NO. _____

In the Supreme Court of the United States

RICKEY NEWSOME,

Petitioner,

v.

RSL FUNDING, LLC;
RSL SPECIAL-IV, LIMITED PARTNERSHIP,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Texas Structured Settlement Protection Act, TEX. CIV. PRAC. & REM. CODE §§ 141.001 *et. seq.* (the "Texas SSPA"), specifically Section 141.004, mandates that a transfer of structured settlement payments (a "transfer") and an agreement to transfer structured settlement payments (a "Transfer Agreement") is not "effective" unless approved by a Texas court in a final court order (a "Transfer Order"). A transfer and a Transfer Agreement that has not received court approval under the Texas SSPA is ineffective, void, and contrary to Texas public policy.

This case arises out of a bill of review proceeding (the "Bill of Review") filed by Petitioner Rickey Newsome ("Newsome"), who had signed a Transfer Agreement with RSL Funding, LLC ("RSL"), to set aside and vacate two conflicting Transfer Orders signed by the same court approximately 10 months apart in a Texas SSPA proceeding, one of which was signed after the trial court lost jurisdiction of the case. In response to the filing of the Bill of Review, RSL sought to compel arbitration.

1. Whether the Texas Supreme Court erred in reversing the Dallas County District Court and the Dallas Court of Appeals, by compelling arbitration in, and staying, the Bill of Review in which Newsome seeks to set aside and vacate two conflicting Transfer Orders.

2. Whether the Texas Supreme Court erred in staying the Bill of Review and compelling arbitration in accordance with a general arbitration clause included in the operative Transfer Agreement, where

said agreement also included a provision in which the parties agreed that the transaction must be approved in a final court order in accordance with the Texas SSPA.

3. Whether the Texas Supreme Court erred in concluding that the issues raised and asserted by Newsome in the Bill of Review related to classic contract defenses, which can be decided by an arbitrator, rather than contract formation questions, which must be decided by a court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of Court, Petitioner Rickey Newsome is an individual. There is no corporate entity or parent corporation that owns 10% of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rickey Newsome respectfully petitions this Court for a writ of certiorari to review the opinion of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 569 S.W.3d 116 and is reprinted in the appendix hereto at App.1a. The order of the Supreme Court of Texas denying rehearing is reported at 2019 TEX. LEXIS 302 and is reprinted in the appendix hereto at App.69a.

The memorandum opinion and dissent of the Court of Appeals of Texas, Fifth District, Dallas, is reported at 559 S.W.3d 169 and is reprinted in the appendix hereto at App.21a and 32a.

The Order Denying Respondents' Motion to Compel Arbitration, Supplement to Joint Motion to Compel Arbitration and Joint Corrected Motion to Compel Arbitration & Verified Motion to Abate Proceedings Pending Arbitration signed by Judge Carl Ginsberg of the 193rd Judicial District Court of Dallas County, Texas on June 2, 2015 has not been reported. It is reprinted in the appendix hereto at App.36a.

The Order Granting in Part and Denying in Part Petitioner Rickey Newsome's Motion for Summary Judgment signed by Judge Carl Ginsberg of the 193rd Judicial District Court of Dallas County, Texas

on May 28, 2015 has not been reported. It is reprinted in the appendix hereto at App.38a.

JURISDICTION

The Supreme Court of Texas rendered its opinion and judgment on December 21, 2018. The Supreme Court of Texas rendered its order denying rehearing on March 29, 2019. This Court has jurisdiction to review this matter under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

- Pertinent provisions of the Federal Arbitration Act are set forth at App.126a.
- 26 U.S.C. § 5891 (App.129a)
- The Texas Structured Settlement Protection Act, TEX. CIV. PRAC. & REM. CODE §§ 141.001 *et. seq.* (App.135a)

STATEMENT OF THE CASE

Petitioner Rickey Newsome settled a lawsuit by way of a structured settlement, whereby he became entitled to receive (i) guaranteed monthly payments from September 1986 through August 2005; (ii) $250,000 on April 14, 2020; and (iii) monthly, life-

contingent payments from September 2005 until his death (the "Settlement Payments"). Allstate Insurance Company, which had agreed to make the Settlement Payments, purchased an annuity from Allstate Life Insurance Company to fund its payment obligations.

In 2013, RSL Funding, LLC ("RSL") solicited Newsome to transfer and assign certain of the Settlement Payments in return for the payment of a discounted lump sum.

In accordance with the Texas SSPA, RSL presented Newsome with a disclosure statement and a Transfer Agreement (For Transfer of Structured Settlement Payment Rights) (the "RSL Transfer Agreement," App.XX). The RSL Transfer Agreement include an arbitration clause (the "Arbitration Clause"). (App.121a-122a). The agreement also included the following language:

> Preliminary: A court must approve Assignor's sale, assignment, and transfer to RSL Funding of the Assigned Payments before such payments can be transferred and the Assignment Price, set forth in Section 2 below, paid to Assignor. The Final Order shall state that the court at least has made all findings required by applicable law, and that Annuity Owner and Annuity Issuer are authorized and directed to pay the Assigned Payments to RSL Funding, its successors and/or assigns. Assignor and RSL Funding agree to proceed in good faith to obtain court approval of the transfer of the Assigned Payments.

