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THE VIATIONAL SETTLEMENT INDUSTRY:
BETTING ON PEOPLE'S LIVES IS
CERTAINLY NO "EXACTA"

Liza M. Ray*

INTRODUCTION

When an individual is faced with a terminal illness, there are numerous issues to consider and many options to weigh. The most crucial matters to settle include sorting out financial considerations. Rising health care costs have left many terminally ill persons in a financially vulnerable position, including those who have health care insurance. In addition to the concern over medical bills, terminally ill patients may also be troubled by familial, employment, and personal finance difficulties. These financial obligations may require depletion of retirement or disability funds, investments, and/or inheritances. Accordingly, those terminally ill persons are left in dire need of immediate cashflow.

In the late 1980s, in response to the Acquired Immunodefficiency Syndrome (AIDS) crisis, the viatical settlement industry emerged in an effort to mitigate the financial burdens of terminally ill persons. A viatical settlement is an investment contract in which an investor acquires an interest in the life insurance policy of a terminally ill person, most

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1. The Health Insurance Portability and Accountability Act defines terminally ill individuals as "those who are certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in twenty-four months or less after the date of certification." 26 U.S.C.A. § 101(g)(4)(A)(1997).


3. Kathryn Sullivan and Joann Canning, Life Benefits from Insurance may be Taxable, 21 TAX’N FOR L. 86, 86 (1992) (arguing that certain medical plans will only subsidize a limited amount of expenses).

4. Eremia, supra note 2, at 773.

typically a person suffering from AIDS.\footnote{Id. at 17; Protective Life Ins. Co. v. Sullivan, 89 F.3d 1, 2 (1st Cir. 1996) (explaining that an investor acquires an interest in the life insurance policy of a terminally ill person); see Kate Nagy, Viaticals for Cancer Patients Gain Popularity in U.S., 87 J. NAT'L CANCER INST. 244, 245 (1995). It is estimated that 85\% of viators are AIDS patients, 10\% are cancer patients, and 5\% have other terminally ill diseases including heart disease, stroke or leukemia. Id.}

The life insurance policy is usually purchased for sixty to eighty percent of its face value, depending upon the terminally ill person’s life expectancy.\footnote{SEC v. Life Partners, Inc., 87 F.3d 536, 537 (D.C. Cir. 1996); Ken Berzof, Kentucky Acts to Protect Consumers in Viatical Insurance Deals, COURIER-JOURNAL (Kentucky), Jan. 31, 2000, at IC. Some life insurance policies are sold for a mere fifty percent of their face value.} A viatical settlement company may either hold the policy in its own account or sell the policy to an investor.\footnote{Florida v. Vatical Services, Inc., 741 So. 2d 560, 561 (Fla. App. 1999).}

“When the insured dies, the investor or viatical settlement company receives the benefit of the insurance.”\footnote{Life Partners, 87 F.3d at 537.}

Accordingly, “[t]he investor’s profit is the difference between the discounted purchase price paid to the insured and the death benefit collected from the insurer, less transaction costs, premiums paid, and other administrative expenses.”\footnote{Id.}

For example, a terminally ill patient may sell his or her life insurance policy worth $100,000 to an investor for $80,000 in order to receive immediate cash prior to his or her death. The investor then continues to pay the insurance premiums and, upon the death of the patient, receives the full $100,000. Certain payout percentages are usually based on the life expectancy of the terminally ill patient.\footnote{Hartford Life and Accident Ins. Co. v. Eterna Benefits L.L.C., No. 3:96-CV-3065-D, 1997 U.S. Dist. LEXIS 18670, at *1 n.1 (N.D. Tex. Nov. 18, 1997).}

Therefore, the shorter the patient’s life expectancy, the sooner the payoff for the investor and the higher the profit.\footnote{Jane Bryant Quinn, Risks Cloud ‘Viatical’ Investments, THE TIMES UNION (Albany, NY), Sept. 24, 2000, at C1.} Likewise, if the patient exceeds his or her life expectancy the profit decreases accordingly.\footnote{See Nagy, supra note 6, at 245.} In addition, the investor runs the risk of new medical treatment or cures, which may extend the life of the patient for months or years.\footnote{New Law Clarifies State Authority Over ‘Viatical Investments’; Investments in ‘Death Futures’ Among Top-Ten State Scams, BUSINESS WIRE, Oct. 10, 2000, at 1 (stating that “[w]ith new therapies coming onto the market every day, [betting on when someone is going to die] is not a good bet”).}
Viatical settlements may be viewed as practical estate-planning tools for terminally ill persons. These settlements represent a financial resource that allows terminally ill persons to settle debts, reduce pain and suffering and enjoy a higher quality of life during their remaining days. Despite these benefits, however, viatical settlement companies have become quite controversial because they market settlements through a network of commissioned licensees who tend to prey on financially vulnerable terminally ill patients. Viatical settlement companies hire brokers and non-brokers who provide assessments on the health of the patient to determine whether a patient's life expectancy may be extended by medical developments. The viatical settlement process must be subject to moral and ethical scrutiny, particularly concerning the relationships between the various parties involved. There is an inherent power imbalance between the viatical settlement company, or investor, and the terminally ill patient as an insurance policy seller.

