

Hall of the House of Representatives
84th General Assembly - Regular Session, 2003
Amendment Form

Subtitle of House Bill No. 2750

"AN ACT TO ADOPT THE NATIONAL ASSOCIATION OF INSURANCE
COMMISSIONERS' VIATICAL SETTLEMENTS ACT."

Amendment No. 1 to House Bill No. 2750.

Amend House Bill No. 2750 as originally introduced:

Delete everything after the enactment clause and substitute the following:

"SECTION 1. Effective January 1, 2004, Arkansas Code Title 23, Chapter 81, is amended to add a new subchapter to read as follows:

23-81-601. Title.

This subchapter may be cited as the "Viatical Settlements Act".

23-81-602. Definitions.

As used in this subchapter:

(1)(A) "Advertising" means any written, electronic, or printed communication that is directly or indirectly published, disseminated, circulated, or placed before the public for the purpose of creating an interest in or inducing a person to sell a life insurance policy under a viatical settlement contract.

(B) "Advertising" includes any communication by means of film strip, motion picture, or video, and any message recorded by telephone or transmitted on radio, television, the Internet, or similar communications media;

(2) "Business of viatical settlements" means an activity involved in the offering, soliciting, negotiating, procuring, effectuating, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, hypothecating or in any other manner of viatical settlement contract or purchase agreement;

(3) "Chronically ill" means:

(A) Being unable to perform at least two (2) activities of daily living, such as eating, toileting, transferring, bathing, dressing, or continence;

(B) Requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment; or

(C) Having a level of disability similar to that described in subdivision (3)(A) of this subsection, as determined by the Secretary of Health and Human Services;

(4)(A) "Financing entity" means an underwriter, placement agent,



lender, purchaser of securities, purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any entity that has a direct ownership in a policy or certificate that is the subject of a viatical settlement contract:

(i) Whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viaticated policies; and

(ii) Who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of a viatical settlement contract.

(B) "Financing entity" does not include a nonaccredited investor or viatical settlement purchaser;

(5) "Fraudulent viatical settlement act" means:

(A) Acts or omissions committed by any person who, knowingly or with the intent to defraud and for the purpose of depriving another of property or for pecuniary gain, commits or permits its employees or its agents to engage in acts including:

(i) Presenting, causing to be presented, preparing, or concealing false material information with knowledge or belief that the information will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, financing entity, insurer, insurance producer, or any other person, as part of, in support of, or concerning a fact material to one (1) or more of the following:

(a) An application for the issuance of a viatical settlement contract or insurance policy;

(b) The underwriting of a viatical settlement contract or insurance policy;

(c) A claim for payment or benefit under a viatical settlement contract or insurance policy;

(d) Premiums paid on an insurance policy;

(e) Payments and changes in ownership or beneficiary made under the terms of a viatical settlement contract or insurance policy;

(f) The reinstatement or conversion of an insurance policy;

(g) In the solicitation, offer, effectuation, or sale of a viatical settlement contract or insurance policy;

(h) The issuance of written evidence of viatical settlement contract or insurance policy; or

(i) A financing transaction; or

(ii) Employing any device, scheme, or artifice to defraud related to viaticated policies;

(B) In the furtherance of a fraud or to prevent the detection of a fraud, committing or permitting its employees or its agents to:

(i) Remove, conceal, alter, destroy, or sequester from the Insurance Commissioner the assets or records of a licensee or other person engaged in the business of viatical settlements;

(ii) Misrepresent or conceal the financial condition of a licensee, financing entity, insurer, or other person;

(iii) Transact the business of viatical settlements in violation of laws requiring a license, certificate of authority, or other legal authority for the transaction of the business of viatical settlements; or

(iv) File with the commissioner or the chief insurance regulatory official of another jurisdiction, a document containing false information or otherwise conceals information about a material fact from the commissioner;

(C) Embezzlement, theft, misappropriation, or conversion of moneys, funds, premiums, credits, or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner, or any other person engaged in the business of viatical settlements or insurance;

(D)(i) Recklessly entering into, brokering, or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the viator or the viator's agent intended to defraud the policy's issuer.

(ii) For purposes of this subdivision (5)(D), "recklessly" means engaging in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, the disregard of which involves a gross deviation from acceptable standards of conduct; or

(E) Attempting to commit, assisting, aiding, or abetting in the commission of, or conspiracy to commit the acts or omissions specified in subdivision (5) of this section;

(6) "Person" means a natural person or a legal entity including an individual, partnership, limited liability company, association, trust, or corporation;

(7) "Policy" means an individual or group policy, group certificate, contract, or arrangement of life insurance affecting the rights of a resident of this state or bearing a reasonable relation to this state, regardless of whether delivered or issued for delivery in this state;

(8)(A) "Related provider trust" means a titling trust or other trust established by a licensed viatical settlement provider or a financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction.

(B) The trust shall have a written agreement with the licensed viatical settlement provider under which:

(i) The provider is responsible for ensuring compliance with all statutory and regulatory requirements; and

(ii) The trust agrees to make all records and files related to viatical settlement transactions available to the commissioner as if those records and files were maintained directly by the licensed viatical settlement provider;

(9) "Special purpose entity" means a corporation, partnership, trust, limited liability company, or other similar entity formed solely to provide either direct or indirect access to institutional capital markets for a financing entity or licensed viatical settlement provider;

(10) "Terminally ill" means having an illness or sickness that is reasonably expected to result in death in twenty-four (24) months or fewer;

(11)(A) "Viatical settlement broker" means a person that on behalf of a viator and for a fee, commission, or other valuable consideration, offers or attempts to negotiate viatical settlement contracts between a viator and one (1) or more viatical settlement providers.

(B) Notwithstanding the manner in which the viatical settlement

broker is compensated, a viatical settlement broker is deemed to represent only the viator and owes a fiduciary duty to the viator to act according to the viator's instructions and in the best interest of the viator.

(C) "Viatical settlement broker" does not include an attorney, certified public accountant, or a financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or purchaser;

(12)(A) "Viatical settlement contract" means a written agreement establishing the terms under which compensation or anything of value will be paid, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance.

(B) "Viatical settlement contract" includes a contract for a loan or other financing transaction with a viator under subdivision (12)(A) of this section, other than a loan by a life insurance company under the terms of the life insurance contract or a loan secured by the cash value of a policy.

(C) "Viatical settlement contract" includes an agreement with a viator to transfer ownership or change the beneficiary designation at a later date, regardless of the date that compensation is paid to the viator;

(13)(A) "Viatical settlement provider" means a person, other than a viator, that enters into or effectuates a viatical settlement contract.

(B) "Viatical settlement provider" does not include:

(i) A bank, savings bank, savings and loan association, credit union, or other licensed lending institution that takes an assignment of a life insurance policy as collateral for a loan;

(ii) The issuer of a life insurance policy providing accelerated benefits under State Insurance Department Rule 60, "Accelerated Benefits In Life Insurance Policies," and under the contract;

(iii) An authorized or eligible insurer that provides stop loss coverage to a viatical settlement provider, purchaser, financing entity, special purpose entity, or related provider trust;

(iv) A natural person who enters into or effectuates no more than one (1) agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit;

(v) A financing entity;

(vi) A special purpose entity;

(vii) A related provider trust;

(viii) A viatical settlement purchaser; or

(ix) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, who purchases a viaticated policy from a viatical settlement provider;

(14)(A) "Viatical settlement purchaser" means a person who, for the purpose of deriving an economic benefit:

(i) Gives a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy;

(ii) Owns or acquires or is entitled to a beneficial interest in a trust that owns a viatical settlement contract; or

(iii) Is the beneficiary of a life insurance policy that has been or will be the subject of a viatical settlement contract.

