

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/SB 1232

SPONSOR: Banking and Insurance Committee and Senator Geller

SUBJECT: Viatical Settlements

DATE: April 10, 2000 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

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 amount paid to the policy owner depends on the person's life expectancy and on market forces. 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.

In 1996, Florida established the framework for regulating the viatical industry by the Department of Insurance (ch. 96-336, L.O.F., creating part XI of chapter 626, F.S., to be entitled the Viatical Settlement Act). 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.

In February 2000, the Fifteenth Statewide Grand Jury released its report on the viatical industry.¹ In its report, the Grand Jury identified various fraudulent activities occurring in the industry and made recommendations for legislative changes, many of which are included in this bill.

Committee Substitute for Senate Bill 1232 provides for the following:

- ◆ Expands viatical settlement regulation by the Department of Insurance to apply to senior or life settlement agreements;

¹To view the Grand Jury report and recommendations in its entirety, go to the web side for the Office of the Statewide Prosecutor (<http://legal.firn.edu/swp/index.html>) and select Report on Viatical Industry.

- ◆ Provides timely written disclosures to viatical settlement purchasers (investors) by viatical settlement providers;
- ◆ Provides that a viatical settlement purchase agreement is voidable by the purchaser at anytime within 3 days after receipt of disclosures;
- ◆ Increases criminal penalties for specified unlawful acts which are based on the value of the life insurance policy;
- ◆ Clarifies the regulation of viatical agreements and contracts involving Florida residents and residents of other states;
- ◆ Requires timely notification to insurance companies by providers that a life insurance policy has or will become a viaticated policy;
- ◆ Requires licensees to maintain books and contracts at a specified location and requires such information to be made available to the department;
- ◆ Mandates that certain viatical transaction forms be submitted to the department for approval;
- ◆ Requires providers to file viatical anti-fraud plans with the Fraud Division; and
- ◆ Authorizes department regulation over viatical settlement transactions relating to administrative remedies, unauthorized insurers, and criminal investigations.

This bill substantially amends the following sections of the Florida Statutes: 626.9911, 626.9912, 626.9921, 626.9922, 626.9924, and 626.9925, 626.99275. This bill creates the following sections of the Florida Statutes: 626.99236, 626.99245, 626.99278, 626.99285, 626.99287, and 626.99295.

II. Present Situation:

Viatical Settlements

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 or 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 under the Department of Insurance (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 or related forms by the department, 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 and violators are subject to second degree misdemeanor penalties.

Under the Viatical Settlement Act, various terms are used to characterize the parties involved in viatical settlement transactions: the “viator” is the policyholder, or the owner of a life insurance policy, who has a catastrophic or life threatening illness, and sells his or her policy in exchange for a cash payment; the “viatical settlement provider” is the person who purchases the policy from a viator; the “viatical settlement broker” is the person who, on behalf of the viator and for a fee, initially brings together both the provider and viator in a viatical sales transaction; the “viatical sales agent” locates investors willing to accept the risk inherent in investing in the life insurance policy; the “viatical settlement contract” means a written agreement between the provider and a viator; and, the “viatical settlement purchase agreement” means 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.

Legislation enacted 2 years ago authorized licensed viatical settlement providers to establish a related provider trust for the purpose of owning viatical settlement contracts (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.

Last year, legislation was passed providing that 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 (ch. 99-212, L.O.F.). In a state where viatical settlements are not regulated, Florida law would apply to the agreements or contracts written in that state. The law prohibited misrepresentations and required disclosures, provided that a person who acts as a viatical sales agent be licensed as a life agent, and that the Department of Insurance could issue cease and desist orders and examine the advertising and solicitation materials of any licensee or applicant for a license.

In recent years, the viatical business has grown steadily in Florida. According to the Department of Insurance, there are eight viatical settlement providers licensed in the state which viaticated \$548 million worth of life insurance policies in 1998. However, along with growth, there has been controversy. According to representatives with the Department of Insurance, a number of inquiries and complaints regarding viaticals concern the lack of regulation involving what are termed “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 catastrophic or life threatening illness.

Statewide Grand Jury Report on Fraud in the Viatical Industry

The Fifteenth Statewide Grand Jury was impaneled last August to investigate financial crimes in Florida including fraud against the government and insurance fraud. The Grand Jury was drawn from persons around the state and focused on fraud in the viatical industry as part of their investigation. On February 4, 2000, the Grand Jury released its report which stated that since August 1999, the Grand Jury has returned three indictments charging seven individuals and one corporation with 155 felony counts relating to criminal fraud in the viatication of life insurance policies belonging to the terminally ill. The face value of these policies is approximately \$12.7 million.

