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**A Division of the
British Columbia Law Institute**

1822 East Mall
University of British Columbia
Vancouver, British Columbia
Canada V6T 1Z1
Voice: (604) 822 0142
Fax: (604) 822 0144
E-mail: ccels@bcli.org
Website: <http://www.ccels.ca>

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**Study Paper
on
Viatical
Settlements**

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Canadian Centre for Elder Law Studies

The Canadian Centre for Elder Law Studies (CCELS) was created by the British Columbia Law Institute as a vehicle to carry forward the Institute's work in relation to legal issues affecting seniors and to enrich and to inform the lives of older people in their relationship with the law. It is a response to the need in Canada for a body that has a dedicated focus on this area to facilitate the development of Elder Law as a coherent body of knowledge.

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: ccels@bcli.org
WWW: <http://www.ccels.ca>

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- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

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EXECUTIVE SUMMARY

A viatical settlement is a transaction in which an insured person with diminished life expectancy transfers the entitlement to receive the death benefit under the policy of insurance to another person. This other person agrees immediately to pay the insured person an amount that is less than the face value of the death benefit and undertakes to pay the premiums for the insurance policy as they come due.

In most jurisdictions in Canada, legislation directed at trafficking in insurance policies which has its origins in the Depression renders viatical settlements illegal. There is a small viatical settlement industry in this country, based in the provinces that lack this legislation. In addition, at the end of the last decade, Ontario gave serious consideration to repealing its anti-trafficking provision and enacting a modern framework for a viatical settlement industry. In the five years since the major Ontario report was published, the viatical settlement industry in the United States has transformed itself from an industry focussed on AIDS patients and others suffering from terminal diseases to one focussed on senior citizens. This shift in focus, coupled with the rising numbers of senior citizens, has led to a notable expansion of the viatical settlement industry in the United States.

The aim of this study paper is to provide the groundwork for a law reform project that will make recommendations on whether Canadian provinces and territories should remove their barriers to the creation of a viatical settlement industry and, if they do, what sort of legal framework should be created for the new industry.

This study paper contains seven parts. After a brief introduction, the second part examines a typical viatical settlement. Drawing on American academic articles, it describes the most common elements of a viatical settlement. Then, it traces the historical development of the viatical settlement in the United States, from its origins as a transaction marketed to AIDS patients, through early attempts at state regulation, to the development of an industry focussed on senior citizens and the evolution of more mature regulatory frameworks.

Part three examines the current law in Canada. It highlights four legal issues that affect viatical settlements: the anti-trafficking provision found in most provincial and territorial *Insurance Acts*; the concept of insurable interest; the treatment of the proceeds of a viatical settlement for income tax purposes; and the applicability of securities laws.

Part four surveys the leading policy arguments for and against removing the legal barriers to viatical settlements in Canada.

Part five examines in detail the leading Canadian model for law reform, the draft regulation published in 2001 by Ontario's Financial Services Commission, describing how the draft

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regulation treats the main players in the viatical settlement industry. The part also touches on legislative reform in the United States.

Part six sets out several issues for reform. Several of these issues are addressed in the Ontario draft regulation, but the passage of time and developments in the viatical settlement industry open the possibility of taking a fresh look at the ways in which they are treated in the draft regulation. A few issues pick up on ideas found in the American legislation which are not addressed in the Ontario draft regulation.

Part seven is a brief conclusion to the study paper.

I. INTRODUCTION

A. Origins of the Project

In its April 2004 report, the Program Committee of the British Columbia Law Institute identified examining the possibility of legalizing and regulating viatical settlements as a potential law reform project for the Institute. At present, most Canadian provinces do not allow individuals to enter into viatical settlements. In the late 1990s, Ontario began to investigate creating a legal structure for a commercial viatical settlement market. These investigations resulted in the enactment of legislation that would legalize viatical settlements.¹ In addition, nearly five years ago, Ontario's insurance regulator circulated a draft regulation that would provide a modern framework for regulating the viatical settlement industry.² These proposals were not implemented, and, after a change in government in 2003, are no longer priorities or, even, government policy. But they represent a serious attempt at thinking through the issues connected with regulating viatical settlements and make a helpful contribution to analyzing those issues today.

Although Ontario's proposals would only have made viatical settlements available to individuals who have a catastrophic or life-threatening illness or condition, and a life expectancy of two years or less, the development of the viatical settlement market in the United States has come to depend more and more on senior citizens who have none of the requisite illness, condition, or life expectancy, as potential clients. The American experience also illustrates the importance of harmonizing regulations among jurisdictions. These elder law and national dimensions make this law reform project appropriate for the Canadian Centre for Elder Law Studies.

B. Scope of this Study Paper

The purpose of this study paper is to examine the shape and content of a law reform project on viatical settlements. In particular, this study paper discusses the following questions: (1) What is a viatical settlement? (2) What Canadian laws currently apply to viatical settlements? (3) What are the arguments for and against legalizing viatical settlements? (4) What models for law reform exist and how do they operate? (5) What other issues should be addressed as part of this law reform project?

1. *Red Tape Reduction Act, 2000*, S.O. 2000, c. 26, Schedule G, sections 1–2 (not in force).

2. Financial Services Commission of Ontario, *Viatical Settlements in Ontario: Key Elements of a Proposed Regulatory System* (July 2001) [no longer publicly available, archived with the Canadian Centre for Elder Law Studies]. The draft regulation contained in this publication is attached as Appendix A to this study paper.

C. A Note on Terminology

A convention has developed in the viatical settlement industry to use the word “viatical” in a limited sense, referring only to transactions involving individuals who have a catastrophic or life-threatening illness, and a life expectancy of two years or less. Transactions with individuals who do not fit into these categories are labelled “life settlements.”³ In order to avoid repetition, this study paper uses the word “viatical” and its derivatives in an expanded sense, embracing both traditional viatical settlements and life settlements. For the most part, this usage is justified, because the legal issues involved in viatical and life settlements are essentially the same.⁴ But, in some cases, circumstances require that a distinction be drawn.⁵ When those cases arise, this study paper will use the terms “viatical settlements” and “life settlements.” This choice of terms is not meant to imply that the two types of transactions should be treated different under the law. These terms are used simply to avoid repeating the wordy (but accurate) phrase “viatical settlement involving an individual who has neither a catastrophic or life-threatening disease nor a life expectancy of two years or less.”

II. WHAT IS A VIATICAL SETTLEMENT?

A. Introduction

“Viatical” is the adjectival form of the Latin noun “viaticum,” which has two meanings. Viaticum means both “the Eucharist as administered to a person near or in danger of death” and “a supply or official allowance of money for a journey.”⁶ These two senses of the word come together in the legal use of the word viatical. Lawyers, judges, and legislators use viatical to describe a very specific type of transaction, known as a “viatical settlement.” At its core this transaction involves an agreement between a person who is insured under a life insurance policy and another person. Under this agreement, the insured person transfers the entitlement to receive the policy’s death benefit from the designated beneficiary to the other party to this agreement. In return, the other party pays to the insured person an amount of money that is less than the face value of the death benefit and undertakes to pay the premiums for the insurance policy as they come due. Surrounding this core agreement are a number of legal issues that may be appreciated by reviewing the elements of a typical viatical

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3. Some commentators and businesses have used the term “senior settlements” to describe these transactions. That label appears to have yielded to “life settlements,” which has established itself as the preferred term.
 4. See *S.E.C. v. Mutual Benefits Corp.*, 323 F. Supp. 2d 1337 at 1338, n. 2 (S.D. Fla. 2004), Moreno J. (“The only distinction between life settlements and viatical settlements is that in life settlements, the insured is not terminally or chronically ill.”), *aff’d*, *S.E.C. v. Mutual Benefits Corp.*, *infra* note 38.
 5. For this study paper, the most important circumstance that requires making this distinction occurs when discussing legislation that is deliberately restricted to traditional viatical settlements.
 6. *The New Shorter Oxford English Dictionary*, s.v. “viaticum.”
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settlement. These issues, in turn, are best understood by reference to the historical context in which viatical settlements developed.

B. Elements of a Typical Viatical Settlement

Since viatical settlements are rare in Canada, it is necessary to look elsewhere to get a sense of how they work in a fully developed and mature market. The United States provides this reference point. Although there is considerable diversity in the types of viatical settlements offered in the United States, it is possible to produce a general outline of the typical transaction. One commentator who recently reviewed the American market concluded that the typical viatical settlement contains six steps.⁷

First, the holder of a life insurance policy initiates the transaction by filling out and submitting an application and any required supporting documentation to an interested firm. The policyholder is usually referred to as a “viator” throughout the transaction; the firm is commonly called a “viatical settlement provider” or “VSP.” In order to be considered for a viatical settlement, a viator must have a diminished life expectancy. There is an obvious business rationale underlying this requirement. The lower a viator’s life expectancy, the sooner the death benefit will be paid. Conversely, VSPs risk a financial loss in a transaction involving a viator who is not close to death. For these reasons, VSPs will typically require viators to certify that they have a life expectancy of two years or less. This requirement has tended to limit the pool of viators to individuals suffering from a terminal illness, a limitation that has been imposed by law in some states.⁸ But some VSPs have begun to offer viatical settlements to senior citizens who have a life expectancy in the three to five year range but who do not suffer from a specific illness or condition.

Second, the viator must submit medical and insurance records to the VSP. This personal information must be shared with the VSP in order to allow it to assess the viator’s life expectancy and insurance coverage.

Third, the VSP reviews the information and determines eligibility for a viatical settlement. This determination involves the VSP receiving opinions both from an insurance underwriter and from a physician. VSPs tend to impose few restrictions on the type of insurance policy that will be the subject of the transaction. Both whole life insurance and term life insurance policies are acceptable to them, as are group life insurance policies. VSPs tend to require only that the policy be in good standing, that it not restrict assignment, and that it has been

7. Jessica Maria Perez, “You Can Bet Your Life on It! Regulating Senior Settlements to Be a Financial Alternative for the Elderly,” Note (2002) 10 Elder L.J. 425 at 431–32.

8. See, e.g., N.Y. Ins. Law § 7801 (b) (McKinney 2000) (defining “viator” as “a person who has a catastrophic or life threatening illness or condition”).

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in force for at least two years.⁹ Some VSPs also evaluate the record of the insurance company in paying out its claims.

Fourth, the VSP presents an offer to the viator. The offer will, of course, be for an amount that is lower than the amount of the expected death benefit. The factor that contributes the most to the determination of this discount is the medical opinion that the VSP received on the viator's life expectancy. Viators with lower life expectancies receive offers that are closer to the face value of the death benefit than viators with higher life expectancies. The amount of future premiums and the current prime rate of interest also contribute to the determination of the amount of the offer.¹⁰ The offer is usually in the range of 50 to 85 percent of the face value of the death benefit.¹¹

Fifth, the viator accepts the offer and completes the necessary contracts and forms with a representative of the VSP.

Sixth, the transaction is completed by a conveyance of the entitlement to receive the death benefit to the VSP and payment to the viator of the agreed-upon compensation. The conveyance in this step is typically referred to as a purchase and sale transaction. Strictly speaking, most viatical settlements proceed by way of an absolute assignment of the viator's life insurance policy.¹² But, apparently, VSPs have used a number of other devices to effect the transfer. This point is underscored by the broad scope of American legislative definitions of "viatical settlement," which often refer to the "assignment, transfer, sale, devise, or bequest of the death benefit or ownership of the insurance policy."¹³ By whatever

9. See Miriam R. Albert, "Selling Death Short: The Regulatory and Policy Implications of Viatical Settlements" (1998) 61 Alb. L. Rev. 1013 at 1018–19 ["Selling Death Short"]. The significance of the last requirement is that most statutes regulating life insurance provide that after the policy has been in effect for two years it will be incontestable, which means that a failure to disclose material information or a misrepresentation (other than a fraudulent misrepresentation) will not render the policy voidable. See, e.g., *Insurance Act*, R.S.O. 1990, c. I.8, section 184; art. 2421 C.C.Q.

10. See Lee Ann Dean, "Acquired Immune Deficiency Syndrome, Viatical Settlement, and the Health Care Crisis: AIDS Patients Reach into the Future to Make Ends Meet," Note (1993) 25 Rutgers L.J. 117 at 136, n. 89.

11. See Shanah D. Glick, "Are Viatical Settlements Securities Within the Regulatory Control of the Securities Act of 1933?" (1993) 60 U. Chi. L. Rev. 957 at 957 (citing range of 50 to 80 percent); Michael R. Davis, "Unregulated Investment in Certain Death: *SEC v. Life Partners, Inc.*," Note (1997) 42 Vil. L. Rev. 925 at 926 (citing range of 60 to 85 percent).

12. See Malcolm E. Osborn, "Rapidly Developing Law on Viatical Settlements" (1996) 31 Wake Forest L. Rev. 471 at 474–75, n. 20 ("It seems that absolute assignment of the life insurance policy will be the more acceptable and customary way for ownership to change.").

13. N.Y. Ins. Law § 7801 (c) (McKinney 2000).

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means ownership of the insurance policy is transferred, the key to the transaction is that the VSP becomes the irrevocable beneficiary of the viator. The viator is ordinarily paid in one lump sum. Often, this lump sum payment is made to a lawyer's trust account or to an escrow firm, pending confirmation of the assignment by the viator's insurance company.¹⁴ After completion, the VSP is, in most cases, responsible for the payment of all future premiums under the policy.

These six steps focus attention on the core participants in a viatical settlement—the viator and the VSP. A viatical settlement will affect more than these two participants, though. A much wider cast of characters is usually involved.

Many viators do not seek out one specific VSP; rather, they approach a broker to solicit offers from many VSPs. These brokers played an ambiguous role in the early days of commercial viatical settlements. Sometimes, they were affiliated with VSPs and did not act in the viators' best interests.¹⁵ As a result, American states began to regulate them as a discrete part of the viatical settlement process.¹⁶

A business decision made by VSPs has proved to be an even more significant development for regulators than the advent of viatical settlement brokers. Rather than holding onto the viators' policies until payment of the death benefit, VSPs began to assign the policy to a third party almost immediately after the transaction with the viator closed. Sometimes, the entire policy is assigned to a single investor. In far more cases, though, the process of fractionalization is used. Fractionalization involves the marketing of fractional interests in a life insurance policy for resale as an investment vehicle. There are a number of reasons why this strategy has proved popular with VSPs. The investors supply capital for use in the VSPs' businesses. These funds are paid almost immediately, whereas the death benefit of the underlying policy would not be paid out until some time in the future. Finally, and most importantly, by involving investors, VSPs are able to spread the financial risks inherent in viatical settlements among a larger pool of people.¹⁷ Investors have come to play a very significant part in the viatical settlement industry. And protecting their rights and interests has become more and more important for government regulators.

14. See Dean, *supra* note 10 at 136.

15. See Pamela Sherrid, "Enriching the Final Days" *U.S. News & World Report* 119:8 (21 August 1995) 56 at 56; 59–60.

16. See, e.g., *Viatical Settlement Act*, Fla. Stat. §§ 626.9916; 626.99181; 626.992 (2005) (Lexis).

17. See Joy D. Kosiewicz, "Death for Sale: A Call to Regulate the Viatical Settlement Industry," Comment (1998) 48 Case W. Res. L. Rev. 701 at 712 ("Fractionalizing spreads the risk among investors and allows each investor to have an interest in more than one life insurance policy.").

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Finally, there are a number of subsidiary players in the viatical settlement process that should not be overlooked. The physicians who are engaged by VSPs are an example of a subsidiary participant. Their participation in this process may generate regulatory and ethical issues. Other players become involved as involuntary participants in viatical settlements. Insurance companies that provide life insurance to viators are an example of one such involuntary participant. Another would be any former beneficiaries under the viator's policy.¹⁸ Since insurance companies and former beneficiaries are involuntary participants, there may be some need for regulation to protect their rights. Regulating viatical settlements, then, involves taking account of and balancing the interests of diverse groups of people—viators, beneficiaries, doctors, insurance companies, viatical settlement brokers, VSPs, and investors.

C. A Brief History of Viatical Settlements

Viatical settlements became commercially available in the United States in the late 1980s. One account of their origin is particularly striking:¹⁹

Rob Worley, of Living Benefits Inc., an Albuquerque, New Mexico viatical settlement firm, has been credited as being the first person to explore viatical settlements. Worley was listening to a radio call-in talk show featuring a 36-year-old caller with no family who had learned that he had only months to live. The caller's only asset was a large life insurance policy, which he tried unsuccessfully to sell to insurance companies and banks.

Mr. Worley researched the relevant laws and surveyed insurance industry participants about available alternatives for terminally-ill policyholders, and then bought his first policy, through Living Benefits, in April 1989.

Whether or not this account actually represents the first viatical settlement,²⁰ it does highlight many themes that would loom large in the development of the American viatical settlement industry.

18. Unlike the insurance companies, the former beneficiaries may have to consent to the viatical settlement in order for it to go ahead. Consent would be required if a beneficiary had been irrevocably designated. In practice, most VSPs seek consent from all beneficiaries. See Russell J. Herron, "Regulating Viatical Settlements: Is the Invisible Hand Picking the Pockets of the Terminally Ill?" Note (1995) 28 U. Mich. J. L. Ref. 931 at 956.

19. Miriam R. Albert, "The Future of Death Futures: Why Viatical Settlements Must Be Classified as Securities" (1999) 19 Pace L. Rev. 345 at 353, n. 24 ["Future of Death Futures"].

20. See *ibid.* (discussing two competing theories of the origins of viatical settlements). See also Osborn, *supra* note 12 at 472, n. 6 (citing theory that "Europeans used viatical settlements before they developed in the United States"). Privately arranged viatical settlements existed long before the development of a commercial market. See, e.g., *Grigsby v. Russell*, 222 U.S. 149 at 154 (1911), Holmes J. (for the court) ("... after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy, and sold it to him in consideration of \$100 and Grigsby's undertaking to pay the premiums due or to become due . . .").

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The first theme is that participants in and supporters of the viatical settlement industry tend to associate the industry with compassionate and humanitarian concerns.²¹ This view is based on the fact that the first major commercial market for viatical settlements was among AIDS patients. From the late 1980s to the mid-1990s the viatical settlement industry grew rapidly, and almost all this growth took place among AIDS patients.²² AIDS advocacy groups in the early 1990s even gave cautious support to the fostering of the viatical settlement industry as a means of allowing AIDS patients to live out their last days with financial security.²³

This association of viatical settlements with terminal illness sounds the second theme. Profits from viatical settlements are derived from the payment of the death benefit less the compensation paid to the viator, premiums on the life insurance policy, and any administrative costs. This fact gives VSPs a financial interest in the early death of viators, both because it accelerates the payment of the death benefit and because it increases their profit on the transaction. It could be argued that the early industry catered to AIDS patients because, in the late 1980s and early 1990s, a diagnosis of full-onset AIDS inevitably meant death within two years or less.²⁴ The early deaths of AIDS patients, coupled with the size of the discounts from face value of their death benefits, led to very high rates of return for VSPs.²⁵ For every commentator at the time who saw a compassionate and humanitarian element to the viatical settlement business, there arose another commentator who saw only ghoulishness and vampirism.

