OHIO SECURITIES BULLETIN

A QUARTERLY PUBLICATION OF THE OHIO DIVISION OF SECURITIES

George V. Voinovich, Governor of Ohio
Donna Owens, Director of Commerce
Thomas E. Geyer, Commissioner of Securities

Division Announces its Position on Viatical Settlements

By Matthew Fornshell

In recent months the Ohio Division of Securities (the "Division") has received numerous inquiries from investors, viatical settlement companies, and the "securities industry" in general, regarding the treatment of viatical settlements under Ohio securities law. Following careful consideration of relevant Ohio caselaw and Ohio Revised Code Chapter 1707 ("Ohio Securities Act"), the Division has concluded that in virtually all instances viatical settlements are securities subject to the regulatory framework of the Ohio Securities Act. This article will discuss the Division's analysis of viatical settlements in light of current Ohio securities law and then briefly discuss the regulatory provisions that impact the sale of viatical settlements in Ohio.

R.C. 1707.01(B) defines "security" for purposes of the Ohio Securities Act. While "viatical settlements" are not specifically enumerated in that definition, the Division has concluded that virtually all viatical settlements satisfy the investment contract analysis announced in *State v. George* (1975), 50 Ohio App.2d 297, and are therefore securities as defined in R.C. 1707.01(B). In *George*, the court found that there is an investment contract, and therefore a security, when: (1) an offeree furnishes initial value to an offeror, and (2) a portion of this initial value is subject to the risks of the enterprise, and (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable

Continued on page 2

Viatical Settlements as Securities; Murky Area of Securities Law Begins to Clear

Editor's Note: This is the second installment of a two-part article excerpted from "Blue Sky Law," by Joseph C. Long. Copyright 1998 West Group (1-800-328-4880). All rights reserved. Reprinted by permission of West Group.

Investment Contract Analysis

It is important to recognize that the viatical settlement, as a property interest is not a per se security any more than the orange grove land in *Howey*. With the exception of oil and gas interests, real or personal property interests are not in and of themselves securities. Therefore, the sale of these interests does not per se involve the sale of a security. However, if a management or selection agreement accompanies the property sale, an investment contract is created.[66]

Applying the anatomy of an investment contract developed above to the pertinent facts developed in the last section, the decision of the court of appeals in *SEC v. Life Partners* not withstanding, it is clear that the offer and sale of viatical settlement interests constitutes the offer and sale of investment contracts.

Investment of Money

There should be little dispute that element one—the investment of money—exists in the viatical settlement situation. It is clear that the person purchasing the interst in the viatical settlement is making an investment when he pays for his interest in a viatical settlement. As noted above, this payment normally ranges from $5,000 to $50,000 in the case of fractional inter-

Continued on page 3

OHIO
DEPARTMENT OF
COMMERCE
DIVISION OF
SECURITIES
http://www.securities.state.oh.us

Ohio Securities Bulletin

Issue 98:3

Table of Contents

Division Announces its Position on Viatical Settlements 1
Viatical Settlements as Securities; Murky Area of Securities Law Begins to Clear 1
Fax Back Service Discontinued; Forms Available on Website 9
Investment Adviser Bill Approved by Ohio House, Awaits Action in Senate 9
Division Enforcement Section Reports 10
Federal and Ohio Securities Issues Conference 13
Capital Formation Statistics 14
Registration and Licensing Statistics 15
Brochure for Start-Up and Small Businesses Now Available 16

The Division of Securities is an Equal Opportunity Employer and Service Provider

Division Position on Viaticals

Continued from page 1

understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

It is important to note that viatical companies typically fractionalize a viator's life insurance policy among many investors. Given the large face amount of many life insurance policies, fractionalizing the policy is often the only way to market the policy to investors. Investor money is combined, or pooled, in an effort to pay the viator an agreed upon percentage of the face amount of his life insurance policy. The interests in a viator's life insurance policy sold to investors represent the "enterprise" for purposes of the investment contract analysis.

The first element of *George* is easily satisfied. Viatical investors pay money, or value, to a viatical company for the right to receive a percentage of the future benefits from a viator's life insurance policy.

The second element of the *George* test requires that a portion of the investor's initial value be subject to the risks of the enterprise. In George, the court was satisfied that an investor's money was subject to the risks of the enterprise when it could be established that the investor's money was used for typical business operating expenses. In the instance of viatical settlements, portions of investor money are used to pay the fees and commissions of the viatical companies, their sales forces and the escrow agent. Investor money is also used to pay the expenses, or premiums, to maintain the life insurance policy. Clearly, a portion of an investor's initial value is subject to the risks of the enterprise.

The third part of *George* requires that the furnishing of the initial value be induced by the offeror's promises or representations which give rise to a reasonable understanding by the investor that a valuable benefit over and above the initial value will accrue to the benefit of the investor as a result of the operation of the enterprise. Viatical investors invest in these instruments because they reasonably understand that their investments will yield returns ranging anywhere from 15 to 50 percent. This understanding is derived from viatical company literature, relied upon by investors, touting the safety and profitability of these instruments. The third element of *George* is met.

The final element of the investment contract test requires a showing that the offeree did not receive the right to exercise practical and actual control over the managerial decisions of the enterprise. In *George*, the court stated that where an investor enjoys little or no meaningful managerial control over the enterprise into which he contributed his initial value, then the fourth part of the test is satisfied.

As a practical matter, even if an investor received managerial rights in a given viatical settlement, it is the position of the Division that these rights are neither "meaningful" or practical for at least two reasons: investors have no experience in managing these types of investments and the potential number of investors with an interest in a given life insurance policy render management by the investors unpractical. In fact most, if not all, managerial responsibilities are either retained by the viatical company or delegated to the escrow agent. The fourth and final element of the *George* test is met.

Having established that viatical settlements are securities under the Ohio Securities Act, those engaged in selling viatical settlements in Ohio should be aware of the three primary regulatory provisions of the Ohio Securities Act: licensing, registration and anti-fraud provisions.

A seller of viatical settlements in Ohio must first determine its "status" under the Ohio Securities Act. The seller is either an issuer, dealer or salesman. The status of the seller will determine the licensing requirements of the seller or that the seller is exempt from licensing. The licensing provisions of the Ohio Securities Act are located in R.C. 1707.01 and R.C. 1707.14 through R.C. 1707.19.

As in the sale of all securities in Ohio, the seller must also determine the applicability of the registration requirements of the Ohio Securities Act. If the seller is the "issuer" of the viatical settlements, the issuer should ask several basic questions before selling securities in Ohio. The issuer must first determine if the security is exempt from registration pursuant to R.C. 1707.02. Next, the issuer should ask if the "transaction" is subject to an exemption located in R.C. 1707.03. If the transaction is exempted from registration under R.C.

OHIO SECURITIES BULLETIN

Desiree T. Shannon, Esq., Editor

The *Ohio Securities Bulletin* is a quarterly publication of the Ohio Department of Commerce, Division of Securities. The primary purpose of the *Bulletin* is to (i) provide commentary on timely or timeless issues pertaining to securities law and regulation in Ohio, (ii) provide legislative updates, (iii) report the activities of the enforcement section, (iv) set forth registration and licensing statistics and (v) provide public notice of various proceedings.