(B) "Viatical settlement purchaser" does not include:

(i) A licensee under this subchapter;

(ii) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended;

(iii) A financing entity;

(iv) A special purpose entity; or

(v) A related provider trust;

(15) "Viaticated policy" means a life insurance policy or certificate that has been acquired by a viatical settlement provider under a viatical settlement contract; and

(16)(A) "Viator" means the owner of a life insurance policy or a certificate holder under a group policy who enters or seeks to enter into a viatical settlement contract.

(B) "Viator" does not include:

(i) A licensee under this subchapter;

(ii) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended;

(iii) A financing entity;

(iv) A special purpose entity; or

(v) A related provider trust.

23-81-603. License requirements.

(a)(1) A person who is not licensed by the State Insurance Department to sell life or disability policies in Arkansas shall not operate as a viatical settlement provider or viatical settlement broker unless the person obtains a license from the Insurance Commissioner of the state of residence of the viator.

(2)(A) If there is more than one (1) viator on a single policy and the viators are residents of different states, the viatical settlement shall be governed by the law of the state in which the viator having the largest percentage of ownership resides.

(B) If the viators hold equal ownership, the viatical settlement shall be governed by the law of the state of residence of one (1) viator agreed upon in writing by all viators.

(b) Application for a viatical settlement provider or viatical settlement broker license shall be made to the Insurance Commissioner by the applicant on a form prescribed by the commissioner, and these applications shall be accompanied by the fees specified in State Insurance Department Rule 57, "Insurance Department Administrative and Regulatory Fees."

(c)(1) Licenses may be renewed from year to year on the anniversary date upon payment of the annual renewal fees specified in Arkansas Insurance Department Rule 57, "Insurance Department Administrative and Regulatory Fees."

(2) Failure to pay the fees by the renewal date results in expiration of the license.

(d)(1) The applicant shall provide information on forms required by the commissioner.

(2) The commissioner may, at any time, require the applicant to

fully disclose the identity of all stockholders, partners, officers, members, and employees.

(3) The commissioner may refuse to issue a license in the name of a legal entity if not satisfied that any officer, employee, stockholder, partner, or member who may materially influence the applicant's conduct meets the standards under this subchapter.

(e)(1) A license issued under this subchapter to a legal entity authorizes all partners, officers, members, and designated employees to act as viatical settlement providers or viatical settlement brokers.

(2) Each person under subdivision (e)(1) of this section who is licensed as a viatical settlement provider or viatical settlement broker shall be named in the application and any supplements to the application.

(f) Upon the filing of an application and the payment of the license fee, the commissioner shall make an investigation of each applicant and issue a license if the commissioner finds that the applicant:

(1) If a viatical settlement provider, has provided a detailed plan of operation;

(2) Is competent and trustworthy and intends to act in good faith in the capacity required by the license for which the applicant has applied;

(3) Has a good business reputation and has had experience, training, or education to be qualified in the business for which the license is applied;

(4) If a legal entity, provides a certificate of good standing from the state of its domicile; and

(5) If a viatical settlement provider or viatical settlement broker, has provided an anti-fraud plan that meets the requirements of § 23-81-612(g).

(g) The commissioner shall not issue a license to a nonresident applicant, unless a written designation of an agent for service of process is filed and maintained with the commissioner or unless the applicant has filed with the commissioner the applicant's written irrevocable consent that any action against the applicant may be commenced against the applicant by service of process on the commissioner.

(h) Each viatical settlement provider or viatical settlement broker shall provide to the commissioner new or revised information about officers, ten percent (10%) or more stockholders, partners, directors, members, or designated employees within thirty (30) days of the change.

23-81-604. License revocation and denial.

(a) The Insurance Commissioner may suspend, revoke, or refuse to issue or renew the license of a viatical settlement provider or viatical settlement broker if the commissioner finds that:

(1) The applicant or licensee made a material misrepresentation in the application for the license;

(2) The licensee or any officer, partner, member, or key management personnel has pleaded guilty or nolo contendere to, or is found guilty of, fraudulent or dishonest practices and is subject to a final administrative action or is otherwise shown to be untrustworthy or incompetent;

(3) The viatical settlement provider demonstrates a pattern of unreasonable payments to viators;

(4) The licensee or any officer, partner, member, or key management personnel has been found guilty of, or has pleaded guilty or nolo contendere to, a felony, or to a misdemeanor involving fraud or moral turpitude, regardless of whether a judgment of conviction has been entered by the court;

(5) The viatical settlement provider has entered into any viatical settlement contract that has not been approved under this subchapter;

(6) The viatical settlement provider has failed to honor contractual obligations set out in a viatical settlement contract;

(7) The licensee no longer meets the requirements for initial licensure;

(8) The viatical settlement provider has assigned, transferred, or pledged a viaticated policy to:

(A) A person other than a viatical settlement provider licensed in this state;

(B) A viatical settlement purchaser;

(C) An accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended;

(D) A financing entity;

(E) A special purpose entity; or

(F) A related provider trust; or

(9) The licensee or any officer, partner, member, or key management personnel has violated any provision of this subchapter.

(b) If the commissioner denies a license application or suspends, revokes, or refuses to renew the license of a viatical settlement provider or viatical settlement broker, the commissioner shall conduct a hearing under the Arkansas Administrative Procedure Act.

23-81-605. Approval of viatical settlement contracts and disclosure statements.

(a) A person shall not use a viatical settlement contract form or provide to a viator a disclosure statement form in this state unless the form has been filed with and approved by the Insurance Commissioner.

(b)(1) The commissioner shall refuse to approve a viatical settlement contract form or disclosure statement form if the commissioner determines that the form contains provisions that are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the viator.

(2) The commissioner may, by rule or regulation, require the submission of advertising material related to the sale of viatical settlement contracts.

23-81-606. Reporting requirements and privacy.

(a) Each licensee shall file with the Insurance Commissioner on or before March 1 of each year an annual statement containing information as the commissioner prescribes by regulation.

(b) Except as otherwise allowed or required by law, no viatical settlement provider, viatical settlement broker, insurance company, insurance producer, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, shall disclose to any other person an insured's identity as an insured, or the insured's financial or

medical information, unless the disclosure:

(1) Is necessary to effect a viatical settlement between the viator and a viatical settlement provider, and the viator and insured have provided prior written consent to the disclosure;

(2) Is provided in response to an investigation or examination by the commissioner or any other governmental officer or agency under § 23-81-612(c);

(3) Is a term of or condition to the transfer of a policy by one (1) viatical settlement provider to another viatical settlement provider;

(4) Is necessary to permit a financing entity, related provider trust, or special purpose entity to finance the purchase of policies by a viatical settlement provider, and the viator and insured have provided prior written consent to the disclosure;

(5) Is necessary to allow the viatical settlement provider or viatical settlement broker or their authorized representatives to make contacts for the purpose of determining health status; or

(6) Is required to purchase stop loss coverage.

23-81-607. Examination or investigations.

(a) Authority, scope, and scheduling of examinations.

(1) The Insurance Commissioner may conduct an examination under this subchapter of a licensee as often as the commissioner in his or her sole discretion deems appropriate.

(2) For purposes of completing an examination of a licensee under this subchapter, the commissioner may examine or investigate any person, or the business of any person if necessary or material, in the sole discretion of the commissioner to complete the examination of the licensee.

(3) In lieu of an examination under this subchapter of any foreign or alien licensee licensed in this state, the commissioner may accept an examination report on the licensee as prepared by the commissioner for the licensee's state of domicile or port-of-entry state.

(b) Record retention requirements.

(1) A person required to be licensed by this subchapter shall for five (5) years retain copies of any:

(A) Proposed, offered, or executed contract, purchase agreement, underwriting document, policy form, and application from the date of the proposal, offer, or execution of the contract or purchase agreement, whichever is later;

(B) Check, draft, or other evidence and documentation related to the payment, transfer, deposit, or release of funds from the date of the transaction; and

(C) Any other record and documents related to the requirements of this subchapter.

