H.B. NO. 3099

A BILL FOR AN ACT

RELATING TO VIATICAL SETTLEMENTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 431, Hawaii Revised Statutes, is amended by adding a new article to be appropriately designated and to read as follows:

"ARTICLE

VIATICAL SETTLEMENTS

§431: -101 Short title. This article shall be known and may be cited as the Viatical Settlements Act.

§431: -102 Definitions. As used in this article, unless the context indicates otherwise:

"Advertising" means any written, electronic, or printed communication or any communication by means of recorded telephone messages or transmitted on radio, television, the internet, or similar communications media, including film strips, motion pictures, and videos that are published, disseminated, circulated, or placed directly before the public, in this State, for the purpose of creating an interest in or inducing a person to sell, assign, devise, bequest, or transfer

the death benefit or ownership of a life insurance policy pursuant to a viatical settlement contract.

"Business of viatical settlements" means an activity involved in, but not limited to, the offering, soliciting, negotiating, procuring, effectuating, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, hypothecating, or, in any other manner, acquiring an interest in a life insurance policy by means of a viatical settlement contract.

"Chronically ill" means:

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

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

(3) Having a level of disability similar to that described in paragraph (1) as determined by the United States Secretary of Health and Human Services.

"Commissioner" means the insurance commissioner of the State of Hawaii.

"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, but:

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

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

The term shall not include a non-accredited investor or a viatical settlement purchaser.

"Life insurance producer" means any person licensed in this State as a resident or nonresident insurance producer who has received qualification or authority for life insurance coverage or a life line of coverage pursuant to article 9A.

"Person" means a natural person or a legal entity, including, without limitation, an individual, partnership, limited liability company, association, trust, or corporation.

1 "Policy" means an individual or group certificate,
2 contract, or arrangement of life insurance owned by a resident
3 of this State, regardless of whether delivered or issued for
4 delivery in this State.
5 "Related provider trust" means a titling trust or other
6 trust established by a licensed viatical settlement provider or
7 a financing entity for the sole purpose of holding the ownership
8 or beneficial interest in purchased policies in connection with
9 a financing transaction. The trust shall have a written
10 agreement with the licensed viatical settlement provider under
11 which the licensed viatical settlement provider is responsible
12 for ensuring compliance with all statutory and regulatory
13 requirements and under which the trust agrees to make all
14 records and files related to viatical settlement transactions
15 available to the commissioner as if those records and files were
16 maintained directly by the licensed viatical settlement
17 provider.
18 "Special purpose entity" means a corporation, partnership,
19 trust, limited liability company, or other similar entity formed
20 solely to provide, either directly or indirectly, access to
21 institutional capital markets:

(1) For a financing entity or licensed viatical settlement provider; or

(2) In connection with a transaction in which:

(A) The securities in the special purposes entity are acquired by the viator or by "qualified institutional buyers" as defined in Rule 144 promulgated under the Securities Act of 1933, as amended; or

(B) The securities pay a fixed rate of return commensurate with established asset-backed institutional capital markets.

"Terminally ill" means having an illness or sickness that can reasonably be expected to result in death in twenty-four months or less.

"Viatical settlement broker" means a person, including a life insurance producer as provided for in section 431: -104, who, working exclusively 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 or more viatical settlement providers or one or more viatical settlement brokers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical

1 settlement broker is deemed to represent only the viator, and
2 not the insurer or the viatical settlement provider, and owes a
3 fiduciary duty to the viator to act according to the viator's
4 instructions and in the best interest of the viator. The term
5 shall not include an attorney, certified public accountant, or a
6 financial planner accredited by a nationally recognized
7 accreditation agency, who is retained to represent the viator
8 and whose compensation is not paid directly or indirectly by the
9 viatical settlement provider or purchaser.
10 "Viatical settlement contract" means a written agreement
11 between a viator and a viatical settlement provider or any
12 affiliate of the viatical settlement provider establishing the
13 terms under which compensation or anything of value is or will
14 be paid, which compensation or value is less than the expected
15 death benefits of the policy, in return for the viator's present
16 or future assignment, transfer, sale, devise, or bequest of the
17 death benefit or ownership of any portion of the insurance
18 policy or certificate of insurance; provided that the term shall
19 include a premium finance loan made for a life insurance policy
20 by a lender to a viator on, before, or after the date of
21 issuance of the policy where the viator or the insured receives
22 on the date of the premium finance loan a guarantee of a future

viatical settlement value of the policy or the viator or the insured agrees on the date of the premium finance loan to sell the policy or any portion of its death benefit on any date following the issuance of the policy; provided further that the term shall not include:

(1) A policy loan or accelerated death benefit made by the insurer pursuant to the policy's terms;

(2) Loan proceeds that are used solely to pay:

(A) Premiums for the policy; or

(B) The costs of the loan, including, without limitation, interest, arrangement fees, utilization fees and similar fees, closing costs, legal fees and expenses, trustee fees and expenses, and third party collateral provider fees and expenses, including fees payable to letter of credit issuers;

(3) A loan made by a bank or other licensed financial institution in which the lender takes an interest in a life insurance policy solely to secure repayment of a loan or, if there is a default on the loan and the policy is transferred, the transfer of the policy by the lender; provided that the default itself is not

pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this article;

(4) A loan made by a lender that does not violate the State's insurance premium finance law, provided that the premium finance loan is not described in paragraph (2);

(5) An agreement where all the parties are closely related to the insured by blood or law, have a lawful substantial economic interest in the continued life, health, and bodily safety of the person insured, or are trusts established primarily for the benefit of such parties;

(6) Any designation, consent, or agreement by an insured who is an employee of an employer in connection with the purchase by the employer, or trust established by the employer, of life insurance on the life of the employee;

(7) A bona fide business succession planning arrangement:

(A) Between one or more shareholders in a corporation, or between a corporation and one or

more of its shareholders or one or more trusts established by its shareholders;

(B) Between one or more partners in a partnership, or between a partnership and one or more of its partners or one or more trusts established by its partners; or

(C) Between one or more members in a limited liability company or between a limited liability company, and one or more of its members or one or more trusts established by its members;

(8) An agreement entered into by:

(A) A service recipient or a trust established by the service recipient; and

(B) A service provider or a trust established by the service provider;

provided that the service provider performs significant services for the service recipient's trade or business; or

(9) Any other contract, transaction, or arrangement exempted from the definition of viatical settlement contract by the commissioner based on a determination

that the contract, transaction, or arrangement is not of the type intended to be regulated by this article.

"Viatical settlement provider" means a person, other than a viator, that enters into or effectuates a viatical settlement contract with a viator who is a resident of this State. The term shall not include:

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

(2) A premium finance company making premium finance loans that is exempted by the commissioner from the licensing requirement under the premium finance laws and takes an assignment of a life insurance policy solely as collateral for a loan;

(3) The issuer of the life insurance policy;

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

1 (5) A natural person who enters into or effectuates no
2 more than one agreement in a calendar year for the
3 transfer of life insurance policies for any value less
4 than the expected death benefit;
5 (6) A financing entity;
6 (7) A special purpose entity;
7 (8) A related provider trust;
8 (9) A viatical settlement purchaser; or
9 (10) Any other person that the commissioner determines is
10 not the type of person intended to be covered by the
11 definition of viatical settlement provider.
12 "Viatical settlement purchaser" means a person who provides
13 a sum of money as consideration for a life insurance policy or
14 an interest in the death benefits of a life insurance policy, or
15 a person who, for the purpose of deriving an economic benefit,
16 owns, acquires, or is entitled to a beneficial interest in a
17 trust that owns a viatical settlement contract or is the
18 beneficiary of a life insurance policy that has been or will be
19 the subject of a viatical settlement contract. The term shall
20 not include:
21 (1) A licensee under this article;

1 (2) An accredited investor or qualified institutional
2 buyer, as defined, respectively, in Rule 501(a) or
3 Rule 144A promulgated under the Federal Securities Act
4 of 1933, as amended;
5 (3) A financing entity;
6 (4) A special purpose entity; or
7 (5) A related provider trust.
8 "Viaticated policy" means a life insurance policy or
9 certificate that has been acquired by a viatical settlement
10 provider pursuant to a viatical settlement contract.
11 "Viator" means the owner of a life insurance policy or a
12 certificate holder under a group policy, who resides in this
13 State and enters or seeks to enter into a viatical settlement
14 contract. For the purposes of this article, a viator shall not
15 be limited to an owner of a life insurance policy or a
16 certificate holder under a group policy insuring the life of an
17 individual with a terminal or chronic illness or condition,
18 except where specifically addressed. If there is more than one
19 viator on a single policy and the viators are residents of
20 different states, the transaction shall be governed by the law
21 of the state in which the viator having the largest percentage
22 of ownership resides or, if the viators hold equal ownership,

