The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/SB 1600

INTRODUCER: Appropriations Committee; Banking and Insurance Committee; and Senators Young and Broxson

SUBJECT: Viatical Settlement Contracts

DATE: April 24, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Knudson	BI	**Fav/CS**
2.	Sanders	Hansen	AP	**Fav/CS**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1600 makes stranger-originated life insurance (STOLI) contracts void and unenforceable and allows a life insurer to contest a policy obtained through a STOLI practice, notwithstanding that life insurance contracts cannot be contested two years after issuance. A stranger-originated life insurance practice is an act, practice, arrangement or agreement to initiate a life insurance policy for the benefit of a third party investor who has no insurable interest in the insured at policy origination.

The bill makes void and unenforceable viatical settlement contracts subject to a loan secured by an interest in the insurance policy within five years from the issuance of the underlying insurance policy. This is referred to as the contestability period of the viatical settlement contract. The bill otherwise retains the existing two year contestability period under current law. Current law provides conditions that, if met, allow the execution of a viatical settlement contract during the contestability period. The bill modifies the process for doing so. The viator must provide a sworn affidavit and accompanying independent evidentiary documentation to a viatical settlement provider certifying that the viator has met a statutory exception that allows viatication of a policy during the contestability period. Current law does not require the viator to execute a sworn affidavit with documentation evidencing that the exception applies. The bill also revises and clarifies some of the conditions that allow viatication during the contestability period.

The bill adds as prohibited practices under the Viatical Settlement Act:

- Engaging in a fraudulent viatical settlement act;
- Engaging in a STOLI practice;
- Knowingly entering into a viatical settlement contract before the application for or issuance of a life insurance policy that is the subject of the viatical settlement contract or within a contestability period unless the viator complied with s. 626.99287, F.S.; and
- Knowingly issuing, soliciting, marketing, or promoting the purchase of a life insurance policy for the purpose of, or with an emphasis on selling the property to a third party.

Violations are third-degree felonies if the insurance policy has a value less than $20,000; second-degree felonies if the insurance policy has a value of $20,000 or more but less than $100,000; and first-degree felonies if the insurance policy has a value of $100,000 or more.

The bill does not affect state revenues or expenditures.[1]

The bill takes effect upon becoming law.

II. Present Situation:

Life Insurance – Insurable Interests

Life insurance allows an individual to set aside money in the present (through the payment of premiums) to provide some measure of financial security for his or her surviving beneficiaries upon his or her premature death. The proceeds allow survivors to pay off debts and other expenses and provide a source of income to replace that lost by the death of the insured.[2] A fundamental concept in life insurance is that the purchaser and beneficiary of an insurance policy must have an insurable interest—a reasonable expectation of a monetary benefit from the continued well-being of the life insured. In the context of life insurance, the insurable interest[3] prevents purchasing insurance as a form of gambling on the death of the insured, which creates a moral hazard for the purchaser who may be tempted to create a situation where he or she will be able to collect on the policy.

Florida law prohibits the procurement of “an insurance contract on the life or body of another individual unless the insurance contract benefits are payable to the insured, his or her personal representatives, or a person having an insurable interest in the insured when the contract was made.”[4] Persons with insurable interest include the insured, family members and loved ones of the insured, others if the insured’s life and health is of greatest benefit to them, trusts and trustees in specified circumstances, charitable organizations, and business organizations in specified circumstances.[5]

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[1] Office of Insurance Regulation, *Senate Bill 1600 Fiscal Analysis* (March 31, 2017) (on file with the Senate Appropriations Committee).

[2] Office of Insurance Regulation, *Life Insurance*, http://www.floir.com/Sections/LandH/Life/default.aspx (last visited April 14, 2017).

[3] Section 627.404, F.S., lists nine exclusive categories in which an “insurable interest” as to life, health or disability insurance are recognized.

[4] The insurable interest need not exist after the inception date of coverage under the contract. *See* s. 627.404(1), F.S.

[5] Section 627.404(2)(b), F.S.

Viatical Settlement Contracts - Background

A viatical settlement contract is a written agreement entered into between the owner[6] of a life insurance policy, referred to as the viator, and a viatical settlement provider wherein the viator agrees to transfer ownership or change the beneficiary designation of a life insurance policy at a later date in exchange for compensation paid to the viator.[7] The compensation paid to the viator is generally less than the expected death benefit under the policy. Rather than retaining the policy, the provider usually sells all or part of the policy to one or more investors. In return for providing funds, these investors receive the death benefit, or a proportionate share thereof, upon the passing of the insured.