(2) This section does not relieve a person of the obligation to produce these documents to the commissioner after the retention period has expired if the person has retained the documents.

(3) Records required to be retained by this section must be legible and complete and may be retained in paper, photograph, microprocess, magnetic, mechanical, or electronic media, or by any process that accurately reproduces or forms a durable medium for the reproduction of a record.

(c) Conduct of examinations.

(1)(A) Upon determining that an examination should be conducted,

the commissioner shall issue an examination warrant appointing one or more examiners to perform the examination and instructing them as to the scope of the examination.

(B) In conducting the examination, the examiner shall observe those guidelines and procedures in the Examiners' Handbook adopted by the National Association of Insurance Commissioners.

(C) The commissioner may also employ other guidelines or procedures as the commissioner may deem appropriate.

(2)(A) Each licensee or person from whom information is sought, its officers, directors, and agents shall provide to the examiners timely, convenient, and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents, assets, and computer or other recordings relating to the property, assets, business, and affairs of the licensee being examined.

(B) The officers, directors, employees, and agents of the licensee or person shall facilitate the examination and aid in the examination to the extent that it is within their power to do so.

(C) The refusal of a licensee, by its officers, directors, employees, or agents to submit to examination or to comply with any reasonable written request of the commissioner shall be grounds for suspension, refusal, or nonrenewal of any license or authority held by the licensee to engage in the viatical settlement business or other business subject to the commissioner's jurisdiction.

(D) Any proceedings for the suspension, revocation, or refusal to issue or renew any license or authority shall be conducted under the Arkansas Administrative Procedure Act.

(3)(A) The commissioner shall have the power to issue subpoenas, to administer oaths, and to examine under oath any person as to any matter pertinent to the examination.

(B) Upon the failure or refusal of a person to obey a subpoena, the commissioner may petition a court of competent jurisdiction, and upon proper showing, the court may enter an order compelling the witness to appear and testify or produce documentary evidence.

(C) The failure to obey the court order shall be punishable as contempt of court.

(4) When making an examination under this subchapter, the commissioner may retain attorneys, appraisers, independent actuaries, independent certified public accountants, or other professionals and specialists as examiners, the reasonable cost of which shall be paid by the licensee that is the subject of the examination.

(5)(A) This subchapter does not limit the commissioner's authority to terminate or suspend an examination in order to pursue other legal or regulatory action under the insurance laws of this state.

(B) Findings of fact and conclusions made as the result of any examination shall be prima facie evidence in any legal or regulatory action.

(6) This subchapter does not limit the commissioner's authority to use or to make public any final or preliminary examination report, any examiner or licensee workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may deem appropriate.

(d) Examination reports.

(1) Examination reports shall be comprised of only facts appearing upon the books, records, or other documents of the licensee, its agents or other persons examined, or as ascertained from the testimony of its officers or agents or other persons examined concerning its affairs, and those conclusions and recommendations as the examiners find reasonably warranted from the facts.

(2)(A) No later than sixty (60) days following completion of the examination, the examiner in charge shall file with the Insurance Commissioner a verified written report of examination under oath.

(B) Upon receipt of the verified report, the commissioner shall transmit the report to the examinee, with a notice affording the examinee a reasonable opportunity of not more than thirty (30) days from the date the commissioner causes the report to be transmitted to make a written submission or rebuttal with respect to any matters contained in the examination report.

(3) If the commissioner determines that regulatory action is appropriate as a result of an examination, the commissioner may initiate any proceedings or actions provided by law.

(e) Confidentiality of examination information.

(1) Names and individual identification data for all viators shall be considered private and confidential information and shall not be disclosed by the Insurance Commissioner, unless required by law.

(2)(A)(i) Except as otherwise provided in this subchapter or by the law of another state or jurisdiction that is substantially similar to this subchapter, all examination reports, working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination made under this subchapter, or in the course of analysis or investigation by the commissioner of the financial condition or market conduct of a licensee, shall be confidential and privileged.

(ii) Information under subdivision (e)(2)(A)(i) of this section shall not be subject to disclosure under the Arkansas Freedom of Information Act of 1967 or §§ 25-15-101 through 25-15-109, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.

(B) The commissioner may use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties.

(3) Documents, materials, or other information, including all working papers and copies thereof, in the possession or control of the National Association of Insurance Commissioners and its affiliates and subsidiaries shall be confidential and privileged, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action if they are:

(A) Created, produced, or obtained by or disclosed to the association and its affiliates or subsidiaries in the course of assisting an examination made under this subchapter, or assisting a commissioner in the analysis or investigation of the financial condition or market conduct of a licensee; or

(B) Disclosed to the association and its affiliates or subsidiaries under subsection (e)(4) of this section by a commissioner.

(4) Neither the commissioner nor any person that received the documents, material, or other information under this section while acting under the authority of the commissioner, including the National Association of Insurance Commissioners and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any confidential documents, materials, or information subject to subdivision (e)(1) of this section.

(5) In order to assist in the performance of the commissioner's duties, the commissioner:

(A) May share documents, materials, or other information, including the confidential and privileged documents, materials, or information subject to subdivision (e)(1) of this section; with other state, federal, and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal, and international law enforcement authorities, if the recipient of the information agrees to maintain the confidentiality and privileged status of the document, material, communication, or other information;

(B)(i) May receive documents, materials, communications, or information, including otherwise confidential and privileged documents, materials, or information from the National Association of Insurance Commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions.

(ii) The commissioner shall maintain as confidential or privileged any document, material, or information received with notice or with the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(C) May enter into agreements governing, sharing, and use of information consistent with this subsection (e).

(6) No waiver of any applicable privilege or claim of confidentiality in the documents, materials, or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in subdivision (e)(4) of this section.

(7) A privilege established under the law of any state or jurisdiction that is substantially similar to the privilege established under this subsection (e) shall be available and enforced in any proceeding in, and in any court of, this state.

(8) This subchapter does not prohibit the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the commissioner of any other state or country, or to law enforcement officials of this or any other state or agency of the federal government at any time or to the National Association of Insurance Commissioners, if the agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this subchapter.

(f) Conflict of interest.

(1)(A) An examiner may not be appointed by the commissioner if the examiner, either directly or indirectly, has a conflict of interest or is affiliated with the management of or owns a pecuniary interest in any person subject to examination under this subchapter.

(B) However, this section does not automatically preclude

an examiner from being:

(i) A viator;

(ii) An insured in a viaticated insurance policy; or

(iii) A beneficiary in an insurance policy that is

proposed to be viaticated.

(2) Notwithstanding subdivision (f)(1) of this section, the commissioner may retain from time to time, on an individual basis, qualified actuaries, certified public accountants, or other similar individuals who are independently practicing their professions, even though these persons may from time to time be similarly employed or retained by persons subject to examination under this subchapter.

(g) Cost of examinations.

Each person or organization examined under this subchapter shall pay to the State Insurance Department those expenses and costs authorized under § 23-61-206.

(h) Immunity from liability.

(1) No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representative, or any examiner appointed by the commissioner for any statement made or conduct performed in good faith while implementing this subchapter.

(2)(A) No cause of action shall arise, nor shall any liability be imposed against any person for communicating or delivering information or data to the commissioner or the commissioner's authorized representative, or appointed examiner under an examination made under this subchapter, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive.

(B) Subsection (h)(2) of this section does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in subdivisions (h)(1) and (h)(2)(A) of this section.

(3)(A) A person identified in subdivisions (h)(1) or (h)(2) of this section shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander, or any other relevant tort arising out of the implementation of this subchapter and the party bringing the action was not substantially justified in doing so.

(B) For purposes of this subdivision (h)(3), a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.

(i)(1) Investigative authority of the commissioner.

(2) The commissioner may investigate suspected fraudulent viatical settlement acts and persons engaged in the business of viatical settlements.

23-81-608. Disclosure.

