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Article

Deterring STOLI: Two New Model Life Settlements Acts

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There are strengths (and weaknesses) in both new model acts. Some states will likely choose to take provisions from both in order to effectively eliminate stranger-originated life insurance and perceived abuses in life settlement practices.

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STOLI is "a practice or a plan to initiate a life insurance policy for the benefit of a third party investor who, at the time the life insurance policy is originated, has no insurable interest in the insured." NCOIL Model Act [1]

Introduction

The life settlement business, which involves the sale of life insurance policies prior to maturity, is thriving. Although records of sales of life insurance to settlement companies are not publicly available, one research firm estimated that the life settlement insurance industry grew to approximately $6.1 billion in 2006.[2] Unfortunately, the growth of the life settlement business has been fueled, at least in part, by stranger-originated life insurance ("SOLI" or "STOLI" or "SPIN-LIFE") programs[3] where brokers or speculators encourage individuals through economic incentives such as "free insurance," cruises, cash payments, and the like to acquire life insurance policies directly or indirectly on their lives, with the intent that the policies be sold over time to investors who have no insurable interest in their lives.[4] STOLI programs, however, are fraught with a host of potentially troublesome issues, including insurable interest, tax, securities, "wet ink" settlement, premium rebate, premium finance, and usury issues.[5]

Life insurance programs that speculate on human lives are not new. For over 100 years, the courts have unraveled such programs.[6] Those programs and their "too good to be true" promises are like the fabled vampire Dracula; they die hard but inevitably reappear with different aliases and mutating forms. Similarly, STOLI programs are a prime example of the never-ending quest to do indirectly what centuries of insurable interest law will not allow directly: speculators purchasing life insurance on the lives of individuals who are, by blood, business relationship and economically, strangers.

The trafficking of life insurance policies by STOLI programs is of grave concern to the life insurance industry and to state insurance regulators, not only for the issues these programs raise but also for their economic effect on the life insurance industry and the insurance-buying public. The insurable interest requirement for life insurance benefits insurers that base premiums on actuarial life expectancies. But the accuracy of actuarial life expectancies is frustrated if the policy owner or beneficiary can control and "game," to any meaningful extent, the probability of the insured's death.

A primary objective in requiring an insurable interest is economic—to be certain that parties to a life insurance policy are not likely to adversely affect the odds of an insured's survival. The insurer's insistence on an insurable interest at the inception of the life insurance contract can be seen as an effort to preserve the integrity of the risk pool and the avoidance of adverse selection. That same motivation may also allow an insurer to escape responsibility under a policy at the death of the insured if subsequent facts indicate a lack of insurable interest. [7]

The trafficking of life insurance policies by STOLI programs is also of grave concern to members of Congress. Rep. Richard Neal, D-MA, Chairman of the Select Revenue Measures Subcommittee of the House Ways and Means Committee, and Rep. Phil English, R-PA, that Subcommittee's top Republican, requested in a letter to Treasury Secretary Henry M. Paulson that Treasury assist elderly Americans who are the targets of STOLI programs by issuing a notice or other public guidance outlining the potential—and often adverse—tax consequences of participating in a STOLI transaction.[8]

Deterring STOLI programs legislatively

State insurance regulators have shown their commitment to deterring STOLI programs by providing model legislation that is intended to be enacted by state legislatures. The first model act (the Viatical Settlements Model Act) was approved by the National Association of Life Insurance Commissioners ("NAIC")[9] in December 2006, and was amended on 6/4/07.[10] The second model act (the Life Insurance Settlements Model Act) was approved by the National Conference of Insurance Legislators ("NCOIL") in November 2007.[11]

The NAIC model act moved to end STOLI and strengthen consumer protection in the life settlement area. That act, which the authors have discussed elsewhere,[12] addresses the most obvious and blatant form of STOLI—transactions involving direct policy settlements (i.e., direct sales of life insurance policies specifically "manufactured" for the purpose of allowing investors to purchase them). The NAIC model act establishes a five-year moratorium (with very broad exceptions[13] to assure legitimate non-STOLI transactions would not be within the scope of the five-year ban) on the settlement of policies having STOLI characteristics, and requires life settlement brokers to disclose to policy owners vital information about settlement transactions, such as commissions and other purchase offers. The NAIC's Life Insurance and Annuities Committee is expected to examine proposals to deter STOLI transactions that do not involve a direct settlement but accomplish the same result by shifting a beneficial interest in life insurance to investors through a transfer of an interest in a trust or other vehicle that holds the policy.