Viatical settlements emerged during the HIV/AIDS epidemic in the 1980s, enabling terminally ill patients with short life expectancies who could no longer work and afford the policy premiums to sell their life insurance policies at a cash discount to pay for high medical care expenses. In the early days of the epidemic, AIDS patients generally died within months of their diagnoses, resulting in fairly quick, significant returns to investors,[8] who in those days were typically senior individuals who risked their savings in what was represented as a safe investment and marketed as a compassionate way to help dying patients. However, innovations in AIDS treatment in the early 1990s significantly improved life expectancies of AIDS patients, sometimes even outliving their investors, which disrupted mortality assumptions and diminished investor returns.

Two consequences resulted from the insureds of viaticated policies exceeding their life expectance. The first is that some viatical settlement providers stopped brokering new viatical settlements. The second, unfortunately, is that some viatical settlement providers engaged in fraudulent practices.[9]

An example cited by the Office of Insurance Regulation (OIR) of such fraudulent activity was Mutual Benefits Corporation (MBC).[10] In 2004, the OIR suspended MBC’s license and the United States Securities and Exchange Commission (SEC) filed an action in federal court seeking an injunction and the appointment of a receiver. The court-appointed receiver reported that MBC had fraudulently procured insurance policies with a total face value of approximately $1.4 billion. The SEC agreed to a $25 million settlement and referred the case to prosecutors. Federal prosecutors charged former company employees, most of whom pled guilty and were sentenced to lengthy prison terms. A factual statement filed by an MBC employee described the scheme. Mutual Benefits Corporation would falsely promise investors a fixed rate of return but was unable to keep those promises because insureds lived longer than expected and their premiums had to be paid to keep the underlying policies in force. New investor sales were used to continue to pay premiums on the previously viaticated life insurance policies. The MBC experience and other fraudulent schemes led to the Legislature comprehensively reforming the regulation of the viatical settlement industry in 2005.

[6] Or certificateholder if a group policy.
[7] Section 626.9911, F.S.
[8] Kelly J. Bozanic, *An Investment to Die For: From Life Insurance to Death Bonds, the Evolution and Legality of the Life Settlement Industry*, 113 PENN. ST. L. REV. 229, 233-234 (2008).
[9] Office of Insurance Regulation, *Secondary Life Insurance Market Report to the Florida Legislature* (Dec. 2013), p. 9.
[10] *See* Office of Insurance Regulation, *supra* note 5, at pg. 10.

Today, the viatical settlement market is not limited to the purchase of the life insurance products of the terminally ill. Viatical settlement contracts are also entered into with non-terminally ill insureds that no longer want, need, or can afford their policies. These agreements, often referred to as life settlements, serve as an alternative to exercising a redemption or accelerated death benefit clause in life insurance policies.

Because investors' expectations of returns can trigger the application of state and federal securities law, viatical settlements are widely treated as a hybrid transaction implicating both insurance law and securities law. Insurance law applies to protect the policy owner or viator in the "front-end" transaction with the viatical settlement provider through licensing, disclosure reporting, and other requirements. On the other hand, securities law applies to the "back-end" transaction to protect investors in viatical settlement investments by state securities regulators, and in some circumstances, the U.S. Securities and Exchange Commission.[11]

In response to increasing concerns over consumer protection in the viatical settlement market, several state insurance regulators, through the National Association of Insurance Commissioners (NAIC), and the National Association of Insurance Legislators (NCOIL)[12] developed model state legislation regulating the "front-end" transaction of viatical settlements in 1993 and 2007, respectively.

Regulation of the Viatical Settlement Industry

Viatical settlement providers and viatical settlement brokers are required to obtain licensure from the OIR. The Viatical Settlement Act (Act)[13] sets forth requirements for licensure, annual reporting, disclosures to viators, transactional procedures, adoption of anti-fraud plans, and administrative, civil, and criminal penalties. The Act also provides the OIR with examination and enforcement authority over viatical service providers and brokers; review and approval authority over the viatical settlement contracts and forms; rulemaking authority; and provided that a violation of the Act is an unfair trade practice under the Insurance Code. The Act does not authorize the OIR to regulate the rate or amount paid as consideration for a viatical settlement contract.[14]

