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| DOCKET NO.: CV-01-0807620 | : | SUPERIOR COURT |
| PABLO ORTEGA, JR. | : | JUDICIAL DISTRICT OF HARTFORD |
| V. | : | AT HARTFORD |
| THE HARTFORD LIFE INSURANCE COMPANY AND THE HARTFORD ACCIDENT AND INDEMNITY COMPANY | : | NOVEMBER 16, 2001 |

**PLAINTIFF'S MEMORANDUM OF LAW**
**IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
**AND OBJECTION TO APPLICATION FOR DECLARATORY RELIEF**

## I. INTRODUCTION

The defendants Hartford Life Insurance Company and Hartford Accident and Indemnity Company (collectively "Hartford") have moved to dismiss the above-captioned action. The court should deny the motion because:

1. C.G.S. § 52-225f, which provides for jurisdiction in "the court in the original action was or could have been filed or the court which has jurisdiction where the applicant resides" does not preclude the Connecticut Superior Court from exercising jurisdiction to apply Connecticut's Structured Settlement Act to Hartford, a Connecticut resident;

2. New York Civil Practice Law and Rule 5048 does not apply in this case and, even if it did, the Rule does not address the right to assign, much less "expressly prohibit" the assignment of plaintiff's periodic installments; and

3. The proposed assignment does not involve "life contingent" payments, and the law

does not prohibit such assignments in any event.

## II. ARGUMENT

### A. STANDARD FOR GRANTING MOTION TO DISMISS

A motion to dismiss may be filed to assert lack of subject matter jurisdiction. FDIC v. Peabody, Inc., 239 Conn. 93, 99, 680 A.2d 1321 (1996). "Subject matter jurisdiction is the power of the court to hear and determine cases of the general class to which the proceedings in question belong." LeConche v. Elligers, 215 Conn. 701, 709, 579 A.2d 1 (1990), quoting Shea v. First Federal Savings & Loan Assn. of New Haven, 184 Conn. 285, 288, 439 A.2d 997 (1981). "That determination must be informed by the established principle that every presumption is to be indulged in favor of jurisdiction . . . ." LeConche v. Elligers, supra, 709-10.

### B. THE COURT HAS JURISDICTION

The court should reject defendant's argument, that C.G.S. § 52-225f, by authorizing jurisdiction where the original action was filed (New York in this case), or where the applicant resides (Florida in this case), impliedly precludes jurisdiction in Connecticut.

First, it is undisputed that the Connecticut Superior Court has general jurisdiction to adjudicate actions for declaratory relief and specifically actions under C.G.S. § 52-225f. See, e.g., Rumbin v.Utica Mutual Insurance Co., 254 Conn. 259 (2000). It is black letter law that, under these circumstances, the mere grant of jurisdiction to one tribunal does not operate to oust the

Superior Court of jurisdiction over the same subject matter. See, e.g., Tafflin v. Levitt, 493 U.S. 455, 461, 110 S. Ct. 792 (1990) ("It is black letter law . . . that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action."); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-78, 69 L. Ed. 2d 784, 101 S. Ct. 2870 (1981). Because the Connecticut Superior Court is a constitutional court of general jurisdiction, it is presumed to have jurisdiction over all matters cognizable by **any** court of law "of which the **exclusive** jurisdiction is not given to some other court. The fact that no other court has **exclusive** jurisdiction in any matter is sufficient to give the Superior Court jurisdiction of that matter." Carten v. Carten, 153 Conn. 603, 612, 219 A.2d 711 (1966) (emphasis added), citing, Cocking v. Greenslit, 71 Conn. 650, 652, 42 A. 1000; State ex rel. Morris v. Bulkeley, 61 Conn. 287, 374, 23 A. 186. The court may not be ousted of its jurisdiction by implication. Id. The grant of jurisdiction to other courts is plainly not an "exclusive" grant of jurisdiction to those courts, and thus does not preclude jurisdiction in Connecticut.

Second, defendants' interpretation of the statute would render the statute unconstitutional because it would export Connecticut's Structured Settlement Act to other jurisdictions in cases where Connecticut courts did not even have subject matter jurisdiction. See, Edgar v. Mite Corporation, 457 U.S. 624, 642, 102 S.Ct. 2629 (1982) ("The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts.")

Thus, canons of statutory construction militate against the defendants' interpretation of the statute. Kulig v. Crown Supermarket, 250 Conn. 603, 608, 738 A.2d 613 (1999) (in construing a statute the court presumes that the legislature intended a constitutional result).

