BETTING ON THE LIVES OF STRANGERS: LIFE SETTLEMENTS, STOLI, AND SECURITIZATION

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Life insurance serves the important purpose of providing a means for families and businesses to survive the premature death of a person whose support they require to maintain themselves. Over time, life insurance has become a much more sophisticated financial product incorporating savings plans, mutual fund investments, and securitizations. This article recounts the history of life insurance including the development of the insurable interest doctrine. It describes life settlements, especially stranger-originated life insurance (STOLI) policies, which represent a particular abuse of the purpose of life insurance. The article discusses the securitization of pools of life insurance policies, reminiscent of the securitization of sub-prime mortgages. Then state and federal attempts at regulation and a variety of lawsuits are summarized. The article concludes that life insurance is such an important protection for families and businesses that its availability for its primary purpose should not be compromised by becoming the basis for complicated, misunderstood, and, in some cases, fraudulent financial products.

I. INTRODUCTION

Life insurance serves the important purpose of providing a means for families and businesses to deal with the premature death of a person whose support they require to maintain themselves. Over time, life insurance has become a much more sophisticated financial product incorporating savings plans, mutual fund investments, and securitizations.

The idea of life insurance has always been problematic because, from a financial viewpoint alone, the insurance company wins if insured clients enjoy long lives during which they make many premium payments before the company has to pay a death benefit. The beneficiary, on the other hand,

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gets the best financial return if the insured dies quickly. So, the problem has always been to get the advantages of life insurance without encouraging gaming by people betting on the imminent death of anyone they care to insure. The latter situation raises the unpleasant circumstance of "a pure wager that gives the [policy owner] a sinister counter interest in having the life come to an end."[1]

To counteract having life insurance encourage murder, the insurable interest doctrine became an important part of insurance law. In the 1980s, however, the doctrine became an impediment to a use of life insurance policies that had not been considered before. People with AIDS were suffering dire medical and financial circumstances to be followed by a sure and imminent death. The idea of viatical settlements developed to allow AIDS patients to sell their existing life insurance policies to strangers, who would pay for them immediately in exchange for receiving the death benefit.[2] The viatical settlement industry waned as medical advances allowed AIDS patients to maintain their jobs and live longer lives.[3] However, viatical settlements remained appealing to insurance agents, brokers, consultants, and other financial entrepreneurs so the life settlement industry developed to allow any elderly life insurance policy owner to sell their policy to a third party stranger for quick cash in exchange for naming the stranger as the beneficiary.[4]

This new industry created novel and complicated financial products, the need for a great deal of legislation to curb abuses of the elderly and investors, and a great deal of litigation. This article recounts the history of life insurance, including the development of the insurable interest doctrine.[5] It describes life settlements, especially stranger-originated life insurance (STOLI) policies which represent a particular abuse of the purpose of life insurance.[6] Next, the article discusses the securitization of pools of life insurance policies, reminiscent of the securitization of sub-prime mortgages.[7] A summary of state and federal attempts at regulation and a

1. Grigsby v. Russell, 222 U.S. 149, 154 (1911) (Holmes, J.) (dictum) (reasoning on the one hand that a "public policy [which] refuses to allow insurance to be taken out by . . . persons [who have no interest in the life insured]" in itself suggests there is reason to reject a later assignment to such persons, but on the other that "[t]he law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death," and that since "life insurance has become . . . one of the best recognized forms of investment" it would be desirable "[s]o far as reasonable safety permits . . . to give to life policies the ordinary characteristics of property").

2. *See infra* notes 76-82 and accompanying text.

3. *See infra* notes 84-86 and accompanying text.

4. *See infra* notes 87-94 and accompanying text.

5. *See infra* notes 8-59 and accompanying text.

6. *See infra* notes 95-129 and accompanying text.

7. *See infra* notes 132-186 and accompanying text.

variety of lawsuits follows.[8] The article concludes that life insurance is such an important protection for families and businesses that it should not be unnecessarily complicated by being combined with other financial products. The power of insurance companies makes it a sure thing that life insurance will never be separated from savings and investment plans. There is still time, however, to keep life insurance from being entirely separated from its primary purpose. Securitization of life insurance pools should not be permitted because they serve no purpose related to protecting against mortality risk. Life settlements should be permitted only as an exception to the insurable interest doctrine when the insured is suffering in dire medical, family, or financial circumstances, all of which should be easy to prove and would not greatly add to the burden of the already-burdened insured person.

II. BACKGROUND: LIFE INSURANCE AND INSURABLE INTEREST

A. Early History

Life insurance originated in Genoa and other Mediterranean cities in the early fifteenth century as a result of merchants buying marine insurance policies for ships with cargoes that included slaves.[9] By the mid-fifteenth century, borrowers were using life insurance to get credit more easily and cheaply by insuring their own lives and naming their lenders as beneficiaries.[10] Lenders diminished their risks by insuring the lives of their borrowers.[11] At that time in Genoa, there were many large life insurance policies on the lives of Pope Nicholas V and the King of Aragon, as well as other public figures, because of these money-lending practices.[12]

These insurance arrangements persuaded many people with no financial interest in the lives of popes and princes to take out insurance policies on their lives as mere wagers.[13] To eliminate such disreputable gambling, most European cities and states began prohibiting the sale of life insurance policies, either on the lives of certain people,[14] or in all

8. *See infra* notes and 205-351 accompanying text.

9. GEOFFREY CLARK, BETTING ON LIVES: THE CULTURE OF LIFE INSURANCE IN ENGLAND, 1695-1775 13 (1999) (citing 1 GIUSEPPE STEFANI, INSURANCE IN VENICE FROM THE ORIGINS TO THE END OF THE SERENISSIMA 118-19 (Trieste, 1958) (Italy) and 1 FEDERIGO MELIS, ORIGINI E SVILUPPI DELLE ASSICURAZIONI IN ITALIA (SECOLI XIV-XVI) [ORIGINS AND DEVELOPMENT OF INSURANCE IN ITALY (14TH-16TH CENTURIES)] 210 and plate 49 (Rome, 1975) (Italy) (depicting the earliest surviving life insurance contract)).

10. CLARK, *supra* note 9, at 14 (citing to 1 STEFANI, *supra* note 9, at 119 and 2 STEFANI at 339).

11. *Id.*

12. *Id.* (citing to 1 MELIS, *supra* note 9, at 214-17 (reproducing the policies on the lives of these two potentates, and others)).

13. *Id.*

14. *Id.* at 14-15 (describing the increasingly restrictive atmosphere for life insurance

circumstances.[15]

Life insurance was first introduced in England in the middle of the sixteenth century by Italian merchants,[16] and it was never banned there.[17] Even though it was probably considered unsavory to be wagering on human lives, the English Parliament used life insurance policies as a source of revenue by taxing them.[18] By the eighteenth century, using insurance to bet on strangers' lives—usually those in the public eye—became a popular English gambling activity.[19] By the middle to the end of the same century, however, the activity began to attract significant public hostility.[20] In response, Parliament enacted the Life Assurance Act of 1774, prefaced as "[a]n Act for Regulating Insurances upon Lives, and for Prohibiting All such Insurances Except in Cases Where the Persons Insuring Shall Have an Interest in the Life or Death of the Persons Insured."[21] The Act stated:

> Whereas it hath been found by experience that the making of insurances on lives . . . wherein the assured shall have no interest[,] hath introduced a mischievous kind of gaming[,] . . . no insurance shall be made . . . on the life . . . of any person . . . wherein the person . . . for whose . . . benefit . . . such policy . . . shall be made, shall have no interest, or by way of gaming or wagering. . . . and in all cases where the insured hath interest in such life . . . no greater sum shall be recovered . . . from the insurer . . . than the amount of value of the interest of the insured

policies in fifteenth-century Italy, after the Venetian Senate forbade wagers on the life of the pope and nullified many prior bets, and Genoa prohibited insurance "on the lives of princes" and extended the prohibition—in a further proclamation of 1494—to any insurance policies or wagers without prior approval from the Senate "on the lives of the pope or emperor, 'kings, cardinals, dukes, princes, bishops, or other eminent persons either spiritual or temporal'").

15. *Id.* at 14-16 (listing other places in Europe outside of Italy, where disreputable associations with gambling led to outright prohibitions, including the general prohibition in the Spanish Ordinances of Barcelona, the French restrictions including those in Louis XIV's Marine Code—which had some loopholes leading to exceptions like "ransom insurance" for the lives of slaves—and Phillip II's ban on life insurance contracts in the Low Countries, later adopted by the ordinances of Amsterdam, Middelburg, and Rotterdam).

16. *Id.* at 4.

17. *Id.* at 21.

18. *Id.*; *see* Stamp Act, 1694, 5 & 6 W. & M., c. 21 (Eng.) ("[A]n A[ct] for granting to theire Majesties severall Dutyes upon Velum Parchment and Paper for Four Yeares [for the purpose of] carryyng on the warr against France[, to be levied upon . . .] every Skinn or Peice of Velum or Parchment or Sheete of Paper upon which any Charter-party Policy of Assurance[,] Passport[,] Bond[,] Release[,] Contract or other Obligatory Instrument or any Protest Procurac[i]on[,] Letter of Attorney or any other Notariall Act whatsoever . . . in the su[m]me of Six pence").

19. CLARK, *supra* note 9, at 49-51.

20. *Id.* at 52-53.

21. 14 Geo. 3, c. 48 (Eng.).

in such life.[22]

This Act created the concept of insurable interest, although it did not define the term. To this day, insurable interest remains an important idea in insurance law in the United States.[23]

B. Insurable Interest

In the late nineteenth century, the U.S. Supreme Court noted that an insurable interest is required to purchase a life insurance policy, but it "is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies."[24] The Court held that life insurance policies purchased without an insurable interest in the insured are against public policy because they constitute "a mere wager, by which the party taking the policy is directly interested in the early death of the [in]sured. Such policies have a tendency to create a desire for the event."[25] Thirty years later, Justice Holmes stated that a "contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end."[26]

At the onset of the twenty-first century in the United States, some aspects of the meaning of insurable interest are well established. It has been accepted for more than a hundred years that each person has an insurable interest in his or her own life and, therefore, has the right to insure his or her own life, naming someone else as the beneficiary.[27] In addition, many states have statutes outlining other circumstances where an insurable interest exists for life insurance. Most of the statutes describe two situations where there is an insurable interest: (1) there is a close blood or legal relationship that engenders love and affection,[28] or (2) there is a reasonable expectation of pecuniary advantage through the continued

22. *Id.*, Preamble, §§ 1, 3.

23. Anthony Alt, Note, *Spin-Life Insurance Policies: A Dizzying Effect on Human Dignity and the Death of Life Insurance*, 7 AVE MARIA L. REV. 605, 612-13 (2009).

24. Warnock v. Davis, 104 U.S. 775, 779 (1881). *See generally* Peter Nash Swisher, *The Insurable Interest Requirement for Life Insurance: A Critical Reassessment*, 53 DRAKE L. REV. 477 (2005).

25. Warnock v. Davis, 104 U.S. at 779.

26. Grigsby v. Russell, 222 U.S. 149, 154 (1911).

27. Aetna Life Ins. Co. v. France, 94 U.S. 561, 564 (1876).

28. Up until 1840, "affection," as in the relationships among spouses, parents, and children, was not considered a sufficient insurable interest. That changed in 1840 when New York, followed by other states, enacted a law that was interpreted so that wives were no longer required to prove their pecuniary interest in their insured husbands. Sharon Ann Murphy, *Life Insurance in the United States through World War I*, *in* EH.NET ENCYCLOPEDIA, http://eh.net/encyclopedia/article/murphy.life.insurance.us (last updated Aug. 14, 2002).

life of the insured person and consequent loss by reason of his or her death.[29] The latter situation contemplates the interests of creditors or sureties who have obvious financial interests in the continued life of the insured. The statutes also often create a specific corporate insurable interest in the lives of any directors, officers, or employees whose death might cause financial loss to the corporation.[30] Starting in the mid-1980s, after intense lobbying by insurance companies, many states expanded their categories of those with insurable interests to include corporations and banks for the lives of rank-and-file employees, and charities for the lives of consenting donors.[31]

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29. *See generally* ALA. CODE § 27-14-3(a) (2008); ALASKA STAT. § 21.42.020(d)(1) & (2) (2008); ARIZ. REV. STAT. ANN. § 20-1104(C)(1) & (2) (2010); ARK. CODE ANN. § 23-79-103(c)(1)(A) & (B) (2009); CAL. INS. CODE § 10110.1(a) (West 2010); DEL. CODE ANN. tit. 18, § 2704(c)(1) & (2) (2010); GA. CODE ANN. § 33-24-3(a) (2009); IDAHO CODE ANN. § 41-1804(3)(a) & (b) (2010); KY. REV. STAT. ANN. § 304.14-040(4)(a) & (b) (2009); ME. REV. STAT. ANN. tit. 24-A, § 2404(3)(A) & (B) (2009); MD. CODE ANN., Ins. § 12-201(b)(2)(i) & (b)(3) (2010); MISS. CODE ANN. § 83-5-251(3)(a) & (b) (2009); MONT. CODE ANN. § 33-15-201 (3)(a) & (b) (2009); NEV. REV. STAT. § 687B.040(4) (2008); N.Y. INS. LAW § 3205(a)(1)(A) & (B) (McKinney 2010); N.D. CENT. CODE § 26.1-29-09.1(3)(a) & (b) (2009); OKLA. STAT. tit. 36, § 3604(C)(1) & (2) (2010); 40 PA. CONS. STAT. ANN. § 512 (West 2010); R.I. GEN. LAWS § 27-4-27(c)(1) & (2) (2009); S.D. CODIFIED LAWS § 58-10-4 (1) & (2) (2009); UTAH CODE ANN. § 31A-21-104(2)(a)(i)(A) & (B) (West 2009); VA. CODE ANN. § 38.2-301(B)(1) & (2) (2009); WASH. REV. CODE § 48.18.030(3)(a) & (b) (2010); W. VA. CODE § 33-6-2(c)(1) & (2) (2010); WYO. STAT. ANN. § 26-15-102(c)(i) & (ii) (2009).

30. *See generally* ALA. CODE § 27-14-3(c) (2008); ARK. CODE ANN. § 23-79-103(c)(1)(D)(i)(a) (2009); CAL. INS. CODE § 10110.1(c) (West 2010); FLA. STAT. § 627.404(2)(b)(9) (2009); GA. CODE ANN. § 33-24-3(d) (2009); MASS. GEN. LAWS ch. 175, § 123A(1) (2009).

