State of Indiana Senate

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Commissioner Amy Beard
Department of Insurance
311 W. Washington St., #300
Indianapolis, IN 46204

Dear Commissioner Beard:

I write to you today to raise a matter of a potential conflict between regulatory action and governing Indiana statutory law. Before your appointment, the Department approved three life insurers' "enhanced cash surrender value" (ECSV) endorsements on universal life insurance policies. There is strong evidence these products violate the Standard Nonforfeiture Law (SNFL), codified in Indiana at IC 27-1-12-7(g), effective Jan. 1, 1985. Beyond this conflict, the approval appears to me to act like an unregulated viatical settlement. This is a serious consumer protection issue, particularly for seniors, so I would appreciate your personal review.

Enhanced Cash Surrender Offers

John Hancock and Lincoln National currently market limited time offers for the policyholder to surrender their contracts for amounts well over cash surrender value, for the purpose of terminating the policy and allowing the carrier to convert reserves to profit.[1] Sun Life bids against viatical settlement providers with enhanced cash surrender offers when it receives notification that the policy will be subject to a viatical settlement.

Examples include Lincoln doubling a cash surrender value of $53,885 to $106,121 for a four month offer period, John Hancock enhancing cash surrender value from $19,037 to $360,601 for three months, and Sun Life bidding against a viatical settlement by offering $437,460 on a policy with $0 cash surrender value. Before reaching the statutory conflict, it would seem that this has the effect of similarly situated policyholders being treated very differently.

Standard Nonforfeiture Law Smoothness Requirement

Legislators in every state amended the Standard Nonforfeiture Law in the 1980s to add the NAIC Model's new section 8, entitled "consistency of progression of cash surrender values." This smoothness requirement was codified in Indiana at IC 27-1-12-7(g), effective Jan. 1, 1985.

The regulators who drafted the smoothness requirement at NAIC explained: “the underlying purpose is to require a reasonably orderly sequence of increases…. Under the prior version “sharp increases” were permitted; however, they were removed for the current version.

This law has been described by actuarial authorities as prohibiting “erratic cash values and “benefits available only during certain windows of time, and “sharp jumps. In other words, the smoothness requirement requires smoothness. The cash surrender offers described above violate each of these descriptions and are the opposite of smooth.

NAIC’s decision that unsmooth “policies should be disapproved as unfair or inequitable, even if…surrender value…is…greater than the [SNFL] minimum, makes sense. If identical risks pay identical premiums for years, with one surrendering for $100,000, while the next day the other receives and accepts a $200,000 ECSV offer, the first consumer has received half the benefit for the same price—unfairly and inequitably.

Unfair Competition With Viatical Settlements

Viatical settlement providers argue this is unfair competition: They follow their regulations (the Viatical Settlement Act (“VSA”)); meanwhile the insurers both violate their regulation (SNFL) and avoid the protections of the VSA.

Viaticals and ECSVs both offer extra cash to give up the death benefit. In response to this risky transaction for seniors, the VSA provides tailored consumer protections. For instance, for seller’s remorse, the VSA grants consumers 30 days to change their mind and rescind the agreement, with rescission automatic if the insured dies during that period, IC 27-8-19.8-21. This frequently exercised right saves viatical consumers millions, but if the insured dies the day after an ECSV, the carrier keeps the profit. Elderly policy owners also receive an important protection under the VSA’s requirement that physicians certify the viator is of sound mind and under no constraint or undue influence, IC 27-8-19.8-24(1). And the VSA also includes a slew of disclosure requirements and imposes a fiduciary duty on settlement brokers.

These fundamental protections, tailored to the needs of vulnerable seniors presented with a giant cash offer, are lost in an ECSV even though the risks—giving up the death benefit for immediate cash—are the same.

Role Of The Regulator

I have heard viatical companies’ concerns and would like to understand if the Department sees this differently. This issue touches on my well-known insistence that legislators make policy and regulators enforce it. When NAIC tells us models like the SNFL are necessary, we trust our regulators and pass their proposals. But after we act, the department is bound to follow the law unless and until we change it again.

If carriers can secure approvals for endorsements that conflict with our enacted SNFL, this would seem to untether Department form review process from legislative standards. Such was not the legislature's intent. If carriers believe the new benefits created by these endorsements should be welcome in the marketplace, I welcome that discussion in the legislature.

With regulators saying that carriers can offer unregulated benefits outside the insurance statutes written by legislators, I plan to raise this SNFL issue at the November NCOIL meeting in an open dialogue with your colleagues. I hope by then to receive your views on the legality of these ECSV endorsements and offers.

Sincerely,

Travis Holdman
Indiana State Senator
Majority Caucus Chair