Testimony of Doug Head, LISA Executive Director
at the
Florida Office of Insurance Regulation
Informational Hearing
on
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Introduction

Thank you for the opportunity to participate in this important hearing. LISA recognizes that Florida has been a leader in regulating the secondary market for life insurance for the protection of its senior citizens, and we are grateful for the chance to share our views on these important issues.

The secondary market for life insurance has brought great benefits to consumers, unlocking the value of life insurance policies through life settlements and non recourse premium finance arrangements which use the market value of a policy as collateral.

The secondary market realizes the promise of well over a century of bedrock insurance law which holds that life insurance policies, after being formed with insurable interest, are freely alienable property. Despite the long standing existence of these property rights, however, there was no institutional secondary market until recent years—because there was not sufficient demand to support one: in earlier years, carriers had not designed products around a market defect—"grossly inadequate cash values," as described by a leading carrier actuary. Insurers paid a reasonable return on premium payments to cash value policyowners.

Today, however, institutional capital funds life settlements in response to urgent consumer demand for an alternative to carriers' "take-it-or-leave-it", cash surrender practices. The resulting secondary market vindicates property rights and represents the triumph of competition and free market economics. This is a matter of significant import since the vast majority of universal life policies lapse without ever paying a claim.

We do share an interest in stopping improper conduct with life insurers, producers, the financial markets and public policy makers. Unfortunately, life insurers have all too often responded to settlements, not by competing with, but by maligning and attempting to restrict the secondary market. This occurs to eventual detriment of consumers. Around the country, we see insurers lobby for protectionist laws which restrict the right of assignment. At the same time, some abuse existing consumer protection laws with aggressive business practices which impair consumers' property rights.

Insurers' rhetoric in proceedings like this often transcends advocacy and even spin. For instance, in a recent official statement to another state insurance department, the ACLI categorically represented that any discussion of lapse supported pricing and unfair cash values was irrelevant to a conversation about the secondary market because consumers only buy universal life policies for the death benefit. In that

1011 E. Colonial Dr Ste 500 - Orlando, FL 32803 - Phone: 407-894-3797 - Fax: 407-897-1325

communication, the ACLI seemed unfamiliar with the old concept of term life insurance. In any case, such rhetoric is a misstatement designed to distort the issue at the very core of the debate over the secondary market.

Insurers' other arguments about insurable interest and stranger originated life insurance (STOLI) are similarly, and consistently, erroneous. Carriers routinely conflate insurable interest with the right of assignment, even though it is well established in common law and statute that, after a policy is formed with insurable interest, assignment is a fundamental property right which empowers consumers to gain the full value of the product.

As we believe, STOLI (the only acceptable definition of this acronym is "STRANGER ORIGINATED LIFE INSURANCE) occurs when a speculator convinces an insured to take out a policy on her own life as a straw purchase for the benefit of that investor. WE OPPOSE SUCH ACTIVITY. But, the courts have repeatedly held that an assignment subsequent to purchase is not evidence of STOLI unless the insured ceded her property rights in the contract to the eventual assignee as of policy inception. The protectionist NAIC Model, now promoted by insurers radically rewrites this bedrock public policy, by extending the prohibition on settling many policies to five years—regardless of whether STOLI was present at policy inception.

The NAIC Model's five year ban on settlements is inconsistent with core principles of bedrock law and public policy throughout the country, including the Florida common law, the Florida Viatical Settlements Act, and the recently enacted Florida insurable interest statute. The two year ban on assignment, now in Florida law, and the NCOIL Model, and the NAIC Model prior to 2007, and most State statutes is a principled waiting period tied to the long-established contestability period. These provisions give the consumer marketable title to her asset at the same time—after two years.

The contestability and wet ink periods, combined with the well-established law of insurable interest and the ban on wager policies, both common law and statutory, provide regulators and litigants all the tools necessary to fight STOLI, as demonstrated by a careful reading of the common law. All of the issues and problems presented by STOLI schemes—the purpose and applicability of insurable interest, the dividing line between a permissible exercise of property rights and a STOLI arrangement where a speculator has induced the insured to take out a policy for the benefit of that speculator, etc.—have also been carefully considered and addressed by high courts as they decided the cases which have articulated the rules of insurable interest, STOLI, and property rights for many decades.

The NAIC Model does not ban, regulate, or address STOLI in any way. Unfortunately, and contrary to its supposed intent, it codifies protection for a market defect—shielding carriers' unfair valuation practices from competition. This model law, approved by the watchdogs of the industry, represents upside-down policymaking: Regulation is intended to remedy, not support market defects, and it is nonsensical and thoroughly anti-consumer to shut down free market innovations which empower consumers by allowing them to bargain on even footing with insurers. Insurance laws are supposed to respond to consumer complaints or other such proven harm. No such problems were identified during the NAIC process; instead, only carriers' desire to avoid competition drove the process.

As the Executive Director of the Florida Consumer Action Network, an NAIC Funded Consumer Representative, told the NAIC A Committee: "Restricting consumer rights on what they can do with their policy clearly robs the consumer of much value from the policy. While we do not object to restrictions during the first two years, while the policy is contestable, after that, it should be the policy owner's choice, not the sellers'. We oppose efforts to lengthen this to five years or prohibit life settlements for five years. This opportunity to sell the policy, for any reason, allows the consumer to get full value from the policy. Anything less only adds to the bottom line of the insurers at the expense to the consumer, and is a hidden cost."

Even life insurers admit that the NAIC Model does not do what it purports to do. The ACLI itself flatly stated that the NAIC Model and its five year ban on settlements "failed to address the fundamental concerns with STOLI." The carriers only supported the Model after the author of the bill told them that he opposed an anti-STOLI bill but would provide them with an anti-settlements bill. A series of unvetted rewrites to the NAIC Model—which violated the scope of the charge given to the A Committee (which pertained only to STOLI) and which violated the NAIC's rules regarding open drafting of models by working groups (which prohibit the unilateral handing down of drafts by committee chairs without principled justification for his policy choices)—impair life settlements with unjustified provisions like excessive rescission periods, unprecedented broker bonding requirements, and required disclosure of providers' relationships with their investors. The NAIC Model thus serves life insurers' purpose by impairing competition from the secondary market, despite the ineffectiveness of its anti-STOLI provisions.

Because it is fundamentally flawed, the NAIC Model has been mostly unsuccessful in the political arena. Even though both the ACLI and the NAIC have put enormous energy and resources into passing it, the NAIC Model was rejected by NCOIL and by the vast majority of state legislatures that have considered it in 2007-2008. Instead, of the 13 new state laws adopted in 2008 so far, 10 were based on the NCOIL Model. In all but one of those 10 states, the legislatures considered – and rejected – the NAIC Model Act. And New York and California, which refused to even consider the protectionist NAIC Model, are poised to adopt legislation this year based on the NCOIL Model.

The primary answer to the STOLI problem lies in enforcement of existing law – not enactment of anti-consumer and anti-competitive bans on consumers' property rights. If Florida deems it necessary to consider additions to its code, we urge the state to base any action on the NCOIL Model, or the recent broadly approved legislation which has moved to the verge of passage in California, and which hews closely to the stated goals of insurers and LISA of attacking STOLI while protecting property rights.

We would also urge that rather than considering ill-conceived legislation which would impair the right of assignment that all Floridians enjoy in their life policies, the OIR, as the enforcer of the laws, should dig down on the real facts of improper and already illegal market conduct designed to impair the secondary market. As discussed below, "stranger owned life insurance" is the natural outgrowth of policyowners' fundamental property right to sell their policies on the open market. This is NOT STOLI.

Unfortunately, some insurers are today engaging in a variety of unwise business practices—many of which tread on the Florida Unfair Insurance Trade Practices Act—which are designed to attack consumers' right of assignment. As discussed below, despite the UTPA's ban on false and/or misleading advertising,

insurers induce consumers to purchase life insurance policies with public promises of full service from their agents, who have the entirely proper authority under their licenses to broker settlements, but secretly prevent their agents from providing such full service to their clients with bans on settlement activity. Occasionally insurers even mislead their own agents by providing false information about settlements or confusing settlement activity with other illicit activities or other laws.

Insurers also engage in a variety of activities designed to scare their own customer consumers away from settlements based on their resulting loss of death benefits. They employ no such tactics when discussing lapse. We believe that this may violate some provisions of the anti-twisting section of the Unfair Trade Practices Act. We have also recently seen an insurer use policy forms which prevent assignment to purchasers without insurable interest. If such forms are widespread, they would represent a clear violation of the OIR's stated policy that such market conduct violates the UTPA. Extensive documentation which has come to our attention suggests that insurers may even be colluding against applicants who use non recourse premium financing which uses the secondary market value of the policy as collateral for the loan—despite the UTPA's clear language banning boycotts.

All of this is startling given our clear understanding that the phenomenon of STOLI (properly conceived and defined Stranger Originated Life Insurance) has been addressed by good work in the underwriting process of insurers, and is declining. Today, we see many approved carrier finance programs which themselves might be unintentionally confused with STOLI in the hot rhetoric of the past years, and this is surely not our intent nor is it the intent of the carriers with whom we have spoken informally. We, the agents, and the insurers share the goal of maximizing consumer options and benefits. If we fail to pursue this goal, we will all fail in our purpose. But the goal will not be achieved by poorly crafted or rhetorically driven legislation in Florida. LISA's concern is that demagoguery about STOLI should not serve as a pretense for passing legislation which does not stop STOLI and does not protect insurable interest—but does impair property rights by restricting the right of assignment and allowing for other abuse of consumers.

