SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1242

SPONSOR: Committees on Judiciary and Banking and Insurance, and Senator Geller

SUBJECT: Viatical Settlement/Life Settlement Provisions

DATE: April 15, 1999 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	Favorable/CS
2.	Forgas	Johnson	JU	Favorable/CS
3.				
4.				
5.				

I. Summary:

This committee substitute amends various provisions pertaining to viatical settlements under Part XI of chapter 626, F.S., and creates a new Part XII relating to life settlements. A viatical settlement contract is a written agreement under which the owner of a life insurance policy who has 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. 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 changes to current law are the following:

Part XI (Viatical Settlement Provisions)

- Revises definitions of “viatical settlement broker,” “viatical settlement contract,” “viatical settlement provider,” “viator,” and, “related provider trust.” Creates the following terms: “viatical settlement purchase agreement,” “viatical settlement purchaser,” and “viatical settlement sales agent.”

- Provides that a viatical settlement broker must disclose to a prospective viator the amount and method of calculating the broker’s compensation and may not receive compensation from anyone other than the compensation disclosed to the viator. The term “compensation” includes anything of value paid or given to a viatical settlement broker for the placement of a policy.

- Provides for 30 days advance notice to the Department of Insurance of a change in name or address of viatical settlement sales agent licensees. Also, requires such viatical settlement sales agents to be licensed as life insurance agents by the department.

- Authorizes the department to examine advertising and solicitation materials pertaining to viatical settlements. Provides that viatical settlement purchase agreements must be maintained

for 3 years by the licensee after the death of the insured and be available to the department for inspection.

- Strengthens disclosure and advertising requirements relating to viatical settlement sales agents and viatical settlement purchasers. Authorizes the department to adopt rules regarding disclosure forms.

- Requires the provider to give notice to the insurer that the policy has become subject to a viatical settlement contract, within 10 days after the expiration of the rescission period of a viatical settlement contract.

- Authorizes the department to promulgate rules establishing record keeping requirements for viatical settlement purchase agreements.

- Prohibits rate regulation by the department as to the consideration paid in connection with a viatical settlement purchase agreement. Provides such agreements are subject to the unfair trade practices law.

- Increases the powers of the Department of Insurance to issue cease and desist orders against persons violating viatical settlement provisions. Authorizes the department to impose an administrative fine of $10,000 for each nonwillful violation and $25,000 for each willful violation of any provision of this part.

- Provides that it is a prohibited practice for any person to employ any device, scheme, or artifice to defraud in the solicitation or sale of viatical settlement purchase agreements. Also, provides that it is unlawful for a person in the advertisement, offer, or sale of a viatical settlement purchase agreement to misrepresent such agreement as being guaranteed, recommended or approved by the state or any agency of the United States. Provides a grace period for viatical settlement sales agents that are transacting business on June 30, 1999, to continue to transact such business, in the absence of any orders to the contrary, until the department approves or disapproves the sales agent’s application for licensure if the agent files no later than November 1, 1999.

Part XII (Life Settlement Provisions)

- Creates a new Part XII of Chapter 626, F.S., to be entitled the “Life Settlement Act” which regulates life settlement issues in a manner similar to the current law (Part XI) which regulates viatical settlement contracts. Life settlement provisions relate to owners of life insurance policies who do *not* have a life-threatening or chronic illness (in contrast to persons who purchase viatical settlement contracts). This part regulates the evolving industry whereby persons sell or transfer their life insurance policy and enter into a life settlement contract. It provides for the following: definitions; licensing of life settlement providers, brokers and sales agents; annual reports; fees; deposits; grounds for suspension and revocation and the effects of same; prohibitions relating to unlicensed persons; form requirements; authorizes rule making by the department; subjects life settlements to unfair trade practices law; allows for fines; and prohibits certain business practices.