In 2005, legislation was enacted that requires the investment transaction to be regulated as a security under ch. 517, F.S. These investments must be registered with either the OFR or the SEC. In addition, persons offering such investments must obtain licensure from the OFR and provide full and fair disclosures concerning viatical settlement investments to prospective investors. The 2005 legislation also provides that a person or firm who offers or attempts to negotiate a viatical settlement between an insured (viator) and a viatical service provider for compensation is a *viatical settlement broker* who must be licensed with the Department of

[11] GOVERNMENT ACCOUNTABILITY OFFICE, *Report to the Special Committee on Aging, U.S. Senate: Life Insurance Settlements*, GAO-10-775 (Jul. 2010), p. 9, at http://www.gao.gov/assets/310/306966.pdf (last visited April 14, 2017).
[12] The NAIC is the standard-setting and regulatory support organization created and governed by the chief insurance departments that regulate the conduct and solvency of insurers in their respective states or territories. NAIC, *About the NAIC*, http://www.naic.org/index_about.htm (last visited April 14, 2017).
[13] Ch. 96-336, Laws of Fla.
[14] Section 626.9926, F.S.

Financial Services (DFS) as a life insurance agent with a proper appointment from a viatical service provider. Viatical settlement brokers owe a fiduciary duty to the viator.[15]

In 2013, the Legislature directed the OIR to review Florida law and regulations to determine whether there were adequate protections for purchasers of life insurance policies in the secondary life insurance market.[16] Following a public hearing conducted by the OIR, in which both life insurers and institutional investors participated, the OIR published a report, concluding that adequate protections for institutional purchasers in the secondary life insurance market existed and that their recommendations did not warrant legislative action at the time.[17]

Stranger-Originated Life Insurance

Stranger-originated life insurance (STOLI) is somewhat similar to a viatical transaction, but with the key difference that the individual who obtains a life insurance policy does so for the express purpose of assigning the policy in exchange for compensation. In a typical STOLI transaction, an individual (usually a senior) is encouraged to take out insurance on his or her own life, sometimes in the millions of dollars. The individual then assigns the policy to an investor or group of investors (the "stranger") who pay the individual a large cash settlement in exchange for the ownership rights to the policy, including the right to receive the proceeds upon the insured's death.

STOLI also differs from legitimate viatical settlements with the following common characteristics:
- Typically targets senior citizens who are induced with gifts, promises of free insurance, or monetary gain;
- Commonly financed through non-recourse "premium finance loans";
- Commonly structured through the use of an irrevocable trust, making it difficult for the life insurance company to know that the policy has been sold;
- Premiums are paid for two years (i.e., the contestable period); and
- Often involves misrepresentation, falsification, or omission of material facts (also known as "cleansheeting") in the life insurance application and inflated underwriting practices, such as the applicant's net worth, in order to obtain a policy with a high face value.

As the Uniform Law Commission noted:

> Those who benefit from STOLI transactions (typically investors in the secondary markets) claim that it is an appropriate use of life insurance consistent with applicable legal principles, including the free transferability of assets. Others, including life insurers, oppose the use of STOLI on the ground that is a perversion of the life insurance asset and

[15] Sections 626.9911(9) and 626.9916, F.S.
[16] Ch. 2013-40, s. 6, Laws of Fla. (2013 General Appropriations Act, p. 316).
[17] *See* Office of Insurance Regulation, *supra* fn. 5, pp. 50-51.

> leads to the moral hazard concerns that insurable interest doctrines were intended to mitigate.[18]

Stranger-originated life insurance may appear similar to a viatical or life settlement. The critical difference is that in viatical or life settlements, an insured initially buys life insurance in a good-faith intent to protect valid insurable interests (i.e., to protect family members or a business from the risk of a premature death). The individual subsequently decides to sell the policy to a third party due to a change in circumstances that may not warrant the policy (such as divorce, death of an intended beneficiary, or the need for immediate cash due to illness or other loss). In a STOLI, the policy is intentionally purchased for the benefit of persons (usually investors) who lack an insurable interest at the time the life insurance contract is entered into. These investors ultimately receive the proceeds, directly or indirectly.[19] The Uniform Law Commission has noted that the beneficiaries of STOLI transactions argue that it is an appropriate use of life insurance consistent with applicable legal principles, including the free transferability of assets. Life insurers oppose the use of STOLI, arguing that it is a perversion of the concept of life insurance and leads to the moral hazard concerns that insurable interest doctrines are intended to mitigate.[20]

Transactions involving STOLI often use fraudulent means to procure life insurance on individuals, such as misrepresentation, falsification, or omission of material facts in the life insurance application. The fraud is conducted so that an assignment or sale of a policy functions as a subterfuge that circumvents the insurable interest requirement. STOLI transactions generally target senior citizens and are often financed through non-recourse "premium finance loans." It is common for STOLI to be structured through the use of an irrevocable trust, which conceals from the life insurance company that the policy was sold. The insured pays premiums during the contestable period to prevent the insurer from discovering a possible violation of the insurable interest requirement.