The NCOIL[14] model act serves as an alternative to the NAIC model act. It attempts to bring within its scope all manifestations of STOLI, whether they involve direct settlements of life insurance, or indirect sales of life insurance to investors through a sale of an interest in trust (or a limited liability company ("LLC") or family limited partnership ("FLP")) or through other practices.[15] The Commonwealth of Kentucky became the first state to adopt the NCOIL model act, but—as noted above—a last-minute amendment narrowed its key provision, the definition of STOLI.[16]

This article summarizes the NCOIL model act and provides a broad-brush comparison of the NAIC and NCOIL model acts.

NCOIL model act

In general, the NCOIL model act aims to deter STOLI by:

- Defining and prohibiting STOLI transactions;
- Requiring life settlement providers to report data annually to state insurance commissioners, including internal policies regarding the life settlement process;
- Prohibiting premium financing providers from receiving amounts from the policy or policy owner in addition to amounts required to pay premiums, interest, and service charges under the premium finance agreement; and
- Allowing insurers to advise applicants in premium-financed transactions of possible adverse consequences resulting from subsequent settlement of the policy.[17]

More specifically, the NCOIL model act manages the STOLI process as follows:

- It defines the parties typically involved in a life settlement process, including an Owner, a Broker and a Provider. An Owner is the owner of a life insurance policy.[18] A Broker is a person who, on behalf of an Owner and for a fee, offers or attempts to negotiate a Life Settlement Contract between an Owner and a Provider.[19] A Provider is a person who enters into or effectuates a Life Settlement Contract ("LSC") with an Owner.[20]
- It thrusts the Commissioner of a state Department of Insurance into the life settlement process by (1) requiring the licensing of Brokers and Providers, (2) requiring the approval of an LSC that will govern the transaction between the Owner, Broker and Provider, (3) authorizing the Commissioner to examine the business and affairs of any Broker or Provider and issue injunctions and cease and desist orders, and (4) empowering the Commissioner to impose civil penalties for any violation of the act, including a Fraudulent Life Settlement Act, and seek an injunction or restraining order.
- It defines a Fraudulent Life Settlement Act ("FLSA"), which includes any practice or plan involving STOLI.
- It treats a person who commits an FSLA as committing an unfair trade practice and the crime of insurance fraud

Licensing

The licensing provisions in the NCOIL model act have teeth in that they require Brokers and Providers to be licensed by the Commissioner before engaging in a life settlement transaction, and they also permit the Commissioner to suspend or revoke those licenses.

Broker and Provider cannot engage in the settlement of a policy in a state without first having obtained a license from the Commissioner. [21]

When settling a contract, a Broker cannot use a Provider, and vice versa, unless each knows that the other is licensed under the act.[22] Thus, each has an affirmative duty to determine whether the other is licensed.

Both must apply for a license using forms prepared by the Commissioner.[23]

1. A life insurance producer desiring to be

licensed as a Broker in a state must be licensed as a life insurance producer for at least one year in that state or in another state. [24]

2. A Broker must also undergo "continuing broker education." Such education involves 15 hours of training biennially, relating to life settlements and life settlement transactions.[25]

3. The Commissioner can issue a license to a Broker or Provider when the Commissioner finds that certain objective and subjective tests have been satisfied.[26] The objective tests that an applicant must meet are as follows:

- An applicant attempting to become a licensed Provider must submit a "detailed plan of operation." This term is not defined but probably includes details of the applicant's life settlement operations.
- An applicant for a Broker or Provider license must, if it is an entity, provide a certificate of good standing showing it is duly organized and existing in its state of domicile.
- An applicant for a Broker or Provider license must provide an "anti-fraud plan" with the Commissioner that describes procedures for (i) detecting possible fraudulent acts, (ii) resolving material inconsistencies between medical records and insurance applications, (iii) reporting fraudulent insurance acts, (iv) providing anti-fraud education of and training for underwriters and others, and (v) outlining personnel to investigate and report activities that may be fraudulent.

The subjective tests that an applicant for a Broker or Provider license must satisfy are as follows:

- The applicant is competent, trustworthy and intends to transact business in good faith.
- The applicant has a good business reputation and has had experience, training or education for the license it seeks.

The objective and subjective tests are quite rigorous. The Commissioner will therefore have substantial work to do to implement the act.

Before a Commissioner denies a license application, or suspends, revokes or refuses to renew a license, an administrative hearing must be conducted.[27] A Commissioner can suspend, revoke or refuse to renew a license upon finding, among other things, a material misrepresentation, fraudulent or dishonest practices, failure to timely pay policy owners under an LSC, entering into an unapproved LSC, failure to honor LSC obligations, or violations of any provision in the act.[28]

Life Settlement Contract (`LSC')

An LSC must be pre-approved by the Commissioner before it can be used.[29] The Commissioner can disapprove a proposed LSC under the following circumstances:

1. It fails to meet the requirements of the act dealing with advertising, disclosure to Owners, general settlement rules, and the right to bring a civil action for damages; or

2. It contains provisions that "are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the Owner."[30]

The Commissioner's duties with respect to an LSC are significant because the Commissioner is called on to establish a uniform standard under which life settlement transactions will be handled. Accordingly, the Commissioner must determine whether LSC provisions not only satisfy the act, but are also reasonable, within the public interest, and not misleading or unfair to Owners. Some of the requirements that an LSC must meet include the following:

1. *Advertising.*[31] Advertising must comply with all applicable regulations, must be accurate, truthful and not misleading, must not promote the purchase of a policy with an emphasis on settling the policy, and must not use the words "free," "no cost," or words of similar import.