This committee substitute substantially amends the following sections of the Florida Statutes: 626.9911, 626.9919, 626.992, 626.9922, 626.99235, 626.9924, 626.9925, 626.9926, 626.9927, and 626.9929. This committee substitute creates the following sections of the Florida Statutes: 626.99181, 626.99272, 626.99275, 626.99277, 626.994, 626.9941, 626.9942, 626.99421, 626.99422, 626.99423, 626.9943, 626.99431, 626.99432, 626.9944, 626.9945, 626.9946, 626.9947, 626.9948, 626.9949, 626.99495, 626.995, 626.9952, 626.9954, 626.996, 626.9965, 626.997, 626.9975, and 626.998.

II. Present Situation:

A viatical settlement contract is a written agreement under which the owner of a life insurance policy who has 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.

Viatical settlements arose as a result of the AIDS epidemic. A 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 to 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.

In recent years, the viatical business has grown steadily in Florida. As of October 1998, there were 90 licensed viatical brokers in the state. Nationally, according to the Viatical Association of America, the industry has grown just since 1991 from $90 million per year to $1 billion per year.

However, along with growth, there has been controversy. According to representatives with the Department of Insurance, 98 percent of all inquiries and complaints to the department regarding viaticals concern false or deceptive advertising or investment practices. Recently, the department 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.

The viatical settlement statutes contain a provision in s. 626.993, F.S., which requires a viatical settlement provider to ascertain whether a viator has any dependent children. The provider must make this determination before entering into a viatical settlement. If the viator has any dependent children, the viator may not viaticate more than 50% of the face value of the policy.

Currently, there is no statutory regulation by the Department of Insurance over what are called "senior or life settlement" agreements. These agreements involve the "viatication" or sale of life insurance policies for other insureds, usually senior citizens who no longer have a need for life insurance and who do not meet the definition of a viator under present law because they do not have a life threatening illness.

III. Effect of Proposed Changes:

Section 1. Amends s. 626.9911, F.S., 1998 Supplement, revising the definition of several terms. A "viatical settlement broker" means a person deemed to represent only the viator and who owes a fiduciary duty to the viator (the term does not include an investment advisor registered with the Department of Banking and Finance). A "viatical settlement contract" means a written agreement under which the viatical settlement provider will pay compensation which is less than the expected death benefit of the insurance policy in return for the viator's assignment of the death benefit. It includes a contract for a loan or other financial transaction secured by a life insurance policy, but excludes loans by a life insurance company pursuant to the terms of a policy or the cash value of a policy. The term "viatical settlement provider" is clarified to mean a person, other than a viator, who, with a resident of this state, effectuates a viatical settlement contract. A "viator" means the owner of a life insurance policy, or certificateholder of a group policy, with a life-threatening, catastrophic or chronic illness or condition as provided in the Internal Revenue Code, who enters into a settlement contract. The term does not include a settlement purchaser, provider or any person acquiring a policy or interest in a policy from a settlement provider. A "related provider trust" is clarified to mean that the term does not include a trust that does not enter into agreements with a life settlement purchaser, nor does it include an independent third-party trustee or escrow agent.

The bill adds three definitions: a viatical settlement purchase agreement, purchaser and sales agent. A "viatical settlement purchase agreement" is an agreement entered into by a viatical settlement purchaser, to which the viator is not a party, to purchase a life insurance policy. A "viatical settlement purchaser" means a person who gives money as consideration for a life insurance policy which is the subject of a viatical settlement contract, for the purpose of deriving an economic benefit. A "viatical settlement sales agent" means a person, other than a provider, who arranges the purchase through a viatical settlement purchase agreement of a life insurance policy.

Section 2. Creates section 626.99181, F.S., relating to viatical settlement broker fees to require disclosure to a prospective viator of the amount of the broker's compensation and how it was calculated. It provides that brokers may not receive compensation from anyone other than that disclosed to the viator.

Section 3. Amends s. 626.9919, F.S., to apply the current requirement that 30 days advance notice be provided to the Department of Insurance of a change in name or address, to viatical settlement sales agent licensees. Currently, this requirement applies to viatical settlement providers and to viatical settlement brokers.