What STOLI Is—And What It Is Not

This important proceeding is entitled: "Informational hearing to discuss and receive public comment on the business arrangements variously called stranger owned life insurance, stranger-oriented life insurance, stranger originated life insurance or speculator initiated life insurance." These labels provide an appropriate place to start our submission, since they provide a window through which to study the long standing and controlling legal and public policy norms which pertain to life insurance, insurable interest, wager policies, and property rights.

"Stranger originated life insurance" and "speculator initiated life insurance" are illegal as a violation of insurable interest under long-standing Florida law, including the recent codification. As long as the policy was not **originated** or **initiated** by a stranger, however, "stranger **owned** life insurance" is explicitly condoned in controlling Florida insurance law and long standing public policy as an appropriate and necessary outgrowth of the original policyowner's property rights. (Stranger oriented life insurance is an imprecise term which we would avoid since it really does not convey any relevant meaning.)

STOLI cannot be the mere ownership by a third party, which can be done through a life settlement or other lawful assignment or transfer. It must be the manufacture by a stranger – an investor – who lacks insurable interest at policy inception. Simply stated, life settlements are not – and cannot be – STOLI. Equally, legitimate loans, where the policy is assigned as collateral, cannot be STOLI. Even today, just before the start of this hearing, the confusion was accentuated by a release from the National Association of Insurance and Financial Advisors who said: "it plans to testify against stranger owned life insurance".

Twin Pillars: Insurable Interest And Property Rights In U.S. And Florida Law

It is long standing public policy throughout the United States, including Florida, that a life insurance policy cannot be initiated without insurable interest. An insured has an unlimited insurable interest in her own life to take out a policy and name whomever she chooses as beneficiary. A person or entity other than the insured can only take out a policy on that insured with insurable interest, which roughly speaking means an interest engendered through love (family member) or financial ties (business partner, high-ranking employee, creditor-debtor, etc.) which gives the initiator of the policy in interest in the continued life of the insured. (Or, as most state insurable interest statutes put it, if a person other than the insured takes out the policy, then the beneficiaries must have insurable interest.) **And, most relevant to our discussion today, insurable interest is only necessary at policy inception. After policy inception, insurable interest is no longer necessary, and, in order to ensure full value to the consumer, the policy becomes an alienable asset.**

The United States Supreme Court laid out the basic rules for insurable interest, wager policies, and property rights in life insurance policies in a series of decisions.

In *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457 (1876), the Court explained what insurable interest is and when it is necessary. "It will be proper, in the first place, to ascertain what is an insurable interest. It is generally agreed that mere wager policies-that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction-are void, as against public policy." The *Schaefer* Court explained the basic concept of STOLI: "A man cannot take out insurance on the life of a total stranger." It also flatly asserted that an insured has an unlimited interest in her own life. "It is well settled that a man has an insurable interest in his own life." Most importantly, the Court established that insurable interest is only necessary at policy inception. "But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained."

The Supreme Court in *Warnock v. Davis*, 104 U.S. 775 (1881), further explained: "[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."

The insurable interest requirement and the property rights which attach after policy inception are twin pillars. The Supreme Court in *Grigsby v. Russell*, 222 U.S. 149 (1911), definitively held that, after the policy is taken out with insurable interest, it is infused with a bundle of property rights, and is no different than other property with respect to its alienability. "[L]ife insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is

desirable to give to life policies the ordinary characteristics of property." The Supreme Court insisted that this is not an academic point, because her right to potential resale is a fundamental part of the bargain that the policyowner strikes in purchasing a life insurance contract. "To deny the right to sell except to persons having such an [insurable] interest is to diminish appreciably the value of the contract in the owner's hands."

The *Grigsby* Court, placing its decision in the context of other property law, very clearly explained that, after a life insurance policy is taken out with insurable interest, the public policy justification for that rule vanishes going forward.

> The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust.... The law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in Shelley's Case.

Florida law, both common law and recent codification, follows these U.S. Supreme Court cases and the rules they establish.

The Florida Supreme Court has held:

- A life insurance policy cannot be taken out without insurable interest. "'Public policy forbids one person who has no interest in the continuance of the life of another from speculating on that life by procuring a policy of insurance. On the other hand, our courts have repeatedly held that one may insure his own life for the benefit of another having no insurable interest therein.'" *Knott v. State ex rel. Guaranty Income Life Ins. Co.*, 136 Fla. 184 (1939) (citations omitted).

- An insured has an unlimited insurable interest in her own life to take out a policy for her own purposes. "[O]ne may insure his own life for the benefit of another having no insurable interest therein." *Id.*

- After being formed with insurable interest, however, life insurance policies, like other property, are freely alienable on the open market. "The effect of the assignment of a life insurance policy, which assignment is made in accordance with the terms of the policy, is to place the assignee in the same status with respect to all rights and liabilities under it that the insured occupied before the transfer. It may be said to amount to the substitution for the assured of the assignee as a party to the policy. ... A life insurance policy is a mere chose in action, and ... it may be assigned as other choses in action." *Moon v. Williams*, 102 Fla. 214 (1931). *See also McMullen v. St. Lucie County Bank*, 128 Fla. 745 (1937) ("[I]f the insurable interest existed at the time the insurance was secured, the fact that such interest is later cut off or for other reasons ceases to exist is of not consequence. The beneficiary who continues to pay the premiums may enforce collection of the proceeds of the policy. *Grigsby v. Russell et al.*, 222 U.S. 149 .... The rule is also settled that a life insurance policy is a chose in action which may be assigned in the same manner that other instruments of like character are assigned."); *Knott*, 136 Fla. 184 ("'where one takes out a policy on his own life, it is a valid contract, and becomes operative just as soon as it is perfected. It is practically a promise on the part

of the insurer to pay a sum of money to the insured upon the happening of a condition. As such it is a valid contract, properly a subject of sale, and is valid in the hands of any person to whom it is assigned for value.' [Citation omitted.] ... [O]ne who has insured his own life may in good faith, by an assignment of the policy, provide for the payment of the insurance money to an assignee who has no insurable interest in the life insured.").

The Florida code's insurable interest provision, Fla. Stat. § 627.404, explicitly follow these rules:

- An insured has an unlimited insurable interest in her own life. "Any individual of legal capacity may procure or effect an insurance contract on his or her own life or body for the benefit of any person."

- A person other than the insured must have an insurable interest to take out the policy. "[B]ut no person shall procure or cause to be procured or effected an insurance contract on the life or body of another individual unless the benefits under such contract are payable to the individual insured or his or her personal representatives, or to any person having, at the time such contract was made, an insurable interest in the individual insured."

- Insurable interest is engendered, among other things, by family relationships ("[a]n individual has an insurable interest in the life, body, and health of another person to whom the individual is closely related by blood or by law and in whom the individual has a substantial interest engendered by love and affection.") and an economic interest in the continuing life of the insured ("[a]n individual has an insurable interest in the life, body, and health of another person if such individual has an expectation of a substantial pecuniary advantage through the continued life, health, and safety of that other person and consequent substantial pecuniary loss by reason of the death, injury, or disability of that other person.").

- And, of crucial interest to any discussion regarding the secondary market: "The insurable interest need not exist after the inception date of coverage under the contract."

The plain language of this statute thus follows the major tenets of U.S. and Florida law and public policy pertaining to insurable interest, property rights, and STOLI. In fact, the legislature specifically stated that the purpose of the 2008 amendments was to codify the well-established principles discussed above, stating in a drafting note which can be found in the Florida code: "[1]**Note.**--Section 2, ch. 2008-36, provides that '[t]he amendments to s. 627.404, Florida Statutes, made by this act are intended to clarify existing law.'"

In other words, the laws on the books address the public policy issues under consideration today, by drawing clear dividing lines between insurable interest, STOLI, and property rights. The public policy considerations, as discussed in the cases, were the same in prior decades and centuries as today.

<u>High Courts Have Repeatedly Addressed Today's STOLI Issues—What Is STOLI, How Are These Schemes Set Up, What Are The Policy Issues, And What Are The Rules Which Determine Whether STOLI Is Present?</u>

The primary questions implicated by today's STOLI schemes are not new and were in fact addressed repeatedly in the common law.

For instance, NCOIL and NAIC's interest in STOLI was triggered in 2005 by a program where speculators fund premium payments on insureds, who take out the policy on their own lives but enter into an agreement which has the effect of ceding back 95% of the death benefit from policy inception to the speculators, while the insured, in consideration of allowing her insurable interest to be used in this way, is allowed to keep 5% of the death benefit for her chosen beneficiaries. The U.S. Supreme Court addressed what appears to have been a similar scheme over 120 years ago in the case of *Warnock v. Davis*, 104 U.S. 775 (1881), where an insured "applied ... for a policy on his life ... and, on the same day, entered into the following agreement with the Scioto Trust Association" under which the insured:

> agrees to and with the Scioto Trust Association that nine-tenths of the amount due and payable on said policy at the time of the death of the party of the first part shall be the absolute property of, and be paid by, said Protection Life Insurance Company to said Scioto Trust Association, and shall be said party of the first part be assigned and transferred to said Scioto Trust Association, and the remaining one-tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy.... In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all dues, fees, and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues, and assessments, and to procure the payment of one-tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.
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> ...
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> The policy, bearing even date with the agreement, was issued to [the insured], and on the following day he executed to the association the following assignment....