(emphasis added, App.109a). (the "Court Approval Provision")[1].

The proposed Newsome-RSL transaction is governed by the Texas SSPA. Transfers of structured settlement payments in Texas must be approved by a designated court in order to be effective, legally binding and valid, and free of a punitive excise tax. (See TEX. CIV. PRAC. & REM. CODE § 141.004; 26 U.S.C. § 5891). Texas is not alone in requiring court approval, as 49 states (all but New Hampshire) and the District of Columbia have enacted statutes which require court approval of such transfers.

The Texas SSPA provides as follows:

> No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final order based on express findings by the court . . .

TEX. CIV. PRAC. & REM. CODE § 141.004 (emphasis added) ("Section 141.004"). Transfer agreements are referenced and defined in the Texas SSPA. TEX. CIV. PRAC. & REM. CODE § 141.002(19).

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[1] The RSL Transfer Agreement also addressed court approval in another section later in the agreement.

RSL, as "transferee," was required to file the application seeking court approval of the proposed Newsome-RSL transaction and did so in the 193rd District Court of Dallas County (the "Newsome Transfer Case"). TEX. CIV. PRAC. & REM. CODE § 141.006.

The RSL Transfer Agreement provided that Newsome would assign to RSL 120 life-contingent monthly payments, in varying amounts, from December 2013 through November 2023 (the "2013 Assigned Payments"). RSL agreed to pay Newsome the sum of $53,000.00 (the "Newsome-RSL Transaction").

Newsome and counsel for RSL attended a hearing on October 23, 2013. An Order Approving Transfer was presented to the court by counsel for RSL. The 193rd District Court (the "193rd Court") signed the "Order Approving Transfer," (App.56a), approving the transfer of the 2013 Assigned Payments to RSL's designated assignee, RSL Special.

The Court included the following language in the Order Approving Transfer: "TRANSFEREE TO PAY NEWSOME THE SUM OF $53,000.00 IN 10 DAYS FROM THIS ORDER BEING SIGNED OR TRANSFEREE WILL BE REQUIRED TO PAY NEWSOME $106,000.00" (the "Funding Condition") (App.68a). Counsel for RSL did not object to or challenge the inclusion of the Funding Condition in the Order Approving Transfer.

Importantly, RSL did not appeal the Order Approving Transfer or file a motion for new trial or motion to modify, amend, or correct the order with the 193rd Court within the time periods required by Texas law. The Order Approving Transfer thus became final and non-appealable 30 days after it was signed,

and the 193rd Court lost jurisdiction and plenary power over the case on November 23, 2013.

Following approval of the RSL-Newsome Transaction, Newsome ceased receiving the 2013 Assigned Payments. RSL Special began receiving the monthly payments, as RSL had delivered the Order Approving Transfer and other documents to Security Title Agency, the entity responsible for receiving and distributing payments.[2]

Despite securing the Order Approving Transfer and diverting the 2013 Assigned Payments from Newsome, RSL never paid Newsome the purchase price as ordered by the 193rd Court–neither the $53,000.00 that RSL was ordered to pay to Newsome within 10 days, nor the $106,000.00 referenced in the Funding Condition.

In mid-2014, approximately 7 months after the 193rd Court had signed the Order Approving Transfer, Newsome, acting *pro se*, sent letters to the 193rd Court complaining of RSL's failure to comply with the order. The letters confirmed Newsome's understanding that RSL was to pay him $53,000.00 if paid within 10 days or $106,000.00 after 10 days. Newsome

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[2] Security Title Agency was designated payment agent in earlier court-approved transfers involving Newsome and other transferees and was to receive payments from Allstate and distribute them to Newsome and the other transferees. In 2014 and 2015, RSL collected from Allstate, via Security Title, at least $8,800.00, constituting the 2013 Assigned Payments. Other payments have been suspended pending resolution of this case. Newsome has not been paid anything, other than a $1,000.00 advance when he signed the RSL Transfer Agreement.

also confirmed that he was not receiving the 2013 Assigned Payments.

With his monthly payments having been diverted and having not been paid anything by RSL since the Order Approving Transfer was signed, Newsome relented to RSL's demand that a new order be procured, after RSL informed Newsome that RSL would never pay him the $106,000.00 required by the Order Approving Transfer. RSL did promise to pay Newsome $53,000.00 within 10 days after the court signed a new order.

In August of 2014, over 10 months after the 193rd Court had lost plenary power and jurisdiction over the case, RSL filed an Agreed Motion for Entry of Corrected Order Nunc Pro Tunc (the "Nunc Pro Tunc Motion") complaining that the Funding Condition altered the terms of the RSL Transfer Agreement. RSL requested entry of a Corrected Order Nunc Pro Tunc to remove the Funding Condition. Newsome, acting under economic duress and in reliance on RSL's promise that it would promptly pay Newsome after securing an amended order, consented to RSL's actions to secure a *nunc pro tunc* order. (Newsome is not a lawyer and was not represented by a lawyer at the time that RSL decided to pursue the improper *nunc pro tunc* order in the 193rd Court.)

On September 15, 2014, the 193rd Court signed a Corrected Order Approving Transfer Nunc Pro Tunc (the "Nunc Pro Tunc Order") (App.43a). Thereafter, RSL still refused to pay Newsome.

