Sixtieth
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT
with House Amendments

ENGROSSED SENATE BILL NO. 2268

Introduced by

Senators Klein, Hacker, Heitkamp

Representatives Ekstrom, N. Johnson, Keiser

A BILL for an Act to create and enact chapter 26.1-33.3 of the North Dakota Century Code, relating to viatical settlement contracts; to amend and reenact subdivision a of subsection 21 of section 10-04-02 of the North Dakota Century Code, relating to the definition of viatical settlement contract; to repeal chapter 26.1-33.2 of the North Dakota Century Code, relating to viatical settlement contracts; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subdivision a of subsection 21 of section 10-04-02 of the North Dakota Century Code is amended and reenacted as follows:

a. The assignment, transfer, sale, devise, or bequest of a death benefit, life insurance policy, or certificate of insurance by the viator to the viatical settlement provider pursuant to chapter ~~26.1-33.2~~ 26.1-33.3;

SECTION 2. Chapter 26.1-33.3 of the North Dakota Century Code is created and enacted as follows:

26.1-33.3-01. Definitions.

1. "Advertising" means any written, electronic, or printed communication or any communication by means of recorded telephone messages or transmitted on radio, television, the internet, or similar communications media, including film strips, motion pictures, and videos, published, disseminated, circulated, or placed directly before the public, in this state, for the purpose of creating an interest in or inducing a person to sell, assign, devise, bequest, or transfer the death benefit or ownership of a life insurance policy pursuant to a viatical settlement contract.
2. "Business of viatical settlements" means an activity involved in, but not limited to, the offering, soliciting, negotiating, procuring, effectuating, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning,

pledging, hypothecating, or in any other manner, acquiring an interest in a life insurance policy by means of a viatical settlement contract.

3. "Chronically ill" means:

a. Being unable to perform at least two activities of daily living, such as eating, toileting, transferring, bathing, dressing, or continence;

b. Requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment; or

c. Having a level of disability similar to that described in subdivision a as determined by the secretary of health and human services.

4. a. "Financing entity" means an underwriter, placement agent, lender, purchaser of securities, purchaser of a policy or certificate from a viatical settlement provider, credit enhancer, or any entity that has a direct ownership in a policy or certificate that is the subject of a viatical settlement contract, but:

(1) Whose principal activity related to the transaction is providing funds to effect the viatical settlement or purchase of one or more viaticated policies; and

(2) Who has an agreement in writing with one or more licensed viatical settlement providers to finance the acquisition of viatical settlement contracts.

b. "Financing entity" does not include a nonaccredited investor or a viatical settlement purchaser.

5. "Fraudulent viatical settlement act" includes:

a. Acts or omissions committed by any person who, knowingly or with intent to defraud, for the purpose of depriving another of property or for pecuniary gain, commits, or permits its employees or its agents to engage in acts including:

(1) Presenting, causing to be presented or preparing with knowledge or belief that it will be presented to or by a viatical settlement provider, viatical settlement broker, viatical settlement purchaser, financing entity, insurer, insurance producer, or any other person, false material

information, or concealing material information, as part of, in support of or concerning a fact material to one or more of the following:

(a) An application for the issuance of a viatical settlement contract or insurance policy;

(b) The underwriting of a viatical settlement contract or insurance policy;

(c) A claim for payment or benefit pursuant to a viatical settlement contract or insurance policy;

(d) Premiums paid on an insurance policy;

(e) Payments and changes in ownership or beneficiary made in accordance with the terms of a viatical settlement contract or insurance policy;

(f) The reinstatement or conversion of an insurance policy;

(g) The solicitation, offer, effectuation, or sale of a viatical settlement contract or insurance policy;

(h) The issuance of written evidence of a viatical settlement contract or insurance; or

(i) A financing transaction; and

(2) Employing any plan, financial structure, device, scheme, or artifice to defraud related to viaticated policies;

b. In the furtherance of a fraud or to prevent the detection of a fraud any person commits or permits its employees or its agents to:

(1) Remove, conceal, alter, destroy, or sequester from the commissioner the assets or records of a licensee or other person engaged in the business of viatical settlements;

(2) Misrepresent or conceal the financial condition of a licensee, financing entity, insurer, or other person;

(3) Transact the business of viatical settlements in violation of laws requiring a license, certificate of authority, or other legal authority for the transaction of the business of viatical settlements; or

(4) File with the commissioner or the equivalent chief insurance regulatory official of another jurisdiction a document containing false information or otherwise conceal information about a material fact from the commissioner;

c. Embezzlement, theft, misappropriation, or conversion of moneys, funds, premiums, credits, or other property of a viatical settlement provider, insurer, insured, viator, insurance policyowner, or any other person engaged in the business of viatical settlements or insurance;

d. Recklessly entering into, negotiating, brokering, or otherwise dealing in a viatical settlement contract, the subject of which is a life insurance policy that was obtained by presenting false information concerning any fact material to the policy or by concealing, for the purpose of misleading another, information concerning any fact material to the policy, if the person or the persons intended to defraud the policy's issuer, the viatical settlement provider or the viator. "Recklessly" means engaging in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; or

e. Attempting to commit, assisting, aiding, or abetting in the commission of, or conspiracy to commit the acts or omissions specified in this subsection.

6. "Person" means a natural person or a legal entity, including an individual, partnership, limited liability company, association, trust, or corporation.

7. "Policy" means an individual or group policy, group certificate, contract, or arrangement of life insurance owned by a resident of this state, regardless of whether delivered or issued for delivery in this state.

8. "Related provider trust" means a titling trust or other trust established by a licensed viatical settlement provider or a financing entity for the sole purpose of holding the ownership or beneficial interest in purchased policies in connection with a financing transaction. The trust must have a written agreement with the licensed viatical settlement provider under which the licensed viatical settlement provider is responsible for ensuring compliance with all statutory and regulatory requirements

and under which the trust agrees to make all records and files related to viatical settlement transactions available to the commissioner as if those records and files were maintained directly by the licensed viatical settlement provider.

9. "Special purpose entity" means a corporation, partnership, trust, limited liability company, or other similar entity formed solely to provide either directly or indirectly access to institutional capital markets:

a. For a financing entity or licensed viatical settlement provider; or

b. (1) In connection with a transaction in which the securities in the special purposes entity are acquired by the viator or by "qualified institutional buyers" as defined in rule 144 adopted under the Securities Act of 1933, as amended; or

(2) The securities pay a fixed rate of return commensurate with established asset-backed institutional capital markets.

10. "Terminally ill" means having an illness or sickness that can reasonably be expected to result in death in twenty-four months or less.

11. "Viatical settlement broker" means a person who working exclusively on behalf of a viator and for a fee, commission, or other valuable consideration, offers or attempts to negotiate viatical settlement contracts between a viator and one or more viatical settlement providers or one or more viatical settlement brokers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator, and not the insurer or the viatical settlement provider, and owes a fiduciary duty to the viator to act according to the viator's instructions and in the best interest of the viator. The term does not include an attorney, certified public accountant, or a financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator and whose compensation is not paid directly or indirectly by the viatical settlement provider or purchaser.