The third important theme in the early development of viatical settlements is that the transactions came into being as a result of entrepreneurial experimentation. Viatical settlements

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21. See, e.g., Denise M. Schultz, "Angels of Mercy or Greedy Capitalists? Buying Life Insurance Policies from the Terminally Ill," *Comment* (1996) 24 *Pepp. L. Rev.* 99 at 103 (noting the "bitter debate between those who believe viatical settlements provide compassionate relief to dying individuals, and those who oppose a company's ability to profit from death").
 22. See Liza M. Ray, "The Viatical Settlement Industry: Betting on People's Lives is Certainly No 'Exacta,'" *Comment* (2000) 17 *J. Contemp. Health L. & Pol'y* 321 at 322, *n.* 6 (citing 1995 estimate that concluded that ". . . 85% of viators are AIDS patients, 10% are cancer patients, and 5% have other terminally ill diseases including heart disease, stroke, or leukemia").
 23. See Abbie Crites-Leoni & Angellee S. Chen, "Money for Life: Regulating the Viatical Settlement Industry," *Comment* (1997) 18 *J. Legal Med.* 63 at 67.
 24. See Jane Bryant Quinn, "The Lottery on Lives" *Newsweek* 133:11 (15 March 1999) 55 at 55 (reporting that investing in viatical settlements in the early 1990s "felt safe because AIDS victims seemed to die 'on time'").
 25. See Schultz, *supra* note 21 at 100 ("Upon the death of the insured, settlements typically yield a fifteen to twenty percent return for the viatical company and its investors.").
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arose in a legal grey area between insurance and securities law.²⁶ They were not regulated for several years after they first appeared. During this time, some participants in the industry began to be associated with dubious business practices. Stories of abuse involving viators' legal rights,²⁷ privacy,²⁸ and dignity²⁹ began to circulate in the mass media. Some commentators also expressed outrage at what they perceived to be the excessive profits reaped by viatical settlement brokers and VSPs. After these stories gained prominence, there were calls to regulate the viatical settlement industry. Some reputable VSPs supported this effort and lobbied for state regulation.³⁰ In 1993, California was the first state to enact legislation.³¹ This legislation set the pattern for the states that followed.³² It was focussed almost entirely on providing protections for viators and giving insurance industry regulators the authority to oversee the business activities of VSPs and viatical settlement brokers.

The mid-1990s saw two significant developments. First, more lobbying by VSPs, this time at the federal level, paid off with the passage of the *Health Insurance Portability and Accountability Act of 1996*.³³ The relevant portion of this statute had the effect of making the proceeds of a viatical settlement tax-free for a viator.³⁴ Second, also in 1996, a major an-

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26. See Ray, *supra* note 22 at 324 (“Because viatical settlements are part insurance, part security, they fall into a regulatory ‘no-man’s land.’ ” [footnote omitted]).
 27. See Sherrid, *supra* note 15 at 58 (“ . . . [S]ome settlement firms would promise to turn over the entire purchase price when the deal closed but would make only a small payment. ‘They were assuming a person with AIDS dementia wouldn’t be able to come after them,’ says David Ganon, an executive at Life Entitlements, a New York City-based viatical firm.”).
 28. See Michael J. Sandel, “You Bet Your Life” *The New Republic* 219:10 (7 September 1998) 9 at 10 (relating story of investor who repeatedly inquired about the health of a viator whose treatments for AIDS had allowed him to escape imminent death by personally writing to and calling the viator).
 29. See Jennifer Berner, “Beating the Grim Reaper, or Just Confusing Him? Examining the Harmful Effects of Viatical Settlement Regulation,” Note (1994) 27 U. Marshall L. Rev. 581 at 586, *n.* 29 (Describing VSP that “. . . provided potential investors with ‘menus’ of dying patients. These menus predicted the number of months the viators had left to live and explained how much insurance the viators had.”).
 30. Other VSPs, it should be noted, were strongly opposed to regulation.
 31. Cal. Ins. Code §§ 10113.1–10113.2 (Deering Supp. 1996).
 32. California’s legislation also provided the basis for the influential *Model Viatical Settlement Act* and *Model Viatical Settlement Regulation* prepared and promoted by the American National Association of Insurance Commissioners.
 33. Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 42 U.S.C.).
 34. 26 U.S.C.S. § 101 (g) (2) (Law. Co-op. 2005). As is often the case in the law of taxation, the application
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nouncement at the World AIDS Conference in Vancouver heralded the potential of drug treatments to increase significantly the life expectancy of persons with AIDS. This development was welcome in all respects, but it did have the effect of casting doubt on the continued existence of the viatical settlement industry.³⁵ In response, the industry began a concerted effort to expand the pool of viators to include other terminally ill patients and senior citizens who were not suffering from a terminal illness but who did have a diminished life expectancy by virtue of their age.³⁶

Coinciding with the initiative to seek out new types of viators, some VSPs moved very aggressively to market fractional interests in viators' death benefits as asset-backed investment vehicles. This product exploited a gap in the regulation of viatical settlements. The first round of state enactments largely concentrated on the vulnerabilities of viators, overlooking the vulnerable position of investors. As a result, insurance regulators lacked the tools to deal with abuse of investors. As investment contracts, viatical settlements fell into a gap between insurance and securities regulation. When the federal Securities and Exchange Commission moved to regulate viatical settlements, it found its efforts hindered by the courts. In 1996, Federal Court of the Appeals for the District of Columbia circuit ruled in favour of a VSP that had challenged the Securities and Exchange Commission's authority to regulate this area.³⁷ More recently, in 2005, another circuit of the Federal Court of Appeals upheld the authority of the Securities and Exchange Commission to regulate

of the legislative provision to a specific transaction is a good deal more subtle than the words "tax-free" can express. The proceeds of a viatical settlement entered into after 31 December 1996 are not be included in a viator's income for American federal income tax purposes so long as two requirements are met. First, the transaction must involve a VSP that is licensed in the state in which the viator resides. *See* 26 U.S.C.S. § 101 (g) (2) (B) (i). Second, the viator must be either terminally ill or chronically ill. *See* 26 U.S.C.S. § 101 (g) (2) (B) (ii)–(iii). *See also* 26 U.S.C.S. § 101 (g) (3). The legislation does not specifically address life settlements. *See* James D. Warring, "Turn Unneeded Policies Into Cash" *Journal of Accountancy* 199:9 (September 2005) 39 at 44–45 (discussing tax treatment of life settlements in the United States).

35. *See* "Future of Death Futures," *supra* note 19 at 354–55 ("... the viatical settlement industry was thrown into a state of flux" [footnote omitted]); 355–56, *n.* 30–32. *See also* Sandel, *supra* note 28 at 10 ("The good news for AIDS victims was bad news for the viatical business. The stock price of Dignity Partners Inc., a San Francisco firm, plunged from \$14.50 earlier in the year to \$1.38.").
36. *See* Steve Tuckey, "Firms Still Arrange Some Viatical Deals" *National Underwriter Life & Health* (19 September 2005) 23 at 23 (estimating that "traditional" viatical settlements involving terminally ill individuals accounted for only 10 percent of the overall American market in 2004). *See also* Keith Kalawsky, "Hinging on Life and Death: Low-Risk Yield Seen as Selling Point" *National Post* (28 February 2006) FP1 (reporting on efforts to "disassociate" life settlements from certain aspects of viatical settlements).
37. *S.E.C. v. Life Partners, Inc.*, 87 F. 3d 536 at 537 (D.C. Cir. 1996), Ginsburg J. (for the majority) (ruling that fractional interests in viatical settlements are not "investment contracts" within the meaning of the American *Securities Act of 1933*), *reh'g denied*, 102 F. 3d 587 (D.C. Cir. 1996).

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viatical settlements.³⁸ But in the intervening years there was a rise in litigation—and in negative press coverage—involving fraud claims by investors in viatical settlements. This litigation and negative press has hampered the development of the viatical settlement industry as it strove to attract senior citizens, but the size and scope of the industry has continued to increase.³⁹ As a result of the confusion at the federal level and the problems in the market, most American states revised their securities legislation to include some protection for investors.⁴⁰

Outside the United States viatical settlements are much less prevalent. Within the past few years a viatical settlement market has begun to develop in the United Kingdom.⁴¹ Canada has had commercial viatical settlements since at least the mid-1990s.⁴² The industry in Canada, however, is microscopic in comparison with that in the United States. For reasons that will be explained in the next section, it also has little prospect (at present) for growth, as the legal landscape in Canada contains a significant roadblock to the development of a mature viatical settlement industry.

III. THE LAW IN CANADA

A. Introduction

In Canada, laws regulating the business of insurance and insurance contracts are primarily found in provincial and territorial statutes.⁴³ At present, no Canadian province or territory has any legislation that is expressly concerned with viatical settlements. But there are provisions in the legislation of many of the provinces and territories that affect the development of the viatical settlement industry. These provisions relate to trafficking in life insurance policies and an insurable interest in a life.

38. *S.E.C. v. Mutual Benefits Corp.*, 408 F. 3d 737 at 744 (11th Cir.), Cox J. (for the court) (holding that sales of fractional interests in viatical settlements are investment contracts and subject to regulation under American federal securities laws).

39. *See Ray, supra* note 22 at 346 (citing 2000 figures that show “[t]he rising sales from viatical settlement contracts are currently approaching the \$1.4 billion mark”).

40. *See Florence Bih Shu-Acquaye & Elisabeth Divine Reid, “Viatical Settlement Industry: Does Mutual Benefits Render it Terminal?”* (2005) 7 *Transactions* 7 at 12 (noting that, in 2005, Florida became the forty-seventh state to regulate viatical settlements as securities).

41. *See Ray, supra* note 22 at 346, *n.* 195.

42. *See John Schofield, “20th-Century Vampires: AIDS Has Given Rise to a Controversial Industry” Maclean’s* 110: 21 (26 May 1997) 46 (profiling VSP that was primarily active in Québec).

43. The federal government’s role is limited to regulating the incorporation of insurance companies, an area where it shares responsibility with the provinces. *See Insurance Companies Act*, S.C. 1991, c. 47.

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Although there are no specific provisions in the *Income Tax Act*⁴⁴ that address viatical settlements, the transaction does have tax consequences. The nature of those consequences depends on how a specific viatical settlement is structured.

The American experience with viatical settlements shows that certain aspects of the transaction can engage securities laws, as well as insurance laws. In Canada, the provinces and territories have primary responsibility for regulating securities. How these laws of general application may apply to viatical settlements is an issue that is just beginning to receive some attention.

B. Trafficking in Life Insurance Policies

An example of the legislative prohibition against trafficking in life insurance policies can be found in section 26 of the British Columbia *Insurance Act*:⁴⁵

Trafficking

- 26 Any person other than an insurer or its authorized agent who advertises, or holds himself or herself out, as a purchaser of life insurance policies or of benefits under it, or who traffics or trades in life insurance policies for the purpose of procuring the sale, surrender, transfer, assignment, pledge or hypothecation of them to himself or herself or any person, commits an offence against this Act.

A substantially similar provision appears in the legislation of eight other jurisdictions.⁴⁶

This provision is not a blanket prohibition against trafficking; insurers and their authorized agents are permitted to engage in the practice. But insurance companies have no incentive to enter into viatical settlements. Since VSPs, by definition, come from outside the insurance industry, the anti-trafficking provision has the effect of outlawing viatical settlements in the jurisdictions in which it is in force. Insurance regulators have confirmed this conclusion, and have stated that they would rely on this provision in prosecuting any VSP that engaged in the viatical settlement business.⁴⁷

44. R.S.C. 1985 (5th Supp.), c. 1.

45. R.S.B.C. 1996, c. 226.

46. Alberta: *Insurance Act*, R.S.A. 2000, c. I-3, section 784; Manitoba: *The Insurance Act*, R.S.M. 1987, c. 140, C.C.S.M. c. 140, section 90; Ontario: *Insurance Act*, *supra* note 9, section 115; Prince Edward Island: *Insurance Act*, R.S.P.E.I. 1988, c. I-4, section 73 (2); Newfoundland and Labrador: *Insurance Companies Act*, R.S.N.L. 1990, c. I-10, section 89; Yukon: *Insurance Act*, R.S.Y. 2002, c. 119, section 41; Northwest Territories: *Insurance Act*, R.S.N.W.T. 1988, c. I-4, section 32. The Northwest Territories legislation is also in force in Nunavut, pursuant to *Nunavut Act*, S.C. 1993, c. 28, section 29.

47. See Financial Services Commission of Ontario, News Release, “*Insurance Act* Amendment to Allow Viatical Settlements in Ontario” (undated) [no longer publicly available, archived with the Canadian

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This prohibition of trafficking was not enacted with the express purpose of restricting viatical settlements. That is only the provision's effect. A look back at the legislative history of the anti-trafficking provision is necessary to shed some light on its purpose and on the evils it was intended to address.

One commentator has said that the anti-trafficking provision is “. . . a Depression-era prohibition that was originally intended to prevent people from selling their insurance policies out of desperation.”⁴⁸ This remark undoubtedly identifies one of the policies underlying enactment of the anti-trafficking provision: protection of an insurance-buying public that had been made financially vulnerable by the Depression. But this policy does not appear to be the only reason for the anti-trafficking provision's enactment.

The first version of the anti-trafficking provision was enacted by Ontario on 3 April 1934.⁴⁹ The next day, Manitoba enacted a substantially similar version of the provision.⁵⁰ A little over one year later, Québec⁵¹ and Prince Edward Island⁵² added the anti-trafficking provision to their insurance legislation. It would be very unusual for four provinces to enact nearly identical legislation spontaneously. In this case an organization called the Association of Superintendents of Insurance of the Provinces of Canada provided external co-ordination of the legislative initiative.

The Association of Superintendents of Insurance of the Provinces of Canada was a body made up of representatives from the government agencies charged with regulating the insurance industry in each of the provinces. (The Association has been succeeded by the Canadian Council of Insurance Regulators, which includes representatives of the federal govern-

Centre for Elder Law Studies] (“. . . section 115 of the *Insurance Act* continues to make viatical settlements illegal in Ontario and FSCO will take whatever steps are appropriate in bringing compliance with the law”); British Columbia, Financial Institutions Commission, Consumer Alert, “Viatical Settlements” (10 April 2002) at 3, online: BC Financial Institutions Commission <<http://www.fic.gov.bc.ca/pdfreports/consumeralerts/alertvs2.pdf>> (“If you must viaticate your policy, you will likely have to make a private arrangement because a viatical settlement company would not be permitted to buy your policy from you in British Columbia.”).

48. Guy Giorno, “‘Life Settlements’ Will Give Consumers More Options” *The Lawyers Weekly* 23:11 (11 July 2003) 14 at 14.

49. *The Insurance Act, 1934*, S.O. 1934, c. 22, section 6 (part).

50. *An Act to Amend the Manitoba Insurance Act*, S.M. 1934, c. 19, section 2.

51. *An Act to amend the Québec Insurance Act for certain purposes*, S.Q. 1935, c. 75, section 7. Québec did not re-enact the provision when it overhauled its insurance law in 1974, so the anti-trafficking provision is no longer in force in that province. See *Insurance Act*, S.Q. 1974, c. 70.

52. *Insurance Amendment Act*, S.P.E.I. 1935, c. 9, section 4.

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ment in addition to the provincial and territorial regulators who made up the previous body.) The Association met annually and made recommendations to provincial and territorial governments that had, in the words of its successor body's mandate, ". . . the overall goal of promoting simplification, coordination and harmonization in the regulation of insurance across Canada."⁵³ These recommendations have been tremendously influential in the creation and development of provincial and territorial legislation respecting insurance.⁵⁴

The anti-trafficking provision was first mentioned in the minutes of the Association's 1935 conference.⁵⁵ The minutes do not disclose a reason for endorsing this specific provision. Instead, it was included in a package of proposed legislative reforms recommended, not by the Association as a whole, but rather by a special committee on licensing and regulation of life insurance agents. The other proposed amendments created a privilege for information disclosed to regulators by licensed agents,⁵⁶ and dealt with disapproved practices known as "rebating"⁵⁷ and "twisting."⁵⁸

It is not immediately clear what these four provisions have to do with one another. The link appears to be provided by their source in a committee dealing with the licensing of life insurance agents. The minutes of other meetings of the Association indicate a desire for

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53. Canadian Council of Insurance Regulators, *Strategic Plan 2005–2008* (Toronto: The Council, 2005) at 2, online: Canadian Council of Insurance Regulators/ Conseil canadien des responsables de la réglementation d'assurance <http://www.ccir-ccrra.org/CCIR/plan_mission/CCIR%20StratPlan%2005-08%20Final.pdf>.
 54. See Craig Brown, *Insurance Law in Canada*, looseleaf, vol. 1 (Toronto: Carswell, 2002) at 1-12, n. 55 ("Most additions or changes to the legislation have been the product of the annual conferences of insurance regulators from across the country.").
 55. Association of Superintendents of Insurance of the Provinces of Canada, *Minutes of Proceedings of the Eighteenth Annual Conference* (Toronto: Office of the Secretary, Parliament Buildings, 1935) at 153–54.
 56. See, e.g., *Ontario Insurance Act*, *supra* note 9, section 116. In addition to providing protection for the public, this provision appears to have been intended to facilitate investigations of agents.
 57. See, e.g., *New Brunswick Insurance Act*, R.S.N.B. 1973, c. I-12, section 368 (5). See also David Norwood & John P. Weir, *Norwood on Life Insurance Law in Canada*, 3d ed. (Toronto: Carswell, 2002) at 48 ("Rebating occurs when an agent provides something of value to a client to induce the purchase of life insurance and is effectively commission splitting, as between the agent and client. . . . The problem is systematic and the loser is the insurance company whose own front-end loaded commission structure finances and makes the scheme possible.").
 58. See, e.g., *The Insurance Act (Manitoba)*, *supra* note 46, section 378 (12). See also Norwood & Weir, *ibid.* ("Twisting . . . occurs when an agent induces a policyholder to replace an existing policy with one sold by the agent. Invariably, the policyholder is induced to utilize the 'cash values' of their existing insurance coverage to pay for the premiums of a replacement or an additional policy sold by the agent." [footnote omitted]).
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insurance regulators to tighten their regulation of life insurance agents.⁵⁹ One of the reasons why stricter regulation was seen to be necessary tied into another abiding concern at the conference: the high rate of lapse and surrender of life insurance policies.⁶⁰ In addition to being a problem for the general public, insurance regulators also saw lapse and surrender as a problem for insurance companies.⁶¹ And they blamed this problem not only on prevailing economic conditions, but also on the activities of insurance agents.⁶²

One can only speculate how the anti-trafficking provision ties into this agenda. Modern viatical settlements do not result in an increase in lapse and surrender of policies, and thus do not provide us with much guidance as to why the Association connected trafficking with lapse and surrender. Unlike viatical settlements, Depression-era trafficking, which would have taken place in a private, unregulated market, could have led to an increase in lapse and surrender by a variety of means. Trafficking could be a rough equivalent of twisting (which by definition requires the lapse or surrender of a policy), only involving individuals from outside the insurance industry. Perhaps the new holders of trafficked life insurance policies, who would likely only have a contractual obligation to pay premiums, allowed them to lapse more readily than the insured persons, who would usually have familial or other extra-legal obligations to the beneficiaries under the policy. The anti-trafficking provision may also have been seen as a way of bolstering stiffer licensing and regulatory requirements for agents by shutting off economic competition in one area from unlicensed persons. At any rate, it is important to note that one of the reasons why the provision was enacted was that

59. See B. Arthur Dugal, “Conservation and Agency Turn-Over” in *Minutes of Proceedings of the Eighteenth Annual Conference*, *supra* note 55, 25 at 31 (“I am just wondering if we should not exercise our authority to a greater degree in making a more rigid selection of those men and women to whom licenses should be issued.”); 32 (“The thought comes to me that as Superintendents we should more frequently use our prerogative of refusal or our power of veto in this matter of issuing new licenses or transferring or reviving old licenses.”).

60. See J.G. Packer, “A Present-Day Life Insurance Problem,” in Association of Superintendents of Insurance of the Provinces of Canada, *Minutes of Proceedings of the Sixteenth Annual Conference* (Toronto: Office of the Secretary, Parliament Buildings, 1933) 80 at 84 (“One of the great problems which the companies have had to face has been the termination of business due to lapse and surrender.”).

61. See Dugal, *supra* note 59 at 26 (“There is, unfortunately, an idea existing that lapsed policies mean profit to the company. We know that this is not the case, but on the other hand, all told, the company suffers financial loss because of initial expense involved in placing the business on the books.”); Packer, *ibid.* at 85–86 (“The policyholder who takes out a policy and lapses it is not deserving of all the sympathy but the position of the company and the agent representing the company should also be given due regard.”). These are rather counterintuitive points from today’s perspective. Today, lapses and surrenders are usually seen as creating windfalls for insurance companies, since the company has collected premiums but does not have to pay out benefits.

62. See Dugal, *ibid.* at 30–33; Packer, *ibid.* at 88–91.

it was seen as part of a series of reforms aimed at enhancing the financial integrity of insurance companies in a time of economic crisis.

