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Alexander D. Eremia

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VIATICAL SETTLEMENT AND ACCELERATED DEATH BENEFIT LAW: HELPING TERMINAL, BUT NOT CHRONICALLY ILL PATIENTS

*Alexander D. Eremia**

INTRODUCTION

When serious illness strikes, financial resources are often drained leaving the sick or their families to deplete their financial resources, scrambling to sell investments, or digging into retirement funds. Even those with health insurance often find their coverage insufficient to pay for all necessary medical expenses.¹ When coupled with the loss of employment, serious illness may destroy the dreams or hopes of many individuals and families. In an effort to ease the financial burdens imposed on the terminally² or chronically ill,³ the Health Insurance Portability and Accountability Act of 1996 (HPAA) was amended.⁴

*Staff, DEPAUL J. HEALTH CARE L., B.S., Biopsychology, University of California, Santa Barbara, 1991; J.D. (Cand.), DePaul University, 1997.

¹See Kathryn Sullivan & Joann Canning, *Life Benefits from Insurance may be Taxable*, 21 TAX'N FOR LAW. 86, 86 (1992) (stating that major medical and hospitalization plans will pay some, but not all, of the medical expenses associated with prolonged hospitalization).

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

³26 U.S.C.A. § 101(g)(4)(B) (1997) (chronically ill individuals are those described by section 26 U.S.C.A. § 7702B(c)(2) (1997), except that such term shall not include a terminally ill individual as having been certified by a licensed health care practitioner within the preceding twelve month period (i) as being unable to perform (without substantial assistance from another individual) at least two activities of daily living for a period of at least ninety days due to a loss of functional capacity; or (ii) as having a level of disability similar (as determined under regulations prescribed by the Secretary of Health and Human Services) to the level of disability described above; or (iii) requiring substantial supervision to protect such an individual from threats to health and safety due to severe cognitive impairment).

⁴Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 29 U.S.C., 42 U.S.C., 18 U.S.C., 26 U.S.C.); see also Russell J. Heron, Note, *Regulating Viatical Settlements: Is the Invisible Hand Picking the Pockets of the Terminally Ill?*, 28 U. MICH. J.L. REF. 931, 941 (1995) (stating the portion of HPAA relating the tax-free treatment of accelerated death benefits and viatical settlements was initially proposed by Sen. Kassenbaum as part of the Republican Contract with America Tax Relief Act

Effective January 1, 1997, certain portions of the HPAA grant terminally or chronically ill individuals with life insurance policies a reprieve from the harshness of their illness⁵ by offering a tax-free disbursement of the policy benefits while still living.⁶ Although ordinarily reserved for the survivors of the insured, life insurance benefits are often needed by the policyholder to finance current needs.⁷ When such benefits are distributed directly by an insurance carrier, they are called Accelerated Death Benefits (ADB).⁸ When a third party regularly engaged in the purchase or assignment of such policies makes the distribution, the distribution is called a "viatical settlement."⁹

Prior to the enactment of the HPAA, such pre-death distributions were taxed as if they were gross income to the recipient.¹⁰ Thus, other sources of money such as home equity loans or loans from relatives were a more appealing method for obtaining needed funds.¹¹ As a result of HPAA, industry experts have speculated that tax-free treatment will make

of 1995).

⁵26 U.S.C.A. § 101(g) (1997).

⁶See generally *id.* (previously such pre-death disbursements were considered gross income and were taxed at ordinary income rates which effectively reduced the total income to the recipient).

⁷See Wesley S. Caldwell, et al., *Innovation and Controversy: Viatical Arrangements and Accelerated Death Benefits*, 172-NOV J.J. Law. 39, 39 (Oct./Nov. 1995) (stating that the insured occasionally has a greater need for the policy's benefits than her beneficiaries); see also Sullivan, *supra* note 1, at 86 (stating that disability income generally is not enough to cover everyday expenses and medical expenses not covered by an employer's policy).

⁸Herron, *supra* note 4, at 971; see also Ronald S. Ross, *Accelerated Death Benefits Tax Treatment Eased*, 23 TAX'N FOR LAW. 229, 229 (1995) (stating that an accelerated death benefit generally allows a life insurance policy holder to receive some or all of the death benefits before death).

⁹See Caldwell, *supra* note 7, at 41 n.1 (explaining "viatical" is from the Latin word viaticum, which defined the money and supplies given to a traveler or Roman soldier before a long journey or adventure. Viaticum is also the name of the host given to a communicant during the Roman Catholic sacrament of extreme unction); see also John F. Blake, *Life Insurance Proceeds Can be Received Tax Free Prior to Death Under New Prop. Regs*, 79 J. TAX'N 156, n.3 (1993).

¹⁰See 26 U.S.C.A. § 61(a) (1997) (gross income means all income from whatever source derived.); cf. Ross, *supra* note 8, at 229 (stating that benefits paid even one minute before death are taxed as gross income, with the exception of the policyowner's investment in the policy); but see 26 U.S.C.A. § 101(a)(1) (1997) (the proceeds of a life insurance policy are not included as gross income if they are paid by reason of death of the insured).

