

MAINE STATE LEGISLATURE

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118th MAINE LEGISLATURE

FIRST REGULAR SESSION-1997

Legislative Document

No. 1558

H.P. 1115

House of Representatives, March 18, 1997

An Act to Regulate Viatical Companies.

Reference to the Committee on Banking and Insurance suggested and ordered printed.

A handwritten signature in cursive script that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative WATSON of Farmingdale.
Cosponsored by Senator MURRAY of Penobscot and
Representatives: CARLETON of Wells, O'BRIEN of Augusta, O'NEIL of Saco, PAUL of
Sanford, QUINT of Portland, SAXL of Portland, Senators: HARRIMAN of Cumberland,
SMALL of Sagadahoc.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 24-A MRSA c.85 is enacted to read:

CHAPTER 85

VIATICAL SETTLEMENTS ACT

§6801. Short title

This chapter may be known and cited as the "Viatical Settlements Act."

§6802. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Financing entity. "Financing entity" means, with respect to any licensed viatical settlement provider, any participant or any transferee of or successor to the interest of a participant in any financing transaction.

2. Financing transaction. "Financing transaction" means any transaction in which a licensed viatical settlement provider obtains financing for viatical settlement contracts, viaticated policies or interests in viatical settlement contracts or viaticated policies, including, without limitation, any secured or unsecured financing, securitization transaction or securities offering, either registered or exempt from registration under federal and state securities law, or otherwise sells, assigns, transfers, pledges, hypothecates or otherwise disposes of a viatical settlement contract, viaticated policy or interest in a viatical settlement contract or viaticated policy.

3. Participant. "Participant" means, with respect to a financing transaction, any underwriter, placement agent, lender, purchaser of securities, credit enhancer or other participant, other than the viatical settlement provider, in any financing transaction.

4. Viatical settlement agent. "Viatical settlement agent" means any authorized agent of a viatical settlement provider that is licensed in this State as a viatical settlement provider and appointed by the viatical settlement provider and any authorized subagent or other representative of an agent, who acts or aids in any manner in the soliciting of a viatical settlement on behalf of a viatical settlement provider or for valuable consideration advertises, offers or advises the availability of viatical settlements. "Viatical settlement agent" does not include an attorney, accountant, financing entity, viatical settlement broker or person exercising a power of attorney granted by the

viator, retained to represent the viator and whose compensation is paid solely by the viator without regard to whether the viatical settlement is effected. The viatical settlement agent is deemed to represent the viatical settlement provider for which that agent is appointed.

5. Viatical settlement broker. "Viatical settlement broker" means any person that, for another and for a fee, commission or other valuable consideration, offers or advertises the availability of viatical settlements, introduces viators to viatical settlement providers and offers or attempts to negotiate viatical settlements between a viator and one or more viatical settlement providers. "Viatical settlement broker" does not include an attorney, accountant or financial planner retained to represent the viator whose compensation is paid by or at the direction of the viator nor does the term include a viatical settlement provider licensed in this State or viatical settlement agent appointed by a viatical settlement provider, a credit union or an employer or association that makes its employees or members aware of viatical settlement contracts. Irrespective of the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the interests of the viator and owes a fiduciary duty to the viator to act according to the viator's instructions and in the best interest of the viator, unless otherwise disclosed to the viator in writing.

6. Viatical settlement contract. "Viatical settlement contract" means a written agreement entered into between a viatical settlement provider and a viator. The agreement must establish the terms under which the viatical settlement provider will pay compensation or anything of value that is less than the expected death benefit of the insurance policy or certificate in return for the viator's assignment, transfer, sale, devise or bequest of the death benefit or ownership of the insurance policy or certificate to the viatical settlement provider.