Finally, a third reason for the adoption of this provision in some provinces is also present. This reason comes from the overriding concern of the Association of Superintendents of Insurance of the Provinces of Canada with promoting uniformity in insurance legislation. When the association as a whole endorsed the anti-trafficking provision, one of the reasons for recommending enactment was to maintain uniformity. This reason loomed very large for provinces that enacted the provision after the first burst of activity. When British Columbia enacted its version in 1950, uniformity was the only reason offered for the legislation.⁶³

C. Insurable Interest

An “insurable interest” refers to the connection of a person who obtains insurance with the subject matter of that insurance.⁶⁴ The concept can be traced back to a number of eighteenth-century English statutes.⁶⁵ For life insurance,⁶⁶ the insurable interest requirement was introduced to combat “a mischievous Kind of Gaming.”⁶⁷ A textbook author has explained the connection between gaming and life insurance:⁶⁸

In the early days of life insurance in England, it was turned to use as disguised gambling. A popular subject of wager was the exact date of death of a prominent person known to be seriously ill. A straight bet was illegal. One bettor, the “insured” would pay a “premium.” The other, giving odds, would be the “insurer” providing “insurance” against the subject’s dying before a specified date. The insurer would keep the premium if the subject was still alive on the agreed date. If death had occurred by then, the insured would collect the “insurance” money.

63. Bill 38, *Insurance Act Amendment Act, 1950*, 1st Sess., 22d Parl., British Columbia, 1950, clause 2 (explanatory note) (“recommended by Association of Superintendents of Insurance for uniformity”).

64. See Brown, *supra* note 54 at 4-1.

65. *Marine Insurance Act, 1745* (U.K.), 19 Geo. 2, c. 37; *Life Assurance Act, 1774* (U.K.), 14 Geo. 3, c. 48.

66. The concept of insurable interest also exists for property insurance, but it relies on a different rationale than the one that animates the concept for life insurance.

67. *Life Assurance Act, 1774*, *supra* note 65, preamble.

68. Brown, *supra* note 54 at 4-3.

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Another reason that is occasionally advanced for maintaining a strict insurable interest requirement is that, in its absence, people will have a financial incentive to murder the insured person.⁶⁹

The insurable interest requirement remains in force in Canada.⁷⁰ The requirement is satisfied if the person placing the insurance is in one of the relationships with the insured set out in the governing statute.⁷¹ Further, the requirement may also be satisfied even if the person is not in one of the listed relationships, so long as the insured person consents in writing to the placing of insurance on his or her life.⁷²

The consequence of a lack of insurable interest is harsh: the insurance contract is void.⁷³ This result, coupled with the fact that VSPs clearly fall outside the statutory list of persons with an insurable interest in the life of another, gave the American viatical settlement industry some pause in its early days.⁷⁴ The insurance commissioner of Utah even declared that viatical settlements would be illegal in Utah due to this lack of insurable interest.⁷⁵

These American concerns do not apply to Canada. Insurable interest became an issue in the United States because, under a position taken by the highest courts in a minority of the states, the insurable interest must be in existence at the time an insurance policy is as-

69. See, e.g., Dean, *supra* note 10 at 137 (citing George J. Couch, *Cyclopedia of Insurance Law*, vol. 3, 2d ed. (Rochester, NY: Lawyers Co-operative, 1984) at § 24:117: “The reason given for such a rule is that a contract made [devoid of this interest] is against public policy on the theory that the beneficiary would be more interested in the early death of the insured than in the prolongation of his life.”).

70. See, e.g., Ontario *Insurance Act*, *supra* note 9, section 178; British Columbia *Insurance Act*, *supra* note 45, section 36.

71. See, e.g., Ontario *Insurance Act*, *ibid.*, section 179 (person having an insurable interest in one’s own life and in the life of: (a) a child or grandchild; (b) a spouse; (c) a dependent; (d) an employee; and (e) “any person in the duration of whose life the person has a pecuniary interest”).

72. See, e.g., Ontario *Insurance Act*, *ibid.*, section 178 (2) (b); Alberta *Insurance Act*, *supra* note 46, section 562 (2) (b).

73. See, e.g., Ontario *Insurance Act*, *ibid.*, section 178 (1); *The Saskatchewan Insurance Act*, S.S. 1978, c. S-26, section 140 (1).

74. See Dean, *supra* note 10 at 136–38; Osborn, *supra* note 12 at 485–86.

75. See Crites-Leoni & Chen, *supra* note 23 at 71. Utah legalized viatical settlements the next year for reasons of enforcement that were not connected to the correctness of its position on insurable interest. See Crites-Leoni & Chen at 71–72 (stating that Utah legalized viatical settlements because “Utah residents were forced to leave Utah, sell their policies, and then return under the current viatical settlement prohibition” [footnote omitted]).

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signed.⁷⁶ As a result, there is some uncertainty in the American law.⁷⁷ This uncertainty does not exist in Canadian law, because the governing statutes are uniformly clear that the requirement only applies “at the time a contract would otherwise take effect.” This timing element is significant because, if a Canadian viatical settlement industry were to follow the lead of the American industry, then most viatical settlements in this country would involve an absolute assignment of the underlying life insurance policy. According to a leading textbook on the law of insurance, in Canada “[w]here a life insurance policy is issued with a valid insurable interest and is then assigned to a person who has no insurable interest, the validity and enforceability of the contract is not affected.”⁷⁸ Indeed, any method of structuring a viatical settlement in Canada should not infringe the insurable interest requirement, so long as it does not involve the placement of a new policy of life insurance.

There is one exception to the otherwise clear picture in Canada. Manitoba’s insurance law contains a unique provision that allows an insured person to apply to court for an order directing a life insurance company to terminate a life insurance policy if an insurable interest no longer exists:⁷⁹

Where court may order termination

- 155 (4) A person whose life is insured may, where insurable interest no longer exists, apply to the court for an order requiring the insurer to immediately terminate the policy and pay over to the policy owner any value that exists in the policy.

76. See Osborn, *supra* note 12 at 486 (“... the courts in a very few states have adopted the minority view that an absolute assignee is required to have an insurable interest even if the assignment is made in good faith” [footnote omitted]).

77. See Dean, *supra* note 10 at 137 (“Though it is well settled that a person or entity must have an insurable interest to purchase insurance on the life of another person, there is considerable controversy as to whether a person without an insurable interest should be allowed to obtain the same policy through assignment.” [footnote omitted]).

78. Norwood & Weir, *supra* note 57 at 85. See also *Chantiam v. Packall Packaging Inc.*, (1998) 38 O.R. (3d) 401, 159 D.L.R. (4th) 517 at para. 12 (C.A.), Robins J.A. (for the court) (“It is a well established principle of law, here and elsewhere, that an insurable interest is required only at the commencement of the policy. Life insurance, unlike many other forms of insurance, is not a contract of indemnity where an insurable interest is required at the time of the loss.”), *leave to appeal to S.C.C. refused*, (1999) 236 N.R. 185n. (S.C.C.).

79. *The Insurance Act*, *supra* note 46, section 155 (4).

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This provision was enacted in 1986.⁸⁰ The ministerial statement that accompanied the introduction of the amending legislation in the Manitoba Legislature sheds some light on its purpose:⁸¹

The section was prompted by a recognition of the fact that “in some circumstances, such as marriage breakdown or dissolution of a partnership, a person whose life is insured may become uncomfortable or find it offensive that an ex-spouse or an ex-partner continues to pay insurance premiums and to stand to personally gain by that individual’s death.”

An applicant under section 155 (4) must prove only that he or she is insured under the policy and that the owner of the policy no longer has an insurable interest; proof that the applicant actually fears for his or her life is not required.⁸² Since the order is made against the insurance company that issued the policy, that insurance company must be joined in the application or the order will not be made.⁸³

It is not clear whether this provision would apply to an assignment of a life insurance policy. The ministerial statement indicates that the legislation was aimed at ex-spouses and ex-partners who maintain a life insurance policy in force after the dissolution of a marriage, partnership, or other relationship, rather than at an assignee of a life insurance policy. But section 155 (4) simply refers to situations “where insurable interest no longer exists.” There is nothing in this language, or in the cases that have considered it, that would support excluding assignees from the provision’s scope.

On its face, then, section 155 (4) could place a viatical settlement in Manitoba in doubt. By virtue of the lack of an insurable interest, the insured person would be in a position to apply to court for an order to cancel the policy. The VSP could possibly avoid this difficulty by establishing insurable interest by way of the insured person’s written consent.⁸⁴ But this option would not be open to a VSP that followed the American practice of fractionalizing the viator’s insurance policy for resale as an investment. As a practical matter, it would be difficult to obtain the insured’s written consent to insurance being held by an unascertained and potentially changing group of investors. An order for termination would represent a

80. *An Act to Amend The Insurance Act and The Queen’s Bench Act*, S.M. 1986–87, c. 37, section 4.

81. Manitoba, Legislative Assembly, *Debates and Proceedings* (6 August 1986) (quoting A. Mackling), quoted in *Chantiam v. Packall Packaging Inc.*, *supra* note 78 at para. 14.

82. See *Hechter v. Sonya*, [1999] 3 W.W.R. 343 at paras. 8–9, 130 Man. R. (2d) 177 (Q.B.), Schulman J., *aff’d*, (1999) 131 Man. R. (2d) 295, 5 C.C.L.I. (3d) 282 (C.A.).

83. See *J.E.L. v. M.A.T.*, (2000) 151 Man. R. (2d) 69 at para. 135, 2000 MBQB 148, Steel J.

84. See *The Insurance Act*, *supra* note 46, section 155 (2) (b).

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considerable loss for the VSP if the “value” to be paid over to the policy owner is merely the cash surrender value of the insurance policy and not the death benefit.⁸⁵

D. Viatical Settlements and the *Income Tax Act*

Section 56 (1) (j) of the *Income Tax Act*⁸⁶ requires a Canadian taxpayer to include life insurance policy proceeds in the taxpayer’s taxable income. The mechanics of this inclusion are set out in section 148 (1). The effect of these two provisions is that a taxpayer who disposes of an interest in a life insurance policy must include the proceeds of that disposition in taxable income as “other income.”⁸⁷

There are some subtleties to section 148 that should be noted. First, a number of specific types of life insurance policies are exempted from the scope of the provision.⁸⁸ Second, the word “disposition” is defined very broadly.⁸⁹ It catches all kinds of transactions. The most common way of structuring a viatical settlement in the United States—an absolute assignment of the policy—would be a “disposition” for the purposes of section 148. But there are any number of ways of structuring a viatical settlement. Some of these ways could result in a different tax treatment.⁹⁰

85. Value is not defined in *The Insurance Act*, but section 148 (1) defines “insurance money” broadly to mean “the amount payable by an insurer under a contract, and includes all benefits, surplus, profits, dividends, bonuses, and annuities payable under the contract.” If the intent of section 155 (4) was to require payment over of the death benefit after a court-ordered termination of the policy, then it likely would have used the term “insurance money” instead of “value.”

86. *Supra* note 44.

87. *See* M.N.R., Interpretation Bulletin, IT87R2, “Policyholders’ Income from Life Insurance Policies” (15 February 1996) at para. 14 (“When a policyholder disposes of an interest in a life insurance policy, the rules in paragraph 56 (1) (j) and subsection 148 (1) apply. These rules require the policyholder to include in income for the taxation year in which the disposition occurs the amount, if any, by which the proceeds of the disposition of the policyholders’ interest that the policyholder, beneficiary or assignee is entitled to receive in the year exceed the [adjusted cost base] to the policyholder of that interest immediately before the disposition.”).

88. *Income Tax Act*, *supra* note 44, section 148 (1) (a)–(b.1); (d) (exempting life insurance policies that are or were issued pursuant to a registered pension fund or plan, a registered retirement savings plan, a registered retirement income fund, or a deferred profit sharing plan).

89. *Income Tax Act*, *ibid.*, section 148 (9) “disposition.”

90. *See* Dean, *supra* note 10 at 138, n. 96 (“... attorneys counseling prospective viators should investigate the possibility of structuring viatication as a loan because this form may effectively avoid the federal and state income taxes currently [in 1993] imposed on viatical settlements”). In Canada, “an assignment of all or part of an interest in the policy for the purpose of securing a debt or loan other than a policy loan” is not a “disposition.” *Income Tax Act*, *ibid.*, section 148 (9) “disposition” (f). A “policy loan” is “an amount advanced by an insurer to a policyholder in accordance with the terms and conditions of the life

E. Securities Laws and Investors in Viatical Settlements

The anti-trafficking provision has largely impeded the development in Canada of a viatical settlement industry based on the primary transaction between a viator and a VSP. But the investment side of the viatical settlement industry has not been restrained by it. Companies began to exploit this side of the industry in Canada in the 1990s. In response, financial regulators tried to assert their authority under existing laws to regulate the investment side of the viatical settlement industry, which resisted. The main skirmish took place in Ontario, and it involved a company called Universal Settlements International, Inc.⁹¹

Universal Settlements was an Ontario-based company that offered interests in viaticated life insurance policies to the public for investment purposes. Universal Settlements was strictly involved in the investment side of the business. All the policies that formed part of its investment portfolio were from the United States.⁹² But many of Universal Settlements' customers were in Canada.⁹³ This fact attracted the attention of two Ontario regulatory bodies: the Financial Services Commission of Ontario and the Ontario Securities Commission. Both bodies moved to assert regulatory jurisdiction, under existing laws, over the business of Universal Settlements. Universal Settlements resisted both assertions of jurisdiction.

The case between Universal Settlements and the Financial Services Commission was the first to be heard by an adjudicator. At issue was a notice of proposed cease and desist order issued under section 441 (2) of Ontario's *Insurance Act*.⁹⁴ The basis for this order was a breach of Ontario's anti-trafficking provision.⁹⁵ Universal Settlements argued that the

insurance policy." *Income Tax Act*, section 148 (9) "policy loan."

91. In addition to the Universal Settlements case, another brief foray into securities regulation occurred in British Columbia. See *Re Westhaven Ocean Terrace Ltd. Partnership*, (1996) B.C.S.C. Weekly Summary, Edition 96:9 at 5 (issuing temporary restraining order against and ordering hearing involving firm offering pooled interests in life insurance policies to investors in British Columbia). The hearing was adjourned, and the temporary order was ultimately revoked when the Executive Director decided not to proceed against the firm. See *Re Westhaven Ocean Terrace Ltd. Partnership*, [2001] B.C.S.C.D. No. 516 (QL).

92. See *Universal Settlements Inc. v. Superintendent of Financial Services*, (14 January 2002) I051-2001-1 (Ont. F.S.T.) at 4, online: Financial Services Commission of Ontario <<http://www.fstontario.ca/english/decisions/insurance/I0151-2001-1.pdf>>.

93. See *Universal Settlements International, Inc. v. Ontario (Securities Commission)*, (2003) 67 O.R. (3d) 670 at para. 7, 40 B.L.R. (3d) 308 (Div. Ct.), Greer J. (for the court) (noting that Universal Settlements "... has customers in Ontario, Nova Scotia, British Columbia and Alberta").

94. *Supra* note 9.

95. *Insurance Act*, *ibid.*, section 115.

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Commission did not have jurisdiction to issue this order if Universal Settlements was not engaging in “insurance undertaken in Ontario,” within the meaning given to that phrase by the *Insurance Act*.⁹⁶ The Financial Services Tribunal concluded that the investment-side transactions undertaken by Universal Settlements did not “. . . rise to the level of assignments between the insurer and the insured,”⁹⁷ and, therefore, did not “. . . have the requisite elements of a contract of insurance.”⁹⁸ As a result, the Commission’s proposed cease and desist order was ruled to be of no force and effect.⁹⁹

After the ruling by the Financial Services Tribunal, the Ontario Securities Commission decided to proceed on an investigation order it had made against Universal Settlements under section 11 of Ontario’s *Securities Act*.¹⁰⁰ The section 11 order required Universal Settlements “. . . to provide certain information regarding its business to the Commission so that it could determine whether the [*Securities Act*] applied to [Universal Settlements’] business.”¹⁰¹ Universal Settlements resisted this order. It sought a review of the order pursuant to section 144 of the *Securities Act*.¹⁰² The Ontario Securities Commission rejected its application under section 144, concluding that Universal Settlements had not persuaded the Commission that “. . . it would not be prejudicial to the public interest for us to revoke the section 11 order.”¹⁰³

Universal Settlements sought judicial review of this decision in the Ontario Divisional Court. It argued that “. . . any such investigation is a very intrusive step in its business operations.”¹⁰⁴ Further, it said that the Commission was basing its investigations on speculations and that it could point to no firm evidence that it was engaging in securities transactions.¹⁰⁵ The court rejected these arguments. It held that “. . . the Commission has the power to order such investigations that it deems are in the public interest, and that it is in no

96. *Ibid.*, section 39.

97. *Universal Settlements Inc. v. Superintendent of Financial Services*, *supra* note 92 at 8.

98. *Ibid.*

99. *Ibid.* at 9.

100. R.S.O. 1990, c. S.5.

101. *Universal Settlements International, Inc. v. Ontario (Securities Commission)*, *supra* note 93 at para. 5.

102. *Supra* note 100.

103. *Re Universal Settlements International Inc.*, (2003) 26 OSCB 2345 at 35.

104. *Universal Settlements International, Inc. v. Ontario (Securities Commission)*, *supra* note 93 at para. 6.

105. *Ibid.*

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way expanding its authority in doing so.”¹⁰⁶ The fact that existing Canadian law, and relevant American authorities, were divided on the question of whether the investment side of the viatical settlement industry is dealing in securities was not enough to restrain the Commission from undertaking this investigation.¹⁰⁷

The case is still proceeding through the Ontario Securities Commission, which recently set a hearing date in the matter.¹⁰⁸ In the meantime, Universal Settlements continues to carry on business in Ontario. And the extent to which existing securities laws apply to the investment side of the Canadian viatical settlement industry remains uncertain.

IV. ARGUMENTS FOR AND AGAINST LEGALIZING VIATICAL SETTLEMENTS

A. Introduction

Even if the Canadian viatical settlement industry were found to be subject to provincial and territorial securities laws, this conclusion would not render their activities illegal. Instead, they would be subject to a regulatory regime that includes licensing, reporting, and disclosure requirements. The anti-trafficking provision that is in force under the insurance legislation of nine Canadian provinces and territories is the only law that renders viatical settlements illegal in this country. Therefore, the focus of this Part is on arguments to repeal or amend that provision.

B. Arguments For Legalizing Viatical Settlements

1. THE ANTI-TRAFFICKING PROVISION DOES NOT EFFECTIVELY SERVE ITS PURPOSES

There are three purposes underlying the anti-trafficking provision: protection of vulnerable policyholders, protection of the financial integrity of insurance companies, and uniformity of provincial legislation governing insurance. Stated in general terms, these policies have clear and obvious appeal. The issue here relates to a specific legislative mechanism. That mechanism is a ban on transfers of insurance policies to a third party. An absolute ban is not the only means by which to advance these three policies. A more sophisticated regulatory structure can preserve each policy and allow for the attainment of other valuable goals.

A total ban on viatical settlements is a less effective way to protect vulnerable consumers than permitting a regulated market in viatical settlements to exist. Regulation can set standards of disclosure. Well-informed consumers tend to be better guardians of their own interests than government agencies. Through licensing, regulation can also set standards

106. *Ibid.* at para. 27.

107. *Ibid.* at para. 26.

108. *Re Universal Settlements International Inc.*, (2006) 29 O.S.C.B. 1471 (ordering a hearing into the matter to commence on 26 June 2006).

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for VSPs. In contrast, a ban on viatical settlements has likely driven the practice underground. Informal or private transactions in the nature of viatical settlements have a high potential to be abusive both to consumers' financial interests and to their legal rights. When these abuses occur, they may be prosecuted under the *Insurance Act*, but the only penalty that the legislation prescribes is a fine. This result provides little assistance and no compensation to the wronged consumer. Prosecutions are hampered by the inherent lack of publicity given to these transactions. Since they are illegal, participants in them may be reluctant to seek out government assistance after they have suffered abuse. A ban on viatical settlements only looks like an appealing mechanism for protecting consumers when it is contrasted with no controls on viatical settlements. A ban has much less appeal when the competing alternative is a regulated marketplace.