31. *See, e.g.*, ALA. CODE § 27-14-3(e) (2008) (requiring that companies notify employees and their families before taking out insurance policies claimable as insurable interests); ARIZ. REV. STAT. ANN. § 20-1104(C)(4) (2009) (explaining that charities may claim an insurable interest in consenting donors); ARK. CODE ANN. § 23-79-103(c)(1) & (2) (2009) (determining that charities may claim an insurable interest in donors and companies may claim an insurable interest in employees for whom benefits are provided); CAL. INS. CODE § 10110.1(h) (West 2010) (allowing for charities to claim an insurable interest in consenting donors); FLA. STAT. ch. 627.404(2)(b)(7) & (8) (2009) (describing how charities and companies can derive an insurable interest in either charitable donors or employees in an employer's retirement plan); IOWA CODE § 511.39 (2009) (considering that charities may claim an insurable interest in donors); KAN. STAT. ANN. § 40-450(b) (2009) (discussing charities and insurable interests); MASS. GEN. LAWS ch. 175, § 123A(2) (2010) (explaining insurable interests in the realm of charities); MONT. CODE ANN. § 33-15-201(5) (2009) (addressing insurable interests as they affect charities when insurance is purchased with insured individual's contributions); N.C. GEN. STAT. § 58-58-75 (2009) (determining that for non-key employees insurance coverage should be reasonably related to benefits provided employees in the aggregate); N.D. CENT. CODE § 26.1-29-09.1(3)(d) & (e) (2009) (discussing insurable interests for charities and also for employees who receive benefits); NEB. REV. STAT. § 44-704(4) (2009) (explaining insurable interests as they relate to charities); N.M. STAT. ANN. § 59A-18-5 (2009) (discussing the manner in which charities may claim an insurable interest in donors); S.D. CODIFIED LAWS § 58-10-4(4) (2009) (addressing insurable interests and charities); VA. CODE ANN. § 38.2-301(b)(6) (2009)

By the twenty-first century, in response to the use of life insurance policies as securitized investment vehicles by strangers to the insureds, it was the insurance companies that were lobbying vigorously to have insurable interest requirements apply more widely. One aspect of insurable interest rules that makes the companies' position more difficult is that most state statutes—and indeed common law relying on nineteenth century English common law[32]—require an insurable interest to exist at the time the life insurance policy first goes into effect, but it does not have to exist at the time the loss occurs.[33] That rule allows a person to insure his or her

(determining how charities may claim an insurable interest); WASH. REV. CODE § 48.18.030(3)(d) (2010) (explaining insurable interests and their relationship to charities); W. VA. CODE § 33-6-2(c)(4) (2010) (discussing that charities may claim an insurable interest in their donors); Ellen E. Schultz & Theo Francis, *"Janitors Insurance" Issue Leaves Workers in the Dark on Coverage*, WALL ST. J., Apr. 24, 2002, at C1 (discussing the ways companies administer life insurance policies to smooth earnings). *But see* MASS. GEN. LAWS ch. 175, § 123A(2) (2009) (stating that charitable institutions have unlimited insurable interest in the life of any donor without requiring specific consent); N.Y. INS. LAW § 3205(b)(3) (2010) (permitting a charitable institution to obtain life insurance on any person without requiring consent). For a full discussion of this expansion of the meaning of insurable interest, see Susan Lorde Martin, *Corporate-Owned Life Insurance: Another Financial Scheme That Takes Advantage of Employees and Shareholders*, 58 U. MIAMI L. REV. 653 (2004).

32. *See* Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 462-63 (1876) (recounting the evolution of English common law toward the requirement that an interest in the insured exist at the time the insurance is effected, but need not continue until death).

33. *See* Lincoln Nat'l Life Ins. v. Gordon R. A. Fishman Irrevocable Life Trust, 638 F. Supp. 2d 1170, 1177 (C.D. Cal. 2009) (noting that California's Insurance Code provides that "an interest in the life or health of a person insured must exist when the insurance takes effect, but need not exist thereafter or when the loss occurs"); Ficke v. Prudential Ins. Co., 202 S.W.2d 429, 431 (Ky. Ct. App. 1947) (noting the general rule that "an insurable interest at the inception of a contract of life insurance is regarded by most courts as sufficient, and it is immaterial that such an interest ceases prior to the death of the insured"). *See generally* ALA. CODE § 27-14-3(f) (2009) (requiring that an insurable interest at the time a contract of personal insurance becomes effective, but need not exist at the time the loss occurs); CAL. INS. CODE § 10110.1(f) (West 2009); GA. CODE ANN. § 33-24-3(h) (2009); KAN. STAT. ANN. § 40-453(a) (2009); OKLA. STAT. tit. 36, § 3604(C)(4)(g) (2009). The result of buying insurance on the life of someone in whom one does not have an insurable interest varies by state. In some states the policy is void; the insurance company is not liable on the contract and may have to pay nothing or may just have to repay the premium payments. *See, e.g.*, ALA. CODE § 27-14-3(f)(2009) (stating that when a contract is voided because the benefits under the contract are not payable to a person with an insurable interest in the individual insured at the time the contract was made the insurer is liable only to repay the person who paid the premiums all premium payments without interest); CAL. INS. CODE § 10110.1(e) (West 2009) (stating that any "device, scheme, or artifice designed to give the appearance of an insurable interest where there is no legitimate insurable interest violates the insurable interest laws"); N.J. STAT. ANN. § 17:35-11 (West 2009) (stating that "[a]ny assignment of the policy or certificate to a person having no insurable interest in the insured's life shall render the policy certificate void"). In other states, if one without an insurable interest in the life of the deceased receives the benefits of a life insurance policy, the executor or administrator of the estate of the deceased may sue to recover the benefits from the recipient. *See, e.g.*, ALASKA STAT. § 21.42.020(b) (2009) (stating that if a payee receives

own life, and then assign the policy to someone with no insurable interest in the insured.[34] On the other hand, having an insurable interest may depend not only on having an interest in the continued life of the insured but, in some jurisdictions also in acting in good faith so that the policy is obtained not merely as a wager.[35]

Some courts have held that good faith requires that the person insuring his or her own life has "a genuine intent to obtain insurance protection for a family member, loved one, or business partner, rather than an intent to disguise what would otherwise be a gambling transaction by a stranger."[36] Other courts have held that an insured's intent in insuring his or her own life is "legally irrelevant."[37] Whether or not the good faith insurable interest existed has become a primary issue in current litigation about life insurance policies.[38]

C. Life Insurance in the United States

Current litigation is the result of the development of the life insurance industry in the United States as it has followed an incremental path to life policies as mere investment vehicles. As in Europe, life insurance in the United States was an outgrowth of marine concerns.[39] In the eighteenth century, ship captains began insuring themselves for four or five thousand

benefits from a void contract, the "person insured or the executive administrator of the person insured may maintain an action to recover the benefits from the person receiving them"); ARIZ. REV. STAT. ANN. § 20-1104(B) (2009); ARK. CODE ANN. § 23-79-103(b) (2009); DEL. CODE ANN. tit. 18, § 2704(b) (2009); HAW. REV. STAT. § 431:10-204(c) (2009); IDAHO CODE ANN. § 41-1804(2) (2009); ME. REV. STAT. ANN. tit. 24-A, § 2404(2) (West 2009); N.Y. INS. LAW § 3205(b)(4) (McKinney 2009); OKLA. STAT. tit. 36, § 3604(B) (2009); OR. REV. STAT. ANN. § 743.024(2) (West 2009); R.I. GEN. LAWS § 27-4-27(b) (2009); WIS. STAT. § 631.07(4) (2009).

34. Grigsby v. Russell, 222 U.S. 149, 155 (1911).

35. *Conn. Mut. Life Ins. Co.*, 94 U.S. at 460-61.

36. Life Prod. Clearing, LLC v. Angel, 530 F. Supp. 2d 646, 653 (S.D.N.Y. 2008); *see also* Finnie v. Walker, 257 F. 698, 701 (2d Cir. 1919) (explaining that the intent of the purchaser is important to determine validity of the policy); Travelers Ins. Co. v. Reiziz, 13 F. Supp. 819, 820 (E.D.N.Y. 1935) (noting that the insured must make the assignment in good faith).

37. *Lincoln Nat'l Life Ins. Co.*, 638 F. Supp. 2d at 1179.

38. *Life Prod. Clearing*, 530 F. Supp. 2d at 655-56.

39. *See, e.g.*, THOMAS HARRISON MONTGOMERY, HISTORY OF THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA 72 (Phila., Press of Rev. Pub. and Printing Co. 1885) (detailing the emergence of life insurance for ship captains traveling to the West Indies); J. Owen Stalson, *The Pioneer in American Life Insurance Marketing*, 12 BULL. BUS. HIST. SOC'Y 65 (Nov. 1938) (explaining the history of life insurance in the United States); Eric Wertheimer, *Insurance in Colonial America*, 7 COMMON-PLACE: INTERACTIVE J. EARLY AM. LIFE, pt. I (Oct. 2006), www.common-place.org/vol-07/no-01/wertheimer/ (explaining why marine insurance emerged before other forms of insurance in Colonial America).

dollars against capture by pirates.[40] The first life insurance enterprises in the United States were started by religious groups to protect the wives and children of ministers.[41] This humanitarian purpose, rather than gambling on lives, made life insurance a more moral and reputable and, therefore, more successful enterprise.[42] At the time, in early and mid-nineteenth century, most life insurance was term insurance[43] with no cash surrender value.[44]

A significant change during that period was for insurance companies to offer term policies, not only for a defined period of time, but for the full term of the insured's life.[45] The next big change occurred when life insurance companies expanded the financial services they offered. By 1830, the New York Life Insurance and Trust Company, founded by the directors of the Bank of New York, offered not only insurance for an individual's life or for a set term, but also accepted deposits and paid interest.[46] In 1853, the Mutual Insurance Company of the City of New York started to offer, in addition to life insurance policies, deferred annuities.[47] When the Manhattan Life Insurance Company of New York started in the early 1850s, the company clearly was intended as a profit-making business that issued life insurance policies as only one of its services.[48] It issued term policies, but it also had alternate plans.[49] It had a "mutual" system, rather than a stockholder system, in which the beneficiary received not only the face amount of the policy, but also dividends that had accumulated.[50] Under the mutual system, which insurance companies adopted because of their difficulty raising capital to form stock-issuing organizations, the owners of policies could borrow on the accumulated premiums and dividends, and the insurance company would deduct the borrowed amount from the pay-out received by the policy's beneficiary.[51]

40. MONTGOMERY, *supra* note 39.

41. *See, e.g.*, Murphy, *supra* note 28 (noting Presbyterians setting up a fund for the "Relief of Poor and Distressed Widows and Children" in 1759 and Episcopalians doing likewise in 1769).

42. Wertheimer, *supra* note 39, at pt. II.

43. A term life insurance policy provides only life coverage; there is no investment aspect. If the insured dies within the term provided for, the beneficiary gets the face amount of the policy. *See, e.g.*, *Term or Whole Life?*, SMART MONEY, Sept. 29, 2000, http://www.smartmoney.com/personal-finance/insurance/term-or-whole-life-8011/# (comparing the relative benefits and drawbacks of term and whole life insurance policies).

44. JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES, VOL. I, 189 (M.E. Sharpe, Inc. 2002).

45. Stalson, *supra* note 39, at 66, 70.

46. MARKHAM, *supra* note 44, at 190.

47. *Id.* at 191.

48. *Id.*

49. *Id.* at 192.

50. *Id.*

51. *Id.*

The next big change, a tontine-type of life insurance, was developed in the United States in the late 1800s.[52] A tontine is an investment arrangement in which participants receive profits while they are alive, but their investments remain in the pool after their deaths to be divided up among those still alive at an agreed upon time or when an agreed upon number of participants remain.[53] Tontine policies were invented by the founder of the AXA Equitable Life Insurance Company (then Equitable Life).[54] In these "deferred dividend" policies, the policy owner was entitled to a death benefit for a beneficiary, and, after the "tontine period" of five to twenty years, the policy owner also received dividends that were based on his premiums and the premiums of any member of the pool who had died or who had stopped paying his premiums.[55]

The New York legislature prohibited these and similar arrangements in 1906.[56] These tontine policies were viewed much the way life insurance originally was viewed, as an unseemly form of gambling. Some found it offensive to profit from the death or economic difficulties, as indicated by lapsed policies, of others.[57] Furthermore, insurance companies were accused of dishonest behavior in using tontine funds for their own purposes and in misrepresenting what dividends would be.[58]

After that period, the life insurance industry grew rapidly in response to urbanization and the breakdown of extended family ties, providing support to families whose breadwinners had died.[59] In seeking increased profits, life insurance companies began offering a wide variety of products that would give people not only a method for managing the economic risks of death, but also an easy way to invest and save.[60]

The pure insurance product is term insurance. Many financial advisors recommend term life insurance as the best product to protect against economic difficulties in the event of the family breadwinner's death.[61] If the insured does not die by the expiration of the term and the

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52. Kent McKeever, *A Short History of Tontines*, FORDHAM J. CORP. & FIN. L. 491, 507 (2010).

53. *Id.* at 491.

54. *Id.* at 507.

55. *Id.*

56. *Id.* (citing 1906 N.Y. Laws 763).

57. *Id.* at 508.

58. *Id.* at 509.

59. Roberta M. Berry, *The Human Genome Project and the End of Insurance*, 7 U. FLA. J.L. & PUB. POL'Y 205, 213 (1996).

60. *Id.* at 216, 222.

61. *See, e.g.*, Suze Orman, *Suze Orman's What-If Policy*, O, THE OPRAH MAG., Jan. 2004, at 27, *available at* http://www.oprah.com/money/Suze-Ormans-What-If-Policy ("[T]he only type of life insurance that makes sense is term."); *Term or Whole Life?*, SMART MONEY, Sept. 29, 2000 (updated online Sept. 10, 2008), http://www.smartmoney.com/personal-finance/insurance/term-or-whole-life-8011/ ("For

policy is not renewed for another term, the policy no longer has any value. The advantage of a term policy is that it is much less expensive than other kinds of policies; therefore, it is often recommended for young people and people with limited budgets.[62]

A whole life insurance policy provides a death benefit to the beneficiary when the insured dies, but it also includes a savings plan.[63] Critics complain that because of high front-end sales loads (perhaps eighty percent of the first-year premium, for example), the savings, or cash value, in the early years of a whole life policy are so low that most people are better off buying term insurance for much less money and investing the rest themselves.[64] An advantage of whole life is that the growth of its cash value is tax deferred.[65] Universal life insurance is whole life with more variables and consequently greater cost. The policyholder can have a variable death benefit, premium, payment schedule, and withdrawal from cash value.[66]

One critic explains that in 2006, the annual premium for one million dollars of twenty-year term insurance for a healthy forty-five-year-old non-smoking man was about $1,400; whereas, his annual premium for a universal life policy would be $8,000 for the rest of his life.[67] On the other hand, a forty-year-old man buying a one-million-dollar twenty-year whole life policy today would pay annual premiums of $17,750, but at the end of twenty years, his policy would have a cash value of $518,068 for an

most people, the right type of insurance can be summed up in a single word: term."); BudgetLife.com, Is Whole Life Insurance a Good Investment?, http://www.budgetlife.com/life_insurance_investment.htm (last visited Dec. 24, 2009) ("The advice for most people is still to use term insurance for most situations."); J.D.Power.com, J.D. Power, The Benefits of Term Life Insurance, http://www.jdpower.com/insurance/articles/The-Benefits-Of-Term-Life-Insurance (last visited Jan. 2010) (listing some of the advantages of term life insurance against whole life insurance); Jeffrey D. Voudrie, *Guarding Your Wealth for Senior Citizens: Beware of Universal Life Insurance: Part 2* (Aug. 17, 2006), http://seniorjournal.com/NEWS/GuardWealth/6-08-17-BewareofUniversalLife-2.htm ("Term insurance allows you to purchase the life insurance you need at a lower cost, while giving you the flexibility and control over your investments."). Advice may differ for wealthy people who can use other types of life insurance policies in estate planning. *See, e.g.*, BudgetLife.com, *supra* note 61 (recommending that wealthy individuals allocate up to ten percent of their portfolios in life insurance); *Term or Whole Life?*, *supra* (advising individuals to calculate a whole life policy's internal rate of return and to expect to hold the policy for at least twenty years).