The *Warnock* Court concluded that this arrangement was an impermissible wager policy, and the *Grigsby* Court later explained the rule which resulted from *Warnock*:

> And cases in which a person having an 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. Coming to the authorities in this court, it is true that there are intimations in favor of the result come to by the circuit court of appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. *Warnock v. Davis*, 104 U.S. 775.

These cases, and many others following the same rule, address the question presented by both yesterday and today's STOLI schemes: When has a stranger, who otherwise lacks insurable interest, and is thus unable to take out a policy on an insured's life, hatched a scheme whereby the stranger has effectively taken out a policy on the insured's life by impermissibly abusing the insured's insurable interest

in her own life, by means of an agreement whereby the insured takes out a policy on her own life on behalf of and/or for the benefit of that stranger? In other words, has a stranger used the insured as a straw purchaser of a policy on her own life in order to evade his or its own lack of insurable interest at policy inception?

This was the question posed in the past, and it is the question posed in today's STOLI schemes: Has a STOLI purveyor induced an insured to take out a policy on her own life for the purpose of benefiting that STOLI purveyor? If so, the STOLI purveyor has violated insurable interest by taking out a policy on an insured without proper insurable interest; in other words, the insured did not really take out the policy on herself, but rather did so for the benefit of the STOLI purveyor at policy inception.

The U.S. Supreme Court explained that such a violation occurs when "the policy ha[s] been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once." These cases, and many others, establish a clear rule for evaluating whether an assignment, subsequent to policy inception, can be understood to have been part of a STOLI scheme. This rule, as explained by LISA in its filing in the 4th Circuit case of *First Penn v. Evans*, incorporates several elements, and requires that a party seeking to establish a STOLI violation must demonstrate that all of the following elements were present: (1) an agreement (2) between the insured and the eventual assignee (3) in place at or before policy inception (4) to transfer the contract (5) to the eventual assignee.

Courts throughout the country have followed this rule, and refused to find that a subsequent assignment demonstrates a lack of insurable interest unless the eventual assignee contracted with the insured—at or before policy inception—for the insured to take out the policy on behalf of that assignee.

For instance, in *Chamberlain v. Butler*, 61 Neb. 730 (1901), the Nebraska Supreme Court, applying *Warnock*, explained:

> Counsel rely upon *Warnock v. Davis*, 104 U.S. 775, 26 L. Ed. 924, as an authority to uphold the judgment of the lower court. That case and this present two very different questions. In that case the insured took out the policy in pursuance of an agreement that a third party, having no insurable interest in his life, should, in consideration of certain payments to be made by it, receive at his death nine-tenths of the insurance money. In the opinion Justice Field says: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." Under the facts involved in that case the language was appropriate, for there was collusion between the insured and the party to be benefited by his death by a receipt of the amount above mentioned. **But the language is not applicable to this case, for there was no agreement between Butler and Chamberlain, at the time the policy was procured, that the latter should participate in its avails. The transaction with him was wholly independent of and subsequent to the original one between Butler and the insurance company. If their agreement had existed prior to the issuance of the policy, or contemporaneous therewith, then the words quoted would be applicable; otherwise not.** (Emphasis added.).

This rule is followed over and over by high courts.[1] And it has been uniformly followed by courts recently called upon to address whether the various arrangements in the market are legitimate uses of the property rights of life insurance or have crossed the line to STOLI.[2]

And, just as importantly, it is the clear, understandable rule which is set down by the Florida legislature in 2008 in the insurable interest statute, in the three elements of its first paragraph:

> (1) Any individual of legal capacity may procure or effect an insurance contract on his or her own life or body for the benefit of any person, but no person shall procure or cause to be procured or effected an insurance contract on the life or body of another individual unless the benefits under such contract are payable to the individual insured or his or her personal representatives, or to any person having, at the time such contract was made, an insurable interest in the individual insured. The insurable interest need not exist after the inception date of coverage under the contract.

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[1] *See, e.g., Mutual Life Ins. Co. of New York v. Allen*, 138 Mass. 24 (1884) ("*Cammack v. Lewis*, 82 U.S. 643 (1872), and *Warnock v. Davis* [citation omitted], were both cases in which the policies were taken out, by the procurement of the assignees, in order that they might be assigned to them."); *Steinback v. Diepenbrock*, 158 N.Y. 24, 31 (1899) ("*Cammack* ... and *Warnock* ... were cases where the policies were taken out in order that they might be assigned to the assignees.... In *Warnock's* case the agreement touching the procurement of the policy and the use to be made of it, including the promise to assign it, was in writing, and executed the very day the policy was applied for, and the day following the assured executed an assignment of the policy, which had in the meantime been issued in pursuance of such an agreement."); *Rylander v. Allen*, 125 Ga. 206 (1906) ("[T]he issue of a policy to one who has an insurable interest, and its immediate assignment, pursuant to a preconceived intent, to one without such interest ... is void. ... [T]here are no allegations in the petition in the case under consideration going to show an intention on the part of Allen and Mrs. Rylander to circumvent the law against wagering policies; it not appearing from the petition that Allen, at the time he effected this insurance upon his life, intended to assign the policy to Mrs. Rylander, or that she even knew of his intention to take out the policy."); *Bussinger v. Bank of Watertown*, 67 Wis. 75 (1886) ("All the cases cited by the learned counsel in the courts of the United States were cases where it was evident the original policies were taken out for the benefit of the persons to whom they were immediately assigned, and who in fact paid the premiums on the policy from the beginning. Taking out the policies in the names of the assignors in those cases was clearly a cover for acquiring a wager policy on the life of a person in whom the person really insured had no insurable interest.").

[2] *See, e.g., First Penn-Pacific Life Ins. Co. v. Evans*, 2007 WL 1810707 (D.Md.) ("I agree that the evidence shows indisputably that Moore planned to sell all or most of his life insurance policies at the time he applied for them, but the scheme did not involve other parties working together with him to procure policies and immediately effect their assignment.... There is no evidence that anyone other than Moore was a participant in the scheme at the time Moore obtained the First Penn policy; at the time he procured the policy, he was entitled to do so. Once a policy has been issued, it is an asset of the insured and he or she is free to sell it. *See, e.g., Grigsby, 222* U.S. at 156-57."); *Sun Life Assur. Co. of Canada v. Paulson*, 2008 WL 451054 (D.Minn. 2008) ("[T]he mutual intent of the insured and the third party to avoid the prohibition on wagering contracts determines the existence of such a scheme, purpose, or agreement. [Citation omitted.] The most important factor in determining the parties' intent is 'whether or not the assignment [from the insured to the third party] was done in pursuance of a preconceived agreement.' [Citation omitted.] ... The complaint ... does not allege that a third party intended to purchase the 360 Policy at the time of its procurement, nor does the complaint allege any facts supporting such intent.").

In other words, a person has unlimited insurable interest in her own life; a person other than the insured must have insurable interest to take out a policy on the insured; and insurable interest only is required at policy inception. This statute closely hews to the rules identified above: Insurable interest is violated if there was an agreement in place at policy inception between the insured and the eventual assignee which resulted in that stranger/assignee effectively taking out the policy on the insured by abusing the insured's insurable interest in herself. That is STOLI. It is, always has been, and always will be, very simple. But, as noted above the confusion continues in press releases.

Opponents of settlements and their allies have sought to impose tortured STOLI rules in the judicial and legislative arenas which would stray from these objective indicators of STOLI. These are a ruse, where legitimate concern about STOLI is twisted in support of bans on settlements which would apply beyond the contestability period.[3] Such laws would not protect insurable interest but instead would only attack consumers' bedrock property rights. This is a perversion of insurable interest law. As LISA explained in its amicus brief in *First Penn v. Evans*:

> Insurable interest is only required—and can only be found lacking—at policy inception. If—at the only possible moment under the law that an infraction can take place—the party who is accused of committing the alleged violation (by taking out a policy on a stranger) was as yet unidentified, and the allegedly illegal contract (the agreement to assign) did not as yet exist, the law cannot possibly have been broken. But First Penn's rule—asserting that a policy is void for lack of insurable interest even when there is no assignee and no agreement to assign at policy inception—would make it so, a wholly absurd result.

We have, in the past, seen many arrangements in the market which likely violate STOLI. Regulators and courts have the tools to address these schemes. In fact, many complaints—of various degrees of merit—have been filed in federal courts in the last two years which use established tools to allege that a STOLI violation has occurred. LISA's concern is that demagoguery about STOLI should not serve as a pretense for passing legislation which does not stop STOLI and does not protect insurable interest—but does impair property rights by restricting the right of assignment. The improved and authorized use of many effective and efficient carrier approved programs for both financing policy purchase and allowing full consumer rights is another piece of evidence of the advances which can be made without interfering with consumer rights.

The common law addresses the basic issues that we confront today. As the Supreme Court explained in *Grigsby v. Russell*, SOLI occurs when "a person having an [insurable] interest lends himself to one without any, as a cloak to what is, in its inception, a wager"—but legitimate use of the subsequent right of assignment should not be impaired, because "[t]o deny the right to sell ... is to diminish appreciably the value of the contract in the owner's hands."

