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l'Association canadienne des compagnies d'assurances de personnes

dans le cadre des

Consultations particulières sur le projet de loi n°150, Loi concernant principalement la mise en œuvre de certaines dispositions des discours sur le budget du 17 mars 2016 et du 28 mars 2017

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Association canadienne des compagnies d'assurances de personnes
1001, boul. de Maisonneuve Ouest, bureau 630
Montréal (Québec) H3A 3C8
514-845-9004

Toronto • Montréal • Ottawa

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Au sujet de l'ACCAP

L'ACCAP est une association à adhésion libre dont les membres détiennent 99 p. 100 des affaires d'assurances vie et maladie en vigueur au Canada. L'industrie canadienne des assurances de personnes fournit à plus de 28 millions de Canadiens une large gamme de produits assurant la sécurité financière, comme l'assurance vie, les rentes et l'assurance maladie complémentaire. Elle administre plus des deux tiers des régimes de retraite des petites et des moyennes entreprises au pays ainsi que la vaste majorité des REER collectifs.

La contribution au Québec des assureurs de personnes, sur le plan économique et social, est notable. L'industrie emploie près de 31 000 Québécoises et Québécois. Notre industrie offre des protections à 7,4 millions de personnes au Québec et verse annuellement plus de 17 milliards de dollars de prestations aux résidents de la province.

Au Québec, les orientations et stratégies de l'ACCAP sont définies par le comité des présidents de l'ACCAP-Québec constitué des sociétés d'assurance suivantes :

- Assurance-vie Banque Nationale
- La Capitale, Assureur de l'administration publique inc.
- Desjardins Sécurité financière
- Financière Sun Life
- Great-West, Compagnie d'assurance/London Life/Canada-Vie
- Humania, Assurance
- Industrielle Alliance, Assurance et services financiers
- L'Union-Vie, Compagnie mutuelle d'assurance
- Manuvie
- Optimum Réassurance
- SSQ Assurance

Le rachat de polices d'assurance vie à des fins spéculatives est aussi appelé : trafic, cession ou commerce d'assurance vie.

Sommaire exécutif

Depuis plusieurs années déjà, les sociétés d'assurances réunies au sein de l'Association canadienne des compagnies d'assurances de personnes (ACCAP), constatent les divers risques associés au rachat de polices d'assurance vie à des fins spéculatives souvent appelé « trafic, cession ou commerce d'assurance vie ». Dans un souci de protection du public, elle a partagé ses préoccupations à de nombreuses reprises avec les autorités du ministère des Finances et les parlementaires. À la lecture du discours sur le budget, nous nous sommes réjouis de constater l'intention du ministre des Finances qui, donnant suite aux demandes de l'ACCAP, annonçait son intention de modifier le Code civil du Québec pour encadrer la cession d'une police d'assurance vie à des fins spéculatives. Le projet de loi 150, Loi concernant principalement la mise en œuvre de certaines dispositions des discours sur le budget du 17 mars 2016 et du 28 mars 2017, nous précise l'encadrement proposé, qui, selon nous, mérite d'être bonifié afin de s'inspirer davantage des pratiques canadiennes et internationales visant à mieux protéger les consommateurs ciblés par ce type de commerce. Malheureusement, les dispositions du projet de loi 150 ne suffisent pas pour assurer la protection du consommateur et contrer les abus envers nos clients, souvent les plus vulnérables.

La majorité des provinces canadiennes interdisent expressément le trafic ou le commerce d'assurance vie. D'autres permettent contractuellement de l'interdire. Nous croyons que les moyens proposés aujourd'hui pour encadrer ce commerce ne protègent pas suffisamment le consommateur qui est généralement dans une position de vulnérabilité.

Les régulateurs d'assurance des États américains ont accordé des ressources considérables pour doter les États américains d'un cadre juridique rigoureux. Ces pratiques prédatrices de rachat de polices à des fins spéculatives prennent trois formes :

1. Le règlement d'assurance viatique (Viatical Settlement) : Le titulaire de police (dont l'assuré est en phase terminale) peut « vendre » sa police à un promoteur en échange d'une somme d'argent.
2. La cession de police à escompte (Life Settlement) : Ça vise généralement **les personnes plus âgées**. Le promoteur prétend offrir au titulaire de la police la possibilité de « monnayer » de son vivant la valeur de sa police, en lui offrant un montant pour devenir bénéficiaire irrévocable de la police au décès. Ce montant est légèrement plus élevé que la valeur de rachat lorsqu'il y en a une, mais certainement moindre que celui du capital-décès.
3. L'assurance détenue par un étranger (STOLI) – Financement sans recours : Le promoteur (fiducie ou investisseur) souscrit une police d'assurance vie et offre un montant d'argent à la personne âgée ou malade. Le promoteur n'a aucun intérêt assurable dans la vie de l'assuré initial qui est aussi le titulaire de la police. Après une courte période de temps, le titulaire initial cède sa police au promoteur en échange de la somme offerte initialement. Le concept de l'assurance vie détenue par un étranger est propice à la fraude, car la police est souscrite uniquement dans le but de produire un retour sur l'investissement et non pour combler un besoin d'assurance.

Après avoir pris connaissance des expériences canadiennes, internationales et des positions des régulateurs sur cette question, nous recommandons de ne pas adopter les articles 228 et 229 venant modifier le Code civil et de former un comité consultatif réunissant les différentes parties prenantes

intéressées par cet enjeu, afin d'élaborer une proposition tenant compte des diverses formes de ce commerce. Nous espérons ainsi mieux protéger tous les consommateurs visés, qui se trouvent souvent en situation de vulnérabilité en discutant, par exemple, de la pertinence d'établir certaines règles pour : la divulgation d'information, le processus d'annulation de la cession, le conseil et l'intervention d'un représentant certifié, les recours possibles, etc.

Enfin, l'adoption de certaines dispositions techniques s'avère nécessaire dans le contexte de la réforme du secteur financier (projet de loi 141).

Dispositions contenues dans le projet de loi 150 visant l'assurance de personnes

Le 31 octobre 2017, le ministre des Finances déposait le projet de loi 150. À la lecture du projet de loi, on constate, notamment, des changements apportés à la *Loi sur la distribution de produits et services financiers* (LDPSF) et à *la Loi sur les assurances* (LA). Dans la foulée de l'importante réforme du secteur financier en cours parallèlement à ce projet de loi, il est nécessaire d'apporter certains amendements de concordance qui sont d'une grande importance pour nos sociétés membres, particulièrement en ce qui a trait à l'assurance collective des débiteurs (également appelée « assurance-créance »).

En effet, certains membres de l'ACCAP distribuent de l'assurance-créance par l'entremise des preneurs de ces contrats, lesquels agissent à titre de distributeurs conformément aux règles de la distribution sans représentant. Or, nous comprenons que la suppression envisagée par ce projet de loi de toutes références dans la LDPSF à l'assurance collective et à l'assurance-créance dans le chapitre de la distribution sans représentant impliquera un ajustement des règles de distribution pour ce type de produit. Conséquemment, nous avons invité le législateur à accorder une attention spécifique aux règles restreignant la possibilité de rétribuer les preneurs d'assurance collective des débiteurs contenues dans le *Règlement d'application de la loi sur les assurances* (« RALA »). En effet, ces règles doivent faire l'objet d'une révision de manière à assurer le maintien de l'offre de ce produit sur le marché. Nous croyons par ailleurs comprendre qu'il n'était pas l'intention du législateur d'imposer des restrictions à cet égard et que ce serait éventuellement précisé.

À cet égard, selon le projet de loi 141, les conditions applicables aux contrats d'assurance collective seront prévues par règlement (art. 72 LA). Nous désirons nous assurer que l'entrée en vigueur des articles 255 à 260 du projet de loi 150 concorde avec les révisions nécessaires au RALA ; que ce soit à l'expiration du délai de deux ans ou tout délai plus court qui pourrait être fixé par le gouvernement, en vertu des dispositions finales du projet de loi (art. 319 PL).

Par ailleurs, nous aimerions qu'il soit apporté une précision à l'article 235 du projet de loi 150 (introduisant l'article 222.3 à la *Loi sur les assureurs*), afin de clarifier que le document destiné aux adhérents qui y est exigé ne doit pas nécessairement être distinct des documents déjà remis au preneur, si les renseignements nécessaires à une prise de décision éclairée et à l'exécution du contrat sont déjà inclus dans la documentation remise au preneur. Il serait par ailleurs souhaitable d'arrimer le libellé de l'article 222.3 de la *Loi sur les assureurs* avec l'article 62 de cette loi introduit par le projet de loi 141.

Modifications au Code civil et conditions pour la cession de polices

Ce projet de loi contient aussi de nouvelles dispositions visant à prévoir les modalités, en vertu desquelles un contrat d'assurance individuelle sur la vie peut être cédé par son titulaire à un tiers. Un meilleur encadrement de cette pratique faisait partie des demandes de notre association depuis quelques années déjà.

À la lecture du discours sur le budget, nous nous sommes donc réjouis d'y apprendre que le ministre des Finances désirait enfin encadrer ce commerce. On constate qu'il se développe actuellement au Québec et qu'il cible souvent les clientèles les plus vulnérables et âgées. C'est toutefois avec regret que nous avons constaté que la solution proposée dans le projet de loi 150 ne répond pas à nos nombreuses préoccupations et ne protège pas adéquatement le consommateur vulnérable. Cette solution pourrait être améliorée afin que les consommateurs ciblés par ce marché, c'est-à-dire ceux qui souffrent d'une maladie, qui sont âgés ou qui sont financièrement vulnérables, soient mieux protégés et ne soient pas pénalisés par cette activité controversée.

Extrait du projet de loi :

228. Ce code est modifié par l'insertion, après l'article 2417, du suivant :

« 2417.1. En matière d'assurance individuelle sur la vie, la clause par laquelle le titulaire du contrat est empêché de le céder ou par laquelle l'assureur est libéré, même en partie, de ses obligations en cas de cession de l'assurance, a effet seulement dans les deux premières années de l'assurance à l'égard uniquement d'une cession à titre onéreux en faveur d'un cessionnaire qui n'a pas un intérêt susceptible d'assurance dans la vie ou la santé de l'assuré. Toutefois, une telle clause demeure sans effet lorsqu'un médecin atteste par écrit qu'il est peu probable que l'assuré survive plus de deux ans. »

229. Ce code est modifié par l'insertion, après l'article 2462, du suivant :

« 2462.1. Dans les 30 jours suivant le moment où la cession d'une assurance individuelle sur la vie lui est devenue opposable, l'assureur peut résilier l'assurance en payant au cessionnaire la somme en considération de laquelle le cédant la lui a cédée. »

Ces amendements, s'ils étaient adoptés, auraient comme conséquence ce qui suit :

- La police d'assurance pourrait interdire la cession de police à titre onéreux, mais seulement durant les 2 premières années suivant son entrée en vigueur.
- Dans l'éventualité d'une cession de la police par le titulaire à un tiers, l'assureur pourrait racheter la police au tiers en lui remboursant la somme payée au titulaire de la police, obligeant alors l'assureur à gérer seul et sans balise la supervision du commerce de l'assurance.
- En plus, ceci n'aura aucun effet sur les polices d'assurance vie déjà en vigueur.

Nous comprenons que le gouvernement tente de trouver une solution équilibrée visant à maintenir le droit d'un titulaire de police de la céder contre rétribution tout en donnant des outils à l'assureur pour restreindre la croissance de cette pratique.

Nous croyons que l'objectif devrait plutôt être une solution équilibrée pour le consommateur, soit la préservation de certains droits de cession contre rétribution, mais dans un cadre où celui-ci est adéquatement conseillé et protégé.

Notre industrie navigue dans un environnement fort réglementé et qui s'emploie chaque jour à mieux répondre aux besoins de ses clients et à entretenir une relation de confiance avec eux. Soulignons ici l'importance de cette relation de confiance entre les deux parties. Or, dans la proposition qui nous est faite, le seul moyen à la disposition de l'assureur serait une clause similaire à une clause de vente-achat obligatoire (clause shotgun) qui non seulement le contraindrait à participer à un commerce qu'il dénonce, mais qui, surtout, ne protégerait aucunement le consommateur. Ainsi, aucune analyse de besoins ne serait réalisée et aucun représentant certifié ne serait intervenu. Si l'assuré ou le bénéficiaire se sentait lésé, il croirait, à tort, que l'assureur approuve et est impliqué dans la transaction. Ce qui n'est pas le cas. Ce serait alors fort dommageable pour la confiance et la réputation de la société d'assurance, mais plus important encore, le consommateur serait laissé à lui-même.

Il nous paraît ambitieux de régler un enjeu aussi complexe et des pratiques prédatrices avec deux seuls articles dans le Code civil du Québec. À moins d'interdire complètement le commerce des assurances vie ou de prévoir la possibilité d'inclure dans les polices d'assurance une interdiction de cession par le titulaire de la police, les dispositions législatives et réglementaires encadrant cette pratique doivent être élaborées avec soin. Vous trouverez d'ailleurs à l'annexe 2 un projet de loi modèle, utilisé par de nombreux états et adopté par d'autres avec certaines variantes. Compte tenu de notre droit civil, la solution se trouve sans doute entre les deux. Une chose est claire pour nous, on ne peut protéger suffisamment le consommateur ainsi. Qui plus est, les principes qui guident la réforme du secteur financier, soit le droit à l'information, au conseil et à la protection du consommateur, doivent être les fondements de ce qui sera éventuellement proposé pour mieux encadrer le trafic des polices d'assurance vie.

Il est aussi essentiel de rappeler la véritable l'intention de celui ou celle qui se procure une assurance vie : protéger ses proches face aux conséquences de son décès et non pas de l'utiliser comme une valeur de revente sur le marché secondaire.

Qu’est-ce que le commerce du rachat de polices d’assurance vie ?