The Division encourages members of the securities community to submit for publication articles on timely or timeless issues pertaining to securities law and regulation in Ohio. If you are interested in submitting an article, contact the Editor for editorial guidelines and publication deadlines. The Division reserves the right to edit articles submitted for publication.

Portions of the *Ohio Securities Bulletin* may be reproduced without permission if proper acknowledgement is given.

Ohio Division of Securities

77 South High Street, 22nd Floor • Columbus, Ohio 43215

http://www.securities.state.oh.us

All listings are area code (614)

Receptionist 644-7381
Broker-Dealer 466-3466
Records 466-3001
Enforcement 466-6140
Registration 466-3440
Webmaster 644-8401

1707.03, the issuer should determine if the exemption is self-executing or if it requires a form filing with the Division. Finally, if no registration exemption is available, the issuer should turn to R.C. 1707.05 through R.C. 1707.11 to determine what form of registration filing is appropriate. The issuer should not forget to look to the administrative rules for additional guidance in complying with the registration provisions. If the seller of viatical settlements is a dealer or salesman, the seller should be aware of the registration status of the security prior to making sales.

Finally, a seller of viatical settlements in Ohio should be aware of the nature and extent of the anti-fraud provisions of the Ohio Securities Act. R.C. 1707.44(B) and R.C. 1707.44(G) prohibit fraud in the sale of securities by affirmative material misrepresentations and material omissions. The anti-fraud provisions of the Ohio Securities Act still apply in those instances where the sale of a security was exempt from registration and the seller was exempt from licensing.

Viatical settlements are investments that the Ohio Securities Act intended to regulate as they involve risks that investors may not realize exist and that unscrupulous promoters may misrepresent or fail to disclose to investors. The Division of Securities has concluded that viatical settlements are securities as that term is defined under Ohio law and that it is appropriate for the Division to assert its regulatory jurisdiction. The Division of Securities arrived at its conclusions based on current Ohio law and the long standing public policy of investor protection. The Division of Securities has no position, and makes no representations, on the social value of viatical settlements.

Matthew Fornshell is a Staff Attorney in the Enforcement Section.

Viatical Settlements

Continued from page 1

ests in a partial or fractional settlement to $100,000 or more in the case of the purchase of a full settlement.[67] However, in a few cases, the fractional interest may be as small as 3 percent of the base policy and sell for as little as $650.[68]

It is also clear that all parties consider this payment to be an investment. The documents used by both Life Partners, Inc. and its independent sales agents are directed to "investors" and talk about making an investment.[69]

Even Life Partners does not dispute that an investment is being made. As the trial court in the original opinion in *Life Partners* said: "The parties . . . do not contest that the buyers of viatical settlements *are investing money*."[70]

Expectation of Profit

It is equally clear that the third element of the *Howey* test—the expectation of a profit—is also met. The person buying the interest in the viatical settlement is doing so to make a profit. The letters and the sales literature recognize this expectation when they promise a "superior return, minimal risk." Further, these documents state "[t]he average investor return is better than 20% annually."[71] Both the trial and appellate courts in *Life Partners* agree that there is an expectation of profit. The trial court[72] said:

> The undisputed evidence in this case indicates that investors in viatical settlements are concerned with gaining a return on their investment. "[R]ates of return on viatical settlements consistently out-perform market rates by a wide margin."[73] Indeed, the material strongly emphasizes the superior return to be expected. "The discount for the longer term commitments is higher and, therefore, the potential annual yield more attractive."[74]

As noted above, the court of appeals had a more difficult time finding an expectation of profit, but concluded:

> The asset acquired by an LPI investor is a claim on future death benefits. The buyer is obviously purchasing not for consumption—unmatured claims cannot be currently consumed—but rather for the prospect of a return on his investment. As we read the *Forman* gloss on *Howey*, that is enough to satisfy the requirement that the investment be made in the expectation of profits.[75]

Common Enterprise

Element two, common enterprise, and four, profits solely or substantially through the efforts of others, are the contested elements. The common enterprise element, as restated above, exists in both the viatical settlement agreements offered by Life Partners and Viaticum. These agreements meet both the horizontal and broad-form vertical common enterprise tests. However, from the evidence presently seen, these viatical settlement agreements do not meet the narrow vertical common enterprise test adopted by the Ninth Circuit.[76] However, the absence of strict vertical common enterprise should not prohibit the finding of an investment contract here. As noted above, most courts are now adopting the position that either horizontal or vertical common enterprise will suffice.

Horizontal Test Is Met

As developed above, the horizontal test for common enterprise requires that the funds of a number of investors be pooled and that the profits and losses from the pooled investments be shared.[77] It is clear that Life Partners sold only fractional interests in its viatical settlements. As a result, there were multiple investors in each individual settlement agreement.[78] This indicates that the profits and the losses[79] from each agreement were divided among the various investors. The court of appeals agreed, saying:

Continued on page 4

Viatical Settlements

Continued from page 3

> Any profits or losses from an LIP contract accrue to all of the investors in that contract; i.e., it is not possible for one investor to realize a gain or loss without each other investors gaining or losing proportionately, based upon the amount that he invested.[80]

As to the pooling of funds, it is clear that investor payments for a fractional interest in a particular settlement go into a discrete escrow account for that agreement.[81] When sufficient funds were received to buy that particular viatical settlement according to the previously negotiated agreement with the insured, the escrow would be closed, the funds divided, and the insured paid. This shows a clear commingling of investor funds. The SEC argued, and I would agree, that this should satisfy the pooling of funds requirement. Thus, I believe that the three elements of the horizontal common enterprise test are met.

The court of appeals in *Life Partners* disagrees slightly here. It claims that commingling of funds does not necessarily establish a "pooling" of funds. It argues that commingling in this context is "but an administrative detail."[82] It concludes that "the inter-dependency of the investors (is what) transforms the transaction substantively into a pooled investment."[83] It is clear that the Life Partners should not actually close the purchase of a particular viatical settlement until all the fractional interests in that settlement were sold to the public and the money received by Sterling Trust.[84] This fact lead the court to conclude that the necessary pooling existed. It said:

> [W]e think that pooling is in practice an essential ingredient of the LPI program; that is, any individual investor would find that the profitability if not the completion of his or her purchase depends upon the completion of the larger deal.[85]

Broad Vertical Test Is Met, But Not the Narrow Vertical Test

It should be readily apparent that the broad vertical test for commonalty is met in both the Life Partners and Viaticum offerings. As noted above, this test requires nothing more than the promoter joining with the investor to accomplish a result, the making of a profit for the investor. Life Partners and Viaticum join with the various investors in negotiating and purchasing the viatical settlements from the insureds. The purpose of their purchase was to make money for the investors.[86]

However, the service companies, Life Partners and Viaticum receive a percentage commission based on the value paid for the viatical settlement.[87] This commission is very similar to what a real estate agent would receive for handling a real estate transaction or what a broker would receive for handling a securities or commodities trade. However, because the service companies will receive this commission regardless of whether the investor makes money, the service companies are not sharing in the profit of the venture.[88] Narrow form common enterprise, therefore, is not present.[89]

Restated Common Enterprise Test Also Met

It also should be obvious that my restated common enterprise test is also met. The service companies join with the investors to buy viatical settlements with the goal of making a profit for the investors.

