No. 14-0122

IN THE
SUPREME COURT OF TEXAS

LIFE PARTNERS, INC. and MILKIE/FERGUSON INVESTMENT, INC.,
Petitioners

v.

MICHAEL ARNOLD, JANET ARNOLD, and STEVE SOUTH, as TRUSTEE ON AND ON BEHALF OF THE SOUTH LIVING TRUST, JOHN S. FERRIS, M.C., CHRISTINE DUNCAN, AND ALL OTHERS SIMILARLY SITUATED,
Respondents

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas
Cause No. 05-12-0092-CV

BRIEF OF AMICUS CURIAE: NORTH AMERICAN SECURITIES ADMINISTRATORS, INC.

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STATEMENT OF INTEREST

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

NASAA's members' fundamental mission is protecting investors. Their principal activities include registering certain types of securities; licensing the firms and agents who offer and sell securities; investigating violations of state law; and, where appropriate, filing enforcement actions. State securities regulators also educate the public about investment fraud and advocate for the adoption of strong, fair, and uniform securities laws and regulations at both the state and federal level.

NASAA supports the work of its members by coordinating multi-state enforcement actions, offering training programs, publishing investor education materials, and presenting the views of its members in testimony before Congress on matters of securities regulation. Another core function of the association is to represent the membership's position, as *amicus curiae*, in significant cases involving the interpretation of securities laws and the rights of investors.

NASAA and its members have a substantial interest in the outcome of this appeal due to the widespread abuses involved in the marketing and sale of viatical and life settlement contracts ("Life Settlement Contracts") for over a decade. Life Settlement Contracts, such as those involved in this case, have been the focus of numerous state enforcement actions. Should this Court agree with Petitioners' position that their Life Settlement Contracts are not securities, regulators in Texas will be unable to protect investors from these abuses by subjecting Life Settlement Contracts to the registration and disclosure requirements of the Texas Securities Act or by bringing enforcement actions for violations of the Act. Specifically, a ruling that the Life Settlement Contracts sold by Petitioners are not securities under an investment contract analysis would stand well outside the mainstream of federal and state securities law and will accordingly narrow the jurisdiction of the Texas State Securities Board and weaken the deterrent effect vital to state securities regulation. As a result, in a very real sense, the citizens of Texas will be more vulnerable to fraud and abuse as unscrupulous promoters are left able to sell these unregistered products in Texas, while individuals and the Texas Securities Board will be left with no recourse under the Texas Securities Act.

Finally, if the Life Settlement Contracts at issue here are found not to be securities, it will undermine investor protection not only in Texas, but in other jurisdictions as well, because the Court can expect the Petitioners and others in the

life settlement business will use the decision to argue that their products are not securities in other states. Allowing petitioners to evade the securities laws in Texas would weaken investor protection nationwide, as a holding adverse to the investors here poses the threat of being used as persuasive authority by courts in other jurisdictions.

STATEMENT OF THE CASE

NASAA incorporates the statement of the case presented in Respondents' Brief on the Merits.

STATEMENT OF JURISDICTION

Section 22.001(a)(3) of the Texas Government Code grants this Court jurisdiction in this case because it involves a question of statutory construction; specifically, how the term "investment contract" is defined under the Texas Securities Act. TEX. REV. CIV. STAT. art. 581-4(A).

This Court also has jurisdiction pursuant to Texas Government Code Section 22.001(a)(2) because of the conflict regarding the construction of Life Settlement Contracts under the Texas Securities Act between the Dallas Court of Appeals decision in this case, *Arnold v. Life Partners, Inc.*, 416 S.W. 3d 577 (Tex. App.—Dallas 2013) and the Austin Court of Appeals decision in *State v. Life Partners Holdings, Inc.*, No. 03-13-00195-CV, 2014 WL 538821 (Tex. App.—Austin February 06, 2014), adopting the Dallas Court's reasoning, and the Waco Court of

Appeals decision in *Griffitts v. Life Partners, Inc.*, No. 10-01-00271-CV, 2004 WL 1178418 (Tex. App.—Waco May 26, 2004).