7. Viatical settlement provider. "Viatical settlement provider" means a partnership, corporation or entity that is regularly engaged in the business of entering into viatical settlement contracts at its own risk and for its own account. The term does not include:

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

B. The issuer of a life insurance policy providing accelerated benefits under section 2555;

2 C. A viator's friend or family member who enters into no
4 more than one agreement in a calendar year for the
6 assignment, transfer, sale, devise or bequest of life
8 insurance policies for any value less than the expected
10 death benefit; or

12 D. A financing entity.

14 8. **Viaticated policy.** "Viaticated policy" means any life
16 insurance policy held by a licensed viatical settlement provider
18 that has been acquired by the licensed viatical settlement
20 provider directly or indirectly through a viatical settlement
22 contract.

24 9. **Viator.** "Viator" means a person who owns a life
26 insurance policy or who owns or is covered under a group life
28 insurance policy insuring the life of a person with a
30 catastrophic or life-threatening illness or condition and who
32 enters into an agreement under which the viatical settlement
34 provider will pay compensation or anything of value that is less
36 than the expected death benefit of the insurance policy or
38 certificate in return for the viator's assignment, transfer,
40 sale, devise or bequest of the death benefit or ownership of the
42 insurance policy or certificate to the viatical settlement
44 provider.

46 **§6803. License requirements**

48 1. **License required.** A person may not act as a viatical
50 settlement provider or viatical settlement broker without a
52 license from the superintendent.

1 2. **Application; fee.** Application for a viatical settlement
3 provider license or a viatical settlement broker license must be
5 made to the superintendent by the applicant on a form prescribed
7 by the superintendent. The application must be accompanied by a
9 fee of \$100.

11 3. **Renewal.** A license for a viatical settlement provider
13 or a viatical settlement broker is renewed for one year upon
15 payment of a fee of \$100. Failure to pay the fee within the
17 terms prescribed may result in the revocation of the license
19 unless cured within 5 days of written notice of failure to pay to
21 the principal office of the licensee.

23 4. **Information required.** The applicant shall provide such
25 information as the superintendent requires and the information
27 must be submitted on forms prepared by the superintendent. The
29 superintendent may at any time require the applicant to disclose
31 fully the identity of all stockholders, partners, officers and
33 employees and the superintendent may, in the exercise of the
35 superintendent's discretion, refuse to issue a license to an

applicant if not satisfied that any stockholder, partner or employee of the applicant who may materially influence the applicant's conduct meets the criteria set forth in subsection 6.

5. Authority under license. A license issued to any person authorizes all officers, partners and key management personnel of that person to act on behalf of the viatical settlement provider or the viatical settlement broker under the license. All officers, partners and key management personnel of the person must be named in the application and any supplements to the application.

6. Investigation. Upon the filing of an application and the payment of the license fee, the superintendent shall make an investigation of the applicant and shall issue a license if the superintendent finds that the applicant:

A. Has provided a detailed plan of operation;

B. Is competent and trustworthy and intends to act in good faith in the capacity required by the license;

C. Has a good business reputation and has had experience, training or education so as to be qualified in the business to which the license relates;

D. If organized under the laws of this State, has provided a certificate of good standing from this State. If the applicant is a foreign entity, it must provide a certificate of good standing from its state of organization and a certificate of good standing from this State; and

E. Or any officer, partner or key management personnel of the applicant has not been convicted of a felony of which fraud was an element.

7. Financial responsibility. The following evidence of financial responsibility must be provided to the superintendent before a license may be issued.

A. A viatical settlement provider shall provide evidence of a binding and committed lending facility of at least \$1,000,000 with a term of at least one year or a net worth in excess of \$100,000.

B. A viatical settlement broker shall provide evidence of a surety bond in the amount of \$5,000.

8. Nonresidents. The superintendent may not issue a license to a nonresident applicant unless a written designation of an agent for service of process is filed and maintained with the superintendent or the applicant has filed with the superintendent the applicant's written irrevocable consent that

an action against the applicant may be commenced against the applicant by service of process on the superintendent.

9. List. The superintendent shall maintain a complete list of all viatical settlement providers and viatical settlement brokers licensed or with license pending in this State. The list must be available upon request to the general public.