Newsome retained counsel who contacted RSL by letter demanding that RSL honor the Order Approving Transfer and pay Newsome $106,000. The

letter also informed RSL that the Nunc Pro Tunc Order was void, noted that Newsome would take action to set aside the void *nunc pro tunc* order, and invited RSL to discuss a possible resolution of this matter.

RSL did not seek a resolution. Instead, RSL filed a new lawsuit against Newsome in Harris County, Texas and sought declaratory relief and an order compelling arbitration via an expedited motion.

Rebuffed in his efforts to pursue a resolution of this matter, and faced with RSL's Harris County lawsuit, Newsome filed a bill of review proceeding in the 193rd Court (the "Bill of Review"), as that was the only court with the power, jurisdiction, and authority to set aside, vacate, and/or enforce the Nunc Pro Tunc Order and/or Order Approving Transfer. A bill of review is an independent equitable action brought by a party to a previous suit who seeks to set aside a judgment that is no longer subject to a motion for new trial or appealable. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 926-927 (Tex. 1999). Newsome also sought injunctive relief to prevent RSL from pursuing the Harris County lawsuit.

Newsome's First Amended Petition for Bill of Review (the "Bill of Review,") was filed in March 2015 and is the live pleading in the case. (App.76a). In the Bill of Review, Newsome sought to have the Nunc Pro Tunc Order vacated and set aside, or in the alternative, to set aside and vacate both the Nunc Pro Tunc Order and the Order Approving Transfer. (App.76a, 96a-97a). After the Bill of Review was filed by Newsome, RSL filed a motion to compel arbitration in the 193rd Court. Newsome filed a response to

the motion to compel and filed a Motion for Summary Judgment (the "MSJ"). (App.70a).

On May 28, 2015, the 193rd Court granted in part and denied in part Newsome's MSJ. (the "Partial Summary Judgment Order", App.38a). RSL's motion to compel arbitration was denied on June 2, 2015 (the "Order Denying Arbitration"). (App.36a).

In the Partial Summary Judgment Order, the 193rd Court ruled that the Nunc Pro Tunc Order was void when entered and set aside and vacated same. (App.39a, 41a). The court denied summary judgment as to Newsome's claim that the Order Approving Transfer should also be vacated and ruled that that claim would be subject to further proceedings. (App. 40a-41a).

RSL appealed the Order Denying Arbitration to the Fifth Court of Appeals in Dallas, which stayed the trial court proceedings pending resolution of the arbitration, but ultimately affirmed the denial of RSL's motion to compel, in a 2-1 decision. (App.21a). RSL appealed to the Texas Supreme Court, which reversed the 193rd Court and the Fifth Court of Appeals. (App.1a).

REASON FOR GRANTING THE WRIT

I. WHETHER THE TEXAS SUPREME COURT ERRED IN REVERSING THE DALLAS COUNTY DISTRICT COURT AND THE DALLAS COURT OF APPEALS, BY COMPELLING ARBITRATION IN, AND STAYING, THE BILL OF REVIEW IN WHICH NEWSOME SEEKS TO SET ASIDE AND VACATE TWO CONFLICTING TRANSFER ORDERS.

A. Structured Settlement Protection Acts Are Pervasive, Paternalistic, and Condoned by Federal Law.

Forty-nine[3] states, including Texas, and the District of Columbia have enacted "paternalistic" statutes (structured settlement protection acts) to regulate structured settlement transfers by requiring court approval of all such transfers. *See Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 599 F.Supp.2d 809, 814 (S.D. Tex. 2008) *aff'd per curiam Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 67 F.3d 754 (5th Cir. 2009). In 2002, Congress enacted legislation to reinforce state protection acts that impose a 40% excise tax on structured settlement transfers that do not receive court approval in accordance with an "applicable state statute." *Symetra Life Ins.*, 599 F.Supp.2d at 815-816; 26 USC § 5891.

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[3] The actual case cite, from 2008, references 43 states as having enacted protection acts. But that number is now up to 49 states, plus the District of Columbia.

The purpose of the Texas SSPA is to protect payees of structured settlement payments from potential abuse and exploitation by factoring companies. *See Transamerica Occidental Life Ins. Co. v. Rapid Settlements, Ltd.*, 284 S.W.3d 385, 391 (Tex. App.—Houston [1st Dist.] 2008, no pet.). The statute reflects the Texas Legislature's intent to promote the public policy of protecting payees through numerous substantive and procedural safeguards, chief among these being an express bar to the enforcement of the transfer of structured settlement payment rights unless a court approves the transfer, finding that the transfer is in the payee's best interest. *Washington Square Financial, LLC D/B/A Imperial Structured Settlements v. RSL Funding, LLC*, 418 S.W.3d 761, 769-770 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). This policy is also reflected in other substantive and procedural safeguards included in the statute—that the payee may not waive any of the statutory provisions and may not incur liability as a result of any failure of the transfer to satisfy the statute. *Id.* at 770. A transfer agreement which has not received the statutorily required court approval is ineffective and unenforceable on public-policy grounds. *Id.*[4] (Notably, RSL was a party in *Washington Square*, and the protagonist to its central holding. Not only is the holding of *Washington Square* important to the current matter, so too are RSL's arguments and contentions in that case. "RSL argues that, among other things, the transfer agreement never came into existence because court approval is both a contractual and a statutory

[4] Notably, RSL was also a party in *Washington Square* and the protagonist for its central holding.

condition precedent to its formation. Therefore, RSL contends, the transfer agreement was not a contract that could form the basis for a tortious-interference claim." *Id.* at 768).

