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DATE: July 1, 1999

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

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

BILL #: CS/CS/SB 1242, 1st Engrossed

RELATING TO: Regulation of insurance and investments in insurance products industry

SPONSOR(S): Committee on Judiciary; Committee on Banking and Insurance; Senator Geller

COMPANION BILL(S): HB 2235

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

(1) BANKING AND INSURANCE YEAS 11 NAYS 0

(2) JUDICIARY YEAS 7 NAYS 0

(3)

(4)

(5)

I. FINAL ACTION STATUS:

CS/CS/SB 1242, 1st Engrossed, passed the Senate on April 23, 1999, by a vote of 39-0. The bill passed the House on April 29, 1999, by a vote of 118-0. On May 26, 1999, CS/CS/SB 1242 was approved by the Governor, and became Chapter 99-212, Laws of Florida.

II. SUMMARY:

The viatical settlement industry has arisen in recent years for terminally ill persons who need money immediately, and who are willing to take immediate payment rather than have their beneficiaries recover under the policy. The amount paid to the policy owner (known as the "viator") depends on the person'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 rather than the payment available under the accelerated benefits option.

A viatical settlement contract is a written agreement under which the owner of a life insurance policy who has a terminal illness sells the policy to another person in exchange for a bargained-for 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.

Current law would be revised in several ways: advertising and sales materials would be available for DOI examination, additional disclosure requirements would be imposed, the DOI would be authorized to adopt a disclosure form by rule, the DOI would be authorized to issue cease and desist orders for regulatory violations, fines would be specified for certain violations, viatical settlement broker compensation would be required to be disclosed, and a person acting as a viatical sales agent would be required to be a licensed life agent.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

A viatical settlement contract is a written agreement under which the owner of a life insurance policy with a terminal illness ("viator") sells the policy to another person in exchange for a bargained-for 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 viatical settlement industry has arisen in recent years for terminally ill persons who need money immediately, and who are willing to take immediate payment rather than have their beneficiaries recover under the policy. The amount paid to the policy owner (known as the "viator") depends on the person'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 rather than the payment available under the accelerated benefits option.

In 1996, Florida established the framework for regulating the viatical industry (ch. 96-336, L.O.F., creating part XI of chapter 626, F.S.). The major elements of regulation under the law are licensure of viatical settlement providers and brokers, prior approval of viatical settlement contract forms, examination of providers' records by the department, mandatory disclosures to policy owners, and the right to rescind a contract within a specified time period. Violations are declared unfair insurance trade practices. A "viatical settlement provider" is a person or entity that enters into a viatical settlement contract with a "viator," who is a terminally ill person who has the right to sell or transfer death benefits or ownership of his or her life insurance policy. The term 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.

Legislation enacted last year authorized licensed viatical settlement providers to establish a related provider trust for the benefit of viatical investors (ch. 98-164, L.O.F.). 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.

According to the Department of Insurance (DOI) as of October 1998, there were 90 licensed viatical brokers in the state. According to representatives with the DOI, 98 percent of all inquiries and complaints to the DOI regarding viaticals concern false or deceptive advertising or investment practices. Recently, the DOI took action against a viatical firm which was charged with the deceptive practice known as "cleansheeting." The practice involves hiding terminal medical conditions from a life insurer in order to obtain a policy that can be subsequently sold to investors.

B. EFFECT OF PROPOSED CHANGES:

Under the provisions of CS/CS/SB 1242, 1st Engrossed, the definitions of "viatical settlement broker," "viatical settlement contract," "viatical settlement provider," "viator," and "related provider trust" would be revised. The terms "viatical settlement purchase agreement," "viatical settlement purchaser," and "viatical settlement sales agent" would be defined.

Florida-based viatical companies would not be 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

A person who acts as a viatical sales agent would be required to be licensed as a life agent as defined in s. 626.051, F.S.

The DOI would be authorized to examine the advertising and solicitation materials of any licensee or applicant for a license.

The bill would modify certain prohibited misrepresentations and required disclosures and make these also applicable to viatical settlement sales agents.

Several additional disclosures would be required of both providers and agents. The DOI would be authorized to adopt by rule an authorized disclosure form.

Viatical settlement brokers would be required to disclose the amount of their compensation and the method by which it was calculated.

The DOI would be authorized to issue cease and desist order upon any person that violates regulations established for the viatical industry or any order issued pursuant to these regulations. For each nonwillful violation, the DOI could impose a fine of up to \$10,000 for nonwillful violations and for a willful violation up to \$25,000 for a willful violation.

Certain practices would be recognized as unlawful (e.g., entering into a viatical settlement contract based on a life insurance policy obtained through a false or deceptive application) as would certain false representations and use of deceptive words.

See Section II. E. of this Analysis for a detailed explanation of the bill.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. Those people who deal in viatical settlements would be subject to more regulation by the DOI.