§6804. License revocation and administrative assessments

1. Superintendent's authority. The superintendent may suspend, revoke or refuse to renew the license of a viatical settlement provider or viatical settlement broker if the superintendent finds that:

A. There was any material misrepresentation in the application for the license or other information submitted to the superintendent;

B. The licensee or any officer, partner or key management personnel of the licensee has been convicted of fraudulent or dishonest practices, is subject to a final administrative action to suspend or revoke a viatical license or is otherwise shown to be untrustworthy or incompetent to act as a viatical settlement provider or viatical settlement broker;

C. The licensee as a viatical settlement provider demonstrates unreasonable payments to viators;

D. The licensee or any officer, partner or key management personnel of the licensee has been convicted of any felony of which criminal fraud is an element; or

E. The licensee has violated any of the provisions of this chapter.

2. Hearing. Before the superintendent may deny a license application or suspend, revoke or refuse to renew the license of a viatical settlement provider or viatical settlement broker, the superintendent shall conduct a hearing in accordance with Title 5, chapter 375, subchapter IV.

3. Administrative penalty. The superintendent may, in addition to any suspension or revocation, assess an administrative civil forfeiture of \$500 for each willful violation of this chapter.

§6805. Approval of viatical settlements contracts, disclosure statements and applications

A viatical settlement provider or viatical settlement broker may not use any contract, disclosure statement or application in

2 this State when dealing with a viator unless it has been filed
3 with and approved by the superintendent. Any contract,
4 disclosure statement or application filed with the superintendent
5 is deemed approved unless disapproved within 60 days of the
6 filing. The superintendent may disapprove a contract, disclosure
7 statement or application if, in the superintendent's opinion, the
8 contract or provisions contained in the contract are
9 unreasonable, not in compliance with this chapter or otherwise
10 misleading to the viator.

12 **§6806. Reporting requirements; confidentiality of information**

13 A licensee shall file with the superintendent by March 1st
14 of each year an annual statement containing such information as
15 the superintendent by rule prescribes. The superintendent may
16 not adopt any rule that requires the submission of information
17 that would permit the identification of a viator. The
18 superintendent may not request, collect or compile personal
19 information that would identify any viator except in connection
20 with the investigation of a specific complaint and with the prior
21 written permission of the viator or the viator's estate or
22 representative as to the collection of personal information.

24 **§6807. Examination**

25 1. Complaint. In response to a complaint concerning a
26 licensee or in connection with an application for a license, the
27 superintendent may examine the business and affairs of any
28 licensee or applicant for a license. Subject to the provisions
29 of section 6806, the superintendent may order a licensee or
30 applicant to produce records, books, files or other information
31 reasonably necessary to ascertain whether the licensee or
32 applicant is acting or has acted in violation of this chapter or
33 rules adopted under this chapter. The expenses incurred in
34 conducting an examination must be paid by the licensee or
35 applicant.

36 2. Confidential information. Names and individual
37 identification data for all viators are confidential information
38 and may not be disclosed by the superintendent unless required by
39 law.

40 3. Records. Records of all viatical transactions must be
41 maintained by the licensee and, subject to the provisions of
42 section 6806, must be available to the superintendent for 3 years
43 after policy maturity for inspection during reasonable business
44 hours.

45 4. Immunity. A licensee responding to an order of the
46 superintendent issued pursuant to this section is immune from any
47 civil action arising out of compliance with the order and is not
48 liable for damages.

required to challenge the authority or validity of the order as a prerequisite to receiving immunity.

§6808. Disclosure

A viatical settlement provider or viatical settlement broker shall disclose in writing the following information to the viator no later than the date the viatical settlement contract is signed by the viator:

1. Alternatives or options. Possible alternatives to or options that can be used in conjunction with viatical settlement contracts for persons with catastrophic or life-threatening illnesses, including, but not limited to, accelerated benefits offered by the issuer of the life insurance policy;

2. Federal tax implications. The fact that some or all of the proceeds of the viatical settlement may be free from federal income tax under the federal Health Insurance Portability and Accountability Act of 1996, Public Law 104-191; and that restrictions, qualifications and other tax laws, particularly those of the state in which the viator resides, may apply and assistance should be sought from a professional tax advisor;