This is the enterprise. It is active because the service company must use their skills to select the viatical agreements that will be purchased. The investors, however, are passive. They merely turn over their money to the service companies. Life Partners, Viaticum or their agents perform all the efforts necessary for the investors to receive this profit. They select the policies to buy, do all the negotiation and legal work to secure the agreements, perform monitoring and premium paying functions, and they finally complete all paper work necessary to get the proceeds of the policy paid.

Thus, we have our active enterprise, with a passive investor. This is exactly the type of endeavor which the securities acts were passed to regulate.

Profits are Solely or Substantially Through the Efforts of Others

Finally, the fourth element of the *Howey* test is also met. To make this determination two things have to be considered. First, are the investors in the viatical settlement agreements passive? And next, are the efforts expended by Life Partners and Viaticum managerial or entrepreneurial efforts within the *Glenn Turner* definition? As will be seen below, the answer to both these questions is "yes." The "efforts" discussion needs to be divided into prepurchase efforts and post-purchase efforts.

Pre-Purchase Efforts of Life Partners

As outlined above, Life Partners performed the following prepurchase efforts: (1) it evaluates the insured's medical condition; (2) it reviews the insurance policy; (3) it negotiates the actual purchase of the settlement including the sales price; and, finally, (4) it drafts all the legal documents necessary for the acquisition of the policy.[90] It does not, however, pay for the settlement.

These are clearly the kind of managerial or entrepreneurial efforts that the *Glenn Turner* case contemplated. Without Life Partners, Viaticum or their agents, the investor could not participate in this investment medium. The trial court in *Life Partners* agreed: "the pre-investment work by LPI . . . is undeniably essential to the overall success of the investment.[91] (sic) It was further stated in the initial opinion:

While investors may be asked for input such as "the amount they would like to spend, . . . T-cell counts, insured's age, insurance company rating, life expectancy and the like,"[92] they are in fact limited to LPI's evaluation of the patient. . . . The

mere retention of theoretical rights of control are of no consequence where the investor's role is essentially a passive one.[93]

Based on this analysis, it is clear that the Life Partner settlements would be securities, but for the decision of the court of appeals that prepurchase "efforts" probably should not be considered at all, or clear certainly only when accompanied by substantial post-purchase efforts.

As demonstrated above, this requirement simply does not stand close examination. Further, comparison of the Viaticum model with the Life Partners model shows the absurdity of the Circuit Court's holding. In the case of Life Partners, the viatical settlement agreement are not securities, even though Life Partners performs what are clearly acknowledged to be entrepreneurial efforts, because these efforts are performed *before* the investor purchases. On the contrary, the Circuit Court would have had to hold the Viaticum settlement agreements to be securities. Viaticum performs the same entrepreneurial efforts that Life Partners does, but *after* the investor puts up his capital.

Thus, the only difference in the programs appears to be the point at which the entrepreneurial efforts are performed. It is simply irrational to find one company's interest to be an investment contract, and the other's not, on the basis of when the efforts were performed. Both are investment contracts or neither are.

It is also clear that the investors are entirely passive in both models. The investors never have any contact with the patient whose policy they buy.[94] Their sole function is to select from a list of preapproved policies available through Life Partners. This is not, however, a realistic management decision. They do not know the name of the person whose policy they are buying.[95] This information is released only after the investor has forwarded his check.[96] They do not have the medical history of the person at the time they select the settlement to be purchased.[97] Then, only limited information is released.[98] No investor has ever attempted to evaluate the medical information for himself. Instead they rely upon Life Partners to secure the preliminary information about persons who are willing to sell all or part of their policy by entering into a viatical settlement.[99]

Further, the investor is relying solely on Life Partners (sic) determination of the patients' life expectancy which, in turn, determines the amount of his return on the settlement.[100] Neither the independent sales agent nor the investor make any independent verification of patient information or whether the policy meets the underwriting criteria.[101]

Based on the above analysis, in my opinion, the conclusion is inescapable that both the Life Partners and Viaticum models involve the sale of investment contracts.

Post-Purchase Efforts of Life Partner

The *Life Partners* courts were incorrect in holding that the post-purchase efforts were not entrepreneurial. Clearly, they were.

As outlined above, in versions one and two of its viatical settlement offerings, Life Partners through its agent, Sterling Trust, performs five important post-purchase efforts in addition to the prepurchase efforts discussed above.[102] They assume that the policy did not lapse by paying any premium due. Second, they convert the policy—if it is a group policy—into an individual policy. Third, they apparently stand ready to arrange for the resale of the investor's fractional interest, if the investor wishes to sell his interest.[103] They also track the insured to determine the state of his health and to learn of the insured's death.

Finally, upon the death of the insured, they perform the paper work necessary to have the death benefits paid. This involves a number of things. They must notify the investor and the insurance company of the death of the insured.[104] They must secure a death certificate which must be filed with the claim on the policy.[105] Next, they must file the death claim itself with the insurance company to collect on the policy.[106] Finally, when the death benefit is paid, they divide the proceeds and send the various investors a check for their share.[107]

Concerning these post-purchase efforts, the investor is entirely passive, relying solely on Life Partners or other service companies. The investors do not have the knowledge, skill, or access to perform these services for themselves. As a result, they are entirely dependent on the knowledge and expertise of Life Partners or Viaticum.

The trial judge recognized this fact and held all three versions to involve the sale of an investment contract.[108] When considering version one, where the services were technically optional, but the investor was not informed of this fact and where LPI, Pardo or Sterling were named beneficiaries under the policies, the judge said:

> [D]efendants' post-investment efforts are critical since LPI, not the investor, has the contractual relationship with the insurance company. The investors are dependent on LPI because they lack any contractual rights vis-a-vis the insurance company and are strangers to both the insurance company and other investors who bought interests in the same policy. As things now stand, LPI and Pardo could designate themselves or their nominees as beneficiaries, and there is the danger that defendants' creditors might attempt to reach the policies.[109]

In the second version, the services were optional, but would be performed unless Life Partners was specifically instructed not to do so, the judge reasoned:

> [T]he control supposed vested by LPI in its investors is largely theoretical, and does little to change the nature of the investors' role in the transaction. *See generally SEC v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577 (2d Cir. 1982). The investors under LPI's scheme are essentially passive; simply explaining to the investors that they themselves may perform some services already provided to them by LPI does not instill the control and access to information necessary to engage vertical commonalty.[110]

Finally, in the third version, Life-Partners discontinued the offering of any

Continued on page 6

Viatical Settlements

Continued from page 5

post-sale services. It left the investors to do the work for themselves or to seek a third party to perform it for them. The trial judge was unimpressed:

