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REPORT FROM COUNSEL

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PENNSYLVANIA VIATICAL INDUSTRY RECEIVES LEGISLATIVE ATTENTION

By Danielle R. Fahr, Esquire

After years of debate, the Pennsylvania Legislature recently enacted the Pennsylvania Viatical Settlement Act ("Act") to govern the viatical and life settlement agreement industry in Pennsylvania. These agreements are a relatively new concept but are a fast growing investment trend. The Act went into effect on October 8, 2002.

A viatical settlement agreement is a personal life insurance policy sold by a terminally or chronically ill person in the last stages of life whereas a life settlement agreement is a personal life insurance policy sold by a senior or otherwise healthy individual during his or her lifetime. The process involves a viatical settlement provider ("Provider") purchasing an existing life insurance policy from an insured for a portion of the actual face value of the policy. The portion paid to the insured typically ranges from fifty to seventy-five percent of the face value. In return, the Provider (or later investors) is named as the beneficiary of the policy and, upon the insured's death, receives the insurance proceeds.

The Act provides for special attention to the protection of the rights and financial interests of Pennsylvania insureds. Under the newly enacted law, a Provider transacting business within the Commonwealth must be licensed by the Pennsylvania Insurance

Department. In order to obtain a license, a Provider must submit detailed personal, business, and financial information to the Pennsylvania Insurance Department, and will continue to be monitored in much the same way as Pennsylvania insurance companies.

Any unlicensed Provider found to have engaged in the viatical industry within Pennsylvania will be guilty of a felony in the third degree, which imposes up to seven years imprisonment. The licensing requirements and stiff violation penalties are designed to protect Pennsylvania insureds by ensuring that all viatical settlements are fairly drafted, executed, and administered by a competent, legitimate, and financially stable Provider.

In addition, insureds must be informed when owner or beneficiary interests are transferred after the initial sale to a licensed Provider. What this means is that insureds will be informed of exactly who has invested in their life insurance policies. An investor in the viatical industry should be cognizant of this possibility.

Licensed Providers receive substantial protection under the Act as well. The Act includes substantial antifraud initiatives including procedures for detecting and investigating actual or possible fraudulent viatical settlements, as well as procedures for resolving material inconsistencies between medical records and insurance applications. The initiatives serve as financial protection for insurance companies and Providers.

A Provider must also submit a description of its organizational structure and key personnel, including antifraud personnel who are responsible for the investigation and reporting of possible fraudulent viatical settlement acts and investigating unresolved material inconsistencies between medical records and insurance applications. These antifraud provisions are meant to address "patients" who are not really terminally ill and who are instead seeking to defraud Providers and abscond with the fraudulently obtained funds.

The Act should serve to better protect both Providers and insureds in the heretofore unregulated Pennsylvania viatical industry. To receive these protections, however, Providers must be certain to take every precaution to ensure compliance with Pennsylvania law. Similarly, an insured wishing to sell his or her life insurance policy should check with several different Providers and ensure the Provider ultimately chosen is licensed within the Commonwealth. An insured should also check with his or her life insurance policy provider to ascertain whether the policy includes an accelerated death benefit provision which will require the insurance company to pay the entire amount of the life insurance proceeds prior to the insured's death. These provisions normally require some type of medical documentation of a short life expectancy, similar to viatical agreements.

About the Author

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in Administration of Justice. Ms. Fahr received her J.D. degree cum laude from Duquesne Law School.

BEWARE OF PREDATORY HOME LOANS

At a time when stock prices have tumbled, so have interest rates on home equity loans and mortgages, and many homeowners are borrowing against their homes to generate cash. As a result, more people are at risk of being victimized by "predatory" lenders. A predatory loan occurs when a company misleads, tricks, or even coerces someone into taking out a home loan with excessive costs and without regard to the homeowner's ability to repay. The consequences of such a loan can be especially severe since the defaulting borrower could lose the home itself.

For the most part, predatory lending has been associated with companies that specialize in marketing to people with poor credit histories or who are simply strapped for cash. Typical targets are elderly people with high medical bills or overdue home repairs, middle-class individuals swamped by credit card debt, and lower-income consumers with less access to reputable lenders.