12. a. "Viatical settlement contract" means a written agreement between a viator and a viatical settlement provider or any affiliate of the viatical settlement provider establishing the terms under which compensation or anything of value is or will be paid, which compensation or value is less than the

expected death benefits of the policy, in return for the viator's present or future assignment, transfer, sale, devise, or bequest of the death benefit or ownership of any portion of the insurance policy or certificate of insurance.

b. "Viatical settlement contract" includes a premium finance loan made for a life insurance policy by a lender to a viator on, before, or after the date of issuance of the policy if:

(1) The loan proceeds are not used solely to pay:

(a) Premiums for the policy; or

(b) The costs of the loan, including interest, arrangement fees, utilization fees and similar fees closing costs, legal fees and expenses, trustee fees and expenses, and third-party collateral provider fees and expenses, including fees payable to letter of credit issuers;

(2) The viator or the insured receives on the date of the premium finance loan a guarantee of a future viatical settlement value of the policy; or

(3) The viator or the insured agrees on the date of the premium finance loan to sell the policy or any portion of its death benefit on any date following the issuance of the policy.

c. "Viatical settlement contract" does not include:

(1) A policy loan or accelerated death benefit made by the insurer pursuant to the policy's terms;

(2) A loan made by a bank or other licensed financial institution in which the lender takes an interest in a life insurance policy solely to secure repayment of the loan or, if there is a default on the loan and the policy is transferred, the further assignment of the policy by the lender, provided that the default itself is not pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this chapter;

(3) A loan made by a lender that does not violate chapter 26.1-20.1, provided that the premium finance loan is not described in subdivision b;

(4) An agreement in which all the parties are closely related to the insured by blood or law or have a lawful substantial economic interest in the continued life, health, and bodily safety of the person insured, or are trusts established primarily for the benefit of such parties;

(5) Any designation, consent, or agreement by an insured who is an employee of an employer in connection with the purchase by the employer, or trust established by the employer, of life insurance on the life of the employee;

(6) A bona fide business succession planning arrangement:

(a) Between one or more shareholders in a corporation or between a corporation and one or more of its shareholders or one or more trusts established by its shareholders;

(b) Between one or more partners in a partnership or between a partnership and one or more of its partners or one or more trusts established by its partners; or

(c) Between one or more members in a limited liability company or between a limited liability company and one or more of its members or one or more trusts established by its members;

(7) An agreement entered into by a service recipient, or a trust established by the service recipient, and a service provider, or a trust established by the service provider, who performs significant services for the service recipient's trade or business; or

(8) Any other contract, transaction, or arrangement exempted from the definition of viatical settlement contract by the commissioner based on a determination that the contract, transaction, or arrangement is not of the type intended to be regulated by this chapter.

13. "Viatical settlement investment agent" means a person who is an appointed or contracted agent of a licensed viatical settlement provider who solicits or arranges the funding for the purchase of a viatical settlement by a viatical settlement purchaser and who is acting on behalf of a viatical settlement provider. A viatical settlement investment agent is an agent as defined in section 10-04-02.

a. A viatical settlement investment agent shall not have any contact directly or indirectly with the viator or insured or have knowledge of the identity of the viator or insured.

b. A viatical settlement investment agent is deemed to represent the viatical settlement provider of whom the viatical settlement investment agent is an appointed or contracted agent.

14. a. "Viatical settlement provider" means a person, other than a viator, that enters into or effectuates a viatical settlement contract with a viator resident in this state.

b. "Viatical settlement provider" does not include:

(1) A bank, savings bank, savings and loan association, or credit union;

(2) A licensed lending institution or premium finance company making premium finance loans and exempted by the commissioner from the licensing requirement under the premium finance laws, that takes an assignment of a life insurance policy solely as collateral for a loan;

(3) The issuer of the life insurance policy;

(4) An authorized or eligible insurer that provides stop-loss coverage or financial guaranty insurance to a viatical settlement provider, purchaser, financing entity, special purpose entity, or related provider trust;

(5) A natural person who enters into or effectuates no more than one agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit;

(6) A financing entity;

(7) A special purpose entity;

(8) A related provider trust;

(9) A viatical settlement purchaser; or

(10) Any other person that the commissioner determines is not the type of person intended to be covered by the definition of viatical settlement provider.

15. "Viatical settlement purchase agreement" means a contract or agreement, entered into by a viatical settlement purchaser, to which the viator is not a party, to purchase a life insurance policy or an interest in a life insurance policy, that is entered into for the purpose of deriving an economic benefit. A viatical settlement purchase agreement is a viatical settlement contract as defined in section 10-04-02.

16. a. "Viatical settlement purchaser" means a person who provides a sum of money as consideration for a life insurance policy or an interest in the death benefits of a life insurance policy that has been or will be the subject of a viatical settlement contract, or a person who owns or acquires or is entitled to a beneficial interest in a trust that owns a viatical settlement contract or is the beneficiary of a life insurance policy that has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit.

b. "Viatical settlement purchaser" does not include:

(1) A licensee under this chapter;

(2) An accredited investor or qualified institutional buyer as defined, respectively, in rule 501(a) or rule 144A adopted under the Federal Securities Act of 1933, as amended;

(3) A financing entity;

(4) A special purpose entity; or

(5) A related provider trust.

17. "Viaticated policy" means a life insurance policy or certificate that has been acquired by a viatical settlement provider pursuant to a viatical settlement contract.

18. a. "Viator" means the owner of a life insurance policy or a certificate holder under a group policy who resides in this state and enters or seeks to enter into a viatical settlement contract. For the purposes of this chapter, a viator shall not be limited to an owner of a life insurance policy or a certificate holder under a group policy insuring the life of an individual with a terminal or chronic illness or condition except where specifically addressed. If there is more than one viator on a single policy and the viators are residents of different states, the transactions shall be governed by the law of the state in which the viator

having the largest percentage ownership resides or, if the viators hold equal ownership, the state of residence of one viator agreed upon in writing by all the viators.

b. "Viator" does not include:

(1) A licensee under this chapter;

(2) Qualified institutional buyer as defined, respectively, in rule 144A adopted under the Federal Securities Act of 1933, as amended;

(3) A financing entity;

(4) A special purpose entity; or

(5) A related provider trust.

26.1-33.3-02. License and bond requirements.

1. a. A person shall not operate as a viatical settlement provider or viatical settlement broker without first obtaining a license from the commissioner of the state of residence of the viator. A person may not operate as a viatical settlement broker without first obtaining an insurance producer license from the commissioner.

b. The insurer that issued the policy being viaticated shall not be responsible for any act or omission of a viatical settlement broker or viatical settlement provider arising out of or in connection with the viatical settlement transaction, unless the insurer receives compensation for the placement of a viatical settlement contract from the viatical settlement provider or viatical settlement broker in connection with the viatical settlement contract.

c. A person licensed as an attorney, certified public accountant, or financial planner accredited by a nationally recognized accreditation agency, who is retained to represent the viator, whose compensation is not paid directly or indirectly by the viatical settlement provider, may negotiate viatical settlement contracts on behalf of the viator without having to obtain a license as a viatical settlement broker.

2. Application for a viatical settlement provider or viatical settlement broker license shall be made to the commissioner by the applicant on a form prescribed by the

commissioner, and these applications shall be accompanied by a two hundred fifty dollar fee for a provider license and a two hundred dollar fee for a broker license.

3. Licenses may be renewed from year to year on the anniversary date upon payment of the annual renewal fee of one hundred dollars. Failure to pay the fees by the renewal date results in expiration of the license.

4. The applicant shall provide information on forms required by the commissioner. The commissioner shall have authority, at any time, to require the applicant to fully disclose the identity of all stockholders, partners, officers, members, and employees, and the commissioner may refuse to issue a license in the name of a legal entity if not satisfied that any officer, employee, stockholder, partner or member thereof who may materially influence the applicant's conduct meets the standards of this chapter.

5. A license issued to a legal entity authorizes all partners, officers, members and designated employees to act as viatical settlement providers or viatical settlement brokers, as applicable, under the license, and all those persons shall be named in the application and any supplements to the application.