¹¹David Flaum, *Money-Tax Law Changes May Ease Medical Expenses*, COM. APPEAL (Memphis), Jan. 5, 1997, at C1.

viatical settlements and ADBs a viable estate-planning tool for the terminally and chronically ill.¹²

Unfortunately, due to the nature of viatical settlements and ADBs, and the restrictions imposed and the uncertainties caused by HPA, its intended usefulness is limited. This article summarizes and analyzes the portion of HPA relating to the tax treatment of ADBs and viatical settlements. It also provides information on the industry and concludes that while there is extreme opportunity for growth in the industry, HPA will not make ADBs or viatical settlements a viable option for every terminally or chronically ill patient.

BACKGROUND

In 1988, viatical settlements and ADBs were virtually non-existent.¹³ In response to the Acquired Immune Deficiency Syndrome (AIDS) epidemic, companies called Viatical Settlement Providers (VSPs) emerged offering AIDS patients pre-death disbursements in exchange for a beneficial interest in the patients' life insurance policies.¹⁴ Shortly thereafter, many life insurers began offering ADB options to compete with the increasing popularity of viatical settlements.¹⁵ Although similar in effect, viatical

¹²*Life Insurance: Health Reform Law Makes Viaticals More Attractive For Terminally Ill*, BNA HEALTH CARE DAILY, Sept. 20, 1996, at d10 [hereinafter *Life Insurance*]; see also Lynn Asinof, *Making Strides: Tax Change Could Make Life Easier For People With Chronic or Terminal Illness*, CHI. TRIB., Oct. 4, 1996. (stating that the new law makes viatical settlements and accelerated death benefits a much better deal).

¹³Jennifer Berner, *Beating the Grim Reaper, or Just Confusing Him? Examining the Harmful Effects of Viatical Settlement Regulation*, 27 J. MARSHALL L. REV. 581, 583 (1994); see also Caldwell, *supra* note 7, at 39 (claiming that viatical arrangements were first offered in 1988 by Miami-based Living Benefits, Inc.); but see Abbie Crites-Lenoni & Angelle S. Chen, *Money for Life: Regulating the Viatical Settlement Industry*, 18 J. LEGAL MED. 63, 65 (1997) (claiming that Living Benefits Inc., of Albuquerque, New Mexico was the first VSP, purchasing its first policy in 1989); Cf. Malcom E. Osborn, *Rapidly Developing Law on Viatical Settlements*, 31 WAKE FOREST L. REV. 471, 495 n.6 (1996) (stating that Europeans have used viatical settlements before they were developed in the United States).

¹⁴See Steven L. Severin & Stephen R. Corrick, *Sale Treatment for Viatical Settlements of Life Insurance*, 82 J. TAX'N 35, 35 (1995) (stating that the AIDS epidemic is the primary cause of the growing interest in viatical settlements and accelerated death benefits); see also Berner, *supra* note 13, at 583 (stating that the viatical settlement market emerged in response to the high cost of living with AIDS).

¹⁵See Caldwell, *supra* note 7, at 39. But see Dennis J. Nirtaut, *Ask a Benefit Manager: Living Benefits Can Offer Flexibility and Security*, CRAIN'S BUS. INS., May 22, 1995, at 23 (estimating that although not widespread, as many as 25 percent of employers' life insurance plans

settlements and ADBs differ in many respects. These inherent differences and the lack of industry regulation have caused critics of HPAAs to complain that it is too easy for VSPs to exploit patients during their most vulnerable moments.¹⁶ Many states, however, have recently adopted legislation to regulate viatical settlements, which greatly diminishes the possibility for fraud or abuse.¹⁷ Despite the controversy, many terminally ill patients have found ADBs and viatical settlements to be a functional means of acquiring needed cash. As word spreads of these options,¹⁸ practitioners will increasingly be called upon to answer their clients' questions regarding the sale or assignment of life insurance policies.

Viatical Settlements

Viatical settlements are created when a terminally ill policy holder (Viator) assigns or sells her interest in a life insurance policy to a VSP in exchange for an immediate cash settlement worth less than the face value of the policy.¹⁹ Upon receipt, the Viator may use the proceeds of the sale to pay medical bills, housing costs, or to do virtually anything she wishes.²⁰ Once the policy is sold or assigned, the VSP names itself as the

may have ADB provisions in them and interest in such plans is increasing); Cf. Brian R. Ball, *Pre-Death Benefits Shift as AIDS Fades*, BUSINESS FIRST OF COLUMBUS, vol. 13, Iss. 40 (May 30, 1997) (stating that 25 percent of universal and variable life policies now have accelerated benefits riders, while only 5 percent of all life insurance policies now have them).

¹⁶See Herron, *supra* note 4, at 968-969 (noting that these people are probably undergoing greater stress than they have ever experienced, and that the unequal bargaining power of viatical settlements is a powerful source of exploitation).

¹⁷At least 20 states currently have some form of legislation regulating the viatical industry (California, Connecticut, District of Columbia, Florida, Illinois, Louisiana, Michigan, Minnesota, Mississippi, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin) and 11 states currently have viatical regulation legislation pending (Alabama, Arkansas, Delaware, Hawaii, Maine, Massachusetts, Missouri, Montana, New Hampshire, Pennsylvania, and South Carolina) [hereinafter State Legislation].

¹⁸*Terminally Ill Using Insurance Policies to Enhance Life*, SALT LAKE TRIB., Sept. 7, 1997, at B2 (noting that popular actor, Robert Urich, has just become a spokesperson for Utah-based "Lifewise" to share his story of surviving cancer and promote the sale of life insurance policies).