Outlawing viatical settlements as a means to protect insurance companies is an idea that is rooted in the specific conditions of the Great Depression. The severe economic conditions of the 1930s posed a serious threat to the survival of many insurance companies. It was only prudent for legislatures to move to stamp out practices such as trafficking, rebating, and twisting, which were perceived to be contributing to this threat. This position cannot be maintained in the current economic climate. Although insurance companies, in the main, have reservations about the legalization of viatical settlements,¹⁰⁹ they do not argue that allowing viatical settlements will compromise their continued existence. Such a justification for a complete ban on viatical settlements is simply not tenable today.

Uniformity of provincial and territorial life insurance legislation is an important achievement that should not be thoughtlessly eroded. But uniformity has never meant that all the provisions of the various provincial and territorial *Insurance Acts* must be identical. From the start, proponents of uniformity have been more concerned with exercising their influence over the core areas of the legislation.¹¹⁰ Despite being championed by the Association of Superintendents of Insurance of the Provinces of Canada, the anti-trafficking provision falls outside those core areas of concern. This provision never achieved uniformity. Saskatchewan, New Brunswick, and Nova Scotia never enacted it. Québec repealed it with no

109. See, e.g., Canadian Life and Health Insurance Association Inc., *Submission to the Standing Committee on the General Government of the Legislature of Ontario Regarding Bill 119, Red Tape Reduction Act, 2000* (October 2000) at 9, online: Canadian Life & Health Insurance Association Inc./ Association canadienne des compagnies d'assurances de personnes inc. <http://www.clhia.ca/submissions/2000/bill_119/bill_119.PDF> (opposing legalization of viatical settlements in the absence of "a robust system of regulation").

110. This point was recognized in the early motto of the Association of Superintendents of Insurance of the Provinces of Canada, which was "uniformity where you can have it; diversity where you must have it; but in all cases certainty" (quoting Lord Macaulay). See Henry Brace, "Forward," in Association of Superintendents of Insurance of the Provinces of Canada, *Minutes of Proceedings of the Tenth Annual Conference* (Toronto: Office of the Secretary, Parliament Buildings, 1927) vii at viii ("Uniformity is not a fetish, an object to be attained notwithstanding all other considerations.").

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fanfare in 1974.¹¹¹ That some provinces have no legislative barriers to viatical settlements has the potential to undermine the ban on viatical settlements in the other provinces.¹¹² Further, it is unlikely that any of these provinces will decide to enact the anti-trafficking provision at this late date, either for the sake of uniformity or to promote its other historic purposes.¹¹³ Uniformity is more likely to be promoted by the enactment of modern legislation permitting viatical settlements within a regulated framework.

2. IN THE ABSENCE OF ANY PRESSING PUBLIC POLICY CONCERNS, INDIVIDUALS SHOULD NOT BE UNDULY RESTRAINED IN DEALING WITH THEIR PROPERTY

Most people take out life insurance policies to provide financial security for their families in the event of death. But legal scholars have long recognized that insurance policies can have other functions, including being a form of intangible personal property:¹¹⁴

Regarded as a contract, the essence of the life insurance policy may be said to be the insurer's promise to pay the contractual benefit when the insured event occurs. But the policy also contains a variety of other rights and options, including policy rights and cash surrender privileges. From this perspective, it is a chose in action consisting of a bundle of rights and, thus, a form of "personal property."

Viatical settlements take this traditional position one step further by treating the death benefit itself as one of the valuable "bundle of rights" that may be dealt with as personal property. The law in Canada favours the freedom of persons to deal with their property, unless a pressing public policy concern overrides this general principle. But viatical settlements are not permitted in the majority of Canadian provinces and territories. A law that was enacted to meet Depression-era purposes restrains individuals from dealing with the death benefits under their insurance policies. Even if it were timely to repeal that law, a more fundamental question would still have to be faced—whether there are any public policy concerns directly related to viatical settlements that justify maintaining the ban on them.

The most common public policy argument raised against viatical settlements is that they are unacceptable because they give a stranger a financial interest in a person's early death.

111. *See supra* note 51.

112. *See* Schofield, *supra* note 42 at 47 (reporting on British Columbia and Ontario clients of a Québec-based VSP).

113. If there is any trend among legislatures in connection with the anti-trafficking provision and the three other provisions that were recommended alongside it, that trend is toward repealing them. *See Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c. 11, section 343 (repealing anti-twisting provision); *Red Tape Reduction Act, 1999*, S.O. 1999, c. 12, Schedule I, section 4 (58) (repealing anti-rebating provision).

114. Norwood & Weir, *supra* note 57 at 359.

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Commentators have seen a number of evils flowing from this financial interest. In their arguments, these evils include discomfort about the mixing of commerce and death,¹¹⁵ concerns about lowering the general moral tone of society,¹¹⁶ and a specific worry that viators' lives will be placed in danger.¹¹⁷

There are several problems with these arguments. They often turn on subjective emotional or moral reactions that are impossible to quantify. When they do make claims that can be measured empirically, those claims are found to be wanting. For example, the supposed incentive to murder viators has not resulted in a single verifiable death in the over 15 years of commercially-available viatical settlements in the United States.¹¹⁸

At a more fundamental level these arguments are flawed because the mixing of commerce and death is not a quality that is unique to viatical settlements. It occurs in legal businesses and transactions that no one has ever questioned. Funeral homes are allowed to operate commercially, remainders after life estates in property may be created, and testamentary dispositions may be made, even though each of these gives one person a financial interest in another person's death. As the American Supreme Court Justice Oliver Wendell Holmes put it, "[t]he law has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death."¹¹⁹ It is inconsistent to disallow viatical settlements on this basis when that treatment is not extended to other transactions that share the same quality.

Another argument against viatical settlements focusses on the numerous frauds that were perpetrated on American investors in viatical settlements in the late 1990s.¹²⁰ This argu-

115. See, e.g., Quinn, *supra* note 24 at 55 (characterizing viatical settlements as a distasteful mixture of gambling and death and concluding that "[t]here's more danger than we think in wagering on lives"). See also Andy Rich & Nicholas Fawcett, "Viatical Settlements: An Arduous Journey" (2003) 21 Can. J. Ins. L. 45 at 46 (noting that "[t]he innate unpalatability of some facets of the industry is compounded by the eagerness of the media and commentators to capitalize on colourful quotes and anecdotes that highlight the more shadowy realities of viaticals").

116. See, e.g., Sandel, *supra* note 28 at 10 (describing viatical settlements as "... bets against life that coarsen the culture and make death a commodity").

117. See, e.g., Ron Panko, "Playing the Death Pool" *Best's Review Life/Health Edition* (1 April 1999) 21 at 21 (quoting Prof. Joseph M. Belth, "[t]hat's creating a powerful incentive for homicide").

118. See *ibid.* at 23 (quoting state insurance commissioner who noticed that many regulations aimed at the viatical settlement industry are "... driven by concerns that undesirable elements could get involved that could result in murder-for-profit type schemes, though, there's no evidence so far that anything like that has ever happened in the U.S.").

119. *Grigsby v. Russell*, *supra* note 20 at 155–56.

120. See, e.g., Canadian Life and Health Insurance Organization, *Submission to the Chief Executive Officer*

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ment implies that viatical settlements have a unique propensity to breed high levels of fraud, which government regulators are unable to control. But this is far from the case. Although viatical fraud is a serious problem, it is not so large and complex that it cannot be managed through competent regulation. Viatical fraud is simply a part of the larger problem of securities fraud, which provincial and territorial securities commissions have long experience in confronting. The situation in the United States was exacerbated by piecemeal and inadequate legislation that failed to address investor protection until problems with fraud grew to troubling proportions.¹²¹ The American experience can serve as a cautionary example for Canadian reforms on the need to include investor protection in the legislation. Finally, it should be noted that the current law in Canada does not apply to viatical settlements as a security, which leaves Canadian investors in foreign viatical settlements open to the kinds of abuse that could be dealt with by viatical settlement legislation in this country.

A third argument against viatical settlements questions the need for them in the Canadian marketplace. Insurers have argued that they already offer products that meet the needs of their policyholders.¹²² Some examples of such products are accelerated death benefits and living benefits.¹²³ Simply stated, these products allow the payment of part of the death benefit to an insured in advance of death. For many people, they may be a better choice than a viatical settlement.¹²⁴ For others, viatical settlements will be superior.¹²⁵ Under the

and Superintendent of Financial Services, Financial Services Commission of Ontario Regarding Key Elements of a Proposed Regulatory System for Viatical Settlements in Ontario (August 2001) at 11, online: Canadian Life & Health Insurance Association Inc./ Association canadienne des compagnies d'assurances de personnes inc. <http://www.clhia.ca/submissions/2001/Viatical/Viatical_Submission.PDF> [CLHIA Submission] (“ . . . the U.S. experience with viatical settlements by widespread fraud, abuse of the terminally ill and harm to investors and insurers”). See Part IV.B.1, above, at 22ff for a discussion of protection of vulnerable consumers under the current statutory regime and under a regulated structure.

121. See, e.g., Panko, *supra* note 117 at 23 (noting problems in insert titled “Regulators Try to Keep Up”).
122. See CLHIA Submission, *supra* note 120 at 2 (“ . . . the industry believes that in Ontario, terminally ill persons do not require viatical settlement mechanisms to access their insurance benefits, because they already have access to living benefits”).
123. Accelerated death benefits are rights granted in the policy or in a rider to it. They allow the insured person to receive a portion of the death benefit in certain circumstances. Living benefits are voluntary payments, by way of loans secured against the policy, made by insurance companies on a compassionate and humanitarian basis. See CLHIA Submission, *ibid.* at 2.
124. One of the advantages of living benefits and accelerated death benefits is the fact that they are generally structured as loans, which means that the proceeds are not included in the insured’s taxable income. In addition, they leave a portion of the death benefit unaffected, which means that the insured’s beneficiaries will ultimately receive a payment from the insurance company.
125. Some commentators have pointed out that insurance company products tend to offer lower compensation
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law of most provinces and territories, though, consumers do not get to make the choice between these products. The law effectively makes it for them, by banning viatical settlements. The need for viatical settlements can be better determined by informed consumers acting in the marketplace.

The leading arguments that directly address viatical settlements do not disclose a pressing public policy concern that requires banning them. Therefore, the principle of allowing persons to deal freely with their property should govern, subject, of course, to the constraints imposed by effective regulation of the viatical settlement market.

B. Arguments Against Legalizing Viatical Settlements

1. THE POTENTIAL FOR HARM TO VULNERABLE CONSUMERS AND THEIR DEPENDENTS IS TOO GREAT

There are two groups of vulnerable consumers in the viatical settlement process: viators and investors. Their vulnerabilities have been exploited by fraudulent operators. But, even in the absence of fraud, there are problems inherent in the viatical settlement process that justify maintaining a ban on viatical settlements.

There is an innate disparity in bargaining power between viators and VSPs. In many cases, the viator is a person whose health is compromised and who is in a desperate financial position. The VSP is a commercial enterprise, guided by the profit motive. This situation creates considerable danger for exploitation, which may occur in concluding viatical settlements at very deep discounts or in structuring them in a one-sided manner.¹²⁶ Correcting this imbalance would require going beyond existing consumer protection measures. It would require an unprecedented government intrusion into private transactions.¹²⁷ But highly intrusive regulations can create a vicious circle. They can drive out participants from the market and lessen the discipline provided by competition. This result exacerbates the conditions that necessitated regulation in the first place, and can produce a need for even tighter regulation. Lack of competition can also be a problem in jurisdictions with sparse

than viatical settlements and to be available only when the insured has a life expectancy of six months or less. Living benefits and accelerated death benefits are also not available in all cases, as they must be authorized by a rider to the policy or made voluntarily. *See, e.g.*, Herron, *supra* note 18 at 971–75; Carole C. Lamson, “Legal Introduction to Living Benefits in Life Insurance: New Perspectives and Developments” (1993) 65.7 N.Y. St. B.J. 16 at 18–20.

126. *See, e.g.*, Schultz, *supra* note 21 at 104 (noting argument that “. . . the viatical settlement companies are in a position to exploit viators easily by offering low settlements” [footnote omitted]).

127. A number of American states, for instance, require VSPs to submit their contracts to state insurance regulators for vetting. *See, e.g.*, *Viatical Settlements Act*, Wash. Rev. Code Ann. § 48.102.020 (West 2000). Some states also control the discount at which VSPs may purchase viators’ life insurance policies. *See, e.g.*, Minn. Stat. § 60A.971 (2005) (Lexis).

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populations.¹²⁸ In such an environment it can be almost impossible to strike the right balance between adequate protection for viators and space to operate for VSPs.

The financial aspects of viatical settlements are also troubling for the original beneficiaries of the viator's life insurance policy. In most cases, these beneficiaries will either be the viator's spouse or children. The death benefit may be important to their financial prospects. But if a viatical settlement has occurred, they will receive nothing. When most viators were AIDS patients, this result appeared to be of little concern. Since AIDS patients in the late 1980s and early 1990s were often unmarried and without children, viatical settlements were promoted as a means of turning a "useless" asset into a financial lifeline.¹²⁹ As the identity of the typical viator begins to change from a terminally ill patient to a senior citizen, the financial problems that may result from viatical settlements will begin to loom larger. Since the complete transfer of the death benefit is fundamental to the viatical settlement process, there is little scope for regulations to balance the interests of VSPs and disappointed original beneficiaries.

Another fundamental aspect of the viatical settlement process is the transfer of highly sensitive medical information from the viator to the VSP. Without this transfer of information VSPs would have no way of structuring a viatical settlement with any certainty. But once private information has been disclosed it can be very difficult to keep it protected from further disclosures. Some American jurisdictions have imposed legal requirements on VSPs to meet the standards of medical facilities in protecting private viator information. One American court, though, has cast some doubt on the effectiveness of such a provision in a commercial setting:¹³⁰

. . . in order to conduct a commercial transaction in which the insured sells the insurance policy for immediate cash, the insured must permit the viatical settlement company to review those medical records. An investor also may have the ability to review those records to ascertain the value of the policy as an investment. Furthermore, the statutes permit the Department of Insurance to review all of the documentation held by a viatical settlement company. . . . Thus, the medical records of the patient are available for review by a variety of persons for the purposes of conducting and monitoring a commercial transaction. While we do not decide the issue because the insureds are not represented in this action, we question whether a right of privacy in one'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.

128. See "Selling Death Short," *supra* note 9 at 1023–24.

129. See Schultz, *supra* note 21 at 105.

130. *Florida v. Viatical Services, Inc.*, 741 So. 2d 560 at 564 (Fla. App. 1999), Warner C.J. (for the court).

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In the result, the court granted a search warrant in a criminal proceeding against a VSP, which allowed the state to seize viators' medical records that were in the possession of the VSP.

For investors, much of the focus of the harm caused by viatical settlements has been on fraud. In the United States, a disproportionate amount of this harm has fallen on senior citizens.¹³¹ Even in the absence of fraud, though, viatical settlements pose difficult problems for investors. Like many asset-backed instruments, viatical settlements are very risky investments. The general public is often not able to appreciate the risk involved in such an investment.¹³² The usual regulatory solution to this issue is to require adequate disclosure to investors. Viatical settlements, by their nature, make this solution difficult to implement. The main source of financial risk for investors in viatical settlements is that the viator will exceed his or her life expectancy.¹³³ Adequate disclosure—to a level that would allow an investor to appreciate the risks involved in investing in a particular viatical settlement—would require the disclosure of sensitive medical information. This disclosure would, in turn, compromise the privacy of the viator. The situation is not one that a legislature can easily remedy by balancing the rights of viators and investors. If adequate disclosure is made, the viator's privacy rights are damaged. If the viator's privacy is adequately protected, then investors will make risky investments without the information needed to evaluate that risk.

2. LEGALIZING VIACICAL SETTLEMENTS WOULD IMPOSE UNACCEPTABLE COSTS ON GOVERNMENT, INSURANCE COMPANIES, AND THE GENERAL PUBLIC

Arguments against legalizing viatical settlements tend to focus on the harm that could be caused to viators and investors. But the number of people who may fit into one or the other of these groups is rather small. The pool of potential viators does not, at present, extend much beyond people with a life expectancy of five years or less.¹³⁴ Investors in asset-

131. See, e.g., Greg Martin, "Senior Crusades Against Viatical Sales" *The Venice [Florida] Gondolier Sun* (19 June 2005), online: Venice Gondolier <<http://www.venicegondolier.com/NewsArchive3/061905/vn8.htm>>.

132. See Quinn, *supra* note 24 at 55 (noting that some VSPs heighten this confusion by ". . . aggressively tout[ing] these investments as 'safe' and 'guaranteed'—because, of course, eventually the insured will die").

133. Another source of risk for investors is the financial stability and integrity of the insurance company that issued the underlying policy. If it fails to pay out the death benefit, then an investor will suffer a total loss. The financial integrity of the VSP may also be a source of risk. In some viatical settlements, the VSP remains as the beneficiary after the policy has been fractionalized and sold to investors. If the VSP does not pay out the proceeds of the death benefit—either because of bankruptcy or some other cause—then the investors will suffer a loss.

134. See Perez, *supra* note 6 at 430 (noting that VSPs deal only with senior citizens whose life expectancy is

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backed investments, such as viatical settlements, are a minor (but growing) segment of the overall financial market. The benefits that may flow to these people from legalizing viatical settlements should be measured against the costs that will be imposed on the broader public.

The American experience provides an instructive example of the costs that viatical settlements can impose on government regulators. Initially, the viatical settlement industry was self-regulated. But this period of self-regulation did not last very long. When state governments decided to act, there was some confusion over which agency should take the lead in regulating them—the insurance regulator or the securities commission. This confusion was the result of the fact that viatical settlements have features common to both insurance and investment securities. Increasingly, the question has been settled by giving both regulatory agencies the authority to regulate specific aspects of the viatical settlement process.¹³⁵ If viatical settlements were legalized here, Canadian regulators would, in all likelihood, face the same problem as their American counterparts. If regulatory authority were handed to one body, then it would have to carry on some of its tasks in a sphere that is outside its ordinary areas of operation and expertise. If regulatory authority were shared, then insurance superintendents and securities commissions would have to undertake a significant degree of preparation and co-ordination in order to handle their respective duties. Whichever approach is chosen, one result would be a drawing of resources away from other areas of concern.

Viatical settlements also impose a number of costs on insurance companies. There are the obvious administrative costs involved in processing an assignment of a life insurance policy. But, more importantly, viatical settlements strike at the intricate planning that is at the heart of the insurance business. Insurance companies plan on the lapse or surrender of a certain amount of their policies. A broadly based viatical settlement industry would deprive insurance companies of the ability to plan based on a percentage of their policies lapsing or being surrendered.¹³⁶ Finally, American insurance companies have been the victims of

less than four or five years). When commercial viatical settlements first became available, the pool of potential viators was even smaller. See Jennifer A. Lann, “Viatical Settlements: An Explanation of the Process, an Analysis of State Regulations, and an Examination of Viatical Settlements as Securities” (1998) 46 Drake L. Rev. 923 at 924 (noting that VSPs in the early 1990s only dealt with individuals with life expectancies of less than two years).

135. This solution is seen in the most recent state legislation on viatical settlements. See, e.g., Florida’s *Viatical Settlement Act*, Fla. Stat. §§ 626.991–626.99295 (2005) (Lexis); See also Martin, *supra* note 131.

136. See “Future of Death Futures,” *supra* note 19 at 358, n. 37 (“Insurers set premiums on policies based on a statistical expectation that some percentage of the policies will be abandoned, and thus no death benefits will be due thereon. If VSPs continue to intervene, and purchase some or all of the policies that would otherwise be abandoned, insurance companies will end up paying out more than planned.”).

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various fraudulent schemes involving viatical settlements. A fraud called “cleansheeting” or a “wet ink transaction” has been a particular concern in the United States. In a “wet ink transaction” an individual who has falsified medical records or failed to disclose a serious illness obtains a life insurance policy and immediately transfers it by way of viatical settlement.¹³⁷ This fraud obviously can place investors and VSPs at risk, but it can also harm insurance companies if the misrepresentation is not detected before the statutory contestability period runs out.¹³⁸ Even if the insurance company is able to treat a fraudulently obtained policy as being void, the existence of such schemes imposes costs in the form of training, monitoring, and litigation.

