

Committee Substitute for
Committee Substitute for Senate Bill No. 108

An act relating to financial settlements; amending s. 626.9911, F.S.; revising definitions; amending s. 626.9921, F.S.; providing for approval of forms; amending s. 626.99235, F.S.; providing for applicability; amending s. 626.99236, F.S.; requiring certain purchases to be handled by an independent third-party trustee; amending s. 626.9924, F.S.; revising procedures for tracking the insured; amending s. 626.99245, F.S.; clarifying the application of licensing requirements to viatical settlement providers; specifying the purpose of the act; providing definitions; providing requirements for the direct or indirect transfer of structured-settlement-payment rights; requiring that any such transfer be approved by a court; requiring that the court make certain findings with respect to the transfer; authorizing an interested party to file an objection to a proposed transfer; providing requirements for an order approving a transfer; requiring that an obligor make certain disclosures to a claimant in negotiating a settlement of claims; requiring a transferee to provide certain notice with respect to a proposed transfer of structured-settlement-payment rights; providing for penalties to be imposed for certain violations of the act; authorizing an interested party to bring an action for injunctive relief; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (8), (9), (10), (14), and (15) of section 626.9911, Florida Statutes, are amended to read:

626.9911 Definitions.—As used in this act, the term:

(8) “Related provider trust” means a titling trust or other trust established by a licensed viatical settlement provider or financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction entering into or owning viatical settlement contracts. The trust must have a written agreement with a licensed viatical settlement provider or financing entity under which the licensed viatical settlement provider or financing entity is responsible for insuring compliance with all statutory and regulatory requirements and under which the trust agrees to make all records and files relating to viatical settlement transactions available to the department as if those records and files were maintained directly by the licensed viatical settlement provider. This term does not include an independent third-party trustee or escrow agent or a trust that does not enter into agreements with a viator. A related provider trust shall be subject to all provisions of this act that apply to the viatical settlement provider who established the related provider trust, except s. 626.9912, which shall not be applicable. A viatical settlement provider may establish no more than one related provider trust, and the sole trustee of such related provider trust shall be the viatical settlement provider licensed under s. 626.9912. The name of the licensed viatical settle-

ment provider shall be included within the name of the related provider trust.

(9) “Viatical settlement purchase agreement” means a contract or agreement, entered into by a viatical settlement purchaser, to which the viator is not a party, to purchase a life insurance policy or an interest in a life insurance policy, which is entered into for the purpose of deriving an economic benefit. The term also includes purchases made by viatical settlement purchasers from any person other than the provider who effectuated the viatical settlement contract.

(10) “Viatical settlement purchaser” means a person who gives a sum of money as consideration for a life insurance policy or an equitable or legal interest in the death benefits of a life insurance policy that has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit, including purchases made from any person other than the provider who effectuated the viatical settlement contract or an entity affiliated with the provider. The term does not include,~~other than~~ a licensee under this part, an accredited investor as defined in Rule 501, Regulation D of the Securities Act Rules, or a qualified institutional buyer as defined by Rule 144(a) of the Federal Securities Act, ~~or~~ a special purpose entity, a financing entity, or a contingency insurer who gives a sum of money as consideration for a life insurance policy or an equitable or legal interest in the death benefits of a life insurance policy which has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit. The above references to Rule 501, Regulation D and Rule 144(a) of the Federal Securities Act are used strictly for defining purposes and shall not be interpreted in any other manner. Any person who claims to be an accredited investor shall sign an affidavit stating that he or she is an accredited investor, the basis of that claim, and that he or she understands that as an accredited investor he or she will not be entitled to certain protections of the Viatical Act. This affidavit must be kept with other documents required to be maintained by this act.

(14) “Special purpose entity” means an entity established by a licensed viatical settlement provider ~~or by a financing entity,~~ which may be a corporation, partnership, trust, limited liability company, or other similar entity formed solely to provide, either directly or indirectly, access to act as a vehicle to permit a lender to the provider to access institutional capital markets to a viatical settlement for the provider or financing entity. A special purpose entity shall not enter into a viatical settlement contract or a viatical settlement purchase agreement.

