

HOUSE BILL No. 2743

By Committee on Insurance and Financial Institutions

2-1

9 AN ACT concerning insurance; relating to sharing of certain records and
10 maintaining confidentiality thereof; relating to termination of agents;
11 relating to maintenance and availability of such records; relating to
12 disclosures and records under the viatical settlement act; amending
13 K.S.A. 2007 Supp. 40-5001 and repealing the existing section; also
14 repealing K.S.A. 2007 Supp. 40-5007.
15

16 *Be it enacted by the Legislature of the State of Kansas:*

17 New Section 1. (a) (1) The commissioner may conduct an examina-
18 tion under this act of a licensee as often as the commissioner in such
19 commissioner's sole discretion deems appropriate.

20 (2) For purposes of completing an examination of a licensee under
21 this act, the commissioner may examine or investigate any person, or the
22 business of any person, in so far as the examination or investigation, in
23 the sole discretion of the commissioner, is necessary or material to the
24 examination of the licensee.

25 (3) In lieu of an examination under this act of any foreign or alien
26 licensee licensed in this state, the commissioner, at the commissioner's
27 discretion, may accept an examination report on the licensee as prepared
28 by the commissioner for the licensee's state of domicile or port-of-entry
29 state.

30 (b) (1) Any person required to be licensed by this act shall for five
31 years retain copies of all:

32 (A) Proposed, offered or executed contracts, underwriting docu-
33 ments, policy forms, and applications from the date of the proposal, offer
34 or execution of the contract, whichever is later;

35 (B) all checks, drafts or other evidence and documentation related to
36 the payment, transfer, deposit or release of funds from the date of the
37 transaction; and

38 (C) all other records and documents related to the requirements of
39 this act.

40 (2) This section shall not relieve any person licensed under this act
41 of the obligation to produce these documents and provide copies thereof
42 to the commissioner after the retention period has expired if the person
43 has retained such documents.

- 1 (3) Records required to be retained by this section must be legible
2 and complete and may be retained in paper, photograph, microprocess,
3 magnetic, mechanical, electronic media or by any process that accurately
4 reproduces or forms a durable medium for the reproduction of a record.
- 5 (c) (1) Upon determining that an examination should be conducted,
6 the commissioner shall issue an examination warrant appointing one or
7 more examiners to perform the examination and instructing them as to
8 the scope of the examination. The commissioner may also employ such
9 other guidelines or procedures as the commissioner may deem
10 appropriate.
- 11 (2) Every licensee or person from whom information is sought, its
12 officers, directors and agents shall provide to the examiners timely, con-
13 venient and free access at all reasonable hours at its offices to all books,
14 records, accounts, papers, documents, assets and computer or other re-
15 cordings relating to the property, assets, business and affairs of the li-
16 censee being examined. The officers, directors, employees and agents of
17 the licensee or person shall facilitate the examination and aid in the ex-
18 amination so far as it is in their power to do so. The refusal of a licensee,
19 by its officers, directors, employees or agents, to submit to examination
20 or to comply with any reasonable written request of the commissioner
21 shall be grounds for suspension or refusal of, or nonrenewal of any license
22 or authority held by the licensee to engage in the viatical settlement busi-
23 ness or other business subject to the commissioner's jurisdiction. Any
24 proceedings for suspension, revocation or refusal of any license or au-
25 thority shall be conducted pursuant to the Kansas administrative proce-
26 dure act.
- 27 (3) The commissioner shall have the power to issue subpoenas, to
28 administer oaths and to examine under oath any person as to any matter
29 pertinent to the examination. Upon the failure or refusal of a person to
30 obey a subpoena, the commissioner may petition a court of competent
31 jurisdiction, and upon proper showing, the court may enter an order com-
32 pelling the witness to appear and testify or produce documentary evi-
33 dence. Failure to obey the court order shall be punishable as contempt
34 of court.
- 35 (4) When making an examination under this act, the commissioner
36 may retain attorneys, appraisers, independent actuaries, independent cer-
37 tified public accountants or other professionals and specialists as exam-
38 iners, the reasonable cost of which shall be borne by the licensee that is
39 the subject of the examination.
- 40 (5) Nothing contained in this act shall be construed to limit the com-
41 missioner's authority to terminate or suspend an examination in order to
42 pursue other legal or regulatory action pursuant to the insurance laws of
43 this state. Findings of fact and conclusions made pursuant to any exami-

1 nation shall be prima facie evidence in any legal or regulatory action.