¹⁹Herron, *supra* note 4, at 933; see also Shanah D. Glick, *Are Viatical Settlements Securities Within the Regulatory Control of the Securities Act of 1933?*, 60 U. CHI. L. REV. 957, 964 (1993); see also Berner, *supra* note 13, at 584 (stating that a viatical settlement is when a terminally ill person (Viator) sells her life insurance policy to a viatical settlement company or an individual purchaser for a cash settlement).

²⁰Berner, *supra* note 13, at 616 n.4.

beneficiary of the policy²¹ and usually assumes responsibility for paying the policy premiums.²² Upon the death of the Viator, the VSP collects the entire face value of the policy from the insurance company.²³ In many instances, the VSP will profit from this transaction by collecting the difference between the face value of the policy and the discounted settlement amount, minus the administrative costs. If the discount on the settlement is low enough and the administrative costs are reasonably contained, the profit can exceed 40 percent.²⁴

The amount of profit, however, is completely dependent on how long the Viator lives. Since the return is fixed, the annualized rate of return depends on the length of the investment.²⁵ If the Viator dies before the predicted date, the VSP's profits will be greater than if the Viator dies after the predicted date.²⁶ If the Viator lives too long beyond the predicted life expectancy, the VSP may incur a net loss because the amount of discount built into the settlement may not be sufficient to cover the continuing premium payments on the policy.²⁷ Therefore, since the calculation of the disbursement is integrally tied to the prediction of life expectancy, an accurate diagnosis of the terminal illness is necessary to insure a profitable transaction.

Because VSPs effectively wager on and profit from the lives of the terminally ill, some complain that this is a "ghoulish industry" and have

²¹See Glick, *supra* note 19, at 965 (stating that after the purchase of the policy, the buyer steps into the shoes of the former owner and assumes the right to name the beneficiary of the policy).

²²Berner, *supra* note 13, at 584; *but see* Herron, *supra* note 4, at 957-958 (explaining that viatical companies do not always need to incur this expense since many insurance companies offer disability waivers for the premium payments. Under such provisions, the insured's employer undertakes responsibility for the policyholder's premium payments in the event that the policyholder becomes disabled or unable to pay the premium. Usually, viatical companies will encourage Viators to secure this waiver before viaticating. As a result, the Viator should receive a larger distribution and the viatical company will not have to take over payment of the premiums and will thus not bear the risk that the Viator will live beyond her life expectancy).

²³Herron, *supra* note 4, at 933.

²⁴See *id.* at 935 (stating that profits sometimes exceed 40 percent of the face value of a policy); *but see id.* at 946 (stating that according to the best estimate, viatical settlement companies average 20 percent in profits on any policy).

²⁵SEC v. Life Partners, Inc., 898 F. Supp. 14 (D.C. 1995), *vacated by* 87 F.3d 536 (D.C. Cir. 1996), *reh'g denied* 102 F.3d 587 (1996).

²⁶Caldwell, *supra* note 7, at 39.

²⁷*Id.*

complained that such arrangements are essentially "death futures."²⁸ Nonetheless, viatical settlements seem to be gaining acceptance; for example, some banks are now offering viatical settlement investment options.²⁹ By allowing investors to spread the risk of loss among several different Viators, such banks are essentially selling viatical settlement "mutual funds."³⁰

Although morbid to some, similar arrangements have been available for many years and liquidating virtually any asset a person owns may create such a death future.³¹ Recently, for example, "reverse mortgages" have become a popular way for the elderly to remain in their homes after retirement.³² Similarly, a seller could enter into a sale-leaseback arrangement or could sell her home subject to a life estate in the property.³³ Alternatively, a buyer could "factor" a seller's "account receivables" to accomplish the goal of cashing out one's assets before death.³⁴

Nonetheless, since a VSP's profit margin is wholly related to the life expectancy of the Viator, concern has arisen over the possibilities for fraud and abuse in the industry.³⁵ Seeking tighter control on the industry, the Securities and Exchange Commission (SEC) recently fought and lost a lengthy battle that sought to classify viatical settlements as securities.³⁶ Such a classification would cause viatical settlements to fall under the

²⁸See Herron, *supra* note 4, at 936; Nirtaut, *supra* note 15, at 23; *see also* Caldwell, *supra* note 7, at 39 (stating that the detractors of viatical settlements refer to them as death futures).

²⁹*Are Banks Ready to Market Viatical Settlements?*, BANK MUTUAL FUND REP., June 9, 1997, at vol. 5, no. 23 (indicating that Suburban Federal Bank near Chicago started selling viatical settlements in late 1996).

³⁰Michelle DeBlasi, *Viaticals Breathe New Life in Banks?*, BANK INVESTMENT MARKETING, Sept. 1, 1997 (claiming that investors can diversify their investments to reduce the risk of loss by investing in a virtual "mutual fund" of viatical settlements).

³¹*See* Osborn, *supra* note 13.

³²Celeste M. Hammond, *Reverse Mortgages: A Financial Planning Device For The Elderly*, 1 ELDER L.J. 75 (1993) (explaining how, under such arrangements, an individual with equity in his/her home is loaned money and may receive advances from a lender with no expectation of repayment until the death of the borrower).

³³SEC v. Life Partners, 898 F. Supp. 14, (D.C. 1995), *vacated by* 87 F.3d 536, 542 (D.C. Cir. 1996), *reh'g denied* 102 F.3d 587 (1996).

³⁴*Id.*

³⁵Herron, *supra* note 4, at 935; *see also* Berner, *supra* note 13, at 583 (stating that the market was open to abuse by viatical companies who could take advantage of vulnerable victims).