According to the OIR, STOLI impacts consumers (both individual investors and insureds) and insurers in a number of ways:[21]

- Seniors may exhaust their life insurance purchasing capability and not be able to protect their own family or business.
- The incentives, especially cash payments, used to lure seniors to participate in STOLI schemes are taxable as ordinary income.
- Seniors may subject themselves or their estates to potential liability in the event the life insurance policy is rescinded by an insurer who discovers fraud.

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[18] UNIFORM LAW COMMISSION, *Insurable Interest Amendment to the Uniform Trust Code Summary*, at http://uniformlaws.org/ActSummary.aspx?title=Insurable%20Interest%20Amendment%20to%20the%20Uniform%20Trust%20Code (last visited April 13, 2017).

[19] AALU, NAIFA, and ACLI, *STOLI: The Problem and the Appropriate State Response*, p. 4, (on file with the Senate Committee on Banking and Insurance).

[20] UNIFORM LAW COMMISSION, *Insurable Interest Amendment to the Uniform Trust Code Summary*, at http://uniformlaws.org/ActSummary.aspx?title=Insurable%20Interest%20Amendment%20to%20the%20Uniform%20Trust%20Code (last visited March 22, 2017).

[21] Office of Insurance Regulation (OIR), *2017 Agency Legislative Bill Analysis of HB 1205*, pg. 5 (March 12, 2017). Additionally, s. 626.9923, F.S., requires viatical service providers to disclose certain risks to viators, such as tax and Medicaid eligibility consequences.

- Seniors may encounter unexpected tax liability from the sale of the life insurance policy.[22]
- The "free" insurance is not free and may be subject to tax based on the economic value of the coverage.
- Seniors have to give the purchaser, and subsequent purchasers, access to their medical records when they sell their life insurance policy in the secondary market so that investors know the health status of the insured. The investors want to know the "status" of their investment and how close they are to getting paid.
- STOLI may lead to an increase in life insurance rates for the over-65 population.
- If STOLI practices continue to proliferate, the U.S. Congress may remove the tax-free status of life insurance proceeds.

Over 30 states currently prohibit STOLI, generally through some combination of the National Association of Insurance Commissioners (NAIC) and National Conference of Insurance Legislators (NCOIL) model acts, in addition to common law or statutory insurable interest laws. STOLI has resulted in significant litigation, criminal and regulatory enforcement actions, both nationally[23] and in Florida.[24]

The OIR may use several legal, criminal or regulatory remedies to address STOLI transactions:

- *The Viatical Settlement Act* authorizes the OIR to impose fines of up to $2,500 for nonwillful violations and up to $10,000 for willful violations, or to suspend, revoke, deny, or refuse to renew the license of any viatical settlement provider found to be engaging in certain acts, such as fraudulent or dishonest practices, dealing in bad faith with viators, or violating any provision of the Act or the Insurance Code. The OIR may also impose cease and desist orders and immediate final orders for violations of the Act.[25]
- *Misrepresentation on an application:* Currently, s. 627.409, F.S., provides that misrepresentation, omission, concealment of fact, or incorrect statements on an application for an insurance contract "may prevent recovery" in certain cases. However, this remedy is viewed as inadequate, because there are no criminal penalties and the only civil penalty available is an action for rescission by the life insurer.
- *Agent regulation*: Various provisions of the Insurance Code authorize the DFS to suspend or revoke the license or appointment of licensees, agencies, or appointees on various grounds, such as using fraudulent or dishonest practices in the conduct of business under the license.[26]
- *Unfair Insurance Trade Practices Act*: Part IX of ch. 626, F.S., contains a number of unfair insurance trade practices. In particular, s. 626.9541, F.S., lists several unfair methods of competition and unfair or deceptive acts or practices. Each violation of this statute can result in fines ranging from $5,000 to $75,000, depending on the willfulness and particular