62. Leslie Scism, *Whole-Life Insurance, Long Derided, Gets New Lease*, WALL ST. J., Feb. 27-28, 2010, at B8.

63. Douglas R. Richmond, *Liability Issues in the Sale of Life Insurance*, 40 TORT TRIAL & INS. PRAC. L.J. 877, 879 (2005).

64. *Id.* at 279-81; Orman, *supra* note 61.

65. Richmond, *supra* note 63, at 880.

66. *Id.* at 881.

67. Voudrie, *supra* note 61.

annualized return of 3.8 percent.[68] During the 2008-2009 financial meltdown, whole life and universal life were good savings vehicles because of their conservative investment strategies but only if the policy owners held their policies for a significant length of time.[69] A forty-year-old policy owner, for example, would not have his cash value equal the premiums he had paid until the twelfth year.[70]

To these products, insurance companies have added variable life policies and variable universal life policies, which employ the characteristics of life and universal life policies, respectively, but allow the policy owner to invest premiums in mutual-fund-type accounts that are securities offered by prospectus.[71] With these policies, the death benefit, or part of it, may or may not be guaranteed but depends instead on the success of the investment portion.[72]

In the 1980s, insurance companies began vigorously marketing corporate-owned life insurance (COLI) and bank-owned life insurance (BOLI) for organizations to insure the lives of rank-and-file employees and to be named as the beneficiaries on these policies for people whose deaths would have no appreciable effect on the business.[73] Charities extended this idea by purchasing policies on the lives of wealthy patrons.[74] These policies made a lot of money for the insurance companies, corporations, banks, and charities.[75]

This brief background indicates that life insurance has transformed from being a wager, to being protection for widows and orphans in the event the death of the head of the household, to being a savings and investment plan with some death risk management, to being merely another financial investment product.

III. VIATICAL AND LIFE SETTLEMENTS

A. History

A viatical settlement added a new financial arrangement to the concept of life insurance. The term derives from "viaticum," used in ancient Rome to describe a purse that contained money and provisions for a trip.[76] The idea of a viatical settlement was created in response to the AIDS

68. Scism, *supra* note 62.
69. *Id.*
70. *Id.*
71. Richmond, *supra* note 63, at 882.
72. *Id.*
73. *See generally* Martin, *supra* note 31, at 653-54 (arguing that third parties should not be allowed to insure a person without the consent of the insured).
74. *Id.* at 657-58.
75. *Id.* at 670-74.
76. Life Partners, Inc. v. Morrison, 484 F.3d 284, 287 (4th Cir. 2007).

epidemic in the 1980s.[77] A viatical settlement allowed HIV/AIDS sufferers to receive money from their life insurance policies to pay current medical and living expenses.[78] The insured, terminally-ill owner of a life insurance policy would sell the policy to a third party for a cash settlement.[79] The new owner would pay the premiums on the policy until the insured died and then would receive the face value of the policy.[80] A viatical settlement provided a good deal for the insured who could no longer work, had high medical expenses, and could no longer afford life insurance policy premiums.[81] Furthermore, in 1996 Congress amended the tax code so that terminally or chronically ill people who sold their life insurance policies to viatical settlement companies would not have to pay income tax on the proceeds of the sales as long as the purchasing companies were licensed in the states in which the sellers resided.[82] It also benefitted the third party because, in the early days, AIDS patients generally died within months of being diagnosed.[83] By the mid-1990s there were about sixty companies in the viatical settlement business.[84]

The viatical settlement industry was dealt a severe blow when AIDS became increasingly treatable, sufferers began living longer, and the threat of a cure arose.[85] These companies began pursuing life insurance policies of people with other terminal illnesses like cancer, Lou Gehrig's disease,

77. *Id.*; Kelly J. Bozanic, Comment, *An Investment to Die for: From Life Insurance to Death Bonds, the Evolution and Legality of the Life Settlement Industry*, 113 PENN. ST. L. REV. 229, 233 (2008); Eryn Mathews, Notes and Commentaries, *STOLI on the Rocks: Why States Should Eliminate the Abusive Practice of Stranger-Owned Life Insurance*, 14 CONN. INS. L.J. 521, 523 (2008).

78. Marlene Y. Satter, *Bonds. Death Bonds*, INVESTMENT ADVISOR, Nov. 2009, at 115.

79. Bozanic, *supra* note 77, at 233-34.

80. *Id.* at 234.

81. A typical settlement was seventy percent of the face value of the policy. Carl T. Hall, *Viatical Firm's Stock Hit Hard*, S.F. CHRON., July 18, 1996, at C1. Typically, a life expectancy of less than six months would lead to a cash offer of about eighty percent of the face value of the policy; a life expectancy of two years or more, no more than fifty percent of face value. David W. Dunlap, *AIDS Drugs Alter an Industry's Math: Recalculating Death-Benefit Deals*, N.Y. TIMES, July 30, 1996, at D4.

82. 26 U.S.C. § 101(g)(2)(B)(i)(I) (2000).

83. Life Partners, Inc. v. Morrison, 484 F.3d 284, 287 (4th Cir. 2007). A typical investor could expect to receive a return of about fifteen percent, but if the insured lived longer than expected, the return could decrease precipitously. Dunlap, *supra* note 81, at D4.

84. Dunlap, *supra* note 81, at D4.

85. *See, e.g.*, Hall, *supra* note 81, at C1 (reporting on the collapse of Dignity Partners, Inc., one of best known viatical settlement companies, whose stock went down from 4 11/16 to 1 3/8 after an announcement that it would no longer buy life insurance policies from people with AIDS); *see also Life Partners*, 484 F.3d at 287-88 (noting the expansion of viatical settlements industry to other terminal illnesses when AIDS became a chronic disease). Viatical settlement companies remaining in business reduced the amount they would pay for policies of AIDS sufferers. Hall, *supra* note 81, at C1; Dunlap, *supra* note 81, at D1 (noting that prices paid to AIDS patients for their policies fell five to ten percent).

Alzheimer's, and advanced heart disease.[86] Once again the industry was growing. Experts estimate that $5 million worth of life insurance policies were sold to third party investors in 1989, and that $200 million worth of policies were sold in 1998.[87] That success encouraged the industry to expand by offering to buy the policies of seniors who were not necessarily terminally ill. Today, the industry has bought such policies worth about $20 billion.[88] Shifting from terminally-ill insureds to people who just wanted to cash out their policies, and in an attempt to reduce the "ghoulish" nature of a business whose success depends on the early demise of insureds, the industry changed its name and description from "viatical settlements" to "life settlements."[89] Among other changes in the industry were the life expectancies of the insureds which grew from under two years to an average of eleven or twelve years while the size of the policies grew from an average of $80,000 in the viatical market to over $1 million in the life settlement market.[90]

The original life settlement arrangement involved a broker who would seek out policyholders in their sixties, seventies, and eighties, whose spouses had financial resources other than existing insurance policies, whose children were grown and self-supporting, and whose annual insurance premiums were large, perhaps $6,000 for a $100,000 policy or $77,000 for a $3,800,000 policy.[91] If the policyholders just stopped paying the premiums on their term policies, they would get nothing. The broker would find a purchaser who would agree to take over the premium payments and pay the policyholder between six and forty percent of the policy's face value, in exchange for receiving the death benefit when the insured died.[92] Obviously, the sooner the insured died, the greater the return for the purchaser. Among the purchasers willing to spend billions on such policies were hedge funds, large financial institutions like Credit

86. Dunlap, *supra* note 81, at D1.

87. *Life Partners*, 484 F.3d at 288.

88. Benjamin Popper, *They Bet Your Life . . . Literally*, ABC NEWS, June 23, 2009 (on file with author).

89. *See* Sachin Kohli, Comment, *Pricing Death: Analyzing the Secondary Market for Life Insurance Policies and its Regulatory Environment*, 54 BUFF. L. REV. 279, 281, 297-99 (2006) (explaining the shift in the market from short-term viatical settlements to more long-term life settlements).

90. A.M. BEST METHODOLOGY, LIFE SETTLEMENT SECURITIZATION, Nov. 24, 2009, at 1, *available at* http://www.ambest.com/debt/lifesettlement.pdf.

91. Joseph B. Treaster, *Death Benefits, Now for The Living*, N.Y. TIMES, Sept. 27, 1998, at BU1.

92. *See* Jennifer Hodson, *Life-Settlements Industry Sees Growth*, WALL ST. J., Feb. 5, 2009 (estimating industry payouts ranging from ten percent to twenty-nine percent of death benefit with average of twenty-four percent across all policy types); Treaster, *supra* note 91, at BU14.

Suisse and Deutsche Bank, and investors like Warren Buffett.[93]

Today, anyone wanting to sell the rights to the death benefit in an insurance policy can go online and find hundreds of companies that will "turn that old policy into cash."[94] Cantor Fitzgerald, an international financial services company, operates an electronic marketplace for life settlements that allows life insurance policy owners to list policies for sale and investors to bid on and buy listed policies.[95]

B. STOLIs

The business of life settlements has evolved from having investors purchase existing life insurance policies from insureds who no longer need the insurance to protect their families in the event of their deaths, to an arrangement in which a life insurance agent or a life settlement broker persuades a senior citizen[96] (preferably one with a net worth of at least $5 million)[97] to take out a life insurance policy, not for the purpose of protecting his or her family, but for a current financial benefit.[98] These arrangements have been dubbed stranger-originated life insurance (STOLI).[99]

The insured may be lured to participate by the promise of two years of free insurance,[100] gifts of a car or a trip or cash,[101] and the promise of a

93. Charles Duhigg, *Late in Life, Finding a Bonanza in Life Insurance*, N.Y. TIMES, Dec. 17, 2006, at 1.

94. *See generally* Learn Life Settlements, http://www.learnlifesettlements.com/ (last visited Sept. 21, 2010); Open Life Settlements, http://www.openlifesettlements.com/your_eligibility.php (last visited Sept. 21, 2010); Patriot Settlement, http://patriotsettlement.reachlocal.net/index.php (last visited Sept. 21, 2010); Policy Options, http://www.mypolicyoptions.com/ (last visited Sept. 21, 2010); Woodbridge Structured Funding, LLC, http://woodbridgeinvestments.com/sell-life-insurance-policy (last visited Sept. 21, 2010).

95. Letter from Stuart Hersch, President & CEO, Cantor LifeMarkets, a unit of Cantor Fitzgerald LP, to Bernie Stoffel, Office of Ins. Regulation, Florida Dep't of Fin. Servs., (Aug. 28, 2008), http://www.floir.com/pdf/CantorFitzgerald.pdf.

96. Typically, it is a person between seventy and eighty-five. Stephan Leimberg, *Stranger Originated Life Insurance (STOLI): What Counsel (and What Every Advisor) Must Absolutely Positively Know!*, SP037 A.L.I-A.B.A 573, 576 (2009).

97. R. Marshall Jones et al., *'Free' Life Insurance: Risks and Costs of Non-Recourse Premium Financing*, ESTATE PLANNING, July 2006, at 2.

98. *See* Popper, *supra* note 88 (explaining why people invest in these policies).

99. Popper, *supra* note 88. These arrangements are also called stranger-owned life insurance (STOLI) or (SOLI), J. Alan Jensen & Stephan R. Leimberg, *Stranger-Owned Life Insurance: A Point/Counterpoint Discussion*, 33 ACTEC J. 110, 110 (Fall 2007); investor-owned life insurance (IOLI), Memorandum from Ed Cassidy, President of Travelers Life Div., et al. to Travelers Life & Annuity Agents (Apr. 18, 2005), http://www.lisassociation.org/vlsaamembers/files/ICP_E_investor_initiated_IOLI_and_SOLI.pdf; and speculator-initiated life insurance (SPINLIFE), Charles Duhigg, *supra* note 91.

100. Leimberg, *supra* note 96, at 576.

substantial profit on the sure sale of the policy.[102] Typically, the broker or agent, under an arrangement with a life settlement company, will solicit a senior to purchase a life insurance policy with a high face value, with the company lending him the money to pay the premiums for two years, or whatever term state law sets as the period during which a claim can be contested by the insurance carrier.[103] It is common for the insured to set up an insurance trust naming his spouse or other loved one as the trust beneficiary.[104] If the insured dies within that period, his spouse, as beneficiary of the insurance trust, will get the death benefit (the free insurance), pay back the loan plus interest from the proceeds,[105] and often pay the broker up to fifty percent of the benefit received.[106] If the insured lives beyond two years or the contestability period, then the life settlement company buys the beneficial interest in the insurance trust, paying the insured a lump sum percent of the face value of the policy, usually between ten and thirty percent, and the agent will get a commission of about ten percent or more of the purchase price.[107] The life settlement company or its investors will continue to pay the premiums on the policy, and when the insured dies, they will get the death benefit.[108] Clearly, the sooner the insured dies, the greater the company's profit.

The legal problem with this arrangement is that the actual party for whom the policy is purchased, the life settlement company, has no insurable interest in the life of the insured and, therefore, it is against public policy designed to prohibit wagering on the lives of others and in violation of statutes in most states.[109]

C. The Life Settlement Industry

Faced with the problems of benefitting from the early death of strangers, threatening the financial structure of powerful insurance companies, and violating or coming very close to violating the law, the life settlement industry has been working hard to justify its existence.[110] It can

101. Jensen & Leimberg, *supra* note 99, at 116.
102. Leimberg, *supra* note 96, at 576.
103. *See, e.g.*, Lincoln Life & Annuity Co. v. Bernstein, 2009 WL 1912468, at *2 (N.Y. Sup. Ct. June 29, 2009) (stating the contestability period of the policy at issue).
104. *Id.* at *3.
105. Charles Duhigg, *Late in Life, Finding a Bonanza in Life Insurance*, N.Y. TIMES, Dec. 17, 2006, at 46.
106. Jensen & Leimberg, *supra* note 99, at 110, 111.
107. *Lincoln Life*, 2009 WL 1912468, at *3.
108. *Late in Life*, *supra* note 105.
109. *See supra* note 25 and accompanying text.
110. *See, e.g.*, Formal Written Submission of Doug Head, Executive Dir. of Life Ins. Settlement Assoc. (LISA), to the Fla. Office of Ins. Regulation Informational Hearing (Sept. 3, 2008), http://www.floir.com/pdf/LifeInsSettlementAssoc.pdf (advocating for the life

afford to do that because by 2008 it was a $16 billion industry[111] with estimates of becoming a $21 billion industry by 2012 as more senior citizens become aware of the option of selling life insurance policies that they no longer need.[112] Its prospects are also increased by the fact that life insurance companies are selling more policies than ever. In 2009, New York Life announced for the first time that its agents had sold term and permanent life insurance policies with over $1 billion in premiums.[113] State Farm's life insurance affiliates added $24 billion of life insurance policies bringing the total in force to $737 billion at the end of 2009.[114]

In 2008, the executive director of the life settlement industry's national trade organization testified to the Florida Office of Insurance Regulation that the "secondary market for life insurance has brought great benefits to consumers, unlocking the value of life insurance policies."[115] He asserted that the industry is opposed to STOLI, but emphasized that merely because someone buys a life insurance policy and assigns it to a third party, one cannot assume the buyer was participating in a STOLI scheme by making a straw purchase for the third party.[116] That is important to the industry because although stranger-originated policies are illegal, stranger-owned policies are not.[117] He cited the fundamental right of the alienability of property as applying to policyholders.[118] Policyholders may not buy a policy for the benefit of a third party without an insurable interest in the insured, but as soon as they own the policy they may assign it to that third party. That is the crux of the industry's argument and the issue in many lawsuits.

