

STORAGE NAME: h2323z.in  
DATE: June 21, 2000

**\*\*PASSED AS CS/SB 1956, 2nd ENG\*\***  
CHAPTER #: 2000-344, Laws of Florida

**HOUSE OF REPRESENTATIVES  
AS REVISED BY THE COMMITTEE ON  
INSURANCE  
FINAL ANALYSIS**

**BILL #:** HB 2323

**RELATING TO:** Viatical Settlements

**SPONSOR(S):** Representative Gay

**TIED BILL(S):**

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

- (1) INSURANCE YEAS 15 NAYS 0
  - (2) GENERAL GOVERNMENT APPROPRIATIONS YEAS 9 NAYS 0
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

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.

This bill would:

- extend DOI's viatical settlement regulation to cover the sale of policies that insure individuals who do not have a life threatening illness or condition;
- expand the definition of "viatical settlement purchaser;"
- require certain written disclosures to viatical settlement purchasers;
- require DOI approval of viatical settlement transaction forms, including viatical settlement purchase agreements, and organizational documents for related provider trusts;
- require licensees to maintain books and contracts at their home office;
- notify insurers when a policy has become the subject of a viatical settlement;
- place the burden on licensees to prove that the law of another state would apply;
- expand the rule authority of the DOI;
- increase criminal penalties for violations of the viatical settlement law; and
- specify that certain DOI authority applies to its regulation of viatical settlements.

**Amendment**

On April 17, 2000, the Committee on Insurance adopted a "remove everything" amendment that is traveling with HB 2323. See Amendments section.

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"/> |

For any principle that received a "no" above, please explain:

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

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

tax consequences, creditors' claims, impact on eligibility for government programs, and the right to rescind within 15 days.<sup>2</sup>

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

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

<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).

violation of ss. 517.301 and 517.312, F.S., relating to investment fraud.<sup>8</sup> Violations of these 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 DOI's viatical settlement regulation to cover the sale of policies that insure individuals who do not have a life threatening illness or condition;
- expand the definition of "viatical settlement purchaser" to include accredited investors, qualified institutional buyers, and special purpose entities;
- 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 viatical settlement transaction forms, including viatical settlement purchase agreements, and organizational documents for related provider trusts;

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<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).

<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.

- require viatical settlement provider, brokers, and sales agents to maintain books and contracts relating to viatical settlement transactions at their home office;
- provide notification to insurers when a policy has become the subject of a viatical settlement contract;
- place the burden on viatical settlement provider, brokers, and sales agents to prove that the law of another state would apply;
- expand the rule authority of the DOI with regard to disclosures, the reporting of medical evaluations, recordkeeping requirements, and the definition of terms;
- 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. This section would: delete paragraphs (e) and (f) from the definition of "viatical settlement provider" relating to when providers are subject to Florida law (see Section 7 of the bill); expand the definition of "viator" to cover any person who wants to sell a life insurance policy, not just individuals with a life threatening illness; corrects an erroneous reference in the definition of "related provider trust;" and expand the definition of "viatical settlement purchaser" to bring accredited investors, qualified institutional buyers, and special purpose entities within the definition. This section would also define the term, "viated policy," as a life insurance policy, or a certificate under a group policy, which is the subject of a viatical settlement contract.

**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 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 agreements, and any related forms that are necessary to effectuate a viatical settlement transaction, under the DOI's regulation. This section also requires 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.

**Section 5:** Creates s. 626.99236, F.S., relating to disclosures. This new section would require the viatical settlement provider, within 45 days of the viatical settlement purchase agreement, to provide written disclosures to any investor, including: 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; the type of policy sold; and the frequency with which the provider will update the purchaser of the health status of the insured.

**Section 6:** Amends s. 626.9924, F.S., relating to viatical settlement contracts. This section removes the requirement that the viator acknowledge a catastrophic or life threatening illness prior to entering a viatical settlement contract. This section also required 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.

**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 places 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 rulemaking authority. This section broadens the DOI's rule making authority so it can enact rules relating to disclosures to viators or purchasers and the reporting of medical evaluations. This section also broadens current rulemaking 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 expands the current prohibition against entering viatical settlement contracts with fraudulently obtained policies to include persons who broker or deal in viatical settlement contracts. This section also changes 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 would also 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.