6. Upon the filing of an application and the payment of the license fee, the commissioner shall make an investigation of each applicant and issue a license if the commissioner finds that the applicant:

a. If a viatical settlement provider, has provided a detailed plan of operation;

b. Is competent and trustworthy and intends to act in good faith in the capacity involved by the license applied for;

c. Has a good business reputation and has had experience, training or education so as to be qualified in the business for which the license is applied for;

d. (1) If a viatical settlement provider, has demonstrated evidence of financial responsibility in a format prescribed by the commissioner through either a surety bond executed and issued by an insurer authorized to issue surety bonds in this state or a deposit of cash, certificates of deposit or securities or any combination thereof in the amount of one hundred fifty thousand dollars.

(2) If a viatical settlement broker, has demonstrated evidence of financial responsibility in a format prescribed by the commissioner through either a surety bond executed and issued by an insurer authorized to issue surety bonds in this state or a deposit of cash, certificates of deposit, or securities or any combination thereof in the amount of one hundred fifty thousand dollars.

(3) The commissioner shall accept, as evidence of financial responsibility, proof that financial instruments in accordance with the requirements in this section have been filed with one or more states where the applicant is licensed as a viatical settlement provider or viatical settlement broker.

(4) The commissioner may ask for evidence of financial responsibility at any time the commissioner deems necessary.

(5) Any surety bond issued pursuant to this subdivision shall specifically authorize recovery by the commissioner on behalf of any person in this state who sustained damages as the result of erroneous acts, failure to act, conviction of fraud, or conviction of unfair practices by the viatical settlement provider or viatical settlement broker.

e. If a legal entity, provides a certificate of good standing from the state of its domicile; and

f. If a viatical settlement provider or viatical settlement broker, has provided an antifraud plan that meets the requirements of subsection 7 of section 26.1-33.3-13.

7. The commissioner shall not issue a license to a nonresident applicant, unless a written designation of an agent for service of process is filed and maintained with the commissioner or the applicant has filed with the commissioner, the applicant's written irrevocable consent that any action against the applicant may be commenced against the applicant by service of process on the commissioner.

8. A viatical settlement provider or viatical settlement broker shall provide to the commissioner new or revised information about officers, ten percent or more

stockholders, partners, directors, members, or designated employees within thirty days of the change.

26.1-33.3-03. License revocation and denial.

1. The commissioner may refuse to issue, suspend, revoke or refuse to renew the license of a viatical settlement provider or viatical settlement broker if the commissioner finds that:

   a. There was any material misrepresentation in the application for the license;

   b. The licensee or any officer, partner, member, or key management personnel has been convicted of fraudulent or dishonest practices, is subject to a final administrative action or is otherwise shown to be untrustworthy or incompetent;

   c. The viatical settlement provider demonstrates a pattern of unreasonable payments to viators;

   d. The licensee or any officer, partner, member or key management personnel has been found guilty of, or has pleaded guilty or nolo contendre to, any felony, or to misdemeanor involving fraud or moral turpitude, regardless of whether a judgment of conviction has been entered by the court;

   e. The viatical settlement provider has entered into any viatical settlement contract that has not been approved pursuant to this chapter;

   f. The viatical settlement provider has failed to honor contractual obligations set out in a viatical settlement contract;

   g. The licensee no longer meets the requirements for initial licensure;

   h. The viatical settlement provider has assigned, transferred, or pledged a viaticated policy to a person other than a viatical settlement provider licensed in this state, viatical settlement purchaser, an accredited investor or qualified institutional buyer as defined respectively in rule 501(a) or rule 144A promulgated under the Federal Securities Act of 1933, as amended, financing entity, special purpose entity, or related provider trust; or

   i. The licensee or any officer, partner, member, or key management personnel has violated any provision of this chapter.

2. The commissioner may suspend, revoke or refuse to renew the license of a viatical settlement broker if the commissioner finds that the viatical settlement broker has violated the provisions of this chapter or has otherwise engaged in bad faith conduct with one or more viators.

3. If the commissioner denies a license application or suspends, revokes or refuses to renew the license of a viatical settlement provider or viatical settlement broker pursuant to this chapter the commissioner shall conduct a hearing in accordance with chapter 28-32.

26.1-33.3-04. Approval of viatical settlement contracts and disclosure statements. A person shall not use a viatical settlement contract form or provide to a viator a disclosure statement from in this state unless first filed with and approved by the commissioner. The commissioner shall disapprove a viatical settlement contract form or disclosure statement form if in the commissioner's opinion, the contract or provisions contained therein fail to meet the requirement of sections 26.1-33.3-07, 26.1-33.3-09, and 26.1-33.3-12, and subsection 2 of section 26.1-33.3-13 or are unreasonable, contrary to the interests of the public, or otherwise misleading or unfair to the viator.

26.1-33.3-05. Reporting requirements and privacy.

1. Each viatical settlement provider shall file with the commissioner on or before March first of each year an annual statement containing such information as the commissioner may prescribed by regulation. Such information shall be limited to only those transactions where the viator is a resident of this state. Individual transaction data regarding the business of viatical settlements or data that could compromise the privacy of personal, financial, and health information of the viator or insured shall be filed with the commissioner on a confidential basis.

2. Except as otherwise allowed or required by law, a viatical settlement provider, viatical settlement broker, insurance company, insurance producer, information bureau, rating agency or company, or any other person with actual knowledge of an insured's identity, shall not disclose that identity as an insured, or the insured's financial or medical information to any other person unless the disclosure:

a. Is necessary to effect a viatical settlement between the viator and a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

b. Is provided in response to an investigation or examination by the commissioner or any other governmental officer or agency or pursuant to the requirements of subsection 3 of section 26.1-33.3-13;

c. Is a term of or condition to the transfer of a policy by one viatical settlement provider to another viatical settlement provider;

d. Is necessary to permit a financing entity, related provider trust or special purpose entity to finance the purchase of policies by a viatical settlement provider and the viator and insured have provided prior written consent to the disclosure;

e. Is necessary to allow the viatical settlement provider or viatical settlement broker or their authorized representatives to make contacts for the purpose of determining health status; or

f. Is required to purchase stop-loss coverage or financial guaranty insurance.

26.1-33.3-06. Examination or investigations.

1. Authority, scope and scheduling of examinations.

a. (1) The commissioner may conduct an examination under this chapter of a licensee as often as the commissioner deems appropriate after considering the factors set forth in this subdivision.

(2) In scheduling and determining the nature, scope, and frequency of the examinations, the commissioner shall consider such matters as the consumer complaints, results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, report of independent certified pubic accountants, and other relevant criteria as determined by the commissioner.

b. For purposes of completing an examination of a licensee under this chapter, the commissioner may examine or investigate any person, or the business of any person, in so far as the examination or investigation is, in the sole

discretion of the commissioner, necessary or material to the examination of the licensee.

c. In lieu of an examination under this chapter of any foreign or alien licensee licensed in this state, the commissioner may accept an examination report on the licensee as prepared by the commissioner for the licensee's state of domicile or port-of-entry state.

d. As far as practical, the examination of a foreign or alien insurer shall be made in cooperation with the insurance supervisory officials of other states in which the insurer transacts business.

2. Record retention requirement.

a. A person required to be licensed by this chapter shall for five years retain copies of all:

(1) Proposed, offered or executed contracts, purchase agreements, underwriting documents, policy forms, and applications from the date of the proposal, offer or execution of the contract or purchase agreement, whichever is later;

(2) Checks, drafts or other evidence and documentation related to the payment, transfer, deposit or release of funds from the date the transaction; and

(3) Other records and documents related to the requirements of this chapter.

b. The section does not relieve a person of the obligation to produce these documents to the commissioner after the retention period has expired if the person has retained the documents.

c. Records required to be retained by this section must be legible and complete and may be retained in paper, photograph, microprocess, magnetic, mechanical, or electronic media, or by any process that accurately reproduces or forms a durable medium for the reproduction of a record.