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends s. 626.9911, s. 626.9919, s. 626.992, s. 626.9922, s. 626.99235, s. 626.9925, s. 626.9926, s. 626.9927, s. 626.9929, and s. 626.993, F.S. Creates s. 626.99181, s. 626.99272, s. 626.99275, and s. 626.99277, F.S. Repeals s. 626.993, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 626.9911, F.S., 1998 Supplement, to revise definitions and define several terms. A "viatical settlement broker" would mean a person who is deemed to represent only the viator and owes a fiduciary duty to the viator. A "viatical settlement contract" would mean a written agreement under which a viatical settlement provider would pay compensation to the viator which would be less than the expected death benefit of a life insurance policy, in exchange for the transfer or sale of the viator's death benefits. The term "viatical settlement provider" would be clarified to mean a person other than the viator who effectuates viatical settlement contracts in this state, from this state, or with a resident of this state. The term "viator" would be redefined as the owner of a life insurance policy or the certificate holder under a group policy. The term "related provider trust" would be redefined to specify that the term does not include an independent third-party trustee or escrow agent.

A "viatical settlement purchase agreement" would be defined as a contract or agreement to purchase a life insurance policy for the purpose of deriving economic benefit. A "viatical settlement purchaser" would be defined as a person who enters into a viatical settlement purchase agreement. A "viatical settlement sales agent" would mean a person other than a licensed viatical settlement provider who arranges the viatical settlement purchase agreement of life insurance policy.

Section 2. Creates s. 626.99181, F.S., to require viatical settlement brokers to disclose to prospective viators both the amount of broker compensation and the way in which it is calculated.

Section 3. Amends s. 626.9919, F.S., to require a viatical settlement sales agent licensee to notify the DOI at least 30 days in advance of any change of name or address.

Section 4. Amends s. 626.992, F.S., to require a viatical settlement provider to use only a licensed viatical sales agent to perform the functions of a viatical sales agent. Only a licensed life agent could act as a viatical settlement sales agent.

Section 5. Amends s. 626.9922, F.S., to allow the DOI to examine the advertising and solicitation materials of applicants or licensees. Licensees would be required to maintain viatical settlement purchase agreements for three years after the death of the insured.

Section 6. Amends s. 626.99235, F.S., 1998 Supplement, to modify certain prohibited misrepresentations and required disclosures and make these also applicable to viatical settlement purchasers. Existing disclosures by the sales agent or provider would be modified, as follows:

- ◆ that the return under an agreement is tied to the projected life span of insureds, rather than being tied to either the projected life span or date of death as under current law;
- ◆ that any represented return is tied to the projected life span of insureds, rather than being tied to either the projected life span or date of death as under current law; and
- ◆ that commissions and deductions be included in the requirement to disclose any trust fees to be charged.

Several additional disclosures would be required of providers and agents. These include disclosing:

- ◆ the name and address of the person responsible for tracking the insured;
- ◆ that conversion rights might be limited under a group policy;
- ◆ that life expectancy and rate of return are only estimates and cannot be guaranteed;
- ◆ that the purchase of a viatical settlement contract should not be considered liquid; and
- ◆ the name and address responsible for paying premium until the death of the insured.

The DOI would be authorized to adopt by rule an authorized disclosure form.

Section 7. Amends s. 626.9925, F.S., to authorize the DOI to adopt rules to establish record keeping requirements for viatical settlement purchase agreements.

Section 8. Amends s. 626.9926, F.S., to prohibit rate regulation by the DOI as to the consideration paid in connection with a viatical settlement purchase agreement.

Section 9. Amends s. 626.9927, F.S., to include viatical settlement purchase agreements to be subject to the unfair trade practices law.

Section 10. Creates s. 626.99272, F.S., to authorize the DOI to issue cease and desist orders upon any person who violates regulations established for the viatical industry or any order issued pursuant to these regulations. The DOI would be authorized to impose fines of up to \$10,000 for a nonwillful violation and up to \$25,000 for a willful violation.

Section 11. Creates s. 626.99275, F.S., to prohibit certain fraudulent practices such as entering into a viatical settlement contract based on a life insurance policy obtained through a false or deceptive application or employing any device to defraud.

Section 12. Creates s. 626.99277, F.S., to provide that it is unlawful for a person in the advertisement, offer, or sale of a viatical settlement purchase agreement to misrepresent that the agreement has been guaranteed, recommended, or approved by the state or the United States. A person would also be prohibited from representing that a viatical settlement purchase agreement is guaranteed by any insurance guaranty fund, or that the investment is free of any sort of risk.

Section 13. Amends s. 626.9929, F.S., to allow for a grace period until November 1, 1999, for the DOI to approve or disapprove the licenses of viatical settlement sales agents transacting business on June 30, 1999.

Section 14. Amends s. 626.993, F.S., to provide that out-of-state viators with dependent children who enter into agreements with Florida-based viatical settlement providers would not be subject to the prohibition against viaticating more than 50 percent of the face value of the life insurance policy.

Section 15. Repeals s. 626.993, F.S., relating to viators with dependent children, on June 1, 2000.

Section 16. Provides that this act would take effect upon becoming a law.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

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

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

VI. COMMENTS:

N/A

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VIII. SIGNATURES:

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