

**STORAGE NAME:** s1956s1z.in  
**DATE:** June 21, 2000

**\*\*AS PASSED BY THE LEGISLATURE\*\***  
**CHAPTER #:** 2000-344, Laws of Florida

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
INSURANCE  
FINAL ANALYSIS**

**BILL #:** CS/SB 1956, 2nd engrossed  
**RELATING TO:** Viatical Settlements  
**SPONSOR(S):** Committee on Banking and Insurance; Senator Lee  
**TIED BILL(S):**

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) BANKING AND INSURANCE YEAS 7 NAYS 2
  - (2)
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

Currently, a viatical settlement is an agreement under which the owner of a life insurance policy with a terminal illness (the "viator") sells the policy to another person in exchange for an up-front payment, which is generally less than the expected death benefit under the policy. The person who buys the policy from the original policy owner takes over premium payments, and, upon the death of the original policy owner, collects the death benefit under the policy.

The Department of Insurance (DOI) regulates the viatical settlement industry. The major elements of regulation under the law are: licensure of viatical settlement providers, brokers, and sales agents; prior approval of viatical settlement contract forms; examination of providers' records; mandatory disclosures to viators and purchasers; and unfair trade practices and prohibited acts.

In addition to extending the DOI's viatical settlement regulation to cover the sale of policies that insure individuals who do not have a life threatening illness or condition, CS/SB 1956, 2nd engrossed, would:

- ◆ expand certain definitions and create new definitions;
- ◆ require viatical settlement providers to make certain written disclosures to viatical settlement purchasers;
- ◆ require DOI approval of viatical settlement transaction forms;
- ◆ require licensees to certain records at their home office;
- ◆ require the notification of insurers when a policy becomes the subject of a viatical settlement;
- ◆ place the burden on licensees to prove that the law of another state would apply;
- ◆ increase criminal penalties for violations of the viatical settlement law; and
- ◆ specify that certain DOI authority applies to its regulation of viatical settlements.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |                              |  |   |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

Less Government:

The bill expands the regulatory authority of the DOI relating to the viatical settlement industry.

B. PRESENT SITUATION:

**Viatical Settlements**

A viatical settlement is an agreement under which the owner of a life insurance policy with a terminal illness (the "viator") sells the policy to another person (the "viatical settlement provider") in exchange for an up-front payment, which is generally less than the expected death benefit under the policy. The viatical settlement provider who buys the policy from the original policy owner takes over premium payments and, upon the death of the original policy owner, collects the death benefit under the policy. The amount paid to the viator depends on the viator's life expectancy and on market forces. Although many life insurance policies contain accelerated benefit provisions under which a policy owner may receive immediate payment in lieu of death benefits, many viators prefer a smaller but earlier payment to the payment available under the accelerated benefits option.

**Regulation of Viatical Settlements**

In 1996, Florida established the framework for regulation of the viatical industry by the Department of Insurance (DOI) (ch. 96-336, L.O.F., creating part XI of chapter 626, F.S.).

Common Terms

A "viatical settlement provider" is a person or entity that enters into a viatical settlement contract with a viator. The term "viatical settlement provider" does not include a financial institution that takes an assignment of a policy as collateral for a loan, an insurer with respect to accelerated benefits provisions of life insurance policies, or an individual who enters into no more than one viatical settlement contract in a calendar year.

A "viatical settlement broker" is a person or entity that arranges viatical transactions between providers and viators.

A "viatical sales agent" is a person who locates investors willing to accept the risk inherent in investing in the life insurance policy.

A “viatical settlement contract” is a written agreement between the provider and a viator.

A “viatical settlement purchase agreement” is a contract or agreement entered into by a purchaser, to which the viator is not a party, to purchase a life insurance policy for an economic benefit.

### Elements of Regulation

#### *Licensure of Persons Involved in Viatical Settlement Transactions*

The DOI licenses and regulates the persons involved in viatical settlement transactions, including viatical settlement providers, brokers, and sales agents.

The law provides that licensees are not subject to Florida law when entering into agreements with purchasers or viators who reside in another state that regulates viatical settlements. In a state where viatical settlements are not regulated, Florida law would apply to licensees for agreements or contracts written in that state.<sup>1</sup>

Viatical settlement providers may establish a related-provider trust for the purpose of entering into viatical settlement contracts. The purpose of establishing such a trust was to shield the viatical investment from liabilities of the provider that were not related to viatical settlement contracts.