³⁶SEC, 87 F.3d at 536.

regulatory authority of the SEC.³⁷ Ruling that profits of the VSP are not related to the work of the VSP, but rather, the death of the Viator, the court concluded that viatical settlements are not securities.³⁸ Consequently, those investing in viatical settlements will not be afforded the protections granted under the Securities Act of 1933 that were designed to require disclosure of material information and to prevent misrepresentation, deceit, and fraud in the sale of securities.³⁹

Acknowledging the need for consumer protection,⁴⁰ many state legislatures have enacted legislation to regulate the viatical industry.⁴¹ However, much of the legislation is presently aimed at protecting the Viator, rather than the VSP or investor in viatical settlement products. In addition, the National Association of Insurance Commissioners (NAIC)⁴² has created the Viatical Settlements Model Act (Model Act) and the Viatical Settlements Model Regulation (Model Regulation). The NAIC's Model Act emulates California's viatical settlement statute,⁴³ and the NAIC has expressed its desire that other state legislatures adopt similar provisions.⁴⁴ Currently, twenty states have adopted some form of viatical settlement regulations⁴⁵ and eleven states are now considering such legislation.⁴⁶ These provisions call for the licensing of VSPs, require disclosure of certain information to the Viators, and grant the authority to impose minimum payout standards for viatical settlements.⁴⁷

³⁷Timothy P. Davis, *Should Viatical Settlements be Considered "Securities" Under the 1933 Securities Act?*, 6 KANSAS J.L. & PUB. POL'Y 75, 76 (Winter 1997).

³⁸SEC v. Life Partners, Inc., 898 F. Supp. 14, (D.C. 1995), *vacated by* 87 F.3d 536, 549 (D.C. Cir. 1996), *reh'g denied* 102 F.3d 587 (1996).

³⁹Davis, *supra* note 37.

⁴⁰See Berner, *supra* note 13, at 586 (stating that several states have responded to concerns over the possibilities for abuse, such as overreaching and undue influence upon vulnerable victims, and that such legislation seeks to protect the Viators).

⁴¹See State Legislation, *supra* note 17.

⁴²See Osborn, *supra* note 13, at 474 (concluding that since viatical settlements involved the business of insurance, the National Association of Insurance Commissioners ("NAIC") adopted the Viatical Settlements Model Act and the Viatical Settlements Model Regulation).

⁴³*Id.*

⁴⁴See *id.* (stating that several states have adopted insurance laws regulating viatical settlements, many of which seem to be based on the Model Act of the NAIC).

⁴⁵See State Legislation, *supra* note 17.

⁴⁶*Id.*

⁴⁷VIACIAL SETTLEMENTS MODEL ACT (National Ass'n of Ins. Comm'rs 1994), *reprinted in* 4 NATIONAL ASS'N OF INS. COMM'RS, MODEL LAWS, REGULATIONS AND GUIDELINES 697-1 to 697-18, 697-1, §§3, 8, 10(B) (1995) [hereinafter Model Act].

Viatical Settlement Model Act and Model Regulation

Essentially, the Model Act requires viatical settlement agreements to be evidenced by a written contract⁴⁸ and for such contracts to be filed with and approved by the appropriate state department of insurance.⁴⁹ The Model Act also imposes strict licensing requirements for VSPs and gives the state department of insurance the power to revoke the license after issuance.⁵⁰ In addition, VSPs must file annual statements with the department of insurance and allow access to all viatical settlement records upon request.⁵¹

Before signing a viatical agreement, VSPs are required to disclose the ramifications of selling a life insurance policy to the potential Viators.⁵² Among the many required disclosures, VSPs must inform potential Viators of:

- 1) the alternatives to viatication, including but not limited to ADBs;
- 2) some or all of the proceeds may be taxable and that assistance should be sought from a personal tax advisor;
- 3) viatical settlements could be subject to claims by creditors;
- 4) the receipt of the viatical settlement may adversely affect the recipient's eligibility for Medicaid or other government benefits, and thus advice should be sought from the appropriate agencies;
- 5) the policy owner has a right to rescind the viatical settlement contract within thirty days of execution of the contract or within fifteen days of the receipt of the viatical settlement proceeds, whichever is sooner; and
- 6) the date the funds will be available to the Viator and the source of those funds.⁵³

⁴⁸Osborn, *supra* note 13, at 484.

⁴⁹*Id.*

⁵⁰*Id.* at 475.

⁵¹Model Act, *supra* note 47, at 697-1 §7(B) (although the insurance Commissioner may examine the records of the viatical settlement company, the names and individual identification data for all Viators shall be considered private and confidential information and shall not be disclosed by the commissioner, unless required by law).

⁵²*See id.* (actually, the disclosure must be made no later than the date the viatical settlement is signed by all parties); *but see* Herron, *supra* note 4, at 943 (criticizing the disclosure period as being so late in the viatication process that it makes the Viator unlikely to pull out and explore other options).

⁵³Model Act, *supra* note 47, at 697-1 §8; *see* Osborn, *supra* note 13, at 476-477.