3. Conduct of examinations.

a. Upon determining that an examination should be conducted, the commissioner shall issue an examination warrant appointing one or more

examiners to perform the examination and instructing them as to the scope of the examination. In conducting the examination, the examiner shall observe those guidelines and procedures set forth in the examiners handbook adopted by the national association of insurance commissioners. The commissioner may also employ such other guidelines or procedures as the commissioner may deem appropriate.

b. Every licensee or person from whom information is sought, its officers, directors and agents shall provide to the examiners timely, convenient, and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents, assets, and computer or other recordings relating to the property, assets, business, and affairs of the licensee being examined. The officers, directors, employees, and agents of the licensee or person shall facilitate the examination and aid in the examination so far as it is in their power to do so. The refusal of a licensee, by its officers, directors, employees, or agents, to submit to examination or to comply with any reasonable written request of the commissioner shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the licensee to engage in the viatical settlement business or other business subject to the commissioner's jurisdiction. Any proceedings for suspension, revocation or refusal of any license or authority shall be conducted pursuant to this title and chapter 28-32.

c. The commissioner shall have the power to issue subpoenas, to administer oaths and to examine under oath any person as to any matter pertinent to the examination. Upon the failure or refusal of a person to obey a subpoena, the commissioner may petition a court of competent jurisdiction, and upon proper showing, the court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the court order shall be punishable as contempt of court.

d. When making an examination under this chapter, the commissioner may retain attorneys, appraisers, independent actuaries, independent certified public accountants, or other professionals and specialists as examiners, the

reasonable cost of which shall be borne by the licensee that is the subject of the examination.

e. Nothing contained in this chapter shall be construed to limit the commissioner's authority to terminate or suspend an examination in order to pursue other legal or regulatory action pursuant to the insurance laws of this state. Findings of fact and conclusions made pursuant to any examination shall be prima facie evidence in any legal or regulatory action.

f. Nothing contained in this chapter shall be construed to limit the commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or licensee workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may deem appropriate.

4. Examination reports.

a. Examination reports shall be comprised of only facts appearing upon the books, records or other documents of the licensee, its agents or other persons examined, or as ascertained from the testimony of its officers or agent or other persons examined concerning its affairs, and such conclusions and recommendations as the examiners find reasonably warranted from the facts.

b. No later than sixty days following completion of the examination, the examiner in charge shall file with the commissioner a verified written report of examination under oath. Upon receipt of the verified report, the commissioner shall transmit the report to the licensee examined, together with a notice that shall afford the licensee examined a reasonable opportunity of not more than thirty days to make a written submission or rebuttal with respect to any matters contained in the examination report.

c. If the commissioner determines that regulatory action is appropriate as a result of an examination, the commissioner may initiate any proceedings or actions provided by law.

5. Confidentiality of examination information.

a. Names and individual identification data for all viators shall be considered private and confidential information and shall not be disclosed by the commissioner, unless required by law.

b. Except as otherwise provided in this chapter, all examination reports, working papers, recorded information, documents, and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under this chapter, or in the course of analysis or investigation by the commissioner of the financial condition or market conduct of a licensee shall be confidential by law and privileged, shall not be subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner is authorized to use the documents, materials or other information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties.

c. Documents, materials or other information, including all working papers, and copies thereof, in the possession or control of the national association of insurance commissioners and its affiliates and subsidiaries shall be confidential by law and privileged, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action if they are:

(1) Created, produced, or obtained by or disclosed to the national association of insurance commissioners and its affiliates and subsidiaries in the course of assisting an examination made under this chapter, or assisting a commissioner in the analysis or investigation of the financial condition or market conduct of a licensee; or

(2) Disclosed to the national association of insurance commissioners and its affiliates and subsidiaries under subdivision d by a commissioner.

(3) For the purposes of subdivision b, this chapter includes the law of another state or jurisdiction that is substantially similar to this chapter.

d. Neither the commissioner nor any person that received the documents, material, or other information while acting under the authority of the commissioner, including the national association of insurance commissioners and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any confidential documents, materials, or information subject to subdivision a.

e. In order to assist in the performance of the commissioner's duties, the commissioner:

(1) May share documents, materials or other information, including the confidential and privileged documents, materials or information subject to subdivision a, with other state, federal and international regulatory agencies, with the national association of insurance commissioners and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication, or other information;

(2) May receive documents, materials, communications, or information, including otherwise confidential and privileged documents, materials or information, from the national association of insurance commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement official of other foreign or domestic jurisdiction, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(3) May enter into agreements governing sharing and use of information consistent with this subsection.

f. No waiver of any applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of disclosure to the commissioner under this section or as a result of sharing as authorized in subdivision d.

g. A privilege established under the law of any state or jurisdiction that is substantially similar to the privilege established under this subsection shall be available and enforced in any proceeding in, and in any court of, this state.

h. Nothing contained in this chapter shall prevent or be construed as prohibiting the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the commissioner of any other state or country, or to law enforcement officials of this or any other state or agency of the federal government at any time or to the national association of insurance commissioners, so long as such agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this chapter.

6. Conflict of interest.

a. An examiner may not be appointed by the commissioner if the examiner, either directly or indirectly, has a conflict of interest or is affiliated with the management of or owns a pecuniary interest in any person subject to examination under this chapter. This section shall not be construed to automatically preclude an examiner from being:

(1) A viator;

(2) An insured in a viaticated insurance policy; or

(3) A beneficiary in an insurance policy that is proposed to be viaticated.

b. Notwithstanding the requirements of this clause, the commissioner may retain from time to time, on an individual basis, qualified actuaries, certified public accountants, or other similar individuals who are independently practicing their professions, even though these persons may from time to time be similarly employed or retained by persons subject to examination under this chapter.

7. Cost of examinations. The expenses incurred in conducting any examination must be paid by the licensee or applicant.

8. Immunity from liability.

a. No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives or any

examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this chapter.

b. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative or examiner pursuant to an examination made under this chapter, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive. This subdivision does not abrogate or modify in any way any common law or statutory privilege or immunity heretofore enjoyed by any person identified in subdivision a.

c. A person identified in subdivision a or b shall be entitled to an award of attorney's fees and costs if the person is the prevailing party in a civil cause of action for libel, slander, or any other relevant tort arising out of activities in carrying out the provisions of this chapter and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.

9. Investigative authority of the commissioner. The commissioner may investigate suspected fraudulent viatical settlement acts and persons engaged in the business of viatical settlements.

26.1-33.3-07. Disclosure to viator.