The Grand Jury found that “perhaps hundreds of millions of dollars of life insurance policies have been fraudulently obtained with the assistance of corrupt agents, brokers and viatical settlement providers in the viatical industry.” Further, the Grand Jury emphasized that fraud is of such a nature and size that it continues to require further action by the Legislature, the viatical industry and the Department of Insurance. Finally, the Grand Jury asked the Legislature to consider several recommendations for statutory changes and many of these proposals have been incorporated into this bill.

III. Effect of Proposed Changes:

Section 1. Amends s. 626.9911, F.S., relating to definitions under viatical settlements, to expand the meaning of the term “viatical settlement contract” 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.

The bill deletes provisions (e) and (f) from the term “viatical settlement provider” and places similar provisions in section 7 of this bill in a newly created “procedural” section entitled “conflict of regulation of viaticals” (s. 626.99245). Under current law, subsections (e) and (f) are exceptions to the definition of a viatical settlement provider and specify that providers from Florida are not subject to Florida law when they enter into viatical settlement purchase agreements or contracts with purchasers or viators who reside in another state that regulates such transactions. In a state where viatical settlements are not regulated, Florida law applies.

The bill provides that a “financing entity” is not included within the term “viatical settlement provider” and expands the meaning of the term “viator” to include the owner of a life insurance policy or a certificateholder under a group policy who enters or seeks to enter into a viatical settlement contract. Under current law, the term applies to persons with a catastrophic or life threatening illness or condition. The bill corrects an error in the law by replacing the term “viatical settlement purchaser” with the term “viator.”

The bill clarifies the term “accredited investor” by requiring that such persons sign an affidavit stating they are investors, the basis for claiming such status, and that they understand they are not entitled to certain (disclosure) protections under the act. The bill requires such affidavits be kept with other documents required to be maintained under the act.

The bill creates four definitions of terms:

- ◆ “Viaticated policy” is a life insurance policy, or a certificate under a group policy, which is the subject of a viatical settlement contract.
- ◆ “Related form” is any form, created by or on behalf of a licensee, which a viator or purchaser is required to sign or initial. Such forms include, but are not limited to, a power of attorney, release of medical information form, or any addendums or amendments to specified contracts or agreements.
- ◆ “Special purpose entity” is 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;
- ◆ “Financing entity” is an underwriter, agent or lender whose sole activity is to provide funds to effect the viatical settlement.

Section 2. Amends s. 626.9912, F.S., applying to viatical settlement provider licenses, to remove the effective date of the original statute because it is obsolete (July 1, 1996). The bill requires viatical settlement purchase agreement forms and escrow forms to be provided to and approved by the department with the application for licensure of a viatical settlement provider. It deletes the requirement that providers submit rating manuals because such manuals are not used in viatical settlement transactions.

The bill further provides that the department may not license an entity unless it is satisfied that persons who exercise control of the entity meet the standards of the viatical settlement act and have not violated any provision of the act relating to viatical settlement contracts or purchase agreements. Also, it deletes a provision that allowed persons applying for viatical settlement provider licenses to not be considered incompetent and untrustworthy solely for any felony committed more than 5 years before licensure, if the person had their civil rights restored by the Governor and Cabinet.

Section 3. Amends s. 626.9921, F.S., relating to the filing of forms, to require the viatical settlement provider or related provider trust to submit certain forms (viatical settlement purchase agreement forms, escrow forms) to the department for approval before such forms can be used. It also requires the organizational documents of a related provider trust to be submitted to the department for approval prior to the transacting of business by the trust. The bill authorizes the department to adopt standardized forms by rule.

Section 4. Amends s. 626.9922, F.S., applying to examinations, to require that books and contracts relating to viatical settlement contract or purchase agreement transactions be maintained at the licensee's "home office." A home office means the principal place of business and any other single storage facility, the street address of which must be disclosed to the department 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 department for examination at the department's request.

Section 5. Creates s. 626.99236, F.S., relating to disclosures to viatical settlement purchasers, to require providers to furnish in writing enumerated disclosures no later than 5 days prior to the transfer or sale of the insurance policy to the purchaser. These disclosures are as follows:

- ◆ 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 bill provides that the agreement is voidable by the purchaser at anytime within 3 days after the above disclosures are received by the purchaser. Further, at the time the disclosures are made, the purchaser must be advised to seek financial advice from a person not compensated by the provider or sales agent. The purchaser must also 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, to remove the provision that a viator must acknowledge the catastrophic or life threatening nature of his or her illness. The bill requires that at any time during the contestable period, within 20 days after a viator executes documents necessary to transfer rights under an insurance policy or within 20 days of any agreement, promise or other understanding, express or implied, to viaticate the policy, the provider must give notice to the insurer of the policy that the policy has or will become a viaticated policy. Such notice must be accompanied by certain documents (e.g., the viator certifies by independent evidence to the provider that the viator is diagnosed with a life threatening or catastrophic illness or needs long term care and such condition could not be disclosed at the time the contract was entered into).