1 the state of residence of one viator agreed upon in writing by
2 all the viators. The term shall not include:
3 (1) A licensee under this article, including a life
4 insurance producer acting as a viatical settlement
5 broker pursuant to this article;
6 (2) A qualified institutional buyer, as defined in Rule
7 144A promulgated under the Federal Securities Act of
8 1933, as amended;
9 (3) A financing entity;
10 (4) A special purpose entity; or
11 (5) A related provider trust.
12 **§431: -103 Fraudulent viatical settlement act.** A
13 fraudulent viatical settlement act includes:
14 (1) Acts or omissions committed by any person who,
15 knowingly or with intent to defraud, for the purpose
16 of depriving another of property or for pecuniary
17 gain, commits or permits its employees or its agents
18 to engage in acts including:
19 (A) Presenting, causing to be presented, or preparing
20 with knowledge or belief that it will be
21 presented to or by a viatical settlement
22 provider, viatical settlement broker, viatical

1 settlement purchaser, financing entity, insurer,
2 insurance producer, or any other person, false
3 material information, or concealing material
4 information, as part of, in support of, or
5 concerning a fact material to one or more of the
6 following:
7 (i) An application for the issuance of a
8 viatical settlement contract or insurance
9 policy;
10 (ii) The underwriting of a viatical settlement
11 contract or insurance policy;
12 (iii) A claim for payment or benefit pursuant to a
13 viatical settlement contract or insurance
14 policy;
15 (iv) Premiums paid on an insurance policy;
16 (v) Payments and changes in ownership or
17 beneficiary made in accordance with the
18 terms of a viatical settlement contract or
19 insurance policy;
20 (vi) The reinstatement or conversion of an
21 insurance policy;

(vii) The solicitation, offer, effectuation, or sale of a viatical settlement contract or insurance policy;

(viii) The issuance of written evidence of a viatical settlement contract or insurance; or

(ix) A financing transaction; and

(B) Employing any plan, financial structure, device, scheme, or artifice to defraud that is related to viaticated policies.

(2) Committing or permitting one's employees or agents, in the furtherance of fraud or to prevent the detection of fraud, to:

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

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

(C) Transact the business of viatical settlements in violation of laws requiring a license,

1 certificate of authority, or other legal
2 authority for the transaction of the business of
3 viatical settlements; or
4 (D) File with the commissioner or the equivalent
5 chief insurance regulatory official of another
6 jurisdiction a document that contains false
7 information or otherwise conceals information
8 about a material fact from the commissioner;
9 (3) Embezzlement, theft, misappropriation, or conversion
10 of moneys, funds, premiums, credits, or other property
11 of a viatical settlement provider, insurer, insured,
12 viator, insurance policy owner, or any other person
13 engaged in the business of viatical settlements or
14 insurance;
15 (4) Recklessly entering into, negotiating, brokering, or
16 otherwise dealing in a viatical settlement contract,
17 the subject of which is a life insurance policy that
18 was obtained by presenting false information
19 concerning any fact material to the policy or by
20 concealing, for the purpose of misleading another,
21 information concerning any fact material to the
22 policy, where the person or the persons intended to

defraud the policy's issuer, the viatical settlement provider, or the viator. For purposes of this section, the term "recklessly" has the same meaning given in section 702-206(3);

(5) Facilitating the change of state of ownership of a policy or certificate or the state of residency of a viator, to a state or jurisdiction that does not have a law similar to this article for the express purposes of evading or avoiding the provisions of this article; or

(6) Attempting to commit, conspiring to commit, or assisting, aiding, or abetting in the commission of the acts or omissions specified in this section.

§431: -104 License and bond requirements. (a) A person shall not operate as a viatical settlement provider or viatical settlement broker without first obtaining a license from the commissioner of the state of residence of the viator.

(b) A life insurance producer who has been duly licensed:

(1) As a resident insurance producer with a life line of authority in this State; or

(2) In the life insurance producer's home state for at least one year and is licensed as a nonresident producer in this State,

shall be deemed to meet the licensing requirements of this section and shall be permitted to operate as a viatical settlement broker.

Not later than thirty days from the first day of operating as a viatical settlement broker, the life insurance producer shall notify the commissioner that the producer is acting as a viatical settlement broker on a form prescribed by the commissioner and shall pay a fee to be determined by the commissioner. Notification shall include an acknowledgment by the life insurance producer that the producer will operate as a viatical settlement broker in accordance with this article.

(c) The insurer that issued the policy being viaticated shall not be responsible for any act or omission of a viatical settlement broker or viatical settlement provider arising out of or in connection with the viatical settlement transaction, unless the insurer receives compensation for the placement of a viatical settlement contract from the viatical settlement provider or viatical settlement broker in connection with the viatical settlement contract.

(d) A person licensed as an attorney, certified public accountant, or 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, may negotiate viatical settlement contracts on behalf of the viator without having to obtain a license as a viatical settlement broker.

(e) Application for a viatical settlement provider or viatical settlement broker license shall be made to the commissioner by the applicant on a form prescribed by the commissioner, and each application shall be accompanied by the fees specified for producers in article 7.

(f) A license may be renewed from year to year on the anniversary date upon payment of the annual renewal fees specified for producers in article 7. Failure to pay the fees by the renewal date results in expiration of the license.

(g) The applicant shall provide information on forms required by the commissioner. The commissioner shall have the authority, at any time, to require the applicant to fully disclose the identity of all stockholders, partners, officers, members, and employees, and the commissioner may, in the exercise of the commissioner's discretion, refuse to issue a

license in the name of a legal entity if the commissioner is not satisfied that any officer, employee, stockholder, partner, or member of the legal entity, who may materially influence the applicant's conduct, meets the standards of this article.

(h) A business entity acting as a viatical settlement broker or viatical settlement provider is required to obtain a viatical settlement broker or viatical settlement provider license. Application shall be made using the uniform business entity application. Before approving the application, the commissioner shall find that:

(1) The business entity has paid all applicable fees;

(2) The business entity has designated a licensed viatical settlement broker or viatical settlement provider for the business entity's compliance with the insurance laws and rules of this State; and

(3) Any licensed viatical settlement broker or viatical settlement provider may not be so designated or empowered by more than one corporation or partnership, except when the corporations or partnerships are affiliates of each other. As used herein, a corporation or partnership is an affiliate of another corporation or partnership if the same person,

directly or indirectly through one or more intermediaries, controls both corporations or partnerships. As used herein, "control" has the same meaning as in section 431:11-102.

(i) Upon the filing of an application and the payment of the license fee, the commissioner shall 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 in which the license applied for is involved;

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

(4) If a viatical settlement provider, has demonstrated evidence of financial responsibility in a format prescribed by the commissioner through either a surety bond executed and issued by an insurer authorized to issue surety bonds in this State, or a deposit of cash, certificates of deposit, securities, or any

combination thereof in the amount of $250,000; provided that any surety bond issued shall be in the favor of this State and shall specifically authorize recovery by the commissioner on behalf of any person in this State who sustained damages as the result of erroneous acts, failure to act, conviction of fraud, or conviction of unfair practices by the viatical settlement provider;

(5) If a viatical settlement broker, has demonstrated evidence of financial responsibility, in a format prescribed by the commissioner, through either a surety bond executed and issued by an insurer authorized to issue surety bonds in this State, or a deposit of cash, certificates of deposit, securities, or any combination thereof in the amount of $250,000; provided that any surety bond issued shall be in the favor of this State and shall specifically authorize recovery by the commissioner on behalf of any person in this State who sustained damages as the result of erroneous acts, failure to act, conviction of fraud, or conviction of unfair practices by the viatical settlement broker;

(6) If a legal entity, has provided a certificate of good standing from the state of its domicile; and

(7) If a viatical settlement provider or viatical settlement broker, has provided an anti-fraud plan that meets the requirements of section 431: -115(g).

The commissioner may request evidence of financial responsibility at any time the commissioner deems necessary. Notwithstanding any provision of this section to contrary, the commissioner shall accept, as evidence of financial responsibility, proof that financial instruments in accordance with the requirements in this section have been filed with one state where the applicant is licensed as a viatical settlement provider or viatical settlement broker.

(j) 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 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.

(k) A viatical settlement provider or viatical settlement broker shall provide to the commissioner updated information within thirty days of the change.

(l) An individual licensed as a viatical settlement broker shall complete on a biennial basis fifteen hours of training related to viatical settlements and viatical settlement transactions, as required by the commissioner; provided that a life insurance producer who is operating as a viatical settlement broker pursuant to subsection (b) shall not be subject to the requirements of this subsection. Any person failing to meet the requirements of this subsection shall be subject to the penalties imposed by the commissioner, including license revocation, suspension, or nonrenewal.

(m) Licensees shall maintain their own continuing education records and shall keep these records for four years after completion of an approved continuing education course. These course providers shall make the records available at all times to the commissioner.

(n) Approved course providers shall maintain attendance records for five years to permit the commissioner to verify the attendance and course completion of all licensees enrolled in an

approved course. These course providers shall make the records available at all times to the commissioner.

