

**WRITTEN STATEMENT OF
STEPHEN B. MERCER, ESQ.**

**To Be Included in the Hearing Record of
The Subcommittee on Oversight and Investigations
Committee on Financial Services**

“Retirement Protection: Fighting Fraud in the Sale of Death.”

February 26, 2002

Preliminary Statement

My name is Stephen Mercer, and I am an attorney in private practice at the firm of Sandler & Mercer, PC in Rockville, Maryland. Today, I have been asked to testify because of my experiences representing “viators,” or people with a shortened life expectancy, who sell their life insurance policies. I have been working in the field of viatical settlements since approximately 1992, when I began to volunteer at the Whitman-Walker Legal Services Clinic here in Washington, DC. As many of you may already know, Whitman-Walker is a non-profit organization that provides a wide range of vital services to persons living with HIV and AIDS in the Washington, DC metropolitan region.

In 1994, Laura Flegel, the Director of the Legal Services Clinic at Whitman-Walker, asked me to assist her staff in drafting a chapter on viatical settlements for the Clinic’s AIDS Advocacy Manual that is published in conjunction with the DC Bar Association. At that time, the nascent business of viatical settlements was booming, but there was little information readily available to the HIV and AIDS legal community about the mechanics of the sale of a life insurance policy and the extent to which state or federal law provided any protections for the viator. My early work with the Whitman-Walker Legal Clinic in this area has continued to today, and has led to

my representation of individual viators seeking advice and guidance related to a viatical settlement, as well as viators who have been harmed by unscrupulous practices in the sale or subsequent administration of their policies.

My testimony today briefly profiles three persons whose individual experiences with viatical settlements illustrates three of the most common abuses viators suffer in the marketplace: (1) Deceptive sales practices; (2) lack of meaningful confidentiality protections before and after a viatical settlement; and (3) unreasonably low purchase offers due to unfair trade practices, greedy viatical settlement companies, and inflated commissions paid to viatical brokers and financial planners. These common abuses illustrate the immediate need for uniform regulation intended to structurally change the existing business of viatical settlements in a fundamental way. Viators, like investors, are consumers who have a stake in a robust viatical settlements marketplace, and if the business of buying and selling life insurance policies is to continue (and it should), it must be changed in certain basic ways on a national scale.

I see first hand how persons living with the stress of a terminal or chronic health condition benefit from cashing out their policies, and I desperately want viatical settlements to continue to be a practical option for persons with HIV and AIDS to increase their liquidity. At the same time, I plainly recognize that the viatical settlements business model as currently structured is in the “end game” because of the rampant abuses and fraud inflicted upon individual investors, many of whom are retirees or other persons with limited assets that can least afford to be scammed. In short, my view from the trenches is that viatical settlements offer a vast potential to

assist certain terminally and chronically ill persons, while at the same time paying a reasonable rate of return to qualified investors, but that as the marketplace is currently structured, no one should be putting a dime into it.

The structural flaw in the business model of viatical settlements is that the “middleman” in the transaction, i.e., the viatical services provider who matches a seller of a policy with an investor, has every incentive to prey upon the vulnerabilities of each but no incentive to fairly reward either party. That is, the incentive of the “middleman” or viatical settlements company, is not to efficiently match a particular viator with a qualified investor, but to maximize the commissions, administrative fees, and markups associated with the viatical transaction. It should come as no surprise that in the marketplace of viatical settlements viators are getting too little cash for their policies and investors are paying far too much. The practical solution is to create an incentive for viatical settlement companies to profit from efficiently pooling the risks and spreading the rewards of viatical settlements among many viators and investors. This will never happen however, so long as viatical settlement companies can evade federal securities law by fractionalizing ownership of individual policies among several investors.

Profiles of Abuses in the Marketplace

Client No. 1: Client 1 is a person living with HIV who had a job that offered him group life

insurance. Client 1 wanted to sell his policy, and he applied with a viatical settlements broker who told him that if he quit his job he could convert his group policy to an individual policy and sell it for \$135,000.00 (about 60% of the death benefit). Client 1 relied upon the viatical settlements broker who held itself out as an advocacy group that represents and assists terminally ill persons and seniors who need to immediately sell their life insurance policies. This broker claimed to have special knowledge and expertise that would economically benefit Client 1. The broker maintained constant contact with Client 1, gathered information about Client 1's employment and benefits, and stressed the need to move quickly because any delay could lower the selling price of the policy. The broker also assured Client 1 that he could obtain more life insurance at his next job that he would be able to sell. Client 1 quit his job, but then was devastated to find out that he could not sell his policy because his group policy prohibited conversions to an individual policy in his circumstances.