### C. NEW YORK LAW DOES NOT PROHIBIT THE PROPOSED ASSIGNMENT

Contrary to Hartford's second argument, New York CPLR 5048 ("Rule 5048)does not prohibit the proposed assignment[1]. Rule 5048 provides that "[a]n assignment of or an agreement to assign any right to periodic installments for future damages *contained in a judgment* entered under this article *is enforceable only as to* amounts: (a) to secure payment of alimony, maintenance, or child support; (b) for the cost of products, services, or accommodations provided or to be provided by the assignee for medical, dental or other health care; or (c) for attorney's fees and other expenses of litigation incurred in securing the judgment." NY CPLR 5048 (emphasis added). By its terms (1) Rule 5048 applies only to the assignment of judgments, it does not apply where, as here, the parties have replaced the judgment with an annuity; and (2) even if it did apply,

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1 Hartford's claim, that the contract is not assignable, is directly contrary to its representations to Ortega in the annuity that "You may assign this contract." Annuity Contract, p.2, attached hereto as Exhibit A. Hartford was well aware of the New York Civil Practice Laws and Rules that applied to the annuity at the time it made this representation. Id., p.3 (referencing "Section 5046 of the New York Civil Practice Laws and Rules.")

Rule 5048 acts only as a limitation on the assignee's *remedies*, it does not limit the *right* to assign.

1. Rule 5048 Does Not Apply In This Case

Rule 5048, by its terms, applies only to the assignment of a "right to periodic installments for future damages *contained in a judgment . . .*" NY CPLR 5048 (emphasis added). This Rule has no application in this case because Ortega does not seek to assign the right to periodic installments "contained in" the underlying "judgment." Rather, Ortega seeks to assign his right to periodic installments due under an annuity contract that has superceded the judgment. Ortega's right to periodic installments for future damages is no longer "contained in a judgment" but is, instead, contained in an annuity agreement that expressly states "You may assign this contract.". See, Annuity Agreement, p.2, attached hereto as Exhibit A.

A construction of Rule 5048 as a limitation on the assignment of judgments, but not as a limitation on the right to assign annuity contracts, is consistent with the Connecticut Supreme Court's ruling in Rumbin, supra. In that case, the Court acknowledged the common law right to assign contract rights and explained that:

> It is well settled that "in determining whether or not a statute abrogates or modifies a common law rule **the construction must be strict, and the operation of a statute in derogation of the common law is to be limited to matters clearly brought within its scope**. . . . Although the legislature may eliminate a common law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed. . . . We recognize only those alterations of the common law that are

> clearly expressed in the language of the statute because the traditional principles of justice upon which the common law is founded should be perpetuated."

Id., at 265-266, quoting, Alvarez v. New Haven Register, Inc., 249 Conn. 709, 715, 735 A.2d 306 (1999); Rumbin, at 268 ("an assignor typically can transfer his contractual right to receive future payments to an assignee."). In this case, the New York legislature has not expressed any intent to limit the common law right to assign contract rights. To the contrary, the legislature manifested an intent to permit judgment creditors to transform their right to periodic payments into lump sum amounts under circumstances similar to those provide for in C.G.S. § 52a-225f. See, NY CPLR 5046.[2]

In sum, Rule 5048, by its terms, applies only to the assignment of judgments. In accordance with the decision in Rumbin, supra, this court should decline to construe Rule 5048 as

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[2] New York CPLR 5046(a) provides in relevant part that: "If, at any time after entry of judgment, a judgment creditor or successor in interest can establish that the continued payment of the judgment in periodic installments will impose a hardship, the court may, in its discretion, order that the remaining payments or a portion thereof shall be made to the judgment creditor in a lump sum."

a broad prohibition, and, instead, should construe it narrowly to apply only to judgments.

2. Rule 5048 Does Not Prohibit Assignment

Even if it did apply to the annuity in this case, Rule 5048 does not address Ortega's right to assign his annuity, much less prohibit such an assignment. To the contrary, the Rule *anticipates* assignments and only limits the *remedies* of an assignee, by providing that the assignment is "enforceable" only as to amounts related to alimony, child support, health care services, or litigation costs and expenses.

In construing any statute, the court seeks to ascertain and give effect to the apparent intent of the legislature. United Illuminating Co. v. Groppo, 220 Conn. 749, 755, 601 A.2d 1005 (1992). It is an axiom of statutory construction that legislative intent is to be determined by an analysis of the language actually used in the legislation. Caltabiano v. Planning & Zoning Commission, 211 Conn. 662, 666, 560 A.2d 975 (1989) When the language of a statute is plain and unambiguous, the court need look no further than the words themselves because it assumes that the language expresses the legislature's intent. American Universal Ins. Co. v. DelGreco, 205 Conn. 178, 193, 530 A.2d 171 (1987). Here, the statutory language is plain and unambiguous -- it does not prohibit the assignment to Stone Street Capital, it merely limits Stone Street's remedies in the event that the assignment is breached. NY CPLR 5048; See e.g. Novametrix Medical System, Inc. v. The BOC

Group, Inc., 224 Conn. 210, 218 & n.11, 618 A.2d 25 (1992) (distinguishing between validity and enforceability of patent); White v. Edmonds, 38 Conn.App. 175, 185, 659 A.2d 748 (1995) (statutory limitation on ability to recover does not implicate the validity of the underlying claim, but merely provides the defendant with a special defense -- it is a condition subsequent upon the exercise of a pre-existing right).