§431: -105 License revocation and denial. (a) The 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) There was any incorrect, misleading, incomplete, or materially untrue information in the application for the license;

(2) The licensee or any officer, partner, member, or key management personnel has been convicted of fraudulent or dishonest practices, 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 any felony or 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 pursuant to this article;

(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 licensure;

(8) The viatical settlement provider has assigned, transferred, or pledged a viaticated policy to a person other than a viatical settlement provider licensed in this State, a viatical settlement purchaser, an accredited investor or qualified institutional buyer as defined respectively in Rule 501(a) or Rule 144A promulgated under the Federal Securities Act of 1933, as amended, a financing entity, a special purpose entity, or a related provider trust; or

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

1 (b) The commissioner may suspend, revoke, or refuse to
2 renew the license of a viatical settlement broker or a life
3 insurance producer operating as a viatical settlement broker
4 pursuant to this article if the commissioner finds that the
5 viatical settlement broker or life insurance producer has
6 violated the provisions of this article or has otherwise engaged
7 in bad faith conduct with one or more viators.
8 (c) If the commissioner:
9 (1) Denies a license application;
10 (2) Suspends, revokes, or refuses to renew the license of
11 a viatical settlement provider or viatical settlement
12 broker; or
13 (3) Suspends, revokes, or refuses to renew a license of a
14 life insurance producer operating as a viatical
15 settlement broker pursuant to this article, the
16 commissioner shall conduct a hearing in accordance
17 with section 431:2-308.
18 **§431: -106 Approval of viatical settlement contracts and**
19 **disclosure statements.** A person shall not use a viatical
20 settlement contract form or provide to a viator a disclosure
21 statement form in this State unless first filed with and
22 approved by the commissioner. The commissioner shall disapprove

a viatical settlement contract form or disclosure statement form if, in the commissioner's opinion, the contract or provisions contained in the contract fail to meet the requirements of sections 431: -109, 431: -111, 431: -114, or 431: -115(b) or are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the viator. At the commissioner's discretion, the commissioner may require the submission of advertising material.

§431: -107 Reporting requirements and privacy. (a) Each viatical settlement provider shall file with the commissioner on or before March 1 of each year a statement containing information as the commissioner may prescribe by form. The information shall be limited to only those transactions where the viator is a resident of this State. Individual transaction data regarding the business of viatical settlements or data that could compromise the privacy of personal, financial, and health information of the viator or insured shall be filed with the commissioner on a confidential basis.

(b) Except as otherwise allowed or required by law, a 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 not disclose that identity as an insured or the insured's financial or medical information to any other person unless the disclosure is:

(1) 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) Necessary to effect a viatical settlement purchase agreement between the viatical settlement purchaser and a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

(3) Provided in response to an investigation or examination by the commissioner or any other governmental officer or agency or pursuant to the requirements of section 431: -115(c);

(4) A term of or condition to the transfer of a policy by one viatical settlement provider to another viatical settlement provider;

(5) Necessary to permit a financing entity, related provider trust, or special purpose entity to finance

1 the purchase of policies by a viatical settlement
2 provider, and the viator and insured have provided
3 prior written consent to the disclosure;
4 (6) Necessary to allow the viatical settlement provider or
5 viatical settlement broker or their authorized
6 representatives to make contacts for the purpose of
7 determining health status; or
8 (7) Required to purchase stop loss coverage or financial
9 guaranty insurance.
10 **§431: -108 Examination or investigations.** (a) The
11 commissioner may conduct an examination of a licensee as often
12 as the commissioner in the commissioner's discretion deems
13 appropriate after considering the factors set forth in this
14 subsection. In scheduling and determining the nature, scope,
15 and frequency of the examinations, the commissioner shall
16 consider consumer complaints, results of financial statement
17 analyses and ratios, changes in management or ownership,
18 actuarial opinions, reports of independent certified public
19 accountants, and other criteria as determined to be relevant by
20 the commissioner.
21 For purposes of completing an examination of a licensee
22 under this article, the commissioner may examine or investigate

1 any person, or the business of any person, insofar as the
2 examination or investigation is, in the discretion of the
3 commissioner, necessary or material to the examination of the
4 licensee.
5 In lieu of an examination under this article of any foreign
6 or alien licensee licensed in this State, the commissioner may,
7 in the commissioner's discretion, accept an examination report
8 on the licensee as prepared by the commissioner for the
9 licensee's state of domicile or port-of-entry state.
10 As far as practical, the examination of a foreign or alien
11 licensee shall be made in cooperation with the insurance
12 supervisory officials of other states in which the licensee
13 transacts business.
14 (b) A person required to be licensed by this article shall
15 for five years retain copies of all:
16 (1) Proposed, offered, or executed contracts, purchase
17 agreements, underwriting documents, policy forms, and
18 applications from the date of the proposal, offer, or
19 execution of the contract or purchase agreement,
20 whichever is later;
21 (2) All checks, drafts, or other evidence and
22 documentation related to the payment, transfer,

1 deposit, or release of funds from the date of the
2 transaction; and
3 (3) All other records and documents related to the
4 requirements of this article.
5 This subsection does not relieve a person of the obligation
6 to produce the documents required to be retained to the
7 commissioner after the retention period has expired if the
8 person has retained the documents.
9 Records required to be retained by this subsection must be
10 legible and complete and may be retained in paper, photograph,
11 microprocess, magnetic, mechanical, or electronic media, or by
12 any process that accurately reproduces or forms a durable medium
13 for the reproduction of a record.
14 (c) Upon determining that an examination should be
15 conducted, the commissioner shall issue an examination warrant
16 appointing one or more examiners to perform the examination and
17 instructing them as to the scope of the examination. In
18 conducting the examination, the examiner shall observe those
19 guidelines and procedures set forth in the Examiners Handbook
20 adopted by the National Association of Insurance Commissioners.
21 The commissioner may also employ other guidelines or procedures
22 as the commissioner may deem appropriate.

1 Every licensee or person from whom information is sought,
2 and the licensee or person's officers, directors, and agents, if
3 any, shall provide to the examiners timely, convenient, and free
4 access at all reasonable hours at its offices to all books,
5 records, accounts, papers, documents, assets, and computer or
6 other recordings relating to the property, assets, business, and
7 affairs of the licensee being examined. The officers,
8 directors, employees, and agents of the licensee or person shall
9 facilitate the examination and aid in the examination so far as
10 it is in their power to do so. The refusal of a licensee, by
11 its officers, directors, employees, or agents, to submit to
12 examination or to comply with any reasonable written request of
13 the commissioner shall be grounds for suspension, refusal of, or
14 nonrenewal of any license or authority held by the licensee to
15 engage in the viatical settlement business or other business
16 subject to the commissioner's jurisdiction. Any proceedings for
17 suspension, revocation, or refusal of any license or authority
18 shall be conducted pursuant to section 431:9A-112.
19 The commissioner shall have the power to issue subpoenas,
20 to administer oaths, and to examine under oath any person as to
21 any matter pertinent to the examination. Upon the failure or
22 refusal of a person to obey a subpoena, the commissioner may

1 petition a court of competent jurisdiction, and upon proper
2 showing, the court may enter an order compelling the witness to
3 appear and testify or produce documentary evidence. Failure to
4 obey the court order shall be punishable as contempt of court.
5 When making an examination under this article, the
6 commissioner may retain attorneys, appraisers, independent
7 actuaries, independent certified public accountants, or other
8 professionals and specialists as examiners, the reasonable cost
9 of which shall be borne by the licensee that is the subject of
10 the examination.
11 Nothing contained in this article shall be construed to
12 limit the commissioner's authority to terminate or suspend an
13 examination in order to pursue other legal or regulatory action
14 pursuant to the insurance laws of this State. Findings of fact
15 and conclusions made pursuant to any examination shall be prima
16 facie evidence in any legal or regulatory action.
17 Nothing contained in this article shall be construed to
18 limit the commissioner's authority to use and, if appropriate,
19 to make public any final or preliminary examination report, any
20 examiner or licensee workpapers, or other documents, or any
21 other information discovered or developed during the course of
22 any examination in the furtherance of any legal or regulatory

1 action which the commissioner may, in the commissioner's
2 discretion, deem appropriate.
3 (d) Examination reports shall be comprised of only:
4 (1) Facts appearing upon the books, records, or other
5 documents of the licensee, its agents or other persons
6 examined, or as ascertained from the testimony of its
7 officers or agents or other persons examined
8 concerning its affairs; and
9 (2) The conclusions and recommendations as the examiners
10 find reasonably warranted from the facts.
11 No later than sixty days following completion of the
12 examination, the examiner in charge shall file with the
13 commissioner a verified written report of examination under
14 oath. Upon receipt of the verified report, the commissioner
15 shall transmit the report to the licensee examined, together
16 with a notice that shall afford the licensee examined a
17 reasonable opportunity of not more than thirty days to make a
18 written submission or rebuttal with respect to any matters
19 contained in the examination report.
20 In the event the commissioner determines that regulatory
21 action is appropriate as a result of an examination, the

commissioner may initiate any proceedings or actions provided by law.

