State [Buildings L.P. v. First Fidelity Bank, N.A., 702 A.2d 1315 (App. Div. 1997)] (internal quotations omitted). Thus, because the language does not specifically restrict the Owen's power of assignment, the assignment is not void under section 322(2) of the Restatement.

Id.

Unlike the settlement agreement in Owen, the Settlement Agreement in this case contains a *specific restriction* on the Debtor's "power to assign" the Periodic Payments.[15] In addition, both the Settlement Agreement and the Annuity Contract reflect that the Debtor does not own the annuity policy and therefore has no power to effect a change in the payee. See, e.g., Allstate Ins. Co. v. American Bankers Ins. Co., 882 F.2d 856, 859-60 (4th Cir. 1989) (where annuitant was not the owner of annuity policy, he lacked power to assign rights under the annuity and purported assignment was void); CGU Life Ins. Co. v. Metropolitan Mortgage & Securities, 131 F. Supp. 2d 670, 676 (E.D. Pa. 2001) (only owner of annuity had the power to assign any rights thereunder); Stone Street Capital, Inc. v. Granati (In re Granati), 270 B.R. 575, 582 (Bankr. E.D. Va. 2001) (same).

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[15]The Anti-Alienation Provisions in this case are substantially identical to those contained in the structured settlement documents in Henderson v. Roadway Express, 720 N.E.2d 1108 (App. Ct. Ill. 1999), where the court found that the payee lacked the power to assign his periodic payments. The Henderson court rejected the argument that "the recent weight of authority disfavors such provisions and refuses to enforce them unless they *explicitly* state that any attempted assignment is 'void' or 'invalid' or 'otherwise ineffective'." Id. at 1111. The court found that because the anti-assignment provision deprived the claimant of the "power" to sell the periodic payments and because the claimant did not own the annuity policy and thus had no right to modify the policy, the parties had clearly expressed their intention that any attempted assignment would be invalid.

It is important to mention that in order for personal injury claimants, defendants and their insurers to take advantage of tax benefits provided by federal law in connection with structured settlements such as this one, the periodic payments made thereunder must be "fixed and determinable" as to amount and time of payment, "cannot be accelerated, deferred, increased, or decreased by the recipient of such payments," and "excludable from gross income of the recipient." 26 U.S.C. § 130(c)(2).

> Structured settlements are a type of settlement designed to provide certain tax advantages. In a typical personal injury settlement, a plaintiff who receives a lump-sum payment may exclude this payment from taxable income under I.R.C. § 104(a)(2) (providing that the amount of any damages received on account of personal injuries or sickness are excludable from income). However, any return from the plaintiff's investment of the lump-sum payment is taxable investment income. In contrast, in a structured settlement the claimant receives periodic payments rather than a lump sum, and all of these payments are considered damages received on account of personal injuries or sickness and are thus excludable from income.
>
> [Western United Life Assurance Co. v. Hayden,] 64 F.3d [833,] 839 [(3d Cir. 1995)].
>
> Under § 130 of the Internal Revenue Code, insurance companies, like Plaintiffs here, who assume the liability to make periodic payments on account of a personal injury are eligible for favorable tax treatment if certain conditions (one of which is non-assignability of the periodic payments) are satisfied.

CGU Life, 131 F. Supp. 2d at 679 (citations omitted).

Because the Tax Code requires these restrictions in order for participants to reap the benefits of Section 130, structured settlement agreements generally contain an anti-assignment provision in order to prevent the claimant/payee from endangering the bargained-for tax advantages. While courts disagree as to whether a claimant's assignment of payments in violation of an anti-assignment clause actually impairs any of the tax benefits expected by the parties, many courts find that the risk

that such tax attributes will be subject to inquiry, investigation, or litigation if periodic payments are assigned is sufficiently onerous to uphold a contractual prohibition on assignment. See CGU Life, 131 F. Supp. 2d at 679; Liberty Life Assurance Co. v. Stone Street Capital, Inc., 93 F. Supp. 2d 630, 635 (D. Md. 2000) ("assignment increases the risks and burdens on [the parties] because it deprives them of their ability to predict the costs and implications of . . . tax treatment under § 130"); Grieve v. General American Life Ins. Co., 58 F. Supp. 2d 319, 323 (D. Vt. 1999); CGU Life Ins. Co. v. Singer Asset Finance Co., 553 S.E.2d 8, 13-14 (Ga. Ct. App. 2001) (because the IRS has not ruled on the issue of whether annuity issuers lose tax benefits if periodic payments are assigned, the potential for jeopardizing tax treatment provides sufficient basis to enforce an anti-assignment provision and preclude such a sale); Henderson, 720 N.E.2d at 1112-13. But see Settlement Funding, L.L.C. v. Jamestown Life Ins. Co., 78 F. Supp. 2d 1349,1357-58 (N.D. Ga. 1999) (the tax benefits occur at the time the annuity is originally purchased; a subsequent violation of the prohibition on assignment should not impair the favorable tax treatment already obtained by the issuer).