Client No. 2: Client 2 is a person living with HIV who sold his life insurance policy over 5 years ago. Since then, he has received periodic emails and postcards from the viatical services company that was administering his policy, which he always responded to. Clearly, Client 2 has outlived whatever life expectancy the viatical settlements company induced individual investors to believe. (This is the primary risk investors face). Recently, while reviewing his personal medical file at his doctor's office, Client 2 discovered that a complete set of his confidential medical records had been provided to the viatical services company on the basis of a medical release that purported to contain his signature but which he had not executed or authorized. Client 2 was further alarmed to find out that the underlying viatical sales agreement did not

contain any covenants regarding confidentiality despite the pre-sale assurances of confidentiality made by the viatical settlements broker.

Client No. 3: Client 3 is a person living with HIV who wanted to sell his life insurance policy with a death benefit of over \$400,000.00. He does not suffer from any end stage complications, and the only viatical settlement broker who would consider the purchase offered him approximately 4% of the face value, or \$18,000.00. The broker justified this price because of the scarce funds available from investors for longer term investments in policies. Nevertheless, the broker earned a 50% commission (\$9,000.00) on the purchase price, and if the rule of thumb for sales to investors is accurate (face value divided by 2.5), the selling price to the investors was in the neighborhood of \$160,000.00, leaving an approximately \$133,000.00 mark up for the viatical settlements company that “packaged” the policy for sale; plenty of cash to pay an exorbitant sales commission (usually in the neighborhood of 10%) to the financial planners who brought the individual investors to the transaction.

These Client profiles illustrate the deceptive sales practices rampant in the viatical settlements marketplace, the lack of meaningful confidentiality protections before and after a viatical settlement, and the unreasonably low purchase offers and unabashed greed of the viatical settlement companies, brokers, and financial planners involved in the transaction. These abuses harm consumers, whether they are viators/sellers of life insurance policies or individual investors. These abuses occur because the viatical settlements companies, brokers, and financial planners are driven by high fees, commissions, and administrative charges instead of a profit

incentive to reward investors with reasonable rates of return. State insurance regulation of the viatical settlements business will not alter this structure; indeed, it may have the unintended consequence of solidifying the marketplace as it currently exists. A basic restructuring of the viatical settlement transaction is necessary to remove the incentive for high fees, commissions and charges.

State Regulation of Viatical Settlements Does not Address Structural Problems in the Marketplace.

State regulation will not alter the basic dynamics of the viatical settlements transaction. To the contrary, allowing states to regulate viatical settlements as an insurance related product locks the industry in place and prevents it from making necessary changes to minimize abusive and fraudulent practices that harm viators and investors. The principal reason why there is so much opportunity for abuse and fraud is that viatical companies do not have a stake in the policies that they buy from viators and sell to investors. Viatical companies fractionalize ownership in an individual policy among individual investors, for example, a \$400,000.00 policy might be divided up among five investors, each of whom is listed with the carrier as an owner of the policy. This has adverse consequences for the viator/seller's confidentiality, and it magnifies the greatest risk to the individual investor of the viator/seller living longer than anticipated. It would be more efficient for a viatical company to be the owner of the policy, as well as many other policies, and to sell shares in the viatical company to investors. This would provide for greater

confidentiality of the viator, spread the risk of longer life expectancy over many policies, provide greater liquidity of investment for an investor, and give the viatical company a profit stake in reducing fraud in the underlying transactions. In turn, there should be more funds available to purchase policies from persons with HIV/AIDS, even though they may be enjoying longer life expectancies.

This will never happen however, because in SEC v. Life Partners, 87 F. 3d 536 (1996), the D.C. Circuit determined that directly fractionalizing an ownership interest in a life insurance policy among several investors does not constitute a “security” within the meaning of the federal securities acts. Thus, viatical companies have an incentive to avoid the scrutiny of federal securities law by maximizing the risk of the viatical settlement to an individual investor. Moreover, because the viatical companies do not share in the profit or losses of policies, they have little incentive to ferret out fraudulent transactions instead of merely flipping bad policies onto unsuspecting investors. The costs of compliance cannot be greater than the amounts consumed by the viatical companies now for commissions and fees, and in any event, the investor scams will bring an end to the market soon enough, to the detriment of prospective viators.

Conclusion

From the perspective of viators today, money is scarce to purchase life insurance policies, which

means that the viator gets paid less. Improved treatments for persons living with HIV and AIDS will result in lower offers, but it is the investment scams associated with the transaction that will bring about the end of viatical settlements. So long as viatical settlements are not subject to federal securities law these frauds will continue. Legitimizing the viatical settlements industry can only benefit prospective viators who have a stake in there being a marketplace for their policies.