(e) The confidentiality of examination information shall be maintained as follows:

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

(2) Except as otherwise provided in this article, 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 article, or in the course of analysis or investigation by the commissioner of the financial condition or market conduct of a licensee, shall be confidential by law and privileged, shall not be subject to chapter 92F, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner is authorized to use the documents, materials, or other information in the furtherance of

1 any regulatory or legal action brought as part of the
2 commissioner's official duties. For the purposes of
3 this paragraph, "article" includes the law of another
4 state or jurisdiction that is substantially similar to
5 this article.
6 (3) Documents, materials, or other information, including,
7 but not limited to, all working papers, and copies
8 thereof, in the possession or control of the National
9 Association of Insurance Commissioners and its
10 affiliates and subsidiaries shall be confidential by
11 law and privileged, shall not be subject to subpoena,
12 and shall not be subject to discovery or admissible in
13 evidence in any private civil action, provided that
14 the documents, materials, or other information are:
15 (A) Created, produced, or obtained by or disclosed to
16 the National Association of Insurance
17 Commissioners and its affiliates and subsidiaries
18 in the course of assisting an examination made
19 under this article or assisting a commissioner in
20 the analysis or investigation of the financial
21 condition or market conduct of a licensee; or

1 (B) Disclosed to the National Association of
2 Insurance Commissioners and its affiliates and
3 subsidiaries under paragraph (4) by a
4 commissioner.
5 (4) Neither the commissioner nor any person that received
6 the documents, material, or other information while
7 acting under the authority of the commissioner,
8 including the National Association of Insurance
9 Commissioners and its affiliates and subsidiaries,
10 shall be permitted to testify in any private civil
11 action concerning any confidential documents,
12 materials, or information subject to paragraph (1).
13 (5) In order to assist in the performance of the
14 commissioner's duties, the commissioner:
15 (A) May share documents, materials, or other
16 information, including the confidential and
17 privileged documents, materials, or information
18 subject to paragraph (1), with other state,
19 federal, and international regulatory agencies,
20 with the National Association of Insurance
21 Commissioners and its affiliates and
22 subsidiaries, and with state, federal, and

international law enforcement authorities; provided that the recipient agrees to maintain the confidentiality and privileged status of the documents, material, communication, or other information;

(B) 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, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under 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.

1 (6) No waiver of any applicable privilege or claim of
2 confidentiality in the documents, materials, or
3 information shall occur as a result of disclosure to
4 the commissioner under this section or as a result of
5 sharing as authorized in paragraph (5).
6 (7) A privilege established under the law of any state or
7 jurisdiction that is substantially similar to the
8 privilege established under this subsection shall be
9 available and enforced in any proceeding in this State
10 and in any court of this State.
11 (8) Nothing contained in this article shall prevent or be
12 construed as prohibiting the commissioner from
13 disclosing the content of an examination report,
14 preliminary examination report or results, or any
15 matter relating thereto, to the commissioner of any
16 other state or country, or to law enforcement
17 officials of this State, any other state or agency of
18 the federal government at any time, or to the National
19 Association of Insurance Commissioners, so long as the
20 agency or office receiving the report or matters
21 relating thereto agrees in writing to hold it

1 confidential and in a manner consistent with this
2 article.
3 (f) An examiner may not be appointed by the commissioner
4 if the examiner, either directly or indirectly, has a conflict
5 of interest or is affiliated with the management of or owns a
6 pecuniary interest in any licensee or person subject to
7 examination under this article. This paragraph shall not be
8 construed to automatically preclude an examiner from being:
9 (1) A viator;
10 (2) An insured in a viaticated insurance policy; or
11 (3) A beneficiary in an insurance policy that is proposed
12 to be viaticated.
13 Notwithstanding the requirements of this subsection, the
14 commissioner may retain from time to time, on an individual
15 basis, qualified actuaries, certified public accountants, or
16 other similar individuals who are independently practicing their
17 professions, even though these persons may from time to time be
18 similarly employed or retained by persons subject to examination
19 under this article.
20 (g) The commissioner shall assess examination costs under
21 this article pursuant to section 431:2-306.

1 (h) No cause of action shall arise nor shall any liability
2 be imposed against the commissioner, the commissioner's
3 authorized representatives, or any examiner appointed by the
4 commissioner for any statements made or conduct performed in
5 good faith while carrying out the provisions of this article.
6 No cause of action shall arise, nor shall any liability be
7 imposed against any person for the act of communicating or
8 delivering information or data to the commissioner or the
9 commissioner's authorized representative or examiner pursuant to
10 an examination made under this article, if the act of
11 communication or delivery was performed in good faith and
12 without fraudulent intent or the intent to deceive. This
13 paragraph does not abrogate or modify in any way any common law
14 or statutory privilege or immunity heretofore enjoyed by any
15 person.
16 A person shall be entitled to an award of attorney's fees
17 and costs if the person is the prevailing party in a civil cause
18 of action for libel, slander, or any other relevant tort arising
19 out of activities in carrying out the provisions of this article
20 and the party bringing the action was not substantially
21 justified in doing so. For purposes of this section, a

1 proceeding is "substantially justified" if it had a reasonable
2 basis in law or fact at the time that it was initiated.
3 (i) The commissioner may investigate suspected fraudulent
4 viatical settlement acts and persons engaged in the business of
5 viatical settlements.
6 **§431: -109 Disclosure to viator.** (a) With each
7 application for a viatical settlement, a viatical settlement
8 provider or viatical settlement broker shall provide the viator
9 with at least the following disclosures no later than the time
10 the application for the viatical settlement contract is signed
11 by all parties; provided that the disclosures shall be provided
12 in a separate document that is signed by the viator and the
13 viatical settlement provider or viatical settlement broker. The
14 required disclosures shall:
15 (1) Inform the viator that:
16 (A) There are possible alternatives to viatical
17 settlement contracts including any accelerated
18 death benefits or policy loans offered under the
19 viator's life insurance policy;
20 (B) The viatical settlement broker represents
21 exclusively the viator, and not the insurer or
22 the viatical settlement provider, and owes a

1 fiduciary duty to the viator, including a duty to
2 act according to the viator's instructions and in
3 the best interest of the viator;
4 (C) Some or all of the proceeds of the viatical
5 settlement may be taxable under federal income
6 tax and state franchise and income taxes and
7 assistance should be sought from a professional
8 tax advisor;
9 (D) Proceeds of the viatical settlement may be
10 subject to the claims of creditors;
11 (E) Receipt of the proceeds of a viatical settlement
12 may adversely affect the viator's eligibility for
13 Medicaid or other government benefits or
14 entitlements and advice should be obtained from
15 the appropriate government agencies;
16 (F) The viator has the right to rescind a viatical
17 settlement contract before the earlier of sixty
18 calendar days after the date upon which the
19 viatical settlement contract is executed by all
20 parties or thirty calendar days after the
21 viatical settlement proceeds have been paid to
22 the viator, as provided in section 431: -

1 111(j). Rescission, if exercised by the viator,
2 is effective only if both notice of the
3 rescission is given and the viator repays all
4 proceeds and any premiums, loans, and loan
5 interest paid on account of the viatical
6 settlement within the rescission period. If the
7 insured dies during the rescission period, the
8 viatical settlement contract shall be deemed to
9 have been rescinded, subject to repayment by the
10 viator or the viator's estate of all viatical
11 settlement proceeds and any premiums, loans, and
12 loan interest paid on account of the viatical
13 settlement within sixty days of the insured's
14 death;
15 (G) Funds shall be sent to the viator within three
16 business days after the viatical settlement
17 provider has received the insurer or group
18 administrator's written acknowledgment that
19 ownership of the policy or interest in the
20 certificate has been transferred and the
21 beneficiary has been designated;

1 (H) Entering into a viatical settlement contract may
2 cause other rights or benefits, including
3 conversion rights and waiver of premium benefits
4 that may exist under the policy or certificate,
5 to be forfeited by the viator. Assistance should
6 be sought from a financial adviser; and
7 (I) Following execution of a viatical contract, the
8 insured may be contacted for the purpose of
9 determining the insured's health status and to
10 confirm the insured's residential or business
11 street address and telephone number, or as
12 otherwise provided in this article. This contact
13 shall be limited to once every three months if
14 the insured has a life expectancy of more than
15 one year and no more than once per month if the
16 insured has a life expectancy of one year or
17 less. All contacts shall be made only by a
18 viatical settlement provider licensed in the
19 state in which the viator resided at the time of
20 the viatical settlement, or by the authorized
21 representative of a duly licensed viatical
22 settlement provider.

(2) Include distribution of a brochure describing the process of viatical settlements. The National Association of Insurance Commissioners' form for the brochure shall be used unless another form is developed or approved by the commissioner; and

(3) 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."