Dans les rachats de contrats d’assurance vie, c’est-à-dire le commerce de la cession de polices d’assurance vie, le titulaire de la police cède à un tiers tous ses droits au titre du contrat en échange d’une somme d’argent qui est, en général, considérablement moins élevée que le capital assuré du contrat.

Il existe actuellement un marché émergent au Québec dont le seul objectif est de spéculer sur la mort imminente. En effet, des groupes non réglementés tentent de développer un marché de cessions de polices d'assurance vie à des fins commerciales ou spéculatives. Le profit de celui qui rachète la police dépend de la vitesse à laquelle l’assuré décède : plus l'assuré décède rapidement après l'achat de la police par le promoteur, plus l’investissement (l'achat) lui sera profitable. Rappelons qu’un produit d’assurance vie se fonde sur l’intérêt de l’assuré de demeurer en vie.

Trois types d’investissements basés sur le commerce de police d’assurance vie

Le règlement d’assurance viatique (Viatical Settlement)

Faisant son apparition avec les cas de VIH dans les années 1980, le règlement d’assurance viatique vise les polices d’assurance vie, **dont l’assuré, la plupart du temps, souffre d'une maladie pouvant entraîner la mort ou est en phase terminale**. Le titulaire de police dont l’assuré est en phase terminale peut « vendre » sa police à un promoteur, en échange d’une somme d’argent. La somme d’argent versée par le promoteur dépendra du pronostic de décès de l’assuré. Plus l’assuré décède rapidement après la vente de la police, plus l’investissement est rentable pour le promoteur. Cependant, il peut arriver que l’assuré ne décède pas dans le laps de temps prévu et le promoteur doit alors continuer de payer les primes ou tenter de vendre la police qu’il avait acquise.

La cession de police à escompte (Life Settlement)

L'achat de police à escompte vise les polices d'assurance vie généralement **détenues par des personnes plus âgées**. Le promoteur prétend offrir au titulaire de la police la possibilité de « monnayer » de son vivant la valeur de sa police en lui offrant un montant légèrement plus élevé que la valeur de rachat lorsqu'il y en a une, mais certainement moindre que celui du capital-décès. Encore une fois, plus l'assuré décède rapidement après l'achat de la police par le promoteur, plus l'achat (investissement) sera rentable.

L'assurance détenue par un étranger (STOLI) – Financement sans recours

Dans le cas d'une police d'assurance vie détenue par un étranger, un individu, généralement une **personne âgée sans couverture d'assurance ou avec peu d'assurance, se voit offrir une somme d'argent par un promoteur pour souscrire à une police d'assurance vie**. Souvent le client contracte un prêt dans le but de payer toutes les primes d'un contrat d'assurance vie. La vie de la personne assurée est alors l'unique garantie offerte pour le prêt. Le promoteur en question n'a aucun intérêt assurable dans la vie de l'assuré initial qui est aussi le titulaire de la police. Après une courte période de temps, le titulaire initial cède sa police au promoteur en échange de la somme offerte initialement. Le concept de l'assurance vie détenue par un étranger est propice à la fraude, car la police est souscrite uniquement dans le but de produire un retour sur l'investissement et non pour combler un besoin d'assurance.

Ailleurs dans le monde : un phénomène préoccupant

Les assureurs vie canadiens sont présents dans plus de 20 pays, et l'actif investi dans leurs activités à l'étranger s'élève à 855 milliards de dollars. Trois sociétés canadiennes figurent parmi les 15 plus grands assureurs vie au monde.

Ces activités menées au-delà de nos frontières contribuent à l'identification de tendances et permettent de sensibiliser le législateur à l'égard des pratiques émergentes, qui pourraient être néfastes pour nos assurés. Ils peuvent ainsi témoigner des lois et règlements mis en place dans 43 états américains, à la demande des régulateurs des états américains, soit le National Council of Insurance Legislator (NCIL). En annexe 2, nous avons inclus le modèle de projet de loi approuvé et proposé par le NCIL et qui a été adopté avec certaines variantes dans 43 états. Cette loi répond aux préoccupations relatives au marché du STOLI uniquement ; ce qui n'est pas abordé dans le projet de loi québécois.

Soulignons également que ce sont des entreprises privées qui ont vu là une opportunité d'affaires et ont créé de toutes pièces ce marché, ce qui a contraint les états américains à réagir pour l'encadrer ou l'interdire après avoir constaté des dérives et des abus, particulièrement envers les aînés. On peut croire que si les états avaient évalué le risque avant, ils auraient sans doute interdit la pratique plus tôt.

Les risques observés justifiant un meilleur encadrement

Exploitation financière des aînés et des personnes en situation de vulnérabilité

Il ressort des exemples américains que ce type de transaction (rachat de police) vise les personnes

vulnérables, telles les personnes malades, âgées ou ayant un urgent besoin d'argent. Ces personnes, qui peuvent toujours avoir un besoin de couverture d'assurance, souffrent d'autant plus du manque d'information nécessaire afin de faire un choix éclairé. Il serait important que l'adoption éventuelle d'une loi encadrant le rachat de police soit accompagnée d'une campagne d'éducation et d'information, destinée aux associations ou résidences pour aînés et aux groupes de patients. Nous sommes favorables à ce que l'Autorité des marchés financiers se voie confier cette responsabilité, puisqu'elle mène déjà des activités d'éducation auprès de cette clientèle.

Sur son site internet, l'association américaine réunissant les acteurs de ce marché prévoit même des mises en garde et recommande de consulter un conseiller juridique, un fiscaliste ou un conseiller en services financiers. À titre d'exemple, les impacts fiscaux doivent aussi être considérés, car contrairement à l'assurance vie, ces produits seraient considérés comme de l'investissement et donc soumis aux taxes et impôts applicables.

Sur le site internet du Life Settlement Insurance Association[1] on y trouve cet avis :

The sale of a life policy is not for everyone.

There are alternatives other than selling a policy that may be appropriate for a policy owner's circumstances:

- Keep the policy inforce through a loan or use of the cash surrender value
- Seek an accelerated death benefit, if available
- Assign the policy as a gift or charitable contribution
- Covert a term policy to permanent insurance
- Reduce the death benefit with a lower face value and lesser premiums
- Lapse or surrender the policy

Important:

Anyone considering a life settlement should first talk with their insurance, financial and/or legal advisor to explore all legal, tax and other consequences from selling their policy.

La question de la divulgation des renseignements personnels de l'assuré a également soulevé beaucoup de problèmes aux États-Unis. En effet, afin de déterminer la valeur de l'offre d'achat, le promoteur voudra accéder aux renseignements médicaux de l'assuré afin de déterminer son espérance de vie, laquelle influencera le montant offert en retour de la cession la police. De plus, le **promoteur voudra aussi consulter de façon ponctuelle les renseignements médicaux de l'assuré ou du moins évaluer son état de santé, afin de déterminer s'il conservera la police en tant qu'investissement**, ou s'il entreprendra des démarches afin de céder ses droits aux termes de la police à un tiers.

Également, puisque le promoteur n'est compensé qu'au moment du paiement du capital-décès, ce dernier a intérêt à ce qu'une demande de réclamation soit envoyée promptement à l'assureur à la

[1] http://www.lisa.org/life-policy-owners

suite du décès de l'assuré. L'expérience américaine démontre que **de nombreuses plaintes ont été soumises à la suite du manque d'égards et de respect de la dignité des assurés**, engendré par les pratiques de suivi plutôt agressives.

Or, aux États-Unis, un comité sénatorial spécial sur le vieillissement[2] s'est réuni en 2009 pour étudier ce phénomène. À cette occasion, les régulateurs de différents états sont venus témoigner. On y apprenait notamment que plusieurs régulateurs étaient témoins d'abus et que plusieurs états avaient mis en place ou réfléchissaient à mettre en place un encadrement, dans le but de protéger le consommateur face aux dérives que ce commerce engendre. Les solutions proposées ou introduites visaient à rendre obligatoire la possession d'un permis pour participer à ce commerce, à assurer que le promoteur respecte certains critères de vente ou encore de rendre obligatoire la divulgation des risques au consommateur.

Au terme des auditions, on pouvait conclure que :

- Le rachat est proposé **presque exclusivement aux aînés.**
- Il est présenté comme un moyen d'accéder à la « valeur » de leur contrat, dont ils estiment ne plus avoir besoin.
- Dans bien des cas, les personnes ciblées n'ont pas l'expertise voulue pour savoir si elles font « une bonne affaire » et risquent de se départir d'un bien important, sans avoir pleinement saisi les conséquences de cette opération.
- Les bénéficiaires apprennent souvent que la police a été cédée après le décès.

C'est pourquoi, comme on le mentionnait précédemment, pour résoudre ces situations et prévenir l'abus chez les aînés, un projet de loi est aujourd'hui largement adopté par la majorité des états américains pour encadrer ce marché ou l'interdire[3] (voir annexe 2).

Les personnes âgées ou malades qui vendent leur contrat d'assurance vie ignorent que :

- Des entités et des investisseurs inconnus pourraient accéder à leurs renseignements personnels et médicaux confidentiels, et partager cette information ;

- Elles pourraient être tenues de subir des examens médicaux pour le restant de leurs jours, et qu'elles ont consenti à ce qu'on les appelle régulièrement pour vérifier si elles sont toujours en vie ;

- Il peut devenir difficile de savoir qui détient réellement le contrat d'assurance sur leur tête puisqu'il peut faire l'objet d'une entente privée entre investisseurs et ils n'ont aucun contrôle quant à l'identité du bénéficiaire ;

- Ils ne pourront porter plainte à l'Autorité des marchés financiers, car celui qui rachète la police n'est pas soumis à l'encadrement de celle-ci ;

[2] https://www.aging.senate.gov/imo/media/doc/4292009.pdf
[3] http://ncoil.org/wp-content/uploads/2016/04/AdoptedLifeSettlementsModel.pdf

- Le produit de la vente sera généralement assujetti à l'impôt sur le revenu, ce qui réduira de façon importante – et irrévocable – la somme que touchera la personne au moment de la cession ;

- Elles risquent de participer au blanchiment d'argent - le commerce de police pouvant engendrer un commerce en argent liquide entre individus peut être difficile à détecter et cet argent sera blanchi lorsque la prestation d'assurance sera versée.

Risques importants de fraude et de blanchiment

Les poursuites intentées aux États-Unis relatives à cette spéculation ont démontré dans plusieurs cas des situations frauduleuses ou des conseils mal avisés de la part du conseiller qui se retrouve en conflit d'intérêts, en encourageant l'assuré à céder sa police d'assurance à un tiers. Les cas répertoriés aux États-Unis démontrent que le promoteur a intérêt à ce que le montant de l'assurance souscrite soit le plus élevé possible. Afin d'y parvenir, le promoteur peut être tenté de convaincre le titulaire initial d'exagérer ses besoins d'assurance, favorisant ainsi la fraude, ou inciter le titulaire initial à omettre des informations importantes (même faire de fausses représentations), en vue d'obtenir une prime moins élevée. Les compagnies d'assurance américaines ont déjà été confrontées à ces approches frauduleuses et aux coûts de formation, surveillance, contrôle et poursuites additionnelles qui en découlent.

Le marché du rachat de contrats d'assurance vie aux États-Unis est fortement réglementé et des responsables de la réglementation des assurances ont dû consacrer des ressources disproportionnées à ce tout petit segment du marché.

Dans une certaine mesure, l'incertitude dans l'évaluation d'une police ou d'un portefeuille de polices fait de ces produits un terrain fertile à la fraude dirigée contre les investisseurs. Malgré cela, les États-Unis continuent de se caractériser par la fraude à grande échelle, les abus contre les consommateurs qui vendent leurs polices d'assurance vie et les consortiums de promoteurs créés pour l'achat de telles polices (renseignements communiqués insuffisants, paiements représentant une fraction seulement de capital assuré de la police, etc.). Cela a entraîné plusieurs faillites de taille sur le marché du rachat à escompte, des pertes pour les investisseurs et des défis dans la gestion des actifs de faillite, étant donné que certains actifs peuvent prendre de nombreuses années à devenir disponibles (voir par exemple l'insolvabilité de Life Partners Holdings Inc.[4]).

Pour réduire les risques de fraudes dans un état où la clientèle âgée est surreprésentée, la Floride adoptait en juin dernier un projet de loi (*HB 1007 relating to Prohibited Insurance Acts*) qui vise à établir des standards pour prévenir spécifiquement les fraudes dans le règlement d'assurance viatique (Viatical settlement) et l'assurance détenue par un étranger (STOLI).[5]

Dans certaines situations, le blanchiment d'argent pourrait être facilité puisque l'assureur ne serait plus en mesure de vérifier qui paie la prime, échappant ainsi aux mesures mises en place par les

[4] http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/11/01/reflections-on-the-life-partners-holding-inc-bankruptcy/?slreturn=20180023100958
[5] http://www.colodnyfass.com/florida-governor-rick-scott-signs-insurance-anti-fraud-bill-hb-1007-law/

assureurs pour limiter le blanchiment d'argent.

On observe que l'assurance détenue par un étranger (STOLI) est susceptible d'être utilisée pour le blanchiment d'argent dans ces situations :

1. S'il y a une demande de changement de propriété de la police comme cela serait le cas pour STOLI, l'argent est un peu plus éloigné de sa source d'origine et sa dispersion[6] possible. Cela aide à rendre plus obscure l'origine des fonds. Malgré les mécanismes en place chez les assureurs pour prévenir le blanchiment et la coordination, qui est faite avec le Centre d'analyse des opérations et déclarations financières du Canada (CANAFE), la lutte au blanchiment pourrait poser des défis dans certaines situations.