(a)(1) With each application for a viatical settlement, a viatical settlement provider or viatical settlement broker shall provide the viator with a minimum of the disclosures under subdivision (a)(2) of this section no later than the time the application for the viatical settlement contract is signed by all parties.

(2) The disclosures shall be provided in a separate document

that is signed by the viator and the viatical settlement provider or viatical settlement broker, and shall inform the viator that:

(A) There are possible alternatives to viatical settlement contracts, including any accelerated death benefits or policy loans offered under the viator's life insurance policy;

(B) Some or all of the proceeds of the viatical settlement may be taxable under federal income tax and state franchise and income taxes, and that the viator should seek assistance from a professional tax advisor;

(C) Proceeds of the viatical settlement could be subject to the claims of creditors;

(D) Receipt of the proceeds of a viatical settlement may adversely affect the viator's eligibility for Medicaid or other government benefits or entitlements, and that the viator should obtain advice from the appropriate government agencies;

(E)(i) The viator has the right to rescind a viatical settlement contract for fifteen (15) calendar days after the receipt of the viatical settlement proceeds by the viator, as provided in § 23-81-609(c).

(ii) If the insured dies during the rescission period, the settlement contract shall be deemed to have been rescinded, subject to repayment of all viatical settlement proceeds and any premiums, loans, and loan interest to the viatical settlement provider or purchaser;

(F) Funds will be sent to the viator within three (3) business days after the viatical settlement provider has received the insurer or group administrator's acknowledgment that ownership of the policy or interest in the certificate has been transferred and the beneficiary has been designated;

(G) Entering into a viatical settlement contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy or certificate, to be forfeited by the viator and that the viator should seek assistance from a financial adviser;

(H)(i) Disclosure to a viator shall include distribution of a brochure describing the process of viatical settlements.

(ii) The National Association of Insurance Commissioners' form for the brochure shall be used unless one is developed by the commissioner;

(I) The disclosure document shall contain the following language: "All medical, financial, or personal information solicited or obtained by a viatical settlement provider or viatical settlement broker about an insured, including the insured's identity or the identity of family members, a spouse, or a significant other may be disclosed as necessary to effect the viatical settlement between the viator and the viatical settlement provider. If you are asked to provide this information, you will be asked to consent to the disclosure. The information may be provided to someone who buys the policy or provides funds for the purchase. You may be asked to renew your permission to share information every two years."; and

(J)(i) The insured may be contacted by either the viatical settlement provider or broker or its authorized representative for the purpose of determining the insured's health status.

(ii) This contact is limited to once every three (3) months if the insured has a life expectancy of greater than one (1) year, and no more than once per month if the insured has a life expectancy of one (1)

year or less.

(b)(1) A viatical settlement provider shall provide the viator with a minimum of the disclosures in subdivision (b)(2) no later than the date the viatical settlement contract is signed by all parties.

(2) The disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator and the viatical settlement provider or viatical settlement broker, and shall provide the following information:

(A) The affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy to be viaticated;

(B) The name, address, and telephone number of the viatical settlement provider;

(C) If an insurance policy to be viaticated has been issued as a joint policy or involves family riders or any coverage of a life other than the insured under the policy to be viaticated, the viator shall be informed of the possible loss of coverage on the other lives under the policy and shall be advised to consult with his or her insurance producer or the insurer issuing the policy for advice on the proposed viatical settlement;

(D)(i) The dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate.

(ii) If known, the viatical settlement provider shall also disclose the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy or certificate, and the viatical settlement provider's interest in those benefits; and

(E) The name, business address, and telephone number of the independent third party escrow agent, and the fact that the viator or owner may inspect or receive copies of the relevant escrow, trust agreements, or documents.

(c) If the provider transfers ownership or changes the beneficiary of the insurance policy, the provider shall communicate the change in ownership or beneficiary to the insured within twenty (20) days after the change.

23-81-609. General rules.

(a)(1) If the viator is the insured, a viatical settlement provider entering into a viatical settlement contract shall first obtain:

(A) A written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract; and

(B) A document in which the insured consents to the release of his or her medical records to a viatical settlement provider, viatical settlement broker, and the insurance company that issued the life insurance policy covering the life of the insured.

(2)(A) Within twenty (20) days after a viator executes documents necessary to transfer any rights under an insurance policy or within twenty (20) days of entering any agreement, option, promise, or any other form of understanding, expressed or implied, to viaticate the policy, the viatical settlement provider shall give written notice to the insurer that issued that insurance policy that the policy has or will become a viaticated policy.

(B) The notice shall be accompanied by the documents required by subdivision (a)(3) of this section.

(3)(A) The viatical provider shall deliver a copy of the medical

release required under subdivision (a)(1)(B) of this section, a copy of the viator's application for the viatical settlement contract, the notice required under subdivision (a)(2) of this section, and a request for verification of coverage to the insurer that issued the life policy that is the subject of the viatical transaction.

(B) The National Association of Insurance Commissioners' form for verification shall be used unless the commissioner adopts different standards for verification.

(4) The insurer shall respond to a request for verification of coverage submitted on an approved form by a viatical settlement provider within thirty (30) calendar days of the date the request is received and shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation at this time regarding the validity of the insurance contract.

(5)(A) No later than the time of execution of the viatical settlement contract, the viatical settlement provider shall obtain a witnessed document in which the viator:

- (i) Consents to the viatical settlement contract;
- (ii) Represents that he or she has a complete understanding of the viatical settlement contract;
- (iii) Represents that he or she has a complete understanding of the benefits of the life insurance policy; and
- (iv) Acknowledges that he or she is entering into the viatical settlement contract freely and voluntarily.

(B) If the insured has a terminal or chronic illness or condition, in addition to obtaining the information required under subdivision (5)(A) of this section, the viatical settlement provider shall obtain a witnessed document in which the viator acknowledges that the insured has a terminal or chronic illness and that the terminal or chronic illness or condition was diagnosed after the life insurance policy was issued.

(6) If a viatical settlement broker performs any of these activities required of the viatical settlement provider, the provider is deemed to have fulfilled the requirements of this section.

(b) Any medical information solicited or obtained by a licensee shall be subject to the applicable provisions of state law relating to confidentiality of medical information.

(c)(1) All viatical settlement contracts entered into in this state shall provide the viator with an unconditional right to rescind the contract for at least fifteen (15) calendar days from the receipt of the viatical settlement proceeds.

(2) If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of all viatical settlement proceeds, and any premiums, loans, and loan interest that have been paid by the viatical settlement provider or purchaser.

(d)(1) The viatical settlement provider shall instruct the viator to send the executed documents required to effect a change in ownership, assignment, or change in beneficiary directly to the independent escrow agent.

(2)(A) Within three (3) business days after the date the escrow agent receives the document, or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the

documents directly to the provider, the provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a state or federally-chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation.

(B) Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment, or change in beneficiary forms to the viatical settlement provider or to the related provider trust.

(C) Upon the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership, assignment, or change in designation of beneficiary from the insurance company, the escrow agent shall pay the settlement proceeds to the viator.

(e) Failure to tender consideration to the viator for the viatical settlement contract within the time specified under § 23-81-608(a)(2)(f) renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and accepted by the viator.

(f)(1) Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider or viatical settlement broker after the viatical settlement has occurred:

(A) Shall only be made by the viatical settlement provider or broker licensed in this state or by its authorized representatives; and

(B) Shall be limited to once every three (3) months for insureds with a life expectancy of more than one (1) year, and to no more than once per month for insureds with a life expectancy of one (1) year or less.

(2) The provider or broker shall explain the procedure for these contacts at the time the viatical settlement contract is entered into.

(3) The limitations in subsection (f) of this section shall not apply to any contacts with an insured for reasons other than determining the insured's health status.

(4) Viatical settlement providers and viatical settlement brokers shall be responsible for the actions of their authorized representatives.

23-81-610. Prohibited practices.