(b) A viatical settlement provider shall provide the viator with at least the following disclosures no later than the date the viatical settlement contract is signed by all parties;

provided that the disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator:

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

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

(3) Any affiliations or contractual arrangements between the viatical settlement provider and the viatical settlement purchaser;

(4) That 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 and that the possible loss of coverage on the other lives under the policy may occur and accordingly, the viator should consult with the viator's insurance producer or the insurer issuing the policy for advice on the proposed viatical settlement;

(5) A statement of the dollar amount of the current death benefit payable to the viatical settlement provider

1 under the policy or certificate. If known, the
2 viatical settlement provider shall also disclose the
3 availability of any additional guaranteed insurance
4 benefits, the dollar amount of any accidental death
5 and dismemberment benefits under the policy or
6 certificate, and the extent to which the viator's
7 interest in those benefits will be transferred as a
8 result of the viatical settlement contract; and
9 (6) A statement regarding whether or not the funds will be
10 escrowed with an independent third party during the
11 transfer process, and if so, a statement that provides
12 the name, business address, and telephone number of
13 the independent third party escrow agent and informs
14 the viator of the fact that the viator or owner may
15 inspect or receive copies of the relevant escrow or
16 trust agreements or documents.
17 (c) A viatical settlement broker shall provide the viator
18 with at least the following disclosures no later than the date
19 the viatical settlement contract is signed by all parties;
20 provided that the disclosures shall be conspicuously displayed
21 in the viatical settlement contract or in a separate document
22 signed by the viator:

(1) The name, business address, and telephone number of the viatical settlement broker;

(2) A full, complete, and accurate description of all offers, counter-offers, acceptances, and rejections relating to the proposed viatical settlement contract;

(3) A written statement of any affiliations or contractual arrangements between the viatical settlement broker and any person making an offer in connection with the proposed viatical settlement contracts;

(4) The amount and method of calculating the viatical settlement broker's compensation. For the purposes of this subsection, "compensation" includes anything of value paid or given to a viatical settlement broker for the placement of a policy; and

(5) The total amount of the viatical settlement offer and the percentage of the viatical settlement offer comprised by the viatical settlement broker's compensation, where any portion of the viatical settlement broker's compensation, as defined in paragraph (4) is taken from a proposed viatical settlement offer.

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

(e) A viatical settlement provider shall provide the viatical settlement purchaser with at least the following disclosures prior to the date the viatical settlement purchase agreement is signed by all parties; provided that the disclosures shall be conspicuously displayed in any viatical purchase contract or in a separate document signed by the viatical settlement purchaser and viatical settlement provider:

(1) That the purchaser will receive no returns, including dividends and interest, until the insured dies and a death claim payment is made;

(2) That the actual annual rate of return on a viatical settlement contract is dependent upon an accurate projection of the insured's life expectancy and the actual date of the insured's death and an annual "guaranteed" rate of return is not determinable;

(3) That the viaticated life insurance contract should not be considered a liquid purchase since it is impossible

to predict the exact timing of its maturity, funds probably will not be available until the death of the insured, and there is no established secondary market for resale of these products by the purchaser;

(4) That the purchaser may lose all benefits or may receive substantially reduced benefits if the insurer goes out of business during the term of the viatical investment;

(5) That the purchaser is responsible for payment of the insurance premium or other costs related to the policy, if required by the terms of the viatical purchase agreement. These payments may reduce the purchaser's return; provided that if a party other than the purchaser is responsible for the payment, the name and address of that party also shall be disclosed;

(6) That the purchaser is responsible for payment of the insurance premiums or other costs related to the policy if the insured returns to health. The amount of the premiums shall be disclosed if applicable;

(7) The name, business address, and telephone number of the independent third party providing escrow services and that party's relationship to the broker;

(8) The amount of any trust fees or other expenses to be charged to the viatical settlement purchaser;

(9) Whether or not the purchaser is entitled to a refund of all or part of the purchaser's investment under the settlement contract if the policy is later determined to be null and void;

(10) That group policies may contain limitations or caps in the conversion rights, that additional premiums may have to be paid if the policy is converted and the name of the party responsible for the payment of the additional premiums, and that there may be no right to convert the original coverage if a group policy is terminated and replaced by another group policy;

(11) The risks associated with policy contestability including, but not limited to, the risk that the purchaser will have no claim or only a partial claim to death benefits should the insurer rescind the policy within the contestability period;

(12) Whether or not the purchaser will be the owner of the policy in addition to being the beneficiary, and if the purchaser is only the beneficiary and not also the owner, the special risks associated with that status, including, but not limited to, the risk that the beneficiary may be changed or the premium may not be paid;

(13) A description of the experience and qualifications of the person who determines the life expectancy of the insured, including in-house staff, independent physicians, and specialty firms that weigh medical and actuarial data, the information this projection is based on, and the relationship of the projection maker to the viatical settlement provider, if any; and

(14) A brochure describing the process of investment in viatical settlements. The National Association of Insurance Commissioners' form for the brochure shall be used unless one is developed by the commissioner.

(f) A viatical settlement provider shall provide the viatical settlement purchaser with at least the following disclosures no later than at the time of the assignment, transfer, or sale of all or a portion of an insurance policy;

provided that the disclosures shall be contained in a document signed by the viatical settlement purchaser and viatical settlement provider:

(1) All the life expectancy certifications obtained by the provider in the process of determining the price paid to the viator;

(2) A statement of whether or not premium payments or other costs related to the policy have been escrowed; provided that if escrowed, a statement shall be provided indicating the date upon which the escrowed funds will be depleted and whether or not the purchaser will be responsible for payment of premiums thereafter and, if so, the amount of the premiums;

(3) A statement regarding whether premium payments or other costs related to the policy have been waived. If waived, the viatical settlement provider shall disclose whether the viatical settlement provider will be responsible for payment of the premiums if the insurer that wrote the policy terminates the waiver after purchase and the amount of those premiums;

(4) Disclose the type of policy offered or sold, such as whole life, term life, universal life, or a group

policy certificate, any additional benefits contained in the policy, and the current status of the policy;

(5) If the policy is term insurance, the special risks associated with term insurance including, but not limited to, the purchaser's responsibility for additional premiums if the viator continues the term policy at the end of the current term;

(6) Whether or not the policy is contestable;

(7) Whether or not the insurer that wrote the policy has any additional rights that could negatively affect or extinguish the purchaser's rights under the viatical settlement contract, what these rights are, and under what conditions these rights are activated; and

(8) The name and address of the person responsible for monitoring the insured's condition and a description of how often the monitoring of the insured's condition is done, how the date of death is determined, and how and when this information will be transmitted to the purchaser.

§431: -110 Disclosure to insurer. Prior to the initiation of a plan, transaction, or series of transactions, a viatical settlement broker or viatical settlement provider shall

1 fully disclose to the insurer the plan, transaction, or series
2 of transactions, to which the viatical settlement broker or
3 viatical settlement provider is a party, to originate, renew,
4 continue, or finance a life insurance policy with the insurer
5 for the purpose of engaging in the business of viatical
6 settlements at any time prior to or during the first five years
7 after issuance of the policy.
8 **§431: -111 General rules.** (a) A viatical settlement
9 provider entering into a viatical settlement contract shall
10 first obtain:
11 (1) If the viator is the insured, a written statement from
12 a licensed attending physician that the viator is of
13 sound mind and under no constraint or undue influence
14 to enter into a viatical settlement contract; and
15 (2) A document in which the insured consents to the
16 release of the insured's medical records to a licensed
17 viatical settlement provider, viatical settlement
18 broker, and the insurance company that issued the life
19 insurance policy covering the life of the insured.
20 (b) Within twenty days after a viator executes documents
21 necessary to transfer any rights under an insurance policy or
22 within twenty days of entering any agreement, option, promise,

1 or any other form of understanding, expressed or implied, to
2 viaticate the policy, the viatical settlement provider shall
3 give written notice to the insurer that issued the insurance
4 policy, which notice shall state that the policy has or will
5 become a viaticated policy. The notice shall be accompanied by
6 the documents required by subsection (c).
7 (c) The viatical provider shall deliver a copy of the
8 medical release required under subsection (a)(2), a copy of the
9 viator's application for the viatical settlement contract, the
10 notice required under subsection (b), and a request for
11 verification of coverage to the insurer that issued the life
12 policy that is the subject of the viatical transaction. The
13 National Association of Insurance Commissioners' form for
14 verification of coverage shall be used unless another form is
15 developed and approved by the commissioner.
16 (d) The insurer shall respond to a request for
17 verification of coverage submitted on an approved form by a
18 viatical settlement provider or viatical settlement broker
19 within thirty calendar days of the date the request is received
20 and shall indicate whether, based on the medical evidence and
21 documents provided, the insurer intends to pursue an
22 investigation at this time regarding the validity of the

1 insurance contract or possible fraud. The insurer shall accept
2 a request for verification of coverage made on a National
3 Association of Insurance Commissioner form or any other form
4 approved by the commissioner. The insurer shall accept an
5 original, facsimile, or electronic copy of the request and any
6 accompanying authorization signed by the viator. Failure by the
7 insurer to meet its obligations under this subsection shall be a
8 violation of section 431: -112(c) and section 431: -117.
9 (e) Prior to or at the time of execution of the viatical
10 settlement contract, the viatical settlement provider shall
11 obtain a witnessed document in which the viator consents to the
12 viatical settlement contract, represents that the viator has a
13 full and complete understanding of the viatical settlement
14 contract, represents that the viator has a full and complete
15 understanding of the benefits of the life insurance policy,
16 acknowledges that the viator is entering into the viatical
17 settlement contract freely and voluntarily, and for persons with
18 a terminal or chronic illness or condition, acknowledges that
19 the insured has a terminal or chronic illness and that the
20 terminal or chronic illness or condition was diagnosed after the
21 life insurance policy was issued.