The viatical settlement industry is highly controversial because it is infected with scam artists, “ponzi” schemes, and other fraudulent activities. Viatical settlements are high-risk investments, particularly because of the uncertainty of when a terminally ill person will die. New drugs, the rise of “healthy” senior citizens, and advancements in medical treatments are keeping people alive longer. Investors are often uninformed about such risks and are unaware of the fact that their investment returns can dwindle rapidly if the person whose contract they hold lives longer than expected. Terminally ill persons are also being victimized by similar instances of fraud and misrepresentation. In a process referred to as “cleansheeting,” terminally ill persons are induced to apply for life insurance policies and lie about their health status. For example, a dying individual may be unduly influenced by a viatical settlement company or broker to take out a life insurance policy by

15. Eremia, supra note 2, at 775.
17. See generally Nicole Ostrow, Policies Pose Ethical Issues; Seniors Market a Growing Target, SUN-SENTINEL (Fort Lauderdale, FL), July 23, 2000, at 1F.
20. Id.
22. Id.
concealing the fact that he or she has a terminal illness. By doing so, an individual is likely to get a higher insurance benefit as an "artificial" healthy person and the viatical settlement industry would proceed to purchase the insurance policy at a highly discounted rate.\(^{23}\) Often times, the terminally ill person may not even have an opportunity to see the policy.\(^{24}\)

Cleansheeting and other fraudulent activities must be addressed in either state or federal insurance legislation. The primary problem with the viatical settlement industry is the lack of regulation. Because viatical settlements are part insurance, part security, they fall into a regulatory "no-man's land."\(^{25}\) As Kentucky's Deputy Insurance Commissioner stated, "We're in unchartered waters. It's evolving. And whenever you have a case of something that's unregulated, there's a lot of opportunity for fraud to occur."\(^{26}\) Because of either nonexistent or inadequate regulation, viatical scams have become one of the nation's top ten financial cons.\(^{27}\) The first portion of this Comment defines and analyzes viatical settlements and the primary players in the viatical settlement industry. This discussion includes further descriptions of the current fraudulent practices that have recently invaded the industry. The next portion of this Comment provides an outline of the current regulation of the viatical settlement industry. This analysis includes an in-depth discussion of the inadequacies of current regulatory schemes and the problems that regulators face in enacting appropriate legislation. Finally, the last portion provides an analysis of the ethical problems facing the viatical settlement industry and proposes options that may remedy these ethics issues. Specifically, state or federal legislation should be enacted in order to provide adequate protection of the terminally ill person, or insurance policy seller, in the viatical settlement process. To achieve this end, the following principles must be applied: (1) a viatical settlement company or investor should owe an ethical, or fiduciary-type, obligation to the terminally ill person who has sold his or her life insurance to the company or investor; (2) valuable medical information that could improve

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23. Id.
24. Id.
The Viatical Settlement Industry

I. DEFINING AND REFINING VIATICAL SETTLEMENTS

A. Exploring the Ecclesiastical Roots of the Viatical Settlement Practice

The phrase "viatical settlement" stems from the ecclesiastical term "viaticum," which refers to the "communion given to a dying person."\(^{28}\) This occurs during the Roman Catholic sacrament of "extreme unction."\(^{29}\) Its Latin interpretation translates into the phrase "journey money," or "money provided for a long journey."\(^{30}\) Before travelers or Roman soldiers would endure a long journey or adventure, they were often given a purse of money and supplies.\(^{31}\) Given the somewhat somber origins of viatical settlements, it is not surprising that the industry is often described as "ghoulish."\(^{32}\)

By allowing others to make an economic profit from an individual's death, the viatical settlement industry encourages unethical values and morals.\(^{33}\) An investor, as an economic stakeholder in a short-term investment, normally desires that a terminally ill policy seller die as soon as possible.

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29. Eremia, supra note 2, at 774 n.9.
31. Nagy, supra note 6, at 774 n.9.
32. See Nagy supra note 6, at 245; Lehr, AIDS Patients Reap Benefits by Selling Their Insurance, BOSTON GLOBE, July 25, 1993, at 1.
as possible. The investor has bought the right to become an irrevocable beneficiary of another person’s life insurance policy, thus reversing the usual role of the beneficiary in relation to the dying individual. In other words, a terminally ill person normally would prefer that the proceeds from a life insurance policy be awarded to an individual who bears a close and personal relation to such person. Life insurance beneficiaries are typically family members, including spouses, siblings, parents and other close relatives. Accordingly, such beneficiaries would generally have an interest in keeping the terminally ill patient alive as long as possible, as opposed to wishing an expeditious death upon the patient.

Despite the seemingly immoral practices that may be involved in the viatical settlement industry, terminally ill persons not only willingly enter into such arrangements, but are often grateful to the investors for the opportunity to receive an immediate economic benefit. As the Latin interpretation suggests, the money received from viatical settlements can help prepare the ill and distressed for their “long journey.” Allowing terminally ill patients to acquire large sums of money during their living days often prepares them better for death. In addition, the economic benefit allows terminally ill persons to continue living as comfortably as possible and to enjoy more control over life in general. The money from the viatical settlement allows the terminally ill patient to pay outstanding and current medical expenses and to purchase supporting medical care including home nursing care and pain relieving medication.

34. See Perrault, supra note 33, at 6B (stating that “individuals or companies investing in such policies don’t necessarily have an incentive to see the policyholders live”).
35. Id.
37. Perrault, supra note 33, at 6B. See also Schofield, supra note 30, at 47 (stating that a terminally ill seller was able to pay down his debts, buy an automobile for his ex-wife, lend his mother a hand in purchasing a home, and help fund his son’s future education with the proceeds he received from his viatical settlement).
38. See generally Nagy, supra note 6.
39. See id.; Schofield, supra note 30, at 48 (seller asserted that the viatical settlement provided him with an opportunity to assert control over his life and actually gave him the encouragement to live much longer than expected).
Despite the conflicting views regarding the viatical settlement practice, the industry continues to gain ground, particularly in economic terms. Viatical settlements have increased "from a $90 million business in 1991 to $1 billion today."