With advances in treatments for HIV and AIDS, investors should be wary of getting locked into a fractional interest in a single life insurance policy in the event an individual insured lives longer than is expected. However, HIV/AIDS continues to drastically shorten the life expectancy of individuals, and if investors could spread the risk of an individual insured living longer over a larger pool of viators, and realize a secondary market for the sale of their shares to increase liquidity before the investment matures, more funds could be available to purchase policies. This will never happen, however, because viatical settlement companies can now avoid compliance with federal securities law by making the individual investor a fractional owner of a particular policy, instead of the viatical settlement company owning the policy and selling shares to investors. Only in the latter scenario does the viatical settlement company have an actual stake in reducing fraud in the transaction.

In summary, while states have a role in regulating viatical settlement companies, the primary regulatory tool to reshape the market is application of federal securities law. Federal regulation will put out of business those that should not be there in the first place, and bring into the market

companies that will benefit viators and investors.

Thank you for the opportunity to present my viewpoint of these matters.

**THE DISTRICT OF COLUMBIA BAR
PUBLIC SERVICE ACTIVITIES CORPORATION**

WHITMAN-WALKER CLINIC, INC.

AIDS ADVOCACY

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*We dedicate this to all of our clients, and to the memory of Gordon Braithwaite, John Rosenberg,
Shirley Ann Sanders, and our long-time friend and fighter, Danny Reed.*

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VI. VIATICAL SETTLEMENTS*

by **Stephen B. Mercer, Esq., and Elizabeth A. Seaton, Esq.****

Note that Whitman-Walker Clinic Legal Services staff and its volunteer attorneys can provide general information and counseling regarding viatical settlements. However, the staff and volunteer attorneys cannot provide detailed review of specific proposed viatical contracts, give legal advice as to whether an individual should enter into a viatical contract or negotiate with viatical settlement companies on behalf of a client.

An individual covered by a life insurance policy may be eligible for a variety of “living benefits” during his or her lifetime. Common benefits available to policyholders include cash surrender payments, endowment payments, annuities, and increasingly, accelerated or advanced death benefits.

Since the late 1980s and up to the middle of 1996 when new drug treatments for people with AIDS began to extend life expectancy rates, many people with advanced HIV infection used less widely recognized methods such as viatical settlements and third party loans secured with a life insurance policy to obtain current income. These tools are still available today for individuals with shortened life expectancies. But as new drug therapies have increased life expectancy rates for people living with AIDS, the availability and value of viatical settlements has decreased, and concerns regarding unscrupulous individual investors and issues of medical confidentiality have increased.

A viatical settlement is a contract between the owner of a life insurance policy (the viator) and a third party (the viatical settlement company). Generally, the viator/policyholder is also the individual whose life is insured by the policy (although the holder of the policy may be a spouse or business partner of the insured, or the group insurance plan itself). The viatical settlement company agrees to pay a discounted portion of the face value (generally between 50 percent and 80 percent of the full benefit) in exchange for ownership and control of the viator’s policy and its benefits. To be eligible for a viatical settlement, the insured must be seriously ill and have a short life expectancy (on average not more than one or two years), and the

*This chapter was last updated in December 1998.

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policyholder must not be barred by language in the insurance policy from assigning policy benefits to a viatical settlement company.

Because people living with HIV face staggering financial pressures, they frequently contact the Whitman-Walker Clinic Legal services program for information on viatical settlements. This chapter discusses the components of a standard viatical settlement. Please note that in 1997, the Virginia legislature enacted the Viatical Settlements Act, Va. Code Ann. §§ 38.2-5700 to 5707 (Supp. 1998), to deal comprehensively with the business of viatication. See Section B, below, for details on the new law. Neither the District of Columbia nor Maryland has similar provisions.

This chapter also explains the common effects of viatical settlements and offers suggestions for alternatives to viatication. Although a viatical settlement may be a valuable lifeline for many clients, it is not always the best option. Clients should be thoroughly advised of the viatical settlement process, its consequences, and other available options. Attorneys should make clients aware of the availability of certified financial planners to assist people in preparing for the financial consequences of long-term illness.

A. DISTRICT OF COLUMBIA AND MARYLAND

As of the date of this printing, no regulations govern viatical settlements in these two jurisdictions. Before consulting with a client on this topic, advocates should check to see if new regulations have been promulgated. Several other states have passed regulations on viatical settlements.