2. *Disclosure to owners.* The Provider must disclose various items in the LSC or a separate document, including the fact that: (i) possible alternatives exist to an LSC; (ii) some or all of the settlement proceeds may be taxable and a professional tax advisor should be consulted; (iii) settlement proceeds may be subject to creditors; (iv) settlement proceeds may adversely affect eligibility for public assistance and government benefits; (v) conversion rights, waiver of premium benefits and other rights will be forfeited if the LSC is executed; (vi) a consumer advisory package approved by the Commissioner will be provided during the solicitation process; (vii) personal information may be disclosed to effect the LSC; (viii) knowingly presenting false information in a life insurance application or an LSC is a crime; (ix) there is an affiliation, if any, between the Provider and the insurer; (x) the Broker must represent the Owner exclusively; (xi) the Owner has 15 days to rescind the LSC; and (xii) settlement proceeds will be sent to the Owner within three business days after the change of owner and beneficiary is completed.[32]

   The Broker, on the other hand, must disclose certain information to the Owner and Provider in the LSC or a separate document no later than the date the LSC is signed, including (i) all offers, counter-offers, acceptances and rejections relating to the LSC; (ii) any affiliation between the Broker and any person making a settlement offer; (iii) all forms of Broker compensation; and (iv) a reconciliation showing the gross offer amount, applicable reductions, and the net amount received by the Owner.[33]

3. *General settlement rules.* An Owner must state in the LSC or a separate document that the Owner has a full and complete understanding of the settlement contract and policy benefits, and is entering into the contract freely and voluntarily.[34] The Owner must also be examined by a physician who must sign a statement stating that the Owner is of sound mind and under no constraint or undue influence to enter into a settlement contract.[35] A request for verification of coverage sent to an insurer must be on a form approved by the Commissioner, and the insurer must respond to the request within 30 days.[36]

   The Broker's fee must be computed as a percentage of the offer obtained, not as a percentage of the face value of the policy.[37] The Broker must disclose to the Owner anything of value received by the Broker in connection with the LSC.[38] No life settlement can be entered into before or within two years of policy issuance except if (i) the Owner is terminally or chronically ill, (ii) the Owner disposes of ownership interests in a closely held business under a buyout agreement in effect when the policy was issued, (iii) the Owner's spouse dies, (iv) the Owner retires, (v) the Owner becomes physically or mentally disabled, or (vi) a court determines that the Owner is bankrupt or insolvent or orders a reorganization or receiver.[39]

4. *Right to bring civil action for damages.* Any person damaged by another as a result of any violation of the act or any regulation implementing it may bring a civil action for damages.[40]

Examination of licensee

The NCOIL model act authorizes a Commissioner to examine the business and affairs of persons involved in the life settlement process who must be licensed under the act, including a Broker and Provider.[41] Accordingly, the Commissioner may order a licensee or applicant to produce records or other information to determine whether that person is acting contrary to the act or the public interest. The Commissioner may also investigate a suspected Fraudulent Life Settlement Act.[42] Examination work papers will be confidential unless made public by the Commissioner.[43] The Commissioner may also suspend an exam and pursue other legal or regulatory action.[44] The primary beneficiary often starts off as a co-trustee and later becomes the sole trustee.

Fraudulent Life Settlement Act (`FLSA')

A major priority of the model act is to prohibit any FLSA, a term that is broadly defined and is pervasive in scope. Certain acts or omissions will be treated as an FLSA if there is intent to defraud for the purpose of depriving another of property or for pecuniary gain.[45] Other acts or omissions are deemed to be an FLSA without a showing of such fraudulent intent.[46] An FLSA requiring intent to defraud includes the following:

- Providing false material information to, or concealing material information from, any person during the application or underwriting of a policy or LSC, the reinstatement or conversion of a policy, the issuance of an LSC, the submission of a claim or payment of a premium, the application or existence of a loan secured by a policy, or the entry into any practice or plan involving STOLI (defined below);
- Failing to disclose that a prospective insured has undergone a life expectancy evaluation by a person other than an insurer;
- Employing any device or scheme to defraud in the business of life settlements; and
- Employing any device or scheme during the solicitation, application, or issuance of a policy that violates insurable interest laws.[47]