ISSUE PRESENTED

Do the Life Settlement Contracts sold by Petitioners satisfy the definition of an investment contract under the Texas Securities Act, making them securities subject to the Texas Securities Act?

STATEMENT OF FACTS

NASAA incorporates the statement of facts as presented in Respondents' Brief on the Merits.

SUMMARY OF THE ARGUMENT

The lower court correctly applied the test articulated by the U.S. Supreme Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946) and adopted by this Court in *Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637, 640 (Tex. 1977) in making its determination that the Life Settlement Contracts sold by Petitioners are securities, in the nature of investment contracts, under the Texas Securities Act.

Given the flexible nature of the *Howey* test, the lower court correctly rejected the rigid approach to *Howey's* "efforts of others prong" laid out by the D.C. Circuit in *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), which excluded from consideration the pre-investment activities of a promoter when considering the "efforts of others" prong of the *Howey* test. The *Life Partners* approach to *Howey's* fourth prong is without reason and support in securities laws.

Federal and state courts across the country have roundly rejected *Life Partners'* approach in favor of an approach that recognizes the economic realities of an investment in a Life Settlement Contract including the pre- and post-investment activities of a promoter. The lower court adopted the economic realities approach and, after a careful analysis of all the efforts of Petitioners, concluded that the Life Settlement Contracts sold by Petitioners are securities under Texas law.

The lower court's decision is consistent with the majority approach among the states, as an overwhelming number of states regulate Life Settlement Contracts as securities. Investments in Life Settlement Contracts continue to be the source of significant investor losses at the hands of unscrupulous promoters perpetrating outright fraud against investors. By finding that such investments are securities, the lower court ruling correctly applied the State's securities laws, consistent with the purpose of the Texas Securities Act to protect investors, and it will discourage fraudsters from flocking to Texas to evade the securities laws of nearly every other jurisdiction.

ARGUMENT

I. THE LIFE SETTLEMENT CONTRACTS SOLD BY PETITIONERS ARE SECURITIES UNDER THE TEXAS SECURITIES ACT BECAUSE THEY ARE INVESTMENT CONTRACTS.

A. Texas applies the Howey test broadly when determining the existence of an investment contract.

Section 4 of the Texas Securities Act defines a "security" to include an "investment contract." TEX. REV. CIV. STAT. art. 581-4(A). In determining whether a financial instrument is an "investment contract," the courts in Texas apply the four-pronged test established by the United States Supreme Court in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946). *Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637, 640 (Tex. 1977). The four elements of the *Howey* test are: (1) the investment of money (2) in a common enterprise (3) with the expectation of profits (4) derived solely through the efforts of others. *Id*. While the *Howey* test's fourth prong refers to the sole efforts of others, most courts, including the courts of Texas, have adopted a broader approach requiring only that "the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *Id*. at 641 quoting *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir. 1973). This approach rings true to the Supreme Court's original description of the definition of a security as "a flexible rather than a static principle, one that is capable of

adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299.

As is usually the case when determining whether an investment product is a security, the *Howey* factor at issue here is the fourth prong—the efforts of others. More specifically, whether under Texas law, the efforts undertaken by Petitioners prior to selling their Life Settlement Contracts to investors can be considered under *Howey*, or whether only the post-sale efforts of Petitioners can be considered.

B. The D.C. Circuit's decision to ignore the pre-sale efforts of the promoter in *SEC v. Life Partners* has been rejected and criticized by federal and state courts.

Petitioners urge this Court to adopt the position originally laid out in *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996), and relied upon in *Griffitts v. Life Partners, Inc.*, No. 10-01-00271-CV, 2004 WL 1178417 (Tex. App.—Waco May 26, 2004) (mem. op.), which focuses on the timing of the promoter's efforts in determining whether an investment contract exists. The decisions distinguish between the pre- and post-investment activities of a promoter as a way to exclude Life Settlement Contracts from the definition of investment contract. *See SEC v. Life Partners, Inc.*, 87 F.3d at 345-48. Neither decision was binding on the court below, and neither is binding on this Court. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in

determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court.") (emphasis in original).