The bill also requires the provider, if the owner of the insurance policy is not the insured, to notify the insured that the policy has become the subject of a viatical settlement contract within 20 days after the transfer of rights under the contract.

Section 7. Creates s. 626.99245, F.S., relating to conflict of regulation of viaticals (formerly under s. 626.9911, F.S.). This provision requires that a Florida based viatical settlement provider, who enters into a viatical settlement purchase agreement with a purchaser residing in another state, and that other state regulates such agreements, shall be governed in the effectuation of that agreement by the laws of the purchaser's state of residence. However, if the purchaser's state does not regulate such agreements, then the Florida provider must give the purchaser notice that neither Florida nor the purchaser's state regulates the transaction. The provider must maintain all records as if the transactions were executed in Florida (however, the forms need not be approved by the Department of Insurance). The bill applies the same provisions to Florida providers entering into viatical settlement contracts with a viator residing in another state.

Section 8. Amends s. 626.9925, F.S., relating to rules. The bill provides that the department may adopt rules to administer the viatical settlement act, including rules for disclosures to viators or purchasers, for the reporting of life expectancies and rules defining terms used this the act.

Section 9. Amends s. 626.275, F.S., applying to penalties, to make it unlawful for persons to broker or otherwise deal in a viatical settlement contract, knowing that the policy was obtained by presenting materially false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer. Also, it is unlawful to knowingly engage in any transaction intending to avoid the notice requirements under s. 626.9924(7), F.S., (Section 6 of the bill).

The bill provides graduated criminal penalties for unlawful acts based upon the amount of the insurance policy involved in the viatical settlement transaction ranging from third to first degree felonies. These sanctions comport with the penalties for grand theft.

Section 10. Creates s. 626.99278, F.S., (Viatical Provider Anti-Fraud Plan) and requires providers to adopt an anti-fraud plan and file it with the Fraud Division within the department by December 1, 2000.

Section 11. Creates s. 626.99285, F.S., to authorize the department to regulate parties to viatical settlement transactions as to administrative remedies (s. 624.310, F.S.); unauthorized insurers (s. 626.901, F.S.); and, criminal investigations (s. 626.989, F.S.).

Section 12. Creates s. 626.287, F.S., to provide for contestability of viaticated policies. The bill provides that a viatical settlement contract is void and unenforceable by either party if entered into within the 2-year period commencing with the date of issuance of the life insurance policy. The bill provides several exceptions to this provision which include: if the policy was issued upon the owner's exercise of conversion rights arising out of a group/term policy; if the policy owner is a charitable organization or not a natural person; if the contract was entered into before the effective date of the bill, or certain other specified conditions are met. The bill further allows an insurer during the 2-year contestability period to contest the validity of any policy on the grounds of fraud.

Section 13. Creates s. 626.99295, F.S., to provide for a grace period for an unlicensed viatical settlement provider to become licensed. The bill requires provider's to file an application for licensure by August 1, 2000, with the department.

Section 14. Provides that the act shall take effect July 1, 2000.

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:

None.

B. Private Sector Impact:

The bill extends viatical settlement regulation by the Department of Insurance to include any life insurance contract that is viaticated. As a result, these new licensure, disclosure, and other regulatory requirements should aid consumers and reduce the incidence of fraud and abuse in the viatical marketplace. The bill provides disclosures by viatical settlement providers to viatical settlement purchasers (investors), thus providing such investors with additional information in order to make an informed decision regarding investing in and monitoring a viatical settlement contract.

Insurance companies should 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.

C. Government Sector Impact:

Representatives with the Department of Insurance state that the department may experience an “indeterminate increase” in revenue from licensure fees, as new entities are required to become licensed to viaticate life insurance policies in Florida. However, they estimate that the bill’s licensure provisions coupled with increased disclosure and notification measures, investigative mandates, and other regulatory requirements will impact the Insurance Commissioners Regulatory Trust Fund. Specifically, the department requests a total of 6 additional FTEs for the Bureau of Specialty Insurers and the Bureau of Agent Investigations to carry out the provisions of this bill:

**Insurance Commissioner’s Regulatory Trust Fund
Non-Recurring Impact**

	FY 00-01	FY 01-02	FY 02-03
Expense	11,961		
OCO	41,200		
Acquisition of Vehicles	72,000		
Total Impact to the Fund	\$125,161		

Recurring Impact

	FY 00-01	FY 01-02	FY 02-03
FTE	6.0	6.0	6.0
Salaries and Benefits	259,843	259,843	259,843
Expense	82,407	70,446	70,446
OCO	41,200		
Acquisition of Vehicles	72,000		
Total Impact to the Fund	\$455,450	\$330,289	\$330,289

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
