



State of Wisconsin / OFFICE OF THE COMMISSIONER OF INSURANCE

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Sean Dilweg, Commissioner

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Office of the Commissioner of Insurance Life Settlement Subgroup

Minutes

Tuesday December 16, 2008

10:00 a.m. – 11:30 a.m.

125 South Webster Street

Room 227

Madison, WI 53703

Subgroup Members Present: Jason Johns, Tenuta and Johns; Ron Kuehn, DeWitt Ross & Stevens; John Gerni, American Council of Life Insurers; Connie O'Connell, Parrett & O'Connell; Martin O'Brien, Principal Financial Group; Dave Larson, American Family Insurance; Grant Nyhammer, Coalition of Wisconsin Aging Groups

Subgroup Members Present Via Teleconference: Daniel Armendariz for Doug Head, National Life Insurance Settlement Association; Heather Thenell, Thrivent; Barbara Becker, Becker & Hickey

OCI Representatives Present: Commissioner Sean Dilweg, Assistant Deputy Commissioner Eileen Mallow, Jim Harris, Jennifer Stegall, Jim Guidry, Sue Ezalarab, Kelli Banks

Others Present: Mark Backe, Fred McGarvey, Nat Shapo, Sharon Brosnan, Susan Callanan

I. Introductions

Eileen Mallow, OCI

Introductions were made.

II. Life Settlement Subgroup Goals, Timeline, Future Meeting Dates

Eileen Mallow, OCI

Eileen stated the end goal of this subgroup is to come to a consensus recommendation for the Commissioner by spring for statutory changes relating to life settlements. Eileen recognized that this will be challenging but will be deliberate in discussing the issues. These meetings will serve as a forum for members to identify problems and offer suggested changes. There will be a lot of diverse interests at the table and all are critical to the

discussion and impact of the language ultimately recommended. To achieve a work product by spring of 2009 the group will meet every month through April. A list of meeting dates was emailed to everyone and also included in everyone's packets. The subgroup will use the "Outline of Proposed WI Viatical Settlements Act" as a starting point.

III. Review of Wisconsin's Insurable Interest Law

Jim Harris, OCI

Jim Harris discussed that states have the authority to regulate the business of insurance and also the authority to enact laws that relate to the regulation of the business of insurance, including marketing, sale, execution, performance and administration of insurance contracts. The Commissioner of Insurance is vested with broad authority to affect the purposes of the insurance statutes which include those listed in s. 601.01, Stat.

Jim indicated that this subgroup will be discussing statutes and court cases and interpretation is important. In discerning the meaning of statutes it is important to look to the plain and ordinary meaning of the words used, their context and their relationship to the statutory sections dealing with the same or similar subject matter. In discerning the meaning and import of court cases it is important to distinguish the rule of the case (holding) from dictum, which is merely comment concerning a legal proposition that is not essential to determination of the case at hand and lacks the force of an adjudication (although it may have persuasive or reflective value). An example Mr. Harris used was *Buringer v. The Bank of Watertown* 67 Wis. 75 (1886).

Jim defined the players. The viator is the target population of course is that which has a short life expectancy, the aged, chronically and terminally ill. The population is most vulnerable because of diminished cognitive or perceptive ability and isolation. They are not organized and are largely unrepresented. The broker is commission based salesmen trained and skilled in the art of "closing a deal". The provider is commission based salesmen interested in profit. The insurer is established and organized with vast resources and an entity that evaluates and accepts the risk. The settlement industry is organized and motivated with vast resources. The financing entity is largely beyond regulatory reach of OCI. The purchaser may be individuals or entities with mutual benefits.

Jim discussed insurable interest. Wisconsin does not specifically define the term by statute. The common understanding of the term in the law as it relates to life insurance is "an interest based upon a reasonable expectation of pecuniary advantage through the continued life, health or bodily safety of another person, and the consequent loss by reason of that person's death or disability." Wisconsin law does require the existence of an insurable interest at the inception of a life insurance policy. Some states deem the transaction

void when there is lack of insurable interest at inception. Wisconsin follows a different approach per s. 631.07(4).

Jim discussed assignability. Wisconsin law recognized at an early date that it is competent for an owner of a valid existing life policy to assign the same so that the assignee may maintain an action thereon in his own name. A life policy is on the same footing in this respect as other choses in action, which are assignable in equity. A "chose in action" is defined as "a personal right not reduced into possession, but recoverable out of a contract" as defined in Black's Law Dictionary.