An FLSA also includes any of the following acts or omissions that further a fraud or prevent detection of a fraud:

- Keeping from the Commissioner the assets or records of a person engaged in the life settlement business;
- Misrepresenting the financial condition of any person;
- Filing false information with, or concealing material information from, the Commissioner;
- Engaging in embezzlement, theft, misappropriation or conversion of funds or other property of an insurer, Owner, Provider or any other person engaged in the life settlement business;
- Transacting life settlement business without a license;
- Knowingly entering into, broker or deal with an LSC with the intent to defraud, where the life insurance policy subject to the LSC was fraudulently obtained, and
- Misrepresenting the state of residence of an Owner to avoid the act because the designated state does not have a law similar to the model act.[48]

Acts that are deemed to constitute an FLSA include the following:

- Entering into an LSC if the person knew or should have known that the policy was obtained through a false, deceptive, or misleading application;

- Engaging in any fraudulent act or practice in connection with a settlement involving an Owner resident in the state;
- Promoting the purchase of an insurance policy with an emphasis on settling the policy;
- Entering into a premium finance arrangement with a person where such person will receive consideration directly or indirectly that is in addition to amounts required to pay principal, interest, and service charges;
- Knowingly soliciting an offer from, or settling a contract with, any Provider, Financing Entity[49] or Related Provider Trust[50] that controls or is controlled by or under common control with the Broker involved with the offer or contract;
- Knowingly entering into an LSC with an Owner where consideration will be paid to a Broker that controls or is controlled by or under common control with the Provider, Financing Entity or Related Provider Trust;
- Entering into an LSC with a Provider before promotional, advertising and marketing materials have been filed with the Commissioner;[51] and
- Making any representation to an applicant or policyholder that insurance is free or without cost for any period unless provided in the policy.[52]

STOLI defined

As previously mentioned, an FLSA includes any practice or plan of STOLI, which is defined as follows:

> '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 probation against wagering on life.[53]

The STOLI definition follows Grigsby v. Russell[54] in which the U.S. Supreme Court noted that a life insurance policy is void if, at its inception, a person with an insurable interest (the future assignor) and a person without an insurable interest (the future assignee) participate in an arrangement to purchase the policy for speculation.[55] The preconceived plan, according to the model act, can be verbal or written, and the plan may even include a trust that is used to give the appearance of an insurable interest. Existing case law provides that the substance of a STOLI arrangement will be determined by reviewing the intent of the parties at the time a life insurance policy is purchased[56] and that many factors will be used in determining the parties' intent.[57]

Enforcement

Civil and criminal enforcement. To enforce the NCOIL model act, the Commissioner is authorized to issue cease and desist orders (including emergency cease and desist orders effective for 90 days) and may seek an injunction or a temporary or permanent restraining order.[58] In addition, the Commissioner may levy a civil penalty against a person for any FLSA or other violation of the act.[59] The civil penalty may not exceed a stated fine and "the amount of the claim." Any person licensed under the act that commits an FLSA will lose the license for a specified period of time. Furthermore, any person committing an FLSA will not only be subject to a civil penalty, but will also be treated as committing the crime of insurance fraud under applicable state law and will be subject to related criminal penalties.

Civil action for damages. In addition to granting various enforcement powers to the Commissioner, the act authorizes a person to bring a civil action for damages against another person who violates the act.[60] This remedy might be appropriate, for instance, if a Broker or Provider failed to give notice to an Owner of adverse tax issues and the Owner is subsequently stuck with a large tax bill upon settling a contract.

Unfair trade practices. The NCOIL model act not only provides for civil and criminal relief, but also provides that the violation of any provision in the act is considered an unfair trade practice and will be subject to penalties provided by state law.[61] Thus, it appears that penalties authorized by the act can be stacked.

Other enforcement. The NCOIL model act does not (1) preempt other enforcement or regulatory agencies from investigating or prosecuting suspected violations of laws; (2) preempt any state securities law, rule or order; or (3) limit the powers granted by other laws to the Commissioner to investigate and examine possible violations.[62] Although the intent here is to have the act exist alongside other invalidating law, the act does not expressly authorize it to exist alongside other common law or statutory remedies.

For instance, common law equitable relief has existed for over a century in connection with life insurance polices that have been determined to be wager or gambling policies but which have not been voided or cancelled by the insurer for whatever reason (e.g., the noncontestability period has expired). If the Commissioner also fails to take action with respect to those policies under the model act or any other law, such equitable relief should arguably remain, and the act should be amended to allow such relief.