> As the SEC notes, it is neither realistic nor feasible for multiple investors, who are strangers to each other, to perform post-purchase tasks without relying upon the knowledge and expertise of a third party. Moreover, the third party in this case will almost certainly be Sterling Trust, the former president of which, Mike Posey, has just been installed as the president of defendant Life Partners, Inc. Defendants claim that there are numerous companies that perform post-purchase services, however, defendants have failed to identify any such company except Sterling Trust.[111]

Inexplicably, the trial judge found as a *matter of fact* and with little or no discussion that these post-purchase efforts[112] were of a "more ministerial nature." Then he did not consider them further in his decision, but focused on the prepurchase activities which he thought clearly were of a managerial nature. On appeal, the circuit court first stated that "ministerial functions should receive a great deal less weight than entrepreneural activities." It then announced:

> The SEC (like the district court) has identified no post-purchase service provided by LPI that could fairly be characterized as entrepreneural . . . .[113]

This holding by both the trial and appellate courts is simply flat wrong. Because it is a *finding of fact*, it is not binding upon, or even persuasive to, any other court or agency that might consider the viatical settlement issue. Other courts have found similar *post-investment* efforts sufficient to meet the efforts test.[114] As noted by the trial court in the language-quoted above, these investors do not have the skill, knowledge, or access to perform these tasks themselves. They have to rely upon either Life Partners, Sterling or some other agent to perform these functions for them. Whether these acts are ministerial in nature is irrelevent. They are essential to the success of the venture and, therefore, entrepreneurial under *Glenn Turner*.

What makes the court of appeals decision so bizarre is that it listed a number of efforts in connection with a mortgage pool which it felt would be considered entrepreneurial. It said of the mortgage pool:

> [A] mortgage pool must be managed on a continuing basis. Among the post-purchase services that should easily meet the "efforts of others" test as we have interpreted it are: *collecting late mortgage payments, initiating foreclosures*, structuring and monitoring work-outs, negotiating concessions in order to avoid refinancing, *and arranging for a secondary market.*[115]

I believe that there are three post-purchase actions by Life Partner (sic), which are similar to those outlined above, that should be held to be entrepreneurial. First, Sterling, as the agent for Life Partners, must see that the underlying insurance policy remains in good standing. This not only requires an action on Sterlings (sic) part, but after the first two years it may also involve a monetary obligation. Both events are critical to the success of the venture. Without payment, the policy will lapse and the entire investment is lost.[116] In my mind, this obligation is similar to collecting late mortgage payments identified by the court of appeals as an entrepreneurial effort.

Second, Life Partners undertakes to help investors re-sell their interests, if for any reason they do not wish to hold them until the insured dies. As outlined above, this is an entirely separate category of efforts which has long been held to staisfy the fourth element of *Howey*. Apparently, the court of appeals does not disagree because in connection with the mortgage pool, it indicated that "arranging for a secondary market" was a sufficient management effort.

Finally, there is the matter of defending a contestability suit by the insurance company. If either before or after the insured dies, the insurance company seeks to void the policy on the basis that the insured did not make full disclosure of his medical health, who will defend this suit?

Because the investors do not have title to the policy and are not named as the beneficiary of the policy, it would appear they do not have standing to defend such an action. Especially after the death of the insured, this obligation would seem to fall to Life Partners or Sterling Trust, acting as its agent.[117] This defense, like initiating a foreclosure action identified by the court of appeals, would seem an entrepreneurial effort.[118] If the defense is not successful, the entire investment is lost.

Joseph C. Long is a professor at the University of Oklahoma Law School and has written extensively on a variety of securities issues.

Endnotes

[66] There is a question of whether sale of the property plus management contract equals the investment contract or whether the management contract alone is the security. Lee *Long*. § 2.04[2][a][i]. This issue does not need to be addressed here as there is a sale of the viatical settlement and the management agreement at the same time.

[67] Pardo Deposition at 125.

[68] 318 U.S. App. D.C. 305, 87 F.3d at 539.

[69] Deposition of Mr. Glenn Pomeroy, North Dakota Securities Commissioner, February 2, 1993 at 182, 187; Pardo Deposition at 157; and undated cover letter on National Insurance Marketing, Inc. letterhead to Mr. Gene Schmidt which is marked as Deposition Exhibit 1; an undated letter, titled "Dear Investor" written on National Insurance Marketing, Inc. letterhead, which is marked as Deposition Exhibit 2 and 2-A to the Deposition of Mr. Larry Bowman February 5, 1993.

[70] 898 F. Supp. at 19 [Emphasis added].

[71] Pardo Deposition at 158.

[72] 898 F. Supp. at 20.

[73] [Author's note.] SEC Ex. 17 ("Life Partners Newsgram").

[74] [Author's Note.] SEC Ex. 39 ("Life Partners Newsgram" of January 1994.) The trial court went on to distinguish those cases rejecting the payment of fixed or contractually agreed to interest as not being a profit for investment contracts purposes, saying:

> Although the face value of the insurance policy is fixed, the return on investment varies based on the ability, or inability, of the terminally ill to outlast LPI life expectancy estimates. The return is also based on LPI's ability to translate that estimate into a valuation of the policy. What results is the prospect of a fluctuating return tied to the performance of an entity rather than a fixed or market based return.

898 F. Supp. at 20.

[75] 318 U.S. App. D.C. at 309, 87 F.3d at 543.

[76] See, e.g., Mordaunt v. Incomco, 686 F.2d 815 (9th Cir. 1982); cert. denied, 469 U.S. 1115(1985); *Brodt v. Bache & Co.*, 595 F.2d 459 (9th Cir. 1978). The SEC argued in *Life Partners* that this type of common enterprise existed. The court, however, found horizontal common enterprise and, therefore, did not address this issue. 318 U.S. App. D.C. at 310, 87 F.3d at 544. I do not know what evidence the SEC was relying on.

[77] Milnark v. M-S Commodities, Inc., 457 F.2d 274 (7th Cir.), cert. denied, 409 U.S. 887 (1972). See generally *Long*, § 2.04[2][b][iii].

[78] Id. at 174-175.

[79] As the court of appeals recognized there can be losses in connection with a viatical settlement.

> If the insured dies in a relatively short time, then the investors realize profits; if the insured lives a relatively long time, then the investors may lose money or at best fail to realize the return they had envisioned; *i.e.*, they experience a loss of the return they could otherwise have realized in some alternative investment of equivalent risk.

318 U.S. App. D.C. at 309, 87 F.3d at 543.

[80] Id.

[81] Pardo Deposition at 138.

[82] 318 U.S. App. D.C. at 310, 87 F.3d at 544.

[83] Id.

[84] Id.

[85] Id. Sterling apparently cashed the checks and put the resulting proceeds in a common escrow account for each settlement agreement. The court indicated that the pooling element would be met even if this practice had not been followed. Thus, there would be a common enterprise, if Sterling had just collected the individual checks and endorsed them over to the insured on an individual basis.