Moreover, a construction of Rule 5048 to "expressly prohibit" the power to assign, would directly contravene the holding in Rumbin, supra, where the Supreme Court discussed both the type of language that manifests an intent to prohibit an assignment and the circumstances under which it would construe a statute to preclude the common law right to contract. First, Rumbin concluded that, even an express provision that "no payment . . . may be assigned" did not operate to prohibit an assignment or render such an assignment void. Id., at 277. The Court held that only language that expressly stated that an assignment shall be "void" or "invalid" would be sufficient to preclude assignment. Id., at 268; See also Pro Cardiaco Pronto Socorro Cardiologica, S.A. v. Trussell, 863 F. Supp. 135, 138 (S.D.N.Y. 1994) ("assignments are enforceable unless expressly made void" ). Rule 5048 does not expressly state that assignment of judgments for future damages are void.

Second, as explained in Section B(1), supra, Rumbin held that a statute in derrogation of the common law right to assign contract rights should be strictly construed. Id., at

265-266, quoting, Alvarez v. New Haven Register, Inc., 249 Conn. 709, 715, 735 A.2d 306 (1999); Rumbin, at 268 ("an assignor typically can transfer his contractual right to receive future payments to an assignee.") Rule 5048 does not provide that any assignment of a judgment is void and of no effect, it merely states that, *vis a vis* the assignor and assignee, the assignee may only enforce the assignment under specific circumstances.

Under these circumstances, "[r]eading that language as a clear and plain expression of the legislature's desire to alter the common law of contracts would be an unwarranted departure from [the Court's] traditional practice of presuming that the legislature is capable of providing explicit limitations when that is its intent." Rumbin, at 266.[3] "In the absence of such explicit language," the court should "adhere to [its] long-standing rule that no statute is to be construed as altering the common law, farther than its words import [and a statute] is not to be construed as making any innovation upon the

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Indeed, the New York legislature expressly provided that certain contracts would be "null and void" when it chose to make them so, and it did not do so with respect to the assignment at issue in this case. See NY CLS Bank § 674-a(1); NY CLS Correc. § 196; NY CLS Gen.Bus. § 399-c(2)(b). Moreover, in other statutes, the New York legislature has specifically treated a contract's validity as separate from its enforceability. See NY CLS Gen. Mun. § 804 (providing that certain contracts are "null and void and wholly unenforceable."); NY CLS Gen. Bus. § 394-b (providing that certain agreements would only be "valid and enforceable" under specific circumstances.); Avalonbay Community, Inc. v. Town of Orange, 256 Conn. 557, 589, 775 A.2d 284 (2001) (statute should be construed so that no word is superfluous or redundant).

common law which it does not fairly express." Id., at 266-267. Simply, Rule 5048, by its terms, does not address the right to assign or prohibit the proposed assignment, and does not provide grounds for dismissing this action.

### D. DEFENDANTS' "LIFE CONTINGENT" ARGUMENT IS SPECIOUS

The Hartford's argument, that so-called "life contingent payments" are not assignable, is without legal citation. As a preliminary matter, the assignment at issue is not contingent; Ortega is seeking to assign his present right to payments. Moreover, the courts regularly enforce the assignment of rights that are contingent upon the life of the assignee. See e.g. Podzunas v. The Prudential Ins. Co. of America, 125 Conn. 581, 7 A.2d 657 (1939) (affirming judgment for plaintiff enforcing an assignment of life insurance benefits); Continental Oil Co. v. United States, 326 F.Supp. 266, 269 (SDNY 1977) ( "under New York law, funds to become due, either definitely or contingently, are assignable."). It is up to Stone Street and Ortega to consider the likelihood of his death in computing the value of the assignment. The fact that these payments will end upon his death only further supports the fairness of the lump sum payment, as Stone Street has no assurance as to Ortega's will expectancy.

## CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that the court deny defendants' Motion to Dismiss.

PLAINTIFF,
PABLO ORTEGA, JR.

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**O R D E R**

The foregoing objection, having been duly heard by this Court, it is hereby ORDERED:

OVERRULED / SUSTAINED.

BY THE COURT,

_____
Judge/Clerk

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed on November 16, 2001, via U.S. Mail, postage prepaid to all counsel and pro se parties of record as follows:

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