Moreover, before the contract is signed, VSPs must obtain a written statement from a licensed physician certifying the insured's sound mind and lack of undue influence.⁵⁴ In addition, the VSP must obtain a witnessed document from the insured that:

- 1) acknowledges the catastrophic or life-threatening condition of the insured;
- 2) represents that she fully understands the viatical settlement contract and the ramifications of selling the policy;
- 3) consents to the viatical settlement contract and professes her free will in entering the agreement; and
- 4) releases her medical records to the VSP.⁵⁵

Finally, the NAIC Model Act permits the insurance commissioner of each state to promulgate regulations implementing the Model Act and to specifically establish standards of reasonableness for viatical settlement disbursements.⁵⁶

In addition to the requirements set forth by the Model Act, the Model Regulation establishes guidelines governing the minimum amounts to be paid to a Viator. Based on an estimate of the insured's life expectancy, the minimum discount percentages as stated in the Model Regulation are as follows:

- 1) less than six months to live equals 80 percent;
- 2) at least six, but less than twelve months to live equals 70 percent;
- 3) at least twelve, but less than eighteen months to live equals 65 percent;
- 4) at least eighteen, but less than twenty-four months to live equals 60 percent; and
- 5) twenty-four months or more to live equals 50 percent.

According to the Model Regulation, these minimum percentages may be reduced by 5 percent if the policy is written by an

⁵⁴Model Act, *supra* note 47, at 697-1 §9(A)(1).

⁵⁵*See* Osborn, *supra* note 13, at 477 (describing the consent and witness requirements for Viators).

⁵⁶*See id.* at 478 (describing the authority granted by section 10 of the Model Act to promulgate regulations).

insurance carrier rated less than the highest four categories by A.M. Best, or a comparable rating by another rating agency.⁵⁷

The Model Regulations also specify numerous licensing requirements for viatical settlement providers and brokers.⁵⁸ Furthermore, the Model Regulation identifies specific information to be included in an annual report to the insurance commissioner, such as the date of viatication, amount disbursed, face values of the policies, and life expectancies for each Viator.⁵⁹ Finally, the Model Regulation imposes strict advertising standards on VSPs that mandate the publication of the average speed of viatication and the average disbursement percentage if the advertisement emphasizes the speed or payment rates of viatication.⁶⁰ However, since the Model Regulations and the Model Act have not been universally adopted, individuals should contact their state insurance commissioner to determine the extent of viatical regulation.

Viatical Industry Controversy

Despite the proposed regulations or legislation enacted, opponents have been troubled by the nature of the industry and the potential for abuse.⁶¹ At least one commentator has suggested that the industry has created the danger of "hit men" being hired to guarantee large profit margins by terminating the insured's life.⁶² In addition, since settlement payouts are

⁵⁷National Ass'n of Ins. Comm'rs, 1994-2 NAIC Proc. 549, 573 (§4) [hereinafter "1994-2 NAIC Proc. 549"].

⁵⁸*Id.* at 572-573 (§§1, 2)

⁵⁹*Id.* at 572-573 (§ 5 - Reporting Requirement). On March 1 of each calendar year, each viatical settlement provider licensed in this state shall make a report containing the following information for the previous calendar year: (A) For each policy viaticated: (1) Date viatical settlement entered into; (2) Life expectancy of the Viator at the time of contract; (3) Face amount of the policy; (4) Amount paid by the viatical settlement provider to viaticate the policy; and (5) If the Viator has died: (a) Date of death; (b) Total insurance premiums paid by viatical settlement provider to maintain the policy in force; (B) Breakdown of Applications Received, Accepted and Rejected, by Disease Category; (C) Breakdown of Policies Viaticated by Issuer and Policy Type; (D) Number of Secondary Market vs. Primary Market Transactions; (E) Portfolio Size; and (F) Amount of Outstanding Borrowings.

⁶⁰*Id.* at 572-573 (§ 6(H) - Advertising Standards).

⁶¹*Playing Field in "Death Futures" Can be Slippery*, PLAIN DEALER, May 5, 1997 (stating that to guard against fraud, experts suggest checking out viatical companies with the National Viatical Association at (800) 741-9465, or the Viatical Association of America (800) 842-9811).

⁶²Denise M. Schultz, *Angels of Mercy or Greedy Capitalists? Buying Life Insurance Policies from the Terminally Ill*, 24 PEPP. L. REV. 99, 105 (1996).

usually only worth 50 to 80 percent of the value of the life insurance policy,⁶³ some commentators complain that these discounted settlements translate into profits that are disproportionate to the risks associated with viatication.⁶⁴ Proponents of viatical settlements, however, claim the risks associated with viatication justify the calculation of low distribution percentages.⁶⁵ Since the failure to accurately assess these variables could result in diminished profits or even a net loss to the VSP, proponents argue that large discounts are necessary to offset potential losses.⁶⁶

Among the considerations, VSPs must evaluate the stability of the insurance carrier because of the risk that the insurer could become insolvent or otherwise default on its obligation under the policy.⁶⁷ In addition, VSPs must bear the risk of rising interest rates after negotiation of the settlement, which would effectively increase the cost of their borrowed capital.⁶⁸ Furthermore, VSPs must consider the possibility that a life-prolonging treatment or cure for the terminal illness might result in a diminished return or net loss.⁶⁹ Similarly, a VSP must accept the danger that the Viator could simply outlive a physician's best estimate of life expectancy.⁷⁰ Viatical companies must also face the risk that ex-beneficiaries might attempt to enforce their previously released rights, thus resulting in costly litigation.⁷¹ Finally, the VSP must accurately estimate the administrative costs associated with viatication. Such costs,

⁶³Berner, *supra* note 13, at 584; *see also* Glick, *supra* note 19, at 964-965 (stating that the fixed sum payment reflects the buyer's estimation of the present value of the policy's future money claim, discounted by both the premiums the buyer expects to pay and the risk that the seller will live longer than expected).