(15) “Financing entity” means an underwriter, placement agent, lender, purchaser of securities, or purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any ~~entity person that may be a party to a viatical settlement contract and that~~ entity person that has direct ownership in a policy or certificate that is the subject of a viatical settlement contract, but whose principal sole activity related to the transaction is providing funds or credit enhancement to effect the viatical settlement or the purchase of one or more viatical policies and who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of

~~viatical settlement contracts a licensed viatical settlement provider to act as a participant in a financing transaction. The term does not include a nonaccredited investor, a viatical settlement purchaser, or other natural person. A financing entity may not enter into a viatical settlement contract.~~

Section 2. Subsection (1) of section 626.9921, Florida Statutes, is amended to read:

626.9921 Filing of forms; required procedures; approval.—

(1) A viatical settlement contract form, viatical settlement purchase agreement form, escrow form, or related form may be used in this state only after ~~the viatical settlement provider or any related provider trust has filed the form~~ has been filed with the department and only after the form has been approved by the department.

Section 3. Subsection (3) is added to section 626.99235, Florida Statutes, to read:

626.99235 Disclosures to viatical settlement purchasers; misrepresentations.—

(3) The requirements of this section also apply to purchases made from any person other than the provider who effectuated the viatical settlement contract which are the subject of a viatical settlement purchase agreement.

Section 4. Section 626.99236, Florida Statutes, is amended to read:

626.99236 Further disclosures to viatical settlement purchasers.—

(1) No later than 5 days prior to the assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate of insurance to the purchaser, the viatical settlement provider and the viatical settlement sales agent, themselves itself or through another person, shall provide in writing the following disclosures to any viatical settlement purchaser:

(a) All the life expectancy certifications obtained by the provider.

(b) The name and address of the insurance company, the policy number, and the date of original issue of the viaticated policy.

(c) The experience and qualifications of the person issuing the life expectancy certification, and that person's relationship to the viatical settlement provider, the viatical settlement broker, the viatical settlement sales agent, and the viator.

(d) The name and address of any person providing escrow services, and that person's relationship to the viatical settlement provider, the viatical settlement broker, the viatical settlement sales agent, and the viator.

(e) The type of life insurance policy offered or sold, including a statement as to whether the policy is whole life, term life, universal life, or a group policy certificate; a statement as to whether the policy is in lapse status or

has lapsed in the last 2 years; and a statement as to whether the purchaser is entitled to benefits contained in the policy other than the death benefit of the policy.

(f) The procedure to be used by the provider to provide the status of the health condition of the insured to a purchaser.

(2) The viatical settlement purchase agreement is voidable by the purchaser at any time within 3 days after the disclosures mandated by this section are received by the purchaser.

(3) At the time the disclosures in subsection (1) are made, the viatical settlement purchaser shall be advised to seek independent financial advice from a person not compensated by the viatical settlement provider or viatical settlement broker or the viatical settlement sales agent. The viatical settlement purchaser shall sign an affidavit that he or she has received the disclosures and understands their importance.

(4) A viatical settlement purchase transaction, which involves a purchase from any person other than the provider who effectuated the viatical settlement contract that is the subject of a viatical settlement purchase agreement, may be completed only through the use of an independent third-party trustee or escrow agent. All funds to be paid by the purchaser must be deposited by the purchaser with the independent third-party trustee or escrow agent. The independent third-party trustee or escrow agent shall not release the deposited funds to the seller until after the 3-day voidable period established by subsection (2) has expired.

(5) The requirements of subsections (1), (2), and (3) also apply to purchases made from any person other than the provider who effectuated the viatical settlement contract that are the subject of a viatical settlement purchase agreement.