1. With each application for a viatical settlement, a viatical settlement provider or viatical settlement broker shall provide the viator with at least the following disclosures no later than the time the application for the viatical settlement contract is signed by all parties. The disclosures shall be provided in a separate document that is signed by the viator and the viatical settlement provider or viatical settlement broker, and shall provide the following information:

a. There are possible alternatives to viatical settlement contracts including any accelerated death benefits or policy loans offered under the viator's life insurance policy.

b. That a viatical settlement broker represents exclusively the viator, and not the insurer or the viatical settlement provider, and owes a fiduciary duty to the viator, including a duty to act according to the viator's instructions and in the best interest of the viator.

c. Some or all of the proceeds of the viatical settlement may be taxable under federal income tax and state franchise and income taxes, and assistance should be sought from a professional tax advisor.

d. Proceeds of the viatical settlement could be subject to the claims of creditors.

e. Receipt of the proceeds of a viatical settlement may adversely affect the viator's eligibility for medicaid or other government benefits or entitlements, and advice should be obtained from the appropriate government agencies.

f. The viator has the right to rescind a viatical settlement contract before the earlier of sixty calendar days after the date upon which the viatical settlement contract is executed by all parties or thirty calendar days after the viatical settlement proceeds have been delivered to the escrow agent by or on behalf of the settlement provider, as provided in subsection 6 of section 26.1-33.3-09. Rescission, if exercised by the viator, is effective only if both notice of the rescission is given, and the viator repays all proceeds and any premiums, loans, and loan interest paid on account of the viatical settlement provider within the rescission period. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment by the viator or the viator's estate of all viatical settlement proceeds and any premiums, loans, and loan interest the viatical settlement within sixty days of the insured's death.

g. Funds will be sent to the viator by the later of the expiration of the rescission period or within three business days after the viatical settlement provider has received the insurer or group administrator's written acknowledgment that ownership of the policy or interest in the certificate has been transferred and the beneficiary has been designated.

h. Entering into a viatical settlement contract may cause other rights or benefits, including conversion rights and waiver of premium benefits that may exist

under the policy or certificate, to be forfeited by the viator. Assistance should be sought from a financial adviser.

i. Disclosure to a viator shall include distribution of a brochure describing the process of viatical settlements. The national association of insurance commissioner's form for the brochure shall be used unless another form is developed or approved by the commissioner.

j. The disclosure document shall contain the following language: "All medical, financial or personal information solicited or obtained by a viatical settlement provider or viatical settlement broker about an insured, including the insured's identity or the identity of family members, a spouse or a significant other may be disclosed as necessary to effect the viatical settlement between the viator and the viatical settlement provider. If you are asked to provide this information, you will be asked to consent to the disclosure. The information may be provided to someone who buys the policy or provides funds for the purchase. You may be asked to renew your permission to share information every two years."

k. Following execution of a viatical contract, the insured may be contacted for the purpose of determining the insured's health status and to confirm the insured's residential or business street address and telephone number, or as otherwise provided in this chapter. This contact shall be limited to once every three months if the insured has a life expectancy of more than one year, and no more than once per month if the insured has a life expectancy of one year or less. All such contacts shall be made only by a viatical settlement provider licensed in the state in which the viator resided at the time of the viatical settlement, or by the authorized representative of a duly licensed viatical settlement provider.

2. A viatical settlement provider shall provide the viator with at least the following disclosures no later than the date the viatical settlement contract is signed by all parties. The disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator and provide the following information:

a. The affiliation, if any, between the viatical settlement provider and the issuer of the insurance policy to be viaticated;

b. The document shall include the name, business address, and telephone number of the viatical settlement provider;

c. Any affiliations or contractual arrangements between the viatical settlement provider and the viatical settlement purchaser;

d. If an insurance policy to be viaticated has been issued as a joint policy or involves family riders or any coverage of a life other than the insured under the policy to be viaticated, the viator shall be informed of the possible loss of coverage on the other lives under the policy and shall be advised to consult with the viator's insurance producer or the insurer issuing the policy for advice on the proposed viatical settlement;

e. State the dollar amount of the current death benefit payable to the viatical settlement provider under the policy or certificate. If known, the viatical settlement provider shall also disclose the availability of any additional guaranteed insurance benefits, the dollar amount of any accidental death and dismemberment benefits under the policy or certificate, and the extent to which the viator's interest in those benefits will be transferred as a result of the viatical settlement contract; and

f. Provide the name, business address, and telephone number of the independent third-party escrow agent, and the fact that the viator or owner may inspect or receive copies of the relevant escrow or trust agreements or documents.

3. A viatical settlement broker shall provide the viator with at least the following disclosures no later than the date the viatical settlement contract is signed by all parties. The disclosures shall be conspicuously displayed in the viatical settlement contract or in a separate document signed by the viator and provide the following information:

a. The name, business address, and telephone number of the viatical settlement broker;

b. A full, complete, and accurate description of all offers, counteroffers, acceptances and rejections relating to the proposed viatical settlement contract;

c. A written disclosure of any affiliations or contractual arrangements between the viatical settlement broker and any person making an offer in connection with the proposed viatical settlement contracts;

d. The amount and method of calculating the broker's compensation, which term "compensation" includes anything of value paid or given to a viatical settlement broker for the placement of a policy; and

e. If any portion of the viatical settlement broker's compensation, as defined in subdivision c, is taken from a proposed viatical settlement offer, the broker shall disclose the total amount of the viatical settlement offer and the percentage of the viatical settlement offer comprised by the viatical settlement broker's compensation.

4. If the viatical settlement provider transfers ownership or changes the beneficiary of the insurance policy, the provider shall communicate in writing the change in ownership or beneficiary to the insured within twenty days after the change.

5. A viatical settlement provider or its viatical settlement investment agent shall provide the viatical settlement purchaser with at least the following disclosures prior to the date the viatical settlement purchase agreement is signed by all parties. The disclosures shall be conspicuously displayed in any viatical purchase contract or in a separate document signed by the viatical settlement purchaser and viatical settlement provider or viatical settlement investment agent, and shall make the following disclosure to the viatical settlement purchaser:

a. The purchaser will receive no returns, such as dividends and interest, until the insured dies and a death claim payment is made.

b. The actual annual rate of return on a viatical settlement contract is dependent upon an accurate projection of the insured's life expectancy, and the actual date of the insured's death. An annual "guaranteed" rate of return is not determinable.

c. The viaticated life insurance contract should not be considered a liquid purchase since it is impossible to predict the exact timing of its maturity and the funds probably are not available until the death of the insured. There is no established secondary market for resale of these products by the purchaser.

d. The purchaser may lose all benefits or may receive substantially reduced benefits if the insurer goes out of business during the term of the viatical investment.

e. The purchaser is responsible for payment of the insurance premium or other costs related to the policy, if required by the terms of the viatical purchase agreement. These payments may reduce the purchaser's return. If a party other than the purchaser is responsible for the payment, the name and address of that party also shall be disclosed.

f. The purchaser is responsible for payment of the insurance premiums or other costs related to the policy if the insured returns to health. Disclose the amount of such premiums, if applicable.

g. State the name, business address, and telephone number of the independent third party providing escrow services and the relationship to the broker.

h. The amount of any trust fees or other expenses to be charged to the viatical settlement purchaser shall be disclosed.

i. State whether the purchaser is entitled to a refund of all or part of the purchaser's investment under the settlement contract if the policy is later determined to be null and void.

j. Disclose that group policies may contain limitations or caps in the conversion rights, additional premiums may have to be paid if the policy is converted, name the party responsible for the payment of the additional premiums and, if a group policy is terminated and replaced by another group policy, state that there may be no right to convert the original coverage.

k. Disclose the risks associated with policy contestability including, but not limited to, the risk that the purchaser will have no claim or only a partial claim

to death benefits should the insurer rescind the policy within the contestability period.

l. Disclose whether the purchaser will be the owner of the policy in addition to being the beneficiary, and if the purchaser is the beneficiary only and not also the owner, the special risks associated with that status, including, but not limited to, the risk that the beneficiary may be changed or the premium may not be paid.

m. Describe the experience and qualifications of the person who determines the life expectancy of the insured, such as in-house staff, independent physicians, and specialty firms that weigh medical and actuarial data; the information this projection is based on; and the relationship of the projection maker to the viatical settlement provider, if any.

n. Disclosure to an investor shall include distribution of a brochure describing the process of investment in viatical settlements. The national association of insurance commissioner's form for the brochure shall be used unless one is developed by the commissioner.

