

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** *the Insurance Act*, R.S.O. 1990, c.18, as amended

**AND IN THE MATTER OF** a proposal by the Superintendent of Financial Services, pursuant to the *Insurance Act* regarding a Cease and Desist Order, dated February 26, 2001, being imposed on Universal Settlements International Inc., Derek O'Brien and Tony Duscio.

**AND IN THE MATTER OF** a Request for Hearing filed by Universal Settlements International Inc.

**BETWEEN:**

**UNIVERSAL SETTLEMENTS INC., TONY DUSCIO and DEREK O'BRIEN**

Applicants

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

Kathryn M. Bush  
Vice Chair of the Tribunal and Chair of the Panel

Martha Milczynski  
Chair of the Tribunal and Member of the Panel

Joseph Martin  
Member of the Tribunal and Member of the Panel

**APPEARANCES:**

Randy Bennett  
For the Applicant

Robert Conway  
For the Respondent Superintendent

**HEARING DATE:**

December 6, 2001

## REASONS FOR DECISION

### A. THE BACKGROUND

This hearing concerned a Notice of Proposed Cease and Desist Order issued by the Superintendent on February 26, 2001. The Notice was issued under section 441(2) of the *Insurance Act* (Ontario). The parties named in the Notice are Universal Settlements International Inc., Derek O'Brien and Tony Duscio, who will be referred to collectively hereafter as "USI".

USI's head office is in the city of Waterloo in the province of Ontario. Derek O'Brien and Tony Duscio were at all material times the principals of USI.

The agreed facts for this proceeding were contained in the Affidavit of Derek O'Brien sworn August 16, 2001, and in the exhibits to the O'Brien Affidavit. The O'Brien Affidavit was filed by USI in a court proceeding related to these proceedings. The court proceeding was quashed on October 25, 2001 on the grounds that it is premature while these proceedings are pending.

The Notice of Proposed Cease and Desist Order was based on Investigative Findings alleging that USI was contravening section 115 of the *Insurance Act* (Ontario) by trafficking in insurance policies, while not licensed as an insurer or while not the duly authorized agent of an insurer.

Section 115 of the *Insurance Act* (Ontario) is as follows:

115. Any person, other than an insurer or its duly authorized agent, who advertises or holds himself, herself or itself out as a purchaser of life insurance policies or of benefits thereunder, or who trafficks or trades in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation thereof to himself, herself or itself or any other person, is guilty of an offence.

It is common ground that the business activity that is the subject of the Notice of Proposed Cease and Desist Order is the sale to Ontario residents by USI of a financial product known as a “viatical settlement purchase program”. The product is described in paragraphs 4,5 and 6 of the O’Brien Affidavit:

- "4. USI is a participant in the viatical settlement segment of the financial services industry. “Viatical settlement” is a term used to define the process whereby an insured receives payment on a discounted basis for their life insurance policy while still alive and the right to receive the death benefit under the policy is purchased by a third party funder. In the viatical settlement industry, the insured person who enters into a viatical settlement contract with a viatical settlement provider is known as a “viator”. This is referred to as the viatication of the life insurance policy. Third party funders purchase the right to receive death benefits through viatical settlement purchase agreements, which are separate from viatical settlement contracts.
5. Since the actual benefits under a life insurance policy are not payable until the death of the viator, the funding for payments directly to the viator in advance of his or her death must be provided by third parties. The ultimate source of this funding is the proceeds of viatical settlement purchase agreements although viatical settlement providers may pay viators out of their own funds prior to receiving funds for the sale of the right to receive the death benefit.
6. Third party funders recover their initial funds, plus a fixed return over and above those amounts, by becoming the beneficiaries under the life insurance policy either directly or

indirectly. When the viator dies, the actual benefits under the policy are paid to or on behalf of the third party funders."

The business of viatical settlements has developed to the point that there are specialized companies handling different parts of a typical viatical transaction. USI has made further refinements in developing its own viatical settlement purchase programs. Nonetheless, USI's participation in the viatical industry is limited to viatical settlement purchase programs and has been since USI's inception. USI is not involved, nor has it ever been involved, in the actual viatication of insurance policies.