(a) It is a violation of this subchapter for any person to enter into a viatical settlement contract within a two-year period commencing with the date of issuance of the insurance policy or certificate unless the viator certifies to the viatical settlement provider that one (1) or more of the following conditions have been met within the two-year period:

(1) The policy was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, if the total of the time covered under the conversion policy plus the time covered under the prior policy is at least twenty-four (24) months.

(2) The time covered under a group policy shall be calculated without regard to any change in insurance carriers, if the coverage has been continuous and under the same group sponsorship;

(3) The viator is a charitable organization exempt from taxation under 26 U.S.C. § 501 (c)(3);

(4) The viator is not a natural person, but is a corporation, limited liability company, partnership, or similar entity;

(5) The viator submits independent evidence to the viatical settlement provider that one (1) or more of the following conditions have been met within the two-year period:

(A) The viator or insured is terminally or chronically ill;

(B) The viator's spouse dies;

(C) The viator divorces his or her spouse;

(D) The viator retires from full-time employment;

(E) The viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from maintaining full-time employment;

(F) The viator was the insured's employer at the time the policy or certificate was issued and the employment relationship terminated;

(G) A final order, judgment, or decree is entered by a court of competent jurisdiction, on the application of a creditor of the viator, adjudicating the viator bankrupt or insolvent, or approving a petition seeking reorganization of the viator or appointing a receiver, trustee, or liquidator to all or a substantial part of the viator's assets;

(H) The viator experiences a significant decrease in income that is unexpected and that impairs the viator's reasonable ability to pay the policy premium; or

(I) The viator or insured disposes of his or her ownership interests in a closely held corporation.

(b)(1) Copies of the independent evidence described in subdivision (d)(1) of this section and documents required by § 23-81-609(a) shall be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage.

(2) The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider; and

(c) If the viatical settlement provider submits to the insurer a copy of the owner or insured's certification described in subdivision (a)(5) of this section when the provider submits a request to the insurer to transfer the policy or certificate to the viatical settlement provider, the copy shall be deemed to conclusively establish that the viatical settlement contract satisfies the requirements of this section and the insurer shall timely respond to the request.

23-81-611. Advertising for viatical settlements.

(a)(1) This section shall apply to any advertising of viatical settlement contracts, or related products or services intended for dissemination in this state, including Internet advertising viewed by persons located in this state.

(2) Where disclosure requirements are established under federal law or regulation, this section shall be interpreted to minimize or eliminate the conflict wherever possible.

(b)(1)(A) Every viatical settlement licensee shall establish and at all times maintain a system of control over the content, form, and method of dissemination of all advertisements of its contracts, products, and services.

(B) A system of control shall include regular routine notification, at least once a year, to agents and others authorized by the viatical settlement licensee who disseminate advertisements of the

requirements and procedures for approval prior to the use of any advertisements not furnished by the viatical settlement licensee.

(2) All advertisements under this subchapter, regardless of by whom they were written, created, designed, or presented, shall be the responsibility of the viatical settlement licensee, as well as the individual who created or presented the advertisement.

(c)(1) Advertisements shall be truthful and shall not mislead in fact or by implication.

(2) The form and content of an advertisement of a viatical settlement contract shall be sufficiently complete and clear so as to avoid deception.

(3)(A) The advertisement shall not have the capacity or tendency to mislead or deceive.

(B) Whether an advertisement has the capacity or tendency to mislead or deceive shall be determined by the commissioner from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence within the segment of the public to which it is directed.

(d)(1) The information required to be disclosed under this section shall not be minimized, rendered obscure, or presented in an ambiguous fashion or intermingled with the text of the advertisement so as to be confusing or misleading.

(2)(A) An advertisement shall not omit material information or use words, phrases, statements, references, or illustrations if the omission or use has the capacity, tendency, or effect of misleading or deceiving viators as to the nature or extent of any benefit, loss covered, premium payable, or state or federal tax effect.

(B) The fact that the viatical settlement contract offered is made available for inspection before consummation of the sale, or an offer is made to refund the payment if the viator is not satisfied or that the viatical settlement contract includes a "free look" period that satisfies or exceeds legal requirements, does not remedy misleading statements.

(3) An advertisement shall not use the name or title of a life insurance company or a life insurance policy unless the advertisement has been approved by the insurer.

(4) An advertisement shall not state or imply that interest charged on an accelerated death benefit or a policy loan is unfair, inequitable, or is in any manner an incorrect or improper practice.

(5)(A) The words "free," "no cost," "without cost," "no additional cost," "at no extra cost," or words of similar import shall not be used with respect to any benefit or service unless true.

(B) An advertisement may specify the charge for a benefit or a service or may state that a charge is included in the payment or use other appropriate language.

(6)(A) Testimonials, appraisals, or analysis used in advertisements shall be genuine, shall represent the current opinion of the author, shall be applicable to any viatical settlement contract product or service advertised, and shall be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective viators as to the nature or scope of the testimonials, appraisals, analysis, or endorsement.

(B) In using testimonials, appraisals, or analysis, the viatical settlement licensee makes as its own all the statements contained

therein, and the statements are subject to all the provisions of this section.

(C) If the individual making a testimonial, appraisal, analysis, or an endorsement has a financial interest in the viatical settlement provider or related entity as a stockholder, director, officer, employee, or otherwise, or receives any benefit directly or indirectly other than required union scale wages, that fact shall be prominently disclosed in the advertisement.

(D)(i) An advertisement shall not state or imply that a viatical settlement contract benefit or service has been approved or endorsed by a group of individuals, society, association, or other organization unless that is the fact and unless any relationship between an organization and the viatical settlement licensee is disclosed.

(ii) If the entity making the endorsement or testimonial is owned, controlled, or managed by the viatical settlement licensee, or receives any payment or other consideration from the viatical settlement licensee for making an endorsement or testimonial, that fact shall be disclosed in the advertisement.

(E) When an endorsement refers to benefits received under a viatical settlement contract, all pertinent information shall be retained by the viatical settlement licensee for a period of five (5) years after its use.

(e)(1) An advertisement shall not contain statistical information unless it accurately reflects recent and relevant facts.

(2) The source of all statistics used in an advertisement shall be identified.

(f) An advertisement shall not disparage insurers, viatical settlement providers, viatical settlement brokers, insurance producers, policies, services, or methods of marketing.

(g)(1) The name of the viatical settlement licensee shall be clearly identified in all advertisements about the licensee or its viatical settlement contract, products or services, and if any specific viatical settlement contract is advertised, the viatical settlement contract shall be identified either by form number or some other appropriate description.

(2) If an application is part of the advertisement, the name of the viatical settlement provider shall be shown on the application.

(h) An advertisement shall not use a trade name, group designation, name of the parent company of a viatical settlement licensee, name of a particular division of the viatical settlement licensee, service mark, slogan, symbol, or other device or reference without disclosing the name of the viatical settlement licensee, if the advertisement would have the capacity or tendency to mislead or deceive as to the true identity of the viatical settlement licensee, or to create the impression that a company other than the viatical settlement licensee would have any responsibility for the financial obligation under a viatical settlement contract.

(i) An advertisement shall not use any combination of words, symbols, or physical materials that by their content, phraseology, shape, color, or other characteristics are so similar to a combination of words, symbols, or physical materials used by a government program or agency or otherwise would tend to mislead prospective viators into believing that the solicitation is in some manner connected with a government program or agency.

(j)(1) An advertisement may state that a viatical settlement licensee

is licensed in the state where the advertisement appears, if it does not exaggerate that fact or suggest or imply that competing viatical settlement licensees may not be so licensed.

(2) The advertisement may request the audience to consult the licensee's web site or contact the department of insurance for the licensee's state to find out if the state requires licensing and, if so, whether the viatical settlement provider or viatical settlement broker is licensed.

(k) An advertisement shall not create the impression that the viatical settlement provider, its financial condition or status, the payment of its claims or the merits, desirability, or advisability of its viatical settlement contracts are recommended or endorsed by any government entity.