B. Structured Settlement Transfers Must Be Approved by a Court.

The use of arbitration in a structured settlement transfer "without the court oversight that the protection act requires" is impermissible. *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 657 F. Supp.2d 795, 824 (S.D. Tex. 2009). Court approval under state protection acts is the exclusive method for transferring structured settlement payments. *See Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 775 F.3d 242, 246 (5th Cir. 2014). An arbitrator's determination that a proposed Transfer Order is in the annuitant's best interest does not satisfy the court-approval requirements of structured settlement protection acts, even if that determination is the subject of a final judgment confirming on an arbitration award. *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 2007 U.S. Dist. LEXIS 1985, *68 (S.D. Tex. 2007). Arbitration is not an acceptable substitute for a court order under the Texas SSPA, or other state protection acts. *See Symetra Life*, 657 F.Supp.2d at 820-821) (Discussing numerous cases wherein courts concluded that actual court approval is required under state protection acts to effectuate transfers and that an arbitrators award will not suffice). Courts in Texas and from other jurisdictions have held that the use of arbitration to obtain rights to structured settlement payments violates SSPAs, as one cannot effectuate a transfer of structured settlement payments from the payee without court

approval. *Allstate Settlement Corp. v. Rapid Settlements, Ltd*, 2007 U.S. Dist. LEXIS 34136 (E.D. Pa. 2007) (Rapid's use of an arbitration award and court confirmation of the award do not satisfy the court approval requirement and circumvents protection acts) *aff'd Allstate Settlement Corp. v. Rapid Settlements, Ltd.*, 559 F.3d 164, 165-166, (3rd Cir. 2008). (Court approval is necessary to "transfer . . . structured settlement payments" in Pennsylvania; best interest finding is required.); *see also Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 567 F.3d 754, 755 (5th Cir. 2009) (Fifth Circuit noted many cases from around the country finding that "sham arbitrations" could not be used as a substitute for court approval. "Arbitral powers do not extend beyond the substantive capacity of the party agreeing to arbitration.").

As noted, Section 141.004 of the Texas SSPA provides that a transfer of structured settlement payment rights shall not be effective unless the transfer has been approved in advance in a final court order. The Texas Supreme Court relied, in part, on *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 61 (Tex. 2008) in deciding the case. But it disregarded Section 141.004 and ignored critical language in its own prior decision, in which that court held that "[g]enerally after finding an agreement valid, a court considers the agreement's terms to determine which issues are arbitrable." *Forest Oil*, 268 S.W.3d at 62 (emphasis added). The Court continued stating that an appropriate delegation clause can remove the "scope determination" from the court and place it with the arbitrator. *Id.* Thus, the arbitrator can determine which issues are arbitrable. But that does not vitiate the first, mandatory step set forth in *Forest Oil*—the court finding an

agreement valid. Per *Forest Oil* that is true in normal, arms-length contracts. It is particularly true when the Texas Legislature has determined, and Texas law has held, that a transfer and a Transfer Agreement are not effective (indeed contrary to Texas public policy) unless approved by a court in a final order, in accordance with specified statutory procedures which cannot be waived, and that includes an express finding that the transfer is in the payee's best interest.

Here, the legal validity and effectiveness of the transfer (the Newsome-RSL Transaction) and the RSL Transfer Agreement, and yes even the existence of same, were dependent on the 193rd Court rendering a final court order. But court proceedings (in the form of the Bill of Review) were ongoing to determine whether RSL had complied with the Texas SSPA and whether a valid, final order had been rendered and, thus, whether a transfer was effective and a Transfer Agreement existed, when the Texas Supreme Court stayed the case and erroneously compelled arbitration. The exclusive procedure for these questions to be determined was for the Bill of Review to run its course.

Until the 193rd Court decides the Bill of Review, there is no way to determine if RSL has complied with the Texas SSPA or whether there is a valid and effective transfer and Transfer Agreement in existence—a contract which has received the statutory, and mandatory, review and approval by a Texas court.

C. The Bill of Review Must Be Resolved in Order to Determine If There Is a Transfer Order.

Under Texas law, a bill of review is an independent equitable action brought by a party to a previous suit who seeks to set aside a judgment that is no longer subject to a motion for new trial or appealable. *Wembley*, 11 S.W.3d at 926-927; *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998); *In re D.S.*, 76 S.W.3d 512, 518 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (after time for appeal expires, bill of review is exclusive remedy to vacate a judgment) (emphasis added). A bill of review proceeding is a new action, commenced in the trial court that rendered the judgment in question. *Urso v. Lyon Financial Services, Inc.*, 93 S.W.3d 276, 280 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Because a bill of review is a direct attack on the judgment, only the court that rendered the original judgment has jurisdiction over the proceeding. *Richards v. Comm'n for Lawyer Discipline*, 81 S.W.3d 506, 508 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

RSL argues that this case is a "dispute" over the terms of the transaction, namely the purchase price. RSL misstates the nature of the case and attempts to force a square peg into a round hole in order to justify compelling arbitration. By pushing the false narrative of a "dispute" over the purchase price, RSL endeavored to convince the lower courts that the transfer and the transfer agreement was a done deal and therefore the parties were at odds over how much RSL was to pay Newsome. Unfortunately, the Texas Supreme Court fell into RSL's trap.