3. State tax implications. The fact that some or all of the proceeds of the viatical settlement may be free from state income tax under section 6809; and that restrictions, qualifications and other tax laws, including those of the State in which the viator resides, may apply and assistance should be sought from a professional tax advisor;

4. Claims of creditors. The fact that the viatical settlement could be subject to the claims of creditors;

5. Effect on government benefits. The fact that receipts of viatical settlements may adversely affect the recipient's eligibility for Medicaid or other means-based government programs, benefits or entitlements and that advice should be obtained from the appropriate agencies; and

6. Right to rescind. The policy owner's or certificate holder's right to rescind a viatical settlement contract before the earlier of the 30th day after the date upon which the viatical settlement contract is executed by both parties or the 15th day after the date upon which payment is received by the viator as provided in section 6809.

§6809. General provisions for viatical settlement contracts

1. Prior conditions. A viatical settlement provider entering into a viatical settlement contract with a viator shall first obtain:

2 A. If the viator is the insured, a written statement from a
4 licensed attending physician that the viator is of sound
 mind and under no constraint or undue influence;

6 B. A witnessed document in which the viator consents to the
 viatical settlement contract, acknowledges that the insured
8 has a catastrophic or life-threatening illness, represents
10 that the insured has a full and complete understanding of
 the viatical settlement contract and that the insured has a
12 full and complete understanding of the benefits of the life
 insurance policy and acknowledges that the insured has
14 entered into the viatical settlement contract freely and
 voluntarily; and

16 C. A witnessed document in which the insured consents to
18 the release of the insured's medical records.

2. Confidentiality of medical information. All medical
20 information solicited or obtained by any licensee is subject to
 the applicable provisions of state law relating to
22 confidentiality of medical information.

24 3. Unconditional rescission. All viatical settlement
 contracts entered into in this State or entered into with
26 residents of this State must contain a provision for an
 unconditional rescission period of the earlier of the 30th day
28 after the date upon which the viatical settlement contract is
 executed by both parties or the 15th day after the date upon
30 which payment is received by the viator. Rescission if exercised
 by the viator is effective only if both notice of the rescission
32 is given and a full return of funds to the trustee or escrow
 agent is made within the rescission period.

34 4. Transfer of insurance policy. Immediately upon receipt
36 from the viator of documents to effect the transfer of the
 insurance policy, the viatical settlement provider shall pay the
38 proceeds of the settlement to an escrow or trust account managed
 by an independent trustee or escrow agent in a state-chartered or
40 federally chartered financial institution that is a member of the
 federal reserve system, pending acknowledgment of the transfer by
42 the issuer of the policy. The trustee or escrow agent shall
 transfer the proceeds due to the viator or otherwise according to
44 the viator's written instructions immediately upon receipt of
 acknowledgment of the transfer from the insurer.

46 5. Effect of failure to tender consideration. Failure to
48 tender consideration for the viatical settlement under the terms
 of the viatical settlement contract renders the contract voidable
50 for lack of consideration.

2 6. Unlicensed provider. A viatical settlement broker or
3 viatical settlement agent may not receive a fee, commission or
4 other valuable consideration for services from a viatical
5 settlement provider not licensed in this State as a viatical
6 settlement provider with respect to viatical settlements in this
7 State.

8 7. Income. Income received by the original policy owner or
9 original certificate holder from the sale of a life insurance
10 policy or certificate, or the sale of a death benefit under a
11 life insurance policy or certificate, under a viatical settlement
12 contract is exempt from state income tax.

13 8. Advertising standards. The following requirements apply
14 to advertising.

15 A. Advertising must be truthful and may not mislead by fact
16 or implication.

17 B. The names of licensed viatical settlement providers,
18 viatical settlement agents and viatical settlement brokers
19 must be clearly identified in all advertisements placed by
20 these entities.