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

(g) All medical information solicited or obtained by any licensee shall be subject to the applicable provisions of state law relating to confidentiality of medical information.

(h) All viatical settlement contracts entered into in this State shall provide the viator with an absolute right to rescind the contract before the earlier of sixty calendar days after the date upon which the viatical settlement contract is executed by all parties or thirty calendar days after the viatical settlement proceeds have been sent to the viator as provided in subsection (j). Rescission by the viator may be conditioned upon the viator both giving notice and repaying to the viatical settlement provider within the rescission period all proceeds of the settlement and any premiums, loans, and loan interest paid by or on behalf of the viatical settlement provider in connection with or as a consequence of the viatical settlement. 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

1 purchaser of all viatical settlement proceeds and any premiums,
2 loans, and loan interest that have been paid by the viatical
3 settlement provider or purchaser, all of which shall be paid
4 within sixty calendar days of the death of the insured. In the
5 event of any rescission, if the viatical settlement provider has
6 paid commissions or other compensation to a viatical settlement
7 broker in connection with the rescinded transaction, the
8 viatical settlement broker shall refund all the commissions and
9 compensation to the viatical settlement provider within five
10 business days following receipt of written demand from the
11 viatical settlement provider, which demand shall be accompanied
12 by either the viator's notice of rescission, if rescinded at the
13 election of the viator, or notice of the death of the insured,
14 if rescinded by reason of the death of the insured within the
15 applicable rescission period.
16 (i) The viatical settlement provider shall instruct the
17 viator to send the executed documents required to effect the
18 change in ownership, assignment, or change in beneficiary
19 directly to the independent escrow agent. Within three business
20 days after the date the escrow agent receives the document (or
21 from the date the viatical settlement provider receives the
22 documents, if the viator erroneously provides the documents

1 directly to the provider), the provider shall pay or transfer
2 the proceeds of the viatical settlement into an escrow or trust
3 account maintained in a state or federally chartered financial
4 institution whose deposits are insured by the Federal Deposit
5 Insurance Corporation. Upon payment of the settlement proceeds
6 into the escrow account, the escrow agent shall deliver the
7 original change in ownership or assignment or change in
8 beneficiary forms to the viatical settlement provider or related
9 provider trust or other designated representative of the
10 viatical settlement provider. Upon the escrow agent's receipt
11 of the acknowledgment of the properly completed transfer of
12 ownership, assignment, or designation of beneficiary from the
13 insurance company, the escrow agent shall pay the settlement
14 proceeds to the viator.
15 (j) Failure to tender consideration to the viator for the
16 viatical settlement contract within the time set forth in the
17 disclosure pursuant to section 431: -109(a)(1)(G) renders the
18 viatical settlement contract voidable by the viator for lack of
19 consideration until the time consideration is tendered to and
20 accepted by the viator. Funds shall be deemed sent by a
21 viatical settlement provider to a viator as of the date that the
22 escrow agent either releases funds for wire transfer to the

1 viator or places a check for delivery to the viator via United
2 States Postal Service or other nationally recognized delivery
3 service.
4 (k) Contacts with the insured for the purpose of
5 determining the health status of the insured by the viatical
6 settlement provider or viatical settlement broker after the
7 viatical settlement has occurred shall only be made by a
8 viatical settlement provider or broker licensed in this State or
9 the viatical settlement provider or broker's authorized
10 representatives and shall be limited to once every three months
11 for insureds with a life expectancy of more than one year, and
12 to no more than once per month for insureds with a life
13 expectancy of one year or less. The provider or broker shall
14 explain the procedure for these contacts at the time the
15 viatical settlement contract is entered into. The limitations
16 set forth in this subsection shall not apply to any contacts
17 with an insured for reasons other than determining the insured's
18 health status. Viatical settlement providers and viatical
19 settlement brokers shall be responsible for the actions of their
20 authorized representatives.
21 **§431: -112 Prohibited practices.** (a) It is a violation
22 of this article for any person to enter into a viatical

1 settlement contract at any time prior to the application or
2 issuance of a policy which is the subject of the viatical
3 settlement contract or within a five-year period commencing with
4 the date of issuance of the insurance policy or certificate,
5 unless the viator certifies to the viatical settlement provider
6 that one or more of the following conditions have been met
7 within the five-year period:
8 (1) The policy was issued upon the viator's exercise of
9 conversion rights arising out of a group or individual
10 policy; provided the total of the time covered under
11 the conversion policy plus the time covered under the
12 prior policy is at least sixty months. The time
13 covered under a group policy shall be calculated
14 without regard to any change in insurance carriers,
15 provided the coverage has been continuous and under
16 the same group sponsorship;
17 (2) The viator submits independent evidence to the
18 viatical settlement provider that one or more of the
19 following conditions have been met within the five-
20 year period:
21 (A) The viator or insured is terminally or
22 chronically ill;

(B) The viator's spouse dies;

(C) The viator divorces the viator's 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; or

(F) 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; or

(3) The viator enters into a viatical settlement contract more than two years after the date of issuance of a policy and, with respect to the policy, at all times prior to the date that is two years after policy issuance, the following conditions are met:

(A) Policy premiums have been funded exclusively with unencumbered assets, including an interest in the

1 life insurance policy being financed only to the
2 extent of its net cash surrender value, provided
3 by, or fully recourse liability incurred by, the
4 insured or a person described in paragraph (2) of
5 the definition of "viatical settlement contract"
6 in section 431: -102;
7 (B) There is no agreement or understanding with any
8 other person to guarantee any such liability or
9 to purchase, or stand ready to purchase, the
10 policy, including through an assumption or
11 forgiveness of the loan; and
12 (C) Neither the insured nor the policy has been
13 evaluated for settlement.
14 (b) Copies of the independent evidence described in
15 subsection (a)(2) and documents required by section 431: -
16 111(a) shall be submitted to the insurer when the viatical
17 settlement provider or other party entering into a viatical
18 settlement contract with a viator submits a request to the
19 insurer for verification of coverage. The copies shall be
20 accompanied by a letter of attestation from the viatical
21 settlement provider that the copies are true and correct copies
22 of the documents received by the viatical settlement provider.

(c) If the viatical settlement provider submits to the insurer a copy of the owner's or insured's certification described in subsection (a)(2) and the independent evidence required by subsection (a)(2) when the provider submits a request to the insurer to effect the transfer of 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.

(d) No insurer may require, as a condition of responding to a request for verification of coverage or effecting the transfer of a policy pursuant to a viatical settlement contract, that the viator, insured, viatical settlement provider, or viatical settlement broker sign any forms, disclosures, consent, or waiver form that has not been expressly approved by the commissioner for use in connection with viatical settlement contracts in this State.

(e) Upon receipt of a properly completed request for change of ownership or beneficiary of a policy, the insurer shall respond in writing within thirty calendar days with written acknowledgement confirming that the change has been effected or specifying the reasons why the requested change

1 cannot be processed. The insurer shall not unreasonably delay
2 effecting the change of ownership or beneficiary and shall not
3 otherwise seek to interfere with any viatical settlement
4 contract lawfully entered into in this State.
5 **§431: -113 Prohibited practices and conflicts of**
6 **interest.** (a) With respect to any viatical settlement contract
7 or insurance policy, no viatical settlement broker knowingly
8 shall solicit an offer from, effectuate a viatical settlement
9 with, or make a sale to any viatical settlement provider,
10 viatical settlement purchaser, financing entity, or related
11 provider trust that is controlling, controlled by, or under
12 common control with the viatical settlement broker.
13 (b) With respect to any viatical settlement contract or
14 insurance policy, no viatical settlement provider knowingly may
15 enter into a viatical settlement contract with a viator, if, in
16 connection with the viatical settlement contract, anything of
17 value will be paid to a viatical settlement broker that is
18 controlling, controlled by, or under common control with the
19 viatical settlement provider or the viatical settlement
20 purchaser, financing entity, or related provider trust that is
21 involved in the viatical settlement contract.