[86] It is interesting to note that Pardo in his deposition acknowledges that an investment contract can be created when a partnership is organized to invest in viatical settlements. Pardo Deposition at 110-111. He rejects, however, the same result when there is a single investor where Life Partners, Inc. is acting as an agent of the investor. In doing so, he has recognized the appropriate legal principle, but is unwilling to extend it to its logical conclusion. A partnership, either general or limited, is a *mutual agency*. The only reason that either limited partnership or general partnership interest becomes an investment contract is because one of the partners (an agent) exercises the management functions for the partnership to the exclusion of the other partners. See, e.g., Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1981); L&B Hospital Ventures, Inc. v. Healthcare, Int'l, Inc., 894 F.2d 150 (5th Cir. 1990). The Life Partners and Viaticum models involve nothing more than dropping the concept of a *mutual agency* in favor of a situation of nonmutual agency. The same concept of common enterprise and management through the efforts of others can be applied. The Fifth Circuit specifically so recognized in Long v. Schultz Cattle Co., 881 F.2d 129 (5th Cir.1989), a case involving a cattle feeding program.

[87] 318 U.S. App. D.C. at 306, 87 F.3d at 540. The net commission appears to be about 10 percent. Id. On the other hand Pardo's testimony indicates that only about 80 percent of the investment received goes to the patient selling the viatical settlement. The remaining 20 percent is paid to Life Partners and its independent sales agents as fees and commissions. Pardo Deposition at 145, 149.

[88] It appears clear that neither company ever takes an investment position in a settlement agreement. Instead, 100 percent of the interest in the policy purchased is fractionalized and sold to the public. 318 U.S. App. D.C. at 310, 87 F.3d at 544. However, it should be noted that sometimes the entire policy is not purchased from the insured. Thus, the service company may only purchase half the policy. This half is then fractionalized.

[89] See, e.g., Mordaunt v. Incomco, 686 F.2d 815 (9th Cir. 1982); cert. denied, 469 U.S. 1115 (1985); Brodt v. Bache & Co., 595 F.2d 459 (9th Cir. 1978).

[90] 318 U.S. App. D.C. at 305, 87 F.3d at 536.

[91] 898 F. Supp. at 22. Re-affirmed by the court in 912 F. Supp. at 9.

[92] [Author's note.] This quote comes from an Affidavit of Brian Pardo, submitted as SEC Ex. 12.

[93] 898 F. Supp. at 22, citing SEC v. Aqua-Sonic Prods. Corp., 687 F.2d 577 (2d Cir. 1982).

[94] Pardo, Deposition at 155.

[95] Id. at 122.

Viatical Settlements

Continued from page 7

[96] Id at 140-141.

[97] Id. at 130-131.

[98] Id. at 135.

[99] Id. at 168.

[100] Id. at 357.

[101] Id. at 122.

[102] 318 U.S. App. D.C. at 305, 87 F.3d at 539. It is believed that Viaticum also offers these same services.

[103] This feature was to be used in another version of Life Partner's agreement involving settlements where the insured had more than twenty-four months to live. 898 F. Supp. at 18. Apparently, none of the Life Partners investors have ever sought to take advantage of this service. 318 U.S. App. D.C. at 312, 87 F.3d at 546. However, whether investors took advantage of this feature is irrelevant because it was *offered*. The offer of an investment contract under *Howey* is just as much a violation as the sale of that contract. Skill in reselling something where there is a limited market and special expertise is required supplies the necessary "efforts" to make the arrangement an investment contract. These "efforts" are category IV efforts discussed in Chapter 2 above. See § 2.0_( )( ) *supra*.

[104] Id. at 151.

[105] Id. at 152.

[106] Id. at 147.

[107] As the trial court pointed out:

> After the insured's death, the benefits are ... paid directly to LPI [or Sterling Trust] which then pays the investors. Whether they receive a return on their investment or even recover their principal depends upon LPI's ability to honor its contractual obligations to them.

898 F. Supp. at 17-18.

[108] 912 F. Supp. at 9-10; 1996 WL 195136 at #1.

[109] 898 F. Supp. at 22.

[110] 912 F. Supp. at 9-10.

[111] 1996 WL 195136 at #1. The court in Daggett v. Jackie Fine Art, Inc., 152 Ariz. 559, 567, 733 P.2d 1142, 1149 (App. 1986) was equally unimpressed with this argument.

[112] It is significant that the trial judge did not recite the obligation of LPI and Sterling to see that any premiums due on the policy were paid. This and the aid in the resale of the interests are clearly managerial duties which would support a finding of investment contract based upon post-purchase activities.

[113] 318 U.S. App. D.C. at 314, 87 F.3d at 548.

[114] See, e.g., State ex rel. Mays v. Ridenhour, 811 P.2d 1220 (Kans. 1991)(the airplane pyramid scheme); 537721 Ontario, Inc. v. Mays, 14 Kan. App. 2d 1 780 P.2d 1126 (1989)(a lottery ticket scheme).

[115] 322 U.S. App. D.C. at 191, 102 F.3d at 589. [Emphasis added.] See also Daggett v. Jackie Fine Art, Inc., 152 Ariz. 559, 566, 733 P.2d 1142, 1149 (App. 1986). In this case, Jackie made all the production and printing arrangements for the limited editions of the prints to be made from the master purchased. It provided a list of art distributors who could handle the sale of the prints, a form letter to contact the distributors, and a sample distribution agreement. Jackie also strongly urged the purchasers to use a distributor. The court found these efforts sufficient to make the agreement an investment contract.

[116] The trial court in Life Partners did not consider this issue and, therefore, did *not* rule that it was *not* entrepreneurial.

[117] Both Life Partners and Sterling Trust were named as defendants along with the named insured in Mutual Life Ins. Co. v. Needham, 1996 U.S. Dis. LEXIS 10662 (N.D. Cal. July 22, 1996). The service company was also the defendant in Amex Life Assurance Co. v. Superior Court, 48 Cal. App. 4th 810, 51 Cal. Rptr. 2d 354 (1996).

[118] The court in Daggett v. Jackie Fine Art, Inc., 152 Ariz. 559, 733 P.2d 1142 (App. 1986) found that the providing of tax advise (sic) if the Internal Revenue Service challenged a tax shelter offering was the providing of managerial efforts.

Investment Adviser Bill Approved by Ohio House, Awaits Action in Senate

Legislation introduced in response to the National Securities Markets Improvement Act of 1996 that would give the Ohio Division of Securities authority to oversee investment advisers and investment adviser representatives operating in Ohio awaits a final hurdle in the Ohio Senate. On May 21, 1998, the Ohio House of Representatives approved Amended Substitute House Bill 695 by a vote of 89 to 6. Introduced as H.B. 695 on January 31, 1998 by Representative Dennis Stapleton (R-Washington Court House), the bill proposes state level oversight of investment advisers and investment adviser representatives operating in Ohio. The bill is based on a proposal developed by the Ohio Division of Securities with input from an industry working group, and consists of a series of amendments to the Ohio Securities Act that would be administered by the Division. The substance of the bill is based on the federal Investment Advisers Act of 1940, which is the law that currently governs the operations of investment advisers and financial planners in Ohio. A more detailed description of the bill appears in Bulletin Issue 98:1 and on the Division website at www.securities.state.oh.us.