Section 5. Subsection (10) is added to section 626.9924, Florida Statutes, to read:

626.9924 Viatical settlement contracts; procedures; rescission.—

(10) The viatical settlement provider who effectuated the viatical settlement contract with the viator (the “initial provider”) is responsible for tracking the insured, including but not limited to, keeping track of the insured’s whereabouts and health status, submission of death claims or assisting the beneficiary in the submission of death claims, and the status of the payment of premiums until the death of the insured. This responsibility may be contracted out to a third party; however, the ultimate responsibility remains with the initial provider. This responsibility continues with the initial provider, notwithstanding any transfers of the viaticated policy in the secondary market. This subsection applies only to those viaticated policies that are or are to become the subject of viatical settlement purchase agreements.

Section 6. Subsection (3) is added to section 626.99245, Florida Statutes, to read:

626.99245 Conflict of regulation of viaticals.—

(3) This section does not affect the requirement of ss. 626.9911(6) and 626.9912(1) that a viatical settlement provider doing business from this state must obtain a viatical settlement license from the department. As used in this subsection, the term “doing business from this state” includes effectuating viatical settlement contracts and effectuating viatical settlement purchase agreements from offices in this state, regardless of the state of residence of the viator or the viatical settlement purchaser.

Section 7. Transfers of structured-settlement-payment rights.—

(1) PURPOSE.—The purpose of this section is to protect recipients of structured settlements who are involved in the process of transferring structured-settlement-payment rights.

(2) DEFINITIONS.—As used in this section, the term:

(a) “Annuity issuer” means an insurer that has issued an annuity contract to be used to fund periodic payments under a structured settlement.

(b) “Applicable law” means any of the following, as applicable in interpreting the terms of a structured settlement:

1. The laws of the United States;

2. The laws of this state, including principles of equity applied in the courts of this state; and

3. The laws of any other jurisdiction:

a. That is the domicile of the payee or any other interested party;

b. Under whose laws a structured-settlement agreement was approved by a court; or

c. In whose courts a settled claim was pending when the parties entered into a structured-settlement agreement.

(c) “Applicable federal rate” means the most recently published applicable rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service pursuant to section 7520 of the United States Internal Revenue Code, as amended.

(d) “Assignee” means any party that acquires structured-settlement-payment rights directly or indirectly from a transferee of such rights.

(e) “Dependents” means a payee’s spouse and minor children and all other family members and other persons for whom the payee is legally obligated to provide support, including spousal maintenance.

(f) “Discount and finance charge” means the sum of all charges that are payable directly or indirectly from assigned structured-settlement payments and imposed directly or indirectly by the transferee and that are incident to a transfer of structured-settlement-payment rights, including:

1. Interest charges, discounts, or other compensation for the time value of money;
2. All application, origination, processing, underwriting, closing, filing, and notary fees and all similar charges, however denominated; and
3. All charges for commissions or brokerage, regardless of the identity of the party to whom such charges are paid or payable.

The term does not include any fee or other obligation incurred by a payee in obtaining independent professional advice concerning a transfer of structured-settlement-payment rights.

(g) "Discounted present value" means, with respect to a proposed transfer of structured-settlement-payment rights, the fair present value of future payments, as determined by discounting the payments to the present using the most recently published applicable federal rate as the discount rate.

(h) "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser:

1. Who is engaged by a payee to render advice concerning the legal, tax, and financial implications of a transfer of structured-settlement-payment rights;
2. Who is not in any manner affiliated with or compensated by the transferee of the transfer; and
3. Whose compensation for providing the advice is not affected by whether a transfer occurs or does not occur.

(i) "Interested parties" means:

1. The payee;
 2. Any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death or, if such designated beneficiary is a minor, the designated beneficiary's parent or guardian;
 3. The annuity issuer;
 4. The structured-settlement obligor; or
 5. Any other party who has continuing rights or obligations under the structured settlement.
- (j) "Payee" means an individual who is receiving tax-free damage payments under a structured settlement and proposes to make a transfer of payment rights under the structured settlement.

(k) "Qualified-assignment agreement" means an agreement providing for a qualified assignment, as authorized by Title 26, section 130 of the United States Internal Revenue Code, as amended.