[22] *See* IRS Rev. Ruls. 2009-13 and 2009-14, regarding taxation of proceeds from settlements as capital gains ordinary income and taxation on a post-settlement basis.
[23] OIR, *STOLI Criminal Cases Against Agents May Be on Upswing*, http://www.floir.com/siteDocuments/ACLI17Feb28STOLICriminalCasesAgainstAgentsMayBeUpswing.pdf (February 28, 2012) (last visited April 14, 2017).
[24] For a listing of OIR enforcement actions, see OIR, *Viatical Criminal, Civil and Regulatory Actions*, http://www.floir.com/sections/landh/viaticals/ccr_actions.aspx (last visited April 14, 2017) and 2013 OIR Report, *Appendix C: Florida Regulatory and Enforcement Actions Pertaining to Viatical Settlement Providers*.
[25] Sections 626.9914 and 626.99272, F.S.
[26] Sections 626.611, 626.6115, 626.6215, and 626.621, F.S.

violation. In addition, "twisting"[27] and "churning"[28] are first-degree misdemeanors, while willfully submitting false signatures on an application is a third-degree felony.[29] While viatical settlement providers (VSP) are subject to s. 626.9541, F.S., by way of s. 626.9927, F.S., and STOLI transactions do share some components of these practices, the statute was written for the initial sale of an insurance policy to an insured, thereby making it difficult to apply the statute to secondary sales of life insurance policies.[30]

- *Insurable Interest Litigation by Life Insurers*: Insurers and investors have relied on two dueling statutes that are not in the Act.
  - As noted above, Florida expanded its insurable interest statute, s. 627.404, F.S., in 2008 to clarify when an insurable interest may be validly recognized for life insurance purposes. Life insurers have relied on this statute in filing suit to rescind the policies subsequently transferred in a STOLI transaction for a lack of insurable interest at the time of the policy.
  - However, another statute, s. 627.455, F.S., requires insurers to include an incontestability clause in their policies that bars a challenge to the policy after it has been in force for two years. Securities intermediaries (acting for the institutional investors) have relied on this statute as a kind of statute of limitations to seek dismissal of insurers' rescission cases, arguing that a tardy challenge is barred regardless whether the policy was made with an insurable interest at inception.
  - In separate cases, the U.S. District Court for the Southern District of Florida reached different interpretations on the interplay of these statutes.[31] These appeals were consolidated to the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit). The Eleventh Circuit noted that there are no cases decided by Florida courts that specifically addressed whether a party can challenge an insurance policy as being void ab initio [to be treated as invalid from the beginning][32] for lack of an insurable interest if the challenge is made after the two-year contestability period, and if so, whether the individual with the required insurable interest must procure the policy in good faith. As a result, the Eleventh

[27] As defined in s. 626.9541(1)(l), F.S., "twisting" means "knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer."

[28] "Churning" by an insurer or an agent is an unfair method of competition and an unfair or deceptive act or practice. As defined in s. 626.9541(1)(aa), F.S., "churning" is: the practice whereby policy values in an existing life insurance policy or annuity contract, including, but not limited to, cash, loan values, or dividend values, and in any riders to that policy or contract, are directly or indirectly used to purchase another insurance policy or annuity contract with that same insurer for the purpose of earning additional premiums, fees, commissions, or other compensation:
a. Without an objectively reasonable basis for believing that the replacement or extraction will result in an actual and demonstrable benefit to the policyholder;
b. In a fashion that is fraudulent, deceptive, or otherwise misleading or that involves a deceptive omission;
c. When the applicant is not informed that the policy values including cash values, dividends, and other assets of the existing policy or contract will be reduced, forfeited, or used in the purchase of the replacing or additional policy or contract, if this is the case; or
d. Without informing the applicant that the replacing or additional policy or contract will not be a paid-up policy or that additional premiums will be due, if this is the case.

[29] Section 626.9541, F.S.

[30] OIR Agency Analysis, *supra* note 24, at 2.

[31] *Pruco Life Ins. v. Brasner*, 2011 WL 134056 (S.D. Fla. Jan. 7, 2011), and *Pruco Life Ins. Co. v. U.S. Bank*, 2013 WL 4496506 (S.D. Fla. Aug. 20, 2013).

[32] BLACKS LAW DICTIONARY, http://thelawdictionary.org/article/ab-initio-big-deal-contract-law/ (last visited April 13, 2017).