#### *Filing and Prior Approval of Documents and Forms*

As a part of a viatical settlement provider’s application for licensure, the viatical settlement provider must submit to the DOI certain organizational documents, including documents relating to the conduct of the viatical settlement provider’s internal affairs.

Viatical settlement providers must also file their viatical settlement contracts with the DOI and obtain DOI approval prior to using them in Florida.

#### *Examination of Records*

Licensees of the DOI must maintain all accounts, records, documents, files, and other information relating to viatical settlement transactions for a period of at least 3 years after the death of the insured. The DOI has the authority to examine the business and affairs of any licensee and to order licensees to produce any records, books, files, or other material to determine whether the licensee is in violation of the law.

#### *Mandatory Disclosures*

Viatical settlement providers and brokers would be required to make certain disclosures to viators, including disclosures relating to alternatives to viatical settlements, possible tax consequences, creditors’ claims, impact on eligibility for government programs, and the right to rescind within 15 days.<sup>2</sup>

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<sup>1</sup> Section 626.9911(6)(e) and (f), F.S.

<sup>2</sup> Section 626.9923, F.S.

Viatical settlement providers and sales agents are required to make certain disclosures to viatical settlement purchasers, including disclosures relating to the projected life span of the viator, the payment of premiums, trust fees, and the name and address of the person tracking the insured.<sup>3</sup>

#### *Unfair Trade Practices and Prohibited Acts*

Violations of the viatical settlement law are considered to be an unfair trade practice which are subject to civil penalties.<sup>4</sup>

Florida law also prohibits persons from knowingly entering into viatical settlement contracts which involve a life insurance policy that is obtained through a false or deceptive application.<sup>5</sup> The law does not provide a specific criminal penalty for this violation. Therefore, the penalty would be a second degree misdemeanor by operation of s. 624.15, F.S., which provides a general penalty for willful violations of the Insurance Code.

#### **Contestability of Life Insurance Policies**

Florida law provides that a life insurance policy cannot be contested by the insurer, except for nonpayment of premiums, after it has been in effect for 2 years.<sup>6</sup> Within the first 2 years of a life insurance policy, the insurer may contest a policy for reasons relating to a fraudulent misrepresentation made by the insured in the policy application. After 2 years, an insurer may not contest the policy on the grounds that a false or fraudulent statement was made by the insured in the application.<sup>7</sup>

#### **General Provisions Relating to Insurance and Investor Fraud**

Florida law contains general provisions relating to insurance and investor fraud, which could apply to viatical settlement transactions. For example, a person who knowingly misrepresents or conceals information on an application for a life insurance policy would be in violation of s. 817.234, F.S. (specifying conduct constituting insurance fraud), which carries criminal penalties of first, second, or third degree felonies depending on the value of the property involved in the violation.

A person who, in connection with the sale or purchase of any investment or security, engages in any fraud, makes misrepresentations, or omits material facts, would be in violation of ss. 517.301 and 517.312, F.S., relating to investment fraud.<sup>8</sup> Violations of these

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<sup>3</sup> Section 626.99235, F.S.

<sup>4</sup> Section 626.9521(2), F.S.

<sup>5</sup> Section 626.99275(1), F.S.

<sup>6</sup> Section 627.455, F.S.

<sup>7</sup> See Allstate Life Insurance Company v. Fox, 700 So.2d 49 (Fla. 5th DCA 1997).

<sup>8</sup> According to the Department of Banking and Finance, the sale of viatical settlement contracts, in certain circumstances, could be considered the sale of an investment or security. The definition of "security" or "investment," for purposes of the Florida statute which prohibits fraudulent security transactions, requires investment of money, in existing common enterprise, and an expectation of profits to be derived solely from efforts of another. Commodity Futures Trading Com'n v. American Metals Exchange Corp., 775 F.Supp. 767 (D.N.J. 1991).

sections carry criminal penalties of third or first degree felonies depending on the amount of money involved.<sup>9</sup>