(1)(1) The name of the actual licensee shall be stated in all of its advertisements.

(2) An advertisement shall not use a trade name, any group designation, name of any affiliate or controlling entity of the licensee, service mark, slogan, symbol, or other device in a manner that would have the capacity or tendency to mislead or deceive as to the true identity of the actual licensee or create the false impression that an affiliate or controlling entity would have any responsibility for the financial obligation of the licensee.

(m) An advertisement shall not directly or indirectly create the impression that any division or agency of the State of Arkansas or of the United States government endorses, approves or favors:

(1) Any viatical settlement licensee or its business practices or methods of operation;

(2) The merits, desirability, or advisability of any viatical settlement contract;

(3) Any viatical settlement contract; or

(4) Any life insurance policy or life insurance company.

(n) If the advertiser emphasizes the speed with which the viatication will occur, the advertising must disclose the average time frame from completed application to the date of offer and from acceptance of the offer to receipt of the funds by the viator.

(o) If the advertising emphasizes the dollar amounts available to viators, the advertising shall disclose the average purchase price as a percent of face value obtained by viators contracting with the licensee during the past six (6) months.

23-81-612. Fraud prevention and control.

(a) Fraudulent viatical settlement acts – Interference and participation of felons prohibited.

(1) A person shall not commit a fraudulent viatical settlement act.

(2) A person shall not knowingly or intentionally interfere with the enforcement of the provisions of this subchapter or an investigation of suspected or actual violations of this subchapter.

(3) A person in the business of viatical settlements shall not knowingly or intentionally permit any person to participate in the business of viatical settlements who has pleaded guilty or nolo contendere to or been found guilty of a felony involving dishonesty or breach of trust.

(b) Fraud warning required.

(1) Viatical settlement contracts and applications for viatical

settlements, regardless of the form of transmission, shall contain the following statement or a substantially similar statement:

“Any person who knowingly presents false information in an application for insurance or viatical settlement contract is guilty of a crime and may be subject to fines and confinement in prison.”

(2) The failure to include the statement under subdivision (b)(1) of this section does not constitute a defense in a prosecution for a fraudulent viatical settlement act.

(c) Mandatory reporting of fraudulent viatical settlement acts.

(1) Any person engaged in the business of viatical settlements having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be, or has been committed, shall provide to the Insurance Commissioner the information required by, and in a manner prescribed by, the commissioner.

(2) Any other person having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be, or has been committed may provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.

(d) Immunity from liability.

(1) No civil liability shall be imposed on and no cause of action shall arise from a person furnishing information concerning suspected, anticipated, or completed fraudulent viatical settlement acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from:

(A) The commissioner or the commissioner’s employees, agents, or representatives;

(B) Federal, state, or local law enforcement or regulatory officials or their employees, agents, or representatives;

(C) A person involved in the prevention and detection of fraudulent viatical settlement acts or that person’s agents, employees, or representatives;

(D) The National Association of Insurance Commissioners; National Association of Securities Dealers; the North American Securities Administrators Association; or their employees, agents, or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities, or investment fraud; or

(E) The life insurer that issued the life insurance policy covering the life of the insured.

(2)(A) Subdivision (d)(1) of this section shall not apply to statements made with actual malice.

(B) In an action brought against a person for filing a report or furnishing other information concerning a fraudulent viatical settlement act or a fraudulent insurance act, the party bringing the action shall specifically plead any allegation that subdivision (d)(1) of this section does not apply because the person filing the report or furnishing the information did so with actual malice.

(3)(A) A person identified in subdivision (d)(1) of this section shall be entitled to an award of attorney’s fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander, or any other relevant tort arising out of activities in implementing this subchapter and the party bringing the action was not substantially justified in doing so.

(B) For purposes of subdivision (d)(3), a proceeding is “substantially justified” if it had a reasonable basis in law or fact at the time that it was initiated.

(4) This section does not abrogate or modify common law or statutory privileges or immunities enjoyed by a person described in subdivision (d)(1) of this section.

(e) Confidentiality.

(1) The documents and evidence provided under subsection (d) of this section or obtained by the commissioner in an investigation of suspected or actual fraudulent viatical settlement acts shall be privileged and confidential, shall not be a public record, and shall not be subject to discovery or subpoena in a civil or criminal action.

(2) Subdivision (e)(1) of this section does not prohibit the release by the commissioner of documents and evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts:

(A) In administrative or judicial proceedings to enforce laws administered by the commissioner;

(B) To federal, state, or local law enforcement or regulatory agencies, to an organization established for the purpose of detecting and preventing fraudulent viatical settlement acts, or to the National Association of Insurance Commissioners; or

(C) At the discretion of the commissioner, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act.

(3) Release of documents and evidence under subdivision (e)(2) of this section does not abrogate or modify the privilege granted in subdivision (e)(1) of this section.

(f)(1) Other law enforcement or regulatory authority.

(2) This subchapter does not:

(A) Preempt the authority or relieve the duty of other law enforcement or regulatory agencies to investigate, examine, and prosecute suspected violations of law;

(B) Prevent or prohibit a person from voluntarily disclosing information concerning viatical settlement fraud to a law enforcement or regulatory agency other than the insurance department; or

(C) Limit the powers granted elsewhere by the laws of this state to the commissioner or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action.

(g) Viatical settlement antifraud initiatives.

(1)(A) Viatical settlement providers and viatical settlement brokers shall have in place antifraud initiatives reasonably calculated to detect, prosecute, and prevent fraudulent viatical settlement acts.

(B) At the discretion of the commissioner, the commissioner may order, or a licensee may request and the commissioner may grant, modifications of the following required initiatives as necessary to ensure an effective antifraud program.

(C) The modifications may be more or less restrictive than the required initiatives under subdivision (g)(1) of this section if the modifications may reasonably be expected to accomplish the purpose of this section.

(2) Antifraud initiatives shall include:

(A) Fraud investigators, who may be viatical settlement

provider or viatical settlement broker employees or independent contractors;
and

(B)(i) An antifraud plan, which shall be submitted to the
commissioner.

(ii) The antifraud plan shall include, but not be
limited to:

(a) A description of the procedures for
detecting and investigating possible fraudulent viatical settlement acts and
procedures for resolving material inconsistencies between medical records and
insurance applications;

(b) A description of the procedures for
reporting possible fraudulent viatical settlement acts to the commissioner;

(c) A description of the plan for antifraud
education and training of underwriters and other personnel; and

(d) A description or chart outlining the
organizational arrangement of the antifraud personnel who are responsible for
the investigation and reporting of possible fraudulent viatical settlement
acts and investigating unresolved material inconsistencies between medical
records and insurance applications.

(c) Antifraud plans submitted to the commissioner shall be privileged
and confidential, shall not be a public record, and shall not be subject to
discovery or subpoena in a civil or criminal action.

23-81-613. Injunctions - Civil remedies - Cease and desist orders.

(a) In addition to the penalties and other enforcement provisions of
this subchapter, the Insurance Commissioner may seek an injunction in a court
of competent jurisdiction and may apply for temporary and permanent orders to
restrain the person from committing the violation.

(b) Any person damaged by the acts of a person violating this
subchapter may bring a civil action against the person committing the
violation in a court of competent jurisdiction.

(c) The commissioner may issue, in accordance with §§ 23-66-209
through 23-66-213 of the Trade Practices Act, a cease and desist order upon a
person that violates any provision of this subchapter, any regulation or
order adopted by the commissioner under this subchapter, or any written
agreement entered into with the commissioner under this subchapter.

(d)(1) When the commissioner finds that an activity in violation of
this subchapter presents an immediate danger to the public that requires an
immediate final order, the commissioner may issue an emergency cease and
desist order reciting with particularity the facts underlying the findings.