⁶⁴*See* Herron, *supra* note 4, at 958 (claiming that the profits enjoyed by viatical companies are disproportionate to the risks and costs incurred and that such profits cannot be explained wholly on those bases).

⁶⁵*See id.* at 950 (justifying the low payouts of viatical companies by pointing to the substantial risks associated with viatication).

⁶⁶*Id.* at 950-51.

⁶⁷*See id.* at 954 (showing that an insurance company default will leave the viatical company with a valueless policy).

⁶⁸Schultz, *supra* note 62, at 104.

⁶⁹*See* Herron, *supra* note 4, at 955.

⁷⁰*See id.* at 950 (stating that the cost to viatical companies can be quite substantial if the Viator outlives the company's life expectancy prediction).

⁷¹Lee Ann Dean, Note, *Acquired Immune Deficiency Syndrome, Viatical Settlement, and the Health Care Crisis: AIDS Patients Reach Into the Future to Make Ends Meet*, 25 RUTGERS L.J. 117, 142 (1993).

including policy premium payments, mailing and telephone expenses, legal fees, and costs resulting from the physician's examination of the Viator,⁷² may exceed \$3,000 per policy.⁷³

Accelerated Death Benefits

Unlike viatical settlements, ADBs are paid directly from the life insurance carrier and cost the recipient very little.⁷⁴ When first introduced, insurance companies touted the option as the alternative that would make viatical settlements obsolete.⁷⁵ The ADB option has failed to live up to such expectations because ADBs are only available to the policy holder if the option was originally written into the policy or if the benefit was made available through a rider.⁷⁶

In addition, most insurers offering ADBs require certain conditions to be met before a disbursement will be made. Traditionally, a physician's diagnosis that the insured has twelve 12 months or less to live has been required by insurers for disbursement to commence.⁷⁷ Viatical arrangements, on the other hand, generally do not require such a prognosis,⁷⁸ and unfortunately, by the time a person has less than twelve months to live, he or she may be virtually immobile or unable to enjoy all of the benefits of an accelerated policy. Therefore, because a terminally ill person may wish to collect the living benefits while still able to enjoy them, ADBs are not always an effective option.

⁷²Herron, *supra* note 4, at 957.

⁷³See Carole C. Lamson, *Legal Introduction to Living Benefits in Life Insurance: New Perspectives and Developments*, N.Y. St. B.J., Nov. 1993, at 16 (stating that some have placed the average administrative costs for viatication at \$3,000 per policy).

⁷⁴Herron, *supra* note 4, at 972.

⁷⁵*Id.* at 971.

⁷⁶*Id.* at 971-972; see also Nirtaut, *supra* note 15, at 23 (estimating that as many as 25 percent of employers may have an ADB provision in their life insurance plans); Cf. Ball, *supra* note 15 (stating 25 percent of universal and variable life policies not have accelerated benefits riders, while only 5 percent of all life insurance policies now have them).

⁷⁷Caldwell, *supra* note 7, at 2; see also Herron, *supra* note 4, at 973 (stating that 67 percent of companies offering accelerated benefits require the policyholder to have a life expectancy of less than one year before benefits will be accelerated. Moreover, 30 percent require a life expectancy of less than six months before benefits will be accelerated).

⁷⁸SEC v. Life Partners, Inc., 898 F. Supp. 14, 18 (D.C. 1995), *vacated by* 87 F.3d 536 (D.C. Cir. 1996), *reh'g denied* 102 F.3d 587 (1996) (although the standard viatical settlement is made to people with life expectancies of twenty-four months or less, other offerings allow investors to select the policies of Viators expected to live longer than two years).

Moreover, many ADB options restrict the percentage of the policy's face value that may be accelerated.⁷⁹ Typically, acceleration of up to 50 percent of the value of the policy is all that is allowed.⁸⁰ In addition, ADBs have generally been available only on whole life policies,⁸¹ while viatical arrangements are generally available for any type of life insurance policy, including term life policies.⁸²

As a result, the conditions and restrictions imposed on such ADB benefits have prompted at least one commentator to claim they are only preferable to viatical settlements in limited instances.⁸³ Not only must the insured have the ADB option available, and have less than one year to live, but also the insured's financial needs must be satisfied by whatever accelerated benefits are permitted under the acceleration clause.⁸⁴

ADB's do, however, offer advantages that viatical settlements cannot. Unlike viatical settlements, accelerated benefits cost the policyholder very little.⁸⁵ Additionally, the unaccelerated remainder of the policy, minus applicable fees, is generally preserved for the named beneficiaries upon the death of the insured.⁸⁶ In the viatical arrangement, no such option is available since the VSP is assigned the entire face value of the policy.

LEGAL TREATMENT OF ADB AND VIATICAL SETTLEMENTS

Although traditionally marketed to Human Immunodeficiency Virus (HIV) and AIDS sufferers, viatical settlements and ADBs have been, and

⁷⁹Herron, *supra* note 4, at 973 (stating that only 25 percent of companies offering acceleration impose no limit, while 59 percent of companies limit the accelerated portion to no more than 50 percent of the policy's face value).

⁸⁰*Id.*

⁸¹Caldwell, *supra* note 7, at 2.

⁸²*Id.*

⁸³Herron, *supra* note 4, at 974.