2. Si le tiers s'engage à payer les primes de l'assuré sans transfert de propriété (par exemple en échange de devenir bénéficiaire irrévocable de la police), l'assureur doit détecter qu'il y a un tiers impliqué puisque le compte à partir duquel le paiement a été effectué a changé et l'assureur devrait faire preuve de diligence raisonnable à l'égard de ce tiers. Et comme ci-dessus, la transaction pourrait faire partie d'un schéma de dispersion.

3. Si le nouveau propriétaire ou le tiers ne fait pas les paiements directement, mais rembourse simplement l'assuré en échange de devenir le bénéficiaire irrévocable en vertu de la police en vigueur, cela serait invisible à l'assureur. Cela représenterait le risque le plus important en matière de blanchiment d'argent puisque l'acquéreur pourra recevoir de l'argent en tant que bénéficiaire de la police, provenant de gains acquis malhonnêtement.

[6] La **dispersion** signifie la conversion des produits de la criminalité en une autre forme, créant ainsi des étapes complexes dans les opérations financières afin de dissimuler la piste de vérification, la source et les propriétaires des fonds. Cette étape peut comprendre des opérations comme l'achat ou la vente d'actions, de biens ou de services. Source : CANAFE - http://www.canafe-fintrac.gc.ca/publications/typologies/2009-05-01-fra.asp

Encadrement du rachat de police à des fins spéculatives au Canada

Au Canada, seulement quatre provinces n'interdisent pas expressément le commerce de contrats d'assurance vie (la Saskatchewan, le Québec, la Nouvelle-Écosse et le Nouveau-Brunswick), mais seul le Québec ne permet pas d'inclure une interdiction dans la police.

PROVINCES QUI INTERDISENT EXPRESSÉMENT LE COMMERCE DE CONTRATS D'ASSURANCE VIE		
Prov.	**Article interdisant le commerce de contrats d'assurance vie (français)**	**Article interdisant le commerce de contrats d'assurance vie (anglais)**
Ont.	**Interdiction de faire le commerce de polices d'assurance-vie** **115** Est coupable d'une infraction quiconque, n'étant ni assureur ni l'agent dûment autorisé d'un assureur, s'annonce ou se présente comme un souscripteur de polices d'assurance-vie ou de prestations accordées en vertu de celles-ci, ou fait le commerce de polices d'assurance-vie afin d'en permettre, à lui-même ou à une autre personne, la souscription, le rachat, le transfert, la cession, la mise en gage ou le nantissement. L.R.O. 1990, chap. I.8, art. 115. https://www.ontario.ca/fr/lois/loi/90i08	**Trafficking in life insurance policies prohibited** **115** Any person, other than an insurer or its duly authorized agent, who advertises or holds himself, herself or itself out as a purchaser of life insurance policies or of benefits thereunder, or who trafficks or trades in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation thereof to himself, herself or itself or any other person, is guilty of an offence. R.S.O. 1990, c. I.8, s. 115. https://www.ontario.ca/laws/statute/90i08
Man.	**Commerce interdit des polices d'assurance** **90** Commet une infraction la personne qui, n'étant pas un assureur ou l'agent dûment autorisé de celui-ci, annonce ou prétend qu'elle est acheteur de polices d'assurance-vie ou de prestations prévues par ces polices ou fait le commerce des polices d'assurance-vie avec l'intention d'en faire la vente, le rachat, le transfert, la cession, la mise en gage ou le nantissement pour elle-même ou pour une autre personne. http://web2.gov.mb.ca/laws/statutes/ccsm/_pdf.php?cap=i40	**Traffic in life insurance policies prohibited** **90** No person other than an insurer or its duly authorized agent shall advertise or hold himself out as a purchaser of life insurance policies or benefits thereunder, nor shall he traffic or trade in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge, or hypothecation thereof, to himself or any other person; and if he does so he is guilty of an offence. http://web2.gov.mb.ca/laws/statutes/ccsm/_pdf.php?cap=i40
Alb.		**Trafficking in life insurance policies** **784** Any person, other than a licensed life company, who (a) through advertisements or other means makes it known that the person is willing to purchase life insurance policies or the benefits under those policies, or

		(b) traffics or trades in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation of the benefits under those policies to any person is guilty of an offence. 1999 cI-5.1 s784 http://www.qp.alberta.ca/documents/Acts/i03.pdf
C.-B.		**Trafficking** **152.** Any person, other than an insurer or its authorized agent, who advertises, or holds himself or herself out, as a purchaser of life insurance policies or of benefits under them, or who traffics or trades in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation of them to himself or herself or any person, commits an offence against this Act. http://www.qp.gov.bc.ca/statreg/12037_01.htm
Î.-P.-É.		**Holding out as purchaser, seller, transferor etc. of life insurance policies, restricted** **73. (2)** No person other than an insurer or its duly authorized agent shall advertise or hold himself out as a purchaser of life insurance policies or benefits thereunder, nor shall he traffic or trade in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation thereof, to himself or any other person, and if he does so, he is guilty of an offence. R.S.P.E.I. 1974, Cap. I-5, s.72 https://www.princeedwardisland.ca/sites/default/files/legislation/I-04-Insurance%20Act.pdf
T.-N.-L.		**Trafficking in life insurance prohibited** **89.** A person other than an insurer or its authorized agent who advertises or holds himself or herself out as a purchaser of life insurance policies or of benefits under life insurance policies or who trafficks or trades in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation of them to himself or herself or another person is guilty of an offence. RSN1970 c176 s77 http://www.assembly.nl.ca/Legislation/sr/statutes/i10.htm

ENCADREMENT DANS LES AUTRES PROVINCES CANADIENNES		
Prov.	**Encadrement existant**	**Encadrement proposé**
		Anglais
Sask.	The Saskatchewan Insurance Act does not prohibit this practice but recognizes the validity of a provision in an insurance contract that prohibits any assignment of the insured's rights: **162(4)** A provision in a contract to the effect that the rights or interests of the insured, or in the case of group insurance the group life insured, are not assignable is valid. **250 (5)** A provision in a contract to the effect that the rights or interests of the insured, or in the case of a contract of group insurance the group person insured, are not assignable, is valid. http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/S26.pdf	Bill 177, which will implement new legislation, *The Insurance Act*, and repeal the *Saskatchewan Act* proposes to prohibit the traffic or trade of life insurance policies: **Trading in life insurance policies** **7-16** Unless specifically authorized in the regulations to do so, no person other than a life company shall: (a) advertise or hold himself, herself or itself out as a purchaser of life insurance policies or of benefits under life insurance policies; or (b) traffic or trade in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation of life insurance policies to himself, herself or itself or any other person.
N.-B.	La Loi sur les assurances du Nouveau-Brunswick n'interdit pas cette pratique, mais reconnaît la validité d'une disposition dans un contrat d'assurance qui interdit toute cession des droits de l'assuré : **161 (4)** Une disposition d'un contrat prévoyant que les droits ou intérêts de l'assuré ou, dans le cas d'une assurance-groupe, de la personne couverte par l'assurance-groupe sur la vie sont incessibles est valide. **210 (5)** Est valide une disposition du contrat stipulant que les droits et intérêts de l'assuré, ou, dans le cas d'un contrat d'assurance-groupe, de la personne couverte par ce contrat, sont incessibles. http://laws.gnb.ca/en/ShowPdf/cs/I-12.pdf	

N.-É.	The Nova Scotia Insurance Act does not prohibit this practice but recognizes the validity of a provision in an insurance contract that prohibits any assignment of the insured's rights: **90 (5)** A provision in a contract to the effect that the rights or interests of the insured, or in the case of a contract of group insurance the group person insured, are not assignable, is valid. **202 (4)** A provision in a contract to the effect that the rights or interests of the insured, or in the case of group insurance the group life insured, are not assignable is valid. https://nslegislature.ca/sites/default/files/legc/statutes/insurance.pdf

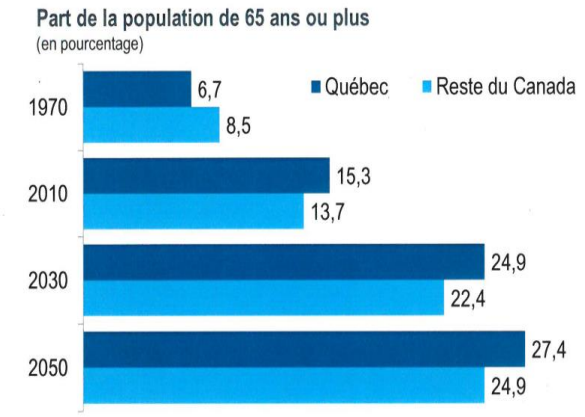
Cette revue du cadre légal mis en place dans les autres provinces pour interdire ou encadrer le trafic de police d'assurance vie laisse planer un risque important : le Québec pourrait devenir la terre d'accueil au pays de ce commerce abusif et aux pratiques discutables.

Une solution mise de l'avant par les assureurs : l'avance par compassion

De nombreux titulaires de polices au Canada ont accès de leur vivant aux prestations de leur assurance vie. C'est en 1988 que cette pratique a vu le jour : pour des raisons d'ordre humanitaire, un grand assureur a alors pris l'initiative de verser des prestations aux assurés en phase terminale. D'autres assureurs lui ont rapidement emboîté le pas. Et par conséquent, la plupart des assureurs vie donnent aujourd'hui accès aux assurés en phase terminale à une partie du capital assuré de leur police d'assurance vie de leur vivant. Les assureurs canadiens sont en fait des chefs de file dans ce domaine. D'ailleurs, cette initiative a ensuite été reproduite à grande échelle autour du globe.

La situation particulière du Québec

Au Québec en 2016, 6,4 millions de résidents du Québec sont couverts par une assurance vie (78 % de la population). Seulement pour ce produit, 2,6 milliards $ ont été versés en prestation en 2016 dans la province.



Ceux et celles qui font des affaires en tentant de racheter les polices d'assurance vie des clients malades ou âgés ciblent **le Québec,** car contrairement aux autres provinces, le Québec n'encadre pas et n'interdit plus, la cession de polices à des fins spéculatives. De plus, le Québec comporte une population vieillissante.

Interprétation de la disposition et collaboration proposée

Nous comprenons l'intention du législateur de ne pas priver le titulaire de police de son droit de la céder contre rétribution. Toutefois, en se fondant sur l'expérience de nos membres ici et à l'étranger, les amendements prévus au Code civil dans le projet de loi 150 ne seraient pas suffisants pour protéger nos clients. Cette réflexion est d'autant plus nécessaire que ce type de commerce est promis à se développer au Québec, puisque les autres provinces l'interdisent ou l'encadrent déjà.

Si le projet de loi 150 était adopté tel quel, une personne vulnérable financièrement et qui serait sollicitée par un « racheteur » pourrait donc céder sa police d'assurance vie en échange d'un pourcentage de la valeur de sa police, sans avoir l'information nécessaire pour prendre une décision éclairée. L'assureur pourrait, dans cette situation, racheter la police au même montant et résilier le contrat. Ainsi, l'assuré, qui ne peut changer d'idée, se trouverait privé de sa protection sur la vie, n'obtiendrait pas nécessairement le meilleur prix, lequel serait imposable, pour la vente de sa police d'assurance-vie à un spéculateur, etc.

Pour mieux répondre aux besoins des assurés, prévenir la fraude et le blanchiment et jouir d'un encadrement rigoureux, nous suggérons de ne pas adopter les articles 228 et 229.

Nous désirons toutefois offrir notre collaboration aux autorités du ministère des Finances ainsi qu'à celles de l'Autorité des marchés financiers, pour élaborer une solution équilibrée qui tiendra compte des différentes situations observées au cours des années.

Enjeux particuliers soulevés par la proposition

1. Légiférer le commerce de police d'assurance dans le Code civil rend impraticable l'établissement de conditions à l'intérieur desquelles ce commerce pourra être exercé, puisqu'il n'est pas d'usage d'établir des règlements afférents au Code civil du Québec. Il est donc vraisemblable qu'il n'y aurait pas d'encadrement supplémentaire. Pourtant, le gouvernement ou même l'Autorité des marchés financiers pourrait préciser les conditions de cession et corriger les pratiques observées.

2. Le projet de loi 150 oblige les compagnies d'assurance à entrer dans un marché qu'elles-mêmes dénoncent. Afin de limiter l'expansion du marché du commerce de l'assurance vie, les assureurs devront racheter leurs propres polices, à une valeur différente de celle prévue au contrat, et ce, en plus d'en assumer la supervision.

3. La possibilité pour l'assureur de racheter ces polices, comme prévu actuellement au projet de loi 150, n'est pas suffisante puisqu'elle engendre une série de risques quant à la mécanique applicable. Il y a entre autres un risque de collusion entre 2 personnes pour le rachat par la compagnie d'assurance, à un prix plus élevé que ce qui aurait été réellement donné. L'assureur devrait faire enquête pour connaître les modalités réelles d'une transaction et l'identité réelle du nouveau titulaire.

4. Aucune disposition ne prévoit l'information ou les conseils qui doivent être donnés au titulaire avant et lors de la cession, contrairement à la souscription d'une police qui est très réglementée. Les titulaires visés ne pourront porter plainte à l'AMF si aucun inscrit n'est impliqué. Si un conseiller certifié participait à la cession, il pourrait toucher des commissions additionnelles, ce qui peut soulever des préoccupations concernant le conflit d'intérêts.

5. Les investisseurs ou les fiducies qui prennent une police d'assurance vie au nom d'une personne âgée ou malade pourraient passer entre les mailles du filet et échapper à certaines lois (fausse déclaration, blanchiment, etc.). Les assureurs seraient donc à la merci de l'information qui sera fournie (STOLI).

6. Aucune des dispositions proposées ne tient compte du traitement fiscal des sommes reçues par le titulaire d'une police. La cession onéreuse de police d'assurance vie constitue un commerce qui, comme tout commerce, doit faire l'objet d'un certain encadrement fiscal. Les conséquences fiscales peuvent varier et sont généralement mal comprises par les titulaires qui cèdent leur police.