A typical consumer may not know the terms for predatory practices, but the borrower will recognize some of these behaviors. In a "bait and switch" scheme, the lender promises one thing but offers something different at closing, when it really matters. "Equity stripping" results from encouraging heavy borrowing from home equity, beyond the consumer's ability to make payments. "Loan flipping" is multiple refinancing, to the point that fees, and possibly higher rates, become unmanageable. When a lender engages in "loan packing," it has added charges to the loan contract for overpriced or unnecessary items.

There are federal laws designed to protect consumers from some of the predatory lending practices. The Truth in Lending Act requires lenders to give timely information about loan terms and costs, and it allows borrowers on loans secured by a home to cancel the loan up to three business days after signing the contract. The Home Ownership and Equity Protection Act requires providers of "high cost" refinancing or home equity loans to give the borrower key information about the loan three days before closing. It also prohibits the making of a home equity loan without regard to a borrower's ability to pay it back. These laws play an important role, but the best deterrent to predatory lending is informed and vigilant consumers.

Some of the most effective preventive measures are only common sense, but in practice they are too often ignored: (1) think through the decision to borrow before taking the plunge, and be wary of a lender who hurries you; (2) select a lender with a good reputation in your community, and steer clear of home improvement contractors or loan brokers who contact you out of the blue; (3) compare quotes from at least three lenders, then negotiate for the best possible deal. And remember, the loan with the lowest monthly

payment is not necessarily the best loan; and (4) read and make sure you understand the loan documents before signing them, keeping an eye out for discrepancies between what may have been discussed previously and what is in the fine print.

AN EXPENSIVE TEE SHOT

For some, golf courses are like outdoor board rooms. The emphasis is as much on conducting business as it is on lowering handicaps. But if business transactions have taken priority over the game itself, there is a risk that an injury caused by someone's negligence can have repercussions for the firm's bottom line.

A member of a golf club invited a guest for a round of golf and a sales pitch as to why he should come to work for the member's family business. The guest was new to golf, and his host did not fill him in about basic golf etiquette. The guest teed off on the first hole when another golfer on the same hole was only about 70 yards down the fairway. The tee shot struck the golfer in the eye, causing permanent partial loss of vision and a scar.

The injured golfer sued the club member for negligence for not controlling her guest, as required under the club's rules. She argued that the member did not meet her duty of stopping her guest from teeing off before the fairway was clear. In fact, the member had hit first, giving her uninitiated guest the impression that he could do the same.

Before the case could get to a jury, it was settled for a substantial amount. Most of the settlement cost was borne by the club member's family business, because the golf outing was as much for recruiting an employee as for recreation. This case suggests the need for company policies requiring employees to supervise their guests when entertaining on a golf course, including a basic review of golf etiquette and safety for novice golfers.

IS IT TIME FOR AN ESTATE PLANNING CHECKUP?

Even the most detailed and carefully crafted estate plan should be revisited periodically to make sure that it is in line with changing laws and life circumstances.

- * Be sure that estate assets are held in such a way as to minimize estate taxes at death and to avoid overfunding or underfunding of post-death trusts;
- * Review the powers of attorney for health care and property to confirm that they reflect current wishes;
- * Make adjustments to reflect the death or disability of a beneficiary, or a significant change in a beneficiary's needs;

- * Review how you hold title to assets (i.e., payable on death, joint tenancy, tenancy by the entirety, etc.);
- * If you have not already done so, name appropriate guardians for minor children in your will;
- * If you have included a marital gift or a marital trust upon the death of one spouse, consider making the provisions more or less restrictive;
- * Examine the scope of "powers of appointment" that allow a survivor to redirect where assets will eventually pass;
- * Confirm that the timing as to when a beneficiary will receive or have the right to demand principal is compatible with current wishes;
- * Make any revisions suggested by changes in the family such as disabilities, births, deaths, or changed marital status;
- * Reassess how title to your home is held;
- * Consider the different options for designating beneficiaries for IRA accounts, pension plans, and other assets related to retirement;
- * Possibly make annual gifts to children and others free of estate and gift taxes (up to \$11,000 per person per year in 2002);
- * Consider setting up separate trusts or Section 529 education funding plans for children or grandchildren.