**Statewide Grand Jury Report on Fraud in the Viatical Industry**

On February 4, 2000, the Fifteenth Statewide Grand Jury (Grand Jury) released a report outlining their findings relating to fraud in the viatical industry. The Grand Jury report focused on the deceptive practice called "cleansheeting," investor fraud, and problems in investigations.<sup>10</sup>

**Agreements Not Subject to DOI Regulation: Senior or Life Settlement Agreements**

Under current law, a viator is the owner of a life insurance policy or a certificateholder under a group policy which insures the life of an individual with a catastrophic or life threatening illness or condition. If an individual does not have a life threatening illness or condition, he or she is not a "viator." The sale of life insurance policies by such individuals are not "viatical settlement contracts" and, thus, are not regulated by the DOI. According to the DOI, individuals who do not meet the definition of "viator," but who currently sell life insurance policies in exchange for an up-front payment, are typically senior citizens who no longer have the need for life insurance. According to the DOI, these agreements are referred to as "senior" or "life settlement" agreements.

**C. EFFECT OF PROPOSED CHANGES:**

Provisions of the viatical settlement statutes would be revised to:

- ◆ extend the DOI's viatical settlement regulation to cover the sale of policies that insure individuals who do not have a life threatening illness or condition;
- ◆ require viatical settlement providers to make certain written disclosures to viatical settlement purchasers, including disclosures relating to the life expectancy used by the provider, the name and address of the insurer, the name, address, experience, and qualifications of the person issuing the life expectancy, and the type of policy sold;
- ◆ require DOI approval of certain forms used in a viatical settlement transaction;
- ◆ require viatical settlement providers, brokers, and sales agents to maintain books and contracts relating to viatical settlement transactions at their home office;
- ◆ provide notification to insurers and insureds when a policy has become the subject of a viatical settlement contract;
- ◆ place the burden on viatical settlement providers, brokers, and sales agents to prove that the law of another state would apply;
- ◆ expand the rule making authority of the DOI with regard to disclosures, the reporting of medical evaluations, recordkeeping requirements, and the definition of terms;

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<sup>9</sup> Section 517.302(1) and (2), F.S.

<sup>10</sup> "Cleansheeting" is a practice whereby a person knowingly fails to disclose pre-existing medical conditions on a life insurance application in order to obtain a policy for which he or she might not otherwise have been eligible.

- ◆ increase criminal penalties for specified unlawful acts which would be based on the value of the life insurance policy involved in the viatical settlement transaction; and
- ◆ specify that the DOI's authority with respect to administrative remedies, unauthorized insurers, and criminal investigations applies to its regulation of viatical settlements.

D. SECTION-BY-SECTION ANALYSIS:

**Section 1:** Amends s. 626.9911, F.S., the definitions section of the viatical settlement law. The definition of "viatical settlement contract" would be expanded to include an agreement to transfer ownership or change the beneficiary of a life insurance policy at a later date, regardless of the date compensation is paid to the viator.

Paragraphs (e) and (f) would be removed from the definition of the term "viatical settlement provider" and would be placed in section 7 of CS/SB 1956, 2nd engrossed, in a newly created "procedural" section entitled "conflict of regulation of viaticals" (s. 626.99245, F.S.).

A "financing entity," which would be defined as an underwriter, agent or lender whose sole activity is to provide funds to effect the viatical settlement, would not be included within the term "viatical settlement provider."

The term "viator" would be expanded to include the owner of a life insurance policy or a certificateholder under a group policy who does not have a catastrophic or life threatening illness or condition.

Definitions would be created for the following terms:

- ◆ "Viaticated policy" would be defined as a life insurance policy, or a certificate under a group policy, which is the subject of a viatical settlement contract.
- ◆ "Related form" would be defined as forms, created by or on behalf of a licensee, which viators or purchasers are required to sign or initial. Such forms would include, but would not be limited to, a power of attorney, release of medical information form, or any addendums or amendments to specified contracts or agreements.
- ◆ "Special purpose entity" would be defined as an entity established by a viatical settlement provider, which may be a corporation, formed solely to act as a vehicle to permit a lender to the provider to access institutional capital markets for the provider.