7. Le consommateur peut ne pas réaliser, au moment de la cession, tous les impacts de ce transfert de ses informations personnelles et de l'accès à ses renseignements médicaux.

8. Aucune disposition ne limite le nombre de fois qu'une police peut être vendue ou achetée.

9. Plusieurs questions non adressées se soulèvent quant aux possibles implications du commerce des polices en matière de valeurs mobilières (titrisation, etc.).

Conclusion : recommandations et pistes de collaboration

En terminant, l'acquisition et le transfert de polices d'assurance vie aux investisseurs sans intérêt assurable dans la vie des assurés sont des activités controversées, selon tous les experts. Michael Lovendusky[7] a étudié le phénomène et selon ses observations, les autorités réagissent de trois façons pour décourager les activités illégitimes, soit :

1. Ils réaffirment les exigences d'intérêt assurable[8].
2. Ils étendent la période d'interdiction de cession et exigent la divulgation du processus de cession (droit à l'information, au conseil, à l'annulation, etc.).
3. Ils créent de nouvelles infractions statutaires pour les tiers qui ont contracté une assurance vie avec une période illimitée pour les parties intéressées à la contester.

À défaut d'une interdiction de procéder à de telles transactions, voici certaines mesures qui pourraient, selon nous, être discutées et évaluées par un comité consultatif réunissant les intervenants du ministère des Finances, de l'Autorité des marchés financiers, de groupes représentants les aînés et les patients ainsi que ceux de l'ACCAP-Québec :

- L'intervention obligatoire d'un représentant certifié (analyse des besoins, identification du besoin du client afin de lui proposer le produit qui lui convient le mieux, etc.)
- L'information obligatoire requise permettant au titulaire de prendre une décision éclairée
- Le droit de révoquer l'entente
- Les critères de cession (ex : maladie chronique, perte d'emploi, décès du conjoint, etc.)
- La protection des renseignements personnels
- La prévention de la fraude (collusion) et du blanchiment
- La fiscalité
- Etc.

Nous serions heureux de contribuer à cette réflexion afin de doter le Québec d'un mécanisme permettant de mieux protéger les droits des citoyens visés par ces pratiques, parfois prédatrices et demeurons donc disponibles pour en discuter et partager nos connaissances sur la question. D'ici là, nous mettons en garde les parlementaires, car les dispositions proposées dans le projet de loi 150 permettront à certaines activités prédatrices de passer entre les mailles du filet.

Pourquoi ne pas débuter l'échange avec les acteurs interpellés par la maltraitance financière, dans le cadre du Forum sur la maltraitance matérielle et financière envers les personnes aînées, qui se tiendra à

[7] Michael Lovendusky est vice-président et secrétaire général associé de l'American Council of Life insurers à Washington, DC. L'ACLI réunit 353 entreprises membres représentant 93% de l'ensemble des actifs de l'industrie, 93% des primes d'assurance vie et 94% des rentes aux États-Unis.

[8] Au Québec, contrairement à ailleurs, l'absence d'intérêt d'assurance peut être palliée simplement avec le consentement de l'assuré (réf. article 2418 du Code civil du Québec).

Québec le 22 février prochain et qui réunira les principaux groupes et intervenants interpellés par cette importante question ?

Annexe 1 – Témoignage de Michael T. Mc Raith, Directeur de l'assurance, État de l'Illinois, Comité sénatorial américain sur le vieillissement, 29 avril 2009

Testimony of Michael T. McRaith
Director of Insurance
State of Illinois

Before the
Senate Special Committee on Aging
United States Senate

Regarding:
Life Settlements and the Need for Increased Transparency

April 29, 2009

Testimony of Michael T. McRaith Director of Insurance, State of Illinois

Introduction

Chairman Kohl, Ranking Member Martinez, and distinguished Members of the Committee, thank you for the invitation to talk with you about the financial safety of our aging population. My name is Michael McRaith. I am the Director of Insurance for the State of Illinois, and in that capacity I testify today.

State insurance officials have a demonstrable record of successful consumer protection and industry oversight. Twenty-eight (28) of the fifty (50) largest insurance markets in the world are individual States within our nation, but we also respond to more than 3,000.000 consumer inquiries annually. The US insurance market surpasses the combined size of the second, third and fourth next largest markets.

In 2007, 387 life insurance companies reported $4,635,396,241 in direct Illinois premiums for Individual Ordinary Life policies and 219 companies reported $1,664,187,690 in direct Illinois premiums for Group Life Business. As of 2007, companies reported 6,941,391 individual policies in force in Illinois and 196,860 group policies in force, the latter accounting for 5,027,538 certificates. With a market of this magnitude, Illinois is fertile ground for those who would prey upon our aging population.

Each day state regulators focus our responsibilities on ensuring that the insurance safety net remains available when individuals, families and businesses are in need. With a proud record of success, insurance regulation constantly evolves, innovates and improves to meet the needs of consumers and industry.

For this reason, we are grateful to the Special Committee for shining additional light on this still-murky marketplace known as "life settlements," a pernicious subset of which is known as "stranger-owned life insurance" (STOLI). With more seniors in need of supplemental income due to the economic crisis and the concurrent degradation of retirement assets, now is the time for this discussion. As insurance regulators, consumer protection has been, is and will remain priority one, and the information deficit with which we function relative to STOLI causes grave concern.

STOLi - Dangerous for Seniors.

STOLI is a problem for Illinois' aging population because such arrangements often lead to unanticipated problems, including:

1. income taxes on cash payments that lured the consumer into the scheme;

2. income tax liability on proceeds from the sale of the insurance policy, which are often unexplained;

3. income tax liability if the premium payment is determined to be a gift in excess of the gift tax limitations;

4. loss of access to public health or other aid programs;

5. loss of access to other insurance products with legitimate insurance purposes;

6. phone calls from Wall Street, or elsewhere, from unknown third parties inquiring about health status;

7. widespread, unregulated dissemination of a senior's health records; and

8. potential liability for the senior's estate if the life insurer rescinds the policy due to fraud.

Life Settlements -Regulation Must Protect Our Seniors.

This Committee's efforts, through this hearing and elsewhere, exemplify the national leadership that with greatly enhance our work at the State level. To this day, our nation remains largely uninformed about:

1. the mechanics of life settlement transactions;

2. the sources of capital for life settlement transactions;

3. the payment arrangements between the involved commercial participants;

4. the marketing and sales practices used to lure our aging population;

5. the identity and type of deal participants;

6. the identity of policyholders and beneficiaries;

7. the sources of profit within a transaction;

8. the regularity and substance of communications between investors and beneficiaries; and

9. the impact on tens of thousands of individual consumers.

In Illinois, our most significant challenges involve a life settlement marketplace about which little is known or can be determined based on reported information. As insurance regulators, we aim to support legislators and to provide data and information on which rest critical consumer protection decisions and legislation. Our regulatory objectives can be stifled when we lack the factual foundation on which sound public policy can be based.

Since 1996, Illinois has regulated transactions commonly known as "viatical settlements," or transactions in which a life insurance policy is sold due to the terminal illness of the policyholder.[9] This law, based on the model developed by the National Association of Insurance Commissioners (NAIC), arose from the business model created during the mid-to late 1980's that afforded HIV/AIDS patients the ability to settle life insurance policies and receive funds for personal or medical expenses prior to death.

Fortunately, treatment and resources for those infected with HIV/AIDS improved. Regrettably, viatical settlements grew into the broader "life settlement" phenomenon, which then developed a strain of the predatory practices known as STOLI.

On September 11, 2007, the Chicago Tribune printed a full-page advertisement in which adults over the age of 55 were invited to meet former Chicago Bear Mike Ditka. Included in the "symposium" enticements was the opportunity to learn about "'free insurance" and how not to "outlive your life insurance." A copy (8.5 x 11) of one-quarter of this advertisement is attached hereto as Exhibit A, and an actual-size version of the entire advertisement will be provided to Committee staff at the hearing on April 29, 2009. Promotions such as this demonstrate that life settlements and STOLI are not marketed solely to wealthy, sophisticated consumers.

In this decade, the life settlement industry has reportedly exploded from an approximately $2 billion enterprise to an approximately $15 billion enterprise, although the exact size, volume and cumulative dollar value of transactions remains uncertain. Insurance regulators, media reports, and the former New York Attorney General, among others, raised public awareness about the explosive growth of STOLI, including abusive marketing and compensation practices. A frequent target of investigations, hearings and news stories has been Coventry First, L.L.C. ("Coventry").

Rather than rely upon allegations or findings by regulators or law enforcement from other states, we sought to scrutinize independently the size and scope of the life settlement industry in Illinois. We identified a need for Illinois to have state-specific information. Accordingly, in October 2007, we served Coventry -- reportedly the nation's largest participant in the life settlement market -- with a subpoena for Illinois-related records and information.

Rather than comply with the subpoena, Coventry filed a lawsuit in February 2008, contending that Illinois laws regulating viatical settlements do not regulate the life settlement industry. See Coventry First, L.L.C. v. McRaith, et al., No. 08 CH 5537 (Cook County Circuit Court). Represented by the Office of the Attorney General of the State of Illinois, we (the State) prevailed in the Circuit Court, a decision which Coventry promptly appealed. See Coventry First, L.L.C. v. McRaith, et al., No. 08-1917 (Ill. App. Ct. 1st Dist.). Among other arguments, Coventry asserts that legislative activity in Illinois, and elsewhere, constitutes an admission that our current laws do not subject the Coventry business model to regulatory oversight. The appeal remains pending.

In January 2008, Senator William Haine, chairman of the Illinois Senate's Insurance Committee, and Representative Frank Mautino, chairman of the Illinois House's Insurance Committee, introduced parallel legislation to the Illinois General Assembly consisting of a modified version

[9] For purposes of this written testimony, the terms "viatical settlement" and "life settlements" shall have identical meaning.

of the model act proposed by the National Conference of Insurance Legislators (NCOIL) and the model developed by the NAIC, respectively. The draft legislation now pending constitutes a hybrid of the best provisions of each model, including clearly articulated consumer protections and regulatory tools. Through seventeen (17) months, the effective and balanced leadership of Senator Haine and Representative Mautino have brought Illinois to the brink of effective consumer protection legislation.

Regulation of Life Settlements - An Effective Solution.

If passed, Illinois law will recognize the valuable rights that policyholders have in a life insurance policy. Recognizing legitimate estate-planning needs and the often unanticipated volatility of life, any prohibition on STOLI should permit lawful life settlements when:

1. the viator exercises conversion rights arising from a group or individual policy, provided that the time covered under the conversion policy plus the time covered under the prior policy exceed twenty-four (24) months;

2. the viator is terminally or chronically ill;

3. the viator's spouse dies;

4. the viator divorces;

5. the viator retires from full-time employment;

6. the viator becomes physically or mentally disabled and a physician determines the disability precludes full-time employment;

7. the sole beneficiary is a family member and the beneficiary dies; an

8. in any other condition that the regulator determines to be an extraordinary circumstance, as determined by rule.

Illinois' draft legislation does not prohibit family members from supporting one another in the purchase of a life insurance policy, but does prohibit the financing of a premium by a hedge fund or other third party. The draft bill allows viatical settlement transactions that do not constitute STOLI, as explicitly described in items 1-8, but prohibits those transactions in which the policy is initiated for the benefit of a third-party investor.

As noted above, STOLI and the business practice of "life settlements" has grown explosively. In recent years. investors who purchased large blocks of life insurance policies on the secondary market encountered solvency and liquidity problems if the individuals did not die in a timely fashion. STOLI business models have evolved so that complicated series of trusts generate a veneer of a genuine "insurable interest," even though the veneer shields the identity of a third party investor.

Many justifiably argue that our current economic crisis was caused by the failure of federal regulators and rating agencies to understand the bundles of assets and potential liabilities on which much of the Wall Street wealth was based. Despite rating agency and regulator concerns, few actually knew and understood the sophisticated financial products on which institutional profit was based. Indeed, our current economic crisis illustrates the need for STOLI regulation that does not remain static but provides regulators with the tools and data on which to base public policy recommendations to legislators. In other words, effective STOLI regulation requires:

1. licensing of viatical settlement brokers, including solicitors and promoters;

2. licensing of viatical settlement providers;

3. regulation of viatical settlement transactions;

4. at least annual reporting by viatical settlement providers to the regulator; and,

5. regulator authority to examine and impose appropriate penalties on all participants in a viatical settlement transaction.

Licensing and reporting requirements, combined with examination authority, provide the regulator with tools needed to protect our aging population. STOLI emerged, and has grown, as a business model because investors, providers and brokers generate enormous profits -- an incentive to circumvent any regulation. For this reason, as illustrated by the credit default swap fiasco, mandatory, thorough and annual reporting will aid regulators so that applicable law and oversight can evolve with the marketplace.

Given the lack of information publicly available to State and Federal. legislators regarding the impact of STOLI and life settlements on our aging population, many states, like Illinois, have moved forward with legislation to regulate the viatical, or life settlement industry. Effective regulation, however, will not statutorily endorse a business model about which policymakers and regulators remain largely ignorant. With more seniors growing ever more vulnerable, and with more investors looking for certainty of a return, i.e. as certain as death, the time for effective regulation is now.

Conclusion

STOLI arrangements are predatory, abusive practices that convert the lives of our elderly parents, friends and neighbors into commodities. The State of Illinois, led by two great legislators, Senator Haine and Representative Mautino, has drafted balanced but effective legislation that, if passed, will protect consumers, and preserve our seniors' ability to enter into legitimate estate-planning arrangements.

We welcome the interest of Congress and this Special Committee in this important consumer protection initiative. As we move forward with regulation of STOLI and viatical settlement transactions, we pledge to share our experience, expertise and Congress and to work with the members and staff of this Special Committee.