(2) The emergency cease and desist order is effective
immediately upon service of a copy of the order on the respondent and remains
effective for ninety (90) days.

(3) If the commissioner begins nonemergency cease and desist
proceedings, the emergency cease and desist order remains effective, absent
an countermanding order by a court of competent jurisdiction under the
Arkansas Administrative Procedure Act.

(e)(1) In addition to the penalties and other enforcement provisions
of this subchapter, any person who violates this subchapter is subject to
civil penalties under § 23-66-210.

(2) The commissioner shall impose civil penalties by order,
under §§ 23-66-209 through 23-66-213 of the Trade Practices Act.

(3) The commissioner's order may require a person found to be in violation of this subchapter to make restitution to persons aggrieved by violations of this subchapter.

(f)(1) A person who is found guilty of, or pleads guilty or nolo contendere to a violation of this subchapter shall be guilty of a Class D felony.

(2) A person who is found guilty of, or pleads guilty or nolo contendere to a fraudulent viatical settlement act shall be ordered to pay restitution to persons aggrieved by the violation of the fraudulent viatical settlement act.

(3) Restitution may be ordered in addition to a fine or imprisonment, but not in lieu of a fine or imprisonment.

23-81-614. Unfair trade practices.

A violation of this subchapter shall be considered an unfair trade practice under §§ 23-66-209 through 23-66-213 of the Trade Practices Act and shall be subject to the penalties contained therein.

23-81-615. Authority to promulgate regulations.

The commissioner may:

(1) Promulgate regulations implementing this subchapter;

(2)(A) Establish standards for evaluating reasonableness of payments under viatical settlement contracts for persons who are terminally or chronically ill.

(B) This authority includes the regulation of discount rates used to determine the amount paid in exchange for assignment, transfer, sale, devise, or bequest of a benefit under a life insurance policy;

(3) Establish appropriate licensing requirements, fees, and standards for continued licensure for viatical settlement providers, and viatical settlement brokers;

(4) Require a bond or other mechanism for financial accountability for viatical settlement providers and brokers; and

(5) Adopt rules governing the relationship and responsibilities of both insurers and viatical settlement providers, viatical settlement brokers during the viatication of a life insurance policy or certificate.

SECTION 2. Effective January 1, 2004, Arkansas Code Title 23, Chapter 81, Subchapter 5, is repealed.

~~23-81-501. Short title.~~

~~This subchapter may be cited as the "Viatical Settlements Act."~~

~~23-81-502. Definitions.~~

~~A. "Activities of daily living" for purposes of this subchapter include each of the following:~~

- ~~(1) Eating;~~
- ~~(2) Toileting;~~
- ~~(3) Transferring;~~
- ~~(4) Bathing;~~
- ~~(5) Dressing; and~~
- ~~(6) Continence.~~

~~B. "Chronically Ill Individual":~~

- ~~(1) Means any individual who has been certified by a licensed~~

~~health care practitioner as:~~

~~(a) Being unable to perform without substantial assistance from another individual at least two (2) activities of daily living for a period of at least ninety (90) days due to a loss of functional capacity;~~

~~(b) Having a level of disability similar to the level of disability described in subdivision (1) above; or~~

~~(c) Requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.~~

~~(2) Shall not include any individual otherwise meeting the requirements of the preceding subdivision unless within the preceding twelve (12) month period a licensed health care practitioner has certified that such individual meets such requirements.~~

~~G. "Commissioner" or "Insurance Commissioner" means the Insurance Commissioner of the State of Arkansas.~~

~~D. "Department" means the Arkansas Insurance Department.~~

~~E. "Person" means any legal entity, natural or artificial, including but not limited to individuals, partnerships, associations, trusts or corporations.~~

~~F. "Regulation" means any rule or regulation promulgated by the Insurance Commissioner unless the context requires otherwise.~~

~~G. "Terminally Ill Individual" means an individual who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in twenty four (24) months or less after the date of certification.~~

~~H. "Viatical Settlement Broker" means an individual, partnership, corporation or other entity who or which for another and for a fee, commission or other valuable consideration, offers or advertises the availability of viatical settlements, introduces viators to viatical settlement providers, or offers or attempts to negotiate viatical settlements between a viator and one (1) or more viatical settlement providers. "Viatical settlement broker" does not include an attorney, accountant or financial planner retained to represent the viator whose compensation is not paid by the viatical settlement provider.~~

~~I. "Viatical Settlement Contract" means a written agreement entered into between a viatical settlement provider and a person owning a life insurance policy or who owns or is covered under a group policy insuring the life of a person who is terminally or chronically ill. The agreement shall establish the terms under which the viatical settlement provider will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the policyowner's assignment, transfer, sale, devise or bequest of the death benefit or ownership of the insurance policy or certificate to the viatical settlement provider.~~

~~J. "Viatical Settlement Provider":~~

~~(1) means any person regularly engaged in the trade or business of purchasing or taking assignments of life insurance contracts on the lives of insureds who are terminally or chronically ill as defined in this subchapter if:~~

~~(a) Such person is licensed for such purpose with respect to insureds described as terminally or chronically ill in the state in which the insured resides; or~~

~~(b) Such person meets the requirements of 23 81 508 and 23 81 509 of this subchapter and of any companion regulation promulgated by the commissioner in compliance with the provisions of this subchapter, in the case of an insured who resides in a state not requiring licensure of such persons as described in subdivision (1) above; and~~

~~(2) Means any person which enters into an agreement, with a person who owns a life insurance policy or who is covered under a group policy insuring the life of a person who has a catastrophic or life threatening illness or condition, under the terms of which the viatical settlement provider pays compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the policyowner's assignment, transfer, sale, devise or bequest of the death benefit or ownership of the insurance policy or certificate to the viatical settlement provider; and~~

~~(3) Does not include:~~

~~(a) Any bank, savings bank, savings and loan association, credit union or other licensed lending institution which takes an assignment of a life insurance policy as collateral for a loan;~~

~~(b) The issuer of a life insurance policy providing accelerated benefits under Arkansas Rule and Regulation 60, "Accelerated Benefits Provisions in Life Insurance Policies promulgated by the Insurance Commissioner; or~~

~~(c) Any natural person who enters into no more than one (1) agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit.~~

~~K. "Viator" means the owner of a life insurance policy insuring the life of a person with a terminal or chronic illness or condition or the certificate holder who enters into an agreement under which the viatical settlement provider will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise or bequest of the death benefit or ownership of the insurance policy or certificate to the viatical settlement provider.~~

~~23 81 503. License requirements.~~

~~A. No individual, partnership, corporation or other entity may act as a viatical settlement provider or enter into or solicit a viatical settlement contract without first having obtained a license from the Insurance Commissioner.~~

~~B. Application for a viatical settlement provider license shall be made to the commissioner by the applicant on a form prescribed by the commissioner, and the application shall be accompanied by a fee of one hundred dollars (\$100), which shall be deposited into The State Insurance Department Trust Fund pursuant to § 23 61 701, et seq.~~

~~C. Licenses may be renewed from year to year on or by July 1 of each year upon payment of the annual renewal fee of one hundred dollars (\$100). Failure to pay the fee as this act requires shall result in automatic revocation of the license.~~

~~D.(1) The applicant shall provide such information as the commissioner may require on forms prepared by the commissioner. The commissioner shall have authority at any time to require the applicant to disclose fully the identity of all stockholders, partners, officers, directors and employees.~~

~~(2) The commissioner may in his discretion refuse to issue a license in the name of any firm, partnership or corporation, if he is not satisfied that any officer, director, employee, stockholder or partner thereof, who may materially influence the applicant's conduct or actions, meets the standards of this subchapter.~~

~~E. A license as a viatical settlement provider issued to a partnership, corporation or other entity authorizes all members, officers, directors and designated employees to act as viatical settlement providers under the license, so long as such persons are named in the application and/or any subsequent supplements, amendments or addendums to the application on the commissioner's records.~~