Although the record in this case does not provide enough evidence for the Court to determine what tax ramifications the parties to the Settlement Agreement expected or received, the Court finds that the reference in the Settlement Agreement to Section 130 of the Tax Code, and the fact that El Paso and USF&G did in fact assign the obligation of making periodic payments to F&G, indicate that the transaction was likely tax-driven, at least in part. In concluding that the Debtor's attempted sale and transfer of the Periodic Payments to Wentworth is void and invalid, however, the Court relies specifically upon the clear and unambiguous language contained in the Settlement Agreement indicating the intention of the parties to the agreement that, for tax reasons or otherwise, the Debtor

simply had no "power" to sell his periodic payments, a result required under Texas law as expressed in the Cloughly case and in the Texas Insurance Code.

D. The doctrines of waiver and estoppel are not applicable in this case

Wentworth argues that the Debtor, as assignor of his periodic payments, is estopped from asserting the Anti-Alienation Provisions against his assignee, Wentworth. In the Kaufman case, *supra*, the Oklahoma Supreme Court, relying upon a prior Oklahoma case, Harris v. Tipton, 1939 OK 256, ¶ 17, 90 P.2d 932, held–

> In Oklahoma, an assignor cannot maintain the inequitable position of asserting, as against its assignee, nonassignability. Based on this well-settled legal principle, we determine that an assignor of a contract containing a valid anti-assignment provision may not invoke the clause as against the assignee.

In re Kaufman, 2001 OK 88, ¶ 21, 37 P.3d 845, 855. Thus, the Oklahoma Supreme Court held that a chapter 13 debtor who had assigned his future periodic payments to Wentworth, notwithstanding a valid non-assignability provision substantially similar to the provisions herein, was estopped from avoiding the assignment. Notably, the Oklahoma Supreme Court appeared disturbed that although the debtor intended to use the periodic payments to fund his chapter 13 plan, he did not propose to repay the lump-sum payment obtained from Wentworth in exchange for the assignment. Id. at ¶ 21, 37 P.2d at 855, n.47.

It has already been determined that Oklahoma law is not applicable in this case. Moreover, here, it is not the Debtor/assignor who is primarily seeking to avoid the assignment, as it was in the Kaufman case; it is the Trustee on behalf of the estate. The Debtor has proposed to repay Wentworth as an unsecured claimant. Finally, it is hardly seemly for Wentworth to plead the equitable doctrine of estoppel in light of the fact that it was acutely aware of the Anti-Alienation Provisions when it

entered into the Purchase Agreement. Wentworth released lump-sum payments to the Debtor in exchange for an assignment that Wentworth *knew* violated the Settlement Agreement and the Annuity Contract; Wentworth assumed the risk that a court would declare the Debtor's assignment void. The other parties to the Settlement Agreement and the Annuity Contract should be able to rely upon the meaning that they ascribed to their words without intrusion by a third party. The Anti-Alienation Provisions "were bargained for and cannot be simply discarded or waived." Henderson, 720 N.E.2d at 1113; see also Johnson v. First Colony Life Ins. Co., 26 F. Supp. 2d 1227, 1229-30 (C.D. Cal. 1998) (claimant had no right or power to waive non-assignability provision contained in settlement agreement without consent of other parties to agreement; "it defies all logic that a party could have the right to waive a term that, by its unambiguous language, restricts that party's own behavior").