"[A]ccording to the National Viatical Association (NVA), [this increase is] roughly 20 times as much as when the business began." Thus, to offer terminally ill persons better protection from fraud and abuse, there is a pressing need to explore what can be done to remedy the unethical aspects of the viatical settlement industry.

B. The Emergence of a New Investment Medium in Response to the AIDS Crisis

During the late 1980s, the AIDS epidemic spawned a heightened awareness of the true evils and realities of this deadly disease. The epidemic created a large pool of persons with relatively short life expectancies and "without traditional benefit" concerns. Accordingly, there was a pressing need to render economic aid to these persons. In order to respond to this need, viatical settlement companies emerged to provide relief from the economic hardships of the rising medical costs of persons living with AIDS. Viatical settlements "supposedly" allow patients a viable option to finance their medical expenses and enjoy a higher quality of life during their remaining days. "In recent years as medical developments have prolonged the lives of many AIDS patients,

at 1.

41. See Cruz, supra note 33.
42. Id.
45. Shaun Schafer, Oklahoma, Other States Move to Regulate Viaticals, TULSA WORLD, Oct. 19, 1999, at 1 (stating that the AIDS epidemic provided a market for viatical settlements to arise).
46. Id.
47. Id.
viaticals for these kind of patients have dramatically decreased in popularity. However, the use of viatical settlements has increased among other terminally ill persons, including heart disease and cancer patients.

When viatical settlement companies originated, they primarily acted as "brokers," bringing together investors and terminally ill persons with life insurance policies available for sale, in addition to providing underwriting and negotiating functions as well. As the industry matured, however, viatical settlement companies acted as "providers," buying the life insurance policies from terminally ill persons and subsequently holding them as the named beneficiaries. As the Viatical Association of America explains, "[T]he NAIC [National Association of Insurance Commissioners] Model Act and Model Regulation differentiates between 'viatical settlement providers' and 'viatical settlement brokers,' recognizing the differences in these two roles by requiring both to be licensed, but requiring providers to post a bond, while brokers must simply maintain errors and omissions coverage.

In recent years, viatical settlement companies have performed both the broker and provider functions. Whether a viatical settlement company is acting as either a broker or provider, or both, the company realizes a profit from entering into transactions with terminally ill policyholders. The patients, on the other hand, actually suffer an economic loss. Although they enjoy the benefit of immediate cash, policyholders do not receive the full value of the benefits of the life insurance policies. As

49. Deborah Highland, Investing in Death; Need For Cash Has Elderly and Terminally Ill Hawking Their Life, THE TENNESSEAN, Mar. 14, 2000, at 1D.
50. Id.
52. Albert, supra note 44, at 1018; Blake, supra note 51, at 1017 n.20 (discussing the differences between brokers and providers).
53. The National Association of Insurance Commissioners.
54. Albert, supra note 44, at 1017.
56. Albert, supra note 44, at 1019.
discussed infra, this inequity must be remedied through state or federal insurance regulation.

C. Who are the Primary Players in the Viatical Settlement Practice?

1. Viatical Settlement Companies

Viatical settlement companies are often referred to as viatical settlement providers (or VSPs). As set forth in New Jersey's state statute, a VSP is defined as:

a person, other than a viator, who enters into a viatical settlement contract. Viatical settlement provider also means a person who obtains financing from a financing entity for the purchase, acquisition, transfer or other assignment of one or more viatical settlement contracts, viaticated policies or interests therein, or otherwise sells, assigns, transfers, pledges, hypothecates or otherwise disposes of one or more viatical settlement contracts, viaticated policies or interests therein.

Consistent with many other state laws and regulations, New Jersey requires that VSPs acquire an operating license from the state insurance commissioner in order to conduct business in the viatical settlement practice. In addition, VSPs may only use forms of a viatical settlement

Melville, president of Universal Guaranty Life Insurance Co., responds to such unfairness by stating that "[I]t is going to take industry coordination and cooperation to solve it, and that isn't going to happen unless we have industry recognition of the problem." Id.

58. Eremia, supra note 2, at 775.

59. 1999 N.J. Laws 211(1). The statute further provides that a viatical settlement provider does not include:

(1) A bank, savings bank, savings and loan association, credit union or other licensed lending institution that takes an assignment of a life insurance policy as collateral for a loan;

(2) The issuer of a life insurance policy providing accelerated benefits ... and pursuant to the policy; or

(3) A natural person who enters into no more than one agreement in a calendar year for the transfer of life insurance policies for any value less than the expected death benefit. Id.

60. Id. at 211(2). Similarly, Connecticut provides that a VSB shall not include:

(A) an attorney, accountant or financial planner retained to represent a viator and whose compensation is paid by or at the discretion of the viator,
(B) a viatical settlement provider, viatical settlement agent or financing entity, or ... (C) a credit union, employer or association which provides information relating to viatical settlements to its members or
contract or disclosure statements in its dealings with a viator, which have been approved by the insurance commissioner of New Jersey. VSPs may also act as, or contract out, viatical settlement brokers (or VSBs). According to New Jersey’s statute, a VSB is considered:

- a person who on behalf of a viator and for a fee, commission or other valuable consideration, offers or attempts to negotiate viatical settlements between a viator and one or more viatical settlement providers. Irrespective of the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator. The term does not include an attorney, accountant or financial planner retained to represent the viator whose compensation is paid directly by or at the direction of the viator.

In accordance with New Jersey law, VSBs may not conduct business in the state unless they obtain a license from the state insurance commissioner.

Brokers stand in a unique position with the terminally ill policyholders in that they are often bound by both “fiduciary” and “best interests of the policyholder” standards. It is important to note that most viatical brokers are not stockbrokers or insurance persons, they are simply persons that put the viatical deals together. However, Kentucky and Mississippi are now requiring viatical brokers to pass licensing exams.