Section 4. Amends s. 626.992, F.S., to require viatical settlement sales agents to be licensed as life insurance agents by the department. Also provides that viatical settlement sales agents, providers and brokers can only use other licensed viatical settlement sales agents, providers or brokers for those respective services.

Section 5. Amends s. 626.9922, F.S., to allow the Department of Insurance to examine advertising and solicitation materials of viatical settlement licensees or applicants. Provides that viatical settlement purchase agreements must be maintained for 3 years by the licensee after the death of the insured and be available to the department for inspection.

Section 6. Amends s. 626.99235, F.S., 1998 Supplement, to strengthen the disclosure provisions that viatical settlement sales agents provide to purchasers. The requirements include providing the name and address of the person who is responsible for tracking the viator, that the life expectancy and rate of return are estimates, that group policies may contain limitations or caps in the conversion rights, that the purchase of a viatical settlement contract should not be considered a liquid purchase, since it is impossible to predict the exact timing of its maturity, and the name and address of the person responsible for paying the premium until the death of the insured. Provides that the department is authorized to adopt by rule the disclosure form to be used.

Section 7. Amends s. 626.9924, F.S., to require that within 10 days after the expiration of the rescission period of a viatical settlement contract, the provider must give notice to the insurer that the policy has become subject to a viatical settlement contract.

Section 8. Amends s. 626.9925, F.S., to authorize the department to promulgate rules establishing record keeping requirements for viatical settlement purchase agreements.

Section 9. Amends s. 626.9926, F.S., to prohibit rate regulation by the department as to the consideration paid in connection with a viatical settlement purchase agreement.

Section 10. Amends s. 626.9927, F.S., to include viatical settlement purchase agreements to be subject to the unfair trade practices law.

Section 11. Creates s. 626.99272, F.S., to provide broad cease and desist powers to the Department of Insurance, including the authority to impose fines of up to $10,000 for nonwillful violations and $25,000 for willful violations.

Section 12. Creates s. 626.99275, F.S., to prohibit certain fraudulent business practices such as knowingly entering into a viatical settlement contract the subject of which is a life insurance policy that was obtained by means of a false or misleading application for life insurance and soliciting or sale of a viatical settlement agreement by employing a device to defraud.

Section 13. 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 such agreement as being guaranteed, recommended or approved by the state or United States, or any agency or officer of either entity. Also prohibits other types of activities relating to misrepresentation of viatical settlement purchase agreements.

Section 14. Amends s. 626.9929, F.S., to provide a grace period for viatical settlement sales agents that are transacting business on June 30, 1999, to continue to transact such business, in the absence of any orders to the contrary, until the department approves or disapproves the sales agent's application for licensure if the agent files no later than November 1, 1999.

Section 15. Creates a new Part XII of Chapter 626, F.S., to be entitled the "Life Settlement Act" (s. 626.994, F.S.) which regulates life settlements in a manner very similar to the current law (Part XI) which regulates viatical settlements. This section regulates the evolving life settlement industry whereby persons who do not have a life-threatening or chronic illness may sell or transfer their life insurance policy by entering into a life settlement contract.

The bill creates the following sections: Section 626.9941, F.S., provides several definitions pertaining to life settlements that are similar to the definitions under viatical settlements: a "life policy" is a life insurance policy that has been acquired by a life settlement provider pursuant to a life settlement contract; an "owner" is a person similar to a viator and is one who has an insurable interest in a life insurance policy, who does not have a catastrophic, life-threatening, or chronic illness or condition as defined in s. 626.9911 (7), F.S., and who has the right to assign or transfer a life insurance policy; a "life settlement contract" is a written agreement between the provider and an owner; a "life settlement broker" is a person similar to a viatical settlement broker as one who, on behalf of an owner and for a fee, offers to negotiate a life settlement contract between an owner and a life settlement provider; a "life settlement provider" is similar to a viatical settlement provider and means a person, other than the owner, who effectuates a life settlement contract; a "life settlement sales agent" is also similar to a viatical settlement agent and is one who arranges the purchase through a life settlement purchase agreement of a life insurance policy; and a "related provider trust" means a trust established by a life settlement provider for the sole purpose of entering into a viatical or life settlement contract.