In reality, Newsome filed the Bill of Review to set aside and vacate the void Nunc Pro Tunc Order, or, alternatively, to vacate both the Nunc Pro Tunc Order and the Order Approving Transfer. (App.76a). That is relief that only the 193rd Court, not an arbitrator could provide. *In re: D.S.*, 76 S.W.3d at 518. Once the Bill of Review is decided, the "dispute" that RSL advances will almost certainly go away. Newsome does not dispute the purchase price in the orders; rather he is attacking the validity and propriety, indeed the existence, of both court orders. Neither party can know what the price is until they know what order, if any, was properly rendered. If Newsome prevails in the Bill of Review, there is no final order under the Texas SSPA, and thus no transfer and, no purchase price or "dispute" over same.

By staying the Bill of Review and forcing the case to arbitration, the Texas Supreme Court also erroneously gave priority to the Arbitration Clause over the Court Approval Provision, and disregarded, or improperly subordinated, the Texas SSPA and substantive Texas law relating to an equitable bill of review to arbitration.

D. The Dallas Court of Appeals, but Not the Texas Supreme Court, Accurately Analyzed Newsome's Bill of Review Claims.

As the Dallas Court of Appeals correctly noted, Newsome asked the trial court to vacate both the Nunc Pro Tunc Order and the Order Approving Transfer and to confirm that none of the payments were ever transferred to RSL. *RSL Funding, LLC v. Newsome*, 559 S.W.3d 169, 175 (Tex. App.—Dallas 2016, pet. granted) *rev'd* at 569 S.W.3d 116. And that

view is borne out by the Bill of Review. (App.76a). The Texas Supreme Court, on the other hand, speculated that the "thrust" of Newsome's Bill of Review was for the trial court to declare the Nunc Pro Tunc Order void so he could enforce the Order Approving Transfer, and then advanced that speculation as an undisputed fact in the case. *RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 125-126 (Tex. 2018). This "thrust" was not supported, in fact was contradicted, by the record and in any event was an issue that should have been, and would have been, decided by the 193rd Court had the Bill of Review been allowed to continue.

The Dallas Court of Appeals noted that Newsome had sought to vacate the Nunc Pro Tunc Order because it was signed after the trial court's plenary power had expired, and that the legal basis for vacating the Order Approving Transfer was unclear. *RSL Funding*, 559 S.W.3d at 174-175. The Dallas Court of Appeals then properly concluded that if there was a "legal basis for vacating the court's transfer orders, these issues are purely for the trial court to decide." *Id.*

The Texas Supreme Court charged ahead, reaching the conclusion, without any evidence to support it, that Newsome's Bill of Review was little more than a conclusory attack on the Order Approving Transfer. *RSL Funding*, 569 S.W.2d at 125-126. And the court made that assertion, knowing that the trial court had denied summary judgment on that claim and reserved it for trial or further proceedings. (App.38a). Then, to add insult to injury, the court stated since "Newsome's bill of review pleads the approval order is valid, and created an enforceable contract, the possible voidness

of the nunc pro tunc order does not affect the existence of the agreement to arbitrate." *Id.* at 26.

Thus, Newsome's Bill of Review claims were (i) mischaracterized by the Texas Supreme Court (who ignored the Bill of Review and accepted RSL's version of the nature of the "dispute"), (ii) dismissed as conclusory and gutted, and (iii) then transformed and used against him. The Texas Supreme Court became an advocate against Newsome's Bill of Review, in order to justify its decision to stay and compel arbitration.

E. Arbitration of the Bill of Review Claims Prohibited; Newsome's Rights Could Not Be Vindicated; There Are Legal Restraints to Arbitration.

Under Texas law, only the 193rd Court could provide the relief sought by the Bill of Review. Only the 193rd Court had the legal authority to approve the proposed Newsome-RSL transfer under the Texas SSPA. RSL acknowledged as much, which is why RSL (i) included the Court Approval Provision in the RSL Transfer Agreement; (ii) filed the application for court approval of the transfer in the 193rd Court; and (iii) went back to the 193rd Court seeking the Nunc Pro Tunc Order. RSL accepted and acknowledged throughout the proceedings that the 193rd Court must sign a Transfer Order in compliance with the Texas SSPA for there to be a valid, effective, and legal contract, transfer and transaction. After Newsome retained counsel, RSL changed its tune.

In essence, RSL argued that the parties were free to agree, and did agree, that an arbitrator can determine the issues asserted by Newsome in the Bill

of Review. However, even if the Court Approval Provision was not present in the agreement, the arbitrator did not have the legal authority to approve a transfer under the Texas SSPA or set aside or vacate the conflicting Transfer Orders under the Bill of Review. Furthermore, the parties could not agree to bestow such authority on the arbitrator. *In re: Prudential Ins.*, 148 S.W.3d 124, 129 (Tex. 2004). (Parties have the right to contract as long as their agreements do not violate the law or public policy.)