One area where the life settlement industry has been having some success in its battle with life insurance companies is in getting states to require life insurance companies to inform policy purchasers that life settlements are a possibility. In Kentucky, the General Assembly passed a bill in March 2010 that requires life insurance companies to notify owners of life insurance policies who are sixty or older or who are terminally ill

settlement industry).

111. *Securitization of Life Insurance Settlements: Hearing Before Comm. on House Fin. Serv. Subcomm. on Capital Markets, Ins. & Gov't Sponsored Enterprises*, 111th Cong. app. at 53 (2009) (statement of Paula Dubberly, Associate Director, Div. of Corporation Finance, SEC).

112. Hodson, *supra* note 92.

113. *New York Life Sets New Record for U.S. Life Insurance Sales in 2009, Achieving $1 Billion in Agent-Sold Premium for the First Time*, INS. NEWS NET, Mar. 4, 2010, http://insurancenewsnet.com/article.aspx?id=168754.

114. *Press Release*, State Farm, State Farm Financial Results Improve (Feb. 26, 2010), http://www.statefarm.com/about/media/media_releases/20100226.asp.

115. Formal Written Submission of Doug Head, *supra* note 110, at 1.

116. *Id.* at 2.

117. *Id.* at 4.

118. *Id.* at 3, 6, 7, 12.

and requesting to surrender a policy, 1) "that life insurance is a critical part of a broader financial plan;" 2) that there are "alternatives to lapse or surrender of the policy;" and 3) what life settlements are and that they "are a regulated transaction in Kentucky."[119] Similar notification requirements exist in Maine, Oregon, and Washington.[120]

The life settlement industry rightly points out the disingenuous quality of life insurance companies' assertions that the full value of life insurance policies is their death benefit.[121] While this may be true for term insurance, it is certainly not true of whole life and universal life products which insurance carriers market very vigorously and from which they make very large profits.[122] In fact, the life insurance industry contributed to the emergence of the life settlement industry by offering very low surrender value payments to people. One life settlement company claims that, on average, it has paid policy owners about ten times the surrender value offered by the issuing insurance company when the policy owner wanted to stop paying premiums.[123] One trade association reports that the average settlement is four to six times the surrender value.[124]

The life insurance industry argues that its surrender value schedule and the fact that policyholders allow thirty-eight percent of all policies to lapse (receiving no death benefit)[125] permit life insurance companies to keep premiums as low as they are.[126] Life settlement arrangements mean

119. H.B. 126, 2010 Sess. (Ky. 2010).

120. Lori Widmer, *Life Settlement Regulations Make It Harder to Avoid the Market*, AGENT'S SALES J., Feb. 24, 2010, *available at* http://www.asjonline.com/Issues/2010/3/Pages/Life-Settlement-Regulations.aspx; *see also, e.g.,* ME. REV. STAT. ANN. tit. 24-A, § 6806-A(2) (West 2009).

121. *See, e.g.*, *Formal Written Submission of Doug Head*, *supra* note 110, at 13 (quoting from memorandum submitted to Maine Bureau of Insurance by American Council of Life Insurers (ACLI), which Head alleges is "an attempt to confuse legislators" and a "demonstrably false and misleading attempt to misrepresent the very essence of the product promoted by all the insurers, the ACLI's membership").

122. *See supra* notes 61-66 and accompanying text.

123. *Securitization of Life Insurance Settlements: Hearings Before Comm. on House Fin. Serv. Subcomm. on Capital Markets, Ins. & Gov't Sponsored Enterprises*, 111th Cong. 68-69 (2009) (testimony of Kurt Gearhart on behalf of Credit Suisse).

124. *Securitization of Life Insurance Settlements: Hearings Before Comm. on House Fin. Serv. Subcomm. on Capital Markets, Ins. & Gov't Sponsored Enterprises*, 111th Cong. 43 (2009) (statement of Russel Dorsett, President, Life Insurance Settlement Association).

125. That is the figure for 2008. ACLI Life Insurers Fact Book 2009, Dec. 8, 2009, at 69, http://www.acli.com/ACLI/Tools/Industry+Facts/Life+Insurers+Fact+Book/GR09-+215.htm.

126. According to LIMRA International, a worldwide association of insurance and financial services companies, 12.7% of whole life insurance policies lapse in the first year (when the annual rate of return is -100%); 8.1% lapse in the second year (when the annual rate of return is -97.4%); and another 5.5% lapse in the third year (when the annual rate of return is -19%). *Cash Value in Life Insurance: What's It Worth to You?*, INSURE.COM, May 7, 2008, http://www.insure.com/articles/lifeinsurance/cash-value.html.

that policies will not lapse, so insurance carriers will pay death benefits on many more policies than they would be paying otherwise.[127] This will result in higher premiums for everyone, including those who want only the death risk coverage.[128] That argument is somewhat reminiscent of the tontine arrangement. Those who can afford to keep paying the premiums the longest do best because they benefit from the lapsing of others.

The life insurance companies could combat the negative impact of the life settlement industry by getting into the life settlements business itself—a possibility it has forcefully rejected by declaring, once again rather disingenuously, that "a settlement fractures the insurer's relationship with its insured."[129] The companies have not clarified why a lapse is not similarly "fracturing" to the relationship. In arguing before state insurance agencies for additional regulation of the life settlement industry, they assert that the real value of a life insurance policy is the insureds' knowing that their beneficiaries "will receive the protection and comfort of the policy death benefit."[130] That would be true if all life insurance were term insurance, entirely separate from savings and investments.

IV. SECURITIZATION OF LIFE SETTLEMENTS

With increasing customers, both as policy sellers and as investors, and growing resources, the life settlement industry has actively asserted that its property rights argument trumps the insurable interest argument of the life insurance companies.[131] The industry's success is encouraging bankers to create new investment opportunities by securitizing life settlements.[132] The industry foresees huge potential for such investment products because there are about $26 trillion in life insurance policies in force today.[133]

127. Marlene Y. Satter, *Insurance Update: Bonds. Death Bonds.*, INVESTMENT ADVISOR, Nov. 1, 2009, at 115, *available at* http://www.investmentadvisor.com/Issues/2009/November-2009/Pages/Bonds-Death-Bonds.aspx.

128. *Id.*

129. Letter from Michael J. Bartholomew representing the American Council of Life Insurers (ACLI) to Thomas M. Record, Senior Staff Attorney for Maine Bureau of Insurance, Aug. 14, 2008, at 5.

130. *Id.* at 6.

131. *See supra* notes 115–18 and accompanying text.

132. *Securitization of Life Insurance Settlements: Hearings Before Comm. on House Fin. Serv. Subcomm. on Capital Markets, Ins. & Gov't Sponsored Enterprises*, 111th Cong. 97 (2009) (statement of Susan E. Voss, Vice-Pres., Nat'l Assoc. of Ins. Commrs. and Comm'r of Iowa Ins. Comm'n).

133. Jenny Anderson, *New Exotic Investments Emerging on Wall Street*, N.Y. TIMES, Sept. 6, 2009, at 1, 24; Arnaud de Borchgrave, *Unraveling at the Seams – Gloom and Doom and Moore Is Less*, WASH. TIMES, Oct. 6, 2009, at A17; Satter, *supra* note 127.

A. Securitization Background

Securitization changes receivables like home mortgage loans or life insurance death benefits into securities that can be sold in capital markets.[134] The securitization idea began to take hold in the 1960s and 1970s when banks, in order to diversify their portfolios, began selling some of their mortgage loans to investors who could make a profit without being in the business of originating mortgage loans.[135] Instead of selling the loans individually, bankers realized that if they packaged many loans together they could spread the risk of any defaults over the entire package.[136] The next step for the bankers was issuing securities—such as bonds—backed by the cash flow from the loan-package mortgage payments; they thus made money not only from the mortgage payments, but also from the sale of the securities they had created.[137] Next in the securitization scheme was dividing the securities into bundles with different levels of risk and return ("tranches") so that defaults on the underlying mortgages would be charged first against the level with the highest risk and highest return; those buying the level with the lowest risk and lowest return would probably never suffer any losses because it was highly unlikely that so many defaults would happen at the same time (or so they thought).[138] The final step was the invention of special purpose vehicles (SPVs), shell companies created to buy the packages of mortgages and to sell the securities.[139] Finally, in the 1980s, bankers came up with a new big idea: taking the mortgage securitization and SPV concept and applying it to a pool of contracts that insured against defaults on corporate bonds and loans (credit derivatives).[140]

B. Securitizing Life Settlements

After the collapse of the subprime mortgage-backed security business in 2008, bankers were looking for another new big idea for making money and came up with a plan to securitize life settlements.[141] Bankers would

134. Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655, 1656 (2004).
135. GILLIAN TETT, FOOL'S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J.P. MORGAN WAS CORRUPTED BY WALL STREET GREED AND UNLEASHED CATASTROPHE 52 (2009).
136. *Id.*
137. *Id.*
138. *Id.* at 52-53.
139. *Id.* at 54.
140. *Id.* at 53.
141. Jenny Anderson, *New Exotic Investments Emerging on Wall Street*, N.Y. TIMES, Sept. 6, 2009, at 1.

bundle hundreds or thousands of life insurance policies together into bonds just as they did with mortgages, and sell the bonds to investors such as pension funds.[142] When the insureds die, the investors receive the death benefits. If the insureds die soon, the return can be high; if they live long, investors may even have to take a loss.[143] In any case, the bankers will make a profit from the fees for creating, reselling, and trading the bonds.[144]

Credit Suisse bought a life settlement company and created a group dedicated to buying, packaging, and reselling large numbers of life insurance policies.[145] Nevertheless, in September 2009, a Credit Suisse spokesperson testified before a congressional subcommittee that, while Credit Suisse is active in the life settlement business and in insurance securitizations, it had never done life settlement securitizations, though it would not rule out doing them in the future.[146] Credit Suisse does, however, sell portfolios of policies to institutional investors such as insurance companies, fund managers, and pension funds.[147]

In 2006 Goldman Sachs created its Longmore Capital unit to handle life settlements,[148] and in 2008 it created its QxX mortality index which tracked the mortality of 46,000 people over sixty-five with diseases other than AIDS to provide information to institutional investors who were going to buy its life settlement securities.[149] But, in December 2009, it began to wind down Longmore, and the following month it shut down its QxX index.[150] Goldman claimed its exit from the life settlements business was a commercial decision based on its assessment that the industry was not going to grow the way Goldman had thought, but some analysts believe that Goldman did not want to antagonize life insurance carriers with large stock and bond portfolios.[151] A managing director at Goldman testified before Congress in September 2009 that Goldman had never executed a life

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 24.

146. *Securitization of Life Insurance Settlements: Hearings Before Comm. on House Fin. Serv. Subcomm. on Capital Markets, Ins. & Gov't Sponsored Enterprises*, 111th Cong. 63 (2009) (statement of Kurt Gearhart on behalf of Credit Suisse).

147. *Id.* at 6.

148. Darla Mercado, *Goldman Abandoning Life Settlements Market*, CRAIN'SNEWYORK.COM, Jan. 29, 2010, http://www.crainsnewyork.com/article/20100129/FREE/100129856.

149. Christian Evulich, *Life Settlement Industry Shaken by Goldman Sachs Departure*, TECHNORATI.COM, Feb. 3, 2010, http://technorati.com/business/finance/article/life-settlement-industry-shaken-by-goldman/.

150. Mercado, *supra* note 148.

151. Ed Leefeldt, *Life (Settlements) Isn't Good for Goldman Sachs*, BNET.COM, Feb. 6, 2010, http://industry.bnet.com/financial-services/10006672/life-settlements-isnt-good-for-goldman-sachs/.

settlement securitization and had no plans to do so.[152]

Credit rating agencies are interested in participating in this new scheme because they receive fees for rating life settlement securities.[153] In 2008, DBRS Ltd., a little-known Toronto-based credit rating agency, became the first rating agency to issue criteria for rating life settlement contracts.[154] DBRS figured that if a bond is made up of policies of insureds who have different diseases, the value of the bond would not fall precipitously if a cure was found for one of them.[155] It is also important for there to be a mix of insurance companies for each bond to decrease the risk associated with company failure.[156] DBRS recommends that no insurance company writing policies in a securitized pool should be responsible for more than twenty percent of the pool's total face amount.[157]

This whole arrangement sounds remarkably like the one that gave rise to the subprime mortgage loan debacle.[158] Nevertheless, investors are still interested because they view life insurance policies as an investment that is not correlated with other economic indicators and, therefore, as one that spreads investors' risk.[159] Success as an investor in life insurance policies does not depend on the usual micro or macroeconomic variables—like corporate earnings or interest rates, respectively—but rather on demographics such as the age and health of the insureds.[160]

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152. *Securitization of Life Insurance Settlements: Hearings Before Comm. on House Fin. Serv. Subcomm. on Capital Markets, Ins. & Gov't Sponsored Enterprises*, 111th Cong. 92 (2009) (statement of Steven H. Strongin on behalf of Goldman Sachs).

153. Anderson, *supra* note 141, at 24.

154. David Parkinson, *Grave Concerns Over Rise of Death Bonds*, GLOBE & MAIL (Toronto), Oct. 16, 2009, at B1.

155. Anderson, *supra* note 141, at 24. A.M. Best has created a "disease diversity" table that sets maximum limits on the percent of insureds with policies in a securitization pool who can have particular diseases. For example, only 50% should have cardiovascular disease; 25% cancer; and 10% diabetes. A.M. BEST, *LIFE SETTLEMENT SECURITIZATION*, 6 (Nov. 24, 2009).

156. Anderson, *supra* note 141, at 24.

157. DBRS, *Rating U.S. Life Settlement Securitizations*, at 7 (Feb. 2008), *available at* http://www.dbrs.com/research/218569/rating-u-s-life-settlement-securitizations.pdf.

158. Bill Weir, *The Business of Life Insurance: Betting on Your Own Mortality*, ABC NEWS, Oct. 5, 2009, http://abcnews.go.com/Business/life-insurance-securitization-wall-street-bet-life-expectancy/story?id=8757456&page=1.

159. Anderson, *supra* note 141, at 24; Jim Connolly, *Few Deals, Much Interest*, INS. BELLWETHER, Oct. 18, 2009, http://www.theinsurancebellwether.com/2009/10/few-deals-much-interest.html. *But see* Trevor Thomas, *Life Settlement Securitizations Leave S&P Cold*, NAT'L UNDERWRITER, Oct. 15, 2009, http://www.lifeandhealthinsurancenews.com/News/2009/10/Pages/Life-Settlement-Securitizations-Leave-SP-Cold.aspx (noting that there is correlation between the condition of the economy and the credit quality of insurance carriers).

160. *Life Settlements: Hedge Funds Turning to Life Settlements for Absolute, Uncorrelated Returns*, HEDGE FUND L. REP., Oct. 1, 2009, http://www.hflawreport.com (click on "Archive").