The costs imposed on insurance companies and government agencies may, in both cases, be passed on to the general insurance-buying and tax-paying public. The result could be higher insurance premiums and higher taxes or reduced government programs in other areas.¹³⁹ It should be borne in mind that legalizing viatical settlements would not be a cost-free exercise involving a simple legislative amendment to one section of the provincial *Insurance Act*.

V. MODELS FOR REFORM

A. Ontario

1. BACKGROUND

Ontario had been considering the legalization of viatical settlements from the mid-1990s until the mid-2000s. The Ministry of Health conducted a feasibility study on creating a nonprofit VSP to benefit AIDS patients and other people suffering from terminal illnesses, publishing its results in January 1997.¹⁴⁰ In the same month, the Red Tape Reduction Commission published its recommendations on the legalization of a commercial market in viatical settlements, concluding that “. . . a greater number of financial options [should] be made available to terminally ill people who have life insurance policies.”¹⁴¹ Legislative changes that would have given effect to viatical settlements were incorporated in an omni-

137. See Panko, *supra* note 117 at 21–23.

138. See *Protective Life Insurance Co. v. Sullivan*, 89 F. 3d 1 (1st Cir. 1996) (certifying question for Massachusetts Supreme Judicial Court on whether Massachusetts law bars contesting an insurance policy after the lapse of the contestability period even in cases involving fraud). See also Panko, *ibid.* at 22–23.

139. Costs to government may be offset, however, by licensing fees charged to VSPs and viatical settlement brokers.

140. See AIDS Committee of Toronto, “The Emergence of a Viatical Industry in Ontario” (28 January 1997), online: AIDS Committee of Toronto <<http://www.actoronto.org/website/home.nsf/pages/viatical>>.

141. See *Viatical Settlements in Ontario: Key Elements of a Proposed Regulatory System*, *supra* note 2 at 1.

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bus statute, which was enacted in 2000.¹⁴² The provisions dealing with viatical settlements consisted simply of an amendment to the anti-trafficking provision of Ontario's *Insurance Act*, which would allow licensed firms legally to carry on the business of viatical settlements, and a wholesale delegation of regulation-making power to the Financial Services Commission. There was little debate in the Legislature on these proposed reforms, as they were overshadowed by other provisions in the omnibus legislation.¹⁴³ These provisions were not brought into force, pending the development of a comprehensive regulation that would govern the business of viatical settlements in Ontario. In 2001, the Financial Services Commission released its draft regulation to the public for comment.¹⁴⁴ In 2003, a provincial election brought a new government into power in Ontario. As of the date of this study paper, the proposed legislative and regulatory changes have not been brought into force, and we understand that they are no longer a priority of the government, nor do they now represent the government's policy in this area.

Nevertheless, the Ontario Draft Regulation remains the leading model for law reform in this country. Even though its implementation is no longer pending, it is worth detailed consideration because it sheds light on the major issues for reform and it provides a serious and sustained attempt to resolve those issues.

The Ontario Draft Regulation is lengthy, detailed, and intricate. Its highlights are illustrated by summarizing the rights it grants to and the obligations it imposes on the main players in a viatical settlement: viators, VSPs, viatical settlement brokers, investors, insurance companies, physicians, and beneficiaries.

2. VIATORS

(a) Overview

Much of the Ontario Draft Regulation is taken up with establishing protective measures for viators. These lengthy provisions are summarized below. But it is important to begin with a restriction that the Ontario Draft Regulation places on the class of viators.

(b) A Limited Class of Viators

The definition of "viator" provides, among other things, that a viator is "an individual with a catastrophic or life threatening illness or condition and a life expectancy of two or less

142. *Red Tape Reduction Act, 2000*, *supra* note 1, Schedule G, sections 1–2 (not in force).

143. See Ruth Carey, "Ontario to Develop a Viatical Industry" (2001) 6.1/2 *Canadian HIV/AIDS Policy & Law Review* 32 at 32–33.

144. *Supra* note 2 [Ontario Draft Regulation].

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years.”¹⁴⁵ The viator is required to acknowledge in writing the catastrophic or life-threatening illness or condition before entering into the viatical settlement.¹⁴⁶ The terms “catastrophic illness or condition” and “life threatening illness or condition” are not defined in the Ontario Draft Regulation. Instead, the VSP is required to obtain a medical certificate from an Ontario physician, which certifies that the viator has either a catastrophic or a life-threatening illness or condition and a life expectancy of two years or less.¹⁴⁷ The Ontario Draft Regulation prohibits viatical settlements involving viators who do not meet these conditions.¹⁴⁸

(c) *Application*

Viators are required to submit a written application to a VSP before entering into a viatical settlement.¹⁴⁹ In the application, the viator must consent to the viatical settlement and to the release of personal medical records to the physician who will provide the medical certification. In addition, the viator must also acknowledge the following: having a catastrophic or life-threatening illness or condition and a life expectancy of two years or less; having a full and complete understanding of the viatical settlement and the benefits of the life insurance policy that is the subject of the viatical settlement; having been advised by the VSP or its representative to obtain independent medical, legal, tax, and financial advice; and being of sound mind and entering into the viatical settlement freely and voluntarily. The application must be signed, dated, and witnessed.

(d) *Enhanced Disclosure*

The VSP must provide the viator with a written disclosure notice before they collectively enter into the viatical settlement.¹⁵⁰ The disclosure notice must be signed and certified to be true by an officer of the VSP and by the agent of that VSP who dealt with the viator. The form must contain the following information: contact information for the VSP and its representative, the physician providing the medical certificate, and the escrow agent or trustee who will hold the proceeds of the viatical settlement; disclosure of conflicts of interest; disclosure of licenses to carry on the business of viatical settlements in other jurisdictions; a description of the viatical settlement process; a description of alternatives to the viatical

145. Ontario Draft Regulation, *supra* note 2, section 1 “viator.”

146. Ontario Draft Regulation, *ibid.*, section 35 (b).

147. Ontario Draft Regulation, *ibid.*, section 4.

148. Ontario Draft Regulation, *ibid.*, section 4.

149. Ontario Draft Regulation, *ibid.*, section 35.

150. Ontario Draft Regulation, *ibid.*, section 36.

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settlement process; cautions about loss of benefits or coverage under group or joint life insurance policies; a statement of the dollar amount of the death benefit and other payments that may be payable under the policy; a statement that the proceeds of the viatical settlement may be subject to income tax and the claims of creditors, and that they may adversely affect the viator's eligibility for public welfare entitlements; a description of the procedures that govern the collection and use of the viator's personal information and for monitoring the health of the viator; disclosure of compensation received by the representative as a result of the viatical settlement and from whom it will be received; a statement of the consequences of providing false or misleading information to obtain a life insurance policy; an acknowledgment of the viator's right to rescind the viatical settlement; an encouragement to obtain independent medical, legal, tax, and financial advice; and a statement of the viator's entitlement to receive a copy of the Ontario Draft Regulation from the VSP or its representative. The disclosure notice forms part of the viatical settlement; a failure to provide it to the viator renders the viatical settlement void.¹⁵¹

(e) *Right of Rescission*

The viator has an unconditional right to rescind the viatical settlement at any time during a period that runs from the "full and final" receipt of the proceeds of the viatical settlement to "at least fifteen days" thereafter.¹⁵² This right is in addition to any other contractual or statutory right that the viator may have.¹⁵³ If the viator dies during the period when the right of rescission is in effect, then the viatical settlement is deemed to be rescinded by operation of law.¹⁵⁴

(f) *Payment of Proceeds*

The VSP is required to pay the "full and final" proceeds of the viatical settlement into an escrow or trust account within two business days of receipt of the documentation necessary to transfer the viator's life insurance policy or to effect a change in beneficiary.¹⁵⁵ The escrow or trust account must be maintained at a chartered bank in Ontario and must be managed by an independent escrow agent or trustee.¹⁵⁶ The escrow agent or trustee must transfer the "full and final" proceeds of the viatical settlement to the viator within two busi-

151. Ontario Draft Regulation, *ibid.*, section 41.

152. Ontario Draft Regulation, *ibid.*, section 37.

153. Ontario Draft Regulation, *ibid.*, section 39.

154. Ontario Draft Regulation, *ibid.*, section 38.

155. Ontario Draft Regulation, *ibid.*, section 45.

156. *Ibid.*

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ness days of the VSP's receipt of an acknowledgement of transfer of ownership or designation of a new beneficiary from the insurance company.¹⁵⁷ A failure to comply with this procedure renders the viatical settlement void.¹⁵⁸

(g) *Protection of Privacy*

After the proceeds of the viatical settlement have been paid, contact with the viator for the purpose of inquiring into his or her health is restricted. Only the VSP is authorized to make such contact.¹⁵⁹ Further, the VSP may only contact the viator once every six months.¹⁶⁰

As part of the application for a license, the VSP must describe the procedures it will employ for governing the collection, use, and disclosure of a viator's personal or medical information.¹⁶¹ The Ontario Draft Regulation does not contain any provisions that specifically address this topic.¹⁶²

The viator must be notified that any information provided to the VSP may be disclosed the Superintendent of Insurance for the purpose of allowing the Superintendent to carry out the mandate of regulating the business of viatical settlements.¹⁶³

3. VIATICAL SETTLEMENT PROVIDERS

(a) *Overview*

The rights accorded to viators under the Ontario Draft Regulation often impose corresponding obligations on VSPs. VSPs also must meet a detailed set of standards in order to obtain a license to carry on the business of viatical settlements in Ontario. Licences are granted by

157. *Ibid.*

158. Ontario Draft Regulation, *ibid.*, section 46.

159. Ontario Draft Regulation, *ibid.*, section 47.

160. *Ibid.*

161. Ontario Draft Regulation, *ibid.*, section 19 (a) (viii).

162. The VSP would have to comply with a province's or territory's legislation of general application governing personal information in the private sector. See, e.g., *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; *Personal Information Protection Act*, S.B.C. 2003, c. 63.

163. Ontario Draft Regulation, *supra* note 2, section 42.

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the Superintendent of Insurance,¹⁶⁴ and remain in force for a two-year term.¹⁶⁵ The application process requires the VSP to file an extensive amount of information with the Superintendent.

(b) Business Information and Contracts

As part of the application process, a VSP must file copies of its corporate charter¹⁶⁶ or partnership agreement and declarations.¹⁶⁷ The VSP is also under an obligation to file certified copies of any amendments to these documents within thirty days of the amendment.¹⁶⁸

The Superintendent has the discretion to require a VSP to file copies of any “form, application, agreement, contract, advertising, marketing or other material that has been used or issued or will be used or issued” by the VSP.¹⁶⁹ If the Superintendent decides that any of this material is “unfair, deceptive, fraudulent or not in the public interest or otherwise misleading” to viators or investors, then the Superintendent may prohibit the VSP from using it.¹⁷⁰

(c) Financial Information

As part of the application for a licence, the VSP is required to submit “a certified copy of its last balance sheet and auditor’s report thereon.”¹⁷¹ A licensed VSP is also under a continuing obligation to file a copy of its annual financial statement within 120 days of its financial year end, or at any time it is requested to do so by the Superintendent.¹⁷² This financial statement must be accompanied by an accountant’s report in a form approved by the Superintendent.¹⁷³ It must also be accompanied by detailed information about the insurance policies that the VSP has purchased over the course of the year, such as the number of policies,

164. Ontario Draft Regulation, *ibid.*, section 9.

165. Ontario Draft Regulation, *ibid.*, section 23.

166. Ontario Draft Regulation, *ibid.*, section 12 (a).

167. Ontario Draft Regulation, *ibid.*, section 13 (a).

168. Ontario Draft Regulation, *ibid.*, section 14.

169. Ontario Draft Regulation, *ibid.*, section 10.

170. *Ibid.*

171. Ontario Draft Regulation, *ibid.*, section 12 (b); 13 (b).

172. Ontario Draft Regulation, *ibid.*, section 27.

173. *Ibid.*

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the insurance companies that have issued them, the total premiums paid under them, and the type and source of funding for any investment contracts involving those life insurance policies.¹⁷⁴

At least once every year, the Superintendent is required to “examine all books and records” of a licensed VSP and to make inquiries to ensure that the VSP is acting in compliance with its licence and with the Ontario Draft Regulation.¹⁷⁵

(d) Business Plans

As part of the licensing process, a VSP is required to provide the Superintendent with two business plans.¹⁷⁶ The first is called a “plan of operation.” It describes how the VSP will carry on the business of viatical settlements. The plan must provide information on the business experience of the individuals who will manage and direct the VSP, audited financial statements for the VSP, and a description of the procedures that will be used to market viatical settlements, to determine whether a viator has a catastrophic or a life-threatening illness and a life expectancy of less than two years, for determining the amount of proceeds to be payable under a viatical settlement, for collection, use, and disclosure of personal and medical information, and for monitoring the health of viators.¹⁷⁷ The second plan is called an “education and anti-fraud plan.” It describes the continuing education for the VSP’s representatives or agents, and the measures that the VSP will employ to deter frauds that may affect viators or investors.¹⁷⁸

(e) Viatical Settlement Representatives

Viatical settlement representatives are the authorized agents or employees of the VSP who negotiate viatical settlements with viators.¹⁷⁹ They are required to be licensed.¹⁸⁰ As part of this licensing process, viatical settlement representatives must also submit plans of operation and education and anti-fraud plans.¹⁸¹

174. Ontario Draft Regulation, *ibid.*, section 27 (a)–(j).

175. Ontario Draft Regulation, *ibid.*, section 28.

176. Ontario Draft Regulation, *ibid.*, section 19.

177. Ontario Draft Regulation, *ibid.*, section 19 (a).

178. Ontario Draft Regulation, *ibid.*, section 19 (b).

179. Ontario Draft Regulation, *ibid.*, section 1 “viatical settlement representative.”

180. Ontario Draft Regulation, *ibid.*, section 20.

181. *Ibid.*

(f) *Other Obligations*

A licensed VSP must “at all times maintain assets in Ontario in an amount required by the Superintendent.”¹⁸² It must also maintain errors and omissions insurance.¹⁸³ Application for a license will require payment of licensing fees.¹⁸⁴ The Ontario Draft Regulation incorporates by reference Part XIX of the *Insurance Act*,¹⁸⁵ which contains a wide range of enforcement tools.

4. VIATICAL SETTLEMENT BROKERS

A viatical settlement broker is defined as a person who acts on behalf of a viator and for a fee, commission, or other valuable consideration attempts to negotiate a viatical settlement between the viator and one or more VSPs.¹⁸⁶ Viatical settlement brokers are subject to the same licensing requirements as viatical settlement representatives.¹⁸⁷ They are also deemed to represent only the viator in any viatical settlement, regardless of how they are compensated, and to owe a fiduciary duty to the viator.¹⁸⁸

5. INVESTORS

(a) *Overview*

The primary mechanism used to protect investors is the imposition on VSPs of an obligation to provide “full, plain and true disclosure of all material facts” connected to the investment in a viatical settlement.¹⁸⁹ In addition to enhanced disclosure, investors are granted a right to rescind the investment contract.

(b) *Enhanced Disclosure*

An investor’s disclosure rights turn on the nature of the investment. An investor who will own “a full or partial interest in one particular life insurance policy” must receive a written

182. Ontario Draft Regulation, *ibid.*, section 17.

183. Ontario Draft Regulation, *ibid.*, section 18.

184. Ontario Draft Regulation, *ibid.*, section 19.

185. *Supra* note 9, sections 442–49.

186. Ontario Draft Regulation, *supra* note 2, section 1 “viatical settlement broker.”

187. Ontario Draft Regulation, *ibid.*, section 1 “viatical settlement representative” (second definition of the term deems it to include a viatical settlement broker).

188. Ontario Draft Regulation, *ibid.*, section 34.

189. Ontario Draft Regulation, *ibid.*, section 48.

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disclosure notice before entering into the investment contract.¹⁹⁰ An investor who will obtain “a fractional or pooled interest in two or more life insurance policies” must receive a prospectus before entering into the investment contract.¹⁹¹

The written disclosure notice is extensively detailed.¹⁹² It must include thorough background information on the VSP and its business,¹⁹³ information about the investment contract,¹⁹⁴ information about the underlying life insurance policy or policies,¹⁹⁵ and a description of the procedures governing the monitoring of the viator’s health.¹⁹⁶ The written disclosure notice must also contain a detailed statement of the risks involved in investing in viatical settlements.¹⁹⁷

The Ontario Draft Regulation does not define “prospectus.” The term seems to be used by analogy to the *Securities Act*.¹⁹⁸ The prospectus is required to include much of the same information required in a written disclosure notice.¹⁹⁹ In addition, the prospectus must also provide information about the fractionalizing process, in particular whether any minimum level of investment funds must be met and the consequences of failing to reach any such minimum level.²⁰⁰ The prospectus must be signed and certified by an officer of the VSP,²⁰¹ and it must be filed with the Superintendent of Insurance.²⁰²

190. Ontario Draft Regulation, *ibid.*, section 51.

191. Ontario Draft Regulation, *ibid.*, section 53.

192. *See* Ontario Draft Regulation, *ibid.*, section 52 (a)–(ff).

193. Ontario Draft Regulation, *ibid.*, section 52 (a)–(o).

194. Ontario Draft Regulation, *ibid.*, section 52 (p)–(s).

195. Ontario Draft Regulation, *ibid.*, section 52 (t)–(aa).

196. Ontario Draft Regulation, *ibid.*, section 52 (cc)–(ee).

197. Ontario Draft Regulation, *ibid.*, section 52 (ff).

198. *Supra* note 100, Part XV.

199. Ontario Draft Regulation, *supra* note 2, section 55 (prospectus to include information required under section 52 (a)–(r) and (ff)).

200. Ontario Draft Regulation, *ibid.*, section 55 (a)–(e).

201. Ontario Draft Regulation, *ibid.*, section 55.

202. Ontario Draft Regulation, *ibid.*, section 53.

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(c) *Right of Rescission*

An investor may rescind any investment contract within three business days of entering into the investment contract.²⁰³ This statutory right of rescission is in addition to any other rights or remedies that the investor may have under the investment contract, written disclosure notice, or prospectus.²⁰⁴

6. INSURANCE COMPANIES

The insurance company is entitled to receive notice in writing from the VSP, or its representative, five business days before the VSP and the viator are to enter into a viatical settlement.²⁰⁵ During this period, the insurance company may advise the viator of any alternatives to the viatical settlement that may be available under the insurance policy.²⁰⁶ The insurance company is required to “respond” to a request to change the beneficiary designation of an insurance policy that is the subject of a viatical settlement “in a timely and reasonable manner.”²⁰⁷

An insurance company may not enter into a viatical settlement in connection with a life insurance policy issued by it or by its affiliate.²⁰⁸

7. PHYSICIANS

An Ontario physician must certify that the viator has a catastrophic or a life-threatening illness and has a life expectancy of two years or less.²⁰⁹ The Ontario Draft Regulation contains no guidance as to the criteria the physician is to apply in making this certification. It grants no other rights and imposes no other obligations on physicians.

203. Ontario Draft Regulation, *ibid.*, section 56.

204. Ontario Draft Regulation, *ibid.*, section 57.

205. Ontario Draft Regulation, *ibid.*, section 43.

206. *Ibid.*

207. Ontario Draft Regulation, *ibid.*, section 44.

208. Ontario Draft Regulation, *ibid.*, section 6.

209. Ontario Draft Regulation, *ibid.*, section 4.

8. BENEFICIARIES

The Ontario Draft Regulation has little to say about the rights of beneficiaries. It only gives effect to the requirement that a beneficiary who has been irrevocably designated by the viator must consent to the viatical settlement.²¹⁰

B. United States

The vast majority of American states regulate viatical settlements. Much of the state legislation draws on a model statute prepared by the National Association of Insurance Commissioners.²¹¹ But the legislation is not completely uniform; there are some significant variations among the states.

The Financial Services Commission of Ontario was clearly able to draw on this American legislation in preparing the Ontario Draft Regulation. The Ontario Draft Regulation shares many provisions in common with the American legislation. But there are some ideas that have not been incorporated into the Ontario Draft Regulation that are worthy of consideration. These ideas form the core of the discussion of issues for reform.