Common law equitable relief that has developed over the past century pertains to insurance policies where speculation in an insured's life arises either before or after the assignment of the policy to a person with no insurable interest. Generally, such relief disgorges profits generated by the speculator and gives them to the insured's estate or designated beneficiaries, except for amounts advanced by the speculator in the transaction with the insured. One commentator has summarized such long-standing relief as follows:

> [I]f there is reason to believe that the assignment is part of a preconceived plan of the assignee to indulge in a speculation on a life in which he has no insurable interest, and on which he could not, therefore, have taken out a policy of insurance in his own name, the assignment will be held to be invalid.
>
> Moreover, if the insured was a party to the illegal plan and if the illegal design was in contemplation at the time the contract of insurance was procured, the case is dealt with just as if the assignee were himself the insured. In such a case the result is that the contract of insurance is itself held to be illegal and unenforceable against the insurer because of the want of insurable interest in the assignee. The court properly looks through the form of the transaction to get at its substance and deals with it accordingly. However, if the insurer is willing to pay or has paid without protest, the tendency is to hold that the representatives of the insured or his properly designated beneficiaries are entitled to the proceeds less any advances made by the assignee in connection with the transaction, and that a suit may be brought by one against the other if necessary to bring about this result. It is said that the illegality here existing does not involve moral turpitude and, consequently, does not call for application of the general rule that the court will not aid either party to an illegal transaction, but will leave them where it finds them. This holding would seem to be commendable in view of the fact that the deceased's beneficiaries are not themselves parties to the illegal transaction and it is better that they receive a windfall than that the assignee profit from his illegal venture. The argument that, if the insurer wishes to make the assignee a gift by paying him something which it is under no legal obligation to pay, no one else has any claim on the fund, scarcely merits consideration.
>
> On the other hand, if the illegal design was not formed until after a valid contract of insurance had been consummated in favor of an insured who had an insurable interest, the tendency is to hold that the representative of the insured or his properly designated beneficiary is entitled to recover the proceeds just as if there had been no assignment, the assignee, however, being reimbursed, on equitable grounds, any consideration or premiums which he had paid. While this result may also be somewhat inconsistent with the generally accepted rule that the law will not aid either party to an illegal transaction where the parties are in pari delictu, it can perhaps be justified on the ground that, since it is only the assignment that is tainted with illegality, the beneficiaries of the deceased do not need to rely on the illegal agreement to make out a case.[63]

The equitable relief discussed above was adopted by the U.S. Supreme Court in Warnock v. Davis[64] over 120 years ago. That decision, which is known more for its definition of an insurable interest,[65] invalidated a policy assignment beyond what was necessary to refund advances made by the assignee who had no insurable interest in the insured, with interest.[66]

Some states have enacted statutes that provide a remedy similar to the equitable relief discussed above. For example, Florida statutory law states as follows:

> If the beneficiary, assignee or other payee under any insurance contract directly or indirectly procured by a person not having an insurable interest in the insured at the time such contract was made receives from the insurer any benefits thereunder by reason of the death, injury or disability of the insured, the insured or his or her personal representative or other lawfully acting agent may maintain an action to recover such benefits from the person receiving them.[67]

Under the Florida statute, when a life insurance contract is procured directly or indirectly by a person having no insurable interest in the insured when the contract was made, 68 the recipient of the death proceeds must deliver those proceeds to the insured or his estate if the insured or his estate maintains an action to recover those proceeds. No provision is made in that statute for the refund of any advances made by the person who procured the contract.

The common law and statutory relief discussed above are perfectly suited for dealing with a STOLI program that neither the insurer nor the Commissioner challenge for lack of knowledge, evidence or otherwise. If that relief is combined, for example, with the civil and criminal penalties, injunctions and restraining orders provided under the NCOIL model act, STOLI programs can be attacked on more fronts.

Conclusion

There are strengths (and weaknesses) in both the NCOIL and NAIC model acts. Some states will likely choose to take provisions from both in order to further the purpose of both model acts—to effectively eliminate STOLI and perceived abuses in life settlement practices.

PRACTICE NOTES

The NCOIL model act attempts to bring within its scope all manifestations of STOLI, whether they involve direct settlements of life insurance, or indirect sales of life insurance to investors through a sale of an interest in trust (or LLC or