On the other hand, Standard & Poor's (S&P), another credit rating agency, has reported several risks associated with these transactions.[161] First, according to the S&P report, statistics about the insureds are unlikely to be sufficiently credible with a pool of fewer than a thousand lives, and many factors about the insureds would have to be considered, including age, gender, smoker or non-smoker, genetic information, occupational history, and living environment.[162] Second, it would have to be ascertained that coverage under the policies could not be denied by the insurance carriers because of a lack of insurable interest.[163] A third problem is the inaccuracy of independent medical reviews.[164] A comparison of life expectancies issued by three different medical examiners on the same lives found differences of between eight and twenty-four months.[165] If there is a twenty-four-month "mistake," the return to investors can go from 12.4% to 6.5%, cutting the rate of return almost in half.[166] A fourth problem is the possibility of not being able to verify the death of an insured, resulting in a long period of delay before the death benefit is paid.[167] S&P has concluded that because of these inherent risks, it would not be rating life settlement securitizations in the foreseeable future.[168]

From the position of the insured, a positive outcome of securitization is that it could raise the amount that the insured would receive for a policy, but that would depend on how much was taken by brokers, agents, originators, and any others involved in the transaction.[169] There is also always the issue of whether the insured has had all the ramifications of the arrangement explained adequately and accurately.[170]

A spokesperson for A.M. Best, another well-known credit rating agency, has said that, in fact, very few life insurance securitizations will take place because the originator of the security would need so much

161. Connolly, *supra* note 159.

162. *Id.*

163. *Id.*; *see also* DBRS, *supra* note 157, at 4 (noting origination risks in addition to insurable interest problems: improprieties committed by brokers selling insurance policies or by life settlement companies buying insurance policies).

164. Connolly, *supra* note 159; *see* DBRS, *supra* note 157, at 5 (noting that multiple, independent medical underwriters should be used in order to minimize the risk of inaccurate life expectancy calculations).

165. Meg Green, *AIG Files First Rated Life Settlement Securitization*, TRADINGMARKETS, Apr. 16, 2009, http://www.tradingmarkets.com/.site/news/Stock%20News/2275566/.

166. *Id.*

167. Connolly, *supra* note 159.

168. Thomas, *supra* note 159.

169. *Recent Innovations in Securitization: Hearing Before the Subcomm. on Capital Markets, Ins., & Gov't Sponsored Enterprises of the Comm. on H. Fin. Services*, 111th Cong. 95 (2009) (prepared statement of Steven H. Strongin, Managing Director and Head of Global Investment Research, Goldman, Sachs & Co.).

170. *Id.*

capital, probably between $500 million and $1 billion, in order to buy enough policies, probably between 300 and 500, in order to have a pool that was diversified enough to reduce risk sufficiently.[171] S&P has concluded that the pool should contain at least 1,000 lives.[172] A life settlement company executive has suggested that the warehouse lending concept that was popular for mortgage securitizations could be resurrected for securitizing life insurance policies.[173] Warehouse lending refers to a short-term revolving line of credit that could be used to fund the purchase of policies until their sale in the secondary market when the line of credit would be paid off.[174]

C. Examples of Life Settlement Securitizations

In spite of the drawbacks, Tarrytown Second, LLC issued the first securitization of life insurance policies in January 2004.[175] It was a $63 million issue of seven-percent-annual-coupon bonds, maturing in December 2011, backed by life insurance policies with a total face value of $195 million.[176] The life expectancies of the insureds ranged from four to seven years.[177] A.M. Best gave the securitization a preliminary AA- rating.[178]

Legacy Benefits Life Insurance Settlements issued the second securitization of life insurance policies in April 2004 for $70 million.[179] It had two tranches that matured in 2039: the less risky one with a 5.35% coupon was rated A1 by Moody's; the more risky one with a 6.05% coupon was rated Baa2 by Moody's.[180] The average age of the insureds was seventy-seven.[181] This transaction was underwritten by Merrill Lynch, and the pool contained some annuities in addition to the life insurance

171. *Life Settlement Securitizations Need Warehousing, Liquidity to Flourish*, RISKMARKETNEWS, Oct. 2, 2009, http://www.riskmarketnews.com/files/938280891c3fe3457d11705368c62895-67.html.

172. Thomas, *supra* note 159.

173. *Life Settlement Securitizations Need Warehousing, Liquidity to Flourish*, RISKMARKETNEWS, Oct. 2, 2009, http://www.riskmarketnews.com/files/938280891c3fe3457d11705368c62895-67.html.

174. Warehouse Lending Definition, http://www.mbaa.org/IndustryResources/ResourceCenters/WarehouseLendingDefinition.htm (last visited Sept. 17, 2010) (defining warehouse lending as it applies to mortgages).

175. Charles A. Stone & Anne Zissu, *Securitization of Senior Life Settlements: Managing Extension Risk*, 13 J. DERIVATIVES 66, 66 (2006).

176. *Id.* at 71.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 71-72.

181. *Id.* at 72.

policies.[182] Annuities can even out the cash-flow ups and downs that could arise over the course of the notes because of the longevity risk inherent in life settlements.[183]

In January 2009, A.M. Best issued its first final debt rating associated with a life settlement securitization for Fieldstone Securitization I LLC on about $2.54 billion of securities collateralized by about $8.4 billion in face value of life insurance policies.[184] Later that year, A.M. Best also rated a securitization of life settlement policies done by Risk Finance, a unit of American International Group (AIG), with $8.4 billion in face value of more than 2000 of its own policies.[185]

The difference in the size of these securitizations in the five-year period between 2004 and 2009 suggests growth in the life settlement industry. It is difficult to adequately discuss the number of these deals or their details because most life settlement securitizations are private placements.[186]

V. PROBLEMS WITH THE LIFE SETTLEMENT INDUSTRY

The President of the industry's trade association has referred to the "'ick' factor" in the industry's business, but has asserted that it is "no different than the life insurance business itself."[187] What he was ignoring is the insurance carrier's interest in having the insured live so it can continue to collect premiums before it has to pay out a death benefit compared to the life settlement investor's interest in having the insured die quickly so that it can stop paying premiums and collect the death benefit sooner. Life insurance companies have a mortality risk—that the insured will die earlier than expected; life settlement investors have a longevity risk—that the insured will live longer than expected. That is a big difference.

The primary purpose of life insurance for families and for society is to keep families from economic disaster should the family's breadwinner fall victim to an untimely death.[188] Life insurance can keep a young family in

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182. Jennifer Banzaca, *Life Settlements: Life Settlement Securitizations Offer Hedge funds Efficient Access to an Inefficient Market*, HEDGE FUND L. REP., Nov. 5, 2009, at 3.

183. *Id.* at 2.

184. A.M. BEST, *supra* note 155, at 2-3.

185. Banzaca, *supra* note 182, at 2; Green, *supra* note 165.

186. *Recent Innovations in Securitization: Hearing Before the Subcomm. on Capital Markets, Ins., & Gov't Sponsored Enterprises of the Comm. on H. Fin. Services*, 111th Cong. 38 (2009) (prepared statement of Daniel Curry, President, DBRS, Inc.).

187. Weir, *supra* note 158.

188. *See, e.g.*, *Recent Innovations in Securitization: Hearing Before the Subcomm. on Capital Mkts, Ins., & Gov't Sponsored Enters. of the Comm. on H. Fin. Servs.*, 111th Cong. 99 (2009) (statement of the Hon. Susan E. Voss, Comm'r, Iowa Insurance Commission, and Vice President, National Association of Insurance Commissioners) ("The basic purpose of having life insurance is to provide financial security in the event of death for individual,

its home and keep it from being a burden on taxpayers. Because life insurance companies figured out that they could make more money by combining life insurance with other financial products does not mean that life insurance policies should now be primarily a cash machine for anyone who can figure out how to "unlock" it, whether they are senior citizens or life settlement investors.

Some of the problems with the life settlement industry are well-known. The most obvious is the one that the insurable interest doctrine was supposed to remove from the life insurance business—that is, to some stranger, the insured is now worth a lot more dead then alive.[189] Even if one is not concerned about murder, the results may not be pleasant. One senior citizen reported that after selling his $1 million life insurance policy for a little over $100,000 to a life settlement company, the company calls him every few months to see if he is still alive.[190]

Another problem is that if the insureds maximize their life insurance coverage and then sell their policies for a life settlement, they may not be able to get life insurance again if their circumstances change.[191] A related problem is that the elderly or infirm, the primary targets of life settlement firms, may be taken advantage of by brokers who do not explain all the ramifications of the agreements they are entering into.[192] Insureds may not realize that any gain they receive on their policies is taxable.[193] Insureds may not understand that the sale of their policies in the secondary market after the two year contestability period is up is not guaranteed.[194] Private

family, and business needs.").

189. Even the insurable interest rule does not remove all the ramifications of the insured being worth more dead than alive. There are many reported examples of one spouse killing another or other relatives killing each other "for the insurance money." *See, e.g.*, Martin, *supra* note 31, at 661 n.48.

190. Weir, *supra* note 158.

191. Franklin L. Best, Jr., *Securitization of Life Insurance Policies*, 44 TORT TRIAL & INS. PRAC. L.J. 911, 916 (2009).

192. *Recent Innovations in Securitization*, *supra* note 186, at 40.

193. *See Recent Innovations in Securitization: Hearing Before the Subcomm. on Capital Mkts, Ins., & Gov't Sponsored Enters. of the Comm. on H. Fin. Servs.*, 111th Cong. 44 (2009) (statement of J. Russel Dorsett, Co-Managing Dir. of Veris Settlement Partners, and President, Life Insurance Settlement Association) ("It has always been recognized that the gain received by the seller (policy owner) was taxable . . . ."). The proceeds of the sale minus the premiums paid plus the value of insurance protection for the period the policy was in force is taxable, partially as ordinary income, partially as capital gains. For a term policy, all proceeds are taxed as capital gains. Rev. Rul. 2009-13 I.R.B. 686; Rev. Rul. 2009-11 I.R.B. 686.

194. *See, e.g.*, Tom Sharpe, *S.F. Bank Among Targets of Investor Suit*, SANTA FE NEW MEXICAN, Nov. 27, 2009, at A6, *available at* http://www.santafenewmexican.com/localnews/S-F--bank-among-targets-of-investor-suit (reporting a suit filed by elderly investors against financial consultants who did not sell their life insurance policies and who told them to "just hang in there" until the incontestability period of the policies would expire).

information about insureds, including their medical conditions, will be made known to strangers because the investors will be entitled to full disclosure about the risks they are undertaking.[195]

Investors, too, may not understand the complicated financial product they are buying. The AARP has warned that life settlements are one of the top ten investment scams.[196] One estimate is that investors, with an average age of seventy years old, have been cheated of up to $2 billion nationwide between 1996 and 2007, averaging $40,000 per investor in life settlement frauds.[197] Investors may be deceived about the rate of return on their investment because they cannot know how long the insureds will live.[198] They may not realize that they have to keep paying premiums as long as the insureds are alive because if the policies lapse, then investors lose everything.[199] There are also risks associated with the viability of the insurance company and legal challenges by the families of the insureds.[200] Insurance companies may refuse to pay the death benefit because of alleged fraud by the insured.[201] Investors may also not understand the tax implications of their investments.[202]

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195. *See Betting on Death in the Life Settlement Market—What's at Stake for Seniors: Hearing Before the S. Special Comm. on Aging*, 111th Cong. (Apr. 29, 2009), *available at* 2009 WLNR 8154008 (statement of Mary Beth Senkewicz, Deputy Ins. Comm'r of the Florida Office of Insurance Regulation) ("Seniors may also have to give the investor, and subsequent investors, access to their confidential medical records when they sell their life insurance policy in the secondary market.").

196. Dana Shilling, *Viatical and Life Settlements*, 204 ELDER L. ADVISORY 1, 4 (February 2008).

197. *Id.* For example, an insurance agent in Florida was arrested and charged with fraud and grand theft after earning $1,600,000 on policies worth $78,000,000 for which he had submitted applications with false information to insurance companies and then arranged for their sale on the secondary market. *Florida Insurance Agent Arrested in Alleged $78M STOLI Scheme*, LIFE SETTLEMENTS REP., Apr. 23, 2010, http://lifesettlements.dealflowmedia.com/wires/article.cfm?id=wnosbnpndlxxuud. The director of the Texas State Securities Board enforcement division has called the Texas life settlement industry the "Wild West" because of all the cases of fraud his office has pursued. Dave Lieber, *Texas is the 'Wild West' of the Life Settlement Industry*, STAR-TELEGRAM, May 2, 2010, http://www.star-telegram.com/2010/05/01/v-print/2156969/texas-is-the-wild-west-of-life.html.

198. Shilling, *supra* note 196.

199. *Id.*

200. *Id.*

201. Rob Curran, *The Pros and Cons of Betting on Death*, WALL ST. J., Apr. 12, 2010, at R7. Among the frauds is "clean sheeting" which refers to an insured hiding medical conditions from the insurance company. *Id.* Insureds may also lie to life settlement brokers by "dirty sheeting," that is, saying they are sicker than they really are in order to get a higher price for their policy because of the likelihood of a quicker death. *Id.*

202. If an investor gets a death benefit or sells the policy to another, his taxable income is the death benefit or the sale proceeds minus the amount paid to the policy owner and any premiums paid. Death benefit proceeds are taxed as ordinary income, not as a capital gain. Sale proceeds are taxed as a capital gain. Because the investor purchased the policy, it was

Some critics have predicted that life settlement companies will be lobbying against improvements in health care because of their interest in early deaths.[203] The most serious practical problem is for the whole regime of life insurance. Life settlements, if they become numerous, will cause everyone's premiums to rise, because life insurance companies, in determining pricing, count on a certain percentage of policies lapsing so that no death benefit will ever be paid even though premium payments have been made.[204]

VI. REGULATION

Life settlements are now regulated in forty-four states and legislation is pending in several of the rest.[205] Both the National Conference of

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a "transfer for a valuable consideration," and therefore, there is no exception for a transfer involving parties related to the insured. Rev. Rul. 2009-14 I.R.B. 687; Rev. Rul. 2009-11 I.R.B. 687.

203. Weir, *supra* note 158 (quoting Michael Greenberger, former Director of the Commodity Futures Trading Commission).

204. *See* Best, *supra* note 191, at 915, 916 (noting that insurers' pricing assumes that some policies will lapse and that pricing which responds to "investors' arbitraging practices" could "make insurance too expensive.").

205. Rachel B. Coan & Henry Bregstein, *Recently Proposed New York Life Settlement Regulation May Have a Significant Impact Upon Those Conducting Business in the State*, KATTEN MUCHIN ROSENMAN LLP (June 3, 2009), http://www.kattenlaw.com/recently-proposed-new-york-life-settlement-regulation-may-have-a-significant-impact-upon-those-conducting-business-in-the-state-06-03-2009/ (follow "Download PDF" hyperlink). For example, in January 2010 a bill was introduced in the Pennsylvania House that amends the state's Viatical Settlements Act to include a definition of stranger-originated life insurance or STOLI as a:

> practice or plan to initiate a life insurance policy for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest in the insured. STOLI practices include, but are not limited to: (1) Cases in which life insurance is purchased with resources or guarantees from or through a person or entity who, at the time of inception, has a verbal or written arrangement or agreement to directly or indirectly transfer the ownership of the policy or the policy benefits to a third party. (2) Trusts created to give the appearance of insurable interest which are used to initiate policies for investors, violate or evade insurable interest laws and the prohibition against wagering on life.

H.B. 2188, 194th Gen. Assemb., Reg. Sess. § 2 (Pa. 2010). The bill then provides:

> [i]t is a violation of this act for a person to enter into a viatical settlement contract prior to the application or issuance of a policy which is the subject of viatical settlement contract or within a five-year period commencing with the date of issuance of the insurance policy or certificate unless the viator certifies to the viatical settlement provider that one or more of the following conditions have been met within the five-year period . . . .