B. VIRGINIA VIATICAL SETTLEMENTS ACT OF 1997

In 1997, Virginia enacted the Viatical Settlements Act, Va. Code Ann. §§ 38.2-5700 to 5707 (Supp. 1998). The law requires licensure of viatical settlement brokers, and protects the insured through provisions prescribing disclosure, informed consent, unconditional refunds, and other measures. In addition, Virginia promulgated regulations to implement the new law that can be found in the Virginia Administrative Code at 14 VAC 5-71-10 (1998) *et seq.*

1. PROVIDERS AND BROKERS MUST BE LICENSED

Under the statute, as of January 1, 1998, people acting as viatical settlement providers and/or brokers must be licensed by the state. Va. Code Ann §§ 38.2-5701 to 5703. The Virginia Bureau of Insurance, a division of the State Corporation Commission, is responsible for issuing licenses to providers and brokers. 14 VAC 5-71-30. Counsel assisting a client should ask to see the provider's or broker's license (or at least his or her application for a license).

2. STATE APPROVAL OF CONTRACTS

Also beginning January 1, 1998, viatical settlement contract forms must be approved by the state before use by a provider or broker. Va. Code Ann. § 38.2-5704. You should ask whether the provider's or broker's form has been approved, and ask to see documentation. In addition, the statute allows for the state to establish standards for evaluating the reasonableness of payments under viatical settlement contracts. Va. Code Ann. § 38.2-5706. Pursuant to regulations outlined in the Virginia Administrative Code, a reasonable return for viaticating a life insurance policy is determined by the insured's life expectancy at the time of viatication. 14 VAC 5-71-60. The regulations require a minimum percentage of face value of the policy depending on the insured's life expectancy. *Id.* The prescribed percentage may be reduced by 5% for a policy written by an insurer who is rated less than the highest four categories by at least two rating agencies or by any outstanding loans received by the viator. *Id.* Currently, the Virginia regulations define reasonableness as follows:

<u>Insured's Life Expectancy</u>	<u>Minimum Percentage of Face Value</u>
Less than 6 months	80%
At least 6 but less than 12 months	70%
At least 12 but less than 18 months	65%
At least 18 but less than 24 months	60%
Twenty-four months or more	50%

3. PROVIDERS/BROKERS REQUIRED TO DISCLOSE KEY INFORMATION

Under the new law, viatical settlement providers must also comply with comprehensive disclosure provisions. Much of the information that is required to be disclosed, especially related to taxes, outstanding debts, and public benefits, is the same information that Whitman-Walker Legal Services has been providing to clients for years. The disclosures must take place both at the time of solicitation for the viatical settlement, and at the time of contract signing. Va. Code Ann. § 38.2-5705. The provider also must retain in its files a signed disclosure form from the insured. § 38.2-5705 (A.6).

Providers now must inform people seeking to viaticate a policy that there are alternatives to viatication {§ 38.2-5705 (A.1)} and that proceeds may be taxable {§38.2-5705 (A.2)}, may be subject to the claims of creditors {§ 38.2-5705 (A.3)}, and may affect their eligibility for Medicaid and other public benefits {§ 38.2-5705 (A.4)}. The provider must also inform the insured of the date by which the funds will be available and the source of those funds. § 38.2-5705 (A.6). A model disclosure form is provided in the Virginia Administrative Code at 14 VAC 5-71-30. However, a provider or broker may use a different form as long as it is "substantially similar" which means that it must address each and every element contained in the model form. 14 VAC 5-71-30.

4. MEDICAL INFORMATION MUST BE KEPT CONFIDENTIAL

Medical information solicited or obtained by a provider or broker must be kept confidential and only released as provided by law. § 38.2-5705 (B).

5. PROTECTIONS AGAINST COERCION

Before completing a transaction, the insured must provide a doctor's written statement that she or he is "of sound mind and under no constraint or undue influence." § 38.2-5705 (B). The client also must sign, and another person must witness, a document in which the viator consents to the contract; acknowledges his or her illness; represents that he or she understands the viatical process, releases his or her medical records, and acknowledges entering the contract freely and voluntarily. *Id.*

6. INSURED MAY RESCIND CONTRACT

A key provision of the Virginia Viatical Settlements Act is that the insured person has the unconditional right to rescind within 30 days of execution of the viatical settlement agreement, or within 15 days of the receipt of the proceeds, whichever is sooner. § 38.2-5705 (C). The provider must inform the person of this right at the time of solicitation for the viatical settlement, and again at the contract signing; the provider also must retain in its files a signed disclosure form from the insured. §§ 38.2-5705 (A to A.6).