VI. ISSUES FOR REFORM

A. Introduction

The Ontario Draft Regulation is a suitable model for the regulation of viatical settlements in Canada, for the most part. But, in some instances, events have overtaken its provisions. This development is to be expected, as nearly five years have elapsed since its publication. The viatical settlement industry has not stood still during this time. Some of the details, and even some of the central concepts, of the Ontario Draft Regulation should be reviewed in light of recent developments.

Some American states have enacted or proposed new legislation since 2001. Further, some provisions that appear in American legislation in force before 2001 did not make it into the Ontario Draft Regulation. Finally, academic commentators have made some proposals that have not been enacted. These three sources provide the issues for reform discussed below.

210. Ontario Draft Regulation, *ibid.*, section 3 (b).

211. This American body is the equivalent of the Canadian Council of Insurance Regulators. It does not make its model legislation freely available over the internet or otherwise.

B. Expanding the Class of Viators

Florida has enacted legislation that defines “viator” without reference to a catastrophic or life-threatening illness or life expectancy.²¹² Texas has expressly included individuals who do not have a catastrophic or life-threatening illness or condition within the class of viators in its viatical settlement legislation.²¹³ Legislation that is pending before the California State Legislature will also regulate these types of viatical settlements, which are commonly called life settlements.²¹⁴ These statutes stand in contrast to the Ontario Draft Regulation, which strictly limits viatical settlements to individuals who are certified by a physician as having a catastrophic or life-threatening illness or condition, or a life expectancy of two years or less. These American trends raise the question of whether any new legislation in Canada should apply more broadly than the Ontario Draft Regulation.

One of the purposes underlying California’s bill is the desire to prevent the development of an unregulated market in life settlements. This concern is not as significant an issue in Canada, since the anti-trafficking provision in force in Ontario and most other provinces and territories would prevent this market from developing. The issue in most parts of Canada, then, is whether there is a compelling policy reason to define the class of viators in the manner proposed in the Ontario Draft Regulation.

The arguments in favour of allowing life settlements are the same as those in favour of allowing viatical settlements—the anti-trafficking provision does not effectively serve its purposes by banning life settlements, and there is no other compelling public policy reason to justify maintaining an absolute ban. The arguments against legalizing and regulating life settlements are harder to grasp. The Financial Services Commission of Ontario did not explain why restricted the class of viators in the Ontario Draft Regulation. It may simply be a reflection of the historical origins of viatical settlements as a transaction that primarily involved terminally ill AIDS patients. Or it could be a deliberate choice designed to protect the interests of one or more of the participants in a viatical settlement.

It could be argued that maintaining the ban on life settlements protects a vulnerable class of consumers—senior citizens. The difficulty with this argument is that, by allowing viatical settlements, an even more vulnerable class of consumers is able to participate in the market.

212. *Viatical Settlement Act*, Fla. Stat. § 626.9911 (6) (2005) (Lexis) (defining “viator” as “the owner of a life insurance policy or a certificateholder under a group insurance policy who enters or seeks to enter into a viatical settlement contract”).

213. Tex. Ins. Code § 1111.001 (1) (2005) (Lexis) (defining “life settlement” as a type of viatical settlement entered into with a person who does not have a catastrophic or life-threatening illness or condition).

214. A.B. 243, 2005–06 Leg., Reg. Sess. (Cal. 2005).

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The ban on life settlements does provide some protection for VSPs, since they are not exposed to the greater risks that are inherent in transactions involving people with longer life expectancies. But there should be no need for the law to shield VSPs from this risk. They are commercial enterprises, and should be able to judge the level of risk they are comfortable with. The ban on life settlements will also limit the market for VSPs, which will limit the ability of VSPs to grow and prosper.

Investors may be protected by the ban on life settlements, since they will not be tempted by risky investments. But the policy of securities laws is to give investors full and accurate disclosure and to allow them to make investment decisions based on that information.

This discussion about broadening the class of viators also raises two subsidiary issues.

First, the Ontario Draft Regulation restricts viatical settlements to individuals. California's proposed legislation, however, permits corporations to enter into viatical settlements. A report on the bill indicates that this decision was taken in recognition of the number of corporations that have "key employee" life insurance policies on their senior management.²¹⁵ This insurance serves no purpose if the key employee leaves the corporation. Permitting a corporation to enter into a viatical settlement was seen as a way for it to obtain a more desirable rate of return than is offered by the cash surrender value of the policy. But allowing corporate viatical settlements may provide an incentive for corporations to purchase speculative life insurance policies on non-management employees.²¹⁶

Second, an argument could be made that life settlements and viatical settlements should be treated differently. The argument is that some of the consumer protection devices needed for viatical settlements are not needed for life settlements. But, given the similarities between viatical settlements and life settlements, it would be difficult to change the regulatory structure fundamentally for life settlements without leaving vulnerable senior citizens exposed to abuses. Uniformity of treatment would also likely be more desirable than small differences between the approaches to viatical and life settlements.

215. California, Senate Committee on Banking, Finance, and Insurance, "Report on AB 243" (28 July 2005), online: California Legislature <http://www.leginfo.ca.gov/pub/bill/asm/ab_0201-0250/ab_243_cfa_2005_0628_174047_sen_comm.html>.

216. This practice is often called "janitor insurance," and it is frowned on in some quarters. *See, e.g.*, Susan Lorde Martin, "Corporate-Owned Life Insurance: Another Financial Scheme that Takes Advantage of Employees and Shareholders" (2004) U. Miami L. Rev. 653. California law bans "janitor insurance." *See* Cal. Ins. Code § 10110.4 (Deering 2006) (Lexis).

C. Defining Viatical Settlements as Securities

After the wave of fraud cases involving investors in viatical settlements, a number of American states moved to have their securities commissions actively regulate viatical settlements. This was accomplished by including viatical settlements in the definition of “security” in the relevant legislation.²¹⁷ The Ontario Draft Regulation appears to take a different approach—it leaves regulation of viatical settlements entirely in the hands of the Superintendent of Insurance, but it requires VSPs to meet several requirements that are similar to those imposed on issuers under the *Securities Act*.²¹⁸

There are some advantages to involving the securities commission in the regulation of viatical settlements by defining a viatical settlement as a security. The securities commission has the expertise needed to deal with fraud involving viatical settlements. The securities commission also has experience in designing investor outreach and education programs. The *Securities Act* contains a more extensive set of remedies and administrative penalties than are found in the Ontario Draft Regulation.

The Ontario approach may also have its benefits, although these benefits would mainly accrue to VSPs. VSPs would only have to deal with one regulator. Duplication and costs would be avoided. There may also be savings for government if only one agency regulated all aspects of the business of viatical settlements.

In addition, it may be worthwhile to draw a distinction similar to the one drawn in the Ontario Draft Regulation between sales of fractional interests in a viator’s life insurance policy and a sale of one policy to one investor. The latter transaction is closer to a brokerage transaction than to a securities contract. An argument could be made that it should not be subject to the prospectus requirements that are more appropriately applied to sales of fractional interests in life insurance policies.

217. See, e.g., Cal. Corp. Code § 25019 (Deering 2006) (Lexis).

218. The Ontario Draft Regulation only “appears” to take this position because it was drafted in the wake of a proposal to merge the Financial Services Commission of Ontario and the Ontario Securities Commission. See Ontario, Ministry of Finance, *Establishing a Single Financial Regulator: Consultation Draft* (April 2001), online: Ontario Ministry of Finance <<http://www.fin.gov.on.ca/english/publications/2001/oscfsc.html>>. The intent was for this merged body to have regulatory authority over all aspects of the business of viatical settlements. This proposal has yet to be implemented.

D. Setting Minimum Levels of Payments to Viators

Minnesota²¹⁹ and Louisiana²²⁰ have enacted legislation that sets minimum levels of payments to viators. The payment levels are expressed as percentages of the value of the death benefit of the viator's life insurance policy. For example, under the Minnesota legislation, a viator with a life expectancy of less than six months must receive at least 80% of the face value of the death benefit; for a life expectancy of at least six months but less than twelve months, the minimum payment is 70%; for a life expectancy of at least twelve months but less than eighteen months, it is 65%; for a life expectancy of at least eighteen months but less than twenty-four months, it is 60%; and for a life expectancy of greater than twenty-four months, it is 50%.²²¹

This idea has attracted a large amount of commentary since it first appeared in the early 1990s in model legislation promoted by the National Association of Insurance Regulators. Much of this commentary has been negative. Critics have argued that these minimum payment levels quickly harden into maximum levels,²²² fail to recognize the risks involved in the viatical settlement process and thereby discourage VSPs from entering the market,²²³ and are arbitrary and difficult to enforce.²²⁴ There have been some defenders of this idea, characterizing it as a reasonable response to financial abuses that may result from the marketing of an innovative product to a vulnerable group of consumers.²²⁵

219. *Supra* note 127.

220. La. Admin. Code tit. 37, § 3915 (2004), online: Office of State Registrar <<http://www.state.la.us/osr/lac/37v01/37v01.pdf>>.

221. *Supra* note 127.

222. *See* Berner, *supra* note 29 at 599 (“... any minimum discount rate likely becomes the maximum price purchasers will offer for viatical insurance policies” [footnote omitted]).

223. *See* Schultz, *supra* note 21 at 113 (“Statutes that deny purchasers reasonable profit margins by interfering with their ability to assess risk discourage viatical settlement companies, as well as additional capital, from entering the industry.” [footnotes omitted]).

224. *See* Crites-Leoni & Chen, *supra* note 23 at 88 (“Because there are no actuarial tables of life expectancies by morbidity patterns for various diseases, life expectancies and purchase prices must be determined by an ad hoc process.” [footnote omitted]).

225. *See* Herron, *supra* note 18 at 970 (“The insured's discovery that he can get substantial sums of money from his own life insurance policy may be a pleasant surprise. By setting a floor below which the viatical payout cannot fall, minimum payout regulations prevent viatical providers from taking advantage of that pleasant surprise.”).

E. Requiring a Statement of Capacity from a Physician

A number of American states require a VSP to obtain a physician's certificate or written statement relating to the viator's capacity before entering into a viatical settlement. The California legislation has a representative example of this type of provision.²²⁶

- (c) Any person entering into a viatical settlement with any person with a catastrophic or life-threatening illness or condition shall first obtain the following:
 - (1) A written statement from a licensed medical practitioner attending the person that the person is of sound mind and under no constraint or undue influence.

This provision is designed to protect viators. Many viators will have health problems that diminish capacity; other viators will have financial concerns that may leave them vulnerable to pressure. Ensuring that medical evidence and a physician's insight are brought to bear on these issues is laudable.

The difficulty with this provision is that it may ask too much of physicians. Capacity is not simply a medical question; it is also a legal issue. Medical evidence may be of no relevance for determining whether a viator is "under no constraint or undue influence."

F. Resolving Conflicts of Interest

VSPs, and physicians engaged by them, will come into possession of a viator's medical information. Investors may also obtain this information. As a result, one or more of the individuals in these groups may be placed in a situation where their knowledge of a course of treatment that could prolong the viator's life conflicts with their financial interest in the viator's early death. A similar conflict of interest could also arise where a physician—or, though it is less likely, a VSP or an investor—acquires expertise in a certain area of medicine. Their financial interest may inhibit them from sharing that expertise with a viator.

For physicians, ethical codes of conduct should resolve this conflict. In addition, physicians do not have an immediate stake in the viator's early death—though they may indirectly be interested in that it will affect the financial strength of the VSP.

Legislation has not addressed this question for VSPs and investors. One commentator has proposed the enactment of legislation requiring VSPs to disclose any such information to a viator and to release their interest or investment in any affected insurance policy.²²⁷ It may be practically difficult to enforce such a provision, though.

226. Cal. Ins. Code, § 10113.1 (c) (1) (Deering 2006) (Lexis). *See generally* Crites-Leoni & Chen, *supra* note 23 at 80–81 (discussing this requirement in state legislation).

227. *See* Ray, *supra* note 22 at 342.

G. Placing an Obligation on Third Parties Not to Compel Someone to Enter into a Viatical Settlement as a Condition of Receiving a Service

New York has legislation that prohibits a health care facility or practitioner from requiring a person to enter into a viatical settlement as a condition of admission, providing, or continuing care.²²⁸ “Health care facility” is broadly defined to embrace everything from hospitals to “retirement communities.”²²⁹

The policy underlying this legislation is sound: no one should be compelled to enter into a viatical settlement as a condition of receiving a service. But it is not clear that this problem exists in Canada. It would be desirable to establish an empirical foundation for such a provision before it is enacted.

H. Requiring Independent Legal Advice for Viators

Most viatical settlement legislation contains a provision requiring the VSP to notify the viator of the desirability of obtaining independent legal and financial advice.²³⁰ It may be more helpful if this legislation took the extra step of requiring viators to be independently represented by a lawyer throughout the viatical settlement process. In all likelihood, the vast majority of viators will enter into only one viatical settlement in their lives, and, as a result, will be relatively unsophisticated about the transaction.²³¹ Independent legal advice can remedy this problem. Further, viatical settlement legislation is increasingly requiring that more and more information be disclosed to viators.²³² The quantity of this information may become overwhelming and counterproductive. Independent legal advice can fit it into a proper context.

The disadvantages of mandatory independent legal representation are well known. Such a requirement may add to the length of time each viatical settlement takes to complete. It will also add to the cost of obtaining a viatical settlement. In addition, viators will come from a variety of backgrounds and have a range of needs. Some viators will be unsophisticated

228. N.Y. Pub. Health Law § 20 (McKinney 2002).

229. *Ibid.*

230. *See, e.g.*, Wash. Rev. Code Ann. §48.102.035 (2) (West 2000); Ontario Draft Regulation, *supra* note 2, section 36 (t).

231. *See* “Selling Death Short,” *supra* note 9 at 1040 (“Unlike the sale of other assets, such as real property, that sellers may undertake several times in their lives, possibly becoming more sophisticated about the process each time, viators typically go through this process only once, possibly with more than one policy, at arguably the most vulnerable time in their lives.”).

232. *See, e.g.*, Ontario Draft Regulation, *supra* note 2, section 36. This provision contains twenty-one paragraphs, each listing a separate item to be disclosed to a viator.

and will require extensive guidance. Others will be sophisticated and will only require minimal assistance. A legislative requirement simply mandating independent legal advice in all cases would be unable to distinguish among these varying backgrounds and needs.

I. Allowing Viatical Settlements to Be Structured as Loans

The Ontario Draft Regulation requires that the proceeds from a viatical settlement be paid to a viator “by way of an absolute payment and not by way of a loan.”²³³ This provision removes a potentially useful tax-planning device from the hands of viators and VSPs. If a viatical settlement were structured as a loan, then the proceeds may not be included in the viator’s taxable income under the federal *Income Tax Act*.²³⁴ The insurance industry uses a similar structure for tax-planning purposes when it pays out “life benefits.”²³⁵

There are two possible reasons for including this provision in the Ontario Draft Regulation. First, there may be a concern that structuring a viatical settlement as a loan could result in abusive practices, leaving the viator’s estate liable for more than the value of the death benefit. Second, it could reflect a desire to leave the tax issue to the federal government, which could directly determine whether or not viatical settlements should qualify for favourable tax treatment.

K. Enacting Legislation

Ontario has proposed implementing its viatical settlement framework almost entirely by regulation.²³⁶ This approach is a departure from the usual practice of placing provisions that affect substantive legal rights in legislation. The American states have followed this practice: their viatical settlement law primarily takes the form of legislation, with some procedural provisions (involving, for example, the process of applying for a licence and the fees payable for maintaining a licence) contained in regulations.

The Ontario approach should result in quicker enactment and speedier amendment (when necessary). But this result will be obtained by a lower level of scrutiny. An argument could

233. *Ibid.*, section 40.

234. *Supra* note 44. It is important to bear in mind that all the elements of a transaction would have to be considered before giving an opinion on whether or not it is subject to income tax.

235. See CLHIA Submission, *supra* note 120 at 14 (“... a carefully structured living benefit offered by insurers [is] typically set up as a loan, and secured by a policy assignment . . .”).

236. The only legislative changes involved in the proposal are amendments to the *Insurance Act*, *supra* note 9, section 115 (allowing trafficking in life insurance bodies by persons who have one of the licences available under the Ontario Draft Regulation) and section 121 (setting out a wide grant of regulatory authority regarding viatical settlements).

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be made that, given the scope of the Ontario Draft Regulation, it should be considered by the Legislature as a whole, and not simply by the cabinet.

VII. CONCLUSION

This study paper has set out the legal background to a project on viatical settlements. It has shown that there are a number of issues that are worthy of further study. The next steps to take in the process will involve building on this structure by determining the best form for the development of this law reform project.

VIII. ACKNOWLEDGMENTS

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APPENDIX A

Draft Ontario Viatical Settlements Regulation (2001)

DEFINITIONS

1. In this Regulation,

“accelerated death benefits” means death benefit payments made by an insurer to the insured under a life insurance policy issued by the insurer, at any time prior to the death of a person whose life is insured under the life insurance policy, but does not include payments made pursuant to a viatical settlement contract or a viatical settlement purchase agreement;

“accountant” means a person who is licensed under the *Public Accountancy Act*;

“business of viatical settlements” means any activity involved in, but not limited to, the offering, solicitation, advertising, marketing, negotiation, procurement, effectuation, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, hypothecating, or in any other manner, of viatical settlement contracts or viatical settlement purchase agreements;

“insured” means a person whose life is insured under a life insurance policy, or in the case of a group life insurance policy, the group life insured as defined in section 171 of the *Insurance Act*;

“insurer” means an insurer as defined in section 1 of the *Insurance Act*;

“insurance agent” means an agent as defined in section 1 of the *Insurance Act*;

“licensee” means a person holding a licence under this Regulation;

“life insurance policy” means a contract as defined in section 171 of the *Insurance Act*;

“physician” means a person authorized by law to practise medicine in Ontario;

“Superintendent” means the Superintendent of Financial Services appointed pursuant to the *Financial Services Commission of Ontario Act, 1997*;

“Tribunal” means the Financial Services Tribunal established pursuant to the *Financial Services Commission of Ontario Act, 1997*;

“viatical settlement broker” means a person that on behalf of a viator and for a fee, commission, anything of value or other consideration offers or attempts to negotiate viatical settlement contracts between a viator and one or more viatical settlement providers;

“viatical settlement contract” means an agreement with a viator establishing the terms under which compensation, anything of value or other consideration will be paid to the viator, which is less than the expected death benefit under a life insurance policy, in return for the viator’s assignment, transfer or sale, in whole or in part, of the death benefit or ownership of the life insurance policy or the designation of a particular beneficiary in respect of all or a portion of the death benefit under a life insurance policy;

“viatical settlement provider” means a person who enters into a viatical settlement contract with a viator, and includes a person who obtains financing for the purchase, acquisition, transfer or other assignment of one or more viatical settlement contracts, viaticated life insurance policies or interests therein, or otherwise sells, assigns, transfers, pledges, hypothecates or otherwise disposes of one or more viatical settlement contracts, viaticated life insurance policies or interests therein, but does not include:

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- a) a bank, loan or trust corporation, caisse populaire or credit union or other licensed or registered lending institution which takes an assignment of a life insurance policy as collateral for a loan;
- b) an insurer that provides accelerated death benefits or makes a loan to its insured against the security of the life insurance policy issued to that insured; or
- c) an individual who is a friend or family member of the insured who enters into a single isolated viatical settlement contract with the insured.

“viatical settlement purchase agreement” means an agreement entered into by a viatical settlement purchaser to purchase a life insurance policy or an interest in one or more life insurance policies or the death benefits or benefits thereunder, that is entered into for the purpose of deriving an economic benefit;

“viatical settlement purchaser” means an investor or other person who gives a sum of money or anything of value as consideration for an interest in one or more life insurance policies or an interest in the death benefits or benefits thereunder, which has been or will be the subject of a viatical settlement contract, for the purpose of deriving an economic benefit;

“viatical settlement representative” means a person who for another and for a fee, commission, compensation, anything of value or other consideration, offers or advertises the availability of viatical settlement contracts, introduces potential viators to viatical settlement providers, or otherwise assists persons who carry on business in viatical settlement contracts or in the conduct of that business offers or attempts to negotiate or facilitate the entering into of viatical settlement contracts between a viator and one or more viatical settlement providers, or of viatical settlement purchase agreements between a viatical settlement purchaser and one or more viatical settlement providers;

“viatical settlement representative” includes an authorized agent of either a viatical settlement provider or a viatical settlement broker, as well as a viatical settlement broker, but does not include:

- a) a lawyer, accountant or any person acting under a power of attorney granted by the viator; or
- b) a person who is retained to represent a viator and whose compensation is paid by or at the direction of the viator, regardless of whether a viatical settlement contract is effected.