The flawed reasoning that certain efforts of promoters are to be considered while others are not in determining whether *Howey's* fourth prong has been satisfied has been widely and deservedly criticized by the federal bench as an anomalous and arbitrary departure from the precedents and principles of securities law. *See, e.g. SEC v. Mutual Benefit Corp.,* 408 F.3d 737, 743 (11th Cir. 2005) (". . . there is no basis for excluding pre-purchase managerial activities from the analysis."); *SEC v. Life Partners Holdings, Inc.*, Civil Action No. 1-12-CV-00033-JRN, 2013 WL 9627102 (W.D. Tex. Nov. 19, 2013) ("the thrust of persuasive authority cuts against following the D.C. Circuit's 1996 opinion in *SEC v. Life Partners*."); *Wuliger v. Christie*, 310 F. Supp. 2d. 897, 903 (N.D. Ohio 2004) (". . . this Court does not find the analysis by the D.C. Circuit to be persuasive."); *Wuliger v. Eberle,* 414 F. Supp. 2.d 814, 824 (N.D. Ohio 2006) ("to limit consideration to pre-purchase conduct would, in the words of Judge Wald, "violate [] the principle that form should not be elevated over substance and economic reality." (quoting *SEC v. Life Partners*, 87 F.3d at 551 (J. Wald dissenting))).

State courts have also criticized *SEC v. Life Partners* and chosen not to adopt its flawed reasoning. *See, e.g.*, *Alabama v. Kash*, Case Nos. CC-00-25, 26,

& 27 (Ala., St. Clair Co. Cir. Ct., July 14, 2001) ("The *Life Partners* decision is based upon flawed logic and is without case precedence."); *Siporin v. Carrington*, 23 P.3d 92 (Az. App. Div. 1, April 19, 2001) ("We disagree with the court of appeals' analysis in *Life Partners*"); *Oklahoma Department of Securities v. Accelerated Benefits Corp.*, No. CJ-99-2500-66 (Okla. Co. Dist. Ct., June 26, 2001) ("This analysis is inconsistent with the test set forth in *U.S. v. Howey*."); *Landau v. Sheaffer*, Case No CI-00-04672 (Pa. Ct. of Common Pleas, Lancaster County, June 22, 2001) ("this approach ignores the purposes of the Securities Act.").

C. The rigid rule in *SEC v. Life Partners* frustrates the underlying investor protection rationale of securities regulation and the lower court was correct to reject it.

Excluding from consideration the pre-sale activities of a promoter when undertaking the *Howey* analysis—as done in *Life Partners*—results in denying investors meaningful disclosures about their potential investments. This result conflicts with the fundamental rationale underlying securities regulation, which is mandatory disclosure of meaningful information for the protection of investors. TEX. REV. CIV. STAT. ANN. art. 581 - 10-1(B). Broadly construing the Texas Securities Act, including its definition of what constitutes a security, is consistent with the Legislature's intent to protect investors from fraud. *Id.*; *see also Shields v. State*, 27 S.W.3d 267, 273 (Tex. App.—Austin 2000) ("Courts are to construe the

[Texas Securities] Act to protect investors."). In the words of Judge Wald, who vigorously dissented from the *Life Partners* decision:

> [W]hat the investor needs to know is . . . what the specific risk factors attached to the investment are and whether there is any reason why the investor should be leery of the promoter's promises. This need for information holds true in regard to investors prior to purchase as much as to investors who have committed their funds—indeed more so, if they are to avoid over-risky investments.

SEC v. Life Partners, 87 F.3d at 552 (J. Wald dissenting).