⁸⁴*Id.*

⁸⁵*Id.* at 972.

⁸⁶*Id.* at 974; *but see* Schultz, *supra* note 62, at 105 (noting that most viaticators are homosexual males without dependents or the need to preserve their life insurance benefits).

are increasingly used by those suffering from other terminal illnesses.⁸⁷ At one time, nearly 90 percent of all viatical arrangements involved AIDS patients, while the remainder was largely comprised of terminally ill cancer patients.⁸⁸ As word has spread of the availability of the financial options, those suffering from heart disease, alzheimer's disease, and amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease, have shown considerable interest in viaticating their life insurance policies.⁸⁹

Today there is some evidence that the creation of viatical settlements for HIV/AIDS sufferers is diminishing.⁹⁰ Encouraging medical news from the 11th International AIDS Conference in Vancouver, Canada, regarding the efficacy of new drug treatment, has caused one of the nation's largest viatical settlement companies to stop buying policies from AIDS patients.⁹¹ Among the discoveries, physicians have found that protease inhibitors significantly diminish the spread of HIV in clinical trials.⁹²

Some believe that these drug cocktails may transform AIDS into a manageable chronic disease.⁹³ As a result of this life-prolonging AIDS discovery, industry experts predict that the growth of the viatical industry will likely come from servicing people with other diseases.⁹⁴ Among those considered desirable Viators are elderly diagnosed with life-threatening diseases such as cancer, heart disease, Alzheimer's disease,

⁸⁷See Matt Roush, *Accelerated Death Benefits are Alive and Well*, CRAIN'S DETROIT BUS., Oct. 28, 1996 (stating that AIDS patients currently make up about 80 percent of the accelerated benefits business, but that a year from now they are expected to only make up 50 percent of the client base).

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰See Lauren Chambliss, *Business Day: How Making Money Out of Death is Dying Out*, THE EVENING STANDARD, Oct. 23, 1996 (stating that new treatments for AIDS have very nearly killed the viatical industry that was making tidy profits from death).

⁹¹See Kathy M. Kristoff, *Consumer Checklist/Your Money Servicing Terminally Ill*, L.A. TIMES, Sept. 13, 1996, at D3 (reporting the medical news that protease inhibitors significantly stem the progression of AIDS in clinical tests); see also Chambliss, *supra* note 90 (stating that a new class of drugs is extending the lives of the HIV-infected, wrecking the actuarial tables on which the viatical industry is based).

⁹²Kristoff, *supra* note 91; Chambliss, *supra* note 90.

⁹³Jane Bennett Clark, *New Weapons Against AIDS—At a Price: The Latest Treatments Cost Up to \$20,000 a Year*, KIPLINGER'S PERS. FIN. MAG., Feb. 1, 1997, at 102 (Managing Money: Health & Fitness).

⁹⁴Kristoff, *supra* note 91.

stroke, or ALS.⁹⁵ In addition, others with certain pulmonary conditions, chronic kidney disease or liver failure are also considered viable candidates for viatication.⁹⁶ Some companies are now even selling viaticals to anyone over age eighty-three.⁹⁷ However, since protease inhibitors do not help everyone and can cost as much as \$20,000 per year to administer, HIV/AIDS patients may still be in need of medical funds since most health insurance plans limit medication reimbursement as well as medications to those included on a specific approved list.⁹⁸

Until now, a significant drawback to ADBs or viatical settlements was that such disbursements were considered gross income and thus taxed at ordinary income rates.⁹⁹ In a 1994 Private Letter Ruling, the Internal Revenue Service (IRS) considered whether the sale or assignment of a life insurance contract is a taxable event.¹⁰⁰ In this instance, the taxpayer argued such an assignment of a life insurance policy should be excluded from gross income under section 101(a)(1) of the Internal Revenue Code (Code)¹⁰¹ because all amounts received under a life insurance contract are tax-free if paid by reason of the death of the insured.

However, because the patient-taxpayer had not yet died, the IRS ruled the amounts received were not considered by reason of the death of the insured. In support of its conclusion, the IRS reasoned that an assignment of a life insurance contract for consideration is a sale or exchange of property under section 1001(b).¹⁰² Hence, because gross income includes all income from whatever source derived,¹⁰³ including

⁹⁵Crites-Lenoni, *supra* note 13, at 67.

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸Clark, *supra* note 93.

⁹⁹Kristoff, *supra* note 91; *see also* Life Insurance, *supra* note 12, at d10; *see also* Thomas W. Johnson, *Viatical Firms Report 300% Surge in Sales*, FINANCIAL PLANNING, May 1, 1997 (citing William E. Kelley, Executive Director of the Viatical Association of America, explaining that viatical companies which have not tapped into the "mainstream" terminal disease market are experiencing only modest growth).

¹⁰⁰Priv. Ltr. Rul. 94-43-020 (1994).

¹⁰¹*See id.*; *see also*, 26 U.S.C.A. § 101(a) (1997) (excluding from gross income, all amounts paid under a life insurance policy if paid by reason of death of the insured).

¹⁰²*Id.*

¹⁰³26 U.S.C.A. § 61(a) (1997).

gains from the sale of property,¹⁰⁴ viatical and ADB disbursements must be taxable.