Id. at § 6(a), and then goes on to list circumstances such as "(i) the viator insured is terminally or chronically ill; (ii) the viator's spouse dies; (iii) the viator divorces his or her spouse . . . ." *Id.*

Insurance Legislators (NCOIL) and the National Association of Insurance Commissioners (NAIC) have developed model acts regulating viatical and life settlements,[206] and most states that have enacted life settlements legislation since 2007 have used one of the two models or a combination of both.[207] The NAIC created its first model act, the Viatical Settlements Model Act, in December 2006 in response to increased STOLI activity, which the commissioners perceived as problematic.[208] State legislators wrote their version, the Life Insurance Settlements Model Act, in November 2007.[209] The purpose of both is to address abuses in the life settlement industry by requiring more disclosure to policy owners and by putting limitations on STOLI.[210]

The NCOIL Model Act attempts to ban all STOLI by prohibiting any "practice or plan to initiate life insurance for the benefit of a 3rd party investor who, at inception, has no insurable interest in the insured."[211] The NAIC Model Act attempts to eliminate STOLI indirectly by establishing a five-year moratorium on policies sold to third parties when the insured is not suffering a medical, financial, or family downturn in circumstances.[212] A sale would be much less attractive to insureds if they had to wait five years to get their money. The NCOIL Model Act has a two-year ban, which coincides with the contestability period in most states.[213]

The NCOIL Model Act also defines as fraud any violation of insurable interest laws; the NAIC Model Act has no such provision.[214] The NCOIL act also specifically allows insurance companies to require applicants for life insurance to certify that they have not made any agreement to sell the policy or received any remuneration for buying the policy; there is nothing

206. *See* News Release, National Association of Insurance Commissioners, NAIC Adopts Viatical Settlements Model Act Revisions (June 4, 2007), http://www.naic.org/Releases/2007_docs/viatical_settlements_model.htm (last visited Sept. 26, 2010) (announcing the adoption of Model Act revisions addressing STOLI and other issues in the life settlement marketplace); *see also* VIATICAL SETTLEMENTS MODEL ACT (Nat'l Ass'n of Ins. Comm'rs 2007); LIFE SETTLEMENTS MODEL ACT (Nat'l Conf. of Ins. Legislators 2007).

207. Coan & Bregstein, *supra* note 205.

208. R. Leimberg, *Stranger Originated Life Insurance (STOLI): What Counsel (and What Every Advisor) Must Absolutely Positively Know!*, ADVANCED ESTATE PLANNING TECHNIQUES 573, 629 (2009). NAIC revised its Model Act in June 2007. *Id.*

209. *Id.* at 629-30.

210. *See generally id.* (outlining the purposes and requirements of the model acts).

211. *Id.*

212. *Id.* at 629-33. The five-year moratorium does not apply to policies purchased with the policyowner's own money. Am. Council of Life Insurers & Nat'l Ass's of Ins. and Fin. Advisors, *2009 Shaping Up as Active Year in Battle to Deter Abuse of Seniors by STOLI Promoters*, STOLI ALERT (Nov. 2008), http://www.flseniors.net/images/StoliAlert_nov08.pdf.

213. Leimberg, *supra* note 208, at 629-33.

214. *Id.* at 631.

similar in the NAIC Act.[215] Both Acts prohibit advertising "free" life insurance.[216]

In 2008, eleven states enacted legislation to eliminate STOLI.[217] Ohio, for example, enacted a statute deeming STOLI "void and unenforceable."[218] The statute follows the NAIC plan of a five-year moratorium and uses some NCOIL provisions, including the STOLI definition.[219] One unusual provision is the requirement that life insurance companies have to file with the Superintendent of Insurance "a description of the measures taken by the insurance company to detect and prevent stranger-originated life insurance."[220] This legislation amended viatical settlements law that Ohio has had since 2001 to address fraud and deception of policy owners and investors.[221]

North Dakota banned STOLI[222] using the NAIC model of prohibiting the sale of a life insurance policy within five years of its issuance but only if the policy owner has borrowed the money to pay the premiums—a common sign of STOLI—with exceptions for divorce, disability, or the death of a spouse.[223] Indiana's anti-STOLI law[224] says that insurance companies cannot use the allegation that a policy is a STOLI to deny payment of the death benefit after the two-year contestability period, but the insurance company can attempt to void a policy at any time for lack of an insurable interest at the time the policy was issued.[225]

Additional states passed life settlement laws with a variety of provisions in 2009.[226] Washington State, for example, enacted a statute

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215. *Id.*

216. *Id.*

217. Am. Council of Life Insurers & Nat'l Ass'n of Ins. and Fin. Advisors, *supra* note 212; *see, e.g.*, FLA. STAT. ANN. § 627.404(1) (West 2008); HAW. REV. STAT. ANN. § 431E-2 (LexisNexis 2008) (repealed June 16, 2010); IND. CODE ANN. § 27-8-19.8-20.1 (West 2008); OKLA. STAT. ANN. tit. 36, § 4055.2(7)(e) (West 2008); W. VA. CODE ANN. § 33-13C-2(18) (LexisNexis 2008).

218. OHIO REV. CODE ANN. § 3916.172 (LexisNexis 2008).

219. *Ohio's Anti-STOLI Legislation*, BRICKER & ECKLER LLP (June 3, 2008), http://www.bricker.com/documents/publications/1267.pdf.

220. OHIO REV. CODE ANN. § 3911.021 (LexisNexis 2008).

221. *Ohio's Anti-STOLI Legislation*, *supra* note 218.

222. N.D. CENT. CODE § 26.1-33.4-01(23) (2009).

223. Kimberly Lankford, *The Strange Saga of STOLI*, KIPLINGER'S PERS. FIN., July 2008, at 67.

224. IND. CODE ANN. § 27-8-19.8-20.1 (West 2008).

225. IND. CODE ANN. § 27-1-12-44 (West 2008).

226. *See, e.g.*, ARK. CODE ANN. § 23-81-802(24) (2009); CAL. INS. CODE § 10113.1(w) (West 2009); 215 ILL. COMP. STAT. 159/50(a) (2010); MINN. STAT. § 60A.0782 subd. 12 (2009); N.Y. INS. LAW § 7815(a)-(b) (McKinney 2009); OR. REV. STAT. § 744.318(18) (2009); TENN. CODE ANN. § 56-50-102(l2) (2009); VT. STAT. ANN. tit. 8, § 3835(18) (2010); WASH. REV. CODE § 48.102.006(25) (2009).

based on the NCOIL model.[227] The statute bans life settlement agreements within two years of the policy's issuance,[228] and it requires a report to the state insurance commissioner's office if a policy is sold within five years of being issued.[229] The law also requires insurance companies to tell policy owners over the age of sixty that they have the right to enter into a life settlement agreement.[230] That was the first time a state had imposed a life settlement mandatory disclosure rule on insurance companies.[231] When California enacted its anti-STOLI legislation near the end of 2009,[232] it prohibited insurance companies from restricting lawful life settlements and restricting agents from telling insureds that life settlements are an option.[233]

At the end of 2009, New York enacted a life settlement statute that prohibits STOLI as being in violation of the state's insurable interest laws,[234] and prohibits everyone from participating in STOLI.[235] The law requires everyone engaging in the business of life settlements to be licensed by the state Superintendent of Insurance.[236] One of the New York requirements that has been most decried by the life settlement industry is the licensing fee, which was originally set by the Superintendent of Insurance at $20,000 with a biennial renewal fee of $5,000.[237] After much pressure from the life settlement industry,[238] the licensing fee was reduced to $10,000.[239] The more common state licensing fee is between $500 and $1,000.[240]

Minnesota's 2009 law outlaws STOLI[241] and allows the insured's estate to recover death benefits from a policy initiated by a STOLI

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227. WASH. REV. CODE § 48.102 (2009).

228. WASH. REV. CODE § 48.102.110(14) (2009).

229. WASH. REV. CODE § 48.102.046 (2009); Sean P. Carr, *Washington State Enacts STOLI Bill with Mandatory Disclosure*, INS. NEWS NET, Apr. 23, 2009, http://www.insurancenewsnet.org/html/BreakingNews/2009/0423/Washington-State-Enacts-STOLI-Bill-With-Mandatory-Disclosure.html.

230. WASH. REV. CODE § 48.102.100(1) (2009).

231. Carr, *supra* note 229.

232. CAL. INS. CODE § 10113.1(w) (West 2009).

233. Bob Graham, *California to Regulate Life Settlements, Forbids STOLI Deals*, INS. & FIN. ADVISOR, Oct. 20, 2009, http://ifawebnews.com/2009/10/20/california-to-regulate-life-settlements/html.

234. N.Y. INS. LAW § 7815(a)-(b) (McKinney 2009).

235. N.Y. INS. LAW § 7815(c) (McKinney 2009).

236. N.Y. INS. LAW § 7803 (McKinney 2009).

237. N.Y. COMP. CODES R. & REGS. tit. 11, § 381.0(a), (c) (2010) (draft).

238. *New York Halves Providers' Licensing Fee to $10,000*, LIFE SETTLEMENTS REP., Apr. 27, 2010, http://lifesettlements.dealflowmedia.com/wires/archive.cfm?nd=042610.

239. N.Y. COMP. CODES R. & REGS. tit. 11, § 381.1(a) (2010).

240. *New York Halves Providers' Licensing Fee to $10,000*, *supra* note 238; *New York Officials Not Backing Off $20,000 Provider Fee*, LIFE SETTLEMENT SOURCE, Apr. 6, 2010, http://www.the lifesettlementsource.com/archive.cfm?nd=040510.

241. MINN. STAT. § 60A.0782, subd. 12 (2009).

scheme.[242] Where violations are willful, a court can order exemplary damages up to twice the death benefits.[243] Most other states prohibit STOLI and then have their own particular requirements on licensing, reporting, disclosures, advertising, privacy, monetary penalties or prison sentences, or both for non-compliance.[244]

The variation in state provisions and the fact that life settlements are still unregulated in some states can be problematic for some life settlement participants. The purpose of most of the laws is to protect insureds, policy owners, beneficiaries, and sometimes investors; however, if a policy owner who wants to sell lives in an unregulated state, neither the insured, nor the beneficiaries, nor the investors will have protection even if their own states regulate life settlements.[245] This situation suggests that federal regulation would be preferable to achieve standardized protections for all parties involved.[246] Several federal institutions have shown interest in greater federal involvement in the life settlement industry. On April 29, 2009, the Senate Special Committee on Aging held hearings on the life settlement market as it relates to senior citizens.[247] On September 24, 2009, the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises held hearings on securitization of life settlements.[248] In August 2009, the Securities and Exchange Commission (SEC) created a task force to examine the life settlement industry.[249]

Following the Senate Special Committee on Aging hearings, the

242. *Minnesota Outlaws Life-Insurance Scheme*, MINNEAPOLIS / ST. PAUL BUS. J., May 11, 2009, http://twincities.bizjournals.com/twincities/stories/2009/05/11/daily.

243. *Id.*

244. *See generally* CONN. GEN. STAT. § 38a-465j(a)(2) (Michie 2009); GA. CODE ANN. § 33-59-2(24) (2009); IDAHO CODE ANN. § 41-1962(1) (Michie 2009); 215 ILL. COMP. STAT. 159/50(a), 159/72(a) (2009); KAN. STAT. ANN. § 40-5002(l) (2009); KY. REV. STAT. ANN. § 304.15-020(7)(a)(1)(k), (15) (2009); ME. REV. STAT. ANN. tit. 24-A, § 6802-A(6)(A)(3), (12-A) (2009); OKLA. STAT. tit. 36, § 4055.2(7)(e) (2009); R.I. GEN. LAWS § 27-72-2(26) (2009); UTAH CODE ANN. § 31A-36-102(18) (2009); *see also* MAJORITY STAFF OF S. SPECIAL COMM. ON AGING, 111TH CONG., LIFE SETTLEMENTS: RISKS TO SENIORS—SUMMARY OF COMM. INVESTIGATION, at 2, 7-8 (2009) (noting state action to increase transparency of life settlements industry but also noting inconsistency).

245. *Recent Innovations in Securitization: Hearing Before the Subcomm. on Capital Mkts, Ins., & Gov't Sponsored Enters. of the Comm. on H. Fin. Servs.*, 111th Cong. 70-71 (2009) (statement of Kurt Gearhart, Global Head of Regulatory and Execution Risk, Life Finance Group, Credit Suisse).

246. *Id.*

247. *Betting on Death in the Life Settlement Market–What's at Stake for Seniors: Hearing Before the S. Special Comm. on Aging*, 111th Cong. (Apr. 29, 2009), *available at* 2009 WLNR 8154008.

248. *Recent Innovations in Securitization: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enter.s of the Comm. on H. Fin. Servs.*, 111th Cong. (2009).

249. Darla Mercado, *SEC Creates Life Settlements Task Force*, INVESTMENTNEWS, Sept. 16, 2009, http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20090916/FREE/909169986.

committee's chair, Senator Kohl, noted the importance of the federal role in addressing life settlements, "a complex transaction that may be fraught with hidden pitfalls."[250] Congressman Kanjorski, chairman of the House Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, noted, in announcing the subcommittee's hearings on securitization of life settlements, "the dangers of excess that securitization can cause" and the importance of reforming "the rules by which the financial industry operates.[251] Mary Schapiro, chairman of the SEC, in a letter to Senator Kohl, explained that life settlements sometimes involve securities subject to federal securities laws.[252] One such situation occurs if the policy being sold is a variable life insurance policy which is itself a security; another is if the policy is sold in order to buy securities with the proceeds.[253] She promised to study whether the SEC needed to regulate life settlement transactions more specifically.[254]

VII. LIFE SETTLEMENT LITIGATION

As states were enacting legislation to regulate the life settlement industry and the federal government was studying it, the life settlement industry and STOLI in particular were giving rise to many lawsuits, making courts the interim regulators. The growth of STOLI policies and scams is indicated by the growth in the number of cases in which STOLI is involved. In 2005, there was one STOLI case in the nation; by the end of 2008, there were 105 pending in state and federal courts.[255] The facts of one case currently being litigated in a New Mexico state district court exemplify problems with life settlements and why the worthwhile concept of life insurance must be separated from corrosive and unrelated financial products.

Five wealthy, elderly Texans went to New Mexico[256] to form a

250. Press Release, S. Special Comm. on Aging, Kohl Calls for Better Regulation, More Transparency of Life Settlement Market (May 1, 2009), http://aging.senate.gov/record.cfm?id=312359.

251. Press Release, H. Fin. Servs. Comm., Capital Markets to Examine the Securitization of Life Insurance Settlements (Sept. 23, 2009), http://www.house.gov/apps/list/press/financialsvcs_dem/presskanjorski_092309.shtml.

252. Letter from Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, to Senator Herb Kohl, Chairman, S. Special Comm. on Aging, (Apr. 28, 2009), *in* MAJORITY STAFF OF S. SPECIAL COMM. ON AGING, 111TH CONG., LIFE SETTLEMENTS: RISKS TO SENIORS – SUMMARY OF COMM. INVESTIGATION, app. II at 10-11 (2009).

253. *Id.*

254. *Id.*

255. AM. COUNCIL OF LIFE INSURERS & NAT'L ASSOC. OF INS. & FIN. ADVISORS, STOLI ALERT, at 1 (Nov. 2008), http://www.flseniors.net/images/StoliAlert_nov08.pdf.