7. REMEDIES

Violations of requirements imposed by the Viatical Settlements Act are considered unfair trade practices. Virginia law provides penalties, remedies and enforcement provisions that address unfair trade practices; these can be found at Va. Code Ann. § 38.2-200 *et seq.* Temporary and permanent injunctions are available; the enforcement of which may be by civil penalty or imprisonment. § 38.2-220. Also, for each knowing and willful unfair trade practice, a fine of up to \$5,000 may be imposed; for other violations the fine is an amount up to \$1,000. Va. Code Ann. § 38.2-218. Other remedies may be available as well.

C. FEDERAL REGULATION BY THE SECURITIES AND EXCHANGE COMMISSION HAS NOT BEEN APPROVED

The Securities and Exchange Commission's (SEC) attempt to regulate certain forms of investments between buyer-brokers of life insurance policies and investors was rejected by the U.S. Court of Appeals for the D.C. Circuit. *See SEC v. Life Partners*, 87 F.3d 536 (D.C. Cir. 1996). Thus, the viatical settlement process is not subject to SEC regulation.

D. VIATICAL SETTLEMENT PROCESS

To advise clients properly, attorneys should have a thorough understanding of the mechanics of the viatical settlement process. Companies generally will pay between 50 and 80 percent of the policy's face amount. However, recent breakthroughs in the fight against AIDS have driven down the prices companies are offering to pay for policies, and driven many institutional investors out of the viatical marketplace. The perception among investors that

AIDS could become a chronic manageable disease is directly reflected by the lower prices being offered for policies as companies encounter greater risk to earn a 15 to 20 percent rate of return. Beyond a life expectancy determination, companies also base the amount paid on the valuation of a viator's life insurance policy, and the cost of capital to the viatical settlement company. The lawyer, therefore, should be familiar with life insurance policy valuation and issues relating to life expectancy determination.

Clients interested in pursuing a viatical settlement should speak with several companies, or a reputable broker, and compare proposed payments and other procedures and policies. Viatical settlement companies consider a wide variety of factors in determining whether to viaticate and for how much. Companies weigh pricing criteria differently, so different companies may offer varying prices for the same policy. Therefore, attorneys should encourage clients to contact as many companies as possible before settling on one. However, in light of advances in medical treatments for AIDS, companies may be reluctant to quote possible prices absent an extensive medical evaluation of the viator.

Whitman-Walker Legal Services does not endorse or recommend any particular viatical settlement company. Volunteer attorneys should not ever recommend a particular viatical settlement company to a client. Furthermore, as is discussed in this chapter, the option of viatical settlement is not appropriate or beneficial to all clients, and should be considered in relation to other options for each client.

Once a client has selected a viatical settlement company, the process typically takes from six to eight weeks to complete and involves the following steps:

1. Release of medical records by the insured to the viatical settlement company (accompanied by a life expectancy determination for the client made by his physician);
2. Provision of information about the insurance policy to the viatical settlement company or seller-broker (in either case the information will be confirmed with the insurer);
3. Presentation of an offer by the viatical settlement company;
4. Execution of closing documents, purchase agreement, and assignment of policy ownership, and placement of funds into escrow; and
5. Recordation of assignment by the insurer and release of funds to the viator.

E. ISSUES IN STRUCTURING VIATICAL SETTLEMENTS

1. VALUATION OF LIFE INSURANCE POLICIES

Factors affecting valuation of a life insurance policy include: the type of policy; its face amount; any applicable period of contestability; whether the policy contains clauses restricting conversion or assignment; the cost of future premiums; lack of financial provisions for insured's dependents; and the rating and death-claims paying record of the insurer.

The two basic types of life insurance policies relevant to valuation are individual policies (term or whole) and group policies (employment-related). Below is a checklist of questions relevant to the valuation of a life insurance policy.

a. Is the policy an individual or group plan? Generally, an individual policy in the same face amount as a group policy will be valued higher because there are usually fewer parties who may affect the salability of the policy. The viatical settlement company perceives less risk when the owner of the policy, who is also the insured, makes an irrevocable assignment of all ownership rights.

b. Has the period of contestability passed? Typically this is a two-year period from the issuance of the policy. See Chapter IV, "Insurance and Employee Benefits," for information about periods of contestability in local jurisdictions. Verify that premiums since the original issuance have been paid. If a lapse occurred and the policy was reissued after past due amounts were paid, a new period of contestability likely will follow. Generally, policies subject to a contestability clause are not salable.