21 9. Contacts with the insured. Contacts with the insured
22 for the purpose of determining the health of the insured after
23 the viatical settlement has occurred are limited to once every 3
24 months for insureds with an estimated life expectancy of more
25 than one year and once per month for insureds with a life
26 expectancy of one year or less. The viatical settlement provider
27 or viatical settlement broker shall explain to the insured the
28 procedure for these contacts prior to the time the insured enters
29 into the viatical settlement. The limitation in this rule on
30 contacts does not apply to contacts initiated by the insured or
31 necessary to maintain the policy in force.

32 §6810. Rules

33 1. Authority. The superintendent may adopt rules
34 implementing this chapter. These rules are routine technical
35 rules under Title 5, chapter 375, subchapter II-A.

36 2. Prohibition. The superintendent may not directly or
37 indirectly regulate the amount paid by a licensed viatical
38 settlement provider to the viator, viatical settlement broker or
39 viatical settlement agent as consideration for entry into a
40 viatical settlement contract.

41 §6811. Prohibited practices and provisions under policies

42 1. Assignment. Policy rights are freely assignable.

2 A. A policy of individual or group life insurance issued or
4 delivered in this State may not, in any way, restrict the
6 insured from making an absolute assignment of rights for
8 consideration. Prohibited restrictions include, but are not
 limited to, assignments only as a gift and without
 consideration, assignments only to a limited class of
 persons and assignments only to a natural person and not to
 a legal entity.

10 B. A life insurance company that acknowledges and records
12 an absolute assignment of life insurance policy or rights
14 under a group life insurance policy may rely solely on the
16 authorization of the assignor to make the assignment and the
18 life insurance company is not obligated to inquire into the
20 validity, sufficiency or terms of the assignment. In
22 acknowledging and recording an assignment, a life insurance
 company acting in good faith and reliance on the
 presentation of the absolute assignment, acts in a
 ministerial capacity and may exhibit no discretion as to
 whether an assignor may make the assignment or whether the
 assignment conforms with applicable law.

24 2. Rights under an assignment. The following provisions
 apply to an assignment.

26 A. The absolute assignee of an individual life insurance
28 policy or of all rights under a group life insurance policy
30 has all rights at law or in equity as the assignor held
32 under such policy, including, but not limited to, the right
34 to convert the coverage to an individual policy, the right
36 to timely notice of the right to such conversion at the time
38 such right accrues, the right to make premium payments or
40 take such other action as may be necessary under the policy
42 in order to preserve the value of the coverage assigned, the
44 right to receive information concerning the coverage, the
46 right to receive notice of a lapse or discontinuation of
48 coverage, the exclusive right to exercise any options
50 concerning the assigned coverage during an open enrollment
 period and all such other rights and privileges initially
 granted to the insured under the terms of the individual or
 group life insurance policy.

42 B. An insured has the right to exercise any option for
44 accelerated benefits under the terms of any individual or
46 group life insurance policy at any time for any unassigned
 portion of such policy or certificate.

48 C. A self-administered group is deemed to be the agent of
50 the insurance company for purposes of notice,
 communications, premium collection and other administrative
 functions and this section applies to any self-administered

group in that agency capacity and the underwriting insurance company through such agency.

3. Failure to give notice under group life insurance policy. If the rights under a group life insurance policy have been assigned and the administrator of the policy fails to give notice to the assignee that the insured is no longer a covered person under the group and of the right to convert the policy to an individual life insurance policy, the period of time during which the assignee must make application for conversion under the terms of the group life insurance policy begins from the date the notice is given to the assignee.

4. Actions of insured as defense. An insurance company may not raise against the assignee of a policy or rights under a group life insurance policy any defense to payment under the terms of the policy if that defense is based on the statements, concealment, misrepresentations, warranties or other actions by the insured and if the assignee took assignment for value in good faith without knowledge of such actions by the insured at the time the actions are alleged to have occurred.

5. Date of incontestability. All policies of individual life insurance that have been converted from a group life insurance policy under the terms of the policy must contain a rider or other policy provision that provides that, for purposes of measuring the period of incontestability or suicide exclusion, the date of issue is the original date of coverage under the group policy and not the date of issue of the individual policy.