Regulation of all financial sectors must allow for innovation and efficiency. Not under any circumstance, though, should consumer interest be sacrificed for the benefit of market goals. In this instance, as we work to protect our aging population from predators, we must remain vigilant to limit, if not eliminate, the potential abuses of life settlement practices.

Thank you for the opportunity to testify, and I look forward to your que

Annexe 2 – Modèle du projet de loi sur la cession de police d'assurance vie à un tiers adopté et promu par la National Conference of Insurance Legislator

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
LIFE SETTLEMENTS MODEL ACT

Readopted by the NCOIL Executive Committee on March 9, 2014
Adopted by the NCOIL Executive Committee on November 16, 2007
Amended by the NCOIL Life Insurance & Financial Planning Committee on November 15, 2007
Amended by the Executive Committee on July 16, 2004
Adopted by the Executive Committee on November 17, 2000.

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[DRAFTING NOTE: "It is an essential public policy objective to protect consumers against stranger-originated life insurance (STOLI). STOLI is a practice or plan to initiate a life insurance policy for the benefit of a third party investor who, at the time of policy origination, has no insurable interest in the insured. STOLI practices include but are not limited to cases in which life insurance is purchased with resources or guarantees from or through a person, or entity, who, at the time of policy inception, could not lawfully initiate the policy themselves, and where, at the time of inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy and/or the policy benefits to a third party. Trusts, that are created to give the appearance of insurable interest, and are used to initiate policies for investors, violate insurable interest laws and the prohibition against wagering on life. STOLI arrangements do not include those practices set forth in Section 2L(2) of this Act.

Trusts that are created to give the appearance of insurable interest and are used to manufacture policies for investors are illegal STOLI schemes. As the United States Supreme Court held, a person with insurable interest cannot lend that insurable interest "as a cloak to what is in its inception a wager." Grigsby v.Russell, 222 U.S. 149 (1911).

Therefore, states should consider adopting an amendment to their insurable interest laws, if necessary, to provide additional protection against trust-initiated STOLI and other schemes involving a cloak, as follows:

'In accordance with Grigsby v. Russell, 222 U.S. 149, it shall be a violation of insurable interest for any person or entity without insurable interest to provide or arrange for the funding ultimately used to pay premiums, or the majority of premiums, on a life insurance policy, and, at policy inception have an arrangement for such person or entity to have an ownership interest in the majority of the death benefit of that life insurance policy.'"

Section 1. Short Title

Sections 1 through 18 of this Act may be cited as the 'Life Settlements Act.'

Section 2. Definitions

A. 'Advertisement' 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, published, disseminated, circulated or placed before the public, directly or indirectly, for the purpose of creating an interest in or inducing a Person to purchase or sell, assign, devise, bequest or transfer the death benefit or ownership of a life insurance policy or an interest in a life insurance policy pursuant to a Life Settlement Contract.

B. 'Broker' means a Person who, on behalf of an Owner and for a fee, commission or other valuable consideration, offers or attempts to negotiate Life Settlement Contracts between an Owner and Providers. A Broker represents only the Owner and owes a fiduciary duty to the Owner to act according to the Owner's instructions, and in the best interest of the Owner, notwithstanding the manner in which the Broker is compensated. A Broker does not include an attorney, certified public accountant or financial planner retained in the type of practice customarily performed in their professional capacity to represent the Owner whose compensation is not paid directly or indirectly by the Provider or any other person, except the Owner.

C. 'Business of life settlements' means an activity involved in, but not limited to, offering to enter into, soliciting, negotiating, procuring, effectuating, monitoring, or tracking, of Life Settlement Contracts.

D. 'Chronically ill' means:

1. being unable to perform at least two (2) activities of daily living (i.e., 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.

E. 'Commissioner' means the Commissioner or Superintendent of the Department of Insurance.

F. ‘Financing Entity’ means an underwriter, placement agent, lender, purchaser of securities, purchaser of a policy or certificate from a Provider, credit enhancer, or any entity that has a direct ownership in a policy or certificate that is the subject of a Life Settlement Contract, but:

1. whose principal activity related to the transaction is providing funds to effect the Life Settlement Contract or purchase of one or more policies; and

2. who has an agreement in writing with one or more Providers to finance the acquisition of Life Settlement Contracts.

‘Financing Entity’ does not include a non-accredited investor or Purchaser.

G. ‘Financing Transaction’ means a transaction in which a licensed Provider obtains financing from a Financing Entity including, without limitation, any secured or unsecured financing, any securitization transaction, or any securities offering which either is registered or exempt from registration under federal and state securities law.

H. ‘Fraudulent Life Settlement Act’ includes:

1. Acts or omissions committed by any person who, knowingly and with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits, or permits its employees or its agents to engage in acts including, but not limited to:

(a) Presenting, causing to be presented or preparing with knowledge and belief that it will be presented to or by a Provider, Premium Finance lender, Broker, insurer, insurance producer or any other person, false material information, or concealing material information, as part of, in support of, or concerning a fact material to one or more of the following:

(i) An application for the issuance of a Life Settlement Contract or insurance policy;

(ii) The underwriting of a Life Settlement Contract or insurance policy;

(iii) A claim for payment or benefit pursuant to a Life Settlement Contract or insurance policy;

(iv) Premiums paid on an insurance policy;

(v) Payments and changes in ownership or beneficiary made in accordance with the terms of a Life Settlement Contract or insurance policy;

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

(vii) In the solicitation, offer to enter into, or effectuation of a Life Settlement Contract, or insurance policy;

(viii) The issuance of written evidence of Life Settlement Contracts or insurance;

(ix) Any application for or the existence of or any payments related to a loan secured directly or indirectly by any interest in a life insurance policy; or

(x) Enter into any practice or plan which involves STOLI.

(b) Failing to disclose to the insurer where the request for such disclosure has been asked for by the insurer that the prospective insured has undergone a life expectancy evaluation by any person or entity other than the insurer or its authorized representatives in connection with the issuance of the policy.

(c) Employing any device, scheme, or artifice to defraud in the business of life settlements.

(d) In the solicitation, application or issuance of a life insurance policy, employing any device, scheme or artifice in violation of state insurable interest laws.

2. In the furtherance of a fraud or to prevent the detection of a fraud any person commits or permits its employees or its agents 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 life settlements;

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

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

(d) File with the Commissioner or the chief insurance regulatory official of another jurisdiction a document containing false information or otherwise concealing information about a material fact from the Commissioner;

(e) Engage in embezzlement, theft, misappropriation or conversion of monies, funds, premiums, credits or other property of a Provider, insurer, insured, owner, insurance, policy owner or any other person engaged in the business of life settlements or insurance;

(f) Knowingly and with intent to defraud, enter into, broker, or otherwise deal in a Life Settlement Contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, where the owner or the owner's agent intended to defraud the policy's issuer;

(g) Attempt to commit, assist, aid or abet in the commission of, or conspiracy to commit the acts or omissions specified in this subsection; or

(h) Misrepresent the state of residence of an owner to be a state or jurisdiction that does not have a law substantially similar to this Act for the purpose of evading or avoiding the provisions of this Act.

I. 'Insured' means the person covered under the policy being considered for sale in a Life Settlement Contract.

J. 'Life expectancy' means the arithmetic mean of the number of months the Insured under the life insurance policy to be settled can be expected to live as determined by a life expectancy company considering medical records and appropriate experiential data.

K. ‘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 *[insert reference to applicable producer licensing statute, with specific reference to a life insurance or equivalent line of authority*].

L. ‘Life Settlement Contract’ means a written agreement entered into between a Provider and an Owner, establishing the terms under which compensation or any thing of value will be paid, which compensation or thing of value is less than the expected death benefit of the insurance policy or certificate, in return for the owner’s assignment, transfer, sale, devise or bequest of the death benefit or any portion of an insurance policy or certificate of insurance for compensation, provided, however, that the minimum value for a Life Settlement Contract shall be greater than a cash surrender value or accelerated death benefit available at the time of an application for a Life Settlement Contract. “Life Settlement Contract” also includes the transfer for compensation or value of ownership or beneficial interest in a trust or other entity that owns such policy if the trust or other entity was formed or availed of for the principal purpose of acquiring one or more life insurance contracts, which life insurance contract insures the life of a person residing in this State.

1. ‘Life Settlement Contract’ also includes

   (a) a written agreement for a loan or other lending transaction, secured primarily by an individual or group life insurance policy; or

   (b) a premium finance loan made for a policy on or before the date of issuance of the policy where:

      (i.) The loan proceeds are not used solely to pay premiums for the policy and any costs or expenses incurred by the lender or the borrower in connection with the financing; or

      (ii.) The Owner receives on the date of the premium finance loan a guarantee of the future life settlement value of the policy; or

      (iii.) The Owner 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.

2. ‘Life Settlement Contract’ does not include:

   (a) A policy loan by a life insurance company pursuant to the terms of the life insurance policy or accelerated death provisions contained in the life insurance policy, whether issued with the original policy or as a rider;

   (b) A premium finance loan, as defined herein, or any loan made by a bank or other licensed financial institution, provided that neither default on such loan nor the transfer of the policy in connection with such default is pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this Act;

   (c) A collateral assignment of a life insurance policy by an owner;

   (d) A loan made by a lender that does not violate [*insert reference to state’s insurance premium finance law*], provided such loan is not described in

Paragraph (1) above, and is not otherwise within the definition of Life Settlement Contract;

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

(f) 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;

(g) A bona fide business succession planning arrangement:

(i.) Between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trust established by its shareholders;

(ii.) Between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trust established by its partners; or

(iii.) 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 trust established by its members;

(h) An agreement entered into by a service recipient, or a trust established by the service recipient, and a service provider, or a trust established by the service provider, who performs significant services for the service recipient's trade or business; or

(i) Any other contract, transaction or arrangement from the definition of Life Settlement Contract that the Commissioner determines is not of the type intended to be regulated by this Act.

M. 'Net death benefit" means the amount of the life insurance policy or certificate to be settled less any outstanding debts or liens.

N. 'Owner' means the owner of a life insurance policy or a certificate holder under a group policy, with or without a terminal illness, who enters or seeks to enter into a Life Settlement Contract. For the purposes of this article, an Owner shall not be limited to an Owner of a life insurance policy or a certificate holder under a group policy that insures the life of an individual with a terminal or chronic illness or condition except where specifically addressed. The term 'Owner' does not include:

1. any Provider or other licensee under this Act;

2. a qualified institutional buyer as defined in Rule 144A of the federal Securities Act of 1933, as amended;

3. a financing entity;

4. a special purpose entity; or

5. a related provider trust.

O. ‘Patient identifying information’ means an insured’s address, telephone number, facsimile number, electronic mail address, photograph or likeness, employer, employment status, social security number, or any other information that is likely to lead to the identification of the insured.

P. ‘Policy’ means an individual or group policy, group certificate, contract or arrangement of life insurance owned by a resident of this state, regardless of whether delivered or issued for delivery in this state.

Q. ‘Premium Finance Loan’ is a loan made primarily for the purposes of making premium payments on a life insurance policy, which loan is secured by an interest in such life insurance policy.

R. ‘Person’ means any natural person or legal entity, including but not limited to, a partnership, Limited Liability Company, association, trust or corporation.

S. ‘Provider’ means a Person, other than an Owner, who enters into or effectuates a Life Settlement Contract with an Owner, A Provider does not include:

1. any bank, savings bank, savings and loan association, credit union;

2. a licensed lending institution or creditor or secured party pursuant to a Premium Finance Loan agreement which takes an assignment of a life insurance policy or certificate issued pursuant to a group life insurance policy as collateral for a loan;

3. the insurer of a life insurance policy or rider to the extent of providing accelerated death benefits or riders under [*refer to law or regulation implementing or accelerated death benefits provision*] or cash surrender value;

4. any natural Person who enters into or effectuates no more than one agreement in a calendar year for the transfer of a life insurance policy or certificate issued pursuant to a group life insurance policy, for compensation or anything of value less than the expected death benefit payable under the policy;

5. a Purchaser;

6. any authorized or eligible insurer that provides stop loss coverage to a provider; purchaser, financing entity, special purpose entity, or related provider trust;

7. a Financing Entity;

8. a Special Purpose Entity;

9. a Related Provider Trust;

10. a Broker; or

11. an accredited investor or qualified institutional buyer as defined in respectively in regulation D, rule 501 or rule 144A of the federal securities act of 1933, as amended, who purchases a life settlement policy from a Provider.

T. ‘Purchased Policy’ means a policy or group certificate that has been acquired by a Provider pursuant to a Life Settlement Contract.

U. ‘Purchaser’ means a Person who pays compensation or anything of value as consideration for a beneficial interest in a trust which is vested with, or for the assignment, transfer or sale of, an ownership or other interest in a life insurance policy or a certificate issued pursuant to a group life insurance policy which has been the subject of a Life Settlement Contract.

V. ‘Related Provider Trust’ means a titling trust or other trust established by a licensed Provider or a Financing Entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a Financing Transaction. In order to qualify as a Related Provider Trust, the trust must have a written agreement with the licensed Provider under which the licensed Provider is responsible for ensuring compliance with all statutory and regulatory requirements and under which the trust agrees to make all records and files relating to life settlement transactions available to the Department of Insurance as if those records and files were maintained directly by the licensed Provider.

W. ‘Settled policy’ means a life insurance policy or certificate that has been acquired by a Provider pursuant to a Life Settlement Contract.

X. ‘Special Purpose Entity’ means a corporation, partnership, trust, limited liability company, or other legal entity formed solely to provide either directly or indirectly access to institutional capital markets:

1. for a financing entity or provider; or

(a) in connection with a transaction in which the securities in the special purpose entity are acquired by the owner or by a “qualified institutional buyer” 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.