1 (c) A violation of subsection (a) or (b) shall be deemed a
2 fraudulent viatical settlement act.
3 (d) No viatical settlement provider shall enter into a
4 viatical settlement contract unless the viatical settlement
5 promotional, advertising, and marketing materials, as may be
6 prescribed by rule, have been filed with the commissioner. In
7 no event shall any marketing materials expressly reference that
8 the insurance is "free" for any period of time. The inclusion
9 of any reference in the marketing materials that would cause a
10 viator to reasonably believe that the insurance is free for any
11 period of time shall be considered a violation of this article.
12 (e) Unless provided in the policy, no life insurance
13 producer, insurance company, viatical settlement broker, or
14 viatical settlement provider shall make any statement or
15 representation to the applicant or policyholder in connection
16 with the sale or financing of a life insurance policy to the
17 effect that the insurance is free or without cost to the
18 policyholder for any period of time.
19 **§431: -114 Advertising for viatical settlements.** (a)
20 This section shall apply to any advertising of viatical
21 settlement contracts or related products or services intended
22 for dissemination in this State, including internet advertising

1 viewed by persons located in this State. Where disclosure
2 requirements are established pursuant to federal regulation,
3 this section shall be interpreted so as to minimize or eliminate
4 conflict with federal regulation wherever possible.
5 (b) Every viatical settlement licensee shall establish and
6 at all times maintain a system of control over the content,
7 form, and method of dissemination of all advertisements of its
8 contracts, products, and services. All advertisements,
9 regardless of by whom written, created, designed, or presented
10 shall be the responsibility of the viatical settlement licensee,
11 as well as the individual who created or presented the
12 advertisement. A system of control shall include regular
13 notification, at least once a year, to agents and others
14 authorized by the viatical settlement licensee to disseminate
15 advertisements, of the requirements and procedures for
16 advertisement approval that shall be compiled with prior to the
17 use of any advertisement not furnished by the viatical
18 settlement licensee.
19 (c) Advertisements shall be truthful and not misleading in
20 fact or by implication. The form and content of an
21 advertisement of a viatical settlement contract shall be
22 sufficiently complete and clear so as to avoid deception and

shall not have the capacity or tendency to mislead or deceive. 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 the advertisement is directed.

(d) 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.

(1) 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 consequence. Misleading statements shall not be remedied by the fact that:

(A) The viatical settlement contract offered is made available for inspection prior to consummation of the sale;

(B) An offer is made to refund the payment if the viator is not satisfied; or

(C) The viatical settlement contract includes a "free look" period that satisfies or exceeds legal requirements.

(2) 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.

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

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

(5) Testimonials, appraisals, or analysis used in advertisements shall:

(A) Be genuine;

(B) Represent the current opinion of the author;

(C) Be applicable to the viatical settlement contract product or service advertised, if any; and

(D) Be accurately reproduced with sufficient completeness to avoid misleading or deceiving prospective viators as to the nature or scope of the testimonials, appraisal, analysis, or endorsement. In using testimonials, appraisals, or analysis, a licensee under this article makes as its own all the statements contained therein. All statements are subject to all the provisions of this section.

(6) If the individual making a testimonial, appraisal, analysis, or an endorsement has a financial interest in the party making use of the testimonial, appraisal, analysis, or endorsement, either directly or through a 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.

(7) 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, a society, an association, or other organization unless that is the fact and unless any relationship between an organization and the viatical settlement licensee is disclosed. 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 prominently disclosed in the advertisement.

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

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

1 licensee would have any responsibility for the financial
2 obligation under a viatical settlement contract.
3 (i) An advertisement shall not use any combination of
4 words, symbols, or physical materials that by their content,
5 phraseology, shape, color, or other characteristics are so
6 similar to a combination of words, symbols, or physical
7 materials used by a government program or agency or otherwise
8 appear to be of the nature that would tend to mislead
9 prospective viators into believing that the solicitation is in
10 some manner connected with a government program or agency.
11 (j) An advertisement may state that a viatical settlement
12 licensee is licensed in the state where the advertisement
13 appears; provided it does not exaggerate that fact or suggest or
14 imply that a competing viatical settlement licensee may not be
15 so licensed. The advertisement may ask the audience to consult
16 the licensee's web site or contact the department of insurance
17 to find out if the state requires licensing and, if so, whether
18 the viatical settlement provider or viatical settlement broker
19 is licensed.
20 (k) An advertisement shall not create the impression that
21 the viatical settlement provider, its financial condition or
22 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.

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

1 (n) If the advertiser emphasizes the speed with which the
2 viatication will occur, the advertising must disclose the
3 average timeframe from completed application to the date of
4 offer and from acceptance of the offer to receipt of the funds
5 by the viator.
6 (o) If the advertising emphasizes the dollar amounts
7 available to viators, the advertising shall disclose the average
8 purchase price as a per cent of face value obtained by viators
9 contracting with the licensee during the past six months.
10 **§431: -115 Fraud prevention and control.** (a) The
11 following fraudulent viatical settlement acts, interference, and
12 participation of convicted felons shall be prohibited:
13 (1) A person shall not commit a fraudulent viatical
14 settlement act.
15 (2) A person shall not knowingly or intentionally
16 interfere with the enforcement of the provisions of
17 this article or investigations of suspected or actual
18 violations of this article.
19 (3) A person in the business of viatical settlements shall
20 not knowingly or intentionally permit any person
21 convicted of a felony involving dishonesty or breach

of trust to participate in the business of viatical settlements.

(b) Viatical settlements 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 or a viatical settlement purchase agreement is guilty of a crime and may be subject to fines and confinement in prison."

The lack of this statement as required shall not constitute a defense in any prosecution for a fraudulent viatical settlement act.

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

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, in a manner prescribed by the commissioner, the information required by the commissioner.

(d) No civil liability shall be imposed on and no cause of action shall arise from a person's 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:

(1) The commissioner or the commissioner's employees, agents, or representatives;

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

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

(4) 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

1 regulatory body overseeing life insurance, viatical
2 settlements, securities, or investment fraud; or
3 (5) The life insurer that issued the life insurance policy
4 covering the life of the insured.
5 This subsection shall not apply to statements made with
6 actual malice. In an action brought against a person for filing
7 a report or furnishing other information concerning a fraudulent
8 viatical settlement act, the party bringing the action shall
9 plead specifically any allegation that this subsection does not
10 apply because the person filing the report or furnishing the
11 information did so with actual malice.
12 A person furnishing information as identified in this
13 subsection shall be entitled to an award of attorney's fees and
14 costs if the person is the prevailing party in a civil cause of
15 action for libel, slander, or any other relevant tort arising
16 out of activities in carrying out the provisions of this article
17 and the party bringing the action was not substantially
18 justified in doing so. For purposes of this subsection, a
19 proceeding is "substantially justified" if it had a reasonable
20 basis in law or fact at the time that it was initiated.
21 However, the award of attorney's fees shall not apply to any

1 person furnishing information concerning the person's own
2 fraudulent viatical settlement acts.
3 (4) This subsection does not abrogate or modify common law
4 or statutory privileges or immunities enjoyed by a
5 person.
6 (e) The documents and evidence provided pursuant to
7 subsection (d) or obtained by the commissioner in an
8 investigation of suspected or actual fraudulent viatical
9 settlement acts shall be privileged and confidential, shall not
10 be a public record, and shall not be subject to discovery or
11 subpoena in a civil or criminal action.
12 This subsection shall not prohibit release by the
13 commissioner of documents and evidence obtained in an
14 investigation of suspected or actual fraudulent viatical
15 settlement acts:
16 (1) In administrative or judicial proceedings to enforce
17 laws administered by the commissioner;
18 (2) To federal, state, or local law enforcement or
19 regulatory agencies, an organization established for
20 the purpose of detecting and preventing fraudulent
21 viatical settlement acts, or to the National
22 Association of Insurance Commissioners; or

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

Release of documents and evidence by the commissioner shall not abrogate or modify the privilege granted in this subsection.

(f) With respect to other law enforcement or regulatory authority, this article shall not:

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

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

(3) 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 take appropriate action against wrongdoers.

(g) Viatical settlement providers and viatical settlement brokers shall have in place antifraud initiatives reasonably calculated to detect, prosecute, and prevent fraudulent viatical settlement acts. At the discretion of the commissioner, the

1 commissioner may order, or a licensee may request and the
2 commissioner may grant, modifications of the following required
3 initiatives as necessary to ensure an effective antifraud
4 program. The modifications may be more or less restrictive than
5 the required initiatives so long as the modifications may
6 reasonably be expected to accomplish the purpose of this
7 subsection.
8 Antifraud initiatives shall include:
9 (1) Fraud investigators, who may be employees of a
10 viatical settlement provider or viatical settlement
11 broker or independent contractors; and
12 (2) An antifraud plan, which shall be submitted to the
13 commissioner. The antifraud plan shall include, but
14 not be limited to:
15 (A) A description of the procedures for detecting and
16 investigating possible fraudulent viatical
17 settlement acts and procedures for resolving
18 material inconsistencies between medical records
19 and insurance applications;
20 (B) A description of the procedures for reporting
21 possible fraudulent viatical settlement acts to
22 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.

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

§431: -116 Injunctions; civil remedies; cease and desist; penalties. (a) In addition to the penalties and other enforcement provisions of this article, if any person violates this article or any rule adopted pursuant to this article, the commissioner may seek an injunction in a court of competent jurisdiction and may apply for temporary and permanent orders

that the commissioner determines are necessary to restrain the person from committing the violation.