2 (6) Nothing contained in this act shall be construed to limit the com-
3 missioner's authority to use and, if appropriate, to make public any final
4 or preliminary examination report, any examiner or licensee work papers
5 or other documents, or any other information discovered or developed
6 during the course of any examination in the furtherance of any legal or
7 regulatory action which the commissioner, in such commissioner's sole
8 discretion, may deem appropriate.

9 (d) (1) Examination reports shall be comprised of only facts appear-
10 ing upon the books, records or other documents of the licensee, its agents
11 or other persons examined, or as ascertained from the testimony of its
12 officers or agents or other persons examined concerning its affairs, and
13 such conclusions and recommendations as the examiners find reasonably
14 warranted from the facts.

15 (2) Not later than 60 days following completion of the examination,
16 the examiner in charge shall file with the commissioner a verified written
17 report of examination under oath. Upon receipt of the verified report,
18 the commissioner shall transmit the report to the licensee examined, to-
19 gether with a notice that shall afford the licensee examined a reasonable
20 opportunity of not more than 30 days to make a written submission or
21 rebuttal with respect to any matters contained in the examination report.

22 (3) In the event the commissioner determines that regulatory action
23 is appropriate as a result of an examination, the commissioner may initiate
24 any proceedings or actions provided by law.

25 (e) (1) Names and individual identification data for all viators shall
26 be considered private and confidential information and shall not be dis-
27 closed by the commissioner, unless required by law.

28 (2) Except as otherwise provided in this act, all examination reports,
29 working papers, recorded information, documents and copies thereof
30 produced by, obtained by or disclosed to the commissioner or any other
31 person in the course of an examination made under this act, or in the
32 course of analysis or investigation by the commissioner of the financial
33 condition or market conduct of a licensee shall be confidential by law and
34 privileged, shall not be subject to the provisions of the Kansas open re-
35 cords act, K.S.A. 45-215 et seq., and amendments thereto, shall not be
36 subject to subpoena, and shall not be subject to discovery or admissible
37 in evidence in any private civil action. The commissioner is authorized to
38 use the documents, materials or other information in the furtherance of
39 any regulatory or legal action brought as part of the commissioner's of-
40 ficial duties.

41 (3) Documents, materials or other information, including, but not
42 limited to, all working papers, and copies thereof, in the possession or
43 control of the NAIC and its affiliates and subsidiaries shall be confidential

1 by law and privileged, shall not be subject to subpoena, and shall not be
2 subject to discovery or admissible in evidence in any private civil action
3 if they are:

4 (A) Created, produced or obtained by or disclosed to the NAIC and
5 its affiliates and subsidiaries in the course of assisting an examination
6 made under this act, or assisting a commissioner in the analysis or inves-
7 tigation of the financial condition or market conduct of a licensee; or

8 (B) disclosed to the NAIC and its affiliates and subsidiaries under
9 paragraph (4) of subsection (e) by the commissioner.

10 For the purposes of paragraph (2) of subsection (e), the term “act”
11 includes the law of another state or jurisdiction that is substantially similar
12 to this act.

13 (4) Neither the commissioner nor any person that received the doc-
14 uments, material or other information while acting under the authority
15 of the commissioner, including the NAIC and its affiliates and subsidi-
16 aries, shall be permitted to testify in any private civil action concerning any
17 confidential documents, materials or information subject to paragraph (1)
18 of subsection (e).

19 (5) In order to assist in the performance of the commissioner’s duties,
20 the commissioner may:

21 (A) Share documents, materials or other information, including the
22 confidential and privileged documents, materials or information subject
23 to paragraph (1) of subsection (e), with other state, federal and interna-
24 tional regulatory agencies, with the NAIC and its affiliates and subsidi-
25 aries, and with state, federal and international law enforcement authorities,
26 provided that the recipient agrees to maintain the confidentiality and
27 privileged status of the document, material, communication or other
28 information;

29 (B) receive documents, materials, communications or information,
30 including otherwise confidential and privileged documents, materials or
31 information, from the NAIC and its affiliates and subsidiaries, and from
32 regulatory and law enforcement officials of other foreign or domestic
33 jurisdictions, and shall maintain as confidential or privileged any docu-
34 ment, material or information received with notice or the understanding
35 that it is confidential or privileged under the laws of the jurisdiction that
36 is the source of the document, material or information; and

37 (C) enter into agreements governing sharing and use of information
38 consistent with this subsection.