256. New Mexico does not regulate life settlements although it has a 1999 statute that regulates viatical settlements for the terminally ill. Corey Pein, *Die, Already!*, SANTA FE

company to drill for oil in a stake that could produce twenty-five million barrels of oil, but they needed money to pay for the drilling.[257] Following the advice of a financial planner, four of them took out life insurance policies totaling $80 million of face value expecting the planner to sell the policies for $16 million.[258] They paid nothing for the policies because the planner enlisted "consultants" who got a Santa Fe company set up by a Connecticut insurance executive to finance the premiums at 21.33% interest.[259] The "consultants" were unable to sell the policies so the Texans were stuck with a $13 million bill for the insurance premiums and interest.[260] The Texans' complaint alleges that they were knowledgeable about the technical aspects of their drilling project but naive about the financial arrangement.[261] Among the allegations in the complaint are fraud, unfair trade practices, breach of contract, and breach of fiduciary duties.[262] That the insureds in that case were wealthy and elderly is typical, because the wealthier the insureds, the larger the policies the insurance companies will write. The more elderly the insureds, the sooner they are likely to die, and all the benefit goes to the ultimate investors, if there are any. Although this case does not elicit strong sympathy for any of the parties involved, it suggests that life settlements pervert the purpose of life insurance and create profits for planners, agents, brokers, or originators who have added nothing of value, and if duplicated often enough, to the detriment of future premium payers.

Many of the cases involving life settlements are based on misrepresentations on the life insurance policy application or on the lack of an insurable interest. Both of these issues were raised in a 2009 case of first impression in New Jersey.[263] A "broker" introduced seventy-five-year-old Calhoun to a Lincoln National Life Insurance Company agent who introduced Calhoun to a California resident who was to be named trustee of the Walter Calhoun Family Insurance Trust, which Calhoun established.[264] The broker told Calhoun he could apply for a life insurance policy and then sell it for a profit at no cost to himself.[265] Calhoun applied to Lincoln for a $3 million policy naming the Trust as the owner and beneficiary.[266] On the

REP., Nov. 17, 2009, at 13.

257. *Id.*

258. Tom Sharpe, S.F. *Bank Among Targets of Investor Suit*, SANTA FE NEW MEXICAN, Nov. 27, 2009, at A6.

259. Pein, *supra* note 256; Sharpe, *supra* note 258.

260. Sharpe, *supra* note 258.

261. *Id.*

262. *Id.*

263. Lincoln Nat'l Life Ins. Co. v. Calhoun, 596 F. Supp. 2d 882 (D.N.J. 2009).

264. *Id.* at 886.

265. *Id.*

266. *Id.*

insurance application, Calhoun answered "no" to a question that asked if the applicant had "engaged in any discussions regarding possible sale or assignment of the policy to 'a life settlement, viatical or other secondary market provider.'"[267] About twenty-two months after issuing the policy, Lincoln came to believe that Calhoun's policy was a STOLI policy and sued to have the policy declared void because of Calhoun's material misrepresentations and because of the absence of an insurable interest.[268] The federal district court held that Lincoln stated a claim on both issues.[269]

The court asserted that the instant case illustrated a growing debate between the insurance industry and "investment speculators."[270] The court noted that in a STOLI transaction the insured is "'selling his policy to a stranger whose only interest in the insured is his early demise.'"[271] In deciding the material misrepresentation issue, the court was emphatic that insurance companies can deny coverage based on the applicant's undertaking a variety of legal activities, including assigning the policy, if there are untruths on the application.[272] The court then cited the Supreme Court's opinion in *Grigsby v. Russell*[273] in 1911 for the proposition that "[l]ife insurance policies must be secured by an insurable interest to be valid"[274] because otherwise, life insurance contracts would merely be wagers.[275] Under both California and New Jersey law, an insurable interest is required at the time a policy is issued, but both states permit an insured to then transfer ownership to a person or entity without an insurable interest.[276] The court asserted, however, that it "run[s] afoul" of the insurable interest law when the insured procures a policy with the intention at the time of issuance to transfer it for a profit to someone without an insurable interest.[277] The court noted, however, that courts outside of New Jersey had differed on the role of intent in determining insurable interest.[278] The following two cases illustrate those differences.

In the beginning of 2008, the United States District Court for the Southern District of New York allowed a case to go forward based on allegations that an insured intended to transfer his life insurance policy in

267. *Id.*
268. *Id.*
269. *Id.* at 888-90.
270. *Id.* at 884.
271. *Id.* at 885 (quoting Life Prod. Clearing LLC v. Angel, 530 F. Supp. 2d 646, 648 (S.D.N.Y. 2008)).
272. *Id.* at 888.
273. 222 U.S. 149, 154-55 (1911).
274. *Lincoln*, 596 F. Supp. 2d at 888.
275. *Id.* at 889.
276. *Id.*
277. *Id.*
278. *Id.* at 889-90.

violation of New York's prohibition on wager policies.[279] In that case, Lobel, a seventy-seven-year-old retired butcher, learning about a new "financial opportunity" from an insurance agent, established the Leon Lobel Insurance Trust with himself as the beneficiary, and on the same day, he applied for a $10 million life insurance policy naming the Trust as the beneficiary.[280] Less than a week later he sold the Trust to Life Product Clearing LLC for $300,000.[281] In their agreement, Life Product agreed to pay all the policy premiums in exchange for receiving the death benefit when Lobel died.[282] He received the money about seven weeks later and died five days after receipt of the money.[283] After investigating for a year, the insurance company paid the Trust $10,712,328.77, the face amount of the policy plus interest.[284] In this case, Life Product sued Lobel's daughter, the personal representative of his estate, for a declaration that Life Product is the rightful beneficiary of the Trust.[285] The daughter counterclaimed arguing that Lobel's agreement with Life Product was void as against public policy because it involved a "wager policy" with Life Product, a stranger gambling on Lobel's life.[286]

The Southern District discussed the new life settlement industry and stated that stranger-owned (not stranger-originated) life insurance policies:

> are lawful only if the insured purchases the policy with a good-faith intent to obtain insurance for the benefit of his family, loved one, or business; they are not lawful if the insured purchases the policy with the intent to resell it to a stranger at the earliest possible moment.[287]

The court concluded that this was a case that turned on the issue of intent and, therefore, it could not be decided summarily.[288]

In deciding a case of first impression in Minnesota at the end of 2008, the U.S. District Court for the District of Minnesota held that a life insurance policy is not void *ab initio* when the policy owner's intent upon issuance of the policy was to transfer the policy for a profit to a third party without an insurable interest unless there is "evidence of the intent of a third party to buy the policies at the time they were procured, which necessarily requires identification of that party."[289] The court held that the

279. Life Prod. Clearing, LLC v. Angel, 530 F. Supp. 2d 646, 655-56 (S.D.N.Y. 2008).
280. *Id.* at 647-48.
281. *Id.* at 647.
282. *Id.* at 649.
283. *Id.* at 647.
284. *Id.* at 647-48.
285. *Id.* at 648.
286. *Id.*
287. *Id.*
288. *Id.* at 656.
289. Sun Life Assurance Co. of Can. v. Paulson, No. 07-3877, 2008 WL 5120953, at *4

policy owner's intent by itself is "irrelevant."[290]

Although the New York and Minnesota cases had opposite results, the difference in holdings can be attributed to the differences in the facts. Unlike the New York case where there were allegations naming the third party who induced the insured to take out the life insurance policy, in the Minnesota case, the insurance company could not, after postponing a hearing and taking several depositions, produce the identity of a third party who intended to buy the policy owner's policies at the time they were issued.[291] Whether the New York court was more inclined to let circumstantial evidence be persuasive about the third party's involvement in the purchase of the insurance policy *ab initio* is also a possibility. In the New York case, if the outcome is "no 'insurable interest'," then the $10 million plus interest will go to Lobel's heirs instead of to life settlement investors.[292] In the Minnesota case, if the outcome is "lack[ing] an insurable interest," then the insurance company will not have to pay a death benefit to anyone.[293]

None of these choices is particularly attractive because involvement in a STOLI scheme should not reap benefits for anyone—not the investors, not the heirs of the insured, not the insurance company. Life settlement companies know they are acting illegally when they participate in STOLI schemes; they and their investors should not benefit from their involvement. The insured should not be able to have it both ways: getting money while alive from a life settlement company in exchange for illegally buying life insurance policies for them, and, if that does not work out for the investors, then the insured's heirs will get the proceeds from the policies—a win-win situation for participating in an illegal scheme. The insurance company should not collect premiums for STOLI policies and then never have to pay out a death benefit at all. Insurance companies should have to forfeit premiums collected if they failed to perform due diligence in writing policies where there is no insurable interest.

In early 2009, the United States Court of Appeals for the Fourth Circuit applying Arizona law agreed with the Minnesota decision.[294] In that case, Moore, an Arizona resident, according to the court, "commenced a fraudulent scheme."[295] Moore bought seven life insurance policies with a total face value of $8.5 million.[296] Within months he sold the policies with

(D. Minn. Dec. 3, 2008).

290. *Id.*

291. *Id.* at *2.

292. *Life Prod. Clearing, LLC*, 530 F. Supp. 2d at 648.

293. *Sun Life Assurance Co. of Can.*, 2008 WL 5120953, at *5.

294. First Penn-Pac. Life Ins. Co. v. Evans, 313 F. App'x 633, 636 n.3 (4th Cir. Feb. 26, 2009).

295. *Id.* at 634.

296. *Id.* at 635.

the help of a viatical settlement broker after falsely claiming to be terminally ill.[297] The insurance company tried to have one of the policies declared void *ab initio* by claiming that Moore did not have an insurable interest because of his intent to sell the policies to strangers at the time he applied for them.[298] The court held that Moore did have an insurable interest when he obtained the policy because "[n]o third party participated in the procurement of Moore's policy and therefore no one was 'wagering' on Moore's life in violation of public policy."[299] The court cited the difficulty of "evaluating insurable interest on the basis of the subjective intent of the insured at the time the policy issues."[300] This argument is not very persuasive, because intent is used to decide a myriad of issues throughout the law, particularly in criminal and tort cases, without making the law in those areas "unworkable."[301] The court rather outrageously refused to consider subjective intent in evaluating insurable interest because doing so "would inject uncertainty into the secondary market for insurance."[302] It is difficult to understand why the court assumed responsibility to protect the life settlement industry. In so doing, the court is encouraging life insurance scams.

In July 2009, the U.S. District Court for the Central District of California, applying California law, also held that the insured's intent is irrelevant in deciding whether the insured had an insurable interest, noting that it was enforcing existing law even though it was "'bad law.'"[303] At issue were three $10 million life insurance policies purchased by Fishman from the Lincoln National Life Insurance Company naming as beneficiary the Fishman Trust which designated Fishman's four sons as trust beneficiaries.[304] Lincoln brought this case to have the three policies declared void because they were STOLI, prohibited under California law.[305] Lincoln contended that before the policies were issued, the Fishman Trust applied to the Mutual Credit Corporation, a known supplier of non-recourse premium financing, and borrowed $2,842,107—enough to cover two years' worth of premiums on the policies ($2.1 million), origination fees, and a "premium reserve" that could be used any way the Trust wanted[306]—and

297. *Id.*
298. *Id.*
299. *Id.* at 636.
300. *Id.*
301. *Id.*
302. *Id.*
303. Lincoln Nat'l Life Ins. Co. v. Gordon R.A. Fishman Irrevocable Life Trust, 638 F. Supp. 2d 1170, 1179-80 (C.D. Cal. 2009) (citing "President Ulysses S. Grant, who said that 'the best way to get rid of a bad law is to enforce it.'").
304. *Id.* at 1174.
305. *Id.* at 1170-71.
306. *Id.* at 1175-76.

almost immediately after the policies were issued, the Trust awarded Mutual a collateral assignment.[307] Lincoln had prior experiences with the Mutual Credit Corporation, because Mutual had funded over eighty other policies that Lincoln had written.[308] Of those policies not a single original insured or beneficial trust retained ownership of the policies after the two-year contestability period had expired.[309] It was known that Mutual's funding source was a hedge fund that invests in life settlements.[310]

The Central District Court recounted a detailed description of insurable interest under California law.[311] The court concluded that the way the Fishman transactions were conducted, the Fishman Trust, which owned the policies when they were issued, had an insurable interest in Fishman's life.[312] The court noted the "not-so-subtle deviousness on the part of [Mutual]," but held that the court could not look behind the sham formalities of the agreement to "re-write it to reflect what was really going on between the various parties [to determine] the existence (or lack thereof) of an insurable interest to an insurance policy."[313] The court also noted that California law might be changed by the legislature[314] and that, in fact, is what happened. In October 2009 the governor signed legislation that defines illegal STOLI policies as including those in which:

> life insurance is purchased with resources or guarantees from or through a person or entity, that, at the time of policy inception, could not lawfully initiate the policy himself, herself, or itself, and where, at the time of inception, there is an arrangement or agreement, to directly or indirectly transfer the ownership of the policy or the policy benefits to a third party. Trusts that are created to give the appearance of insurable interest and that are used to initiate policies for investors violate insurable interest laws and the prohibition against wagering on life.[315]

The United States District Court for the Eastern District of Michigan, applying Michigan law in a case with several different claims, held that the intention of the insured at the time life insurance policies are issued, to transfer them to a third party stranger does violate the insurable interest

307. *Id.* at 1178.
308. *Id.* at 1176.
309. *Id.*
310. *Id.*
311. *Id.* at 1177-79.
312. *Id.* at 1178. Under California law, an irrevocable trust "may purchase and hold life insurance policies on the life of its settlor. Moreover, Dr. Fishman's sons, who were the ultimate beneficiaries of the Trust, also have an insurable interest in their father's life as . . . California law defines relation 'by blood' as rendering it an insurable interest." *Id.*
313. *Id.* at 1178-79.
314. *Id.* at 1179.
315. CAL. INS. CODE § 10113.1(w) (West 2009).

requirement.[316] The court noted that "the consensus is that an assignment is void if it is made in bad faith in order to circumvent the law on insurable interest . . . . The test for determining whether the assignment is valid is the intent of the parties."[317]

On the issue of who can assert the lack of an insurable interest in procuring a life insurance policy, in May 2009, the U.S. Court of Appeals for the Sixth Circuit, applying Ohio law, held that only the insurance company can assert it, and then the insurance contract is voidable at the company's option.[318] In a case where the receiver of a defunct life settlement company was seeking to recover the premiums the company had paid on life insurance policies it had encouraged elderly people to purchase and then assign to the company, the court refused to support a rule that would have allowed policy owners who had committed fraud in procuring life insurance policies to receive a refund of the premiums paid.[319] The court concluded that doing so would have the "perverse effect" of allowing any defrauders to pay premiums knowing that if they ever could not afford them, they could get back the premiums they had already paid.[320]

Two months later the U.S. District Court for the Southern District of New York also had to decide who can assert the lack of an insurable interest in procuring a life insurance policy.[321] The case involved Moldaw, who participated in a scheme suggested by his "longtime estate-planning advisor," for which he purchased ten or twelve insurance policies on his life with a total face value of $78 million.[322] A group of investors bought the policies for $4 million and, after Moldaw died, the insurance companies paid the death benefits to the investors.[323] In this case, Moldaw's widow and a trust he had set up, both domiciled in California, sued the investors, domiciled in New York, to recover the insurance payments.[324] The court cited a New York statute that permits the administrator or executor of an estate to sue a person or entity that procured a life insurance policy on the deceased without having an insurable interest in his or her life.[325] But the court concluded that California law applied to this case, and under

316. Phoenix Life Ins. Co. v. LaSalle Bank N.A., Nos. 2:07-cv-15324, 2:08-cv-11562, 2009 WL 877684, at *11 (E.D. Mich. Mar. 30, 2009).