c. What is the face amount of the policy? Some viatical settlement companies will not purchase policies below a specified amount (although policies with a face amount of less than \$5,000 have been purchased) because of the transaction costs, which include medical and legal advice. Policies with a face amount of \$100,000 or more are those that are typically viaticated. Viatical settlement companies with available capital often prefer to invest in these larger policies because the transaction costs are lower than they would be if several smaller policies were viaticated. Clients with large insurance policies should consider the option of viaticating only a portion of their policy and retaining the balance for later viatication or as insurance to be paid to a beneficiary upon their death. See Section G.3, below, page VI-12.

d. Is there a disability waiver for payment of premiums? The existence of a waiver of premium reduces the cost to the viatical settlement company, and the viator/insured should benefit from it. If the insurer must be contacted to verify the existence of a disability waiver, you should first know whether the policy is still subject to a contestability clause. This is because the existence of a disability is not information that should be shared with the insurer if the policy might be successfully contested. An additional concern is whether the disability waiver needs to be recertified at regular intervals. If so, this may reduce the value of the policy to the viatical settlement company.

e. Does any clause restrict assignment? This issue usually arises in the context of group insurance but may also be present in an individual policy. Sometimes an insurer may waive this clause at the request of the policy owner; but again, you should know whether the period of contestability is in effect before sharing information about a disability with an insurer. If the policy contains a clause restricting assignment and the insurer refuses to waive the clause, then there is little chance the policyholder will be able to viaticate the policy.

f. Does the policy have a cash value? Does it have additional riders or acceleration of benefit provisions that must be addressed? Each of these issues may affect the price paid by the viatical settlement company. However, a high cash value or good accelerated benefits provisions might make viatication unnecessary. For a more complete discussion on alternatives to viatical settlements, *see* Section G, below, starting on page VI-11.

g. Has the insured made adequate financial provisions for dependents? Even with releases secured from currently named beneficiaries, a viatical settlement company may be reluctant to purchase a policy when the insured's dependents may later initiate legal action regarding the sale of the policy.

h. What is the rating of the insurer? Counsel for the client should review the insurer's rating in *Best Insurance Reports* (available in most public and law libraries). A higher rating for the insurer means less risk to the buyer and, therefore, more money for the seller.

i. Does the group policy limit whom may be designated as the beneficiary? Some group plans do not permit the participant in the group to name a corporate beneficiary or a beneficiary who is not a family member or relative. Such a restriction, similar to the bar on assignments discussed in Section E.1.e, above, will make viatication impossible unless the insurer agrees to waive this limitation.

j. Is the group policy a life and medical combination? Clients should be counseled not to risk the loss of medical insurance. Medical insurance is likely an asset of much greater value to a person living with HIV than the proceeds of a viatical settlement.

k. Is the group policy a federal or military policy? Many of the largest government and military group policies have some prohibition on assignments (other than as a gift). Servicemen's Group Life Insurance (SGLI) and Veterans' Group Life Insurance (VGLI) currently prohibit assignment for value to a viatical settlements company. 38 C.F.R. § 9.6 (1998). However, the Federal Employees' Group Life Insurance Program (FEGLI) allows assignment for value; current regulations for assignment of life insurance proceeds for FEGLI are codified at 5 C.F.R. § 870.901 *et seq.* (1998). These regulations include procedures for assigning life insurance policies and delineate the rights of insured individuals after assignment occurs.

2. DETERMINATION OF LIFE EXPECTANCY

The primary factors affecting the determination of an insured's life expectancy are the ad hoc judgments of the insured's doctors and viatical settlement company's physicians. No actuarial tables for HIV symptoms currently exist. The practitioner should press the insured's physician for a specific life expectancy determination, recognizing that the shorter the term, the higher the price a viatical settlement company will pay. In this regard, a viator's viral load will probably be of greater significance than his CD4 (T-cell) count. To determine eligibility, the insured must release his or her medical records to the viatical settlement company. These records should reflect any current medical conditions that may affect a life expectancy determination. A client's confidentiality concerns related to re-disclosure of those records should be taken into account and addressed by counsel.

3. VIATICAL COMPANY'S COST OF CAPITAL

Viatical companies have different sources of capital. Some operate with a line of credit or commercial loan; other companies pool funds from individual investors. In any event, an individual viatical company may be in a position where it needs to buy more policies to supply investors, or may have limited funds. These differences in viatical companies' costs of capital are illustrated by the large variances in offering prices often encountered by clients who obtain multiple bids. The viator usually should be advised to contact at least three to five viatical settlement companies or to engage the services of a reputable seller-broker. If the client deals directly with the viatical settlement companies, the practitioner may want to handle the final negotiations himself to avoid the situation where a client with a shortened life expectancy must argue that his life expectancy is less than that determined by the viatical settlement company. Finally, be aware of the current marketing trend for viatical settlement companies to offer "value-added services," such as supplying prescription drugs to viators. These are marketing devices designed to make a viatical settlement company more attractive without necessarily paying more cash to the viator.