6. A viatical settlement provider or its viatical settlement investment agent shall provide the viatical settlement purchaser with at least the following disclosures no later than at the time of the assignment, transfer or sale of all or a portion of an insurance policy. The disclosures shall be contained in a document signed by the viatical settlement purchaser and viatical settlement provider or viatical settlement investment agent, and shall make the following disclosures to the viatical settlement purchaser:

a. Disclose all the life expectancy certifications obtained by the provider in the process of determining the price paid to the viator.

b. State whether premium payments or other costs related to the policy have been escrowed. If escrowed, state the date upon which the escrowed funds will be depleted and whether the purchaser will be responsible for payment of premiums thereafter and, if so, the amount of the premiums.

c. State whether premium payments or other costs related to the policy have been waived. If waived, disclose whether the investor will be responsible for

payment of the premiums if the insurer that wrote the policy terminates the waiver after purchase and the amount of those premiums.

d. Disclose the type of policy offered or sold, such as whole life, term life, universal life or a group policy certificate, any additional benefits contained in the policy, and the current status of the policy.

e. If the policy is term insurance, disclose the special risks associated with term insurance including the purchaser's responsibility for additional premiums if the viator continues the term policy at the end of the current term.

f. State whether the policy is contestable.

g. State whether the insurer that wrote the policy has any additional rights that could negatively affect or extinguish the purchaser's rights under the viatical settlement contract, what these rights are, and under what conditions these rights are activated.

h. State the name and address of the person responsible for monitoring the insured's condition. Describe how often the monitoring of the insured's condition is done, how the date of death is determined, and how and when this information will be transmitted to the purchased.

7. The viatical settlement purchase agreement is voidable by the purchaser at any time within three days after the disclosures mandated by subsections 5 and 6 are received by the purchaser.

26.1-33.3-08. Disclosure to insurer. Prior to the initiation of a viatical settlement plan, viatical settlement transaction, or series of viatical settlement transactions, a viatical settlement broker or viatical settlement provider shall fully disclose all nonproprietary information to an insurer the details of the plan, transaction, or series of transactions, to which the viatical settlement broker or viatical settlement provider is a party, to originate, renew, continue, or finance a life insurance policy with the insurer for the purpose of engaging in the business of viatical settlements at any time prior to, or during the first five years after, issuance of the policy. Any disclosure required under this section must be in writing.

26.1-33.3-09. General rules.

1. a. A viatical settlement provider entering into a viatical settlement contract shall first obtain:

(1) If the viator is the insured, a written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter into a viatical settlement contract; and

(2) A document in which the insured consents to the release of the insured's medical records to a licensed viatical settlement provider, viatical settlement broker and the insurance company that issued the life insurance policy covering the life of the insured.

b. Within twenty days after a viator executes documents necessary to transfer any rights under an insurance policy or within twenty days of entering any agreement, option, promise or any other form of understanding, expressed or implied, to viaticate the policy, the viatical settlement provider shall give written notice to the insurer that issued that insurance policy that the policy has or will become a viaticated policy. The notice shall be accompanied by the documents required by subdivision c.

c. The viatical provider shall deliver a copy of the medical release required under paragraph 2 of subdivision a, a copy of the viator's application for the viatical settlement contract, the notice required under subdivision b, and a request for verification of coverage to the insurer that issued the life policy that is the subject of the viatical transaction. The national association of insurance commissioner's form for verification of coverage shall be used unless another form is developed or approved by the commissioner.

d. The insurer shall respond to a request for verification of coverage submitted on an approved form by a viatical settlement provider or viatical settlement broker within thirty calendar days of the date the request is received and shall indicate whether, based on the medical evidence and documents provided, the insurer intends to pursue an investigation at this time regarding the validity of the insurance contract or possible fraud. The insurer shall accept a request for verification of coverage made on a national association of insurance commissioner's form or any other form approved by the commissioner. The insurer shall accept an original or facsimile or electronic copy of such request and any accompanying authorization signed by the

viator. Failure by the insurer to meet its obligations under this subsection shall be a violation of subsection 3 of section 26.1-33.3-10 and section 26.2-33.3-15.

e. Prior to or at the time of execution of the viatical settlement contract, the viatical settlement provider shall obtain a witnessed document in which the viator consents to the viatical settlement contract, represents that the viator has a full and complete understanding of the viatical settlement contract, that the viator has a full and complete understanding of the benefits of the life insurance policy, acknowledges that the viator is entering into the viatical settlement contract freely and voluntarily and, for persons with a terminal or chronic illness or condition, acknowledges that the insured has a terminal or chronic illness and that the terminal or chronic illness or condition was diagnosed after the life insurance policy was issued.

f. If a viatical settlement broker performs any of these activities required of the viatical settlement provider, the provider is deemed to have fulfilled the requirements of this section.

2. All medical information solicited or obtained by any licensee shall be subject to the applicable provisions of state law relating to confidentiality of medical information.

3. All viatical settlement contracts entered into in this state shall provide the viator with a right to rescind the contract before the earlier of sixty calendar days after the date upon which the viatical settlement contract is executed by all parties or thirty calendar days after the viatical settlement proceeds have been sent to the escrow agent by or on behalf of the viatical settlement provider as provided in subdivision 6 of section 26.1-33.3-09. Rescission by the viator may be conditioned upon the viator both giving notice and repaying to the viatical settlement provider within the rescission period all proceeds of the settlement and any premiums, loans, and loan interest paid by or on behalf of the viatical settlement provider in connection with or as a consequence of the viatical settlement. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of all viatical settlement proceeds, and any premiums, loans, and loan

interest that have been paid by the viatical settlement provider or purchaser, which shall be paid within sixty calendar days of the death of the insured. In the event of any rescission, if the viatical settlement provider has paid commissions or other compensation to a viatical settlement broker in connection with the rescinded transaction, the viatical settlement broker shall refund all such commissions and compensation to the viatical settlement provider within five business days following receipt of written demand from the viatical settlement provider, which demand shall be accompanied by either the viator's notice of rescission if rescinded at the election of the viator, or notice of the death of the insured if rescinded by reason of the death of the insured within the applicable rescission period.

4. The viatical settlement provider shall instruct the viator to send the executed documents required to effect the change in ownership, assignment, or change in beneficiary directly to the independent escrow agent. Within three business days after the date the escrow agent receives the document, or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the documents directly to the provider, the provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a state or federally chartered financial institution whose deposits are insured by the federal deposit insurance corporation. Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment, or change in beneficiary forms to the viatical settlement provider or related provider trust or other designated representative of the viatical settlement provider. Upon the later to occur of the expiration of any then remaining rescission period or the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership, assignment, or designation of beneficiary from the insurance company, the escrow agent shall pay the settlement proceeds to the viator.

5. Failure to tender consideration to the viator for the viatical settlement contract within the time set forth in the disclosure pursuant to subdivision g of subsection 1 of section 26.1-33.3-07 renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and

accepted by the viator. Funds shall be deemed sent by a viatical settlement provider to a viator as of the date that the escrow agent either releases funds for wire transfer to the viator or places a check for delivery to the viator via United States postal service or other nationally recognized delivery service.

6. Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider or viatical settlement broker after the viatical settlement has occurred shall only be made by the viatical settlement provider or broker licensed in this state or its authorized representatives and shall be limited to once every three months for insureds with a life expectancy of more than one year, and to no more than once per month for insureds with a life expectancy of one year or less. The provider or broker shall explain the procedure for these contacts at the time the viatical settlement contract is entered into. The limitations set forth in this subsection shall not apply to any contacts with an insured for reasons other than determining the insured's health status. Viatical settlement providers and viatical settlement brokers shall be responsible for the actions of their authorized representatives.