Adopting the rigid pre-purchase/post-purchase distinction put forth by the D.C. Court of Appeals in *Life Partners* ignores this important policy of investor protection and results in an inflexible and artificial approach to analyzing an investment. Indeed, such a restrictive interpretation elevates the form of the transaction over its substance, contrary to the United States Supreme Court's admonition that remedial statutes such as the securities laws should be broadly construed to effectuate their purposes. *See Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967) ("[I]n searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality."). The *Life Partners* rationale also ignores the Supreme Court's direction that the definition of a security is "a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299.

The D.C. Circuit's decision to exclude a promoter's pre-sale efforts also ignores a line of decisions in which courts have held that pre-investment efforts alone are sufficient under *Howey*, such as where a manager uses special expertise to select items within a particular class that have greater value or that will appreciate at a rate higher than other items within the class. *See*, *e.g.*, *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918 (4th Cir. 1990) (selecting embryos for cattle breeding); *Glen-Arden Commodities, Inc. v. Costantino*, 493 F. 2d 1027 (2nd Cir. 1974) (selecting scotch whiskey); *SEC v. Haffenden-Rimar Int'l, Inc.*, 496 F.2d 1192 (4th Cir. 1974) (selecting scotch whiskey); *SEC v. Brigadoon*, 388 F.Supp. 1288 (S.D. N.Y. 1975) (selecting rare coins).

In this case, Petitioners identified life insurance policyholders and negotiated with the policyholders to settle those policies for an immediate cash payout before selling interests in these policies to investors. In doing so, Petitioners utilized their expertise in evaluating the policyholders' life expectancy and negotiating a favorable price at which to purchase the policies. If using one's expertise to select rare coins or whiskey are enough to satisfy *Howey*, certainly the Petitioners' expertise selecting and evaluating life insurance policies satisfies the test as well. Petitioners urge this Court to take a rigid view of *Howey's* "efforts of others prong," that requires a promoter to take specific efforts after the sale of an investment to enhance the investments value, however, as the cases cited above

show, *Howey* created a flexible test under which the Court must consider all of a promoter's efforts irrespective of when they occurred.

Here, the court below correctly rejected Petitioners' calls to find that their Life Settlement Contracts were not securities based on the D.C. Circuit's flawed rationale. *Arnold v. Life Partners, Inc.*, 416 S.W. 3d 577 (Tex. App.—Dallas 2013). Instead, the appeals court found that "the rigidity of the bright-line rule contrasting pre- and post-purchase activities pronounced by the D.C. Circuit in *Life Partners*, as relied on by the *Griffitts'* court, contravenes the policy identified in *Howey*." *Id*. at 588. By rejecting the bright-line rule in *Life Partners*, the court below correctly applied the flexible standard embodied in *Howey* and described by this Court in *Searsy*, recognizing " . . . the Supreme Court in *Howey* did not distinguish between pre- and post-purchase activities of a promoter." *Id*. at 587.

After correctly rejecting the rigid and unsupported rule of the D.C. Circuit, the lower court undertook an examination of the pre- and post-investment efforts of Petitioners and found "the profits appellants expected to realize from their investments depended almost entirely upon Life Partners' expertise in choosing the policies, estimating life expectancy, negotiating an advantageous price, and monitoring the policy to keep it in force, these activities must not be considered lightly." *Id*. at 587-88. The issue here is whether the investors are relying on the

efforts of the promoter to make a profit or not. It does not matter when those efforts took place.

Even a cursory examination of the efforts undertaken by Petitioners shows that the efforts necessary to generate a profit on these investments were not undertaken by the investors. Here, the investors relied on the Petitioners' expertise in selecting, evaluating, and pricing life insurance policies ripe for this type of investment. Investors further relied on Petitioners' services in making on-going premium payments and undertaking the necessary actions to collect the insurance benefits upon a policyholder's death. The investors in Petitioners' Life Settlement Contracts were, by design, passive investors that relied on Petitioners to undertake the significant efforts required to make their investments profitable. Indeed, without Petitioners' efforts there would be no investment or return for purchasers of the Life Settlement Contracts. Because Respondents relied on the efforts of Petitioners and such efforts were the "undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise," *Searsy*, 560 S.W.2d at 641 (quoting *SEC v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d at 482), the lower court correctly found that the Life Settlement Contracts sold by Petitioners satisfied *Howey's* four prongs, making them investment contracts, and thus securities under the Texas Securities Act.