Circuit certified questions to the Florida Supreme Court for a determination of Florida law on the conflict between these two statutes.[33]

- In September 2016, the Florida Supreme Court considered the Eleventh Circuit's certified questions and concluded that "[b]ecause the STOLI policies like the . . . policies at issue have the insurable interest required by section 627.404(1) at their inception, they become incontestable two years after their issuance under the plain language of section 627.455."[34] The Florida Supreme Court rephrased the certified question and answered the following in the negative: "Can a party challenge the validity of a life insurance policy after the two-year contestability period established by section 627.455 because of its creation through a STOLI scheme?"[35] Answering in the affirmative would essentially create a STOLI-policy exception to the two-year contestability period in s. 627.455, F.S. The Florida Supreme Court noted that, "[w]hile such an exception might be wise public policy, that decision is for the Florida Legislature, not this Court."[36]

Currently, s. 627.409, F.S., provides that misrepresentation, omission, concealment of fact, or incorrect statements on an application for an insurance contract "may prevent recovery" in certain cases, however, there are no criminal penalties and an action for rescission by the life insurer is the only civil penalty available. Various provisions of the Insurance Code authorize the DFS to suspend or revoke the license or appointment of licensees, agencies, or appointees on various grounds, such as using fraudulent or dishonest practices in the conduct of business under the license.[37] Finally, the Unfair Insurance Trade Practices Act in s. 626.9541, F.S., lists several unfair methods of competition and unfair or deceptive acts or practices. Each violation of this statute can result in fines ranging from $5,000 to $75,000, depending on the willfulness and particular violation. In addition, "twisting" and "churning" are first-degree misdemeanors, while willfully submitting false signatures on an application is a third-degree felony.[38]

Current law does not specifically define STOLI, nor does it have a specific regulatory prohibition on STOLI or life insurance policies lacking an insurable interest at inception. Life insurers engage in insurable interest litigation to combat STOLI, usually relying on the insurable interest statute in s. 627.404, F.S., to rescind the policies transferred in a STOLI transaction for a lack of insurable interest when the policy was initially entered into. This argument is sometimes opposed with arguments seeking the application of the incontestability statute, s. 627.455, F.S., which requires life insurance policies to include a provision barring the insurer from challenging the policy after it is in force for two years.

In *Wells Fargo Bank, N.A. v. Pruco Life Insurance Company*, the Florida Supreme Court addressed whether a party can challenge the validity of a life insurance policy after the two-year contestability period established by s. 627.455, F.S., because of its creation through a STOLI scheme.[39] The court ruled that if a STOLI policy has the insurable interest required by

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[33] *Pruco Life Ins. Co. v. Wells Fargo Bank, N.A.*, 780 F.3d 1327 at 1336 (11th Cir. C.A. 2015).
[34] *Wells Fargo Bank, N.A. v Pruco Life Ins. Co.*, 200 So. 3d 1202, 1206 (Fla. 2016). The appeal will go back to the Eleventh Circuit for final disposition.
[35] *Id.* at 1206-07.
[36] *Id.* at 1203.
[37] Sections 626.611, 626.6115, 626.6215, and 626.621, F.S.
[38] Section 626.9541, F.S.
[39] *Wells Fargo Bank, N.A. v. Pruco Life Insurance Company*, No. SC15-382 (Fla. September 22, 2016).

s. 627.404(1), F.S., at its inception, the policy becomes incontestable two years after it is issued under s. 627.455, F.S.[40] Thus, even if the insurable interest is created as the result of a STOLI scheme, the policy is incontestable after two years.

III. Effect of Proposed Changes:

Defining a "Fraudulent Viatical Settlement Act" and a "Stranger-originated Life Insurance Practice"

Section 1 creates two new subsections in s. 626.9911, F.S. The new subsection (2) defines "fraudulent viatical settlement acts" as an act or omission committed by a person who knowingly, or with intent for the purpose of depriving another of property or for pecuniary gain, commits or allows an employee or agent to commit any of the following:

- Presenting, causing to be presented, or preparing false or concealed material information concerning specified material facts, such as:
  - An application for the issuance of a viatical settlement contract or a life insurance policy;
  - The underwriting of a viatical settlement contract or a life insurance policy;
  - Premiums paid on a life insurance policy;
  - Payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract or a life insurance policy;
  - The reinstatement or conversion of a life insurance policy;
  - The solicitation, offer, effectuation, or sale of a viatical settlement contract or a life insurance policy;
  - The issuance of written evidence of a viatical settlement contract or a life insurance policy; or
  - A financing transaction for a viatical settlement contract or life insurance policy.
- Employing a plan, financial structure, device, scheme or artifice related to viaticated policies for the purpose of perpetrating fraud;
- Engaging in a stranger-originated life insurance practice;
- Failing to disclose, upon request by an insurer, that the prospective insured has undergone a life expectancy evaluation by a person other than the insurer or its authorized representatives in connection with the issuance of the life insurance policy;
- Perpetuating a fraud or preventing its detection;[41]
- Embezzling, stealing, or misappropriating funds or other property of an insurance policyholder, insured, insurer, viator, viatical settlement provider, or any person engaged in the business of viatical settlement contracts or life insurance;
- Entering into, negotiating, brokering, or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained on false or concealed information to defraud the policy's issuer, a viatical settlement provider, or a viator;
- Facilitating the viator's change of state to avoid the provisions of this act;