This Court has recognized that claims may be arbitrated so long as the prospective litigant may effectively vindicate his or her cause of action or claims in the arbitral forum. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). If the matter goes to arbitration before the 193rd Court decides the Bill of Review, then the only Transfer Order that will be relevant to the arbitration would be the void Nunc Pro Tunc Order, as that order purported to replace and "correct" the Order Approving Transfer. An arbitrator simply does not have the power or authority to grant the relief Newsome seeks in the Bill of Review and the parties could not, by agreement, bestow such authority on him/her. The arbitrator cannot approve the transfer under the SSPA or decide and grant the Bill of Review. Thus, the arbitrator cannot vindicate Newsome's statutory, substantive, procedural and contractual rights.

Even after courts determine whether parties agreed to arbitration, courts must still determine whether there are legal restraints external to the parties' agreements that foreclosed arbitration. *Hadnot v. Bat, Ltd.*, 344 F.3d 474, 476 (5th Cir. 2003) *citing*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985). The Texas SSPA; the existence of two conflicting court orders, including one (the Nunc Pro Tunc Order) that is clearly void under Texas Law; and the nature of the equitable Bill of Review proceedings make it clear that Newsome cannot vindicate his rights in arbitration and there are "legal restraints" that preclude arbitration. Thus, compelling arbitration under the FAA and this Court's precedents and staying the Bill of Review was improper.

Since 49 states and the District of Columbia have enacted structured settlement protection statutes that require court approval of transfers, the issues at the heart of this case, or ones very similar to them, are apt to repeat and proliferate. The likely inclusion of arbitration provisions in most transfer agreements, and the inevitable tension between statutory court approval provisions and contractual arbitration clauses weigh heavily in favor of this Court granting cert. The obvious national policies evidenced by the protection acts, including mandating court review/approval of transfers, have collided with the policies of the FAA, at least according to the Texas Supreme Court. This Court should seize the opportunity to address those conflicting policies; clarify the interplay between protection statutes, state procedural/substantive law principles (the Bill of Review) relating to attacking final judgments (Transfer Orders); and arbitration law. And in the process right the wrong done to Mr. Newsome.

II. WHETHER THE TEXAS SUPREME COURT ERRED IN STAYING THE BILL OF REVIEW AND COMPELLING ARBITRATION IN ACCORDANCE WITH A GENERAL ARBITRATION CLAUSE INCLUDED IN THE OPERATIVE TRANSFER AGREEMENT, WHERE SAID AGREEMENT ALSO INCLUDED A PROVISION IN WHICH NEWSOME AND RSL AGREED THAT THE TRANSACTION MUST BE APPROVED IN A FINAL COURT ORDER IN ACCORDANCE WITH THE TEXAS SSPA.

A. Arbitration Is a Matter of Consent; and Contracting Parties Can Agree to Exclude Matters from Arbitration.

Section 2 of the FAA was intended to make arbitration agreements as enforceable as other contracts, but not more so. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 fn. 12 (1967). Arbitration agreements are on equal footing with all other contracts. *Buckeye Check Casing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

Arbitration is simply a matter of contract between parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute. *Id. citing Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995). The FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties. *Mastrobuono*, at 57.

Arbitration under the FAA is a matter of consent, not coercion, and the parties are generally

free to structure their arbitrations as they see fit; just as they may limit by contract the issues which they will arbitrate. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989); *citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). The Texas Supreme Court noted in the underlying opinion that arbitrators derive their jurisdiction over disputes from the parties consent and the law of contract. *RSL Funding, LLC*, 569 S.W.3d at 122, but then either ignored that pronouncement by disregarding the Court Approval Provision, or improperly subordinating it to the Arbitration Clause.

The Arbitration Clause included in the RSL Transfer Agreement is admittedly broad in scope and includes a delegation clause. (App.121a-122a). Yet reviewing that provision alone, and noting the presence of the delegation clause, does not end the inquiry in this or any case. An arbitration provision with a delegation clause is not the silver bullet that halts all judicial action in every case.

B. The "Dispute" Is Not as RSL Has Framed It.

The Arbitration Clause provides that all "disputes under this Agreement" shall be resolved through arbitration. (App.121a). As discussed elsewhere, the issue in this case is not the alleged "dispute" described by RSL, or a disagreement over the purchase price. Rather the question in the case which is set forth in, and can only be decided by, the Bill of Review is whether there is a "final order" approving the transfer under the Texas SSPA, and thus a contract; if so, which one of the two conflicting orders is valid and effective; and/or whether one or both orders must be vacated. (App.76a).

Once the 193rd Court determines the Bill of Review (and it was halfway there when the case was dispatched on this arbitration odyssey), the question of which order, if any, is effective will be answered, and so will the question of the purchase price that must be paid. ($ 53,000 if the Nunc Pro Tunc Order is the final Transfer Order of the 193rd Court; $ 106,00 if the Nunc Pro Tunc Order is vacated; or nothing if, as Newsome was seeking in the Bill of Review, both orders are vacated.)

The 193rd Court and the Dallas Court of Appeals understood and rejected RSL's attempts to recharacterize the nature of the case, and focused on the Bill of Review and the relief requested by Newsome in same. The Texas Supreme Court, unfortunately, did not.