It is anticipated that the measure will be introduced into the Ohio Senate when the General Assembly reconvenes after the November elections. It is expected that the bill will be referred to the Senate Finance Committee for hearings.

Copies of Am. Sub. H.B. 695 as passed by the House may be obtained from the LSC Bill Room in the basement of the Ohio Capitol Building (Statehouse) in Columbus. For more information regarding this proposal, you may telephone the Division at (614) 644-7381 and ask for Thomas Geyer or Michael Miglets. Updates will be posted on the Division's website, www.securities.state.oh.us.

Fax Back Service Discontinued; Forms Available on Website

In 1994, the Division launched a document "fax back" service to provide Division forms and documents. The automated service allowed a caller to request a specific form or document and have it sent to a designated fax machine.

Due to diminishing use, the fax back service has been discontinued. Use of the service had been declining over recent quarters, and Division records indicate that the service was not used at all during the last quarter. Consequently, the cost of maintaining the service far outweighed the benefit.

Although the fax back service has been discontinued, Division forms are available on the Division's website, www.securities.state.oh.us. The forms are in a PDF format and can be read and downloaded using the Adobe Acrobat program. Blank forms can be downloaded, completed and submitted to the Division.

Administrative Orders

LEWIS LEE COLLINS

On May 24, 1998, the Division issued a Final Order to Deny Application for Securities Salesman License, Order No. 98-199, to Lewis Lee Collins, a Virginia resident.

The Division had previously issued Division Order No. 98-103, a Notice of Opportunity for Hearing. The Order alleged the Respondent was not of "good business repute" as that term is used in Administrative Code Rule 1301:6-3-19(D)(7) and (9) and Revised Code section 1707.19(A) and gave him notice of intent to deny his application for licensure as a salesman of securities. The Respondent failed to request an adjudicative hearing pursuant to Chapter 119 of the Revised code upon receiving service of the Order. Therefore, the Division issued its Final Order to Deny Application for Securities Salesman License, Order No. 98-199, incorporating the allegations set forth in the Notice of Opportunity for Hearing.

HARRY JOSEPH FENZEL

On June 26, 1998, the Division issued a Final Order to deny Application for Securities Salesman License, Order No. 98-232, to Harry Joseph Fenzel, a New Jersey resident.

The Division had previously issued Division Order No. 98-232, a Notice of Opportunity for Hearing, to the Respondent. The Order alleged the Respondent was not of "good business repute" as that term is used in Administrative Code Rule 1301:6-3-19(D)(7) and (9) and Revised Code section 1707.19(A) and gave him notice of intent to deny his application for licensure as a salesman of securities. The Respondent failed to request an adjudicative hearing pursuant to Chapter 119 of the Revised Code upon receiving service of the Order. Therefore, the Division issued its Final Order to Deny Application for Securities Salesman License, Order No. 98-232.

DAVID L. HOLMES; FRANK BLASKO; ENERCON AMERICA, INC.

On June 29, 1998, the Division issued Order No. 98-239, a Cease and Desist Order, against David L. Holmes, Frank Blasko and Enercon America, Inc. The Respondents' business residence is in Ohio.

On August 28, 1997, the Division issued Division Order No. 97-234A, a Notice of Opportunity for Hearing against the Respondents, alleging that they had violated R.C. 1707.44(B)(4), 1707.44 (C)(1) and 1707.44(G). These sections prohibit, respectively, making false representations in the sale of securities; selling securities without proper registration or claim of exemption from registration and selling securities while knowingly engaging in any act or practice which is declared illegal, defined as fraudulent or prohibited under the provisions of Chapter 1707 of the Revised Code. The Order also notified the Respondents of the Division's intent to issue a final Cease and Desist Order against them. Upon receiving service of the Order, the Respondents requested an adjudicative hearing pursuant to Chapter 119 of the Revised Code. A hearing was granted and the Hearing Officer found in the Division's favor. The Division approved the Hearing Officer's Report and Recommendation, thereby issuing a final Cease and Desist Order against the Respondents, Order No. 98-239.

JAMES S. POWELL; POWELL FINANCIAL GROUP; POWELL FINANCIAL GROUP LIMITED PARTNERSHIP

On August 31, 1998, the Division issued Order No. 98-368, a Cease and Desist Order, against James S. Powell, Powell Financial Group and Powell Financial Group Limited Partnership, all of Ohio.

On May 29, 1998, the Division issued and thereafter served a Notice of Opportunity for Hearing, Order No. 98-204. The Order alleged the Respondents had violated R.C. 1707.44(C)(1) and R.C. 1707.44(B)(4), which respectively prohibit the sale of securities not registered or claimed for exemption and the making of false representations in the sale of securities. The Order also advised the Respondents of the Division's intention to issue a final Cease and Desist Order regarding the matter. The Respondents requested an adjudicative hearing as permitted pursuant to Chapter 119 of the Revised Code, but later withdrew their request. Therefore, the Division issued its Cease and Desist Order, Order No. 98-368, incorporating the allegations set forth in the Notice of Opportunity for Hearing.

ROBERT LIPPARD DAVIDSON, JR.

On July 2, 1998, the Division issued a Final Order, Order No. 98-245, to Robert Lippard Davidson, an Ohio resident, granting him a securities salesman license.

On April 9, 1998, the Division issued Order No. 98-124, a Notice of Opportunity for Hearing to the Respondent. The Order notified the Respondent of the Division's intent to deny his application for licensure as a securities salesman because the Respondent was not of good "business repute" as that term is used in R.C. 1707.16, R.C. 1707.19 and Administrative Code section 1301:6-3-19(D)(7) and (9). Upon receipt of the Order, the Respondent timely requested a hearing regarding the matter as permitted under Chapter 119 of the Revised Code. A hearing was held and the Hearing Officer found in the Respondent's favor. The Division confirmed and approved the Hearing Officer's recommendation and issued its Final Order No. 98-245.

LA JOLLA CAPITAL CORPORATION

On July 22, 1998, the Division issued Order No. 98-279, a Final Order To Refuse Renewal of Securities Dealer License, against La Jolla Capital Corporation of California.

On December 23, 1997, the Division issued to the Respondent Order No.

97-430, a Refusal of Renewal of Securities Dealer License and Notice of Opportunity for Hearing alleging that the Respondent was not of "good business repute" as that phrase is used in R.C. 1707.19(A) and Administrative Code Rule 1301:6-3-19(D)(2),(7) and (9). The Respondent timely requested an adjudicative hearing pursuant to Chapter 119 of the Revised Code. A hearing was held and the Hearing Officer found in the Division's favor. After also considering the Respondent's objections to the Hearing Officer's Report and Recommendation, the Division confirmed and approved the Hearing Officer's recommendations, thereby issuing its Final Order to Refuse Renewal of Securities Dealer License.

TERRA NOVA TRADING, L.L.C.