II. LIFE SETTLEMENTS MUST BE REGULATED AS SECURITIES IN TEXAS FOR THE PROTECTION OF ALL INVESTORS

A. Life settlements are rife with fraud and the potential for investor abuse.

Over the last fifteen years, there have been widespread problems in the sale of Life Settlement Contracts, and as a result, thousands of investors have lost significant amounts of money. The patterns of investor abuse in the sale of these products are well documented. For example, in May 2007, the Colorado Division of Securities filed an enforcement action against Life Partners and its affiliates and agents. The Colorado Division of Securities alleged that from 2004 to 2007, the defendants sold unregistered viatical settlement investments to at least 110 Colorado investors, netting over $11 million. The Department also alleged that the Life Partners sales agents were unregistered and that they marketed the investments using fraudulent misrepresentations and omissions about the risks, costs, and returns associated with viaticals. In December 2008, the court held that the offerings were unregistered securities marketed through unlicensed agents. Life Partners subsequently stipulated to a permanent injunction and agreed to make a rescission offer to all Colorado investors. *See Joseph v. Life Partners, Inc.*, No. 07CV5218 (Denver D. Ct. Dec. 2, 2008). *See also, e.g., State of Idaho, Dept. of Fin., Sec. Bur. v. Potter*, CV OC 0905488 (D. Ct. 4th Jud. Dist. Mar. 20, 2009) (defendants sold investors Life Settlement Contracts, but never purchased any

policies); *In the Matter of the Stamford Group, Inc.*, No. ENF.-09-CDO-1671 (Tex. Secs. Bd. Apr. 2, 2009) (defendants made misrepresentations and omissions in the sale of Life Settlement Contracts). Federal regulators have also been active in policing fraud associated with the sale of life settlements. *See* SEC LIFE SETTLEMENTS TASK FORCE REPORT 30-33 (July 22, 2010) (describing enforcement actions taken by the SEC and the Financial Industry Regulatory Authority ("FINRA")).

Many investors in Life Settlement Contracts have sustained losses due to outright fraud, such as when life settlement companies sell non-existent policies or pocket investment proceeds. *See id*. at 32 (describing *SEC v. Lydia Capital, LLC* where the SEC charged the defendants with engaging in a scheme to defraud approximately $34 million from investors who were told their funds would be used to acquire life settlements). Additionally, sales agents have asserted bold, unfounded claims about the rates of return on Life Settlement Contracts, leading to unsuitable purchases that have been ruinous for investors. *See id*. (describing *SEC v. ABC Viaticals* where promoters defrauded investors out of $100 million with promises of guaranteed returns of up to 150%).

In addition to the potentially fraudulent behaviors of life settlement promoters, there are many risks inherent in Life Settlement Contracts, and these risks may not be adequately disclosed to prospective investors if they are not

regulated as securities. For example, rates of return are difficult to predict—and yields vary greatly—because of uncertainties in calculating the policyholders' life expectancy. *See, e.g. SEC v. Life Partners Holdings, Inc.*, Civil Action No. 1-12-CV-33-JRN slip op. at 10 (W.D Tex. Dec. 2, 2014) ("The SEC's theory in this case is that by not telling the investing public that their LEs [life expectancy estimates] were coming up short a significant rate, [Life Partners Holdings, Inc.] hid the fact that their future revenues were bound to dry up as retail investors got wise to the fact that LPIs investment products were not worth purchasing. The Court thinks there is considerable validity to the SEC's theory."). This uncertainty can also result in shortfalls in the funds set aside for continuing premium payments if the policyholder lives longer than expected, forcing investors to commit additional funds to maintain the policy.