Other state statutes that have adopted comparable definitions and requirements of VSPs include: CONN. GEN. STAT. § 38a-465(10) (1999), 72 Del. Laws §132(1)(g) (1999), 1999 Kan. Sess. Laws 151(2)(h), and ME. REV. STAT. ANN. tit. 24-A, § 6802(8) (West 1999).

61. 1999 N.J. Laws 211(1).
62. Berzof, supra note 7, at 1C.
63. Id.
64. 1999 N.J. Laws 211(1).
66. N.J. STAT. ANN. §17B:304(1) (West 2000) (stating that “a viatical settlement broker is deemed to represent only the viator and owes a fiduciary duty to the viator to act according to the viator’s best instructions and in the best interest of the viator.”).
Brokers typically receive as compensation from the viatical investment company ten to eighteen percent of the purchase price of the insurance policy.

Brokers, however, are certainly not new to fraudulent schemes. Some brokers will not acquire the best deal available for the policy seller, an ill and vulnerable person.\(^6\) In such instances, brokers will recruit persons with terminal or serious illnesses that are in dire financial need and purchase life insurance policies on such persons without revealing to the insurance company their true physical condition.\(^6\) Here, an insurance company would have only two years to discover the fraud in order to cancel the contract; however, "unscrupulous viatical brokers have become adept at hiding fraudulent activities for the two years."\(^7\)

Both VSPs and VSBs enter into viatical contracts with terminally ill policyholders, the outcome of which is referred to as a "viatical settlement," or "proceed distribution."\(^8\) A viatical settlement formally refers to:

a transaction between a viator and a viatical settlement provider in which the viatical settlement provider pays compensation or other value in return for the viator's assignment, transfer, sale, devise or bequest to the viatical settlement provider of the ownership of or death benefit payable under a life insurance policy or a certificate.\(^9\)

The viatical settlement contract binds a VSP, VSB, or another investor and the terminally ill policyholder to its terms.\(^10\) As parties to viatical settlement contracts, both VSPs and VSBs are also bound to comply with state and federal contract laws, including the requirement of "good faith and fair dealing" in the performance of contracts.\(^11\)

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68. Eisenberg, supra note 43. One viator indicated that she only received $5400, or 6% of the value of her $90,000 life insurance policy due to the fraudulent activities of her broker.


72. Id. See also ME. REV. STAT. ANN. tit. 24-A, § 6802(7) (West 1999).

73. See id. (stating that under a viatical settlement agreement, an insured sells a life insurance policy for an immediate payment equal to the discounted face value of such policy).

74. 1999 N.J. Laws 211(1). A "viatical settlement contract" means:
a written agreement entered into between a viatical settlement provider and a viator. The agreement shall establish the terms under which the viatical settlement provider will pay compensation or anything of value,
2. Investors or Viatical Purchasers

A VSP entering into a viatical settlement contract may either keep the life insurance policy or sell the rights in the policy to an "investor." The investor then pays the premiums on the life insurance policy and subsequently collects the benefits at the time the original insured passes away. Due to the risky nature of investing in viatical settlements, both state governments and the federal government need to regulate the viatical settlement industry in order to better protect the investor. Several investors have demanded that viatical settlement companies must provide adequate disclosure regarding the risks associated with viatical settlements, including the possibility that profits may be diminished or decreased by advances in medicine that may prolong the life of terminally ill persons. In addition, several investors have complained that viatical settlement companies present materials about both yield and return in false and misleading terms. Some companies have even advertised promised returns of up to fifty-five percent on an investment.

The investor stands in a unique position with the terminally ill person, as does the VSP. It is normally in the best financial interest of the investor or VSP for the terminally ill person to die prior to the predicated contract which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate of insurance to the viatical settlement provider. A viatical settlement contract also includes a contract for a loan or other financial transaction secured primarily by an individual or group life insurance policy, other than a loan by a life insurance company pursuant to the terms of the life insurance contract, or a loan secured by the cash value of a policy. Id.

77. Schafer, supra note 45, at 1. See also SEC. v. Life Partners, Inc., 87 F.3d at 537.
79. See id. (stating that Accelerated Benefits, a viatical settlement company, supplied written statements to investors that were false and misleading because they detailed both duration and annualized yield of viatical settlements, neither of which can be determined with any true accuracy).
80. See Berzof, supra note 7.
Often, an investor may be required to pay for a tracking service in order to keep tabs on the terminally ill patient and notify the investor when he or she dies. There are two competing interests in need of protection during the viatical settlement process. On the one hand, there is a need to protect an investor from fraud and manipulation in the investment process by requiring full disclosure of the risks associated with investing in viatical settlements. On the other hand, there is a pressing demand to protect a terminally ill patient from not only entering into unconscionable agreements, but also from potential abuse by an investor or VSP.

3. Sellers or Viators

There are several terms which essentially refer to the same party in a viatical settlement contract. A terminally ill person who sells his or her life insurance policy to a viatical settlement company is normally deemed to be the “viator.” A “viator” is most often referred to as:

- the owner of a life insurance policy, or a holder of a certificate, which policy or certificate insures the life of an individual with a catastrophic or life-threatening illness or condition and who enters or seeks to enter into a viatical settlement contract.
- Viator shall not include a viatical settlement provider, viatical settlement agent, viatical settlement broker or financing entity.