39 (6) No waiver of any applicable privilege or claim of confidentiality
40 in the documents, materials or information shall occur as a result of dis-
41 closure to the commissioner under this section or as a result of sharing
42 as authorized in paragraph (4) of subsection (e).

43 (7) A privilege established under the law of any state or jurisdiction

1 that is substantially similar to the privilege established under this subsection
2 shall be available and enforced in any proceeding in, and in any court
3 of, this state.

4 (8) Nothing contained in this act shall prevent or be construed as
5 prohibiting the commissioner from disclosing the content of an examination
6 report, preliminary examination report or results, or any matter
7 relating thereto, to the commissioner of any other state or country, or to
8 law enforcement officials of this or any other state or agency of the federal
9 government at any time or to the NAIC, so long as such agency or office
10 receiving the report or matters relating thereto agrees in writing to hold
11 it confidential and in a manner consistent with this act.

12 (9) The provisions of this subsection shall expire July 1, 2013, unless
13 the legislature acts to reenact such provisions. The provisions of this section
14 shall be reviewed by the legislature prior to July 1, 2013.

15 (f) (1) An examiner may not be appointed by the commissioner if the
16 examiner, either directly or indirectly, has a conflict of interest or is affiliated
17 with the management of or owns a pecuniary interest in any person
18 subject to examination under this act. This section shall not be construed
19 to automatically preclude an examiner from being:

20 (A) A viator;

21 (B) an insured in a viaticated insurance policy; or

22 (C) a beneficiary in an insurance policy that is proposed to be
23 viaticated.

24 (2) Notwithstanding the requirements of this clause, the commissioner
25 may retain from time to time, on an individual basis, qualified
26 actuaries, certified public accountants or other similar individuals who are
27 independently practicing their professions, even though these persons
28 may from time to time be similarly employed or retained by persons
29 subject to examination under this act.

30 (g) Unless provided otherwise, all fees and procedures for examinations
31 under this act shall be in accordance with K.S.A. 40-223, and amendments
32 thereto.

33 (h) (1) No cause of action shall arise nor shall any liability be imposed
34 against the commissioner, the commissioner's authorized representatives
35 or any examiner appointed by the commissioner for any statements made
36 or conduct performed in good faith while carrying out the provisions of
37 this act.

38 (2) No cause of action shall arise, nor shall any liability be imposed
39 against any person for the act of communicating or delivering information
40 or data to the commissioner or the commissioner's authorized representative
41 or examiner pursuant to an examination made under this act, if the
42 act of communication or delivery was performed in good faith and without
43 fraudulent intent or the intent to deceive. This paragraph does not ab-

1 rogate or modify in any way any common law or statutory privilege or
2 immunity heretofore enjoyed by any person identified in paragraph (1).
3 (3) A person identified in paragraph (1) or (2) shall be entitled to an
4 award of attorney fees and costs if such person is the prevailing party in
5 a civil cause of action for libel, slander or any other relevant tort arising
6 out of activities in carrying out the provisions of this act and the party
7 bringing the action was not substantially justified in doing so. For pur-
8 poses of this section a proceeding is “substantially justified” if it had a
9 reasonable basis in law or fact at the time that it was initiated.

10 (i) The commissioner may investigate suspected fraudulent viatical
11 settlement acts and persons engaged in the business of viatical
12 settlements.

13 (j) This section shall be part of and supplemental to the viatical set-
14 tlements act of 2002.

15 Sec. 2. K.S.A. 2007 Supp. 40-5001 is hereby amended to read as
16 follows: 40-5001. K.S.A. 2007 Supp. 40-5001 through 40-5016 inclusive
17 *and section 2*, and amendments thereto, may be cited as the viatical set-
18 tlements act of 2002.

19 Sec. 3. K.S.A. 2007 Supp. 40-5001 and 40-5007 are hereby repealed.

20 Sec. 4. This act shall take effect and be in force from and after its
21 publication in the statute book.