EXHIBIT 1
Comparison of the NCOIL and NAIC Model Acts

NCOIL Model Act	NAIC Model Act
STOLI practice includes transfer of ownership or shift of beneficial interest in trust (or other entity)-- if entity formed or availed of for purpose of acquiring life insurance.	STOLI practice includes premium finance loans if owner agrees--at time of loan--to sell a policy or any portion of the death benefit at a later date or receives guarantee of future settlement value of policy at time loan initiated.
Classic premium financing exempted. Also COLI, split-dollar, and similar arrangements blessed under insurable interest statutes are exempted.	Classic premium financing exempted. Also COLI, split-dollar, and similar arrangements blessed under insurable interest statutes are exempted.
Two-year ban on settlement of new policies.	Five-year ban on settlement of new policies--unless seller is terminally or chronically ill,retired, disabled, or bankrupt or has financed the policy with his/her "own" money, has not had an LE, and no agreement to settle exists.
Settlement after two years allowed--if policy not STOLI.	Settlement after two years allowed if Owner pays premiums with own funds, financing is based solely on policy's cash surrender value, no life expectancy evaluation occurs, and no "agreement or understanding to settle."
STOLI defined. Any participation in STOLI deemed "fraudulent life settlement act."	No similar provision.
Any use of device, scheme, or artifice that violates state insurable interest laws is considered "fraudulent life settlement act."	No similar provision.
Failure to disclose to insurer (upon request by insurer) that life expectancy evaluation performed with respect to policy is "fraudulent settlement act."	No similar provision.
If "person" issues, solicits, markets, or otherwise promotes purchase of policy--with emphasis on settling it, that is considered unlawful.	No similar provision.
Insurer specifically allowed to require applicant to certify that he/she has not entered into agreement/arrangement to sell. Also can require applicant to certify that no consideration received in return for buying policy. Can further require applicant to certify borrower has insurable interest in insured's life.	No similar provision.
Lender forbidden from receiving more than amounts needed to repay principal, interest, and service charges.	No similar provision.
Requires settlement company to provide insurance commissioner with annual statement of information "as the commissioner may prescribe by regulation" and specifically requires report of total number, total face amount, and proceeds of policies settled during past year (broken down by policy issue year).	Requires settlement company to provide insurance commissioner with annual statement of information "as the commissioner may prescribe by regulation."
Advertising materials may not state or imply insurance is "free" or of "no cost."	Advertising materials may not state or imply insurance is "free" or of "no cost," nor may advertising use words such as "guaranteed," "no risk," "no sales charges or fees" and many other terms.
Settlement contracts must contain a "fraud warning"; brokers and providers must implement antifraud initiatives to detect and prevent fraudulent settlement acts as defined, and are required to report such acts to the insurance commissioner.	Contracts must contain a "fraud warning"; brokers and providers must implement antifraud initiatives to detect and prevent fraudulent settlement acts as defined, and are required to report such acts to the insurance commissioner.

State insurance commissioner empowered to seek injunctions/cease and desist orders/impose fines. Civil and criminal penalties stated.	State insurance commissioner empowered to seek injunctions/cease and desist orders/impose fines. Civil and criminal penalties stated.
Owner must consent to settlement contract and to full and complete understanding of the contract.	Owner must consent to settlement contract and to full and complete understanding of the contract.
All medical, financial, or personal information provided in connection with a settlement contract may be disclosed to effect the contract; otherwise it is private.	All medical, financial, or personal information provided in connection with a settlement contract may be disclosed to effect the contract; otherwise it is private.
No premium finance loan may be made where the lender receives consideration in addition to amounts required to the payment of principal, interest, and service charges.	No similar provision. Settlement contract includes a premium finance loan where there is a guarantee of a future settlement or an agreement to sell the policy.

FLP) or through other practices.

1. Promoters are already attempting to water down and render the NCOIL Model Act ineffective by convincing some state legislators (e.g., Kentucky) to delete the phrase "a practice or plan to initiate a life insurance policy" and substitute "a written agreement for the procurement of a new life insurance policy…." This would enable STOLI practices to continue if it is not put into writing (even though verbal contracts are enforceable under most circumstances). Likewise, a written contract signed immediately after the policy is originated would fall outside the NCOIL Model Act.

2. STOLI Alert (December 2007) published by the American Council of Life Insurers and National Association of Insurance and Financial Advisors ("STOLI Alert"), which is available at www.naifa.org/advocacy/stolialert/pdf/stoli_dec07.pdf. This prediction may be, according to LIMRA (Life Insurance Marketing & Research Association), too high. Currently, in most states, life settlement companies are not required to provide state insurance departments with detailed information on sales.

3. STOLI is also known as investor-initiated life insurance (or "IOLI").

4. If a policy is validly obtained, the majority view in the U.S. is that the policy may be later assigned to anyone, even a person or party with no insurable interest. STOLI assumes that the spirit, if not the letter, of a state's insurable interest laws, has been violated through an attempt to make it look like an insurable interest existed at the time a policy was purchased—even though in reality—it never did.