**Section 2:** Amends s. 626.9912, F.S., relating to viatical settlement provider licenses. This section would require viatical settlement providers to include viatical settlement purchase agreement forms, escrow forms, and other related forms with the application for licensure with the DOI. This section would delete a reference to rating manuals because rating manuals are not used in viatical settlement transactions. This section would also delete language which currently provides that an applicant is not deemed to be incompetent or untrustworthy because of a felony committed 5 years before licensure, if the applicant's civil rights have been restored.

**Section 3:** Amends s. 626.9921, F.S., relating to the filing of forms. This section brings viatical settlement purchase agreement forms, escrow forms, and any related forms that are necessary to effectuate a viatical settlement transaction, under the DOI's regulation. This section also would require the organizational documents of a related provider trust to be submitted to the DOI for approval.

**Section 4:** Amends s. 626.9922, F.S., relating to examination of viatical settlement documents. This section would require viatical settlement providers, brokers, and sales agents to maintain records, including books and contracts, at the home office. "Home office" would be defined as the principal place of business and any other single storage facility, the street address of which must be disclosed to the DOI within 20 days after its initial use, or within 20 days of the effective date of the bill. The originals of records required to be maintained must be made available to the DOI for examination.

**Section 5:** Creates s. 626.99236, F.S., relating to disclosures to viatical settlement purchasers. The viatical settlement provider would be required to furnish the following information to the viatical settlement purchaser no later than 5 days prior to the transfer or sale of the insurance policy:

- ◆ all the life expectancy certifications obtained by the provider;
- ◆ the name and address of the insurer, the policy number, and the date of issue of the viaticated policy;
- ◆ the experience and qualifications of the person issuing the life expectancy certification, and that person's relationship to the provider, broker, sales agent, and viator;
- ◆ the name and address of any person providing escrow services, and that person's relationship to the provider, broker, sales agent, and viator;
- ◆ the type of life insurance policy offered or sold, including whole life, term life, and universal life, or a group policy certificate and a statement as to whether the policy is in lapse status or has lapsed in the last 2 years, and a statement as to whether the purchaser is entitled to benefits other than the death benefit of the policy; and
- ◆ the procedure used by the provider to provide the status of the health condition of the insured to a purchaser.

The viatical settlement agreement could be voided by the purchaser at anytime within 3 days after the above disclosures are received by the purchaser. At the time the disclosures are made, the purchaser must be advised to seek financial advice from a person not compensated by the provider, broker, or sales agent. Purchasers also would be required to sign an affidavit acknowledging they received the disclosures and understand their importance.

**Section 6:** Amends s. 626.9924, F.S., relating to viatical settlement contracts. This section would remove the requirement that the viator acknowledge a catastrophic or life threatening illness prior to entering a viatical settlement contract. This section also would require the viatical settlement provider to notify, within 20 days after the transfer of rights, the insurer and, in cases where the owner of the policy is not the insured, the owner that a policy has become the subject of a viatical settlement contract. Additionally, if the viatical settlement provider transfers the ownership or changes the beneficiary of a policy, the provider would be required to notify the insured.

**Section 7:** Creates s. 626.99245, F.S., relating to conflict of regulation. This section would be substantially similar to the language currently contained in s. 626.9911(6)(e) and (f), F.S., which relates to when another state's law would apply. This section would place the burden on the viatical settlement provider, broker, or sales agent to prove that Florida law would not apply.

**Section 8:** Amends s. 626.9925, F.S., relating to rule making authority. This section would broaden the DOI's rule making authority to enact rules relating to disclosures to viators or purchasers and the reporting of medical evaluations. This section also would broaden current rule making authority by granting the DOI the authority to enact rules defining terms used in this act.

**Section 9:** Amends s. 626.99275, F.S., relating to prohibited practices. This section would expand the current prohibition against entering into viatical settlement contracts with fraudulently obtained policies to include persons who broker or deal in viatical settlement contracts. This section also would change the standard which determines whether a policy was obtained through fraud. The statutory prohibition would come into play if the policy was obtained in violation of s. 626.989(1), F.S. (which is the definition of "fraudulent insurance act").

This section also would prohibit any transaction or practice intending to avoid the notice requirements of s. 626.9924(8), F.S.

Finally, this section would establish criminal penalties for any violations of s. 626.99275, F.S., which vary depending on the value of the insurance policy involved in the viatical settlement contract. For policies with a value of less than \$20,000, the penalty would be a third degree felony. For policies valued between \$20,000 and \$100,000, the penalty would be a second degree felony. For policies valued at \$100,000 or more, the penalty would be a first degree felony.