The terminally ill policyholder may also be referred to as the “seller” or the “insured.” As discussed supra, an investor’s profit depends wholly on the life expectancy of the viator. Thus, it is necessary to limit or prohibit the amount and nature of contact between the VSP, or investor, and the viator through regulation. After all, the VSP is betting that the terminally ill person will die prior to a specified date, as predicted by the

81. See Cruz, supra note 33.
82. See Schafer, supra note 45.
84. AP, State Asks Firms Buying Insurance To Sign Up Early, THE TENNESSEAN, Aug. 27, 2000, at 5B.
87. Life Partners, 898 F. Supp. at 17 n.3.
88. Id.
89. Albert, supra note 44, at 1013.
Thus, the sooner the viator passes away, the greater the profit that the VSP or investor will realize. There is an inherent risk that an angry investor may attempt to "accelerate maturity" by tampering with the life of a terminally ill policyholder. Tampering may include the withholding of pertinent medical information relating to treatments that may improve a patient's illness or actively seeking out patients and attempting to induce death.

Several states have addressed the issue of providing adequate disclosure to viators. Most of the current state regulations require that viators are provided with enough information to make an informed decision about whether to enter into viatical settlements. In addition, other efforts have been made to protect and promote the best interests of the viator. In January 1997, the Health Insurance Portability and Accountability Act ("HIPAA") became effective, granting terminally or chronically ill persons with life insurance policies tax-free disbursements of their policy benefits while they are still living.

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90. Kosiewicz, supra note 18, at 701.
91. Id.
92. See Jane Bryant Quinn, The Lottery on Lives, NEWSWEEK, March 15, 1999, at 55 (stating that there is great danger when wagering on lives, particularly if an angry investor decides to take action to speed up the opportunity to cash in on his or her investment). See also Wipperfurth, supra note 76, at 24 (stating that "at what point does the financial interest become powerful enough to induce murder?"); Ostrow, supra note 17, at 1F (stating that "million dollar senior policies might lead to someone putting a 'bounty' on the policyholder").
93. See Jane Bryant Quinn, The Lottery on Lives, NEWSWEEK, March 15, 1999, at 55; See also Wipperfurth, supra note 76, at 24; Ostrow, supra note 17, at 1F.
94. See Jane Bryant Quinn, The Lottery on Lives, NEWSWEEK, March 15, 1999, at 55; See also Wipperfurth, supra note 76, at 24; Ostrow, supra note 17, at 1F.
95. R.J. Herron, Regulating Viatical Settlements: Is the Invisible Hand Picking the Pockets of the Terminally Ill?, 28 U. MICH. J.L. REF. 931, 935-6 (1995) (noting that state regulations focus on disclosure to viators, requiring enough information for a viator to make an educated choice to vitiate).
97. A "chronically ill" person does not include: a terminally ill individual as having been certified by a licensed health care practitioner within the preceding twelve month period (i) as being unable to perform (without substantial assistance from another individual) at least two activities of daily living for a period of at least ninety days due to a loss of functional capacity; or (ii) as having a level of
the viators are receiving only a discounted value of their life insurance policies, the tax-free treatment is a tremendous benefit to viators and their families, particularly when payouts are often $50,000 or more. The regulatory efforts should continue to move forward in the direction of viator protection. In the meantime, it would be in the viators' best interests to perform the necessary research in order to find the best deal and also to consult with a financial planner, accountant or attorney prior to selling his or her life insurance policy to a viatical settlement company.

4. Reviewing Physicians

Most VSPs require that a potential seller of a life insurance policy be reviewed by a physician in order to determine the life expectancy of the individual. Such physicians are often referred to as "independent reviewing physicians" and are normally on the payroll of the viatical settlement company or referred by the company. Difficult issues arise with respect to the doctor-patient relationship that is created by, or facilitated by, the VSP, including issues of confidentiality and trust.

One of the major concerns in this area is the confidential treatment of the viator's medical records and correspondence with the reviewing physician. A viator should be hesitant to hand over, or permit unlimited access to, medical records. At least one state, Florida, has ruled in Florida v. Viatical Services, Inc. that a patient may lose his or her constitutional protection if he or she agreed to a limited waiver to the right of privacy as a part of the business deal with a VSP. In the transaction at issue, the viator was required to allow the viatical settlement company, and potentially an investor, to inspect the viator's

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98. Eremia, supra note 2, at 773-774. Viators should be aware, however, that the sudden income from the life insurance policy may affect other financial areas, including Social Security benefits or disability payments. See Highland, supra note 49, at 1D.

99. Highland, supra note 49, at 1D.


101. Id.


medical records. If the viator did not agree to the waiver, he or she would not be able to receive the cash benefits of the life insurance policy.

The court found that the medical privacy privilege could not be invoked in order to protect the terminally ill person from invasion by a VSP or an investor. As the court explains, "[W]e question whether the right of privacy of one's medical records exists where that person's medical condition has become an essential condition of a commercial transaction, at least with respect to those persons involved in the transaction and those entities who may be charged with monitoring such transactions." The court also noted that because the medical records were deemed to be a part of a commercial transaction regulated by state law, the state also has authority to inspect the documents. Viatical settlement companies must erect appropriate firewalls between investors and policyholders in order to effectively protect the privacy of policyholders from impatient investors.

5. Issuers or Insurance Companies

The insurance companies that issue life insurance policies play only a small role in the viatical settlement process. Once the viator and VSP or investor have entered into a viatical settlement contract, the VSP usually forwards a change of ownership form and change of beneficiary form to the insurance company. The insurance company then records the information provided in the forms, files the documents and forwards a confirmation to the viator which reflects the change in ownership. The relationship between the viator and the insurance company ceases once this process is complete.