However, even if the "dispute" was just as RSL misleadingly describes it (over the purchase price), and even with the inclusion of the delegation clause in the Arbitration Provision, the matter is not robotically resolved in favor of staying the Bill of Review and compelling arbitration.

C. RSL and Newsome Excluded Court Approval of the Transfer from the Arbitration Clause; the FAA Permits and Supports Such an Agreement.

RSL and Newsome agreed that a "court must approve Assignor's [Newsome's] sale, assignment, and transfer to RSL Funding of the Assigned Payments before such payments can be transferred and the Assignment Price, set forth in Section 2 below, paid to Assignor." (App.109a). The Court Approval Provision

controls over the Arbitration Clause because RSL and Newsome agreed to exclude the issue (court approval of the transfer) from the Arbitration Clause. (App.109a). The Court Approval Provision also provided that the "Final Order shall state that the court at least has made all findings as required by applicable law . . . ," obviously referring to the Texas SSPA. (App.109a). As this Court has held, the two provisions must be read together, to give effect to both provisions and render them consistent with each other, and the Arbitration Clause is on "equal footing," but not superior to, other contractual provisions.

This Court has also confirmed the black letter law principle that a document should be read to give effect to all its provisions and render them consistent with each other in the context of reviewing an arbitration provision. *Mastrobuono*, 514 at 63.

RSL and Newsome generally agreed, in the Arbitration Clause, that any disputes would go to arbitration, but specifically and expressly acknowledged and agreed in the Court Approval Provision that a "court must approve" the transfer before such payments could be transferred. This provision reserved the issue of court approval of the transfer to a court, as permitted by the FAA. It is unremarkable that the parties agreed that a court must approve the transfer in a Final Order, in light of the Texas SSPA provision, Section 141.004, which requires court approval of a transfer in order for it to be effective, and applicable Federal law, which provides a safe harbor from a 40% excise tax for structured settlement transfers approved in a qualified order, by an applicable state court, in accordance with an applicable state statute.

26 U.S.C. § 5891. Moreover, the parties could not agree to the contrary. They could not have agreed to allow an arbitrator to determine whether the transfer should be approved. The Texas Supreme Court did not give effect to both provisions and therefore erred in staying the Bill of Review and ordering arbitration, in effect holding that the general Arbitration Clause was superior to the more specific Court Approval Provision.

While the FAA preempts state laws which render arbitration agreements unenforceable, the FAA does not preclude parties from agreeing to abide by state laws. *See Volt*, 489 at 496; *see also Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219 (1985). (The Texas SSPA does not preclude parties from agreeing to arbitrate disputes once there is an effective transfer. RSL and Newsome could, and did, agree to comply with the Texas SSPA's requirement that a court, and only a court, must approve a transfer in order to be effective.) Because the thrust of the federal law is that arbitration is strictly a matter of contract, the parties to an arbitration agreement should be "at liberty to choose the terms under which they will arbitrate." *Volt*, at 496; *Byrd* at 72.

In *Volt*, the parties had agreed in a construction contract to arbitrate all disputes arising out of or relating to the contract. *Volt*, at 470. The contract had a California choice of law provision, and California arbitration law permitted a stay of arbitration pending resolution of related litigation involving third parties if there was a possibility of "conflicting rulings." *Id.* at 471. The California courts stayed arbitration pending the other case, holding in part that the application of

the FAA to prevent the parties from agreeing to be governed by, and the enforcement of, California law would be "inimical to the policies underlying state and federal arbitration law," because it would force the parties to arbitration in a manner contrary to their agreement. *Id.* at 472. This Court affirmed, agreeing that the result advocated by the petitioner, to push forward with the arbitration notwithstanding the statutory stay, would "indeed be quite inimical" to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. *Id.*

Here, RSL and Newsome agreed that the court must approve the transfer in a Final Order, and that disputes arising afterwards would be resolved by an arbitrator. Furthermore, because the status, effectiveness, and validity of the court orders are still to be determined by the 193rd Court in the context of the Bill of Review proceeding, there is nothing to arbitrate. Allowing the 193rd Court to proceed with the Bill of Review and determine whether either one, or both, of the conflicting court orders should be vacated, is entirely consistent with the parties' agreement, the FAA, and this Court's precedents.

D. The Texas Supreme Court Improperly Elevated the Arbitration Clause.

By ignoring the Court Approval Provision, and compelling arbitration under the Arbitration Provision, the Texas Supreme Court improperly elevated the Arbitration Provision over the Court Approval Provision, which is inconsistent with the FAA. If the Texas Supreme Court had followed this Court's precedent and adhered to the fundamental underpinnings of the

FAA, generally allowing contracting parties to agree to arbitrate, or not arbitrate, as they see fit, that court would have placed the contractual provisions at issue on equal footing. By doing so, the Texas Supreme Court would have (or at least should have) affirmed the lower courts and allowed the Bill of Review to proceed, unimpeded by an improper arbitration.

By failing to rigorously enforce the RSL Transfer Agreement, including both the Arbitration Clause and the Court Approval Provision, the Texas Supreme Court erred in elevating the Arbitration Clause above the Court Approval Provision and by failing to give effect to the contractual rights and expectations of the parties. *See Volt*, at 479.