Jim next discussed incontestability. Incontestability is simply a statute of limitations for an insurer, and in Wisconsin, s. 632.46(1), Stat. provides: "Except...for nonpayment of premiums, no individual life insurance policy may be contested after it has been in force from the date of issue for 2 years during the lifetime of the person whose life is at risk". In the context of viatical settlements, this limitation coupled with the Wisconsin view of insurable interest would appear to create a strict due diligence standard for life insurers at the time a policy application is taken

IV. Coventry Comments on the "Outline of Proposed WI. Viatical Settlements Act"

Jason Johns, Coventry

Nat Shapo spoke on behalf of Jason Johns. Nat provided background on the property rights in alienating a life insurance policy. Nat cited the Wisconsin Supreme Court case *Bussinger v. Bank of Watertown* 67 Wis. 75 (1886). This case recognized property rights which allow consumers to take out policies on their own lives for whatever purpose they desire.

Grant Nyhammer asked if there were any more recent cases after 1886? Nat stated there are many cases but feels that the issue is so far settled and clearly stated law has been established.

Mr. Shapo feels that purchasing with intent to later resell is a property right, not a contract right. Mr. Shapo explained that STOLI is stranger originated life insurance not stranger owned or oriented life insurance.

Eileen Mallow asked how WI laws are different going back to Jim Harris presentation?

Nat Shapo answered he did not hear how WI laws are different but the remedy is different.

Nat stated that the secondary market provides alternatives for consumers which allow them to use competition to their benefit in order to challenge what

has been recognized by the courts as the issuing insurer's monopoly over setting resale value of life policies. Nat explained that the secondary market provides a competitive insurance environment and the five year ban and other provisions in the current settlement draft directly violate this. Nat thinks there are flaws in the NAIC model process. NCOIL recognized the substantial problems with the NAIC process when it took the highly unusual step of passing a resolution in March 2007 asking NAIC to re-open its process and proceed with proper deliberations. Nat believes the concept of an NAIC/NCOIL hybrid is irrational. He urged OCI to use NCOIL, not NAIC as a starting point. Nat explained that his main concerns include the five year ban on settlements, the financial responsibility requirement, the rescission period of 60 days after contract or 30 days after proceeds received and the disclosure by settlement provider to insurer.

Connie O'Connell questioned whether the existence of a property right in a life insurance policy negate the responsibility or authority of government to regulate that property right?

Nat explained that Coventry is not against government regulation when an identified consumer problem exists. He feels that there are virtually no complaints regarding secondary life insurance market transactions and regulation will stifle the market's ability to sort out competition between interest groups.

Ron Kuehn asked if Coventry supports the prohibition of stranger originated life insurance.

Nat answered yes they do.

Martin O'Brien asked isn't the 5 year ban avoided when looking at the exceptions?

Nat answered that the five year ban is anti-consumer and represents an extreme restriction on property rights for no consumer gain.

Jim Harris commented that OCI and other insurance departments have limitations or regulations restricting certain events in the sale of an insurance policy based on consumer protection.

V. Remarks

Commissioner Dilweg, OCI

Commissioner Dilweg thanked everyone for coming together as a group. He will work closely with Eileen and Jennifer in communicating the thoughts of this group. He will work closely with the legislature as well. He hopes to get as much done at this level as we can. He thinks there are many important

issues that we can work through recognizing we may not be able to work through all of them.

VI. American Council of Life Insurers Comments on the “Outline of Proposed WI. Viatical Settlements Act”

John Gerni, ACLI

John Gerni showed a news clip from a television station in California where an elderly couple was faced with this issue.

John indicated this issue is not complicated. He said unfortunately the insurable interest doctrine is being turned on its head by third party investors who procure the issuance of life insurance policies on elderly people in whom the investors have no insurable interest, for the sole purpose of acquiring those policies and profiting from them at a later date.

Marty O’Brien asked if these life expectancy companies can be taken to court?

John answered that there are life expectancy companies and he is not sure if they could be litigated.

John explained that there are restrictions on all property rights. He believes that these proposals are not restricting property rights on life insurance. John believes the outline is consistent with the NAIC Viatical Settlements Model Act and also includes additional consumer protection provisions from the NCOIL Life Settlements Model Act. John said it is important to stay focused on the goal of stopping these abusive schemes and not take our eyes off the ball when changes are offered to the provisions. These provisions were carefully drafted with the intent of stopping these STOLI schemes, so any suggested changes to important provisions should be carefully reviewed with the goal of stopping STOLI and whether such changes could actually legitimize STOLI. John stated that ACLI believes the initial draft outline as presented by the OCI is a positive first step in development of appropriate legislation.

VII. Other Business

Eileen Mallow, OCI

The discussion ended with the group agreeing all are opposed to STOLI, but that future discussion will be needed to define STOLI.

VIII. Next Meeting

Eileen Mallow, OCI

Next meeting Thursday, January 29, 2009