Many other risks affect the wisdom of investing in Life Settlement Contracts, about which investors will remain ill-informed without the disclosures required by the securities laws. For example, the health of policyholders must be monitored so death certificates can be obtained at the proper time. Further, there is no return whatsoever until the policyholders die and claims for death benefits are properly filed and paid. Also, there is little recourse for an investor needing access to his or her funds because a secondary market for life settlement investments is non-existent. Additionally, policies that have been transferred may not be honored

by the insurance companies that issued them, or policies may still be in their contestable periods. Likewise, term or group policies may be subject to subsequent contract changes. Finally, policyholders may not have taken all the necessary steps to perfect the transfer of interests in their policies, and surviving family members may contest the transfer of such interests.

Given the myriad problems associated with these investments as outlined above, public policy necessitates that Texas' securities laws be construed to include Life Settlement Contracts in the definition of a security. A Texas decision holding that investments in life settlements are not securities will set a negative precedent that will harm Texas investors and allow unscrupulous promoters to argue here—and in other jurisdictions—that these investments are not securities, and therefore are not subject to the investor protection provisions in state securities law. A decision to the contrary will also put Texas far outside of the mainstream in regards to the regulation of Life Settlement Contracts.

B. The overwhelming majority of states regulate investments in life settlements as securities.

According to a U.S. Government Accountability Office ("GAO") report, "all but two states regulate investments in life settlements as securities under their securities laws." U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-10-775, LIFE INSURANCE SETTLEMENTS: REGULATORY INCONSISTENCIES MAY POSE A NUMBER

OF CHALLENGES 6 (2010).[1] Specifically, the GAO report found that"[t]hirty-five states have statutes defining a "security" or "investment contract" to expressly include investments in life settlements under their securities laws." *Id*. at 53. The remaining "[t]hirteen [] states and the District of Columbia [] apply the investment contract test to life settlement investments to determine whether these investments fall within the definition of a security and are subject to their securities laws." *Id*. at 54. The majority of these states have found that life settlements are investment contracts and thus securities. *Id.*

Petitioners, in their Appendix 7, illustrate that a number of states do not specifically include Life Settlement Contracts in their definitions of investment contract, while other states either have specifically included Life Settlement Contracts within their definitions of security or specifically defined investment contract to include these products as investment contracts. Petitioners fail to note, however, and as the GAO Report found, that the overwhelming majority of states that do not specifically define investment contract or include Life Settlement Contracts in their definitions of security, apply the *Howey* test and that their courts have concluded that Life Settlement Contracts are investment contracts and thus securities.

[1] Because of the *Griffitts* decision, Texas was one of the two states that, at the time of the GAO report, was considered not to regulate life settlements as securities.

In addition to applying the *Howey* test to determine whether a financial instrument is an investment contract—and thus a security—the Texas Securities Act states: "The term "security" or "securities" shall include any . . . other instrument commonly known as a security." TEX. REV. CIV. STAT. art. 581-4(A). As evidenced by the discussion above illustrating that the overwhelming majority of states consider Life Settlement Contracts securities, it follows that, for the purposes of the Texas Securities Act, Life Settlement Contracts are commonly known as securities. Further, the Life Settlement Contracts at issue here were sold to investors through a registered broker-dealer, Milkie/Ferguson.[2] A broker-dealer is generally a company in the business of selling securities. *See* TEX. REV. CIV. STAT. art. 581-4(C). ("The term dealer shall include every person or company . . . who engages in this state, either for all or part of his or its time . . . in selling, offering for sale or delivery or soliciting subscriptions to or orders for, or undertaking to dispose of, or to invite offers for any security or securities . . .."). [3]