Unless this Court grants cert, and ultimately reverses the Texas Supreme Court, the obvious conflict between this Court's precedents and the "new view" espoused by the Texas Supreme Court, elevating arbitration provisions above that of others, at least in the context of structured settlement transfer governed by protection acts, could spread. There is a history of abuse of arbitration in the context of structured settlement transfers, as reflected in the authorities cited herein. Those abuses and the legal questions relating to same were largely addressed and resolved via a series of court cases. As a result, today it is clear that an arbitrator's approval of a transfer of structured settlement payments and/or subsequent court order confirming the arbitrators award (approval) does not satisfy the statutory court approval requirement of 49 states and D.C.

But the result and findings of the Texas Supreme Court do not bode well for avoiding another spate of

similar cases and potential abuses of the arbitration process in the context of structured settlement transfers. This Court has the opportunity to nip this issue in the bud and address and make or clarify the relevant law in the context of this case. Such an opportunity will likely not come up again because of the nature of the interests and parties involved, as payees, who are looking for liquidity in these transfers because they are in need of funds, simply cannot afford (in terms of time or money) to oppose these types of abuses.

III. WHETHER THE TEXAS SUPREME COURT ERRED IN CONCLUDING THAT THE ISSUES RAISED AND ASSERTED BY NEWSOME IN THE BILL OF REVIEW RELATED TO CLASSIC CONTRACT DEFENSES, WHICH CAN BE DECIDED BY AN ARBITRATOR, RATHER THAN CONTRACT FORMATION QUESTIONS, WHICH MUST BE DECIDED BY A COURT.

A court must consider whether a contract containing an arbitration clause exists before an arbitrator has the authority to decide a dispute that appears to be within the scope of that clause. *Will-Drill Resources, Inc. v. Samson Resources, Co.*, 352 F. 211, 219 (5th Cir. 2003). Generally under the FAA, state law governs whether a litigant agreed to arbitrate, and federal law governs the scope of an arbitration clause. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005). Where the very existence of any agreement to arbitrate is at issue, it is for the courts to decide based on state-law contract formation principles. *Will-Drill*, 352 F.3d at 219.

Challenges to the "validity of arbitration agreements" can be divided into two types. *Buckeye Check*

Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 (2006). Those that challenge the validity of the arbitration agreement itself and those that challenge the validity of the contract as a whole. In *Buckeye*, Justice Scalia noted that the issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded, and noted that *Buckeye* addresses only the former. *Id.* n.1. The holding of *Buckeye* relative to a challenge to the validity of a contract as whole, and not specifically to the arbitration clause, must go to the arbitrator, conflicts with *Forest Oil* (wherein the Texas Supreme Court held that the court must initially determine whether the agreement is valid before considering the agreement's terms to determine which issues are arbitrable). *Forest Oil*, 268 S.W.2d at 62. And if state law governs whether a litigant agreed to arbitrate, then one must wonder whether, under Texas law and *Forest Oil*, the court, not the arbitrator, must determine whether the contract is valid.

While the resolution of this apparent conflict is not critical to the ultimate determination of this case, or necessary for Newsome to prevail, the upshot is that if State law governs whether a litigant agreed to arbitrate, and the Texas Supreme Court has decreed that the court must determine whether a contract is valid, that weighs in favor of this Court granting cert.

In any event, what is not in dispute is that "contract formation" issues and whether a contract exists are to be decided by a court, not the arbitrator, and clearly such issues are governed by state-law principles

of contract. *First Options*, 514 U.S. 944; *Granite Rock Co. v. Int'l Bhd of Teamsters*, 561 U.S. 287, 296 (2010). *Will-Drill*, 352 F.3d at 218. Courts may not invalidate arbitration agreements under state laws that apply only to arbitration provisions as a whole, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), but may apply state law if that law governs issues regarding the validity, revocability, and enforceability of contracts generally. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987).

A condition precedent may be either a condition to the formation of a contract or to an obligation to perform under an existing agreement. *Castroville Airport, Inc. v. City of Castroville*, 974 S.W.2d 207, 210 (Tex. App.—San Antonio 1988, no pet.) A condition precedent to contract formation means that no binding contract exists until the condition has occurred or has been performed. *Parkview General Hosp., Inc. v. Eppes*, 447 S.W.2d 487, 490-491 (Tex. Civ. App.—Corpus Christi 1969, writ ref.d n.r.e.). The court-approval requirement of the Texas SSPA has been held to be a condition precedent to the existence of any contract. *In re: Rapid Settlements, Ltd.*, 202 S.W.3d 456, 462 (Tex. App.—Beaumont 2006, orig. proceeding).

Since the court approval requirement is a condition precedent to the formation of the Transfer Agreement, and impacts the very existence, or non-existence, of the Transfer Agreement, the court, not the arbitrator, must decide those issues in the RSL-Newsome case. The 193rd Court was in the process of doing that in the Bill of Review, when the case was stayed on appeal and ultimately compelled to arbitration by the Texas Supreme Court. The Bill of Review

must continue until the 193rd Court makes a final ruling as to whether to vacate the Order Approving Transfer and/or the Nunc Pro Tunc Order or not, and thus determines whether a Transfer Agreement exists or was formed, and which of the two conflicting court orders, if any, is the final judgment of the 193rd Court. For those reasons, the Texas Supreme Court erred in staying the case and compelling arbitration.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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