Despite its meager role in the viatical settlement process, the insurance company, or issuer, has a duty to disperse the life insurance benefits to the

104. Id.
105. Id.
106. AIDS POL'Y & L., supra note 102, at 1.
107. Id.
110. Herron, supra note 95, at 933.
111. Id. at 934.
112. Id.
lawful beneficiary. In certain circumstances, this may become an arduous process. In *Eterna Benefits v. Hartford Life and Accident Insurance Co.*, Clifford, a terminally ill person, sold his life insurance policy at a discounted value to a viatical settlement company, Eterna Benefits. Dissatisfied with the arrangement, Clifford changed his beneficiary from Eterna to his mother. The court determined that Eterna Benefits was the intended beneficiary because Clifford failed to comply with the original insurance policy requirements to change the named beneficiary. Even though insurance companies play a small role in the viatical settlement process, this case illustrates how important their role becomes upon the death of the insured.

II. REGULATION OF THE VIATICAL SETTLEMENT INDUSTRY

It is important to note that viatical settlements are somewhat problematic to regulate, particularly in light of their investment nature. The bulk of regulation takes place at the state level, primarily through state insurance laws. However, many states have not adopted viatical settlement regulations, leaving many terminally ill persons with no protection from potential fraud and abuse by other players in the viatical settlement industry, particularly VSPs. In response, state insurance departments have made the eradication of viatical fraud a major priority. State insurance regulators in North Carolina, Texas, Florida and Nevada are working “to shut down rings of viatical fraud offenders.” “Currently, the North Carolina Department of Insurance is investigating more than 100 cases of suspected fraud [involving viatical settlements].” In addition, the Florida Department of Insurance has also taken action by indicting

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116. *Id.*
120. See Herron, *supra* note 95, at 956.
122. *Id.*
123. *Id.*
Future First Financial Group on multiple counts of grand theft.\textsuperscript{124} "[T]he five dealers and the viatical settlement company involved in the scheme were charged with improperly buying and reselling $9.4 million worth of life insurance policies from 53 different insurance companies."\textsuperscript{125} These dealers would defraud viators and investors by making false representations, including "[negating] the word 'viatical' from their names and [using] the Internet, magazines and the radio to lure investors."\textsuperscript{126}

These potentially deceptive businesses are highly organized and manipulative, reaping millions of dollars of profits from vulnerable and unprotected terminally ill persons.\textsuperscript{127} Despite efforts made by these select state insurance departments, Congress has not made any effort to enact national regulation. Some states, including Tennessee, have not dealt with viaticals in any regulatory capacity whatsoever.\textsuperscript{128} In addition, attempts to regulate these transactions under federal security law have failed.

Although these agreements serve as investment vehicles and share specific characteristics with securities, the United States Court of Appeals for the District of Columbia Circuit recently held that these contracts were not securities and thus not regulated by the federal securities laws.\textsuperscript{129} Accordingly, there are limited vehicles that states may employ to regulate the viatical settlement industry. States must have the capacity to capitalize resources and provide adequate laws within the insurance regulatory scheme.

\textbf{A. The Model Viatical Settlement Act and Model Regulation}

The National Association of Insurance Commissioners (NAIC) promulgated a model act and model regulation.\textsuperscript{130} The model regulations "were designed to protect viators when dealing with viatical settlement companies."\textsuperscript{131} The NAIC model enforcement provisions include: "mandatory disclosure to viators, and mandated minimum payouts" to

\footnotesize
\begin{itemize}
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} BESTWIRE, supra note 121, at 1.
  \item \textsuperscript{128} Highland, supra note 49.
  \item \textsuperscript{129} SEC v. Life Partners, 87 F.3d 536, 549 (D.C. Cir. 1996).
  \item \textsuperscript{130} Albert, supra note 44, at 1027 n.62-63 (noting that the NAIC is a voluntary association comprised of insurance regulatory commissioners and staff that adopted the Viatical Settlements Model Act at their June 1993 National Meeting).
  \item \textsuperscript{131} Id. at 1027.
\end{itemize}
viators from viatical settlement companies. 132

1. Ultimate Goal is Viator Protection

The NAIC Models work together to protect viators from entering into unconscionable agreements with VSPs and exposure to unethical business practices. 133 They also set forth several important provisions aimed at uniform regulation. First, they require that viatical settlement contracts acquire prior approval and that each VSP comply with state confidentiality laws. 134 Secondly, the Model Act requires that all viatical settlement contracts, or at least model or generic forms of the agreements, be approved by the commissioner. 135 Third, VSPs must hold proceeds of a viatical settlement in an escrow or trust account until the policy has transferred hands. 136 Lastly, the Act allows commissioners to set standards for viatical settlement contract payments. 137

B. State Insurance Laws

Approximately thirty states regulate at least some aspects of the viatical settlement industry. 138 There are states, however, that do not provide for any regulation at all. 139 States have adopted statutes and regulations based on the NAIC Model Act and Model Regulation. 140 The states that provide regulations have an affirmative interest in protecting viators from fraud and manipulation in the course of business dealings with the viatical settlement industry. 141 Accordingly, state commissioners often have the power to license viatical settlement companies and to monitor the activities of such companies. In achieving this goal, state regulations improve disclosure to viators and correct the information imbalances and financial inequities that arise in the viatical settlement practice. 142

132. Id.
135. Id.
136. See id. at § 9(C).
138. Ostrow, supra note 17, at 1F.
139. Id.
140. Albert, supra note 44, at 1026 n.59.
141. Id.
142. Id.
C. The Securities and Exchange Commission's Attempt at Regulation

The Securities and Exchange Commission (SEC) argued that viatical settlements are securities. Therefore, VSPs should be required to register with the SEC and provide adequate disclosure to their investors.\textsuperscript{143} The United States Court of Appeals for the District of Columbia, however, disagreed, holding that viatical settlements were not securities.\textsuperscript{144} Therefore, investors may not rely on the protections of the federal securities laws and the SEC cannot intervene in viatical settlements.\textsuperscript{145}