“viaticated life insurance policy” means a life insurance policy that is the subject of a viatical settlement contract or viatical settlement purchase agreement, as the case may be;

“viator” means the insured under a life insurance policy insuring the life of an individual with a catastrophic or life threatening illness or condition and a life expectancy of two or less years, who enters into or seeks to enter into a viatical settlement contract;

“viator” does not include a viatical settlement provider or viatical settlement purchaser or any person acquiring an interest in one or more life insurance policies or the death benefits or benefits thereunder from a viatical settlement provider.

CONDITIONS

- 2. No person, other than a person who is specifically exempted from the definition of viatical settlement provider or viatical settlement representative and carrying on an activity to which the exemption relates, shall undertake or carry on the business of viatical settlements in Ontario or act as a viatical settlement provider or viatical settlement representative in Ontario without having first obtained a licence from the Superintendent under this Regulation.
- 3. No viatical settlement contract or viatical settlement purchase agreement shall be entered into in Ontario, or with a viator or a viatical settlement purchaser who is a resident of Ontario, where any life insurance policy that is the subject of the viatical settlement contract or viatical settlement purchase agreement:

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- a) was not issued by an insurer licensed under the *Insurance Act* to undertake insurance or carry on business in Ontario;
 - b) in respect of which there is a designated irrevocable beneficiary who has not consented to the beneficiary being changed; or
 - c) contains any benefits, terms or conditions that prevent the life insurance policy from being the subject matter of a viatical settlement contract or viatical settlement purchase agreement, as the case may be.
4. No viatical settlement contract shall be entered into in Ontario unless the life expectancy of the viator is certified by a physician as having a catastrophic or life threatening illness or condition and a life expectancy of two or less years.
 5. No viatical settlement contract or viatical settlement purchase agreement shall be entered into in Ontario where the viator is not a resident of Ontario, or where any payment to the viator is conditioned on the viator's agreement to commit suicide.
 6. No insurer shall engage in the business of viatical settlements or enter into viatical settlement contracts or viatical settlement purchase agreements in Ontario with respect to any life insurance policy issued by that insurer or by a person affiliated with that insurer or by a predecessor of that insurer or of a person affiliated with that insurer.
 7. A viatical settlement provider and viatical settlement broker shall assume responsibility for all actions and conduct of its viatical settlement representatives in the conduct of the business of viatical settlements on its behalf.
 8. Where a viatical settlement representative is also an insurance agent, the viatical settlement representative shall not engage in the business of viatical settlements with respect to any life insurance policy issued by any insurer, on the sale of which the viatical settlement representative acted as that insurer's duly authorized agent or received or stands to receive a commission, fee or other remuneration or thing of value from the insurer in connection with the sale or servicing of the life insurance policy.

LICENSING

9. An application for a licence or renewal of a licence shall be made to the Superintendent, in a form approved by the Superintendent, and shall contain such information and material as the Superintendent may require to be furnished.
10. The Superintendent may require an applicant to file with him or her a copy of any application for a viatical settlement contract or viatical settlement purchase agreement or other form, application, agreement, contract, advertising, marketing or other material that has been used or issued or will be used or issued by the applicant, and where this material in the Superintendent's opinion is unfair, deceptive, fraudulent or not in the public interest or otherwise misleading to the viator or viatical settlement purchaser, the Superintendent may prohibit the applicant from issuing or using this material and the applicant or licensee shall not issue or use this material.
11. The Superintendent shall not issue any licence to or renew any licence of any corporation that is not qualified to carry on business in Ontario.
12. If the applicant is a corporation, before the issue or renewal of a licence, the applicant shall file with the Superintendent the following information and documents verified in a manner satisfactory to the Superintendent:
 - a) a certified copy of its Act or other instrument of incorporation or association and of its constitution, by-laws and Regulations;

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- b) a certified copy of its last balance sheet and auditor's report thereon;
 - c) the full name, address and telephone number of each officer and director; and
 - d) the full name, address, telephone number and occupation of each shareholder holding more than 10% of its issued shares for the time being enjoying voting rights, and the number and type of such shares held by each such shareholder.
13. If the applicant is a partnership, before the issue or renewal of a licence, the applicant shall file with the Superintendent the following documents and information verified in a manner satisfactory to the Superintendent:
- a) a certified copy of all its partnership agreements and declarations;
 - b) a certified copy of its last balance sheet and auditor's report thereon;
 - c) the date of the formation of the partnership; and
 - d) the full name, address and telephone number of each partner, or in the case of a limited partnership, of every general partner.
14. Every licensee shall file with the Superintendent certified copies of every amendment, revision or consolidation to its act or other instrument of incorporation, association or partnership and of its constitution, by-laws and regulations verified in a manner satisfactory to the Superintendent, within thirty days after the passing of the amendment, revision or consolidation.
15. No transfer of shares of a licensee shall be entered in the book or books maintained for that purpose until thirty days after notice thereof has been deposited with the Superintendent, if
- a) the transfer relates to 10% or more of the issued shares of the licensee for the time being enjoying voting rights; or
 - b) the licensee has reason to believe that the transfer would result in a majority of the issued shares of the licensee for the time being enjoying voting rights being beneficially owned by any one person.
16. When requested by the Superintendent, an applicant or licensee shall fully and promptly disclose the full name, address, telephone number and occupation of all members, partners, shareholders, officers, directors and other persons who exercise or have the ability to exercise effective control over the applicant or licensee.
17. Every viatical settlement provider licensed under this Regulation shall at all times maintain assets in Ontario in an amount required by the Superintendent and shall maintain capital and unimpaired surplus in an amount required by the Superintendent that bears not less than a reasonable relationship to the outstanding liabilities of the viatical settlement provider.
18. Every licensee shall at all times maintain errors and omissions insurance in a form approved by the Superintendent in an amount of at least \$1 million in respect of any one occurrence with extended coverage for loss resulting from fraudulent acts, or another form of financial guarantee in a form approved by the Superintendent in an amount of at least \$1 million in respect of any one occurrence.
19. Upon the application and payment of the required fee, the Superintendent shall make an investigation of each applicant for a viatical settlement provider licence or renewal thereof, and may issue or renew a licence if the applicant:
- a) has provided a written detailed plan of operation that includes:
 - i) a demonstration that the business of viatical settlements will be managed and directed by individuals with the training and experience necessary to supervise and direct the business of viatical settlements;

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- ii) audited financial statements, prepared in accordance with generally accepted accounting principles, and certified by an officer or partner of the applicant, that demonstrate a sound condition of affairs;
 - iii) a copy of all licences or registrations held in other jurisdictions to carry on the business of viatical settlements, and a description of where and how the applicant carries on the business of viatical settlements in jurisdictions that do not require a licence or registration;
 - iv) in the case of a corporate applicant whose head office is outside Ontario, the full name, address and telephone number of the agent in Ontario who will be responsible for receiving service of process;
 - v) a description of how and where the business of viatical settlements will be marketed and solicited;
 - vi) the procedures to determine whether a viator has a catastrophic or life threatening illness or condition and a life expectancy of two or less years, and the full name, address, telephone number and qualifications of the physician or physicians who will make such determinations for the viatical settlement contracts, or if unknown, the criteria for selecting such physician or physicians;
 - vii) the method for determining the amount of proceeds payable under a viatical settlement contract, including the fees, compensation, anything of value or other consideration paid to any person in order to effectuate the viatical settlement contract;
 - viii) the procedures for the collection, use and disclosure of personal and medical information and the full name and address of the individual responsible for the applicant's compliance;
 - ix) the procedures for monitoring the health status of the viator and the full name and address of the individual or individuals responsible for this;
- b) has provided a written detailed education and anti-fraud plan that includes:
- i) the procedures for detecting and investigating possible fraudulent acts or practices in relation to the business of viatical settlements and for resolving material inconsistencies between medical and other records and insurance applications, and viatical settlement contracts and viatical settlement purchase agreements;
 - ii) the procedures for reporting possible fraudulent acts or practices to the Superintendent;
 - iii) a description of the plan for anti-fraud education and continuing education and training of its personnel and viatical settlement representatives;
 - iv) a description of the organizational arrangement of the anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent acts or practices in relation to the business of viatical settlements and investigating unresolved material inconsistencies between medical and other records and insurance applications, and viatical settlement contract applications and viatical settlement purchase agreements;
- c) in the case of an individual applicant, has passed any qualifying examination required by the Superintendent;
- d) has not made the application for the purpose of obtaining a licence for any objective inconsistent with this Regulation;
- e) is otherwise suitable to receive a licence; and
- f) has satisfied any other requirement of the Superintendent.

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20. Upon the application and payment of the required fee, the Superintendent shall make an investigation of each applicant for a viatical settlement representative licence or renewal thereof, and may issue or renew a licence if the applicant:
- a) has provided a written detailed plan of operation that includes:
 - i) a demonstration that the business of viatical settlements will be managed and directed by individuals with the training and experience necessary to supervise and direct the business of viatical settlements;
 - ii) a copy of all licences and registrations held in other jurisdictions to carry on the business of viatical settlements, and a description of where and how the applicant carries on the business of viatical settlements in jurisdictions that do not require a licence or registration;
 - iii) in the case of a corporate applicant whose head office is outside Ontario, the full name, address and telephone number of the agent in Ontario who will be responsible for receiving service of process;
 - iv) a description of how and where the business of viatical settlements will be marketed and solicited;
 - v) the procedures for the collection, use and disclosure of personal information and the full name and address of the individual responsible for the applicant's compliance;
 - b) has provided a written detailed education and anti-fraud plan that includes:
 - i) the procedures for detecting and investigating possible fraudulent acts or practices in relation to the business of viatical settlements and for resolving material inconsistencies between medical and other records and insurance applications, and viatical settlement contracts and viatical settlement purchase agreements;
 - ii) the procedures for reporting possible fraudulent acts or practices to the Superintendent;
 - iii) a description of the plan for anti-fraud education and continuing education and training of its personnel;
 - iv) a description of the organizational arrangement of the anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent acts or practices in relation to the business of viatical settlements and investigating unresolved material inconsistencies between medical and other records and insurance applications, and viatical settlement contract applications and viatical settlement purchase agreements;
 - c) in the case of an individual applicant, has passed any qualifying examination required by the Superintendent;
 - d) has not made the application for the purpose of obtaining a licence for any objective inconsistent with this Regulation;
 - e) is otherwise suitable to receive a licence; and
 - f) has satisfied any other requirement of the Superintendent.
21. The Superintendent shall refuse to issue or renew a licence and may suspend, or revoke or refuse to issue or renew a licence if in the opinion of the Superintendent the applicant:
- a) has made any material misrepresentation in the application or any documents;
 - b) has engaged in an unfair or deceptive act or practice;
 - c) has pleaded guilty to or has been convicted of any fraudulent or dishonest acts or practices;

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- d) deals in bad faith or demonstrates a pattern of unreasonable or untimely payments to viators or viatical settlement purchasers;
 - e) has failed to honor contractual obligations related to the business of viatical settlements;
 - f) retains or employs any person who fails to meet the requirements of this Regulation;
 - g) has made a material misrepresentation to an insurer that issued a life insurance policy which is the subject of a viatical settlement contract or viatical settlement purchase agreement;
 - h) uses a name that is objectionable on any public grounds or is similar to the name of another licensee or an insurer and the assumption or use of the name in Ontario would be likely to deceive or mislead the public;
 - i) in the case of an application for renewal of a licence, no longer meets the requirements for initial licensing;
 - j) has not complied with any requirement of this Regulation, or any undertaking made by or on behalf of the applicant or licensee, or any inquiry, direction, order or decision of the Superintendent; or
 - k) is otherwise unsuitable, untrustworthy or incompetent.
22. The licence shall be in a form approved by the Superintendent who may at any time and in respect of any licence:
- a) impose any term, condition or limitation on the licence; or
 - b) vary, amend or revoke any term, condition or limitation to which the licence is subject.
23. Subject to section 22, the term of a licence shall be two years and the licence shall expire on its anniversary date.
24. The Superintendent may require notice of the application for a licence or renewal of a licence to be given by publication in the *Ontario Gazette* or elsewhere as the Superintendent directs.
25. Before the Superintendent shall deny an application for a licence or suspend, vary, revoke or refuse to renew a licence, the Superintendent shall give notice and an opportunity to be heard, except in cases where in the opinion of the Superintendent the interests of the public may be adversely affected by any delay in taking any such action, such action may be taken prior to a hearing.
26. The decision of the Superintendent to deny a licence, or suspend, vary, revoke or refuse to renew a licence may be appealed to the Financial Services Tribunal.
27. Every viatical settlement provider holding a licence under this Regulation shall file with the Superintendent within 120 days of the end of its fiscal year, or at any time when requested by the Superintendent, a financial statement for the period of the previous fiscal year of the viatical settlement provider, which shall be accompanied by a report of an accountant prepared in the manner required by the Superintendent and shall be in a form approved by the Superintendent, together with such additional information and material regarding the period of the previous fiscal year as the Superintendent shall require, including:
- a) the number of life insurance policies viaticated and the date of viatication;
 - b) the name of the insurer that issued each life insurance policy that is the subject of a viatical settlement contract and the date of issuance;
 - c) the face amount of each life insurance policy that is the subject of a viatical settlement contract and the amount of the death benefit under the life insurance policy;

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- d) the amounts paid by the viatical settlement provider, pursuant to each viatical settlement contract, to viaticate the life insurance policy and the percentage that amount represented of the face amount of the life insurance policy;
 - e) the total insurance premiums paid or payable to maintain in force each life insurance policy that is the subject of a viatical settlement contract;
 - f) the type of coverage under each life insurance policy and whether the life insurance policy was within the contestable or suicide period or both at the time of the viatical settlement contract;
 - g) the type and source of funding for each viatical settlement contract;
 - h) the number of applications for viatical settlement contracts accepted and rejected and the reasons for such acceptance or rejection;
 - i) the full name, address and telephone number of every viatical settlement representative through whom the viatical settlement provider engaged in the business of viatical settlements; and
 - j) the total fees, commissions, compensation, anything of value or other consideration given to any viatical settlement representatives.
28. Once a year, or more frequently as the Superintendent may direct, the Superintendent or a person designated by the Superintendent shall examine all books and records and make such inquiries as are necessary to ascertain the licensee's condition or compliance with this Regulation and the licensee shall comply with and facilitate such an examination.
29. The Superintendent is authorized to obtain from an applicant or a licensee any information or material, including personal information about an identifiable individual, in order to ascertain the applicant's or licensee's compliance with this Regulation, and when requested, the applicant or licensee shall provide this information or material forthwith to the Superintendent.
30. No person shall represent orally or in writing that the issue of a licence, or the printing or publication of a statement in the annual report or other publication of the Superintendent, or any other circumstance of the supervision or regulation of the business of viatical settlements by the Superintendent, is a warranty or guarantee of the financial standing of the licensee or its ability to meet its obligations.
31. No viatical settlement provider or viatical settlement representative shall use an escrow or trust agreement in connection with its business of viatical settlements that has not been approved by the Superintendent.
32. No viatical settlement provider or viatical settlement representative shall use an escrow agent or trustee who is related to the viatical settlement provider or viatical settlement representative, or where such use would result in a conflict of interest or potential conflict of interest.

VIACIAL SETTLEMENT CONTRACTS

33. Every viatical settlement provider and its duly authorized representatives shall provide every viator with full, plain and true disclosure of all material facts regarding the viatical settlement contract.
34. Regardless of the manner in which a viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator and to owe a fiduciary duty to the viator to act according to the viator's instructions and in the best interests of the viator.
35. No viatical settlement contract shall be entered into unless a viatical settlement provider or its duly authorized viatical settlement representative first obtains from the viator a witnessed, dated and signed application for a viatical settlement contract, in which the viator:
- a) consents to the viatical settlement contract;

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- b) acknowledges the catastrophic or life threatening illness or condition;
 - c) represents that they have a full and complete understanding of the viatical settlement contract;
 - d) represents that they have a full and complete understanding of the benefits of the life insurance policy, including any accelerated death benefits available under the life insurance policy;
 - e) represents that they have been advised by the viatical settlement provider or viatical settlement representative to obtain independent medical, legal, tax and financial advice in order to understand the nature of the viatical settlement contract and any contract or document that they are asked to sign;
 - f) consents to releasing their medical records to the physician who will be making the certification under the viatical settlement contract; and
 - g) acknowledges that they are of sound mind and entering into the viatical settlement contract freely and voluntarily.
36. No viatical settlement contract shall be entered into unless a viatical settlement provider or its duly authorized viatical settlement representative, first provides the viator with a written disclosure notice, certified to be true and signed by an officer of the viatical settlement provider and by the viatical settlement representative, which shall be signed by the viator and shall include the following information and documents:
- a) the full name, address and telephone number of the viatical settlement provider and the viatical settlement representative;
 - b) a statement that the life insurance policy which is the subject of the viatical settlement contract was not issued as the result of or with the involvement of the viatical settlement provider or the viatical settlement representative acting as the insurer's duly authorized agent, or on the sale of which such viatical settlement provider or viatical settlement representative acted as that insurer's duly authorized agent, or received or stands to receive a commission, fee or other remuneration or thing of value from the insurer in connection with the sale or servicing of the life insurance policy;
 - c) the identity of every insurer for which the viatical settlement provider or the viatical settlement representative acts or has acted as that insurer's duly authorized agent and received or stands to a commission, fee or other remuneration or thing of value from that insurer in connection with the sale or servicing of the life insurance policy;
 - d) any conflict of interest or potential conflict of interest that is associated or may be associated with the viatical settlement contract, to which the viatical settlement provider or viatical settlement representative is subject;
 - e) any other licences or registrations held by the viatical settlement provider and the viatical settlement representative to carry on the business of viatical settlements and financial services business, and the jurisdictions of the authorities issuing such licences or registrations;
 - f) a description of how viatical settlement contracts operate;
 - g) the manner in which the full and final proceeds of the viatical settlement contract will be paid to the viator and when;
 - h) the full name, address and telephone number of the independent escrow agent or trustee who will manage the escrow or trust account in which the full and final proceeds of the viatical settlement contract will be deposited, including a copy of the escrow or trust agreement;
 - i) a description of possible alternatives to viatical settlement contracts for individuals with catastrophic or life threatening illnesses or conditions, including any accelerated death benefits offered under the life insurance policy that is the subject of the viatical settlement;