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[3] As discussed below, the two year ban on such arrangements in the NCOIL Model, the original NAIC Model, and most State statutes—including Florida's—is fully consistent with the traditional STOLI rules since they tie the prohibition on settlements to the contestability period, during which time policies do not have marketable title.

The Secondary Market: A Competitive Response To A Market Defect In Life Insurance Products

The Institutional Secondary Market Grew In Direct Response To Consumer Demand To Respond To The Market Defect Of Universal Life Policies' "Grossly Inadequate Cash Surrender Values"

Further discussion of issues pertaining to drawing the line between legitimate stranger owned life insurance and illegal stranger originated life insurance in today's market must start with an understanding of why and how the secondary market has grown.

As discussed above, the property rights in life insurance policies which are the building block of the secondary market have been bedrock insurance law for well over a century. The disputes which underlay these common law decisions came about as a result of a variety of fact patterns where policies were transferred from a sellers to buyers on an ad hoc basis. The institutional secondary market only developed in the last decade in response to broad consumer demand.

Policymakers must confront what created this demand: Systemic inequity in the universal life products on which life insurers are increasingly focusing their marketing—and deriving profits. These products are characterized by a fundamental market defect: The cash values offered by carriers upon lapse/surrender, in monopolistic, take-it-or-leave-it fashion, frequently lag far behind the actual market value of the policies created by the consumers' premium payments.

As described by Northwestern Mutual Chief Actuary William Koenig, universal life policies

> depend on lapse-supported pricing, a pricing method facilitated by the absence of nonforfeiture requirements. This pricing method is unfair to consumers.... [E]ach time a policy lapses, the company's gain is much larger than would reasonably be expected. ... The vast majority of policyholders who lapse their policies before death are the "losers." They receive much less at surrender than what any reasonable person would perceive as acceptable value. ... Some permanent policies are being sold with grossly inadequate cash values. ... The current environment suggests that if an issuing company does not provide fair value, policyholders will proceed directly to a secondary market--presumably, a viatical company--to get a better deal. There will be a secondary market for these contracts, and this will not be good for the life insurance industry.

William Koenig and Stephen Frankel, "Don't Forfeit Nonforfeiture," Best's Review, June 1, 2000.

Life Insurers' Shocking Assertion That It Is Unfair To Evaluate The Worth Of Permanent Policies By Anything Other Than The Death Benefit

Amazingly, when confronted with the obvious and unassailable fact that the secondary market is simply a competitive response to, and correction of, a market defect which is unfair to consumers, some life insurers disassemble and try to change the subject by building up straw men and repeating questionable anecdotes to deflect the conversation. This troubling behavior reached a new low in a recent official submission to the Maine Bureau of Insurance, which is undergoing a similar review of the issues today being studied by the

OIR. The ACLI, in purportedly rebutting another submission which raised legitimate concern regarding universal life products (lapse supported pricing and "grossly inadequate cash values," per Mr. Koenig's analysis), stated the following:

> The Memorandum raises the issue of lapse rates in an attempt to confuse legislators with a snapshot analysis of actuarial sciences. It is an argument with no foundation. **Simply speaking, every insured knows that he/she gets full value for the insurance policy they own every minute that he/she is alive. The value a policy owner enjoys from a life insurance policy is knowing that his/her beneficiaries will receive the protection and comfort of the policy death benefit should he/she die during the policy term. People do not buy a policy for its cash surrender value but the protection it affords for unexpected death.** The policy's intrinsic economic value is not always realized through the death of the insured (for which the insured is usually grateful), so naturally some policies are surrendered, and some lapse and others are sold into the secondary market, all depending on the policy owner's circumstances.

ACLI memo to Maine Bureau of Insurance, Aug. 14, 2008. (Emphasis added.)

This statement is shocking to us. It does not occupy the grey area of spin but rather is a demonstrably false and misleading attempt to misrepresent the very essence of the product promoted by the all insurers, the ACLI's membership.

The notion that permanent life insurance policies should not be evaluated by the fairness of their cash surrender value payouts because the "full value ... a policy owner enjoys from a life insurance policy is ... the policy death benefit," and that "people do not buy a policy for its cash surrender value but the protection it affords for unexpected death" is fundamentally flawed. It reminds us of the sort of business practices that led in the 1990s to the payment of billions of dollars in settlements and fines by major insurers in a collection of lawsuits and market conduct examinations which questioned the integrity of basic sales practices pertaining to universal life products.

The statements made by the ACLI about death benefit protection providing the full value of life insurance can only be applied to term insurance products. They simply cannot be applied to universal life. Consumers pay billions of dollars in extra premiums for universal life products for investment returns in addition to death benefits. To rebut arguments that suggest that the secondary market is a competitive response to lapse supported pricing and unfair cash surrender values by claiming that the full value that consumers receive—and intend to purchase—in universal life products is death benefit protection just an indefensible assertion, as demonstrated by the following.

Numerous courts have expounded on the differences between term and permanent insurance.

For instance, the ACLI may wish to turn to the federal court in Ohio for a primer on the products sold by its members:

> *General principles of life insurance*

> This case involves many of the unique attributes of life insurance. There are two basic kinds of life insurance: term insurance, which, as its name implies, provides a death benefit for a specified term of years; and whole life insurance, which provides a death benefit throughout the lifetime of the insured. Term insurance policies are priced on the basis of the actuarially-determined cost of providing the stipulated death benefit during the term of the policy. This is referred to in the insurance industry as the cost of insurance ("COI"). The premium for a term insurance policy includes a profit for the insurance company, but the contract provides no benefits to the insured other than the death benefit. Whole life policies, on the other hand, are customarily priced to permit the accumulation of value in addition to the cost of providing the death benefit. **These policies provide a benefit known as cash value, which may be accessed by the policyholder during the insured's lifetime through policy loans or withdrawals of policy value. The accumulation of cash value within the policy may be likened to a savings account.** ... Many whole life insurance policies have an additional mechanism for distributing benefits to the policyholder, known as dividends. ... Generally, dividends are paid when the insurance company's operating results have exceeded its profit expectations and there are additional funds available for distribution to policyholders. ...
>
> In the late 1970s, a new form of cash value life insurance, known as "universal life," was introduced to the market. In a universal life policy, all of the economic components of the policy are revealed. **The introduction of universal life had a significant impact on the life insurance industry by providing a product that could be marketed with an emphasis on investment goals and returns. With the introduction of universal life, the flexibility of life insurance as an investment vehicle was enhanced and the variations in the kinds of policies multiplied.**

American Elec. Power, Inc. v. U.S., 136 F.Supp.2d 762 (S.D.Ohio 2001) (emphasis added).

Contrary to the ACLI's assertion that the "full value" of **universal life** policies comes from the consumer "knowing that his/her beneficiaries will receive the protection and comfort of the policy death benefit should he/she die during the policy term," and that "[p]eople do not buy a policy for its cash surrender value but the protection it affords for unexpected death," the Ohio federal court clearly explained that these phrases nicely describe the way **term life** is designed and marketed—but are simply inadequate to describe permanent insurance policies, which are explicitly designed and marketed with separate death benefit and investment components—a distinction drawn even more clearly with the advent of universal life, with which "the flexibility of life insurance as an investment vehicle was enhanced."

In a similar description, New York State's highest court explained:

> Cash value life insurance combines "pure" life insurance **with an investment component that creates a potential accumulation of money in the policy.** [Citations omitted.] In a cash value policy, the carrier typically invests accumulated money and pays returns to the policyholder in the form of dividends or interest (Downes and Goodman, *op. cit.*, at 81). When cash value insurance first emerged, insurance companies invested accumulated money exclusively in conservative securities with fixed interest rates, such as municipal and corporate bonds [citation omitted]. Commentators point out that because interest rates "soared" in the late 1970s and early 1980s, the economics of these cash value life insurance

> policies became unattractive to investors who sought to take advantage of the high interest rates [citations omitted] **In the mid- 1980s, the life insurance industry reacted to its diminishing market share by designing policies, like the ones here at issue, in which policyholders' accumulated money is tied to the current rate of interest [citation omitted].**

Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999) (emphasis added).

The New York high court again clearly explains that term life is "pure" life insurance—where the "full value" reaped by the consumer is death benefit coverage—and that much of the value of permanent policies like universal life comes from their investment component. This has been recognized over and over by the courts. *See, e.g., U.S. v. Mitchell*, 349 F.2d 94 (5th Cir. 1965) ("In the typical whole-life level premium life insurance policy, the annual premium is used for three purposes: current insurance protection, costs and a profit to the insurer, and as the principal of an investment on which interest accrues until maturity."); *Young v. C.I.R.*, 1995 WL 471390 (U.S.Tax Ct. 1995) ("In the typical split-dollar arrangement, an employer and an employee, or a corporation and a shareholder, jointly purchase a life insurance contract in which there is a substantial investment element. ... The insured employee or shareholder pays the portion of the annual premium that covers the annual risk charge and the administrative charge (the current cost of insurance coverage; i.e., term life insurance coverage), while the employer or the corporation pays the portion of the premium that relates to the investment component. .... Generally, the employer or the corporation is entitled to recover, out of the policy proceeds, an amount equal to the cash surrender value of the policy or at least an amount equal to the payments made by the employer or the corporation; i.e., the investment component. .... The insured's beneficiary is entitled to receive the balance of the policy proceeds; i.e., the risk component."); *Bowes v. Travelers Ins. Co.*, 173 F.Supp.2d 342 (E.D.Pa. 2001) ("As explained by The Travelers, universal life insurance, as opposed to term life insurance, combines life insurance with an investment component. '[T]he cost of insurance and expense charges are deducted from the premiums paid and the excess monies are credited with interest.'").