Even though the SEC was unable to assert jurisdiction over the viatical settlement practice by bringing viatical settlements within the definition of “securities,” some states have been successful at regulating viaticals under the umbrella of state securities regulation.\textsuperscript{146} For example, the Kansas Office of the Securities Commissioner issued an opinion stating that viatical settlements are securities under state law and require registration.\textsuperscript{147} In addition, some states require licensing of VSPs and VSBs in order to conduct business in the viatical settlement industry in state.\textsuperscript{148} Other states, including Kentucky, Rhode Island and California, have followed this trend.\textsuperscript{149}

III. THE ETHICAL CONSIDERATIONS OF THE VIATICAL SETTLEMENT COMPANY OR INVESTOR

It is not surprising that the insurance industry has received wide criticism for allowing VSPs and investors to profit from another person's
However, the notion of profiting from death is not limited to the viatical settlement industry. Medical and health care providers, funeral home and pharmaceutical companies all benefit from the terminally ill and the dead. While it is not unethical to profit from death, the methods which certain viatical companies employ in order to conduct business certainly deserve ethical scrutiny. Viatical settlement regulation should focus on protecting the best interests of the viator and his or her will to live. In order for such regulation to be successful, certain obligations must be imposed on VSPs and investors regarding their relationships with viators.

A. Applying Agency or Broker Principles in Order to Determine Whether or Not a VSP Has Any Duty to the Viator

As outlined in various state statutes, VSBs represent only the viator and owe a fiduciary duty to the viator to act in accordance with the viator’s instructions and in the best interests of the viator. Considering the role of the broker in the viatical settlement process, it would not be unreasonable to impose similar standards upon VSPs. As VSPs normally have the most access to confidential information, such as viator medical records, they should be required to meet the highest ethical standards.

1. Exploring the Notion of Imposing a Fiduciary Duty upon the VSP or Investor

The ultimate aim of regulation of the viatical settlement industry should be protection of the viator. Viators require protection from VSPs and investors with overreaching adverse interest. VSPs should have a fiduciary duty to the viators. This standard should require that a VSP act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise

150. See Lehr, supra note 33, at 1. See also Ostrow, supra note 17, at 1F; Wipperfurth, supra note 76, at 24.
152. Miller, supra note 17, at A1.
155. See Crites-Leoni, supra note 16, at 9, 12, 14.
156. Id. at 14.
157. King, supra note 133.
of a like character and with like aims." This standard is substantially similar to the duty imposed upon fiduciaries under ERISA. These principles are also consistent with the doctrine of "good faith and fair dealing" in conducting consumer transactions and contracts. VSPs should have a similar duty to viators.

a. What Should Happen to Valuable Medical Information in the Hands of the VSP or Investor?

Because of their ties to the AIDS community and their knowledge of other terminally ill conditions, VSPs are well informed about the advancements in AIDS treatments and terminal illnesses. Withholding such information could be detrimental to the life of a terminally ill person. To ensure that withholding such information does not become an issue, a VSP should prohibit certain investors with valuable information regarding a particular patient or illness from entering into the viatical settlement agreement. If at any time an investor would be in a position to influence the treatment of the viator's illness, the investor should be released from the viatical settlement contract or agreement. This would serve to better protect the dignity of a terminally ill person's condition.

b. Potential Disclosure Obligations of the Owner to the Seller

There are several options that may remedy the problem of inadequate disclosure between the VSPs, VSBs, investors and viators. Such options include: "(1) removing existing restraints on information; (2) correcting misleading information; and (3) requiring additional information." Prior to entering into viatical settlements, many terminally ill persons do not even know what a viatical settlement is, much less the risks

158. Viatical Ethics, The National Viatical Association, available at http://www.nationalviatical.org/ethics.html (last visited Oct. 30, 2000). Buyers and sellers can also check this website to see whether or not a broker is a member of the association.


160. See Viatical Ethics, supra note 158.

161. See MEALEY'S, supra note 78.

162. AP, State Asks Firms Buying Insurance to Sign Up Early, THE TENNESSEAN, Aug. 27, 2000, at 5B.

163. Id.

164. Id.

165. Howard Beales, The Efficient Regulation of Consumer Information, 24 J.L. & ECON. 491, 513 (1981). See also AP, supra note 162, at 5B.
involved. The ramifications and reasonable alternatives should be disclosed to each potential viator. Such disclosure should include both legal and financial advice, outlining the risks associated with investing in viatical settlements. In addition, the viator should also be aware that the receipt of proceeds from a viatical settlement may affect a viator’s eligibility for certain state and federal “entitlement programs.” Receiving proceeds from a viatical settlement may also prevent a viator from receiving disability or supplemental income benefits. Each of these risks should be disclosed to the viator by a VSP or VSB prior to entering into viatical settlements. Viators must be able to rely on more than just the “ethics” of a VSB or VSP to ensure adequate disclosure.

c. Prolonging the Life of the Viator Creates Serious Investment Risks for the VSP or Investor

A major problem that needs to be addressed via regulation is the inherent conflict of interest that VSPs face as the middlemen in the viatical settlement process. VSPs do not necessarily have an incentive to prolong the life of a viator. They owe primary loyalty to the investors and not to the viators. One possible remedy is to require VSPs to abide by a “code of ethics.” The National Viatical Association has adopted a code entitled “Viatical Ethics.” All members of the National Viatical Association must abide by these standards, pledging:

To prohibit certain business practices by viatical settlement companies:
- unfair and deceptive acts;
- high pressure sales tactics;
- direct solicitation of viators;
- discrimination in the making of viatical settlement offers; and

166. Kosiewicz, supra note 18, at 718.
167. Id.
168. Id.
169. Id.
170. Id.
171. See Schmidt, supra note 57.
172. Id.
173. Perrault, supra note 33.
174. Rackham, supra note 40.
• collusion in bidding, including communication of any offers made to a particular viator on a particular policy.