USI does not deal directly or indirectly with insureds in any jurisdiction in Canada or elsewhere. The life insurance policies that form the basis of USI's viatical settlement purchase programs originate in the United States where they are viaticated by United States viatical settlement providers. USI neither markets nor has it ever marketed viatical settlement purchase programs that are based on Ontario life insurance policies or those of any other jurisdiction in Canada.

**B. THE ISSUE**

USI contended that the Financial Services Tribunal does not have jurisdiction to determine whether a Cease and Desist Order should be issued in the circumstances of this case. The USI submission rests on whether the sale of USI's "viatical settlement purchase program" to Ontario residents amounts to "insurance undertaken in Ontario". If it does not amount to "insurance undertaken in Ontario" within the meaning of section 39 of the *Insurance Act* (Ontario), then USI's business activity does not contravene section 115. That is because section 39 of the *Insurance Act* (Ontario) limits the application of section 115 to insurance undertaken in Ontario.

39. (1) This Part applies to insurance undertaken in Ontario and to all insurers carrying on business in Ontario.

(2) An insurer undertaking a contract of insurance that under this Act is deemed to be made in Ontario, whether the contract is original or renewed, except the renewal from time to time of life insurance policies, shall be deemed to be undertaking insurance in Ontario within the meaning of this part.

The Superintendent contended that the Financial Services Tribunal has jurisdiction in the circumstances of this case, because USI's "viatical settlement purchase program" meets the two essential criteria under section 39 of the *Insurance Act* (Ontario). Firstly, it is "insurance"; secondly, it is insurance "undertaken in Ontario".

C. **ANALYSIS**

The matter to be considered clearly turns on the definition of "insurance" as set out in s.1 of the *Insurance Act*, (Ontario). Under that section, insurance is defined as follows:

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance.

As described above, the viatical contract in issue does not constitute any indemnification. It is a purchase of a right to a payment. Therefore, we must turn to the second part of the definition and consider whether the agreement between the USI and the viatical settlement purchaser is a contract of insurance in that it is an agreement "to pay a sum or money or other thing of value upon the happening of a certain event". That does not seem to be the case.

First, neither USI nor the viatical settlement purchaser undertakes to pay a sum of money upon the happening of a certain event under the structure of USI's viatical settlement purchase program. The purchaser purchases the right to receive death benefits from the life insurance policy of the viator. USI does not agree to pay the purchaser those funds from its own resources. Further, although the purchaser undertakes to, and does, pay a sum of money, that payment is advanced before the insured event, i.e. the death of the viator, occurs.

The viatical contract appears to be more akin to an assignment of an insurance contract.

The question is then raised as to "whether the assignment of the benefits of an insurance policy constitutes 'insurance' under the *Insurance Act* (Ontario)".

It is a settled principle of statutory interpretation that where a statutory definition employs the word "means", the definition is to be construed as exhaustive. (*Yellow Cab Ltd. V. Alberta (Board of Industrial Relations)*(1980), 114 D.L.R. (3d) 427 (S.C.C.) at p. 432.)

Section 1 of the *Insurance Act* (Ontario) is set out above.

Contract is defined in the *Insurance Act* (Ontario) as follows:

"contract" means a contract of insurance, and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement.

The exhaustive definitions of "insurance" and "contract of insurance" set out in the *Insurance Act* (Ontario) do not contain any reference to the assignment of the benefits of an insurance policy.

In addition, there are additional provisions within the *Insurance Act* (Ontario) that indicate that such an assignment is neither 'insurance' nor a 'contract of insurance'.