On August 11, 1998, the Division issued Order No. 98-322, a consented Cease and Desist Order, to Terra Nova Trading, L.L.C., an Ohio company.

On August 5, 1998, the Division issued a Notice of Opportunity for Hearing to the Respondent, Order No. 98-321. The Order alleged the Respondent had violated R.C. 1707.44(A), which prohibits the unlicensed sale of securities and informed the Respondent of the Division's intent to issue a final Cease and Desist Order regarding the matter. The Respondent and the Division entered into discussions which resulted in both parties entering into a Consent Agreement, which principally requires the Respondents to consent, stipulate and agree to the terms set forth in the accompanying Cease and Desist Order (which incorporated the allegation stated in the Notice of Opportunity for Hearing), Order No. 98-322 and to waive rights to appeal this order.

PELLETT INVESTMENTS, INC.

On August 13, 1998, the Division issued Order No. 98-326, a Confirmation of Suspension of Ohio Securities Dealer License No. 179357, Revocation of Ohio Securities Dealer License No. 179357 against Pellett Investments, Inc., a Montana company.

On July 2, 1998, the Division issued a Notice of Opportunity for Hearing, alleging the Respondent had violated R.C. 1707.44(L), which prohibits dealers from engaging in any act that violates the provisions of section 15(c) or 15 (g) of the Securities and Exchange Act of 1934, or any rule or regulation promulgated by the securities and exchange commission thereunder. The order also notified the Respondent of the Division's intention of issuing a final order revoking the Respondent's dealer's license. The Respondent failed to request a hearing as permitted by Chapter 119 of the Ohio Revised Code. Therefore, the Division issued its final order, Order No. 98-326, revoking the Respondent's dealer's license.

GARY M. HESS

On August 18, 1998, the Division issued Order No. 98-332, a Cease and Desist Order, against Gary M. Hess, an Ohio resident.

On July 14, 1998, the Division issued Order No. 98-266, a Notice of Opportunity for Hearing, against the Respondent, alleging violation of R.C. 1707.44(A) and 1707.44(C)(1), respectively, the unlicensed and unregistered sales of securities. The order also notified the Respondent of the Division's intent to issue a final Cease and Desist Order. The Respondent failed to timely request a hearing pursuant to Chapter 119 of the Revised Code, thereby allowing the Division to issue its Cease and Desist Order, Order No. 98-332, incorporating the allegations set forth in the Notice of Opportunity for Hearing.

RONALD S. LEICHMAN

On August 18, 1998, the Division issued Order No. 98-333, a Cease and Desist Order, against Ronald S. Leichman (see related action involving Gary M. Hess above). Leichman is an Ohio resident.

On July 14, 1998, the Division issued Order No. 98-265, a Notice of Opportunity for Hearing, alleging that the Respondent had sold unregistered securities in violation of R.C. 1707.44(C)(1). The Order also notified the Respondent of the Division's intention to issue a Cease and Desist Order incorporating this allegation. The Respondent failed to timely request a hearing pursuant to Chapter 119 of the Revised Code, thereby allowing the Division to issue its Cease and Desist Order No. 98-333.

CESARE JOSEPH IORI, JR.

On August 20, 1998, the Division issued Order No. 98-336, a Final Order to Deny Application for Securities Salesman License, against Cesare Joseph Iori, Jr., a resident of New York state.

On July 8, 1998, the Division issued to the Respondent Order No. 98-254, a Notice of Opportunity for Hearing, alleging that the Respondent was not of "good business repute" as that term is used in Administrative Code Rule 1301:6-3-19(D)(3) and (9) and R.C. 1707.19(A). The Order also notified the Respondent of the Division's intention to issue a final order denying him an Ohio securities salesman license. The Respondent failed to request an adjudicative hearing regarding the matter as permitted by Chapter 119 of the Revised Code. Therefore, the Division issued its Final Order to Deny Application for Securities Salesman License, Order No. 98-336.

LEO OPPENHEIM & CO., INC.

On August 24, 1998, the Division issued Order No. 98-355, a consented Cease and Desist Order, against Leo Openheim & Co., Inc., Ohio License No. 210830. The Respondent is an Oklahoma company.

On April 27, 1998, the Division issued and subsequently served on the Respondent Order No. 98-160, a Notice of Opportunity for Hearing. The order alleged that the Respondent violated R.C. 1707.44(A), which prohibits the unlicensed sale of securities. Upon issuance of the order, the Division and the Respondent entered into a Consent Agreement, which was to be accompanied by the issuance of a Cease and Desist Order, Order No. 98-355. The agreement principally requires the Respondent to consent, stipulate and agree to the terms set forth in the Notice of Opportunity for Hearing and to the issuance of a Cease and Desist Order. The agreement also requires the Respondent to waive appeal rights in the matter. The Respondent also agreed separately to apply

for an Ohio securities dealer license and to offer recission to investors involved in the unlicensed sales.

SALEM SECURITIES CORPORATION

On August 25, 1998, the Division issued Order No. 98-357, a consented Cease and Desist Order against Salem Securities Corporation, a Florida company.

On August 14, 1998, the Division issued a Notice of Opportunity for Hearing to the Respondent, Order No. 98-331. The Order alleged the Respondent had violated R.C. 1707.44(A), which prohibits the unlicensed sale of securities. The Order also notified the Respondent of the Division's intention of issuing a Cease and Desist Order incorporating this allegation. Upon issuance of the Order, the Respondent and the Division entered into a Consent Agreement. The agreement principally requires the Respondent to consent, stipulate and agree to the terms set forth in the Notice of Opportunity for Hearing, as well as to the issuance of a Cease and Desist Order, Order No. 98-357. The Respondent also agreed to waive appeal rights in the matter. The Respondent also agreed separately to apply for an Ohio Dealer's license and offer recission to investors involved in unlicensed transactions.

MARK MAHER

On August 26, 1998, the Division issued a consented Cease and Desist Order, Order No. 98-358 against Mark Maher, an Ohio resident.

On April 2, 1998, the Division issued a Notice of Opportunity for Hearing, Amended Division Order No. 98-062. The Order alleged the Respondent had violated R.C. 1707.44(C)(1), which prohibits the sale of unregistered securities, and notified the Respondent of the Division's intention to issue a Cease and Desist Order incorporating this allegation. The Respondent requested an adjudicative hearing regarding the matter as permitted under Chapter 119 of the Revised Code. The Respondent later withdrew this request and entered into a Consent Agreement with the Division. The agreement principally requires the Respondent to consent, stipulate and agree to the conclusions and orders set forth in the Division Order to Cease and Desist, Order No. 98-358 and to waive appeals in the matter.

Editor's Note: Enforcement Section Reports of Division Orders issued or finalized for the remainder of the third quarter will be reported in the next Ohio Securities Bulletin. Those wishing further information regarding any of the above enforcement actions may contact the Division and review the Orders summarized above.