Y. ‘Stranger-Originated Life Insurance’ or ‘STOLI’ is a practice or plan to initiate a life insurance policy for the benefit of a third party investor who, at the time of policy origination, has no insurable interest in the insured. STOLI practices include but are not limited to cases in which life insurance is purchased with resources or guarantees from or through a person, or entity, who, at the time of policy inception, could not lawfully initiate the policy himself or itself, and where, at the time of inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy and/or the policy benefits to a third party. Trusts, that are created to give the appearance of insurable interest, and are used to initiate policies for investors, violate insurable interest laws and the prohibition against wagering on life. STOLI arrangements do not include those practices set forth in Section 2L(2) of this Act.

Z. ‘Terminally Ill’ means having an illness or sickness that can reasonably be expected to result in death in twenty-four (24) months or less.

Section 3. Licensing Requirements

A. No Person, wherever located, shall act as a Provider or Broker with an Owner or multiple Owners who is a resident of this state, without first having obtained a license from the Commissioner**.** If there is more than one owner on a single policy and the owners are residents of different states, the Life Settlement Contract shall be governed by the law of the state in which the owner having the largest percentage ownership resides or, if the owners hold equal ownership, the state of residence of one owner agreed upon in writing by all owners.

B. Application for a Provider, or Broker, license shall be made to the Commissioner by the applicant on a form prescribed by the Commissioner, and the application shall be accompanied by a fee in an amount established by the Commissioner, provided, however, that the license and renewal fees for a Provider license shall be reasonable and that the license and renewal fees for a Broker license shall not exceed those established for an insurance producer, as such fees are otherwise provided for in this chapter.

C. A life insurance producer who has been duly licensed as a resident insurance producer with a life line of authority in this state or his or her 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 Broker.

D. Not later than thirty (30) days from the first day of operating as a Broker, the life insurance producer shall notify the Commissioner that he or she is acting as a Broker on a form prescribed by the Commissioner, and shall pay any applicable fee to be determined by the Commissioner. Notification shall include an acknowledgement by the life insurance producer that he or she will operate as a Broker in accordance with this Act.

E. The insurer that issued the policy that is the subject of a Life Settlement Contract shall not be responsible for any act or omission of a Broker or Provider or Purchaser arising out of or in connection with the life settlement transaction, unless the insurer receives compensation for the placement of a Life Settlement Contract from the Provider or Purchaser or Broker in connection with the Life Settlement Contract.

F. 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 Owner, whose compensation is not paid directly or indirectly by the Provider or Purchaser, may negotiate Life Settlement Contracts on behalf of the Owner without having to obtain a license as a Broker.

G. Licenses may be renewed every [*INSERT NUMBER OF YEARS*] on the anniversary date upon payment of the periodic renewal fee. As specified by subsection B of this section, the renewal fee for a Provider shall not exceed a reasonable fee. Failure to pay the fee within the terms prescribed shall result in the automatic revocation of the license requiring periodic renewal.

H. The term of a Provider license shall be equal to that of a domestic stock life insurance company and the term of a Broker license shall be equal to that of an insurance producer license. Licenses requiring periodic renewal may be renewed on their anniversary date upon payment of the periodic renewal fee as specified in subsection B of this section. Failure to pay the fees on or before the renewal date shall result in expiration of the license.

I. The applicant shall provide such information as the Commissioner may require on forms prepared by the Commissioner. The Commissioner shall have authority, at any time, to require such applicant to fully disclose the identity of its stockholders (except stockholders owning fewer than ten percent of the shares of an applicant whose shares are publicly traded), partners, officers and employees, and the Commissioner may, in the exercise of the Commissioner's sole discretion, refuse to issue such a license in the name of any Person if not satisfied that any officer, employee, stockholder or partner thereof who may materially influence the applicant's conduct meets the standards of Sections 1 to 14 of this Act.

J. A license issued to a partnership, corporation or other entity authorizes all members, officers and designated employees to act as a licensee under the license, if those Persons are named in the application and any supplements to the application.

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

1. if a Provider, has provided a detailed plan of operation;

2. is competent and trustworthy and intends to transact its business in good faith;

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

4. if the applicant is a legal entity, is formed or organized pursuant to the laws of this state or is a foreign legal entity authorized to transact business in this state, or provides a certificate of good standing from the state of its domicile; and

5. has provided to the Commissioner an anti-fraud plan that meets the requirements of section 13 of this Act and includes:

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

(b) a description of the procedures for reporting fraudulent insurance acts to the Commissioner;

(c) a description of the plan for anti-fraud education and training of its underwriters and other personnel; and

(d) a written description or chart outlining the arrangement of the anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent insurance acts and investigating unresolved material inconsistencies between medical records and insurance applications.

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

M. Each licensee shall file with the Commissioner on or before the first day of March of each year an annual statement containing such information as the Commissioner by rule may prescribe.

N. A Provider may not use any Person to perform the functions of a Broker as defined in this Act unless the Person holds a current, valid license as a Broker, and as provided in this Section.

O. A Broker may not use any Person to perform the functions of a Provider as defined in this Act unless such Person holds a current, valid license as a Provider, and as provided in this Section.

P. A Provider, or Broker shall provide to the Commissioner new or revised information about officers, ten percent or more stockholders, partners, directors, members or designated employees within thirty days of the change.

Q. An individual licensed as a Broker shall complete on a biennial basis fifteen (15) hours of training related to life settlements and life settlement transactions, as required by the Commissioner;

provided, however, that a life insurance producer who is operating as a Broker pursuant to this Section 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.

Section 4. License Suspension, Revocation or Refusal to Renew

A. The Commissioner may suspend, revoke or refuse to renew the license of any licensee if the Commissioner finds that:

1. there was any material misrepresentation in the application for the license;

2. the licensee or any officer, partner, member or director has been guilty of fraudulent or dishonest practices, is subject to a final administrative action or is otherwise shown to be untrustworthy or incompetent to act as a licensee;

3. the Provider demonstrates a pattern of unreasonably withholding payments to policy Owners;

4. the licensee no longer meets the requirements for initial licensure;

5. the licensee or any officer, partner, member or director has been convicted of a felony, or of any misdemeanor of which criminal fraud is an element; or the licensee has pleaded guilty or nolo contendere with respect to any felony or any misdemeanor of which criminal fraud or moral turpitude is an element, regardless whether a judgment of conviction has been entered by the court;

6. the Provider has entered into any Life Settlement Contract that has not been approved pursuant to the Act;

7. the Provider has failed to honor contractual obligations set out in a Life Settlement Contract;

8. the Provider has assigned, transferred or pledged a settled policy to a person other than a Provider licensed in this state, a purchaser, an accredited investor or qualified institutional buyer as defined respectively in Regulation D, Rule 501 or Rule 144A of the Federal Securities Act of 1933, as amended, financing entity, special purpose entity, or related provider trust; or

9. the licensee or any officer, partner, member or key management personnel has violated any of the provisions of this Act.

B. Before the Commissioner denies a license application or suspends, revokes or refuses to renew the license of any licensee under this Act, the Commissioner shall conduct a hearing in accordance with this state's laws governing administrative hearings.

Section 5. Contract Requirements

A. No Person may use any form of Life Settlement Contract in this state unless it has been filed with and approved, if required, by the Commissioner in a manner that conforms with the filing procedures and any time restrictions or deeming provisions, if any, for life insurance forms, policies and contracts.

B. No insurer may, as a condition of responding to a request for verification of coverage or in connection with the transfer of a policy pursuant to a Life Settlement Contract, require that the Owner, Insured, Provider or Broker sign any form, disclosure, consent, waiver or acknowledgment that has not been expressly approved by the Commissioner for use in connection with Life Settlement Contracts in this state.

C. A Person shall not use a Life Settlement Contract form or provide to an Owner a disclosure statement form in this state unless first filed with and approved by the Commissioner. The Commissioner shall disapprove a Life Settlement Contract form or disclosure statement form if, in the Commissioner's opinion, the contract or provisions contained therein fail to meet the requirements of Sections 8, 9, 11 and 15B of this Act or are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the Owner. At the Commissioner's discretion, the Commissioner may require the submission of advertising material.

Section 6. Reporting Requirements and Privacy

A. For any policy settled within five (5) years of policy issuance, each Provider shall file with the Commissioner on or before March 1 of each year an annual statement containing such information as the Commissioner may prescribe by regulation. In addition to any other requirements, the annual statement shall specify the total number, aggregate face amount and life settlement proceeds of policies settled during the immediately preceding calendar year, together with a breakdown of the information by policy issue year. The annual statement shall also include the names of the insurance companies whose policies have been settled and the Brokers that have settled said policies.

1. Such information shall be limited to only those transactions where the Insured is a resident of this state and shall not include individual transaction data regarding the business of life settlements or information that there is a reasonable basis to believe could be used to identify the Owner or the Insured.

2. Every Provider that willfully fails to file an annual statement as required in this section, or willfully fails to reply within thirty days to a written inquiry by the Commissioner in connection therewith, shall, in addition to other penalties provided by this chapter, be subject, upon due notice and opportunity to be heard, to a penalty of up to two hundred fifty dollars per day of delay, not to exceed twenty-five thousand dollars in the aggregate, for each such failure.

B. Except as otherwise allowed or required by law, a Provider, 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 the identity of an insured or information that there is a reasonable basis to believe could be used to identify the insured or the insured's financial or medical information to any other person unless the disclosure:

1. is necessary to effect a Life Settlement Contract between the owner and a Provider and the owner and insured have provided prior written consent to the disclosure;

2. is necessary to effectuate the sale of Life Settlement Contracts, or interests therein, as investments, provided the sale is conducted in accordance with applicable state and federal securities law and provided further that the Owner and the insured have both provided prior written consent to the disclosure;

3. is 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 13;

4. is a term or condition to the transfer of a policy by one Provider to another Provider, in which case the receiving Provider shall be required to comply with the confidentiality requirements of Section 6B;

5. is necessary to allow the Provider or Broker or their authorized representatives to make contacts for the purpose of determining health status. For the purposes of this section, the term "authorized representative" shall not include any person who has or may have any financial interest in the settlement contract other than a Provider, licensed Broker, financing entity, related provider trust or special purpose entity; further, a Provider or Broker shall require its authorized representative to agree in writing to adhere to the privacy provisions of this Act; or

6. is required to purchase stop loss coverage.

[Drafting Note: In implementing this section, states should keep in mind privacy considerations of insureds. However, the language needs to be broad enough to allow licensed entities to notify Commissioners of unlicensed activity and for insurers to make necessary disclosures to insurers and in similar situations.]

C. Non-public personal information solicited or obtained in connection with a proposed or actual life settlement contract shall be subject to the provisions applicable to financial institutions under the federal Gramm Leach Bliley Act, P.L. 106-102 (1999), and all other state and federal laws relating to confidentiality of non-public personal information.

Section 7. Examination

[Drafting Note: NCOIL has established a Model Act for the examination of insurers. This Model should be applied to settlement companies. Where practicable, examination should be detailed in a rule adopted by the Commissioner under the authority of this law.]

A. The Commissioner may, when the Commissioner deems it reasonably necessary to protect the interests of the public, examine the business and affairs of any licensee or applicant for a license. The Commissioner may order any licensee or applicant to produce any records, books, files or other information reasonably necessary to ascertain whether such licensee or applicant is acting or has acted in violation of the law or otherwise contrary to the interests of the public. The expenses incurred in conducting any examination shall be paid by the licensee or applicant.

B. In lieu of an examination under this Act of any foreign or alien licensee licensed in this state, the Commissioner may, at the Commissioner's discretion, accept an examination report on the licensee as prepared by the Commissioner for the licensee's state of domicile or port-of-entry state.

C. Names of and individual identification data, or for all Owners and insureds shall be considered private and confidential information and shall not be disclosed by the Commissioner unless required by law.

D. Records of all consummated transactions and Life Settlement Contracts shall be maintained by the Provider for three years after the death of the insured and shall be available to the Commissioner for inspection during reasonable business hours.

E. Conduct of Examinations

1. Upon determining that an examination should be conducted, the Commissioner shall Issue an examination warrant appointing one or more examiners to perform the

examination and instructing them as to the scope of the examination. In conducting the examination, the examiner shall use methods common to the examination of any life settlement licensee and should use those guidelines and procedures set forth in an examiners' handbook adopted by a national organization.

2. Every licensee or person from whom information is sought, its officers, directors and agents shall provide to the examiners timely, convenient and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents, assets and computer or other recordings relating to the property, assets, business and affairs of the licensee being examined. The officers, directors, employees and agents of the licensee or person shall facilitate the examination and aid in the examination so far as it is in their power to do so. The refusal of a licensee, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the Commissioner shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the licensee to engage in the life settlement business or other business subject to the Commissioner's jurisdiction. Any proceedings for suspension, revocation or refusal of any license or authority shall be conducted pursuant to Section [insert reference to cease and desist statute or other law having a post-order hearing mechanism].

3. The Commissioner shall have the power to issue subpoenas, to administer oaths and to examine under oath any person as to any matter pertinent to the examination. Upon the failure or refusal of a person to obey a subpoena, the Commissioner may petition a court of competent jurisdiction, and upon proper showing, the Court may enter an order compelling the witness to appear and testify or produce documentary evidence.

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

5. Nothing contained in this Act shall be construed to limit the Commissioner's authority to terminate or suspend an examination in order to pursue other legal or regulatory action pursuant to the insurance laws of this state. Findings of fact and conclusions made pursuant to any examination shall be prima facie evidence in any legal or regulatory action.

6. Nothing contained in this Act shall be construed to limit the Commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or licensee work papers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the Commissioner may, in his or her sole discretion, deem appropriate.

[Drafting Note: In many states examination work papers remain confidential. The previous paragraph should be adjusted to conform to state statute and practice.]

F. Examination Reports

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

2. No later than sixty (60) days following completion of the examination, the examiner in charge shall file with the Commissioner a verified written report of examination under oath. Upon receipt of the verified report, the Commissioner shall transmit the report to the licensee examined, together with a notice that shall afford the licensee examined a reasonable opportunity of not more than thirty (30) days to make a written submission or rebuttal with respect to any matters contained in the examination report and which shall become part of the report or to request a hearing on any matter in dispute.