(l) “Settled claim” means the original tort claim resolved by a structured settlement.

(m) “Structured settlement” means an arrangement for periodic payment of damages for personal injuries established by settlement or judgment in resolution of a tort claim.

(n) “Structured-settlement agreement” means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement, including the rights of the payee to receive periodic payments.

(o) “Structured-settlement obligor” means the party who is obligated to make continuing periodic payments to the payee under a structured-settlement agreement or a qualified-assignment agreement.

(p) “Structured-settlement-payment rights” means rights to receive periodic payments, including lump-sum payments under a structured settlement, whether from the structured-settlement obligor or the annuity issuer, if:

1. The payee or any other interested party is domiciled in this state;
2. The structured settlement agreement was approved by a court of this state; or
3. The settled claim was pending before the courts of this state when the parties entered into the structured-settlement agreement.

(q) “Terms of the structured settlement” means the terms of the structured-settlement agreement; the annuity contract; a qualified-assignment agreement; or an order or approval of a court or other government authority authorizing or approving the structured settlement.

(r) “Transfer” means a sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made by a payee for consideration.

(s) “Transfer agreement” means the agreement providing for transfer of structured-settlement-payment rights from a payee to a transferee.

(t) “Transferee” means a person who is receiving or who will receive structured-settlement-payment rights resulting from a transfer.

(3) CONDITIONS TO TRANSFERS OF STRUCTURED-SETTLEMENT-PAYMENT RIGHTS AND STRUCTURED-SETTLEMENT AGREEMENTS.—

(a) A direct or indirect transfer of structured-settlement-payment rights is not effective and a structured-settlement obligor or annuity issuer is not required to make a payment directly or indirectly to a transferee of structured-settlement-payment rights unless the transfer is authorized in advance in a final order by a court of competent jurisdiction which is based on the written express findings by the court that:

1. The transfer complies with this section and does not contravene other applicable law;

2. At least 10 days before the date on which the payee first incurred an obligation with respect to the transfer, the transferee provided to the payee a disclosure statement in bold type, no smaller than 14 points in size, which specifies:

a. The amounts and due dates of the structured-settlement payments to be transferred;

b. The aggregate amount of the payments;

c. The discounted present value of the payments, together with the discount rate used in determining the discounted present value;

d. The gross amount payable to the payee in exchange for the payments;

e. An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, referral fees, administrative fees, legal fees, and notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

f. The net amount payable to the payee after deducting all commissions, fees, costs, expenses, and charges described in sub-subparagraph e.;

g. The quotient, expressed as a percentage, obtained by dividing the net payment amount by the discounted present value of the payments, which must be disclosed in the following statement: "The net amount that you will receive from us in exchange for your future structured-settlement payments represent ___ percent of the estimated current value of the payments based upon the discounted value using the applicable federal rate";

h. The effective annual interest rate, which must be disclosed in the following statement: "Based on the net amount that you will receive from us and the amounts and timing of the structured-settlement payments that you are turning over to us, you will, in effect, be paying interest to us at a rate of ___ percent per year"; and

i. The amount of any penalty and the aggregate amount of any liquidated damages, including penalties, payable by the payee in the event of a breach of the transfer agreement by the payee;

3. The payee has established that the transfer is in the best interests of the payee, taking into account the welfare and support of the payee's dependents;

4. The payee has received, or waived his or her right to receive, independent professional advice regarding the legal, tax, and financial implications of the transfer;

5. The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured-settlement obligor and has filed a copy of the notice with the court;

6. The transfer agreement provides that if the payee is domiciled in this state, any disputes between the parties will be governed in accordance with the laws of this state and that the domicile state of the payee is the proper venue to bring any cause of action arising out of a breach of the agreement; and

7. The court has determined that the net amount payable to the payee is fair, just, and reasonable under the circumstances then existing.