F. IMPACT OF VIATICAL SETTLEMENTS

For people living with HIV, receiving cash from a viatical settlement will affect at least three important areas: (1) access to public benefits (relating to both income and medical care); (2) income, estate, and gift taxes; and (3) debt management and planning for a possible bankruptcy filing. Attorneys should make their clients aware of all the potential consequences of a viatical settlement and help them determine whether viatication would be beneficial in light of those issues. If it is not, the practitioner should help the client consider possible alternatives to viatical settlements, described in Section G, beginning on page VI-11.

1. PUBLIC BENEFITS

Public benefits provide an essential lifeline to many Whitman-Walker clients. These services provide cash, food, and medical assistance to people living with HIV and AIDS. Access to these programs can literally be a matter of life and death for clients. Advocates must be certain of the impact a viatical settlement will have on benefits the client may need in the future as well those benefits the client currently receives. Counsel should review Chapter VII, "Public Benefits," for a discussion of various assistance programs and their eligibility guidelines. In the

event that the attorney has any questions regarding the impact of viatical settlements on public entitlements, please contact Whitman-Walker Legal Services for assistance.

a. Non-means-tested programs. Eligibility for some benefit programs such as Social Security Disability Insurance (SSDI) and Medicare are not based on an applicant's income or assets. Eligibility for both SSDI and Medicare is based on employment history; current income and asset criteria are irrelevant. Viatical settlements will have no impact on an applicant's eligibility for either of these programs.

b. Means-tested programs. As a general proposition, the proceeds from viatical settlements will affect the viator's eligibility for means-tested programs. During the month an individual receives the proceeds from a viatical settlement, the amount of the settlement is considered income. *See Arnfeld v. U.S.*, 163 F. Supp. 865 (Ct. Cl. 1958); *Gallun v. Commissioner*, 327 F.2d 809 (7th Cir. 1964). In the following months, unspent balances from a viatical settlement will be considered as an asset. It may be possible for a client to minimize the period of time during which eligibility is lost by using viatical settlement proceeds to prepay known expenses (*e.g.*, rent, mortgage, car loan payments, or other debt).

The potential right to receive money by entering into a viatical settlement is not considered countable income or resources. Similarly, an applicant for or recipient of federal benefit programs cannot be required to enter into a viatical settlement as a condition of eligibility. However, remember that any life insurance policy that can be surrendered for cash will always be counted as an asset (in the amount of the cash surrender value, not the face value) for purposes of any means-tested benefit program.

Among the means-tested programs of concern to people with HIV/AIDS who are deciding whether to access living benefits are Supplemental Security Income (SSI), Medicaid, Temporary Assistance to Needy Families (TANF), and veterans' benefits (medical and pension). Each program calculates income and asset eligibility differently. *See* Chapter VII, "Public Benefits," for details on many of the relevant means-tested programs.

2. TAXES

Section 331 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) treats the proceeds of certain accelerated death benefits and viatical settlements as an amount paid under the life insurance contract as though the insured had died. In other words, the proceeds of certain transactions are no longer considered taxable income. However, to receive this tax-exempt treatment, a viatical settlement must meet certain stringent requirements. For example, the viatical settlement company involved must be licensed in the state where the viator resides. (If the viator lives in a state that does not require the viatical settlement companies to be licensed, the company must satisfy the disclosure and general requirements of the Viatical Settlements Model Act of the National Association of Insurance Commissioners (NAIC).)

In addition, to be tax-exempt under § 331, the payment for a viatical settlement must be reasonable, as that term is defined by the NAIC's minimum pricing regulations. For example, the NAIC's Viatical Settlements Model Regulations require that a viator with an 18 to 24-month

life expectancy receive 60 percent of the face value of his or her policy. But if prices offered for policies continue their downward trend, this minimum payment requirement may unintentionally disqualify large numbers of viatical settlements from the protections of the Health Insurance Portability and Accountability Act. Counsel should also explore whether the insured individual's policy permits its prepayment if the insured becomes chronically ill; to be tax-exempt under the act, any payment must be used for qualified long-term care services.