In addition to these considerations, there is a broad range of estate planning options, one or more of which may be desirable based on current circumstances. Among these devices are charitable trusts, irrevocable life insurance trusts, family limited partnerships, family foundations, and qualified personal residence trusts. A qualified professional can help you sort through the possibilities and arrive at an estate plan that keeps up with changing conditions.

IRS MAKES IT EASIER TO SETTLE TAX DEBTS

The Internal Revenue Service has published new regulations that will make it easier for taxpayers to negotiate settlements of their tax debts. The regulations expand the "offer in compromise" program, under which settlements can be reached with taxpayers who cannot pay their entire tax debts.

Under the old policies, the IRS could accept a taxpayer's offer of settlement only if there was a doubt about whether the taxpayer was liable or the debt could ever be collected. These bases for compromise remain in effect, but the new regulations add flexibility, making the IRS decision to accept or reject a compromise offer dependent on the taxpayer's particular circumstances. The bottom line is that a taxpayer is eligible for a compromise where collection of the entire tax debt would create economic hardship or where there are compelling public policy or equity considerations favoring a settlement.

It may be evidence of hardship if a taxpayer cannot: (1) earn a living due to a long-term illness or disability, and it is foreseeable that resources will be exhausted; (2) pay basic living expenses if assets are liquidated to pay the tax debt; or (3) borrow against equity in assets, and seizure or sale could make it difficult for the IRS to collect the tax debt.

Even with loosened-up rules, the IRS will only come so far to meet a taxpayer in a settlement. The new rules do not allow a compromise that "would undermine compliance with the tax laws." The burden is on the taxpayer to make the case for compromise. Absent exceptional circumstances, the IRS will presume that an uncompromising application of the tax laws gives a fair and equitable result.

FIRM ANNOUNCEMENT

Matt A. Jarrell is an associate attorney with the firm and is a member of the firm's Litigation Group. Prior to joining the firm, Mr. Jarrell was employed at a mid-size regional firm located in Pittsburgh where he practiced in the Corporate/Commercial Litigation Group and focused primarily on commercial and corporate contract disputes. Mr. Jarrell is a 1997 graduate of West Virginia University and a 2000 graduate of Washington and Lee University School of Law. Mr. Jarrell is an active member of both the Pennsylvania Bar and the West Virginia State Bar.

NO PRIVACY FOR HOME COMPUTER

An insurance services company bought two computers for use by Robert, one of its employees. One computer was used at the office, and one was used exclusively at home. Robert signed a policy statement in which he agreed that he would use the computers for business purposes only and not for various inappropriate purposes, including accessing obscene material. He also consented to having his computer use monitored "as needed" by employer personnel and agreed that his communications by computer were not private.

When Robert's employer determined that he had used the home computer to view sexually explicit material, it fired him, despite Robert's protests that he had not

intentionally accessed the pornographic sites. Robert sued for wrongful discharge, contending that the real reason he was let go was the fact that three days after the termination some of his stock options were going to vest. Since the company contended that the home computer was likely to contain evidence that Robert was deliberately accessing pornography, it demanded that the computer be produced, with nothing deleted from the hard drive. Robert refused, arguing that he had an expectation of privacy when using a computer at home, even a computer supplied by his employer.

The court ordered Robert to turn over the computer under the terms required by his employer. It rejected the argument that the home computer was a "perk" for senior executives that could be used for personal purposes. In Robert's case, the home computer was, in fact, primarily used by him and his family for personal matters. Information on the computer included his family's financial information and personal correspondence. Robert and his family had been treating the home computer as a personal computer at their own risk.

Robert lacked a reasonable expectation of privacy in the home computer, in part because he had notice of and had consented to his employer's policy allowing only business use of the computer. Another factor weighing against his position, however, was "accepted community norms." He could not argue forcefully that there had been an invasion of privacy given that, according to the court, over three-quarters of major firms in the country monitor, record, and review employee communications and activities on the job.