(b) If a proposed transfer would contravene the terms of the structured settlement, upon the filing of a written objection by any interested party and after considering the objection and any response to it, the court may grant, deny, or impose conditions upon the proposed transfer which the court deems just and proper given the facts and circumstances and in accordance with established principles of law. Any order approving a transfer must require that the transferee indemnify the annuity issuer and the structured-settlement obligor for any liability, including reasonable costs and attorney's fees, which arises from compliance by the issuer or obligor with the order of the court.

(c) Any provision in a transfer agreement which gives a transferee power to confess judgment against a payee is unenforceable to the extent that the amount of the judgment would exceed the amount paid by the transferee to the payee, less any payments received from the structured-settlement obligor or payee.

(d) In negotiating a structured settlement of claims brought by or on behalf of a claimant who is domiciled in this state, the structured-settlement obligor must disclose in writing to the claimant or the claimant's legal representative all of the following information that is not otherwise specified in the structured-settlement agreement:

1. The amounts and due dates of the periodic payments to be made under the structured-settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;

2. The amount of the premium payable to the annuity issuer;

3. The discounted present value of all periodic payments that are not life-contingent, together with the discount rate used in determining the discounted present value;

4. The nature and amount of any costs that may be deducted from any of the periodic payments;

5. Where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law; and

6. That any transfer of the periodic payments by the claimant may subject the claimant to serious adverse tax consequences.

(4) JURISDICTION; PROCEDURE FOR APPROVAL OF TRANSFERS.—At least 20 days before the scheduled hearing on an application for authorizing a transfer of structured-settlement-payment rights under this section, the transferee must file with the court and all interested parties a notice of the proposed transfer and the application for its authorization. The notice must include:

- (a) A copy of the transferee's application to the court;
- (b) A copy of the transfer agreement;
- (c) A copy of the disclosure statement required under subsection (3);
- (d) Notification that an interested party may support, oppose, or otherwise respond to the transferee's application, in person or by counsel, by submitting written comments to the court or by participating in the hearing; and
- (e) Notification of the time and place of the hearing and notification of the manner in which and the time by which any written response to the application must be filed in order to be considered by the court. A written response to an application must be filed within 15 days after service of the transferee's notice.

(5) WAIVER PROHIBITED; NO PENALTIES INCURRED.—

- (a) The provisions of this section may not be waived.
- (b) If a transfer of structured-settlement-payment rights fails to satisfy the conditions of subsection (3), the payee who proposed the transfer does not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee.

(6) NONCOMPLIANCE.—

(a) If a transferee violates the requirements for stipulating the discount and finance charge provided for in subsection (3), neither the transferee nor any assignee may collect from the transferred payments, or from the payee, any amount in excess of the net advance amount, and the payee may recover from the transferee or any assignee:

1. A refund of any excess amounts previously received by the transferee or any assignee;
2. A penalty in an amount determined by the court, but not in excess of three times the aggregate amount of the discount and finance charge; and
3. Reasonable costs and attorney's fees.

(b) If the transferee violates the disclosure requirements in subsection (3), the transferee and any assignee are liable to the payee for:

1. A penalty in an amount determined by the court, but not in excess of three times the amount of the discount and finance charge; and

2. Reasonable costs and attorney's fees.

(c) A transferee or assignee is not liable for any penalty in any action brought under this section if the transferee or assignee establishes by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the transferee's maintenance of procedures reasonably designed to avoid such errors.

(d) Notwithstanding any other law, an action may not be brought under this section more than 1 year after the due date of:

1. The last transferred structured-settlement payment, in the case of a violation of the requirements for stipulating the discount and finance charge provided for in subsection (3).

2. The first transferred structured-settlement payment, in the case of a violation of the disclosure requirements of subsection (3).

(e) When any interested party has reason to believe that any transferee has violated this section, any interested party may bring a civil action for injunctive relief, penalties, and any other relief that is appropriate to secure compliance with this section.

Section 8. This act shall take effect October 1, 2001.

Approved by the Governor June 13, 2001.

Filed in Office Secretary of State June 13, 2001.