26.1-33.3-10. Prohibited practices.

1. It is in violation of this chapter for any person to enter into a viatical settlement contract at any time prior to the application for or issuance of a policy which is the subject of a 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 or it is otherwise conclusively shown by the viatical settlement provider that one or more of the following conditions have been met within the five-year period:

   a. The policy was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least sixty months. The time covered under a group policy shall be calculated without regard to any change in insurance carriers, provided the coverage has been continuous and under the same group sponsorship;

b. The viator submits independent evidence to the viatical settlement provider that one or more of the following conditions have been met within the five-year period:

(1) The viator or insured is terminally or chronically ill;

(2) The viator's spouse dies or no remaining beneficiaries are then surviving;

(3) The viator divorces a spouse;

(4) The viator retires from full-time employment; or

(5) The viator becomes physically or mentally disabled and a physician determines that the disability prevents the viator from maintaining full-time employment;

c. A final order, judgment, or decree is entered by a court of competent jurisdiction, on the application of a creditor of the viator, adjudicating the viator in default, bankrupt, or insolvent, or approving a petition seeking reorganization of the viator or appointing a receiver, trustee, or liquidator to all or a substantial part of the viator's assets; or

d. The viator enters into a viatical settlement contract more than two years after the date of issuance of a policy and, with respect to the policy, at all times prior to the date that is two years after policy issuance, the following conditions are met:

(1) Policy premiums have been funded exclusively with unencumbered assets, including an interest in the life insurance policy being financed only to the extent of its net cash surrender value, provided by, or fully recourse liability incurred by, the insured or a person described in paragraph 4 of subdivision c of subsection 12 of section 26.1-33.3-01;

(2) There is no agreement or understanding with any other person to guarantee any such liability or to purchase, or stand ready to purchase, the policy, including through an assumption or forgiveness of the loan; and

(3) Neither the insured nor the policy has been evaluated for settlement in connection with the issuance of the policy.

2. Copies of the independent evidence described in subdivision b of subsection 1 and documents required by subsection 1 of section 26.1-33.3-09 shall be submitted to the insurer when the viatical settlement provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the viatical settlement provider that the copies are true and correct copies of the documents received by the viatical settlement provider.

3. If the viatical settlement provider submits to the insurer a copy of the owner or insured's certification described in and the independent evidence required by subdivision b of subsection 1 when the provider submits a request to the insurer to effect the transfer of the policy or certificate to the viatical settlement provider, the copy shall be deemed to conclusively establish that the viatical settlement contract satisfies the requirements of this section and the insurer shall timely respond to the request.

4. A insurer may not require, as a condition of responding to a request for verification of coverage or effecting the transfer of a policy pursuant to a viatical settlement contract, that the viator, insured, viatical settlement provider, or viatical settlement broker sign any forms, disclosures, consent, or waiver form that has not been expressly approved by the commissioner for use in connection with viatical settlement contracts in this state.

5. Upon receipt of a properly completed request for change of ownership or beneficiary of a policy, the insurer shall respond in writing within thirty calendar days with written acknowledgement confirming that the change has been effected or specifying the reasons why the requested change cannot be processed. The insurer shall not unreasonably delay effecting change of ownership or beneficiary and shall not otherwise seek to interfere with any viatical settlement contract lawfully entered into in this state.

26.1-33.3-11. Prohibited practices and conflicts of interest.

1. With respect to any viatical settlement contract or insurance policy, no viatical settlement broker knowingly shall solicit an offer from, effectuate a viatical settlement with, or make a sale to any viatical settlement provider, viatical

settlement purchaser, financing entity, or related provider that is controlling, controlled by, or under common control with such viatical settlement broker.

2. With respect to any viatical settlement contract or insurance policy, no viatical settlement provider knowingly may enter into a viatical settlement contract with a viator, if, in connection with such viatical settlement contract, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider or the viatical settlement purchaser, financing entity, or related provider trust that is involved in such viatical settlement contract.

3. A violation of subsection 1 or 2 shall be deemed a fraudulent viatical settlement act.

4. It is unlawful for an insurance company to engage in any transaction, act, or practice or course of business or dealing which restricts, limits, or impairs in any way the lawful transfer of ownership, change of beneficiary, or assignment of a policy to effectuate a viatical settlement contract.

26.1-33.3-12. Advertising for viatical settlements. Every viatical settlement licensee shall establish and at all times maintain a system of control over the content, form, and method of dissemination of all advertisements of its contracts, products, and services. All advertisements, regardless of by whom written, created, designed, or presented, shall be the responsibility of the viatical settlement licensees, as well as the individual who created or presented the advertisement. A system of control shall include regular routine notification, at least once a year, to agents and others authorized by the viatical settlement licensee who disseminate advertisements of the requirements and procedures for approval prior to the use of any advertisements not furnished by the viatical settlement licensee. The commissioner may adopt rules to implement this section.

26.1-33.3-13. Fraud prevention and control.

1. Fraudulent viatical settlement acts, interference and participation of convicted felons prohibited.

a. A person shall not commit a fraudulent viatical settlement act.

b. A person shall not knowingly or intentionally interfere with the enforcement of the provisions of this chapter or investigations of suspected or actual violations of this chapter.

c. A person in the business of viatical settlements shall not knowingly or intentionally permit any person convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements.

2. Fraud warning required.

a. Viatical settlement contracts and applications for viatical settlements, regardless of the form of transmission, must contain the following statement or a substantially similar statement:

"Any person who knowingly presents false information in an application for insurance or viatical settlement contract is guilty of a crime and may be subject to fines and confinement in prison."

b. The lack of a statement as required in subdivision a does not constitute a defense in any prosecution for a fraudulent viatical settlement act.

3. Mandatory reporting of fraudulent viatical settlement acts.

a. Any person engaged in the business of viatical settlements having knowledge or a reasonable suspicion that a fraudulent viatical settlement act is being, will be or has been committed shall provide to the commissioner such information as required by, and in a manner prescribed by, the commissioner.

b. Any other person having knowledge or a reasonable belief that a fraudulent viatical settlement act is being, will be or has been committed may provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.

4. Immunity from liability.

a. No civil liability shall be imposed on and no cause of action shall arise from a person's furnishing information concerning suspected, anticipated or completed fraudulent viatical settlement acts or suspected or completed fraudulent insurance acts, if the information is provided to or received from:

(1) The commissioner or the commissioner's employees, agents or representatives;

(2) Federal, state or local law enforcement or regulatory officials or their employees, agents or representatives;

(3) A person involved in the prevention and detection of fraudulent viatical settlement acts or that person's agents, employees or representatives;

(4) The national association of insurance commissioners, national association of securities dealers, the North American securities administrators association, or their employees, agents or representatives, or other regulatory body overseeing life insurance, viatical settlements, securities or investment fraud; or

(5) The life insurer that issued the life insurance policy covering the life of the insured.

b. Subdivision a shall not apply to statements made with actual malice. In an action brought against a person for filing a report or furnishing other information concerning a fraudulent viatical settlement act, the party bringing the action shall plead specifically any allegation that subdivision a does not apply because the person filing the report or furnishing the information did so with actual malice.

c. A person furnishing information as identified in subdivision a shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this chapter and the party bringing the action was not substantially justified in doing so. For purposes of this section a proceeding is "substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated. However, such an award does not apply to any person furnishing information concerning that person's own fraudulent viatical settlement acts.

d. This section does not abrogate or modify common law or statutory privileges or immunities enjoyed by a person described in subdivision a.