Part V of the Insurance Act (Ontario) deals with life insurance. In s. 171, the terms “beneficiary” and “insured” are defined as follows:

“beneficiary” means a person, other than the insured or the insured’s personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration “insured”

‘insured’,

- (a) in the case of group insurance, means, in the provisions of this Part relating to the designation of beneficiaries and the rights and status of beneficiaries, the group life insured, and
- (b) *in all other cases, means the person who makes a contract with an insurer;*” (emphasis added)

The clear distinction between the exhaustive definitions of “beneficiary” and “insured” in Part V of the Insurance Act (Ontario) is consistent with the distinction that is drawn at common law between the assignment of the policy itself and the assignment of the benefits under the policy. The significance of this distinction has been propounded by Canadian courts. In *Gosse*, Steele J.A. adverts to the distinction by quoting the following from a leading text on insurance law:

“it is vital to distinguish between the assignment of the contract of insurance and an assignment of the debt that arises under that contract. The assured may wish to transfer the subject-matter of the insurance and at the same time transfer the benefit of the insurance policy so that the transferee can sue under the policy for the damage sustained by what is now his interest; this can only be done in accordance with settled rules of law and, since there is to be a substitution of the original assured by a new assured, there is, in effect, a novation and the consent of the insurers will be required. On the other hand the assured may wish

merely to transfer the right to recover under the policy, this is a chose in action and can be effectively assigned at common law...[T]he consent of the insurer is not required because there is no change in the scope or the terms of the policy...”

*St. John's (City) v. Gosse (1995)*, [1996] I.L.R. 1-3294  
(Nfld. C.A.)

The passage quoted in *Gosse* accords with the holding in *Sanderson v. Halstead* [1968] 1 O.R. 749 (H.C.) that “the right to receive payment under an insurance policy is a chose in action”.

Accordingly, the decided cases have held that where there is an assignment involving insurance, in order for the assignment agreement itself to constitute insurance or a contract of insurance, it must be an assignment of the entire policy or contract rather than an assignment of the benefits or proceeds under the existing contract. In other words, and notwithstanding any other circumstances that may affect the determination, at a minimum, the assignee must be stepping into the shoes of the insured under the contract rather than becoming a substituted beneficiary in order for the assignment to be considered insurance or a contract of insurance.

However, the viatical settlement purchases at issue in this proceeding do not rise to the level of assignments of the contracts of insurance between the insurer and the insured. To quote from *Grosse*, there is “no change in the scope or the terms of the policy” as between the insurer and the insured (or viator). The insured (viator) does not assign the policy to the viatical settlement purchaser but rather the benefits under the policy are assigned. The assignment of a “chose in action” is not and cannot be either insurance or a contract of insurance. Apart from the statutory and common law distinctions between insureds and beneficiaries on the one hand and the insurance contracts and proceeds thereunder on the other, assignments of the benefits under an insurance contract simply do not have the requisite elements of a contract of insurance.

Counsel for the Superintendent concedes that an assignment of a contract of insurance for security of a loan would not constitute insurance. He argues that it is not insurance because the assignee has the right to re-acquire the contract on repayment of the loan. With all due respect, we cannot see why a repayment right affects whether an assignment constitutes insurance.

The only rights being dealt with in this case that are subject to an agreement connected with Ontario are, in essence, the right to designate who will receive the proceeds from the benefits of an American life insurance contract. The right to designate a beneficiary of the proceeds or to assign the right to so designate is a personal property right of the American insured that is thereby an incident to the contract between the insurer and the insured. The agreement evidencing the exercise of such a right is not insurance nor can it reasonably be construed to be so in light of either the statutory definition of insurance nor the common law interpretation of that definition.

D. **THE DISPOSITION**

In light of our conclusions, we find that the Financial Services Tribunal does not have jurisdiction to determine this matter as USI's viatical settlement purchase program does not constitute "insurance undertaken in Ontario" and consequently the Superintendent's Notice of Proposal is of no force or effect.

No submissions were made as to costs. The Financial Services Tribunal reserves the right to consider any such submissions.

**DATED** at Toronto, this 14<sup>th</sup> day of January 2002.

“Kathryn M. Bush”

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Vice Chair of the Tribunal and Chair of the Panel

“Martha Milczynski”

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Chair of the Tribunal and Member of the  
Panel

“Joseph Martin”

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Panel