And many of the courts which established the fundamental property right to alienate a policy on the free market for its full value have pointed toward the investment component of life insurance policies as a prime reason why these property rights are essential. For instance, in the seminal case of *Grigsby v. Russell*, the Court grounded its holding establishing the free right of assignment of life insurance policies in the economic reality that "life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property."

The Michigan appellate court cited *Grigsby*, quoted the passage above, and then further explained:

> The purchaser of ordinary life insurance, as distinguished from casualty or property insurance, buys not only indemnification in a specific amount against a particular peril or potential loss but also makes an investment. To terminate the rights of the owner or beneficiary of ordinary life insurance because the relationship to the life insured has changed, perhaps after many years of making premium payments, at a time when death is bound to be more imminent than it was at the time the policy was issued, would not only adversely affect this investment quality of life insurance but would also confer an unanticipated and unwarranted windfall on the insurer.

Secor v. Pioneer Foundry Co., 173 N.W.2d 780 (Mich. App. 1969).

Bankruptcy courts have in a very practical way demonstrated the difference between term and permanent policies. As explained by the federal bankruptcy court in Florida, "Courts have consistently held that expenses are not reasonably necessary for the maintenance of the debtor, and denied confirmation of a plan, where the expenses are for luxury goods and services, investments, investment property, or where the expenses are clearly excessive." *In re Presley*, 201 B.R. 570 (Bkrtcy.N.D.Fla. 1996). In applying this rule, bankruptcy courts have consistently distinguished between term and permanent policies, ruling that the former can be understood to be "reasonably necessary"—but that premiums attributable to the savings component of the latter cannot, because they are inherently investment products. *See, e.g., Id.* ("[T]erm life insurance is not an investment asset."); *In re Williamson*, 296 B.R. 760 (Bkrtcy.N.D.Ill. 2003) ("The courts that have found payments for life insurance to be reasonably necessary have done so only to the extent that the policy does not have any investment or cash value component."); *In re Smith*, 207 B.R. 888 (9th Cir.BAP (Idaho) 1996) ("Some types of life insurance are indeed mainly estate planning devices which ought to be treated as retirement contributions. However, other types of life insurance are intended to legitimately protect the debtor's dependents from destitution if the debtor were to die."); *In re Husemann*, 2001 WL 1757048 (Bkrtcy.D.N.H. 2001) ("The focus of the Court's inquiry is whether the policies are reasonably necessary for the support of the debtor's dependents. [Citations omitted.] Here, the Debtor has explained that he is in a high risk occupation which results in higher premiums and that his various insurance policies have no cash value to them."); *In re Heffernan*, 242 B.R. 812 (Bkrtcy.D.Conn.,1999) ("Even accepting the need for the additional insurance provided by this policy, the court cannot consider the 'savings' portion of the premiums, the portion applied to increase the policy value, as an expense that is necessary for the support of the debtors. [Citation omitted.] (To the extent that life insurance premium payments are attributable to the savings or investment component of a whole life policy, they may not be excluded from disposable income.).").

If the ACLI does not believe the courts' categorical and repeated findings that the ACLI's statements that the value that consumers pay for in universal life products goes far beyond the death benefit, perhaps it should peruse its members' websites, where it would find the following descriptions of product offerings:

- Phoenix, "Life Insurance Basics": "First, a Few Familiar Terms. At its core, life insurance policies allow you to choose a beneficiary -- generally a family member, business or institution -- to receive a payment upon your death. **And then the features begin to diverge:** Permanent life insurance can provide coverage for your entire life (as opposed to a specified term). **Permanent life insurance offers tax-deferred accumulation and income tax free death benefit.** Universal, variable universal and whole life insurance are all forms of permanent life insurance. ... Term life insurance provides you with coverage for a specified period of time. **Term life offers pure insurance protection -- it does not accumulate cash values**." (Emphasis added.)

- Transamerica. "Term Insurance. If you die during the term, your beneficiary is paid the coverage amount subject to your policy terms. **Because it provides 'pure' insurance without any cash value accumulation, term coverage is generally less expensive initially than permanent coverage.** Term insurance provides a great answer to the question: How will your family manage financially if you die prematurely? About Universal Life Insurance **Universal life is a permanent insurance product in which the internal policy charges and interest crediting components are**

specifically broken out separately in the policy. Universal life insurance cash value is dependent on the investment returns credited. With certain limits, the policy owner can choose the premium he or she wishes to pay and this determines how the policy values develop. The policy owner benefits from current investment and expense experience." (Emphasis added.)

- MetLife. **"Why Guarantee Advantage UL?** Guarantee Advantage UL can offer you and your loved ones the following: **Guarantees:** Lifetime guaranteed protection for* you. *Lifetime guaranteed monthly income for your family."

- ING. "**Universal life insurance also has a 'savings' feature, called cash value.** Each payment you make to the contract pays for your insurance coverage and then the excess is invested to build cash value that you can use in the future. The insurance company invests this cash value and credits interest to this account. Most UL contracts also offer a guaranteed minimum interest rate so you always know that your money will earn a minimum amount. The cash value in your account also grows income tax-deferred allowing it to accumulate faster." (Emphasis added.)

- AXA. "**Term Life is the simplest form of life insurance. Coverage is for a specified period of time (the term) and provides a death benefit only**. ... **Universal life is permanent insurance that provides protection in case of death, as well as a savings or cash value component.** The cash value of a universal life policy is based on the amount of premiums you pay, the declared interest crediting rate and the policy charges of the insurance company." (Emphasis added.)

- Columbus Life. "**Universal Life insurance offers the best of two worlds--a set amount of coverage with a tax-deferred, cash accumulation account based on current interest rates**." (Emphasis added.)

- Northwestern Mutual. "This flexibility gives you the ability to match your protection to your needs, whatever they may be down the road. **The cash value can also help you meet a variety of other financial objectives. Northwestern Mutual Custom Universal Life-Accumulator is a flexible premium universal life insurance policy that shares in the investment performance** of Northwestern Mutual's general account." (Emphasis added.)
- Nationwide. "Term life insurance is probably one of the most popular forms of life insurance. In exchange for a premium that stays the same for a specific period, you get a taxfree death benefit. That way, if something happens to you, your family can continue to pay for the things your income provided. ... Universal Life Insurance. With universal life insurance, you can provide a permanent death benefit to those who depend on you while earning cash value."

- Hartford. "**Term Life. Coverage provides lower premiums for people who cannot afford permanent life insurance premiums**. ... Universal Life ?Access to cash accumulation and benefits – Since any earnings are tax-deferred until you withdraw them from the policy[1], your policy account values have the potential to accumulate faster. **You receive a guaranteed minimum rate of interest on the policy's cash value**." (Emphasis added.)

- Lincoln. "**Universal Life (UL) is permanent life insurance that combines economical death benefit protection with cash value accumulation**." (Emphasis added.)

- Penn Mutual. "Universal life is a type of permanent life insurance. **Permanent life insurance policies combine death benefit protection with the ability to build wealth within the policy, which is referred to as the 'cash value.'**" (Emphasis added.)

- SunLife. "Universal Life Insurance. A more flexible but **intricate type of insurance that combines long term life insurance with an opportunity for tax-deferred savings**.... Payments made, in excess of required cost of insurance, can be **invested** and grow tax-deferred." (Emphasis added.)

- New York Life. "**Universal Life Insurance.** Universal life insurance provides permanent life insurance protection and access to cash values that grow tax-deferred at competitive interest rates."

- Pacific Life. "**In addition to death benefit protection, permanent universal life insurance offers accumulated value to use for supplemental income or other needs**." (Emphasis added.)

- Allstate. "There are two big ways that **permanent is different from term**. First, the policy is meant to last the rest of your life (as long as you make the required premium payments, of course). Second, **part of the money you pay in is set aside in an account where it can grow cash value that you can tap into later on**." (Emphasis added.)

- John Hancock. "Universal Life. Description: - Permanent insurance which has the potential to accumulate cash value. ... When To Consider: - You want the potential to earn a higher rate of return than a whole life account, even though there's a risk that your rate of return could drop."

In light of the above, ACLI's statements with respect to universal life insurance products—in an official submission to a Department of Insurance—that "the value a policy owner enjoys from a life insurance policy is knowing that his/her beneficiaries will receive the protection and comfort of the policy death benefit should he/she die during the policy term" and that "[p]eople do not buy a policy for its cash surrender value but the protection it affords for unexpected death" are very troubling, and undermine the credibility of its policy prescriptions for STOLI.

Insurers' Anti-Competitive Conduct And Florida Consumer Protection Laws

Also troubling are current life insurers' efforts in the market to diminish consumers' property rights through troubling business practices which appear to violate the letter and/or spirit of Florida's Unfair Insurance Trade Practices Act.

