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John J. UyHam, Esq.
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600 Peachtree Street, NE, Ste. 2400
Atlanta, Georgia 30308-2222

Re: Habersham Funding, LLC
Exemption from Registration for
Sale of Viatical Settlement Contracts Pursuant to
Rule 504.01(A)(12)(m)
No Action Letter No. 02-1

Dear Mr. UyHam:

We are in receipt of your letter dated 29 November 2001 and written on behalf of your client, Habersham Funding, LLC (Habersham), a Georgia limited liability company, which proposes to sell viatical settlement contracts (viaticals) to Arkansas residents pursuant to the exemption set out in Rule 504.01(A)(12)(m), Rules of the Arkansas Securities Commissioner.

In your letter you represent that Habersham proposes to sell viaticals to Arkansas residents that originated outside of Arkansas, specifically whole life insurance policies or fractionalized interests in life insurance policies of policyholders resident outside of Arkansas. Habersham will sell viaticals that it has purchased or will broker viaticals directly from the policyholders to the purchasers.

The exemption set out in Rule 504.01(A)(12)(m) has three requirements, to wit:

1. the underlying viatical settlement transaction with the viator be in compliance with the Viatical Settlements Act (VSA), Ark. Code Ann. §§ 23-81-501, *et seq.* (Repl. 1999);
2. the contract for the sale of the viatical have a provision providing for a right of rescission within fifteen (15) days of the date either the purchase price was paid, or the last disclosure document was delivered to the purchaser, whichever is later; and

3. two disclosure documents published by the Arkansas Securities Commissioner are delivered to the purchaser within time limits set out in the rule.

You represent that Habersham intends to comply with the provisions of Rule 504.01(A)(12)(m) by delivering the disclosure documents (Viatical Disclosure Documents I and II) to purchasers in a timely manner and by ensuring that purchasers have not exercised their rescission rights by checking with them the day after the rescission period runs.

Your first question is whether sales of viaticals that are comprised of life insurance policies of policyholders resident in states outside of Arkansas and who purchased their life insurance policies in states outside of Arkansas must have complied with the VSA in order to qualify for the exemption in Rule 504.01(A)(12)(m)? Because it is fundamental that state laws can have no extraterritorial jurisdiction, the answer to this question is no.

It is also noteworthy that the VSA applies only to viaticals comprised of policyholders who are terminally or chronically ill. Ark. Code Ann. § 23-81-502(l) (Repl. 1999). Because the definition of viatical settlement contract in Rule 102.01(36), Rules of the Arkansas Securities Commissioner, is broader than that and includes the sale of any life insurance policy, fractionalized or whole, for consideration less than the death benefit, regardless of the health of the person whose life is insured, the VSA will not apply to all viaticals covered by the Arkansas Securities Act.

Your second question deals with the registration requirements of agents of Habersham who would be selling viaticals in Arkansas. You submit that because these agents would be selling viaticals that are exempt from registration pursuant to Rule 504.01(a)(12)(m), they would not have to be registered because they would be excluded from the definition of agent under Ark. Code Ann. § 23-42-102(2)(B)(i)(b) (Supp. 2001).

You are correct in this supposition. First, § 23-42-102(2)(B)(i)(b) excludes from the definition of agent anyone representing the issuer of a security exempt from registration pursuant to Ark. Code Ann. § 23-42-504 (Repl. 1999). Although viaticals are exempt from registration pursuant to Rule 504.01(A)(12)(m), that rule was promulgated pursuant to Ark. Code Ann. § 23-42-504(a)(12) (Repl. 1999). Thus, viaticals are also exempt from registration pursuant to § 23-42-504.

Second, Habersham would be the issuer under either of the alternative definitions of issuer in the Arkansas Securities Act found at Ark. Code Ann. § 23-42-102(9)(E) (Supp. 2001). In the case of fractionalized interests, an issuer is “the person who creates for the purpose of sale the fractionalized or pooled interest.” § 23-42-102(9)(E)(i). In the case of a viatical that is not fractionalized, an issuer is “the person effecting the transaction with the investor in such a contract.” § 23-42-102(9)(E)(ii). Because Habersham would be creating the fractionalized interests by purchasing life insurance policies and then selling fractionalized interests in them, Habersham would be an issuer under the first definition. Habersham would be the issuer under the second definition in the case of the un-fractionalized or whole policy sale because it, through its agents, would be effecting the sale between the policyholder and the investor.

In sum, any agent of Habersham selling viaticals exempt from registration pursuant to Rule 504.01(A)(12)(m) need not be registered in accordance with the Arkansas Securities Act.

Accordingly, the Staff of the Arkansas Securities Department will recommend that the Arkansas Securities Commissioner take no enforcement action against Habersham for not registering its viaticals or its agents who are selling them if the facts remain as stated in your letter.

Please note that the position of the Staff is based solely upon the representations made in your letter and your telephone conversations with me. Different facts or circumstances might and often would require a different response. The position expressed deals only with anticipated enforcement action and does not purport to be a legal opinion.

Please note, also, that even though the Staff considers the viaticals discussed in this letter exempt from registration if sold as represented in your letter, and the agents of Habersham selling them also exempt from registration, there is no exemption from the anti-fraud provisions of the Arkansas Securities Act. See Ark. Code Ann. § 23-42-507 (Repl. 2000).

Lastly, it is important to note that this position applies only to sales in Arkansas. If you are planning on selling viaticals to persons in other states, it is recommended that you obtain a similar no action letter from the securities regulatory agency in that state or seek a legal opinion from counsel in that state.

With best regards,
Theodore Holder
ASSISTANT COMMISSIONER