Sections 626.9942 through 626.9946, F.S., establish licensure, suspension, revocation, and nonrenewal requirements for persons involved in life settlement contracts which are similar to viatical settlement provisions. Also, provides that licensed brokers, providers, and sales agents must be used in performing functions related to life settlement activities.

Section 626.9947, F.S., requires the filing of forms with the department.

Section 626.9948, F.S., authorizes the department to examine the business and affairs of any licensee.

Sections 626.9949 and 626.99495, F.S., pertain to disclosure requirements and misrepresentation.

Section 626.995, F.S., provides for a 15-day rescission period for life settlement contracts and provides procedures relating to escrow requirements.

Section 626.9952, F.S., authorizes the department to adopt rules relating to advertising by licensees and record retention requirements.

Section 626.9954, F.S., prohibits the department from regulating the amount paid for entry into a life settlement contract or purchase agreement.

Section 626.996, F.S., provides for unfair trade practices, cease and desist orders, civil remedies, and fines.

Sections 626.9965 and 626.997, F.S., prohibit certain practices as unlawful which pertain to false, deceptive, and misleading applications and life settlement agreements.

Section 626.9975, F.S., provides disclosure of the life settlement broker's compensation to a prospective owner.

Section 626.998, F.S., provides a grace period for life settlement providers, brokers or sales agents who transact business in this state on June 30, 1999, that they may continue to transact business until the department approves or disapproves an application for licensure if they file an application no later than November 1, 1999.

Section 16. Provides that the act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The committee substitute establishes licensure requirements for life settlement providers, brokers, and sales agents. Life settlement providers must pay to the department a $500 application fee, a $500 annual fee, and must deposit and maintain in trust, securities of a value of not less than $100,000 or, in the alternative, securities in the amount of $25,000 and a surety bond of $75,000. Life settlement brokers must pay a $50 application fee, while life settlement sales agents, licensed as life insurance agents, must pay the application and license fees that currently apply to such agents.

B. Private Sector Impact:

The committee substitute would have the effect of protecting investors, viators and life settlement owners from deceptive investment and advertising practices as well as other unlawful practices of viatical and life settlement brokers, providers and sales agents. Individuals who sell or broker life settlement contracts would now have to be licensed and otherwise regulated by the Department of Insurance. (See Tax/Fee Issues, above.)

The committee substitute expands the definition of “viator” so that it would include individuals with a “chronic illness or condition.” The committee substitute’s inclusion of a chronic illness or condition in the definition of “viator” as provided in the Internal Revenue Code means that viatical settlement proceeds are not taxable if they are received by terminally ill or chronically ill individuals as they are defined by the code. A chronically ill individual, as defined by the code, is one who has been certified by a licnsed health care practitioner as: (1) being unable to perform at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity; (2) having a level of disability similar to that described in (1); or (3) requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment. The effect of this change would bring all of these individuals under the ambit of s. 626.993, F.S., which would allow these individuals, if they have any dependent children, to viaticate no more than 50% of the face value of the life insurance policy (the committee substitute’s life settlement provisions do not contain a similar limitation.)

C. Government Sector Impact:

The Department of Insurance would be responsible for enforcing the provisions of the committee substitute including issuing cease and desist orders where appropriate, licensing and otherwise regulating life settlement brokers, providers, sales agents and others under the newly created part XII of the bill. The Department of Insurance provided the following estimate of expenses, but did not provide an estimate of revenues expected to be generated from licensure requirements under part XII of the bill.

Expense to Insurance Commissioner’s Regulatory Trust Fund (ICRTF)

Expense to ICRTF	FY 1999-00	FY 2000-01	FY 2001-02
Non-Recurring Impact	**$97,841**	**0**	**0**
Recurring Impact (5 F.T.E.)	**$268,865**	**$268,865**	**$268,865**

TOTAL	**$366,706**	**$268,865**	**$268,865**

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.