5. For a thorough analysis of STOLI programs and the issues associated with them, see Leimberg, "Investor Initiated Life Insurance: Really a 'Free Lunch' or Prelude to Acid Indigestion," 41 U. Miami Heckerling Inst. on Est. Plan. ¶300 (2007) ("Leimberg Article"); Kingma, "Update on Insurable Interests," 47th Ann. Mich. Prob. & Est. Plan. Inst.16-1 (2007) ("Kingma Article"); and Jensen and Leimberg, "Stranger Owned Life Insurance: A Point/Counterpoint Discussion," 33 ACTEC J. II (2007). See also Leimberg, "Planners Must Be Aware of the Danger Signals of `Free' Insurance," 34 ETPL 20 (Feb. 2007) ; Jones, Leimberg, and Rybka, "'Free' Life Insurance: Risks and Costs of Non-Recourse Premium Financing," 33 ETPL 3 (July 2006) ; and Leimberg, "Stranger-Owned Life Insurance (SOLI): Killing the Goose That Lays Golden Eggs," 32 ETPL 43 (Jan. 2005) , reprinted as Leimberg, "Stranger-Owned Life Insurance (SOLI): Killing the Goose That Lays Golden Eggs," 28 Tax Analysts/The Insurance Tax Review No. 5 (May 2005).

6. Prime examples are Warnock v. Davis, 104 US 775 , 26 L Ed 924 (S.Ct., 1882) (a "free" insurance case where the insured contracted with the Scioto Trust Association to acquire a $5,000 policy on his life in exchange for the Association paying all the premiums and transferring one-tenth of the death proceeds to the insured's wife), and Colgrove v. Lowe, 175 NE 569 (1931) cert den. (a speculative arrangement where 100 individuals agreed in writing to take out polices on their lives and designate the same trust as a common beneficiary for a term of five years, during which the proceeds of any policy maturing during that term were paid 75% to the estate of the insured and 25% to the surviving parties to the contract who kept their policies in force).

7. See Leimberg Article, ¶305.1, and Kingma Article, 16-3, supra note 5.

8. See www.naifa.org/advocacy/documents/stoli_20071116.PDF.

9. The National Association of Insurance Commissioners ("NAIC") is a voluntary organization of the chief insurance regulatory officials of the 50 states, the District of Columbia, and five U.S. territories. It assists state insurance regulators in protecting consumers and helping maintain the financial stability of the insurance industry by offering financial, actuarial, legal, computer, research, market conduct, and economic expertise.

10. The NAIC model act may be obtained by contacting the NAIC at www.naic.org/press_home.htm.

11. The NCOIL model act may be obtained by contacting NCOIL at www.ncoil.org.

12. See Leimberg Article, ¶370.6, and Kingma Article, 16-13 and 16-14, supra note 5.

13. NCOIL Model Act Sec. 11: If one or more of the following conditions have been met within the five-year period, the ban does not apply: (1) the viator or insured is terminally or chronically ill; (2) the viator's spouse dies, (3) the viator divorces his/her spouse, (4) the viator retires from full-time employment, (5) the viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from full-time employment, (6) a final order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor of the viator, adjudicating the viator bankrupt or insolvent, or approving the petition seeking reorganization of the viator or appointing a receiver, trustee or liquidator to all or a substantial part of the viator's assets. Yet another exception in A3 of Section 11 provides that the five-year ban on settlement does not apply if the seller has paid policy premiums exclusively with unencumbered assets, including an interest in the life insurance policy being financed only to the extent of its net cash surrender value, provided by, or fully recourse liability incurred by, the insured and there is no agreement or understanding with any other person to guarantee any such liability or to purchase, or stand ready to purchase, the policy, including through an assumption or forgiveness of the loan; and neither the insured nor the policy has been evaluated for settlement, i.e., no "LE" (life expectancy analysis) has been performed.

14. The National Conference of Insurance Legislators ("NCOIL") is an organization of state legislators whose primary focus is insurance legislation and regulation. Many legislators active in NCOIL either chair or are members of the committees responsible for insurance legislation in their respective state houses across the country. For more information, visit www.ncoil.org.

15. STOLI Alert, supra note 2.

16. H.B. 348, which passed in a 93-0 vote on 2/5/08.

17. Id.

18. Section 2.N of NCOIL model act.

19. Section 2.B of NCOIL model act.

20. Section 2.S of NCOIL model act.

21. Section 3.A of NCOIL model act.

22. Sections 3.N and 3.O of NCOIL model act.

23. Sections 3.B and 3.I of NCOIL model act.

24. Section 3.C of NCOIL model act. If licensed as such in the other state,

that producer must also be licensed as a nonresident producer in the state in which it is obtaining a license as a Broker.

25. Section 3.Q of NCOIL model act.

26. Section 3.K of NCOIL model act.

27. Section 4.B of NCOIL model act.

28. Section 4.A of NCOIL model act.

29. Section 5.A of NCOIL model act.

30. Section 5.C of NCOIL model act.

31. Section 8 of NCOIL model act.

32. Section 9.A of NCOIL model act.

33. Section 9.C of NCOIL model act.

34. Section 11.C of NCOIL model act.

35. Section 11.A of NCOIL model act. Although a physician may be willing to sign a statement concluding that the patient is of sound mind, the physician is likely to balk at signing a statement concluding that the patient is under no constraint or undue influence to enter into a settlement contract. The physician is trained to make medical determinations, not factual determinations about matters outside one's health. Moreover, the model act fails to state what standard of liability the physician will be held to in making these statements.