**Section 10:** Creates s. 626.99285, F.S. This section specifies that the DOI's authority with respect to administrative remedies, unauthorized insurers, and criminal investigations applies to its regulation of viatical settlements.

**Section 11:** 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. See Fiscal Comments.

2. Expenditures:

| Department of Insurance                                   | <u>FY 2000-01</u> |               |               |               |
|---|-------------------|---------------|---------------|---------------|
|   | FTE               | Recurring     | Non-recurring | Total         |
| Salaries  | 8.0               | \$334,278     |               | \$334,278     |
| CJIP  |                   | 1,560         |               | 1,560         |
| Expense   |                   | 107,138       | 20,488        | 127,626       |
| Operating Capital Outlay                                  |                   | 16,000        | 16,000        | 16,000        |
| Vehicles  |                   | <u>54,000</u> | <u>54,000</u> | <u>54,000</u> |
| Total (Insurance Commissioner's<br>Regulatory Trust Fund) |                   | \$442,976     | \$90,488      | \$533,464     |

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill extends viatical settlement regulation to 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:

The DOI estimates it would need a total of 8 additional FTEs (for the Bureau of Specialty Insurers, the Bureau of Agent Investigations and the Division of Insurance Fraud) to carry out the additional functions relating to licensure, increased disclosure, and investigations.

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:

None.

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:

The bill sets up criminal penalties for violations of s. 626.99275, F.S. It provides for a third degree felony when the value of the policy involved is less than \$20,000 and for a second degree felony when the value of the policy involved is between \$20,000 and \$100,000. But, the bill does not provide for a criminal penalty for policies valued at more than \$100,000. It is unclear whether the penalty in such cases would be a second degree felony (as with policies valued between \$20,000 and \$100,000) or a second degree misdemeanor (as with other willful violations of the Insurance Code).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 17, 2000, the Committee on Insurance adopted a “remove everything” amendment that is traveling with HB 2323. This amendment would make the following changes to HB 2323:

- Expand the definition of “viatical settlement contract;” define the terms “financing entity,” “related form,” and “special purpose entity;” and exclude financing entities from the definition of “viatical settlement provider.”
- Restore the language in the definition of “viatical settlement purchaser” to exclude an accredited investor and a qualified institutional buyer. Accredited investors would be required to sign affidavits stating they are accredited investors, the basis for claiming such status, and that they understand they are not entitled to certain protections under the act.
- Require that escrow forms be provided to and approved by the DOI with the viatical settlement provider’s application for licensure.
- Require that all records relating to viatical settlement contracts or purchase agreement transactions be maintained at the licensee’s “home office,” which would mean the principal place of business and any other single storage facility. The location of the home office would be required to be disclosed to the DOI within a certain time period. The original records that must be maintained would be required to be made available to the DOI for examination.
- Require that a viatical settlement provider notify the insured within 20 days, if the viatical settlement provider transfers ownership or changes the beneficiary of the policy.
- Allow the viatical settlement purchaser to void the agreement within 3 days after certain disclosures are received. The purchaser would be required to sign a statement acknowledging the receipt of the disclosures.
- Require viatical settlement providers or viatical settlement brokers to adopt an anti-fraud plan and file it with the Division of Fraud within the DOI by December 1, 2000.
- Provide for the contestability of viaticated policies. A viatical settlement contract would be void and unenforceable if it is entered into within a 2-year period of the date the policy was issued. Exceptions would include if: the policy was issued upon the owner’s exercise of conversion rights arising out of a group or term policy; the policy owner is a charitable organization or not a natural person; or the contract was entered into before July 1, 2000. Additional exceptions include if: 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 when the insured entered in to the 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 bankrupt or experiences a significant decrease in income.
- Provide a grace period for unlicensed viatical settlement providers or viatical settlement brokers to become licensed.

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On April 26, 2000, the Committee on General Government Appropriations adopted one amendment providing an appropriation of \$533,464 which is consistent with the fiscal analysis provided by the Department of Insurance.

VII. SIGNATURES:

**COMMITTEE ON INSURANCE:**

Prepared by:

Staff Director:

Meredith Woodrum Snowden

Stephen Hogge

**AS REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:**

Prepared by:

Staff Director:

Juliette Noble

Cynthia P. Kelly

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

Prepared by:

Staff Director:

Meredith Woodrum Snowden

Stephen Hogge