Insurers publicly induce consumers to buy their policies by promising that their agents will provide full service commensurate with their policyowners' needs—but privately they forbid their agents from helping consumers access the secondary market value of their policies:

- Prudential promises that its agents "help you make sense of it all," and "provide assistance on a range of financial issues," so that "having a relationship with a Prudential licensed financial professional puts all of his or her experience and skill at your disposal." But all of its agents' skills are NOT at the customer's disposal: Prudential's contracts require its agents to certify "that no Company Policy shall be sold or used in any manner to or with a viatical or life settlement company or be part of a viatical or life settlement."

- Axa says that insurance agents will "help you determine ... how to make the most of your premium dollars" and that "a qualified professional from AXA Advisors can offer you access to an array of products and services." But Axa's confidential directives to its distribution network prohibit producers from "using ... written materials with prospective purchasers of life insurance that make any representations about the ability to sell a policy or rights to its death benefits, or in any way promote, propose or orchestrate such a sale."

- New York Life promises potential customers that its agents are "professional problem solver[s] who can help you identify the most cost-effective products to help you meet your financial objectives"; that they "provide[ ] a full range of services"; "serve as a quarterback for you and the other members of your team of advisors"; and "monitor progress, provide ongoing service as your needs and situation change over time. This is crucial. Planning is not a one-shot deal. Strategies need to be adjusted periodically. Your agent will work with you over the years to help keep your program on track with your changing needs." But, contrary to the substance of these promises, New York Life has prohibited its agents' participation in life settlements, warning them that "you may not obtain forms or papers for the transaction, accompany a client to a meeting with a life settlement broker or provider, evaluate any proposals they receive from a life settlement company."

We do not complain to the OIR about the confusion of these statements but rather their legality or possible lack thereof. When insurers induce consumers to buy their products by publicly promising that their life insurance agents will provide a full range of services, but then covertly prohibiting these agents from counseling their clients about a life settlement, they appear to be engaging in false and/or misleading advertising. Florida law specifically contemplates that life insurance policies come with the fundamental property right of alienation. These carriers are using forms approved by the State of Florida which contain assignment and change of ownership clauses which bring these property rights to fruition. And the Florida Code specifically makes the function of life settlement brokers part of the authority of a life insurance agent's license, with the agent granted the power of self-appointment. *See* Fla. Stat. § 626.9916 ("a person, other than a life agent licensed under this chapter, may not in this state, from this state, or with a resident of this state perform the functions of a viatical settlement broker.... Before performing the functions of a viatical settlement broker, a life agent shall appoint himself or herself with the department.").

Given this legal framework, the promise of their agents' full and comprehensive service, coupled with carrier interference with and prohibition of precisely such services, would appear on its face to put carriers in violation of the broad prohibitions against false and/or misleading advertising in the Florida code. *See* Fla. Stat. § 626.9541(1)(b) ("Knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public ... [i[n any ... way, an advertisement, announcement, or statement containing any assertion,

representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.")

And untrue and/or misleading statements by carriers about the secondary market are routine. For instance, New York Life, in trying to scare its customers away from life settlements, casts untrue aspersions against secondary market providers by telling policyowners that, after a life settlement, "the new owner will name a beneficiary, who will collect the income-tax-free proceeds on your passing." This is flatly false: The tax benefit does not travel with the policy in a life settlement.

Insurers pile on misleading warnings to scare consumers from life settlements. New York Life shouts: "What if you die suddenly? Without death benefit proceeds, will your loved ones have enough to help settle debts, avoid selling assets to pay bills and taxes, and run the household? They had better because only the life settlement company will gain at your death." MassMutual will not process a change of ownership in a life settlement unless the consumer signs a series of affirmations about the results of the settlement, including admitting: "I am forfeiting a financial asset that probably has a higher rate of return than any other asset in my estate."

Almost 90% of their policies lapse/surrender without paying a claim, but companies focus their worst hyperbole about loss of death benefits upon the rare occasion of a life settlement. MassMutual provides a whole page of special disclosures about the loss of death benefits resulting from a settlement, but makes no such warnings at all in its surrender forms.

The UTPA also prohibits "twisting": "Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which ... Is a misrepresentation for the purpose of inducing, or tending to induce, the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy," Fla. Stat. § 626.9451(1)(6); or "[k]nowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer," Fla. Stat. § 626.9451(1)(l). All of the practices discussed herein appear to be misrepresentations designed to push consumers away from life settlements and toward lapse.

Another troubling area of carrier behavior pertains to potential collusion between competitors in the primary market. The CEO of a major insurer stated on an earnings call: "We have the top 30 life company CEOs that are on the American Council of Life Insurance Board have all agreed that we will not write ... stranger owned life insurance.... So the big companies have all agreed to no longer write it. Starting we made that agreement in early 2006."

This does accurately describe what carriers were doing in 2006. A survey circulated through the industry asked whether 20 of the largest carriers would issue a policy when the consumer used a non recourse premium finance loan secured by the policy's value on the secondary market. Six carriers indicated they would, then quickly reversed their practices to conform with the others. One put out a directive to its agents saying that it was "chang[ing]" its position—refusing to issue policies supported by non recourse loans—in order "to support this industry-wide stance."

This concerted agreement not to compete appears to directly violate the plain language of Fla. Stat. § 626.9541(1)(d)'s prohibition against "[e]ntering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance."

Carriers are also now apparently using policy forms which flout the OIR's stated position regarding the right of assignment. We recently received a copy of a policy purportedly in use by Ohio National which flatly prohibits the use of the contract in a life settlement. Its Assignment Clause states: "We will not allow an Assignment that, in our sole opinion, could result in the transfer of any rights or benefits payable under this contract to a person, entity, or trust that does not have an insurable interest in the life of the Insured at the time of the requested Assignment." LISA has previously corresponded with the OIR about just such a contract, and was given the following written response from Rich Robleto on behalf of the State, "in response to [LISA's] letter ... concerning insurance contracts that include limitations on the right of assignment. More specifically, your letter addresses policy language that prohibits the policy owner from viaticating the policy. The Florida Department of Insurance would also be concerned with contract language that places a limitation on policy owner rights to assign the benefits or ownership of the policy. At this time we are not aware of any approvals of the type of contract language that you have described. We appreciate you taking the time to write ... and support the NAIC in addressing any form of unfair trade practice." Ohio National's policy, if it is being used in Florida, would thus on its face appear to violate the UTPA based on the clear policy articulated by the OIR.

Other carrier practices which are troubling include denying coverage to applicants for insurance based on the consumer's stated intent to use non recourse premium financing to pay for the coverage. Fla. Stat. § 626.9541(g) prohibits "knowingly making or permitting any unfair discrimination between individuals of the same actuarially supportable class and equal expectation of life," and this has consistently been interpreted by the courts, applying similar statutes, to prevent discrimination on factors other than mortality. *See, e.g., Trapp v. Metropolitan Life Ins. Co.*, 70 F.2d 976 (8th Cir. 1934) ("[t]he purpose of the antidiscrimination statute is to secure to the purchasers of life insurance, of the same age and condition of health, equality of treatment with respect to premiums and coverage."); *Mahone v. Hartford Life*, 561 P.2d 142 (Ct. App. Ok. 1976) ("If the decedent, for example, had been singled out from the class of employees of similar life expectancy, and had been denied the right to benefits accorded the others, or forced to pay more for these benefits than the others, the statute would have been violated."). And the Florida courts have specifically held that unfair discrimination occurs when consumers are grouped differently based on their paying status. *See, e.g., Afro American Life Ins. v. LaBerth*, 136 Fla. 37 (Fla. 1939) ("provisions in life insurance policies which discriminate between borrowing and non-borrowing insurants ... have, in most cases where the question has arisen, been held to be invalid, ... in that they violate a statute prohibiting discrimination between insurants of the same class."); *Praetorians v. Fisher*, 89 So.2d 329 (Fla. 1956) ("But the provision of the policy ... operates very differently upon borrowing and non-borrowing insurants in otherwise identical situations, and our inquiry must be whether the difference in treatment is justified by the difference in status.")

We respectfully request that the OIR carefully review carriers' market conduct and evaluate these practices for compliance with the UTPA and/or other controlling consumer protection laws. If the OIR determines that it does not have authority to act against these anti-consumer practices, we suggest that it consider supporting legislation which directly addresses these attacks on property rights, such as:

- **A prohibition under the law on carriers prohibiting their agents from assisting their clients with life settlements.** As discussed above, life agents, after executing a simple self-appointment, have the authority under their licenses in Florida law to act as settlement brokers. Particularly since carriers advertise that one of the benefits of their policies is the full service of their agents, such a requirement as proposed above is fully consistent with the letter and spirit of prevailing public policy in Florida.

- **A requirement that consumers who are lapsing, surrendering, considering a loan or otherwise contemplating the disposition of their policies be informed of the option of a life settlement.** Florida law requires the mirror disclosure upon settlement. *See* Fla. Stat. § 626.9923(1), requiring that "[t]he viatical settlement broker, or the viatical settlement provider in transactions in which no broker is used, must inform the viator by the date of application for a viatical settlement contract ... [t]hat there are possible alternatives to viatical settlement contracts for persons who have a catastrophic or life-threatening illness, including, but not limited to, accelerated benefits offered by the issuer of a life insurance policy." Given that insurers' are aggressively thwarting consumers' efforts to settle their policies, and that the law requires that other options be disclosed upon settlement, is it not appropriate for the law to require disclosure of the settlement option in kind?