[40] *See id* at pgs. 9-10.

[41] Such acts include removing, concealing, altering, destroying, or sequestering from the OIR the assets or records of a licensee or other person engaged in viatical settlements; misrepresenting or concealing the financial condition of a licensee, financing entity, insurer, or other person; transacting business relating to viatical settlement contracts in violation of the Viatical Settlement Act; and filing with the OIR or the insurance regulator in another jurisdiction false information or concealing information about a material fact.

- Facilitating or causing the creation of a trust with a non-Florida or other nonresident entity for the purpose of owning a life insurance policy covering a Florida resident to avoid the provisions of this act;
- Applying for or obtaining a loan that is secured directly or indirectly by an interest in a life insurance policy with intent to defraud, for the purpose of depriving another of property, or for pecuniary gain; and
- Attempting to commit, assisting, aiding, abetting, or conspiring to commit an act or omission that meets the definition of a "fraudulent viatical settlement act."

Subsection (9) is created for the purpose of defining a "stranger-originated life insurance practice." It is an act, practice, arrangement or agreement to initiate a life insurance policy for the benefit of a third party investor who has no insurable interest in the insured at policy origination.[42]

Contestability Periods for Viaticated Policies and Stranger-Originated Life Insurance

Section 2 amends s. 626.9924, F.S., to require the viatical settlement provider to give the documents required under s. 626.99287, F.S., to the life insurer that issued a life insurance policy within 20 days of an agreement to viaticate the policy during the five-year contestability period. The documents must accompany the notice required under current law. The required documents support the affidavit executed by the viator that an exception applies allowing the creation of a viatical settlement contract within five years after the issuance of the viaticated insurance policy.

Section 5 amends s. 626.99287, F.S., and makes void and unenforceable viatical settlement contracts entered into within five years from the issuance of the underlying insurance policy if the policy is subject to a loan secured directly or indirectly by an interest with the policy. This is the contestability period of the viatical settlement contract. The bill otherwise retains the two-year contestability period for viatical settlement contracts under current law.

Current law provides conditions that, if met, allow the execution of a viatical settlement contract during the contestability period. This section modifies the process for doing so. The viator must provide a sworn affidavit and accompanying independent evidentiary documentation to a viatical settlement provider certifying that the viator has met a statutory exception that allows viatication of a policy during the contestability period. Current law does not require the viator to execute a sworn affidavit with documentation evidencing that the exception applied.

This section revises two of the conditions allowing viatication during the contestability period. Currently, the limitation on viaticating a policy does not apply the life insurance policy was issued upon the owner's exercise of conversion rights arising out of a group or term policy. The bill limits this condition by requiring that the policy has been in effect for at least 60 months.[43]

[42] The bill states that stranger-originated life insurance practices include the purchase of a life insurance policy with resources or guarantees from or through a person who, at the time of the policy's inception, is not lawfully able to execute an arrangement or agreement to transfer the ownership or benefits of the policy to a third party. It also includes creating a trust or other entity that has the appearance of an insurable interest in order to initiate policies for investors, in violation of insurable interest laws and the prohibition against wagering on life.

[43] The 60-month period is calculated without regard to any change in insurance carriers if coverage has been continuous and under the same group sponsorship.

This section clarifies the exception for insureds or viators with illnesses by requiring them to provide evidence of a "terminal" or "chronic" illness, terms that are more precise in meaning than the current law. Current law refers to an illness that is catastrophic, life threatening, or requires at least three years of long-term care or home health care.

The bill allows the viator to enter into a viatical settlement contract more than two years after the policy's issuance date if at all times prior to two-years after policy issuance, the viator met three conditions. The viator must continuously fund the policy premiums exclusively with the viator's unencumbered assets.[44] There must not be an agreement or understanding with another person to guarantee any liabilities related to the policy or to purchase the policy. Neither the insured nor policy were evaluated for settlement.