3. In the event the Commissioner determines that regulatory action is appropriate as a result of an examination, the Commissioner may initiate any proceedings or actions provided by law.

G. Confidentiality of Examination Information

1. Names and individual identification data for all owners, purchasers, and insureds shall be considered private and confidential information and shall not be disclosed by the Commissioner, unless the disclosure is to another regulator or is required by law.

2. Except as otherwise provided in this Act, 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 Act, 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 [INSERT OPEN RECORDS, FREEDOM OF INFORMATION, SUNSHINE OR OTHER APPROPRIATE PHRASE] 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 any regulatory or legal action brought as part of the Commissioner's official duties. The licensee being examined may have access to all documents used to make the report.

H. Conflict of Interest

1. An examiner may not be appointed by the Commissioner if the examiner, either directly or indirectly, has a conflict of interest or is affiliated with the management of or owns a pecuniary interest in any person subject to examination under this Act. This section shall not be construed to automatically preclude an examiner from being:

(a) an owner;

(b) an insured in a Life Settlement Contract or insurance policy; or

(c) a beneficiary in an insurance policy that is proposed for a Life Settlement Contract.

2. Notwithstanding the requirements of this clause, the Commissioner may retain from time to time, on an individual basis, qualified actuaries, certified public accountants, or other similar individuals who are independently practicing their professions, even though these persons may from time to time be similarly employed or retained by persons subject to examination under this Act.

I. Immunity from Liability

1. No cause of action shall arise nor shall any liability be imposed against the Commissioner, the Commissioner's authorized representatives or any examiner appointed by the Commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this Act.

2. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the Commissioner or the Commissioner's authorized representative or examiner pursuant to an examination made under this Act, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive. This paragraph does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in Paragraph (1).

3. A person identified in Paragraph (1) or (2) shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this Act and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.

J. Investigative Authority of the Commissioner

1. The Commissioner may investigate suspected Fraudulent Life Settlement Acts and persons engaged in the business of life settlements.

K. Cost of Examinations

[Drafting Note: The Insurance Department may have a funding mechanism for examinations and it should be inserted in this section and be consistent with other examination expenses.]

Section 8. Advertising

A. A broker, or provider licensed pursuant to this act may conduct or participate in advertisements within this state. Such advertisements shall comply with all advertising and marketing laws [statutory cite] or rules and regulations promulgated by the Commissioner that are applicable to life insurers or to brokers, and providers licensed pursuant to this act.

B. Advertisements shall be accurate, truthful and not misleading in fact or by implication.

C. No person or trust shall:

1. directly or indirectly, market, advertise, solicit or otherwise promote the purchase of a policy for the sole purpose of or with an emphasis on settling the policy; or

2. use the words “free”, “no cost” or words of similar import in the marketing, advertising, soliciting or otherwise promoting of the purchase of a policy.

Section 9. Disclosures to Owners

A. The Provider shall provide in writing, in a separate document that is signed by the Owner and Provider, the following information to the Owner no later than the date the Life Settlement Contract is signed by all parties:

1. the fact that possible alternatives to Life Settlement Contracts exist, including, but not limited to, accelerated benefits offered by the issuer of the life insurance policy;

2. the fact that some or all of the proceeds of a Life Settlement Contract may be taxable and that assistance should be sought from a professional tax advisor;

3. the fact that the proceeds from a Life Settlement Contract could be subject to the claims of creditors;

4. the fact that receipt of proceeds from a Life Settlement Contract may adversely affect the recipients' eligibility for public assistance or other government benefits or entitlements and that advice should be obtained from the appropriate agencies;

5. the fact that the Owner has a right to terminate a Life Settlement Contract within fifteen (15) days of the date it is executed by all parties and the Owner has received the disclosures contained herein. Rescission, if exercised by the Owner, is effective only if both notice of the rescission is given, and the Owner repays all proceeds and any premiums, loans, and loan interest paid on account of the Provider within the rescission period. If the insured dies during the rescission period, the Contract shall be deemed to have been rescinded subject to repayment by the Owner or the Owner's estate of all proceeds and any premiums, loans, and loan interest to the Provider;

6. the fact that proceeds will be sent to the Owner within three (3) business days after the Provider has received the insurer or group administrator's acknowledgement that ownership of the policy or interest in the certificate has been transferred and the beneficiary has been designated in accordance with the terms of the Life Settlement Contract;

7. the fact that entering into a Life Settlement Contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist under the policy or certificate of a group policy to be forfeited by the Owner and that assistance should be sought from a professional financial advisor;

8. the amount and method of calculating the compensation paid or to be paid to the Broker, or any other person acting for the Owner in connection with the transaction, wherein the term compensation includes anything of value paid or given;

9. the date by which the funds will be available to the Owner and the transmitter of the funds;

10. the fact that the Commissioner shall require delivery of a Buyer's Guide or a similar consumer advisory package in the form prescribed by the Commissioner to Owners during the solicitation process;

11. the disclosure document shall contain the following language: "all medical, financial or personal information solicited or obtained by a Provider or 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 Life Settlement Contract between the owner and 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;

12. the fact that the Commissioner shall require Providers and Brokers to print separate signed fraud warnings on their applications and on their Life Settlement Contracts is as follows:

> "Any person who knowingly presents false information in an application for insurance or Life Settlement Contract is guilty of a crime and may be subject to fines and confinement in prison."

13. the fact that the insured may be contacted by either the Provider or broker or its authorized representative for the purpose of determining the insured's health status or to verify the insured's address. This contact is limited to once every three (3) months if the insured has a life expectancy of more than one year, and no more than once per month if the insured has a life expectancy of one year or less;

14. the affiliation, if any, between the Provider and the issuer of the insurance policy to be settled;

15. that a Broker represents exclusively the Owner, and not the insurer or the Provider or any other person, and owes a fiduciary duty to the Owner, including a duty to act according to the Owner's instructions and in the best interest of the Owner;

16. the document shall include the name, address and telephone number of the Provider;

17. the name, business address, and telephone number of the independent third party escrow agent, and the fact that the owner may inspect or receive copies of the relevant escrow or trust agreements or documents;

18. the fact that a change of ownership could in the future limit the insured's ability to purchase future insurance on the insured's life because there is a limit to how much coverage insurers will issue on one life;

B. The written disclosures shall be conspicuously displayed in any Life Settlement Contract furnished to the Owner by a Provider including any affiliations or contractual arrangements between the Provider and the Broker.

C. A Broker shall provide the Owner and the Provider with at least the following disclosures no later than the date the Life Settlement Contract is signed by all parties. The disclosures shall be conspicuously displayed in the Life Settlement Contract or in a separate document signed by the Owner and provide the following information:

(1) The name, business address and telephone number of the Broker;

(2) A full, complete and accurate description of all the offers, counter-offers, acceptances and rejections relating to the proposed Life Settlement Contract;

(3) A written disclosure of any affiliations or contractual arrangements between the Broker and any person making an offer in connection with the proposed Life Settlement Contracts;

(4) The name of each Broker who receives compensation and the amount of compensation received by that broker, which compensation includes anything of value paid or given to the Broker in connection with the life settlement contract;

(5) A complete reconciliation of the gross offer or bid by the Provider to the net amount of proceeds or value to be received by the Owner. For the purpose of this section, gross offer or bid shall mean the total amount or value offered by the Provider for the purchase of one or more life insurance policies, inclusive of commissions and fees; and

(6) The failure to provide the disclosures or rights described in this Section 9 shall be deemed an Unfair Trade Practice pursuant to Section 17.

Section 10. Disclosure to Insurer

[Drafting Note: The provisions in this Section pertaining to premium finance arrangements and disclosures may be inserted into a state's premium finance law. If so, it is recommended that the disclosures be made to the borrower and/or insured by a lender which takes the policy as collateral for a premium finance loan.]

A. Without limiting the ability of an insurer from assessing the insurability of a policy applicant and determining whether or not to issue the policy, and in addition to other questions an insurance carrier may lawfully pose to a life insurance applicant, insurance carriers may inquire in the application for insurance whether the proposed owner intends to pay premiums with the assistance of financing from a lender that will use the policy as collateral to support the financing.

1. If, as described in Section 2L, the loan provides funds which can be used for a purpose other than paying for the premiums, costs, and expenses associated with obtaining and maintaining the life insurance policy and loan, the application shall be rejected as a violation of the Prohibited Practices in Section 13 of this Act.

2. If the financing does not violate Section 13 in this manner, the insurance carrier:

(a) may make disclosures, including but not limited to such as the following, to the applicant and the insured, either on the application or an amendment to the application to be completed no later than the delivery of the policy:

"If you have entered into a loan arrangement where the policy is used as collateral, and the policy does change ownership at some point in the future in satisfaction of the loan, the following may be true:

(i.) a change of ownership could lead to a stranger owning an interest in the insured's life;

(ii.) a change of ownership could in the future limit your ability to purchase future insurance on the insured's life because there is a limit to how much coverage insurers will issue on one life;

(iii.) should there be a change of ownership and you wish to obtain more insurance coverage on the insured's life in the future, the insured's higher issue age, a change in health status, and/or other factors may reduce the ability to obtain coverage and/or may result in significantly higher premiums;

(iv.) you should consult a professional advisor, since a change in ownership in satisfaction of the loan may result in tax consequences to the owner, depending on the structure of the loan;" and

(b) may require certifications, such as the following, from the applicant and/or the insured:

(i) I have not entered into any agreement or arrangement providing for the future sale of this life insurance policy;

(ii) My loan arrangement for this policy provides funds sufficient to pay for some or all of the premiums, costs, and expenses associated with obtaining and maintaining my life insurance policy, but I have not entered into any agreement by which I am to receive consideration in exchange for procuring this policy; and

(iii) the borrower has an insurable interest in the insured."

Section 11. General Rules

A. A Provider entering into a Life Settlement Contract with any Owner of a policy, wherein the insured is terminally or chronically ill, shall first obtain:

1. if the Owner is the insured, a written statement from a licensed attending physician that the Owner is of sound mind and under no constraint or undue influence to enter into a settlement contract; and

2. a document in which the insured consents to the release of his medical records to a Provider, settlement broker, or insurance producer and, if the policy was issued less than two years from the date of application for a settlement contract, to the insurance company that issued the policy.

B. The insurer shall respond to a request for verification of coverage submitted by a Provider, settlement broker, or life insurance producer not later than thirty calendar days of the date the request is received. The request for verification of coverage must be made on a form approved by the Commissioner. The insurer shall complete and issue the verification of coverage or indicate in which respects it is unable to respond. In its response, the insurer shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation at this time regarding the validity of the insurance contract.

C. Before or at the time of execution of the settlement contract, the Provider shall obtain a witnessed document in which the Owner consents to the settlement contract, represents that the Owner has a full and complete understanding of the settlement contract, that the Owner has a full and complete understanding of the benefits of the policy, acknowledges that the Owner is entering into the settlement contract freely and voluntarily, and, for persons with a terminal or chronic illness or condition, acknowledges that the insured has a terminal or chronic illness and that the terminal or chronic illness or condition was diagnosed after the policy was issued.

D. The insurer shall not unreasonably delay effecting change of ownership or beneficiary with any Life Settlement Contract lawfully entered into in this state or with a resident of this state.

E. If a settlement broker or life insurance producer performs any of these activities required of the Provider, the Provider is deemed to have fulfilled the requirements of this section.

F. If a Broker performs those verification of coverage activities required of the Provider, the provider is deemed to have fulfilled the requirements of section 9A.

G. Within twenty (20) days after an owner executes the Life Settlement Contract, the Provider shall give written notice to the insurer that issued that insurance policy that the policy has become subject to a Life Settlement Contract. The notice shall be accompanied by the documents required by Section 10 A. (2).

H. All medical information solicited or obtained by any licensee shall be subject to the applicable provision of state law relating to confidentiality of medical information, if not otherwise provided in this Act.

I. All Life Settlement Contracts entered into in this state shall provide that the Owner may rescind the Contract on or before fifteen (15) days after the date it is executed by all parties thereto. Rescission, if exercised by the Owner, is effective only if both notice of the rescission is given, and the Owner repays all proceeds and any premiums, loans, and loan interest paid on account of the Provider within the rescission period. If the insured dies during the rescission period, the Contract shall be deemed to have been rescinded subject to repayment by the Owner or the Owner's estate of all proceeds and any premiums, loans, and loan interest to the Provider.

J. Within three business days after receipt from the Owner of documents to effect the transfer of the insurance policy, the Provider shall pay the proceeds of the settlement to an escrow or trust account managed by a trustee or escrow agent in a state or federally chartered financial institution pending acknowledgement of the transfer by the issuer of the policy. The trustee or escrow agent shall be required to transfer the proceeds due to the Owner within three business days of acknowledgement of the transfer from the insurer.

K. Failure to tender the Life Settlement Contract proceeds to the Owner by the date disclosed to the Owner renders the Contract voidable by the Owner for lack of consideration until the time the proceeds are tendered to and accepted by the Owner. A failure to give written notice of the right of rescission hereunder shall toll the right of rescission until thirty days after the written notice of the right of rescission has been given.

L. Any fee paid by a Provider, party, individual, or an Owner to a Broker in exchange for services provided to the Owner pertaining to a Life Settlement Contract shall be computed as a percentage of the offer obtained, not the face value of the policy. Nothing in this Section shall be construed as prohibiting a Broker from reducing such Broker's fee below this percentage if the Broker so chooses.

M. The Broker shall disclose to the Owner anything of value paid or given to a Broker, which relate to a Life Settlement Contract.