Wentworth could not have reasonably believed that the Anti-Alienation Provisions had been waived by the other parties to the Settlement Agreement *(i.e.*, El Paso or USF&G) or by parties to the Annuity Contract (USF&G and F&G), especially since Wentworth required the Debtor to promise "not [to] tell anyone, including the Annuity Company, that You have sold the Assigned Assets to Us." Purchase Agreement ¶ 5(b). Further, it is undisputed that Wentworth was fully aware of the restrictions on alienation placed on the periodic payments: the Settlement Agreement was attached to and made a part of the Purchase Agreement! Wentworth could not reasonably rely upon any promises or representations that Wentworth (a) knew were not true or (b) knew that the Debtor did not have the power to make.[16] Wentworth's call for equitable relief under the Kaufman

[16]These promises and representations include, without limitation—

decision, or for the creation of an "equitable assignment" as the Court did in Stone Street Capital v. Granati (In re Granati), 270 B.R. 575 (Bankr. E.D. Va. 2001),[17] would require that Wentworth had

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c. The signing and performance of this Agreement by You and the transactions described in this Agreement:
   i. do not conflict with any other obligations of Yours;
   ii. will not cause a violation under (or create any right of termination, cancellation or acceleration or similar right under) any contract or agreement by which You or Your assets, including the Release, are bound or may be affected.

*****

g. This Agreement is a valid sale, transfer and assignment to Us of the Assigned Assets.

*****

i. No representation or warranty of Yours in this Agreement or in any of the documents delivered in connection with this Agreement or in any agreement required by this Agreement, is inaccurate or contains any untrue or misleading statement.

*****

l. The signing by You of this Agreement and the other documents will not violate the Release, the Annuity, or any other agreements you have signed. The signing will also not violate any other promise you have made to anyone else. The signing will also not violate any law or create any tax on the Assigned Assets or their sale.

m. . . . You now give up forever all Your rights in any agreement that says that You cannot assign or sell Your rights in the Assigned Assets to Us. . . .

Original Purchase Agreement.

[17]In Granati, while the Court found that the periodic payments could not be assigned because the debtor had no power to do so pursuant to her lack of ownership in the annuity policy, it also noted that there was no anti-assignment clause in the settlement agreement. Thus the purchaser of the payments did not necessarily encourage, aid or abet the violation of the settlement agreement, which may have influenced the Court's discretionary exercise of its equitable powers in favor of the purchaser. Id. at 579.

Other cases cited by Wentworth as supporting its position that the Debtor made a valid assignment of his Periodic Payments are likewise factually distinguishable because they lacked unambiguous and enforceable anti-assignment clauses in their respective settlement agreements. See. e.g., Settlement Funding LLC v. Jamestown Life Ins. Co., 78 F. Supp. 2d 1349 (N.D. Ga. 1999) (no anti-assignment clause in the settlement agreement); In re Brooks, 248 B.R. 99 (Bankr. W.D.

conducted itself in a fair and equitable manner. Knowingly inducing the Debtor to violate the terms of the Settlement Agreement and to hide the fact from the "Annuity Company" hardly recommends the application of equity to Wentworth's position. See e.g., Granati, 270 B.R. at 583-84 (discussion of knowledge of non-assignability as a factor in determining whether court should exercise equitable powers to provide purchaser of annuity payments an equitable remedy).

Finally, Wentworth argues that it is inconsistent for the Trustee to invoke the anti-assignment provision to avoid Wentworth's ownership in the payments and at the same time claim that the payments become property of the estate subject to payment of the Debtor's creditors. Section 541(c)(1)(A) of the Bankruptcy Code disposes of Wentworth's argument. It states, in pertinent part–

> . . . an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law —
>
> (A) that restricts or conditions transfer of such interest by the debtor. . . .

11 U.S.C. § 541(c)(1)(A). Therefore, the Anti-Alienation Provision in the Settlement Agreement did not prevent the Debtor's interest in the Periodic Payments from becoming property of the estate upon the commencement of the Debtor's bankruptcy case.[18]

Mich. 2000) (only anti-assignment clause was in the annuity contract which did not bind debtor); Berghman v. J.G. Wentworth S.S.C. Limited Partnership (In re Berghman), 235 B.R. 683, 691 (Bankr. M.D. Fla. 1999) (no anti-assignment clause in settlement agreement or in annuity contract); In re Powless, 734 N.E.2d 111 (Ill. App. Ct. 2000) (no anti-assignment provision in settlement agreement or annuity contract).