Section 7 creates s. 626.99291, F.S., to allow a life insurer to contest a life insurance policy that was obtained by a STOLI practice, notwithstanding s. 627.455, F.S., which provides that life insurance and annuity contracts are not to be contestable for the initial two years.

Prohibiting Fraudulent Viatical Settlement Acts and Stranger Originated Life Insurance (Sections 4 and 6)

Section 4 amends s. 626.99275(1), F.S., to add to the list of prohibited practices:
- Knowingly entering into a viatical settlement contract before the application for or issuance of a life insurance policy that is the subject of the viatical settlement contract or during the two-year contestability period specified in s. 626.99287(1) or the five-year contestability period specified in s. 626.99287(2), F.S., unless the viator provides a sworn affidavit and accompanying evidence pursuant to.;
- Engaging in a fraudulent viatical settlement act, as defined in s. 626.9911, F.S.;
- Knowingly issuing, soliciting, marketing, or promoting the purchase of a life insurance policy for the purpose of, or with an emphasis on selling the property to a third party; and
- Engaging in a stranger-originated life insurance practice, as defined in s. 626.9911, F.S.

The prohibited practices are subject to criminal penalties, which remain unchanged. Violations are third-degree felonies if the insurance policy has a value less than $20,000; second-degree felonies if the insurance policy has a value of $20,000 or more but less than $100,000; and first-degree felonies if the insurance policy has a value of $100,000 or more.[45]

Section 6 creates s. 626.99289, F.S., to make void and unenforceable any contract or agreement entered into for the furtherance or aid of a STOLI practice.

Notice to Insureds

Section 8 creates s. 626.99292, F.S., to require a life insurer to provide an individual life insurance policyholder with a statement informing him or her that a policyholder considering changes in the status of a policy should consult with a licensed insurance or financial advisor. The statement must also advise the policyholder that he or she may contact the Office of

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[44] May include the net surrender value of the life insurance policy being financed.
[45] Section 626.99275(2), F.S.

Insurance Regulation (OIR) for more information and include a website address or other manner by which the policyholder may contact the OIR. The statement may accompany or be included in notices or mailings otherwise provided to the policyholder.

Miscellaneous Provisions (Sections 3 and 8)

Section 3 amends s. 626.99245, F.S., to correct a cross reference. This section provides viatical settlement providers doing business from this state must obtain a viatical settlement license from the OIR. The term "doing business from this state" within this subsection, includes effectuating viatical settlement agreements from offices in this state, regardless of the state of residence of the viator.

Section 9 provides that the act is effective 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. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Policyholders, particularly senior adults, will benefit from the prevention fraudulent viatical settlement acts and STOLI practices that deprive them of property or are created for the pecuniary gain of the party that becomes the new beneficiary or owner of the underlying life insurance policy.

C. Government Sector Impact:

The bill does not have an impact on state revenues or expenditures.

VI. Technical Deficiencies:

Section 1 of the bill defines "fraudulent viatical settlement acts" as various actions done by a person "knowingly, or with intent to defraud for the purpose of depriving another of property or

for pecuniary gain." On lines 116-119 the prohibition against "applying for or obtaining a loan that is secured directly or indirectly by an interest in a life insurance policy" needlessly duplicates the clause "with intent to defraud, for the purpose of depriving another of property, or for pecuniary gain." The redundant language on lines 118-119 is unnecessary.

Section 8 of the bill requires insurers to provide a notice to policyholders considering making changes in the status of a life insurance policy. On line 314, it requires the notice to include information for contacting the Office of Insurance Regulation. It may be more appropriate for the notice to include information on how to contact the Division of Consumer Services at the Department of Financial Services.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 626.9911, 626.9924, 626.99245, 626.99275, and 626.99287.

This bill creates the following sections of the Florida Statutes: 626.99289, 626.99291, and 626.99292.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Appropriations on April 20, 2017:
Deletes a bill provision that would have created a default five-year contestability period; the current two-year contestability period is instead retained with exceptions created by the bill. Requires insurers to notify individual life insurance policyholders that they should consult with licensed insurance or financial advisors if considering a change in the status of a life insurance policy.

CS by Banking and Insurance on March 27, 2017:
Defines a stranger-originated life insurance practice in s. 626.9911, F.S. Specifies that a life insurer may contest a life insurance policy obtained by a STOLI practice, notwithstanding that life insurance contracts are incontestable two years after issuance.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.