5. Confidentiality.

a. The documents and evidence provided pursuant to subsection 4 or obtained by the commissioner in an investigation of suspected or actual fraudulent

viatical settlement acts shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

b. Subdivision a does not prohibit release by the commissioner of documents and evidence obtained in an investigation of suspected or actual fraudulent viatical settlement acts:

(1) In administrative or judicial proceedings to enforce laws administered by the commissioner;

(2) To federal, state or local law enforcement or regulator agencies, to an organization established for the purpose of detecting and preventing fraudulent viatical settlement acts or to the national association of insurance commissioners; or

(3) At the discretion of the commissioner, to a person in the business of viatical settlements that is aggrieved by a fraudulent viatical settlement act.

c. Release of documents and evidence under subdivision b does not abrogate or modify the privilege granted in subdivision a.

6. Other law enforcement or regulatory authority. This chapter shall not:

a. Preempt the authority or relieve the duty of other law enforcement or regulatory agencies to investigate, examine and prosecute suspected violations of law;

b. Prevent or prohibit a person from disclosing voluntarily information concerning viatical settlement fraud to a law enforcement or regulatory agency other than the insurance department; or

c. Limit the powers granted elsewhere by the laws of this state to the commissioner or an insurance fraud unit to investigate and examine possible violations of law and to take appropriate action against wrongdoers.

7. Viatical settlement antifraud initiatives.

a. Viatical settlement providers and viatical settlement brokers shall have in place antifraud initiatives reasonably calculated to detect, prosecute and prevent fraudulent viatical settlement acts. At the discretion of the

commissioner, the commissioner may order, or a licensee may request and the commissioner may grant, such modifications of the following required initiatives as necessary to ensure an effective antifraud program. The modifications may be more or less restrictive than the required initiatives so long as the modifications may reasonably be expected to accomplish the purpose of this section.

b. Antifraud initiatives shall include:

(1) Fraud investigators, who may be viatical settlement provider or viatical settlement broker employees or independent contractors; and

(2) An antifraud plan, which shall be submitted to the commissioner. The antifraud plan shall include, but not be limited to:

(a) A description of the procedures for detecting and investigating possible fraudulent viatical settlement acts and procedures for resolving material inconsistencies between medical records and insurance applications;

(b) A description of the procedures for reporting possible fraudulent viatical settlement acts to the commissioner;

(c) A description of the plan for antifraud education and training of underwriters and other personnel; and

(d) A description or chart outlining the organizational arrangement of the antifraud personnel who are responsible for the investigation and reporting of possible fraudulent viatical settlement acts and investigating unresolved material inconsistencies between medical records and insurance applications.

c. Antifraud plans submitted to the commissioner shall be privileged and confidential and shall not be a public record and shall not be subject to discovery or subpoena in a civil or criminal action.

26.1-33.3-14. Injunctions - Civil remedies - Cease and desist - Penalty.

1. In addition to the penalties and other enforcement provisions of this chapter, if any person violates this chapter or any regulation implementing this chapter, the commissioner may seek an injunction in a court of competent jurisdiction and may

apply for temporary and permanent orders that the commissioner determines are necessary to restrain the person from committing the violation.

2. Any person damaged by the acts of a person in violation of this chapter may bring a civil action against the person committing the violation in a court of competent jurisdiction.

3. The commissioner may issue, in accordance with this title and chapter 28-32, a cease and desist order upon a person that violates any provision of this chapter, any regulation or order adopted by the commissioner, or any written agreement entered into with the commissioner.

4. When the commissioner finds that an activity in violation of this chapter presents an immediate danger to the public that requires an immediate final order, the commissioner may issue an emergency cease and desist order reciting with particularity the facts underlying the findings. The emergency cease and desist order is effective immediately upon service of a copy of the order on the respondent and remains effective for ninety days. If the commissioner begins nonemergency cease and desist proceedings, the emergency cease and desist order remains effective, absent an order by a court of competent jurisdiction pursuant to this title and chapter 28-32.

5. In addition to the penalties and other enforcement provisions of this chapter, any person who violates this chapter is subject to civil penalties of up to fifty thousand dollars per violation. Imposition of civil penalties shall be pursuant to an order of the commissioner issued under this title and chapter 28-32. The commissioner's order may require a person found to be in violation of this chapter to make restitution to persons aggrieved by violations of this chapter.

6. A person convicted of a violation of this chapter by a court of competent jurisdiction is governed by chapter 12.1-32. A person convicted of a violation of this chapter shall be ordered to pay restitution to persons aggrieved by the violation of this chapter. Restitution shall be ordered in addition to a fine or imprisonment, but not in lieu of a fine or imprisonment.

7. Except for a fraudulent viatical settlement act committed by a viator, the enforcement provisions and penalties of this section shall not apply to a viator.

8. A person convicted of a violation of this chapter by a court of competent jurisdiction may be sentenced in accordance with subdivision a, b, c, or d based on the greater of the value of property, services, or other benefit wrongfully obtained or attempted to obtain; or the aggregate economic loss suffered by any person as a result of the violation. A person convicted of a fraudulent viatical settlement act must be ordered to pay restitution to persons aggrieved by the fraudulent viatical settlement act. Restitution must be ordered in addition to a fine or imprisonment but not in lieu of a fine or imprisonment. A fraudulent viatical settlement act is:

   a. A class A felony if the value of a viatical settlement contract is more than thirty-five thousand dollars;

   b. A class B felony if the value of a viatical settlement contract is more than two thousand five hundred dollars but not more than thirty-five thousand dollars;

   c. A class C felony if the value of a viatical settlement contract is more than five hundred dollars but not more than two thousand five hundred dollars; or

   d. A class A misdemeanor if the value of a viatical settlement contract is five hundred dollars or less.

   In any prosecution under this section under subdivisions a, b, c, and d, the value of the viatical settlement contracts within any six-month period may be aggregated and the defendant charged accordingly in applying in the provisions of this section; provided that when two or more offenses are committed by the same person in two or more counties, the accused may be prosecuted in any county in which one of the offenses was committed for all of the offenses aggregated under this section. The applicable statute of limitations provision shall not begin to run until the insurance company or law enforcement agency is aware of the fraud, but in no event may the prosecution be commenced later than seven years after the act has occurred.

26.1-33.3-15. Unfair trade practices. A violation of this chapter, including the commission of a fraudulent viatical settlement act, shall be considered an unfair trade practice under section 26.1-04-03 subject to the penalties contained in that section.

26.1-33.3-16. Authority to promulgate regulations. The commissioner shall have the authority to:

1. Promulgate regulations implementing this chapter;
2. Establish standards for evaluating reasonableness of payments under viatical settlement contracts for persons who are terminally or chronically ill. This authority includes, but is not limited to, regulation of discount rates used to determine the amount paid in exchange for assignment, transfer, sale, devise or bequest of a benefit under a life insurance policy insuring the life of a person that is chronically or terminally ill;
3. Establish appropriate licensing requirements, fees, and standards for continued licensure for viatical settlement providers and brokers;
4. Require a bond or other mechanism for financial accountability for viatical settlement providers and brokers; and
5. Adopt rules governing the relationship and responsibilities of both insurers and viatical settlement providers and viatical settlement brokers during the viatication of a life insurance policy or certificate.

26.1-33.3-17. Effective date. This chapter takes effect on August 1, 2007. A viatical settlement provider or viatical settlement broker transacting business in this state may continue to do so pending approval or disapproval of the provider or broker application for a license as long as the application is filed with the commissioner by August 1, 2007.

SECTION 3. REPEAL. Chapter 26.1-33.2 of the North Dakota Century Code is repealed.