§6812. Insurance company practices

1. Duty to provide information. An insurance company that is licensed to do business in this State shall provide the specified information requested on the status of a viator's policy or viator's certificate within 10 business days of the receipt of the following documents in the office of the insurance company:

A. An authorization signed by the viator to release specified information regarding the policy or certificate to a named licensed viatical settlement provider, viatical settlement agent or viatical settlement broker; and

B. A request in writing from the named licensed viatical settlement provider, viatical settlement agent or viatical settlement broker for the specified policy or certificate information.

2. Conversion of group insurance. An issuer of a group life insurance policy that is licensed to do business in this State shall, within 10 business days of the receipt in the office

of the insurer of a written request from a certificate holder for a conversion to an individual life insurance policy, deliver the conversion policy to the policy holder if the certificate holder has indicated that the conversion is being requested for the purpose of entering into a viatical settlement contract.

3. Right to assign rights or benefits. Subsection 1 or 2 does not prohibit a viator under a group life insurance policy from assigning rights or benefits under the policy to a licensed viatical settlement provider or converting the coverage to an individual life insurance policy.

4. Assignment restrictions prohibited. A policy of group life insurance issued or in existence in this State that permits any assignment of a viator's rights may not restrict the viator from making assignments other than by gift.

5. Purchase of securities. This chapter does not require notice to the superintendent of, or restrict an insurance company from investing in, or participating in, or purchasing any securities issued in any transaction including without limitation any financing, securitization transaction or securities offering in which the licensed viatical settlement provider sells, assigns, transfers, pledges, hypothecates or otherwise disposes of viatical settlement contracts, viaticated policies or any interest therein.

§6813. Financing

1. Financing entity. A financing entity is not required to obtain a license as a viatical settlement provider or a viatical settlement broker.

2. Fee. This chapter does not restrict a person from receiving a fee, commission or other valuable consideration for services in connection with a financing transaction.

§6814. Unfair trade practices

A violation of this chapter is an unfair trade practice under Title 5, chapter 10 and subject to the penalties contained in that chapter.

§6815. Assignment or resale of viaticated policies

1. Prohibited transfers. A viatical settlement provider may not sell, assign, transfer or pledge a viaticated policy except to a licensed viatical settlement provider or a person exempt from licensing under section 6803 or 6813.

2. Securities registration. Any sale by a viatical settlement provider of viatical settlement contracts, viaticated

2 policies or interests in a viatical settlement contract or
3 viaticated policy that constitute a "security" within the meaning
4 of the United States Securities Act of 1933, as amended, or the
5 Revised Maine Securities Act, as amended, must be registered
6 under those statutes unless there is an available exemption from
7 registration under those statutes.

8 **§6816. Permitted operations before formal approval**

10 A viatical settlement provider or viatical settlement broker
11 that is currently acting in this State may continue to operate
12 pending approval or disapproval of the applicant's license under
13 this chapter, if an application is filed with the superintendent
14 pursuant to this chapter and prior to January 1, 1998.

16 **Sec. 2. Effective date.** This Act takes effect November 1, 1997.

18 **SUMMARY**

20 This bill establishes a mechanism for regulating viatical
21 settlement agreements. Viatical settlement agreements are
22 agreements by which a person insured under a life insurance
23 policy who has a catastrophic or life-threatening illness agrees
24 to designate the viatical provider as the beneficiary under the
25 policy in exchange for an immediate payment to the ill person.
26 This bill requires a person who acts as viatical settlement
27 provider or viatical settlement broker to obtain a license from
28 the Superintendent of Insurance, demonstrate trustworthiness and
29 good business standing and demonstrate financial responsibility.
30 Forms used by viatical settlement providers and viatical
31 settlement brokers must be approved by the superintendent.
32 Annual reports are required. The bill also provides for the
33 confidentiality of information relating to the viator, disclosure
34 of the rights of a viator, potential implications of a settlement
35 agreement and provisions for ensuring that a viator is competent
36 and enters into the agreement voluntarily. A violation of the
37 viatical settlement provisions is an unfair trade practice.
38 Currently, these types of agreements are being entered into
39 without regulation or protection for the insured person.
40