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- j) if the life insurance policy to be viaticated has been issued as a joint policy or involves any coverage of a life other than the viator in the case of a group life insurance policy, the viator shall be informed of any conditions that may not allow the life insurance policy to be viaticated and the possible loss of coverage on the other lives and shall be advised to consult with their legal and financial advisor or the insurer issuing the life insurance policy for advice on the proposed viatication;
 - k) a statement that entering into a viatical settlement contract may cause other rights or benefits, including conversion rights in respect of group coverage and waiver of premium benefits that may exist under the life insurance policy to be forfeited by the viator, or that a term life insurance policy may not be renewed or extended;
 - l) the dollar amount of the current death benefit and all other payments that are payable under the viaticated life insurance policy;
 - m) a statement that the proceeds of the viatical settlement contract may be subject to provincial or federal income tax, the claims of creditors, and may adversely affect the viator's eligibility for social assistance, health benefits or other entitlements;
 - n) the full name, address, telephone number and qualifications of the physician making the life expectancy certification under the viatical settlement contract and a statement that the physician is not related to or affiliated to the viatical settlement provider or viatical settlement representative and what fees, compensation, anything of value or consideration that physician has or will receive and from whom;
 - o) the procedures that will govern the collection and use of personal information and the protection of privacy;
 - p) the procedures for monitoring the health status of the viator and the frequency and manner of such contact and the name, experience and qualifications of the individual who will be responsible for such monitoring;
 - q) the total amount of fees, compensation, anything of value or other consideration that the viatical settlement representative or any other person has received or will receive as a result of the viatical settlement and from whom;
 - r) a statement that furnishing false, deceptive or misleading information in order to obtain a life insurance policy may be an offence subject to sanctions at law;
 - s) a statement that the viator has an unconditional right to rescind the viatical settlement contract within fifteen days from receipt of the full and final proceeds under the viatical settlement contract; and
 - t) a statement that the viator should obtain independent medical, legal, tax and financial advice in order to understand the nature of the life insurance policy to be viaticated and the nature of the viatical settlement contract and any other contract or document that the viator is asked to sign;
 - u) a statement that the viatical settlement provider and the viatical settlement representative shall immediately provide the viator, when the viator requests it, with a copy of this Regulation.
37. Every viatical settlement contract shall provide that the viator has an unconditional right to rescind the contract for at least fifteen days from the receipt of the full and final viatical settlement proceeds and this shall be deemed to be part of the viatical settlement contract.
38. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider of any viatical settlement proceeds.
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39. The right of rescission provided in this Regulation is in addition to any other rights that the viator has in respect of the viatical settlement contract or written disclosure notice thereto.
40. No viatical settlement contract shall be entered into that does not provide for full, final and absolute payment of the proceeds to the viator in a timely fashion in a single lump sum, by way of an absolute payment and not by way of loan, or that is unreasonable or inequitable or that uses a longer life expectancy than is reasonable or realistic in order to reduce any payment to which the viator would otherwise be entitled.
41. No viatical settlement contract shall be binding or have any effect unless a copy of the certified and signed written disclosure notice under section 36 is provided to the viator and it shall form part of every viatical settlement contract, and failure to provide it to the viator renders the viatical settlement contract void.
42. Prior to any application for a viatical settlement contract, a viatical settlement provider or its duly authorized viatical settlement representative shall inform a viator that information regarding the viatical settlement may be provided to the Superintendent pursuant to this Regulation and may be subject to the *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, F.31.
43. The viatical settlement provider or its duly authorized viatical settlement representative shall provide written notice to the insurer that has issued the life insurance policy which is to be viaticated, at least five business days before the viatical settlement contract is entered into, that there is an offer to purchase the life insurance policy from a viator and the insurer may advise the viator of other alternatives which may be available under the life insurance policy.
44. Where an insurer receives a request to change the beneficiary designated under a life insurance policy and or to transfer the ownership of a life insurance policy, pursuant to a viatical settlement contract or viatical settlement purchase agreement, the insurer shall respond to such a request in a timely and reasonable manner and the viatical settlement provider or its duly authorized representative shall promptly provide the insurer with all necessary information.
45. Within two business days from the viatical settlement provider's receipt of documents to effect a change in the beneficiary designated under a life insurance policy and or the transfer of the ownership of a life insurance policy, the viatical settlement provider shall pay the full and final proceeds of the viatical settlement into an escrow or trust account held in a chartered bank in Ontario and managed by an independent escrow agent or trustee, who shall transfer the full and final proceeds to the viator within two business days of the viatical settlement provider's receipt of acknowledgment of the transfer of ownership or designation of a new beneficiary under the life insurance policy.
46. Failure to tender consideration pursuant to section 45 renders the viatical settlement contract void.
47. Contact with the viator for the purpose of determining the health status of the viator after the viatical settlement contract has been entered into, shall only be made by the viatical settlement provider and shall be limited to no more than once every six months.

VIATICAL SETTLEMENT PURCHASE AGREEMENTS

48. Every viatical settlement provider and its duly authorized representatives shall provide every viatical settlement purchaser with full, plain and true disclosure of all material facts regarding the viatical settlement purchase agreement.
49. Any funds forwarded to the viatical settlement provider under the terms of the viatical settlement purchase agreement shall be held in trust for the viatical settlement purchaser and maintained in a trust account in a chartered bank and used only for the purposes of the viatical settlement purchase agreement and not in connection with any other business of the viatical settlement provider, and ownership of any life insurance policy by a viatical settlement provider and death benefit or other payments thereunder

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shall be held in trust for the viatical settlement purchaser or other viatical settlement purchasers, as the case may be.

50. Where a viatical settlement purchaser will own a full or partial interest in one particular life insurance policy, no such viatical settlement purchase agreement shall be marketed, solicited or entered into unless the provider first obtains a witnessed, dated and signed application for a viatical settlement contract from a viator, or has signed a viatical settlement contract with a viator providing for the viatication of the life insurance policy to the viatical settlement provider.
51. Where a viatical settlement purchaser will own a full or partial interest in one particular life insurance policy, before any viatical settlement purchase agreement is entered into, the viatical settlement provider shall provide to the viatical settlement purchaser a written disclosure notice, certified to be true and signed by an officer of the provider, and which shall be signed by the viatical settlement purchaser.
52. The written disclosure notice referred to in section 51 shall include the following information:
 - a) in the case of an individual, their full name, address, telephone number, qualifications and where their principal place of business is located;
 - b) in the case of a partnership, the full name, address and telephone number of the partnership, the full name, address, telephone number and qualifications of every partner and in the case of a limited partnership, of every general partner;
 - c) in the case of a corporation, the full name of the corporation including the jurisdiction in which the corporation was incorporated and the incorporation number, the head office, address and telephone number of the corporation, and the full name, address, telephone number and qualifications of its officers and directors, and any shareholder holding directly or indirectly more than 50% of all of the issued shares of the viatical settlement provider, entitling the holder to voting rights;
 - d) the full name, address and telephone number of the individual who may respond to inquiries regarding the viatical settlement provider;
 - e) the viatical settlement provider's licence number under this Regulation and any restrictions on that licence;
 - f) all licences and registrations issued by jurisdictions outside Ontario in which the viatical settlement provider carries on the business of viatical settlements, and a description of where and how the viatical settlement provider carries on the business of viatical settlements in jurisdictions that do not require a licence or registration;
 - g) any registrations or licences held by the provider, in or outside Ontario, in the area of financial services and the registration or licence number and the jurisdiction of the authorities that issued such registration or licence;
 - h) the location at which the books and records of the viatical settlement provider are maintained and whether they are available for inspection by viatical settlement purchasers;
 - i) financial information regarding the background and qualifications of the viatical settlement provider and the amount of the business of viatical settlements the viatical settlement provider has conducted in the last two years;
 - j) audited financial statements, prepared in accordance with generally accepted accounting principles, for the last two years;
 - k) the full name, address and telephone number of all key management personnel who operate or will operate the viatical settlement provider's business of viatical settlements and the qualifications of these individuals;

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- l) any other business that the viatical settlement provider owns, operates or is associated with;
- m) whether the viatical settlement provider and any of its duly authorized viatical settlement representatives are insurers or agents as defined in the *Insurance Act*;
- n) a description of any pending litigation or proceeding to which the viatical settlement provider is or will be a party and which may materially affect its business or assets, including any litigation or proceeding reasonably known to be contemplated by any public authorities;
- o) how the viatical settlement provider will market, solicit or sell viatical settlement purchase agreements to the public;
- p) a description of the terms and conditions of the viatical settlement purchase agreement to be entered into by the viatical settlement purchaser;
- q) any terms or conditions that could reasonably affect or extinguish the viatical settlement purchaser's rights, what these rights are and under what conditions these rights may be activated;
- r) any other factors or risks material to the viatical settlement purchase agreement that are not otherwise referred to in the viatical settlement purchase agreement or written disclosure notice;
- s) the total costs, fees and expenses to be charged to the viatical settlement purchaser, including who is responsible for payment of any insurance premiums or other costs required to maintain the life insurance policy in force during the term of the viatical settlement purchase agreement;
- t) if the viatical settlement provider or some other person is responsible for payment of any insurance premiums or other costs to maintain the life insurance policy in force during the term of the viatical settlement purchase agreement, who will be responsible for such payments in the event that the viatical settlement provider or other person becomes insolvent or otherwise goes out of business during the term of the viatical settlement purchase agreement;
- u) how the viatical settlement purchaser will receive notice of any default in the payment of the insurance premiums or other costs associated with keeping the life insurance policy in force during the term of the viatical settlement purchase agreement;
- v) how the viatical settlement purchaser will receive notice of any notice of cancellation or pending cancellation of the life insurance policy or any changes in the terms and conditions of the life insurance policy during the term of the viatical settlement purchase agreement;
- w) whether the viatical settlement purchaser is entitled to a refund of all or of a portion of their investment if the life insurance policy subject to the viatical settlement purchase agreement is later cancelled by the insurer or otherwise determined to be null or void;
- x) a statement regarding the current status, benefits and term of the life insurance policy, how long it has been in force, and if it is contestable or has any terms or conditions rendering it incapable of being subject to a viatical settlement contract or viatical settlement purchase agreement;
- y) whether the life insurance policy under the viatical settlement purchase agreement has an irrevocable beneficiary, and if so, whether the beneficiary is prepared to consent to the beneficiary being changed,
- z) whether the life insurance policy under the viatical settlement purchase agreement is the subject of any assignment and if so, whether the assignee is prepared to consent to the viatication;
- aa) who will be the policyholder and beneficiary under the life insurance policy subject to the viatical settlement purchase agreement;
- bb) of the funds invested by the viatical settlement purchaser, the amount that will be used to purchase the life insurance policy or an interest therein, the amount that will be used to pay any commission,

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- fee or other remuneration or thing of value to any viatical settlement representative, physician, escrow agent or trustee with respect to the viatical settlement purchase agreement;
- cc) how the viatical settlement purchaser's investment will be dealt with by the provider in the event that the viator outlives their projected life expectancy or the term of the viatical settlement purchase agreement;
 - dd) the procedures for monitoring the health status of the viator and when and in what manner this information will be provided to the viatical settlement purchaser;
 - ee) the full name, address, telephone number and experience of any physician making any life expectancy certification under the viatical settlement purchase agreement, and a statement that the physician is not related to the viatical settlement provider or its duly authorized viatical settlement representatives and is not in any conflict of interest;
 - ff) a statement including the following:
 - i) if the viatical settlement purchase agreement involves a group life insurance policy, that such a policy may contain limitations or caps in conversion rights and there may be additional premiums or related costs involved and that the term may expire and not be renewed, and if the group life insurance policy is terminated and replaced by another group life insurance policy, that any conversion rights may be lost;
 - ii) the rate of return is dependent upon an accurate projection of the life expectancy and actual date of death of the viator and no guaranteed rate of return is determinable, unless the viatical settlement provider guarantees a minimum return by the terms and conditions of the viatical settlement purchase agreement;
 - iii) no one can accurately project the actual life expectancy of a person whose life is insured under the life insurance policy and factors affecting the accuracy of a projection include the qualifications and experience of the physician making the life expectancy certification and future advances in medical treatment and cures;
 - iv) the viatical settlement purchaser will receive no returns until the viator dies, unless there is some other guarantee otherwise specified in the viatical settlement purchase agreement;
 - v) the insurer may cancel a life insurance policy and refuse to pay any benefits under the life insurance policy if premiums are not paid to keep the life insurance policy in force;
 - vi) the viatical settlement purchaser may lose benefits or receive substantially reduced benefits if the insurer that issued the life insurance policy becomes insolvent or otherwise goes out of business during the term of the viatical settlement purchase agreement;
 - vii) there is no established secondary market through which the viatical settlement purchase agreement may be assigned or sold and viatical settlement purchasers may not be able to assign or sell their interests under the viatical settlement purchase agreement;
 - viii) the viatical settlement purchaser has the right to rescind the viatical settlement purchase agreement within three business days of entering a viatical settlement purchase agreement, or within a longer period as may be specified in the viatical settlement purchase agreement;
 - ix) investing in a viatical settlement purchase agreement may involve risks in addition to those referred to in the viatical settlement purchase agreement or written disclosure notice;
 - x) the Superintendent has not guaranteed, approved, recommended or sponsored the viatical settlement purchase agreement and no person shall claim otherwise; and

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- xi) the viatical settlement purchaser should obtain independent legal, tax and financial advice in order to understand the nature of the investment and terms of the viatical settlement purchase agreement, and any other contract or document they are asked to sign.
- 53. Where a viatical settlement purchase agreement is marketed or solicited in a manner that makes or would give any viatical settlement purchaser entering into such an agreement a fractional or pooled interest in two or more life insurance policies, the viatical settlement purchase agreement shall not be marketed, solicited or entered into before the viatical settlement provider files a prospectus with the Superintendent, in a form approved by the Superintendent, and receives a receipt, and a copy of the prospectus shall be provided to a viatical settlement purchaser before any viatical settlement purchase agreement is entered into.
- 54. At the time of the filing, the prospectus shall also be accompanied by a copy of the proposed viatical settlement purchase agreement and any other information, material or records as the Superintendent may require, including any pamphlet, circular, form letter, advertisement or other sales literature or advertising communication addressed or intended for distribution to viatical settlement purchasers or prospective viatical settlement purchasers.
- 55. The prospectus shall be signed and certified by an officer of the viatical settlement provider and shall include the information required under section 52 (a) to (r) and 52 (ff), and any other information the Superintendent requires, including the following information:
 - a) the minimum number of life insurance policies and minimum aggregate face values of these life insurance policies and any maximum number of life insurance policies or maximum aggregate face value of life insurance policies that must be acquired by the viatical settlement provider as a condition to proceeding with the sale of viatical settlement purchase agreements;
 - b) any minimum level of investment funds that are required to be raised in order to proceed with the sale of viatical settlement purchase agreements;
 - c) whether the investment funds will be returned to viatical settlement purchasers if minimum amounts are not raised by a specific date;
 - d) the criteria for selecting and pooling life insurance policies for investment under the viatical settlement purchase agreements, and how any changes to these criteria will be reported to the viatical settlement purchasers, and what rights the viatical settlement purchasers will have with respect to any changes in these criteria; and
 - e) how viatical settlement purchase agreements will be marketed and sold by the provider, and how the viatical settlement purchasers will be advised of the pooling of life insurance policies and any material changes in the viatical settlement purchaser's interests in life insurance policies under the viatical settlement purchase agreement.
- 56. The viatical settlement purchaser has the right to rescind the viatical settlement purchase agreement within three business days of entering a viatical settlement purchase agreement, or within a longer period as may be specified in the viatical settlement purchase agreement.
- 57. The right of rescission provided in this Regulation is in addition to any other rights that the viatical settlement purchaser has in respect of the viatical settlement purchase agreement, or written disclosure notice or prospectus thereto.
- 58. The Superintendent may make such inquiries with respect to a prospectus and any document required to be filed therewith as are necessary to determine whether a receipt should be issued, including an examination of the provider and the obtaining of information or reports from public authorities or others within or outside Ontario.

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59. The Superintendent shall issue a receipt except where it appears to the Superintendent that the prospectus or any document required to be filed therewith :
 - a) contains any statement, promise, estimate or forecast that is unfair or deceptive or that has the effect of concealing material facts or contains a misrepresentation; or
 - b) does not comply with or is inconsistent with this Regulation.
60. Before the Superintendent shall deny issuing a receipt, the Superintendent shall give notice and an opportunity to be heard.
61. The Superintendent's decision to deny issuing a receipt may be appealed to the Financial Services Tribunal.
62. A receipt expires twelve months after it is issued and shall thereupon be deemed not to be issued, subject to the right to file a new prospectus and obtain a receipt in accordance with this Regulation.
63. No viatical settlement purchase agreement shall be binding or have any effect unless a copy of the certified and signed written disclosure notice or prospectus, as the case may be, is provided to the purchaser and it shall form part of every viatical settlement purchase agreement, and failure to do so renders the viatical settlement purchase agreement void.

GENERAL

64. A viatical settlement provider shall promptly provide a viator or viatical settlement purchaser with a copy of this Regulation when so requested.
65. No viatical settlement provider or viatical settlement representative shall:
 - a) contravene the Ontario Human Rights Code with respect to the availability of viatical settlement contracts or viatical settlement purchase agreements;
 - b) pay or offer to pay any finder's fees, referral fees, other fees, commission, compensation, anything of value or other consideration to any physician, health care provider, lawyer, accountant or other person who has provided or is providing care or services to the viator, or to any other person acting as agent of the viator with respect to the viatical settlement;
 - c) disclose medical, financial or other personal information obtained from a viator to any other person without the knowledge and written consent of the viator;
 - d) condition the consideration of applications on any exclusive dealing between the viator and the viatical settlement provider or viatical settlement representative; and
 - e) engage in any unfair or deceptive act or practice.
66. All information, material and records, and accurate copies of the originals of such information, material and records relating to every viatical settlement contract and viatical settlement purchase agreement, including all materials forwarded by the viatical settlement representative to the viatical settlement provider, shall be maintained by every person engaging in the business of viatical settlements at their principal place of business in Ontario for a minimum of six years after the death of a viator and shall be made available to the Superintendent for inspection during reasonable business hours.
67. All persons engaging in the business of viatical settlements shall maintain records at their principal place of business in Ontario regarding every complaint received concerning the business of viatical settlements, including the total number of complaints for every calendar year, the nature of each complaint, the length of time required to resolve the complaint and the manner in which the complaint was resolved, and these records shall be made available to the Superintendent for inspection during reasonable business hours.

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68. Any person licenced under this Regulation who has knowledge or believes that a fraudulent act or practice has or will be committed in relation to the business of viatical settlements shall report it promptly to the Superintendent.
69. No person shall engage in any unfair or deceptive act or practice, with respect to the business of viatical settlements, which includes:
- a) representing that the business of viatical settlements or a viatical settlement contract or viatical settlement purchase agreement is guaranteed, approved, recommended or sponsored by the Superintendent or by the issuer of the life insurance policy which has been or will be viaticated;
 - b) representing that a return on a viatical settlement contract or viatical settlement purchase agreement is safe, low-risk or otherwise without risk;
 - c) entering into a viatical settlement contract or viatical settlement purchase agreement, the subject of which is a life insurance policy that to the knowledge of such person was obtained by means of a false, deceptive or misleading application for the life insurance policy;
 - d) employing any advertising, marketing, device or scheme or engaging in any conduct, transaction or course of business that misleads or misrepresents the nature and benefit of a viatical settlement contract or viatical settlement purchase agreement or the timing or method of payment thereunder, or that uses false, unfair or deceptive means to induce a person to enter into a viatical settlement contract or viatical settlement purchase agreement;
 - e) engaging in any conduct, transaction or course of business intending or having the effect of avoiding or not providing the written disclosure notices or prospectus required under this Regulation;
 - f) employing any advertising or marketing that is unfair, deceptive, false or misleading by fact or implication;
 - g) offering an inducement or using coercion or undue influence in order to control, direct, or secure the business of viatical settlements;
 - h) obtaining money or property by means of a misrepresentation of a material fact or by any omission to state a material fact;
 - i) misappropriating, converting to a person's own use or illegally withholding money belonging to a viator or viatical settlement purchaser;
 - j) failing to adopt and implement reasonable standards for the prompt, fair and equitable payment of the proceeds of a viatical settlement contract to viators;
 - k) failing to maintain the confidentiality of personal and medical information and protection of privacy;
 - l) harassing a viator or viatical settlement purchaser with respect to a viatical settlement contract or viatical settlement purchase agreement;
 - m) misrepresenting or concealing the health condition or life expectancy of a viator; or
 - n) misrepresenting or concealing the financial condition of a licensee, insurer or other person.
70. The following persons are exempted from section 115 of the *Insurance Act*:
- a) a person licensed under this Regulation;
 - b) an insurer or its duly authorized agent engaged in providing accelerated death benefits to its insured;
 - c) an insurer or its duly authorized agent undertaking insurance in Ontario within the meaning of the *Insurance Act*;

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- d) a person who is specifically exempted from the definition of viatical settlement provider or viatical settlement representative in section 1 and is carrying on an activity to which the relevant exemption relates.
71. The following provisions of the *Insurance Act* apply and for that purpose a reference to an insurer shall be deemed to be a reference to a person who carries on the business of viatical settlements: 5.1, 27, 28, 29, 30, 31, 55 and Part XIX.
72. The following provisions of the *Financial Services Commission of Ontario Act, 1997 Insurance Act* apply and for that purpose a reference to an insurer shall be deemed to be a reference to a person who carries on the business of viatical settlements: 25 and 26.

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