**Section 10:** Creates s. 626.99278, F.S., (Viatical Provider Anti-Fraud Plan) which would require providers and brokers to adopt anti-fraud plans and file them with the Division of Insurance Fraud within the DOI by December 1, 2000.

**Section 11:** Creates s. 626.99285, F.S. This section would specify that the DOI's authority with respect to administrative remedies, unauthorized insurers, and criminal investigations would apply to the regulation of viatical settlements.

**Section 12:** Creates s. 626.99287, F.S., to provide for the contestability of viaticated policies. A viatical settlement contract would be void and unenforceable if entered into within 2 years of the date the policy was issued, unless:

- ◆ the policy was issued upon the owner's exercise of conversion rights arising out of a group/term policy;
- ◆ the policy owner is a charitable organization or not a natural person;
- ◆ the viatical settlement contract was entered into before July 1, 2000;
- ◆ the insured is diagnosed with a catastrophic or life threatening illness or one that requires at least 3 years of long-term or home-health care;
- ◆ the condition was not known to the insured when the insured entered into the life insurance policy;
- ◆ the viator's spouse dies;
- ◆ the viator divorces, retires from full-time employment, or becomes disabled;



- ◆ the policy was owned by the insured's employer when issued and the viator is no longer employed by that employer; or
- ◆ the viator is declared bankrupt or experiences a significant decrease in income.

**Section 13:** Creates s. 626.99295, F.S., to provide for a grace period for unlicensed viatical settlement providers and brokers to become licensed. The bill would require providers to file applications for licensure by August 1, 2000, with the DOI.

**Section 14:** Amends s. 626.9915, F.S., to allow a provider whose license has been suspended or revoked to continue to maintain and service viaticated policies subject to the approval of the DOI.

**Section 15:** Effective July 1, 2000, \$250,000 would be appropriated from the Insurance Commissioner's Regulatory Trust Fund to fund four positions within the DOI for the purpose of carrying out the provisions of CS/SB 1956, 2nd engrossed.

**Section 16:** Provides an effective date of July 1, 2000.

### III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill could result in an indeterminate increase in revenue from DOI's licensure fees. The increase is indeterminate because it is not known how many additional persons would be licensed and pay fees to the DOI.

##### 2. Expenditures:

Insurance Commissioner's Regulatory Trust Fund  
4 FTEs

FY 2000-2001  
(\$250,000)

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None

##### 2. Expenditures:

None

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill extends viatical settlement regulation by the DOI to include any life insurance contract that is viaticated. As a result, people not currently subject to DOI regulation could be subject to these new licensure, disclosure, and other regulatory requirements.

Insurance companies could realize a fiscal benefit from the requirement that providers timely notify the insurer when a policy issued by that company has or will become a viaticated policy. Such notice would provide the insurer with the opportunity to assure that a policy, still in the contestable period, was not fraudulently issued.

**D. FISCAL COMMENTS:**

According to the DOI, two of the four funded positions would be within the Bureau of Agent and Agency Investigations within the Division of Agent and Agency Services and two positions would be within the Bureau of Specialty Insurers within the Division of Insurer Services.

**IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:**

**A. APPLICABILITY OF THE MANDATES PROVISION:**

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

**B. REDUCTION OF REVENUE RAISING AUTHORITY:**

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

**C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:**

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

**V. COMMENTS:**

**A. CONSTITUTIONAL ISSUES:**

N/A

**B. RULE-MAKING AUTHORITY:**

The bill grants additional rule making authority to the DOI for the purpose of implementing provisions of the act relating to disclosures to viators and purchasers and reporting of medical evaluations. The bill also grants rule making authority to the DOI to define terms used in the act.

**C. OTHER COMMENTS:**

None

**VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

N/A

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VII. SIGNATURES:

**COMMITTEE ON INSURANCE:**

Prepared by:

Staff Director:

Meredith Woodrum Snowden

Stephen Hogge

**FINAL ANALYSIS PREPARED BY THE COMMITTEE ON INSURANCE:**

Prepared by:

Staff Director:

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Stephen Hogge