317. *Id.* (citing Lee R. Russ & Thomas F. Segalia, COUCH ON INSURANCE 3D § 36:87 (2001)).

318. Wuliger v. Mfrs. Life Ins. Co., 567 F.3d 787, 796-97 (6th Cir. 2009).

319. *Id.* at 797.

320. *Id.*

321. 2004 Stuart Moldaw Trust v. XE L.I.F.E., LLC, 642 F. Supp. 2d 226, 228 (S.D.N.Y. 2009).

322. *Id.* at 228.

323. *Id.*

324. *Id.*

325. *Id.* (citing N.Y. INS. LAW § 3205(b) (McKinney)).

California law only the insurer can raise the issue of insurable interest.[326]

The alleged facts of a case ongoing now in the Southern District of New York illustrate why the California rule is preferable as a STOLI deterrent. In *Kramer v. Lockwood Pension Services, Inc.*,[327] Arthur Kramer, a founder of a well-known international law firm, at the age of seventy-eight established two trusts with his children as beneficiaries, and associates of Lockwood Pension Services as trustees.[328] Then he took out life insurance policies, with himself as the insured and the trusts as owners and beneficiaries, with three different life insurance companies for a total face value of $56.2 million.[329] After the policies were issued, Kramer allegedly told his children to assign their interests in the trusts to stranger investors.[330] Court documents indicate that one of the children sold her rights for a $100,000 payment.[331] Neither Kramer nor any of the children ever made a premium payment.[332]

Three years later, Kramer at the age of eighty-one died of a stroke after taking ill while skiing alone in Sun Valley, Idaho.[333] Now Kramer's widow, as the personal representative of his estate, is seeking to have the proceeds of the insurance policies paid to her on the grounds that the stranger investors had no insurable interest in her husband's life.[334] The stranger investors want the proceeds paid to them as holders of the beneficial interest in the trusts, and the insurance companies want to have the policies voided and not paid to anyone.[335] No one in this case has clean hands; they were all involved in perverting the purpose of life insurance.

326. *Id.* at 234-35 (citing Jenkins v. Hill, 96 P.2d 168 (Cal. Ct. App. 1939); Woodmen of the World v. Rutledge, 65 P. 1105 (Cal. 1901)).

327. 653 F. Supp. 2d 354 (S.D.N.Y. 2009) (deciding various motions to dismiss). Phoenix Life Insurance Co. appealed the District Court decision to the United States Court of Appeals for the Second Circuit, and the Second Circuit certified the following question to the New York Court of Appeals: Does New York Insurance Law §§ 3205(b)(1) and (b)(2) prohibit an insured from procuring a policy on his own life and immediately transferring the policy to a person without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection for a person with an insurable interest in the insured's life? Kramer v. Phoenix Life Ins. Co., No. 176, 2010 WL 4628103, at *1 (Nov. 17, 2010). The Court of Appeals answered in the negative and held that "New York law permits a person to procure an insurance policy on his or her own life and immediately transfer it to one without an insurable interest in that life, even where the policy was obtained for just such a purpose." *Id.*

328. Asher Hawkins, *Should Strangers Be Able to Profit from Your Death?*, FORBES, Sept. 11, 2009, http://www.forbes.com/2009/09/11/stoli-stranger-originated-life-insurance-personal-finance-stoli.html.

329. *Id.*

330. *Kramer*, 653 F. Supp. 2d at 366.

331. *Id.* at 368.

332. *Id.* at 366.

333. Hawkins, *supra* note 328.

334. *Kramer*, 653 F. Supp. 2d at 363.

335. *Id.*

But the court is applying New York law, which gives the heirs of Kramer, a well-known lawyer who had to have known that he was participating in an insurance fraud, the opportunity to reap tens of millions because of his fraud. That is not a desirable outcome. The insurance companies should be able to void the policies and then pay the premiums received from the investors as a penalty for issuing the policies without adequately investigating the circumstances of their origination.

In addition to the issue of insurable interest, these STOLI cases often include a misrepresentation claim. An example is a 2009 case decided by the U.S. Court of Appeals for the Eleventh Circuit, which held that an insurance company can rescind a life insurance policy for a material misrepresentation on the application.[336] Eighty-one-year-old Sam Schoenthal applied to American General Life Insurance Company for a $7 million life insurance policy.[337] In his application he said his net worth was $10.7 million and his annual income was more than $150,000 when, in fact, his net worth was $160,000, and his annual income was $7,200.[338] In one paragraph the Eleventh Circuit cited the district court's explanation of the "complicated insurance investment mechanism" involving a "maze of related entities" in which Schoenfeld was a participant, and then the court described some of the "agents" and "independent contractors" involved.[339] But the court did not discuss life settlements or STOLI at all: it focused on the specific issue of the right under Georgia law of an insurance company to void a policy because of a material misrepresentation on an application and concluded that American General had the right in the instant case.[340] One has to wonder about the efficacy or existence of American General's due diligence regime if it could not discover such extreme exaggerations before issuing a large policy.

Finally, a recent case decided in March 2010 by the U.S. District Court in Minnesota illustrates the greedy players in these financial schemes taking advantage of existing law to subvert the purpose of life insurance to obtain something for nothing. In *PHL Variable Insurance Company v. Morello*,[341] Jason Mitan, a disbarred lawyer with a felony conviction for tax evasion and bankruptcy fraud, approached his part-time hairdresser, Jeffrey Chiaro, about obtaining a life insurance policy for Chiaro's mother, Lucille Morello.[342] Mitan introduced Morello to his associate David Claus, who

336. Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC, 555 F.3d 1331, 1335 (11th Cir. 2009).

337. *Id.*

338. *Id.*

339. *Id.* at 1335-36.

340. *Id.* at 1340-41.

341. PHL Variable Insurance Co. v. Lucille E. Morello 2007 Irrevocable Trust, No. 08-572 (MJD/SRN), 2010 WL 2539755, at *1 (D. Minn. Mar. 3, 2010).

342. *Id.* at *2.

offered Morello free life insurance and explained that the policies obtained would be sold to third parties.[343] Claus and Chiaro set up trusts that would own Morello's policies.[344] Claus also provided a financial statement for Morello that he said was prepared by Certified Public Accountant John Abrams.[345] The court noted that there was no official record of John Abrams or his accounting business.[346]

The Lucille E. Morello 2007 Irrevocable Trust applied to PHL Variable Insurance Company (Phoenix) for a life insurance policy insuring Morello, and in its application the Trust affirmed that Morello had a net worth of almost $34 million and an annual income of more than $800,000.[347] The Trust submitted a Statement of Client Intent (SOCI) stating that there was no intent to transfer an interest in the policy to a third party, and that the intent was to use the policy for "estate conservation purposes."[348] The Trust also submitted a report by Examination Management Services, Inc. (EMSI) to confirm the truth of the statements in the application.[349] The EMSI representative approved the application after speaking with Morello, Chiaro, and Claus.[350] In fact, Morello had assets of about $800,000 and an annual income of about $30,000.[351]

Phoenix issued a life insurance policy with a $10 million death benefit, and the Trust paid premiums of over $500,000 after receiving a loan for more than that amount funded by the company that was going to be the ultimate purchaser of the Trust.[352] Phoenix paid commissions to two insurance agents for a total of over $570,000.[353] When Morello died within two years of the policy being issued, Phoenix did an investigation and concluded that the original application contained fraudulent information.[354]

The district court held that the policy was void because of the "willfully false" statements on the application and that, under Minnesota law, the insurer is not required to return premiums paid when a policy is issued because of a fraud.[355] The court opined that a "contrary rule would be an invitation to commit fraud."[356] The court did not acknowledge that the current rule is an invitation for insurance companies to provide life

343. *Id.*
344. *Id.* at *3.
345. *Id.* at *2.
346. *Id.*
347. *Id.* at *1.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.* at *3.
352. *Id.*
353. *Id.* at *2.
354. *Id.* at *3.
355. *Id.* at *4.
356. *Id.*

insurance policies to everyone without performing due diligence to see if the purchaser has an insurable interest and is entitled under the law to procure the policy. Phoenix did an investigation and discovered the fraud when it had to pay out a $10 million death benefit.[357] Phoenix did not bother to investigate when it gladly was accepting a premium of over half a million dollars, knowing that if there was a fraud involved, it would not have to pay out on the policy, and it would be able to keep the premiums paid. There is so much money at stake for all the actors in these life settlement schemes that poorly considered regulation encourages bad behavior on all their parts.

VIII. ANALYSIS AND CONCLUSION

Life insurance serves the important public purpose of allowing people "to ensure from beyond the grave" that family members and business associates who relied on them will have the financial resources to maintain their lives.[358] Life insurance keeps those people who have suffered personal losses from also suffering financial disasters, and it keeps them from burdening taxpayers.

But life insurance policies are a peculiar financial product. When people buy automobile insurance policies, their purpose is to lessen the risk that they will suffer significant financial repercussions if they are involved in car accidents that cause property damage or personal injuries. When people buy homeowners policies, their purpose is to lessen the risk that they will suffer significant financial damage if, for example, someone slips and falls on their property incurring physical injuries. If these policy owners never use their policies, they consider themselves lucky even though they have been paying premiums for many years. Policy owners are paying to have risk coverage, not savings accounts. They do not expect to get anything back after paying premiums for years. Presumably if they had risk coverage plus savings accounts, their premiums would be much higher. This last arrangement is the situation with whole life or universal life insurance. It got to be that way because these financial products were and are big moneymakers for insurance companies.

It is important to remember this life insurance history to see clearly that there is no good reason for life insurance policies to be investment vehicles, either simple ones in which original policy owners save for the future or complicated ones where investors buy shares of securitized pools of policies. Realistically, there will, of course, be no change in the availability of whole and universal life policies, but using life insurance

357. *Id.* at *2.
358. *See, e.g.*, Lincoln Life & Annuity Co. of N.Y. v. Bernstein, No. 08-2641, 2009 WL 1912468, at *4 (N.Y. Sup. Ct. June 29, 2009).

policies in a way that is completely unrelated to their original purpose could and should be banned. There is, perhaps, one appropriate exception, to the idea of using life insurance only for its primary traditional purpose; and that is in the original viatical settlement situation. If someone has an existing life insurance policy, no longer has a need for it, and is facing a dire health, financial, or family emergency, it is reasonable to permit that insured to sell the policy to the highest bidder. In those circumstances, it would not be difficult for the insured to rebut a presumption that life insurance policies are being sold as mere investment tools.

It is a mistake to encourage the "same wild financial infrastructure" that led to the mortgage meltdown to subvert the underlying transaction of providing a death benefit for loved ones or business associates.[359] Securitizing pools of life insurance policies that have been purchased as life settlements has no connection to the purpose of the underlying product. The only purpose of these new transactions is to create huge fees for the brokers, agents, originators, and traders while adding nothing of value to society.[360]

Just as there was a lack of transparency in the securitization of mortgages, there will be the same problem in the securitization of life insurance policies.[361] Investors will not know how old the insureds are, what their medical conditions and life expectancies are, or how financially sound the insurance companies underwriting the policies are. But in this kind of securitization there are the additional problems of preserving the privacy of the insureds and the unspoken fact that the sooner the insureds die, the better off investors are; quick deaths could make the difference between earning a substantial profit and taking a loss. A Washington journalist had described the "$26 trillion life insurance market" as "ripe for

359. Weir, *supra* note 158, at 2 (quoting Michael Greenberger, former Director of Commodity Futures Trading Commission).

360. *See generally* Roger Lowenstein, *Who Needs Wall Street?*, N.Y. TIMES, Mar. 21, 2010, (Magazine), at 15, 16 (arguing that devising complex financial instruments is not in the best interest of clients); Klaus Schwab, Op-ed., *Bank Bonuses and Communitarian Spirit*, WALL ST. J., Jan. 15, 2010, at A19 ("The purpose of an enterprise–to create goods and services for the common good–has been replaced by a purely functional enterprise philosophy aimed at maximizing profits in the shortest time possible. . . . This development was particularly visible in the financial sector, where there is at best only an indirect connection with the original purpose of an enterprise, meaning the creation of substantive, real value."); Anniki Laine, *Securities Speculation Tax*, CITIZEN WORKS (Citizen Works, D.C.), 2009, at 1, http://www.citizenworks.org/admin/Microsoft%20Word%20-%20SST.4DiscussionPiece.pdf ("Today, our economy is overwhelmingly dominated by a type of finance that has less to do with financing corporate production, and more to do with shuffling money around the market to make a profit.").

361. *See generally* Gretchen Morgenson, *Pools That Need Some Sun*, N.Y. TIMES, Mar. 21, 2010, (Business), at 1, 8 (arguing that investors have lost confidence in securitization pools and that greater securitization is necessary to lure them back).

plucking a la subprime mortgage sleight of hand. For the next big bubble, scam artists are buying, bundling, packaging, securitizing and selling 'stranger-owned' life insurance policies that ill and elderly people sell for cash."[362] Such an unseemly financial undertaking should create in us the same kind of hostility engendered in eighteenth century England when life insurance wagers were popular.

It would provide clarity and certainty if Congress acted to consolidate in one federal law a compilation of the various regulatory schemes enacted in most states. But courts can also make life settlements very unattractive by strictly enforcing insurable interest laws and not allowing policy owners or life settlement agents to game the system. In addition, insurance companies can take actions that would limit the reach of life settlement companies. For example, although the insurable interest doctrine requires a relationship between the purchaser of a policy and the insured, the policy owner can designate any person or entity as a beneficiary. Insurance companies could in their contracts require that for the life of the policy at least fifty percent of the death benefit be paid to people or entities with insurable interests or to a trust in which the beneficial interest is held by people or entities with insurable interests.[363] Such a requirement would not prohibit the insured from changing beneficiaries during the life of the policy, but the fifty percent insurable interest requirement would remain constant, except in the case of medical, financial, or family dire change of circumstances. That beneficiary change alone would undo the life settlement industry and securitization. The industry would return to being a viatical settlement business and would not have sufficient numbers of policies to securitize them. Life insurance companies should also reconsider the amount they pay out in surrender value so that life settlement offers would not look so attractive. Life insurance companies are involved in so many lawsuits involving life settlements and are being threatened with such a major change in the way they do business that it is certainly in their interest to do their own due diligence in writing policies and in examining their own ways of doing business.

In his opening statement at the Hearing on Recent Innovations in Securitization held by the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Chairman Paul Kanjorski (D. Pa.) noted some important cautionary considerations before a public embrace of the current direction of the litigation settlement industry:

> [T]his industry . . . has the potential for substantial abuse. . . . The improper securitization of life settlements could ultimately leave

362. Arnaud de Borchgrave, Op-ed., *Unraveling at the seams–Gloom and Doom and Moore Is Less*, WASH. TIMES, Oct. 6, 2009, at A17.

363. Best, Jr., *supra* note 191, at 931.

countless seniors penniless and innumerable investors broke. The idea of institutional investors profiting from a person's death also seems, to say the least, unsettling and immoral. It leads us down a slippery slope that might eventually result in indexes based on divorce rates and swaps tied to gambling losses. . . . [T]he best policy [may be] to keep this Pandora's box shut.[364]

364. *Hearing on Recent Innovations in Securitization Before the H. Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. Servs*, 111th Cong. (Sept. 24, 2009) (statement of Rep. Paul E. Kanjorski, Chairman, H. Fin. Servs. Subcomm.).