[2] Milkie/Ferguson Investments, Inc. was a registered dealer in Texas at the time of the sale of the Life Settlement Contracts at issue in this case. *See In re the Dealer and Investment Advisor Registration of Milkie/Ferguson Investments, Inc.*, Texas State Securities Board, Order No. IC09-CAF-12, at ¶2 (May 19, 2009), available at http://www.ssb.state.tx.us/Enforcement/files/IC09-12.pdf ("On or about February 11, 1991, Respondent [Milkie/Ferguson Investments, Inc.] registered with the Securities Commissioner as a securities dealer and investment adviser, both of which are currently effective."). Subsequently, Milkie/Ferguson filed for bankruptcy and ceased operations. Bruce Kelly, *Long-running B-D Closes Its Doors*, INVESTMENTNEWS, Aug. 13, 2012, *available at* http://www.investmentnews.com/article/20120813/FREE/120819971/long-running-b-d-closes-its-doors.

[3] Broker has the same meaning as dealer. TEX. REV. CIV. STAT. art. 581-4(H).

While the fact that Life Partners utilized the services of a broker-dealer to sell its Life Settlement Contracts is not dispositive on the issue of whether the Life Settlement Contracts are securities, this fact, when considered in light of the application of the *Howey* test and the fact that these instruments are considered securities in nearly every other state, lends support to the argument that the Life Settlement Contracts sold here are securities. This is especially true when viewed from an investor's perspective; simply, from their viewpoint, investors purchased financial instruments considered to be securities in nearly every state from a company in the business of selling securities.

As the "local cops on the beat," state securities regulators have long been concerned with the dangers inherent in life settlement transactions. *See* GAO report at 7 ("[S]tate and federal securities regulators have played the primary role in protecting investors by regulating the sale of life settlement investments."). In 2002, in response to many of the problems seen in the life settlement market, NASAA issued its guidelines regarding these investments. NASAA Guidelines Regarding Viatical Investments (Oct. 2002), *available at* http://www.nasaa.org/wp-content/uploads/2011/07/12-NASAA_Guidelines_Regarding_Viatical_Investments.pdf ("2002 Guidelines"). In the 2002 Guidelines, NASAA affirmatively adopted the position that "viatical investments, commonly known as investments in viatical, senior or life settlement

contracts, are securities and must be registered with a state securities division as required by state law." *Id.* at 1. The 2002 Guidelines also asserted that "this type of investment is unsuitable for the financial needs and interests of the average individual investor." *Id.*

Over the years, NASAA and its members have been particularly successful in combatting the harms associated with Life Settlement Contracts, though continued and enhanced regulation of the life settlement industry under the securities laws is necessary because Life Settlement Contracts have proven to be fertile ground for investor abuse. *See, supra*, Part II.A. State securities actions against life settlement providers and companies have sent an important message of deterrence to other providers and companies that might consider fraudulently selling in—or relocating to—a particular state. In the instant case, a ruling that finds the Life Settlement Contracts sold by Petitioners are not securities threatens to eliminate this deterrent in Texas. A judicially created gap in Texas securities law will attract financial predators that have been turned away by the overwhelming majority of states that continue to regulate life settlements as securities and represent a significant step backwards in investor protection.[4]

[4] Uniformity amongst the states is important for another reason: it not only maximizes investor protection nationwide, it also promotes fairness. Uniformity helps ensure that the citizens of every state receive investor protection in roughly equal measure, so that no state becomes a preferred haven for financial fraud.

CONCLUSION

For the reasons stated above, NASAA urges this court to affirm the lower court's finding that the Life Settlement Contracts sold by Petitioners are, as a matter of law, securities under the Texas Securities Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing amicus curiae brief was electronically filed with the Clerk of the Court using the electronic case filing system of the Court. I also certify that a true and correct copy of the foregoing was served via e-service or email on the following counsel of record on December 12, 2014:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 9.4 because it contains 4,745 words according to the word count of the computer program used to prepare the document, Microsoft Word 2007, excluding the parts of the brief exempted by Rule 9.4(i)(1).

/s/Michael A. Shaunessy
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