- **A prohibition under the law against insurers or agents issuing any form or requiring any owner of a policy to sign any form that is not prescribed in the settlement law.** The legislature has already set forth in the Florida code all the consumer protections requisite to a policyowner's selling of her policy, including a long list of disclosures carefully designed to address the particular risks of a life settlement. As discussed above, under the guise of providing helpful information, insurers are scaring their customers away from settlements while providing no commensurate warnings regarding lapses. To prevent against twisting or the promotion of false or misleading information, no other forms or information should be permitted to be used.

Public Policy Questions Going Forward

The two year prohibition on settlements in the NCOIL Model, the original NAIC Model, and most States, including Florida, follows the dictates of the common law. *Grigsby v. Russell* explained that, "[s]o far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property." A two year prohibition on policy sales implements the Court's vision of "reasonable safety" given concerns in today's market about the potential for clean sheeting and wet ink abuses, and is a reasonable restriction on property rights, as described below.

Two years is a principled period of time tied to one of the most fundamental cornerstones of public policy pertaining to life insurance: the two year statutory[4] contestability period. "[T]the purpose of this statute is

[4] Fla. Stat. § 627.455 ("Every insurance contract shall provide that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue except for nonpayment of premiums and except, at the option of the insurer, as to provisions relative to benefits in event of disability and as to provisions which grant additional insurance specifically against death by accident or accidental means.")

to create a reasonable time period during which insurance companies can investigate applicants and void policies issued in error, while protecting consumers from untimely efforts to void policies." *Bankers Sec. Life Ins. Soc. v. Kane*, 885 F.2d 820 (11th Cir. 1989). *See also American Life Ins. Co. v. Martinez,* 480 F.3d 1043 (11th Cir. 2007) ("[I]ncontestability clauses function much like statutes of limitations. While they recognize fraud and all other defenses, they provide insurance companies with a reasonable time in which to assert such defenses, and disallow them thereafter.").

Statutes prohibiting settlements for two years and prohibiting contestability after two years fit seamlessly together, guaranteeing that the policyowner as of a date certain holds fully marketable title to her asset and thus perfecting her property right. The NAIC minutes, not surprisingly, clearly and repeatedly demonstrate the drafters of the original NAIC Model's intent to tether these two concepts, including Florida's clear recognition that the two year proposal was based on the contestability period.[5] In fact, the tie between wet ink and contestability was so well understood that a member of the NAIC Viatical Settlements Working Group who had participated in all of the discussions on the issue asserted that the waiting period for settlements in the original Model was not a two-year ban but rather a ban on transfer during contestability. "Mr. [Bill] McAndrew [Illinois DoI assistant deputy director] said that the drafting of the model act may have not been correct. The key is not whether the policy has been held for two years, but rather whether it is in the contestability period." NAIC Viatical Settlements Working Group minutes, June 21, 2003.

And, more to the point, the Florida code implicitly recognizes that the two year prohibition on settlements is designed to mirror statutory contestability: The title of the provision which imposes the two year prohibition on settlements is entitled "Contestability of viaticated policies." *See* Fla. Stat. § 626.99287 ("**Contestability of viaticated policies.**--Except as hereinafter provided, if a viatical settlement contract is entered into within the 2-year period commencing with the date of issuance of the insurance policy or certificate to be acquired, the viatical settlement contract is void and unenforceable by either party.").

The tie between contestability and the so-called "wet ink" period has always been clear. When the five year ban on settlements was originally proposed at the NAIC in May, 2006, it was referred to in the minutes as an extension of the contestability period.

> Commissioner Poolman asked the panelists' opinions on addressing the issues involved with the two-year incontestability provision. ... Mr. Cook expressed support for Commissioner Poolman's proposal to extend the incontestability period to five years. ... Mr. Newton stated that he would be opposed to extending the incontestability period to five years, as suggested by Commissioner Poolman.

NCOIL rejected the five year ban in large part because it separated the "wet ink" period from the contestability period. NCOIL Vice President, Rep. Robert Damron of Kentucky:

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[5] *See, e.g.,* Viatical Settlements Working Group minutes, Jan. 18-19, 2000 ("Mr. McCarty reminded the group that Ms. Spiezio [life insurance trade association lobbyist] had suggested limiting transfer during the contestability period."); Life Insurance and Annuities Committee minutes, March 6, 1999 ("Sale of newly issued policies (also known as 'wet paper') 'Wet paper' is a life insurance policy that is still in its contestable period.").

> The two year ban in the NCOIL model, and in every State law except one, is a principled waiting period tied to the statutory contestability period. The two year waiting period, which until June 2007 prevailed for years in the NAIC model, was established after lengthy, detailed, and thoughtful debate by a working group when it was adopted by the NAIC in 2000. Other lengths of time were considered by the working group, and rejected in favor of tying the waiting period to contestability. A five year ban impairs property rights by banning legitimate life settlements and legitimate premium finance arrangements. The tie between the waiting period on life settlements and contestability is fundamental.

The "principled waiting period" of two years is obliterated by the NAIC Model. The five year ban on settlements is arbitrary and capricious, and its supporters have yet to articulate how it addresses identified problems in the marketplace. The five year ban is a shotgun approach which, instead of identifying and banning problem behavior, is specifically designed to distort the free market by imposing disincentives to capital investment in the secondary market.

Proponents of the NAIC Model point to the purported exceptions to the five year ban, but these only underscore the bill's hostility to basic consumer property rights in life insurance. One exception exempts non recourse premium finance loans from the five year ban only to the extent that they are secured by cash surrender value (insurers' preferred method), while punishing consumers who secure their loans up to market value (competing with insurer programs). (NAIC Model, Sect. 11(A)(3)(a).) This is an unprecedented codification of a preference in the law for cash surrender value over the salutary workings of the free market.

The NAIC Model also deny the safe harbor of a two year waiting period to consumers who have the temerity to appraise the value of their policy. (NAIC Model, Sect. 11(A)(3)(c).) Purchasers of homes, autos, jewelry, and stocks base purchase decisions on the asset's resale value, but, contrary to well-established law which holds that life insurance policies are the same as other property, policyowners who seek to even the playing field and the information gap between themselves and their insurers are punished for appraising their asset.

In fact, the NAIC Model's focus on attacking true non recourse premium financing (where the loan is secured by the market value rather than the cash surrender value) demonstrates an improper desire to attack the secondary market and protect a market defect. Non recourse premium finance loans are made possible by the presence of the secondary market, which allows lenders to assess whether a policy's market value is high enough such that no further collateral is needed. This is fully consistent with existing law. In *Steinback v. Diepenbrock*, 158 N.Y. 24 (1899), the court recognized that consumers might borrow against a policy's market value, not just sell their asset for that amount. "[S]ound public policy would seem to require that the payee should be permitted to treat it as he may any other chose in action and go to the best market he can find, either to sell it or borrow money on it."[6] But the NAIC Model specifically attacks the

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[6] Consistent with this law, the New York high court shortly thereafter specifically upheld a non recourse premium finance arrangement—where a loan to fund premium payments for the purchase of a new life insurance policy was secured solely by the value of the policy itself—as consistent with insurable interest. In *Reed v. Provident*, 190 N.Y. 111 (N.Y. 1907), the Court explained that "it appears that all of the insurance was procured in pursuance of the contract between [the lender], the assured, and his children. It was to be maintained by [the lender] for their benefit and they were to be named as the

consumer's right to "go to the best market he can find" to "borrow money on" his policy.

Just as life settlements are not STOLI, non recourse premium financing is not STOLI. STOLI occurs when strangers arrange to use insureds as straw purchasers of insurance. In a non recourse premium finance arrangement, the consumer retains full control over the policy, and can always take it to the secondary market—"the best market he can find"—as opposed to being tied down to assigning the policy to a particular speculator.

The NAIC Model, quite simply, does not ban STOLI. NCOIL member Sen. Ralph T. Hudgens of Georgia explained:

> [A]mendments to the NAIC Viatical Settlements Model act ... surprisingly do[ ] not address trust structured STOLI. I say that the NAIC's actions are surprising because ... the NAIC Model Act amendments contain[ ] a 'loophole' for this form of transaction ..., despite [the NAIC] having condemned such schemes in a 2005 resolution.

As revealed by NCOIL, the ACLI agreed. It specifically "insisted" in discussions with the sole author of the NAIC Model that that bill "failed to address the fundamental concerns with STOLI" because it did not ban or even regulate "finance programs permitting investor participation prior to or at issuance where the policy does not settle and the policyowner derives some modest percentage of the death benefit"—what the ACLI, and NCOIL, insisted is true STOLI.