~~F. Upon the filing of an application and the payment of the license fee, the commissioner shall make an investigation of each applicant and may issue a license if the commissioner finds that the applicant:~~

- ~~(1) Has provided a detailed plan of operation; and~~
- ~~(2) Is competent and trustworthy and intends to act in good faith in the capacity involved in the license applied for; and~~
- ~~(3) Has a good business reputation and has had experience, training or education so as to be qualified in the business for which the license is applied for;~~
- ~~(4) If a corporation, is a corporation incorporated under and authorized by the laws of this state or is a foreign corporation authorized to transact business in this state; and is in good standing according to the records of the Arkansas Secretary of State if and as applicable; and~~
- ~~(5) If a partnership, is a partnership organized under the laws of this state or is a nonresident partnership authorized to transact business in this state.~~

~~G.(1) The commissioner shall not issue any license to any nonresident applicant, unless:~~

- ~~(a) A written designation as agent for service of process is filed and maintained with the commissioner; and~~
- ~~(b) The applicant has filed with the commissioner the applicant's written irrevocable consent that any action against the applicant may be commenced against the applicant by service of process on the registered agent and that the applicant submits to the jurisdiction of this state.~~

~~(2) On and before January 1, 2003, all registered viatical settlement providers shall replace the commissioner as agent on department records, and shall file with the commissioner a designation of an Arkansas resident as an agent for service of legal process, and the commissioner shall maintain a listing in conformity with § 23-63-301 et seq.~~

~~23-81-504. License revocation.~~

~~A. The commissioner shall have the right to suspend, revoke or refuse to renew the license of any viatical settlement provider if the commissioner finds that:~~

- ~~(1) There was any misrepresentation in the application for the license;~~
- ~~(2) The holder of the license has been guilty of fraudulent or dishonest practices, is subject to a final administrative action, or is otherwise shown to be untrustworthy or incompetent to act as a viatical settlement provider;~~

~~(3) The licensee demonstrates a pattern of unreasonable payments to policyowners;~~

~~(4) The licensee has been convicted of a felony or any misdemeanor of which criminal fraud is an element; or~~

~~(5) The licensee has violated any of the provisions of this subchapter.~~

~~B. Before the commissioner shall deny a license application or suspend, revoke or refuse to renew the license of a viatical settlement provider, the commissioner shall conduct a hearing in accordance with the Arkansas Administrative Procedure Act, §§ 25-15-201, et seq.~~

~~23-81-505. Approval of viatical settlements contract.~~

~~No viatical settlement provider may use any viatical settlement contract in this state unless it has been filed with and approved by the commissioner. Any viatical settlement contract form filed with the commissioner shall be deemed approved if it has not been disapproved within sixty (60) days of the filing. The commissioner shall disapprove a viatical settlement contract form if, in the commissioner's opinion, the contract or provisions contained therein are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the policyowner.~~

~~23-81-506. Reporting requirements.~~

~~Each licensee shall file with the commissioner on or before March 1 of each year an annual statement containing such information as the commissioner by rule may prescribe.~~

~~23-81-507. Examination.~~

~~A. The commissioner may, when the commissioner deems it reasonably necessary to protect the interests of the public, examine the business and affairs of any licensee or applicant for a license. The commissioner shall have the authority to order any licensee or applicant to produce any records, books, files or other information reasonably necessary to ascertain whether or not the licensee or applicant is acting or has acted in violation of the law or otherwise contrary to the interests of the public. The expenses incurred in conducting any examination shall be paid by the licensee or applicant.~~

~~B. Names and individual identification data for all viators shall be considered private and confidential information and shall not be disclosed by the commissioner, unless required by law.~~

~~C. Records of all transactions of viatical settlement contracts shall be maintained by the licensee and shall be available to the commissioner for inspection during reasonable business hours.~~

~~23-81-508. Disclosure.~~

~~A viatical settlement provider shall disclose the following information to the viator no later than the date the viatical settlement contract is signed by all parties:~~

~~A. Possible alternatives to viatical settlement contracts for persons with terminal or chronic illnesses, including, but not limited to, accelerated benefits offered by the issuer of the life insurance policy;~~

~~B. The fact that some or all of the proceeds of the viatical settlement may be taxable, and that assistance should be sought from a~~

~~personal tax advisor;~~

~~C. The fact that the viatical settlement could be subject to the claims of creditors;~~

~~D. The fact that receipt of a viatical settlement may adversely affect the recipient's eligibility for Medicaid or other government benefits or entitlements, and that advice should be obtained from the appropriate agencies;~~

~~E. The policyowner's right to rescind a viatical settlement contract within thirty (30) days of the date it is executed by all parties or fifteen (15) days of the receipt of the viatical settlement proceeds by the viator, whichever is less, as provided in § 23-81-509(c) of this subchapter; and~~

~~F. The date by which the funds will be available to the viator and the source of the funds.~~

~~23-81-509 General rules.~~

~~A. A viatical settlement provider entering into a viatical settlement contract with any person with a terminal or chronic illness or condition shall first obtain:~~

~~(1) A written statement from a licensed attending physician that the person is of sound mind and under no constraint or undue influence; and~~

~~(2) A witnessed document in which the person:~~

~~(a) Consents to the viatical settlement contract;~~

~~(b) Acknowledges the terminal or chronic illness;~~

~~(c) Represents that he or she has a full and complete understanding of the viatical settlement contract;~~

~~(d) Acknowledges that he or she has a full and complete understanding of the benefits of the life insurance policy;~~

~~(e) Authorizes release of his or her medical records; and~~

~~(f) Acknowledges that he or she has entered into the viatical settlement contract freely and voluntarily.~~

~~B. All medical information solicited or obtained by any licensee shall be subject to the applicable provision of state law relating to confidentiality of medical information.~~

~~C. All viatical settlement contracts entered into in this state shall contain an unconditional refund provision of at least thirty (30) days from the date of the contract, or fifteen (15) days of the receipt of the viatical settlement proceeds, whichever is less.~~

~~D. Immediately upon receipt from the viator of documents to effect the transfer of the insurance policy, the viatical settlement provider shall pay the proceeds of the settlement to an escrow or trust account managed by a trustee or escrow agent in a bank approved by the commissioner, pending acknowledgment of the transfer by the issuer of the policy. The trustee or escrow agent shall be required to transfer the proceeds due to the viator immediately upon receipt of acknowledgment of the transfer from the insurer.~~

~~E. Failure to tender the viatical settlement by the date disclosed to the viator renders the contract null and void.~~

~~23-81-510 Authority to promulgate regulations standards.~~

~~The commissioner shall have the authority to:~~

~~A. Promulgate regulations implementing this subchapter; and~~

~~B. Establish standards for evaluating reasonableness of payments under viatical settlement contracts. This authority includes, but is not limited~~

~~to, regulation of discount rates used to determine the amount paid in exchange for assignment, transfer, sale, devise or bequest of a benefit under a life insurance policy; and~~

~~C. Establish appropriate licensing requirements and fees for agents and brokers; and~~

~~D. Require a bond.~~

~~23-81-511 Unfair trade practices.~~

~~A violation of this subchapter shall be deemed or considered an unfair trade practice under §23-66-201 et seq., as appropriate, and subject to the penalties contained in that subchapter, including § 23-66-210 and § 23-66-211.~~

~~23-81-512 Effective date.~~

~~This subchapter shall apply to all new viatical settlement contracts solicited, sold, issued, issued for delivery, or to be performed in this state on and after January 1, 1998. Further, no person shall act as or hold himself out to be a viatical settlement provider, broker or agent in this state or solicit or sell viatical settlement contracts issued, issued for delivery or to be performed in this state unless first licensed or registered in this state pursuant to this subchapter and is otherwise acting in conformity with this subchapter."~~

The Amendment was read _____
By: Representative Napper
AAF/CDS - 032020031414
CDS385

Chief Clerk