To perform our fiduciary responsibilities with respect to our clients so as not to create any adverse transactions.\textsuperscript{176}

Assuming proper enforcement, adopting such codes of ethics would greatly reduce the incidences of fraud and abuse in the viatical settlement process.

d. Creating a “Best Interests of the Seller” Standard

(1). Prohibiting VSPs and Investors From Harassing Sellers

Investors have been known to call terminally ill patients to check on the status of their illness or to see whether or not a patient has passed away.\textsuperscript{177} Investors may even attempt to visit hospitals, private homes, or nursing homes in order to gather information on a viator’s condition.\textsuperscript{178} Such instances of contact, or attempted contact, should be strictly prohibited via uniform federal insurance regulation.

(2). The Status of Seller’s Health Should Receive Confidential Treatment

The somewhat relaxed nature of viatical settlement regulations often lead to abuses.\textsuperscript{179} As discussed supra, a patient’s constitutional right to privacy may be waived via contract or otherwise by viators and, thus, medical records may become “open book.” As VSBs seek to ensure investors that the viators are indeed terminally ill, they may break confidentiality barriers even absent an explicit waiver by a viator.\textsuperscript{180} It is necessary for regulation to move in the direction of requiring compliance with principles of confidentiality. VSPs and VSBs should hold the viator’s medical history or current medical condition in the strictest confidence.\textsuperscript{181}

\textsuperscript{176} Id.
\textsuperscript{177} Schofield, supra note 30, at 47.
\textsuperscript{179} See Eisenberg, supra note 43, at “Time Select Bus.”
\textsuperscript{180} Schofield, supra note 30, at 47.
\textsuperscript{181} See National Viatical Association, supra note 175.
B. What Other Alternatives Are Available for Terminally Ill Patients Seeking Immediate Funds?

There certainly are alternative options for terminally ill persons to derive other sources of income prior to death. Such sources include liens, or loans, against the life insurance policies of the terminally ill person. Under such a transaction, a policyholder may have the option of borrowing against the stated value of the life insurance policy in accordance with the terms provided by the issuing life insurance company. However, the full death benefits cannot be realized until the loan, including interest, has been repaid. In addition, such persons may also obtain accelerated death benefits (ADBs). ADBs allow terminally ill persons to receive tax-free disbursements of their life insurance policies prior to death. ADBs are virtually identical to viatical settlements absent the role of the viatical settlement company as the distributor.

These alternative sources, however, are not as readily available and are not as economically beneficial as viatical settlements. Such alternatives may only be available to persons with certain terminal illnesses who are not expected to live longer than six months. In addition, certain life insurance policies may not have the accelerated benefit option implemented into the policy and may not offer liens or loans against such policies. If the policies do indeed provide for ADBs, they normally require that a portion of the face value benefit be retained as a death benefit for the named beneficiary. Therefore, the immediate cash amounts available using these alternatives are considerably less than amounts available under viatical settlement agreements.

Considering the impediments and disadvantages associated with these

183. Id.
184. Laura Castaneda, How to Tap Life Insurance Policy Before You Die, S.F. CHRON., Mar. 10, 1997, at E3 (stating that holders of universal life insurance policies may be able to borrow against such policies).
185. Id.
186. Eremia, supra note 2, at 774 n.8.
188. Eremia, supra note 2, at 774.
189. Herron, supra note 95, at 970 n.192.
190. See Crites-Leoni, supra note 16, at 3.
191. Id.
192. Albert, supra note 44, at 1017 n.16.
193. Id.
alternatives, it is not surprising that the viatical settlement industry continues to grow and gain widespread popularity. It appears, therefore, that viatical settlements will be available for quite some time.

CONCLUSION

Is it ethical to gamble on people’s lives? Tom Volz, a prostate cancer patient with approximately two to three years left to live, is thankful that someone has decided to gamble on his life. He received a viatical settlement of $58,500 for a life insurance policy with a face value of $150,000. While this sum only represents forty percent of the policy’s total worth, he now has the resources to enjoy a trip to Hawaii and herbal remedies that are not covered by medical insurance.

From an investor or VSP perspective, the ultimate profit is realized the sooner the viator dies. For the viatical industry, death is certainly “good for business.” Despite the possible unethical and immoral nature of viatical settlements, they have proven to be a profitable tool for viators, investors and VSPs alike. The rising sales from viatical settlement contracts are currently approaching the $1.4 billion mark.

Accordingly, it is necessary for regulation to keep up with the growth of the viatical settlement industry. The ultimate goal of such regulation must be to maximize the protection of viators’ best interests and dignity in dealing with the sensitive nature of terminal illnesses and death. In addition, the vast instances of fraud and pressure selling must be addressed through federal regulation. These goals can be achieved if certain principles of fiduciary law are imposed on VSPs and VSBs. In addition, such principles should be adopted in a uniform regulatory body, thus eliminating the current problem of insufficient regulation among the states. As Bill McDonald, Chief of Enforcement for the California Department of Corporations indicated, “[P]rofitability is related to the

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194. See Nagy, supra note 6, at 245.
195. Cruz, supra note 33, at 6D. Viatical settlements are even popping up in the UK. However, their success overseas depends on the resolution of certain regulatory, tax and ethical issues. In addition, the role of the National Health Service in providing free healthcare in the UK may reduce the potential viatical settlement market. See Viatical Statistics, MONEY MARKET, Mar. 16, 2000, at 55.
196. Kosiewicz, supra note 18, at 701.
198. Id.
199. Id. See Herron, supra note 95, at 931.
200. Schofield, supra note 30, at 47.
201. Id.
predictability of death, which has proved to be singularly unpredictable." 202