Criminal Actions

JOSEPH ROY

On October 22, 1998, Judge Sheward of the Franklin County Court of Common Pleas, accepted the guilty plea of Joseph Michael Roy to two counts of felonies of the fourth degree: sale of unregistered securities and misrepresentations in the sale of securities. Judge Sheward ordered a pre-sentence investigation and set sentencing for December 11, 1998. Roy, of Franklin County, had been indicted on July 30, 1998, on those two counts plus securities fraud and theft.

As part of the plea agreement, the defendent made complete restitution to the victim in this case. The state dismissed the other two charges against the defendent.

PATRICK A. HANNAHS

On July 14, 1998, Patrick A. Hannahs was convicted on two counts of aggravated theft and one count of making false representations in selling securities. He was sentenced to a total of five years imprisonment and ordered to pay restitution to investors. After Hannahs ceased being licensed as a securities salesman, he continued to sell securities to his clients in the Cambridge area. Investors were not aware that Hannahs was no longer licensed or that their funds were placed in an account controlled by Hannahs rather than purchasing investments.

THEODORE E. MONG

Theodore E. Mong II was sentenced to 15 to 35 years in prison, after being convicted by a Licking County jury. The jury convicted Mong of 79 felony counts involving securities fraud after a trial was held. Mong, of Columbus, is the former President of Liberty Bell Association, Inc. in Newark, Ohio. Mong, through this company, sold promissory notes to approximately 40 investors located primarily in Licking County, who were defrauded out of approximately $1.5 million.

Mong was convicted of 32 counts of selling securities without a license (fourth degree felony), 31 counts of selling unregistered securities (fourth degree felony), 7 counts of misrepresentations in selling securities (fourth degree felony), 7 counts of securities fraud (fourth degree felony), one count of receiving stolen property (second degree felony) and one count of corrupt activities (first degree felony). A Licking County Grand Jury had previously issued an 81-count indictment on June 19, 1997. (See *Ohio Securities Bulletin* Issue 97:2). One count of securities fraud and one count of misrepresentation in selling securities were later dropped.

S.E.C. AND OHIO SECURITIES ISSUES CONFERENCE

Thursday, December 10, 1998, Holiday Inn West, Columbus, Ohio

Sponsored by:
Kent State University
The Ohio Society of Certified Public Accountants
The Ohio Division of Securities

TOPICS: Globalization of the Securities Markets; Y2K Reporting Progress; Current Accounting and Legal Issues in Business Combinations; SEC Reporting Issues for Registrants; Securitization Issues; SEC Accounting and Disclosure Issues; Legal Issues in Private Capital Formation; Securities Law and the Internet; and Current Developments at the Ohio Division of Securities.

The meetings of the Division's Advisory Committees will be held at the conclusion of the seminar portion of the Conference (approximately 3:30 p.m.).

All Ohio subscribers to the Ohio Securities Bulletin will be mailed a brochure containing additional details and providing information about Conference registration. Please note that Conference registration and administration will be handled by the Ohio Society of Certified Public Accountants, not the Division. You may contact the Ohio Society at (614) 764-2727.

Capital Formation Statistics
Amounts in Thousands (rounded up)

Filing Type	Third Quarter 1998	YTD 1998
Exemptions		
Form 3(Q) & Form D*	$568,707	$2,548,520
Form 3(W)	17,199	57,872
Registrations		
Form .06	304,298	646,440
Form .09	17,691	391,889
Form .091	3,082,723	6,703,260
Investment Companies		
Definite	94,603	292,346
Indefinite**	655 filings	1979 filings
TOTAL	**$4,740,221**	**$12,619,327**

**Reflects sales actually reported. Remaining categories reflect amount of securities registered or eligible to be sold in Ohio by issuers.*
***Investment companies may seek to sell an indefinite amount of securities by submitting maximum fees. Based on the maximum filing fee of $1,100, an indefinite filing represents the sale of a minimum of $1,000,000 worth of securities, with no maximum. For purposes of calculating an aggregate capital formation amount, each indefinite filing has been assigned a value of $1,000,000.*

Because the Division's mission includes enhancing capital formation, the Division tabulates the aggregate dollar amount of securities to be sold in Ohio pursuant to filings made with the Division. As indicated in the notes to the table, the aggregate dollar amount includes a value of $1,000,000 for each "indefinite" filing. However, the table does not reflect the value of securities sold pursuant to "self-executing exemptions" like the "exchange listed" exemption in R.C. 1707.02(E) and the "limited offering" exemption in R.C. 1707.03(O). Nonetheless, the Division believes that the statistics set out in the table are representative of the amount of capital formation taking place in Ohio.

Registration Statistics

The following table sets forth the number of registration and exemption filings received by the Division during the third quarter of 1998, compared to the number of filings received during the third quarter of 1997. Likewise, the table compares the year-to-date filings for 1997 and 1998.

Filing Type	3rd Qtr '98	YTD 1998	3rd Qtr '97	YTD 1997
1707.03(Q)	366	1152	354	1027
1707.03(W)	10	41	13	47
1707.04	0	0	0	0
1707.041	0	1	0	5
1707.06	21	92	32	122
1707.09	16	38	125	637
1707.091	65	264	321	1837
NF**	1042	3166	615	706
1707.39	1	5	2	14
1707.391	21	89	25	103
Total	1542	4848	1487	4498

**Includes 231 filings submitted on federal Form D for offerings made pursuant to Rule 506 of Regulation D. Use of the federal Form D was not available before April 21, 1997.*

***The Form NF is a form adopted by the North American Securities Administrators Association, Inc. to be used by investment companies in making notice filings. The form was drafted as a result of the National Securities Markets Improvement Act of 1996, and is used at the election of the issuer. Usage of the Form NF began in 1997, with its usage increasing throughout the year.*

Licensing Statistics

The table below sets out the number of Salesmen and Dealers licensed by the Division at the end of the first, second and third quarters of 1998, compared to the corresponding quarters of 1997 as well as the fourth quarter of 1997 compared to the corresponding quarter of 1996.

	End of Q3 1998	End of Q3 1997	End of Q2 1998	End of Q2 1997	End of Q1 1998	End of Q1 1997	End of Q4 1997	End of Q4 1996
Number of Salesmen Licensed:	88,796	83,545	85,526	82,135	81,210	80,289	83,238	82,498
Number of Dealers Licensed:	2,151	2,154	2,106	2,113	2,082	2,050	2,170	2,060

Brochure for Start-Up and Small Businesses Now Available

The Division of Securities has developed a new brochure titled "An Introduction to the Ohio Securities Laws for Start-Up and Small Businesses." As its title suggests, the brochure gives an overview of the Ohio securities laws, although it is not intended to be a substitute for consultation with competent legal counsel. In particular, the brochure describes the securities registration exemptions most commonly available to start-up and small businesses. The brochure also lists the Ohio securities registration exemptions that may correspond to the federal securities registration exemptions most commonly used by start-up and small businesses. Copies of the brochure may be obtained by contacting the Division at (614) 644-7381.

OHIO SECURITIES BULLETIN

Ohio Division of Securities
77 South High Street
22nd Floor
Columbus, Ohio 43215

Bulk Rate
U.S. Postage
PAID
Columbus, Ohio
Permit No. 5455