The primary tax concerns for recipients of viatical settlements not covered under the 1996 law are federal income tax and estate tax. If they do not qualify under the HIPAA, viatical settlements are treated as proceeds of the sale of life insurance and must be included in calculations of ordinary income. *Arnfeld v. United States*, 163 F. Supp. 865 (Ct. Cl. 1958); *Gallun v. Commissioner*, 327 F.2d 809 (7th Cir. 1964). Only proceeds payable by reason of the insured's death are not included in the beneficiary's gross income. I.R.C. § 101, 26 U.S.C. § 101 (1994). Applicable state tax issues also must be considered, but their impact is relatively minor compared to the potentially severe federal tax liability.

Upon an insured's death, amounts received for a viatical settlement may be included in the decedent's estate for estate tax purposes. If the decedent has assigned or gifted all rights in the policy within three years of his or her death, the viaticated amounts will be considered part of the decedent's gross estate. I.R.C. § 2035(d)(2), 26 U.S.C. § 2035(d)(2) (1994).

There are two key strategies to minimize the taxation of accelerated death benefits and viatical settlements. The first is to schedule the receipt of proceeds in conjunction with an offset to taxable income, such as medical bills. The second is to divide the insurance policy into smaller policies that are accelerated or viaticated over time so that the proceeds flow to the client in more than one taxable year. This strategy may also result in a better return on those portions of the policy that are sold when there is an increasingly shortened period of life expectancy. The practitioner, however, must exercise caution when having a larger policy divided into smaller policies to avoid any new periods of contestability attaching to the smaller policies. Otherwise, the smaller policies will likely not be saleable during that time (*see* Section E.1.b, page VI-6 above).

3. CREDITOR/DEBTOR AND BANKRUPTCY ISSUES

Proceeds from viatical settlements are subject to the claims of creditors. Proceeds from potential viatical settlements, however, are not subject to the claims of creditors. If a client receives viatical settlement proceeds soon before or soon after filing for bankruptcy, those proceeds might be subject to creditors' claims, notwithstanding the bankruptcy. *See* Chapter XI, "Debtor's Rights and Bankruptcy Issues," for a more complete discussion of this topic.

G. ALTERNATIVES TO VIATICAL SETTLEMENTS

There are several alternatives to viatical settlements which clients and advocates should consider before the client decides to viaticate. Some of these options may help clients avoid the common problems that viatical settlements can create with respect to tax liability, entitlements eligibility, or debt problems. All options should be reviewed thoroughly before pursuing a course of action.

1. ACCELERATED DEATH BENEFITS (ADB)

Many life insurance policies offer policyholders some type of accelerated death benefit in lieu of paying a benefit when the insured dies. The criteria for determining the amount of an ADB are similar to those for viatical settlements (*see* Section B.2, starting on page VI-3). Receiving an ADB has all the same tax, debt and entitlement eligibility impacts as a viatical settlement (described in Section F, beginning on page VI-8). However, the policyholder's insurance company may pay more in ADBs than the viator could receive from a viatical settlement company. ADBs may also be a policyholder's only option if the policy contains significant restraints on assignment, transfer, or viatication. ADBs also may be available if a policyholder requires extraordinary or long-term medical care. The client and advocate should carefully review the policy to determine when and how ADBs can be accessed.

2. THIRD-PARTY LOANS

Clients should consider the possibility of obtaining a third-party loan by using the life insurance policy as collateral and the primary method of repayment. In this scenario, a client would contract to receive a cash loan from a third party (generally a friend or relative). In exchange, the third party would become the beneficiary of the life insurance policy.

This approach has some distinct advantages over a viatical settlement. A loan is not considered income for tax purposes. A loan would also not constitute income when evaluating a client's eligibility for public benefits programs.

However, a loan also entails negative considerations. First, third-party loans that are not between friends or relatives generally permit the lender to assign its interest in the policy to another party who may or may not have the liquidity necessary to satisfy future loan requests. Second, loans can be costly. The price for a commercial viatical loan will usually be similar to the price of a viatical settlement, plus a significant loan origination fee. Third, if the loan is "friendly," the insured would need to locate a third party willing to enter into such an agreement (as noted above, usually a friend or relative). Fourth, although a loan is not considered income for public benefits purposes, the proceeds will be considered as an asset. Finally, creditors may attach unspent loan proceeds.

3. PARTIAL VIATICATION

A client might benefit from splitting a single policy into smaller policies to be sold over a period of time, especially if the face amount is \$100,000 or more. This method has significant tax advantages and also should result in greater returns on those portions of the policy sold when life expectancy may be shorter. However, as mentioned above, the client and advocate must use extreme caution when dividing a policy to avoid subjecting the insured to any new underwriting

problems such as periods of contestability regarding the smaller policies. See Section E.1.b, page VI-6 and Chapter IV, “Insurance and Employee Benefits.”