Insurers went along with this anti-STOLI Model which does not do anything about STOLI because, as NCOIL revealed, they were told that they would not receive any other amendments to the NAIC Model if they did not. And, despite the clear charge given to the A Committee to limit its review to STOLI, it presented carriers with a broad attack on the secondary market with a slew of provisions which, having nothing to do with STOLI, rewrote the basic nuts-and-bolts regulation of life settlements found in the existing NAIC Model. Despite the limited charge, dozens of changes were made to the Model, unilaterally by the chair, without the slightest debate or justification (in clear violation of NAIC rules requiring the open drafting of all Model provisions in a working group and the documentation of rationale for all policy decisions). A few examples of the anti-assignment amendments to a Model which was functioning smoothly include:

- Sect. 3(F)(4)(b) requires the demonstration of financial responsibility of viatical settlement brokers in a high amount of $250,000, in the form of a surety bond or cash—but not the traditional method of errors and omissions insurance. Brokers and producers have repeatedly stated that they cannot

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beneficiaries; but [the lender] was to be compensated by the repayment from the proceeds of the policies of the amount of his advances of premiums, or assessments, with interest...." The *Reed* Court found insurable interest in two ways: the insured's ability to take out a policy on his life and do with it as he saw fit ("If the insurance is made upon the application of one who has no insurable interest whatever in the life insured, it is a wager policy, that is to say, a speculative contract, which the law condemns. But a person may insure his own life and provide in the contract of insurance that the money shall be payable to any one whom he may appoint, or assign the policy to."); and the lender's insurable interest in its debtor ("The assured was a debtor for the premiums paid by [the lender] to maintain the insurance on his life.").

meet this requirement, which led to many brokers relinquishing their licenses in North Dakota, according to published reports. This will simply make it harder for consumers to access the secondary market, thus reducing the value of their policies.

- Sect. 10(C) doubles of the rescission period for settlement contracts from the previous NAIC Model from 30 to 60 days. Thirty days was an appropriate period of time for a policyowner to decide to change their mind after signing a contract. Balance is necessary, and doubling the period to 60 days will force settlement providers to lower their offers to viators since there is a cloud over the title of the asset.

- Sect. 8(b)(3) requires settlement providers to disclose any affiliations with their investors. This is proprietary information which is not relevant to the transaction. Affiliations between providers and brokers are relevant, since the broker owes the consumer a fiduciary responsibility. But the provider and viator bargain at arms' length, and such a required disclosure is highly irregular.

The NAIC Model fails to ban or even regulate STOLI, and instead attacks the secondary market by prohibiting or restricting currently legal transactions involving changes of ownership and potential changes of ownership. Shockingly, as described above, it codifies protection for a market defect—"grossly inadequate cash surrender values"—while shutting down consumers' ability to use the free market to put themselves on even footing with insurer's monopolistic practices. It does so by equating settlements with STOLI in the five year ban, and by rewriting the existing NAIC Model with a long list of onerous restrictions on the smooth workings of the secondary market.

The nakedly protectionist and anti-consumer leanings of the NAIC Model caused the total opposition of the NAIC Funded Consumer Representatives. The Executive Director of the Florida Consumer Action Network explained in a letter to the A Committee dated May 3, 2006:

> Once a policy is lawfully obtained, and it is beyond the normal two year incontestability period, it is the property of the consumer. For example, once a consumer buys a car, that consumer can sell the car or do anything they wish with it. Imagine a law that said you could only sell your car back to the original dealer for the first five years! You certainly wouldn't expect a very good deal because the dealer knows you don't have a choice. And knowing you're stuck with the car, the dealer can manipulate the original selling price. People wouldn't stand for it. I see no difference between the ownership of a car and the ownership of a life insurance policy. ...
>
> [A]ll those consumers who get nothing when their policies lapse lose their entire investment. Their loss is all gain for the insurers. Perhaps we should be more concerned with those folks and not as concerned with preserving lapse rates. ...
>
> On the issue of consumer intent to settle, I'd like to suggest that knowing that policies lapse is not the exclusive privilege of insurance companies. If a consumer understands that lapse rates, investment returns, and other factors mean the policy has a greater worth and that consumer feels the funds might be better invested elsewhere, we can't preclude them from

that decision. Why should only the insurance companies be allowed to profit from the knowledge of how insurance works?

And the NAIC consumer representative from the Center for Economic Justice called the NAIC Model "a nuclear bomb for the secondary market."

NCOIL was just as hostile to the NAIC Model as were the NAIC consumer representatives. The members of the NCOIL Life Settlements Subcommittee explained in a joint letter that the NAIC model "fall[s] short of our two core goals, which are preventing investors from manufacturing life insurance policies and ensuring that we do not 'impair, or interfere with Life Settlements or Viatical Settlements.'Georgia Sen. Ralph T. Hudgens criticized the NAIC for "imposing unprecedented restrictions on the right of assignment of life insurance in lieu of encouraging carriers to underwrite for insurable interest and of enforcement of other insurance laws which already protect against wagering policies." And Kentucky Rep. Robert R. Damron explained that the NAIC model "is anti-consumer and is unacceptable because it impairs legitimate life settlements and rolls back private property rights while doing nothing about STOLI."

NCOIL understood that STOLI occurs at policy inception. Rep. George Keiser, the Chair of the Life Settlements Subcommittee stated: "STOLI occurs at the front-end of a life insurance sale. By defining STOLI, and strengthening reporting requirements and penalties for participating in STOLI, the NCOIL model gets at the heart of what needs to change. We hope that states considering amendments to existing laws, or new life settlements statutes, will be well-served by the NCOIL proposal."

Consistent with the organization's stated goals, the NCOIL Model refrains from the NAIC's gratuitous attacks on the secondary market, instead focusing on STOLI by defining and outlawing the improper manufacturing of life insurance by speculators.

The NCOIL Model suggests in a drafting note that states incorporate the language of *Grigsby v. Russell* which defines an illegal wager into their insurable interest statutes. This directly addresses the problem—identified by the NAIC but not regulated under the NAIC Model—of STOLI arrangements where investors fund premium payments and take control of the death benefit through the use of a trust structure which abuses the insurable interest of the insured.[7]

The NCOIL Model also includes a definition of STOLI which several states this year have used as a template for their new anti-STOLI laws. Identifying, defining, and banning the problem: That is what

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[7] The drafting note reads as follows: "Trusts that are created to give the appearance of insurable interest and are used to manufacture policies for investors are illegal STOLI schemes. As the United States Supreme Court held, a person with insurable interest cannot lend that insurable interest 'as a cloak to what is in its inception a wager.' *Grigsby v. Russell*, 222 U.S. 149 (1911). Therefore, states should consider adopting an amendment to their insurable interest laws, if necessary, to provide additional protection against trust-initiated STOLI and other schemes involving a cloak, as follows: 'In accordance with *Grigsby v. Russell*, 222 U.S. 149, it shall be a violation of insurable interest for any person or entity without insurable interest to provide or arrange for the funding ultimately used to pay premiums, or the majority of premiums, on a life insurance policy, and, at policy inception have an arrangement for such person or entity to have an ownership interest in the majority of the death benefit of that life insurance policy.'"

policymakers do. While, as discussed above, we believe that the answer to STOLI lies in existing law, if Florida feels that it needs to use a belt-and-suspenders approach, LISA suggests that it does so by adding to its code the NCOIL insurable interest drafting note and the definition of STOLI (with the friendly amendments, adding clarity, which have been added in states which have rejected the NAIC Model and based their statutes on the NCOIL Model).

The NCOIL Model also fosters the fundamental regulatory goal of creating an informed and responsible consumer. Like many commercial transactions, non recourse premium finance arrangements do have risks which must be weighed against the benefits. The NCOIL model encourages a series of certifications made by, and disclosures provided to, applicants for insurance which directly address the legitimate concerns which have been raised about the potential consequences of using a life insurance policy's market value as collateral for a premium finance loan. The disclosures alert the consumer that a change in ownership can result in a stranger owning a policy on her life; can use up her insurance capacity; can render her later uninsurable; and/or can result in tax consequences. The certifications leave the consumer responsible for affirming, under penalty of false statement, that she has not entered into an arrangement to sell the policy; has not received consideration as inducement to entering the policy; and that the borrower of funds has an insurable interest in the insured.

The NAIC Model, which was designed to protect insurers regardless of the harm to consumers, chose to punish consumers who engage in non recourse premium financing rather than help them. This is upside-down policymaking. That is why:

- The vast majority of state legislatures that have considered the NAIC Model have rejected it.
- Of 13 new state laws adopted in 2008 so far, 10 were based on the NCOIL Model.
- Out of these 10 states, the legislatures specifically considered – and rejected – the NAIC Model Act.
- The state legislatures of New York and California are poised to adopt legislation this year based on the NCOIL Model.
- Despite the NAIC's insistence that its members introduce and actively work for passage of the NAIC Model, a growing number of state regulators are not following the NAIC's own directive to introduce and dedicate resources to the adoption of the NAIC Model. The New York Insurance Superintendent did not include the five year ban in his proposal. The Commissioner of Insurance from the District of Columbia introduced legislation that did not include the wrong-headed 5 year ban or restrictions on legitimate non-recourse premium financing. And the commissioners of Kansas, Kentucky Indiana and Connecticut, most of whom supported state legislation of the NAIC Model, endorsed their own home state legislature's decision to reject the NAIC Model in favor of the NCOIL Model.

Conclusion

We respectfully submit that, consistent with longstanding law and public policy pertaining to insurable interest, STOLI, and property rights, Florida should reject the protectionist, anti-consumer NAIC Model in

lieu of enforcing existing anti-STOLI laws; monitoring anti-consumer carrier market conduct; and considering the NCOIL Model with the friendly amendments which have been adopted in the states which passed legislation based on the NCOIL, not the NAIC, Model.

1011 E. Colonial Dr Ste 500 - Orlando, FL 32803 - Phone: 407-894-3797 - Fax: 407-89