[18]Wentworth refers to Grochocinski v. Crossman (In re Crossman), 259 B.R. 301 (Bankr. N.D. Ill. 2001), in asking "[h]ow can payments which the trustee argues are unassignable be taken through the judicial process?" But in Crossman, the parties *agreed* that the payments due to the debtor under a structured settlement agreement containing an anti-assignment provision were property of the estate, and the Court concurred. Id. at 306. The contested issue in Crossman was whether the trustee could obtain the present value of the payments through a Section 363 sale of the

The Court concludes that because the Debtor was not empowered to sell or assign the Periodic Payments, Wentworth is not entitled to a declaratory judgment that Wentworth is the owner of the Periodic Payments, either by legal or equitable assignment, as a matter of law.[19] Thus, the Periodic Payments are not excluded from the estate. The Court will reserve consideration of whether an equitable remedy other than an equitable assignment (*i.e.*, disgorgement of unjust enrichment) is appropriate until after the parties have an opportunity to reassess their respective positions in light of this Order.

E. Wentworth's claim for payments made between June 1999 and December 2000 may be dischargeable

It is undisputed that the Debtor received and retained the Periodic Payments between June 1999 and December 2000 in violation of the Purchase Agreement. Wentworth argues that because the Debtor knew that he had sold the payments to Wentworth, the diversion of payments was fraudulent and the debt the Debtor owes to Wentworth as a result of the Debtor's redirection and retention of payments is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), which states—

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

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future payments rather than collecting and administering the payments as they came due. Thus, Crossman does not stand for the proposition that restricted annuity payments are somehow excluded from the estate.

[19]Whether Wentworth has a valid security interest in the Periodic Payments was not addressed in Wentworth's Motion and brief nor does the Court address the issue herein.

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

11 U.S.C. § 523(a)(2)(A).

Wentworth first argues that the Debtor committed fraud because the "Purchase Agreement between the Debtor and Wentworth specifically provides that the Debtor's receipt and retention of payments sold to Wentworth, constitutes an act of fraud. *See*, Purchase Agreement p. 5, ¶ 5 & ¶ 5(d)." Wentworth Brief at 11. A term in a contract whereby parties agree that certain conduct will constitute fraud does not define what constitutes non-dischargeable fraud under the Bankruptcy Code. In this circuit, in order to obtain a judgment that a debt is non-dischargeable under Section 523(a)(2)(A), a creditor must prove the following elements of fraud by a preponderance of the evidence:

> The debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was reasonable; and the debtor's representation caused the creditor to sustain a loss.

Fowler Bros. v. Young (In re Young), 91 F.3d 1367, 1373 (10th Cir. 1996).[20] Advising the annuity payor to make payments to the Debtor rather than to the Post Office box required under the Purchase Agreement does not, without more, amount to actionable fraud.

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[20]In Young, the Court of Appeals determined the level of reliance to be "reasonable reliance." However, the United States Supreme Court has established that only "justifiable reliance" upon a false representation is required to sustain a non-dischargeability claim under Section 523(a)(2)(A). See Field v. Mans, 516 U.S. 59, 69 (1995).

Second, Wentworth contends that "'actual fraud,' under 11 U.S.C. § 523(a)(2)(A), encompasses more than just misrepresentation and reliance, and that the concept of 'actual fraud' is broad enough to include other intentional malfeasance that deprives a party of value to which it is entitled." Wentworth Brief at 11. The United States Supreme Court, however, has held that the term "fraud" as used by Congress in Section 523(a)(2)(A) must be understood to imply elements that common law has defined, which includes actual and justifiable reliance on a material misrepresentation of fact. See Field v. Mans, 516 U.S. 59, 69 (1995). Wentworth does not point to any material misrepresentation of fact upon which it actually and justifiably relied to its detriment in connection with the Debtor's redirection of the Periodic Payments to his own address and use. To the extent that the Debtor promised not to do that, the Debtor has breached his promise. A breach of contract is not fraud.

Finally, Wentworth appears to contend that the Debtor "stole" payments that were owned by Wentworth, and therefore the debt represented by those payments should not be discharged. Since the Court has determined that the Debtor could not validly assign the payments to Wentworth, Wentworth was not the owner of the payments, and therefore the Debtor did not convert them. However, that issue may be revisited if Wentworth establishes that it had a perfected security interest in the payments.

VI. CONCLUSION

For the reasons preceding, Wentworth's Motion for Summary Judgment is **denied**.

SO ORDERED this 25 day of July, 2002.

DANA L. RASURE, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

cc: Lyle R. Nelson, Esq.
Patrick J. Malloy III
David Ashbaugh, Esq.