N. No person at any time prior to, or at the time of, the application for, or issuance of, a policy, or during a two-year period commencing with the date of issuance of the policy, shall enter into a Life Settlement regardless of the date the compensation is to be provided and regardless of the date the assignment, transfer, sale, devise, bequest or surrender of the policy is to occur. This prohibition shall not apply if the Owner certifies to the Provider that:

1. the policy was issued upon the Owner's exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least twenty-four months. The time covered under a group policy must be calculated without regard to a change in

insurance carriers, provided the coverage has been continuous and under the same group sponsorship; or

2. the Owner submits independent evidence to the Provider that one or more of the following conditions have been met within the two-year period:

   (a) the Owner or insured is terminally or chronically ill;

   (b) the Owner or insured disposes of his ownership interests in a closely held corporation, pursuant to the terms of a buyout or other similar agreement in effect at the time the insurance policy was initially issued;

   (c) the Owner's spouse dies;

   (d) the Owner divorces his or her spouse;

   (e) the Owner retires from full-time employment;

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

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

3. Copies of the independent evidence required by Section 11.N(2) shall be submitted to the insurer when the Provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the Provider that the copies are true and correct copies of the documents received by the Provider. Nothing in this Section shall prohibit an insurer from exercising its right to contest the validity of any policy;

4. If the Provider submits to the insurer a copy of independent evidence provided for in item (2)(a) when the Provider submits a request to the insurer to effect the transfer of the policy to the Provider, the copy is deemed to establish that the settlement contract satisfies the requirements of this section.

Section 12. Authority to Promulgate Regulations; Conflict of Laws

A. The Commissioner may:

1. promulgate regulations implementing Sections 1 to 18 of this Act and regulating the activities and relationships of Providers, Brokers, insurers and their agents, subject to statutory limitations on administrative rule making.

   [Drafting Note: *Fees need not be mentioned if the fee is set by statute.]*

B. Conflict of Laws.

1. If there is more than one Owner on a single policy, and the Owners are residents of different states, the Life Settlement Contract shall be governed by the law of the state in

which the Owner having the largest percentage ownership resides or, if the Owners hold equal ownership, the state of residence of one Owner agreed upon in writing by all of the Owners. The law of the state of the Insured shall govern in the event that equal Owners fail to agree in writing upon a state of residence for jurisdictional purposes.

2. A Provider from this state who enters into a Life Settlement Contract with an Owner who is a resident of another state that has enacted statutes or adopted regulations governing Life Settlement Contracts, shall be governed in the effectuation of that Life Settlement Contract by the statutes and regulations of the Owner's state of residence. If the state in which the Owner is a resident has not enacted statutes or regulations governing Life Settlement Contracts, the Provider shall give the Owner notice that neither state regulates the transaction upon which he or she is entering. For transactions in those states, however, the Provider is to maintain all records required if the transactions were executed in the state of residence. The forms used in those states need not be approved by the Department.

3. If there is a conflict in the laws that apply to an Owner and a Purchaser in any individual transaction, the laws of the state that apply to the Owner shall take precedence and the Provider shall comply with those laws.

Section 13. Prohibited Practices

A. IT IS UNLAWFUL FOR ANY PERSON TO:

1. enter into a Life Settlement Contract if such Person knows or reasonably should have known that the life insurance policy was obtained by means of a false, deceptive or misleading application for such policy;

2. engage in any transaction, practice or course of business if such Person knows or reasonably should have known that the intent was to avoid the notice requirements of this Section;

3. engage in any fraudulent act or practice in connection with any transaction relating to any settlement involving an Owner who is a resident of this state;

4. issue, solicit, market or otherwise promote the purchase of an insurance policy for the purpose of or with an emphasis on settling the policy;

5. enter into a premium finance agreement with any person or agency, or any person affiliated with such person or agency, pursuant to which such person shall receive any proceeds, fees or other consideration, directly or indirectly, from the policy or owner of the policy or any other person with respect to the premium finance agreement or any settlement contract or other transaction related to such policy that are in addition to the amounts required to pay the principal, interest and service charges related to policy premiums pursuant to the premium finance agreement or subsequent sale of such agreement; provided, further, that any payments, charges, fees or other amounts in addition to the amounts required to pay the principal, interest and service charges related to policy premiums paid under the premium finance agreement shall be remitted to the original owner of the policy or to his or her estate if he or she is not living at the time of the determination of the overpayment;

6. with respect to any settlement contract or insurance policy and a Broker, knowingly solicit an offer from, effectuate a life settlement contract with or make a sale to any

Provider, financing entity or related provider trust that is controlling, controlled by, or under common control with such Broker;

7. with respect to any Life Settlement Contract or insurance policy and a Provider, knowingly enter into a Life Settlement Contract with a Owner, if, in connection with such Life Settlement Contract, anything of value will be paid to a Broker that is controlling, controlled by, or under common control with such Provider or the financing entity or related Provider trust that is involved in such settlement contract;

8. with respect to a Provider, enter into a Life Settlement Contract unless the life settlement promotional, advertising and marketing materials, as may be prescribed by regulation, have been filed with the Commissioner. In no event shall any marketing materials expressly reference that the insurance is "free" for any period of time. The inclusion of any reference in the marketing materials that would cause an Owner to reasonably believe that the insurance is free for any period of time shall be considered a violation of this Act; or

9. with respect to any life insurance producer, insurance company, Broker, or Provider make any statement or representation to the applicant or policyholder in connection with the sale or financing of a life insurance policy to the effect that the insurance is free or without cost to the policyholder for any period of time unless provided in the policy.

B. A violation of Section 13 shall be deemed a Fraudulent Life Settlement Act.

Section 14. Fraud Prevention and Control

A. Fraudulent Life Settlement Acts, Interference and Participation of Convicted Felons Prohibited.

1. A person shall not commit a Fraudulent Life Settlement Act.

2. A person shall not knowingly and intentionally interfere with the enforcement of the provisions of this Act or investigations of suspected or actual violations of this Act.

3. A person in the business of life settlements shall not knowingly or intentionally permit any person convicted of a felony involving dishonesty or breach of trust to participate in the business of life settlements.

B. Fraud Warning Required

1. Life Settlement Contracts and applications for Life Settlement Contracts, 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 Life Settlement Contract is guilty of a crime and may be subject to fines and confinement in prison."

2. The lack of a statement as required in Paragraph (1) of this subsection does not constitute a defense in any prosecution for a Fraudulent Life Settlement Act.

C. Mandatory Reporting of Fraudulent Life Settlement Acts

1. Any person engaged in the business of life settlements having knowledge or a reasonable belief that a Fraudulent Life Settlement Act is being, will be or has been committed shall provide to the Commissioner the information required by, and in a manner prescribed by, the Commissioner.

2. Any other person having knowledge or a reasonable belief that a Fraudulent Life Settlement Act is being, will be or has been committed may provide to the Commissioner the information required by, and in a manner prescribed by, the Commissioner.

D. Immunity from Liability

1. No civil liability shall be imposed on and no cause of action shall arise from a person's furnishing information concerning suspected, anticipated or completed Fraudulent Life Settlement Acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from:

   (a) the Commissioner or the Commissioner's employees, agents or representatives;

   (b) federal, state or local law enforcement or regulatory officials or their employees, agents or representatives;

   (c) a person involved in the prevention and detection of Fraudulent Life Settlement Acts or that person's agents, employees or representatives;

   (d) any regulatory body or their employees, agents or representatives, overseeing life insurance, life settlements, securities or investment fraud;

   (e) the life insurer that issued the life insurance policy covering the life of the insured; or

   (f) the licensee and any agents, employees or representatives.

2. Paragraph (1) of this subsection shall not apply to statements made with actual malice. In an action brought against a person for filing a report or furnishing other information concerning a Fraudulent Life Settlement Act or a fraudulent insurance act, the party bringing the action shall plead specifically any allegation that Paragraph (1) does not apply because the person filing the report or furnishing the information did so with actual malice.

3. A person identified in Paragraph (1) shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this Act and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.

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

E. Confidentiality

1. The documents and evidence provided pursuant to Subsection D of this section or obtained by the Commissioner in an investigation of suspected or actual Fraudulent Life

Settlement Acts shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

2. Paragraph (1) of this subsection does not prohibit release by the Commissioner of documents and evidence obtained in an investigation of suspected or actual Fraudulent Life Settlement Acts:

   (a) in administrative or judicial proceedings to enforce laws administered by the Commissioner;

   (b) to federal, state or local law enforcement or regulatory agencies, to an organization established for the purpose of detecting and preventing Fraudulent Life Settlement Acts or to the NAIC; or

   (c) at the discretion of the Commissioner, to a person in the business of life settlements that is aggrieved by a Fraudulent Life Settlement Act.

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

F. Other Law Enforcement or Regulatory Authority. This Act 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. preempt, supersede, or limit any provision of any state securities law or any rule, order, or notice issued thereunder;

3. prevent or prohibit a person from disclosing voluntarily information concerning life settlement fraud to a law enforcement or regulatory agency other than the insurance department; or

4. limit the powers granted elsewhere by the laws of this state to the Commissioner or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action against wrongdoers.

G. Life Settlement Antifraud Initiatives.

1. Providers and Brokers shall have in place antifraud initiatives reasonably calculated to detect, prosecute and prevent Fraudulent Life Settlement Acts. At the discretion of the Commissioner, the Commissioner may order, or a licensee may request and the Commissioner may grant, such modifications of the following required initiatives as necessary to ensure an effective antifraud program. The modifications may be more or less restrictive than the required initiatives so long as the modifications may reasonably be expected to accomplish the purpose of this section. Antifraud initiatives shall include:

2. Fraud investigators, who may be Provider or Broker employees or independent contractors; and

3. An antifraud plan, which shall be submitted to the Commissioner. The antifraud plan shall include, but not be limited to:

(a) a description of the procedures for detecting and investigating possible Fraudulent Life Settlement Acts and procedures for resolving material inconsistencies between medical records and insurance applications;

(b) a description of the procedures for reporting possible Fraudulent Life Settlement Acts to the Commissioner;

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

(d) a description or chart outlining the organizational arrangement of the antifraud personnel who are responsible for the investigation and reporting of possible Fraudulent Life Settlement Acts and investigating unresolved material inconsistencies between medical records and insurance applications.

4. Antifraud plans submitted to the Commissioner shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

Section 15. Injunctions; Civil Remedies; Cease and Desist

A. In addition to the penalties and other enforcement provisions of this Act, if any Person violates this Act or any rule implementing this Act, the Commissioner may seek an injunction in a court of competent jurisdiction in the county where the Person resides or has a principal place of business and may apply for temporary and permanent orders that the Commissioner determines necessary to restrain the Person from further committing the violation.

B. Any Person damaged by the acts of another Person in violation of this Act or any rule or regulation implementing this Act, may bring a civil action for damages against the Person committing the violation in a court of competent jurisdiction.

C. The Commissioner may issue a cease and desist order upon a Person who violates any provision of this part, any rule or order adopted by the Commissioner, or any written agreement entered into with the Commissioner, in accordance with this State's Act governing administrative procedures.

D. When the Commissioner finds that such an action presents an immediate danger to the public and requires an immediate final order, he may issue an emergency cease and desist order reciting with particularity the facts underlying such findings. The emergency cease and desist order is effective immediately upon service of a copy of the order on the respondent and remains effective for 90 days. If the department begins non-emergency cease and desist proceedings under paragraph A, the emergency cease and desist order remains effective, absent an order by an appellate court of competent jurisdiction pursuant to [cite the state's administrative procedure Act]. In the event of a willful violation of this Act, the trial court may award statutory damages in addition to actual damages in an additional amount up to three times the actual damage award. The provisions of this Act may not be waived by agreement. No choice of law provision may be utilized to prevent the application of this Act to any settlement in which a party to the settlement is a resident of this state.

Section 16. Penalties

A. It is a violation of this Act for any Person, Provider, Broker, or any other party related to the business of life settlements, to commit a Fraudulent Life Settlement Act.

B. For criminal liability purposes, a person that commits a Fraudulent Life Settlement Act is guilty of committing insurance fraud and shall be subject to additional penalties under [*insert State statute regarding insurance fraud]*.

C. The Commissioner shall be empowered to levy a civil penalty not exceeding *[insert appropriate State fine]* and the amount of the claim for each violation upon any person, including those persons and their employees licensed pursuant to this Act, who is found to have committed a Fraudulent Life Settlement Act or violated any other provision of this Act.

D. The license of a person licensed under this Act that commits a Fraudulent Life Settlement Act shall be revoked for a period of at least *[insert appropriate State penalty]*.

Section 17. Unfair Trade Practices

A violation of Sections 1 to 16 of this Act shall be considered an unfair trade practice pursuant to state law and subject to the penalties provided by state law.

Section 18. Effective Date

A. A Provider lawfully transacting business in this state prior to the effective date of this Act may continue to do so pending approval or disapproval of that person's application for a license as long as the application is filed with the Commissioner not later than 30 days after publication by the Commissioner of an application form and instructions for licensure of Providers. If the publication of the application form and instructions is prior to the effective date of this chapter, then the filing of the application shall not be later than 30 days after the effective date of this Act. During the time that such an application is pending with the Commissioner, the applicant may use any form of Life Settlement Contract that has been filed with the Commissioner pending approval thereof, provided that such form is otherwise in compliance with the provisions of this Act. Any person transacting business in this state under this provision shall be obligated to comply with all other requirements of this Act.

B. A person who has lawfully negotiated Life Settlement Contracts between any Owner residing in this state and one or more Providers for at least one year immediately prior to the effective date of this Act may continue to do so pending approval or disapproval of that person's application for a license as long as the application is filed with the Commissioner not later than 30 days after publication by the Commissioner of an application form and instructions for licensure of Brokers. If the publication of the application form and instructions is prior to the effective date of this chapter, then the filing of the application shall not be later than 30 days after the effective date of this Act. Any person transacting business in this state under this provision shall be obligated to comply with all other requirements of this Act