(b) Any person damaged by the acts of a person in violation of this article 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 chapter 91, a cease and desist order upon a person that violates any provision of this article, any rule or order adopted by the commissioner, or any written agreement entered into with the commissioner.

(d) Notwithstanding any other provision in this chapter, when the commissioner finds that an activity in violation of this article 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. The emergency cease and desist order shall be effective immediately upon service of a copy of the order on the respondent and shall remain effective for ninety days. If the commissioner begins non-emergency cease and desist proceedings, the emergency cease and desist order shall

1 remain effective, absent an order by a court of competent
2 jurisdiction pursuant to chapter 91.
3 (e) In addition to the penalties and other enforcement
4 provisions of this article, any person who violates this article
5 shall be subject to civil penalties of not less than $100 nor
6 more than $10,000 per violation. Imposition of civil penalties
7 shall be pursuant to an order of the commissioner issued under
8 sections 431:2-202 and 431:2-308. The commissioner's order may
9 require a person found to be in violation of this article to
10 make restitution to persons aggrieved by violations of this
11 article.
12 (f) A person convicted of a violation of this article by a
13 court of competent jurisdiction for the crime of theft under
14 chapter 708 shall be ordered to pay restitution to persons
15 aggrieved by the violation of this article. Restitution shall
16 be ordered in addition to a fine or imprisonment, but not in
17 lieu of a fine or imprisonment.
18 (g) Except for a fraudulent viatical settlement act
19 committed by a viator, the enforcement provisions and penalties
20 of this section shall not apply to a viator.
21 (h) A person convicted of a violation of this article by a
22 court of competent jurisdiction may be sentenced in accordance

with paragraph (1), (2), (3), or (4) based on the greater of the value of property, services, or other benefit wrongfully obtained, attempted to be obtained, or the aggregate economic loss suffered by any person as a result of the violation:

(1) Imprisonment for not more than twenty years or payment of a fine of not more than $100,000, or both, if the value of viatical settlement contract is more than $35,000;

(2) Imprisonment for not more than ten years or payment of a fine of not more than $20,000, or both, if the value of viatical settlement contract is more than $2,500 but not more than $35,000;

(3) Imprisonment for not more than five years or payment of a fine of not more than $10,000, or both, if the value of viatical settlement contract is more than $500 but not more than $2,500; or

(4) Imprisonment for not more than one year or payment of a fine of not more than $3,000, or both, if the value of viatical settlement contract is $500 or less.

A person convicted of a fraudulent viatical settlement act shall be ordered to pay restitution to persons aggrieved by the fraudulent viatical settlement act. Restitution shall be

ordered in addition to a fine or imprisonment but not in lieu of a fine or imprisonment.

In any prosecution under paragraph (1), (2), (3), or (4) the value of the viatical settlement contracts within any six-month period may be aggregated and the defendant charged accordingly in applying the provisions of this section; provided that when two or more offenses are committed by the same person in two or more counties, the accused may be prosecuted in any county in which one of the offenses was committed for all of the offenses aggregated under this section. The applicable statute of limitations provision under section 701-108 shall not begin to run until the insurance company or law enforcement agency is aware of the fraud, but in no event may the prosecution be commenced later than seven years after the act has occurred.

§431: -117 Unfair trade practices. A violation of this article, including the commission of a fraudulent viatical settlement act, shall be considered an unfair trade practice under article 13.

§431: -118 Authority to adopt rules and establish standards and other requirements. The commissioner shall have the authority to:

(1) Adopt rules to implement this article;

(2) Establish standards for evaluating reasonableness of payments under viatical settlement contracts for persons who are terminally or chronically ill. 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 insuring the life of a person that is chronically or terminally ill;

(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 insurers, viatical settlement providers, and viatical settlement brokers during the viatication of a life insurance policy or certificate.

§431: -119 Other jurisdiction. Nothing in this article shall be construed to affect in any manner any provision of chapter 485A."

SECTION 2. Section 431:2-306, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) Examinations of:

(1) Any insurer;

(2) Any person subject to examination under section 431:2-303(2); [~~or~~]

(3) Any insurance guaranty fund established pursuant to article 16; or

(4) Any licensee subject to examination under section 431: -108

shall be at the expense of the insurer, person, [~~or~~] guaranty fund, or licensee examined. Examination expenses shall include fees, mileage, and expenses incurred as to witnesses or any other person, as defined in article 1, subject to an examination by the commissioner.

(b) The insurer, person, [~~or~~] guaranty fund, or licensee examined and liable therefor shall pay to the commissioner's examiners upon presentation of an itemized statement, their actual travel expenses, their reasonable living expense allowance, and their per diem compensation at a reasonable rate approved by the commissioner, incurred on account of the

examination. All payments collected by the commissioner shall be remitted to:

(1) The compliance resolution fund; or

(2) The captive insurance administrative fund if independent contractor examiners or captive staff examiners were employed for a captive insurer's examination.

The commissioner or the commissioner's examiners shall not receive or accept any additional emolument on account of any examination."

SECTION 3. A viatical settlement provider or viatical settlement broker transacting business in this State may continue to do so pending approval or disapproval of the provider or broker's application for a license as long as the application is filed with the commissioner by July 1, 2009.

SECTION 4. If any portion of this article or any amendments thereto, or its applicability to any person or circumstance is held invalid by a court, the remainder of this article or its applicability to other persons or circumstances shall not be affected.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

H.B. NO. 3099

SECTION 6. This Act shall take effect on July 1, 2009.

INTRODUCED BY: Calvin K. Say

BY REQUEST

JAN 22 2008

H.B. NO. 3099

Report Title:
Viatical Settlements

Description:
Protects those with terminal or chronic illnesses from unscrupulous brokers who trade in life insurance policies of the sick, by requiring disclosure of the consequences to the consumer, providing the right to rescind the contract, and prohibiting the transfer of the life insurance benefits to the new owner for five years.

HB 3099

JUSTIFICATION SHEET

DEPARTMENT: Commerce and Consumer Affairs

TITLE: A BILL FOR AN ACT RELATING TO VIATICAL SETTLEMENTS.

PURPOSE: To regulate the viatical settlements industry to protect consumers, generally the terminally or chronically ill, and other consumers, including healthy, older people, who might want to sell their insurance policy on the secondary market, by adopting the National Association of Insurance Commissioners' Viatical Settlements Model Act (Model Act).

MEANS: Add a new article to chapter 431, Hawaii Revised Statutes.

JUSTIFICATION: Viatical settlement transactions typically involve persons with terminal or chronic illnesses who require funds as a result of circumstances caused by their illness. Thus, the person holding a life insurance policy (the viator) typically sells the policy to a third party "broker" in return for a portion of the death benefit. The broker then sells shares of the policy to investors, who collect a share of the death benefit from the broker when the viator dies. The sooner the policyholder dies, the higher the investor's profit. Thus, the arrangement gives investors a financial interest in the policyholder's death. Recently, viatical companies also have sold investors "senior settlements" which are interests in the death benefits of healthy, older people.

While viatical contracts are legitimate products, persons enticed into viatical settlements may face unexpected taxes, transaction fees, loss of insurance capacity, legal costs, and loss of privacy, for example, with respect to their medical records. These transactions also are contrary to state insurable interest statutes

HB 3099

which require that beneficiaries of a life insurance policy have an interest in the continued life rather than the early death of a policyholder.

Adoption of the model act would give the Insurance Commissioner the authority to license persons working in the viatical settlements industry, including, for example, the authority to examine the business and affairs of any licensed viatical settlement provider or broker. It would give the insurance commissioner the regulatory authority to aggressively combat the problem of viatical fraud by, for example, defining "fraudulent viatical settlement acts" and providing administrative and criminal penalties for violation. The model act includes important consumer protections, such as the requirement to disclose to consumers possible alternatives to viatical settlement contracts, information about tax consequences, and information about the right of the viator to rescind the viatical settlement contract. The model act also requires the filing of viatical settlement promotional, advertising, and marketing materials with the insurance commissioner. Provisions to protect the viator's identity and privacy also are included. Finally, the imposition of a five-year prohibition on settling a life insurance policy forces investors to wait a longer period of time before being able to own the policy, thus making the transaction less attractive as an investment, due to the increased mortality risk and the investor's most likely lower rate of return.

As of June 4, 2007, 35 states have adopted the model act or similar legislation.

The delayed effective date of the bill is necessary to enable the insurance commissioner to adopt rules, forms, and procedures, and get the licensing requirements in place to implement the new Viatical Settlements Act.

Impact of the public: The bill provides important consumer protections for persons who want to sell their insurance policies on the secondary market.

HB 3099

Impact on the department and other agencies:
The Department of Commerce and Consumer Affairs will have the added responsibility of regulating the viatical settlements industry.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: CCA-106

OTHER AFFECTED AGENCIES: None.

EFFECTIVE DATE: July 1, 2009.