36. Section 11.B of NCOIL model act.

37. Section 11.L of NCOIL model act.

38. Section 11.M of NCOIL model act.

39. Section 11.N of NCOIL model act.

40. Section 15.B of NCOIL model act.

41. Section 7.A of NCOIL model act. The drafting note under this section states that this section assumes that the Commissioner already has the power to examine insurers.

42. Section 7.J of NCOIL model act.

43. Sections 7.E.6 and 7.G of NCOIL model act.

44. Section 7.E.5 of NCOIL model act.

45. Section 2.H.1 of the NCOIL model act.

46. Section 13.B of NCOIL model act.

47. Section 2.H.1.(a) of NCOIL model act.

48. Section 2.H.2 of NCOIL model act.

49. Section 2.F of NCOIL model act defines "Financing Entity" as an underwriter, lender, purchaser of securities, purchaser of a policy from a Provider, credit enhancer, or any entity that has direct ownership in a policy that is the subject of a Life Settlement Contract, whose principal activity is to provide funds to effect an LSC or purchase the policy, and who has an agreement with a Provider to finance the acquisition of an LSC.

50. Section 2.V of NCOIL model act defines "Related Provider Trust" as a titling trust or other trust established by a Provider or a Financing Entity for the sole purpose of holding ownership or beneficial interest in the purchased policy in connection with a Financing Transaction.

51. This prohibition, contained in Section 13.A.8 of the NCOIL model act, applies to an Owner as well as a Broker. Arguably, a Broker knowledgeable in the life settlement business should know whether such materials have been filed with the Commissioner, but an unsophisticated Owner would normally be totally unaware of the filing requirement. Time will tell whether a Commissioner will attempt to enforce this prohibition against an Owner.

52. Section 13 of NCOIL model act.

53. Section 2.Y of NCOIL model act.

54. 222 US 149 , 56 L Ed 133 (S.Ct., 1911).

55. According to Justice Holmes in Grigsby v. Russell, 222 US 149 , 56 L Ed 133 (1911), "[C]ases in which a person having an [insurable] interest lends himself to one without any as a cloak to what is in its inception a wager have no similarity to those where an honest contract is sold in good faith" (emphasis added). Accord, Travelers Inc. Co. v. Reiziz, 13 F Supp 819 (DC N.Y., 1935); Lawrence v. Travelers Ins. Co., 6 F Supp 428 (DC Pa., 1934); Brett v. Warnick, 75 P 1061 (1904).

56. Anno. "Validity of assignment of life insurance policy to one who has no insurable interest in insured," 30 ALR 2d 1310, §30 ("ALR Article"); Parker, "Does Lack of an Insurable Interest Preclude an Insurance Agent From Taking an Absolute Assignment of His Client's Life Policy?," 31 U. Rich. L. Rev. 71, 87-88 (1997) ("Parker Article").

57. Leimberg Article, ¶¶316.2 and 339.7, and Kingma Article, 16-7 to 16-10, supra note 5; and ALR Article, §§31-38, and Parker Article, p. 87, n. 40, supra note 56.

58. Section 15 of NCOIL model act.

59. Section 16 of NCOIL model act.

60. Section 15.B of NCOIL model act.

61. Section 17 of NCOIL model act.

62. Section 14.F of NCOIL model act.

63. Grismore, "The Assignment of a Life Insurance Policy," 42 Mich. L. Rev. 789, 791-92 (1944) ("Grismore Article") (emphasis added; footnotes omitted).

64. 104 US 775 , 26 L Ed 924 (S.Ct., 1882).

65. As to the requirement of an insurable interest, Justice Field stated that "[I]n all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy." 104 U.S. 775 at 779.

66. The balance of the death proceeds in Warnock v. Davis were paid to the insured's estate. However, the assignment in that case did not involve any fraud or deception by the assignor and assignee, nor did its execution involve any moral turpitude. The assignment there was invalidated merely because the assignee did not have an insurable interest in the insured. The United States Supreme Court noted that some states allow the assignment of policies to one having no insurable interest when the assignment is made in good faith and free of any fraud, deception or moral turpitude. 104 U.S. 775 at 781-782.

67. Section 627.404(4) of the Florida Statutes.

68. Such person is often referred to as the real party to the contract. See Dolan v. Supreme Council Catholic Mutual Benefit Ass'n, 152 Mich. 266, 271, 116 N.W. 383 (1908) ("[I]nsurance obtained in the name of the insured payable to one having no insurable interest will be void if the beneficiary was the real party to the contract. Elliott on Insurance, §59.").