Although the private letter ruling was not a legal precedent *per se*,¹⁰⁵ it was viewed as a serious deterrent for some people considering viaticating their life insurance policies.¹⁰⁶ Of those who did viaticate, some simply never reported the income on their tax returns knowing the companies that buy life insurance death benefits typically do not send 1099 forms to the recipients or to the IRS.¹⁰⁷ As a result of the HPA, recipients may no longer need to be concerned about the federal tax implications of receiving ADBs or viatical settlements. However, it is important to recognize that every personal situation is unique and there are still numerous considerations¹⁰⁸ that an insured must evaluate before selling, assigning, or accelerating her policy.¹⁰⁹

26 U.S.C.A. § 101(g) Treatment of Certain Accelerated Death Benefits

Under HPA, section 101 of the U.S. Code (relating to certain death benefits) is amended by adding section (g): Treatment of Certain Accelerated Death Benefits. Included as part of section (g) is sub-section (2), which specifically addresses the "Treatment of Viatical

¹⁰⁴26 U.S.C.A. § 61(a)(3) (1997).

¹⁰⁵See 26 U.S.C.A. § 6110(j)(3) (1997) (a private letter ruling is directed only to the taxpayer who requested it, and may not be used or cited as precedent).

¹⁰⁶See Life Insurance, *supra* note 12, at d10 (noting that in the past, people knew that the IRS wanted to tax proceeds as regular income, thus people opted not to use viatical settlements because they did not want to pay income taxes on the settlement).

¹⁰⁷Asinof, *supra* note 12; *but see* 26 U.S.C.A. 6050Q(A) (1997) (mandating that any person who pays long-term care benefits shall make a return, according to the forms or regulations prescribed by the Secretary, setting forth: (1) the aggregate amount of such benefits paid by such person to any individual during any calendar year; (2) whether or not such benefits are paid in whole or in part on a per diem or other periodic basis without regard to the expenses incurred during the period to which the payments relate; (3) the name, address, and TIN of such individual; and (4) the name, address, and TIN of the chronically or terminally ill individual on account of whose condition such benefits are paid).

¹⁰⁸Among the considerations, the potential Viator must determine whether such disbursements are subject to state taxation. Although many states follow the federal law with respect to such disbursements, some do not.

¹⁰⁹See Lynn Waldsmith, *Insurers Widen Scope of Death Settlements: Better AIDS Therapies Prompt Insurance Buyout Companies to Consider Cancer, Other Fatal Diseases*, The Detroit News, Feb. 9, 1997, at C1 (noting that the interest on a bank loan may be less than the discount one could receive on a life insurance policy).

Settlements.”¹¹⁰ Collectively, any pre-death distribution received under a life insurance contract¹¹¹ on the life of an insured who is either terminally¹¹² or chronically ill¹¹³ shall be treated as an amount paid by reason of the death of an insured.¹¹⁴ Therefore, due to section 101(a)(1), such pre-death disbursements shall be excluded from the gross income of the recipient.

According to section 101(g)(4)(A), a “terminally ill individual” is one who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death within twenty-four months or less after the date of certification.¹¹⁵ A “chronically ill individual” is defined by section 101(g)(4)(B) as having the meaning given by section 7702B(c)(2), except that such term shall not include a “terminally ill individual.” As such, a chronically ill individual is one who has been certified by a licensed health care practitioner, within the preceding twelve month period, as being unable to perform (without substantial assistance from another individual) at least two activities of daily living for a period of at least ninety days due to a loss of functional capacity. Such daily activities include:

- 1) eating,
- 2) toileting,
- 3) transferring,
- 4) bathing,
- 5) dressing, and
- 6) continence.¹¹⁶

An individual may also be deemed chronically ill if she is certified by a licensed health care practitioner within the preceding twelve month period as having a

¹¹⁰26 U.S.C.A. § 101(g)(2) (1997).

¹¹¹H.R. Conf. Rep. 104-736, July 31, 1996 (to qualify as an insurance contract for federal income tax purposes, a contract must be a life insurance contract under the applicable state or foreign law and must satisfy either of two alternative tests: (1) cash value accumulation test; or (2) a test consisting of a guideline premium requirement and a cash value corridor requirement (26 U.S.C.A. 7702(a) (1997))).

¹¹²26 U.S.C.A. § 101(g)(1)(A) (1997).

¹¹³26 U.S.C.A. § 101(g)(1)(B) (1997).

¹¹⁴26 U.S.C.A. § 101(g)(1)(A), (B) (1997).

¹¹⁵26 U.S.C.A. § 101(g)(4)(A) (1997).

¹¹⁶26 U.S.C.A. § 7702B(c)(2)(A)(ii) (1997).

level of disability similar to the level of disability described above,¹¹⁷ or requiring substantial supervision to protect such an individual from threats to health and safety due to severe cognitive impairment.¹¹⁸

This distinction between the chronically and terminally ill is made because there are certain special rules which apply only to the chronically ill. Under section 101(g)(3)(A), a chronically ill insured may not receive tax-free pre-death disbursements unless certain conditions are met. First, the distribution must be used to pay for the unreimbursed costs incurred by the insured for "qualified long-term care services."¹¹⁹ "Qualified long-term services" are defined in section 101(g)(4)(C) as necessary diagnostic, preventative, therapeutic, curing, treating, mitigating, and rehabilitative services and maintenance or personal care services which: (a) are required by a chronically ill person,¹²⁰ and (b) are provided pursuant to a plan of care prescribed by a licensed health care practitioner.¹²¹

Second, for a chronically ill patient to be covered by HPAA, the terms of the contract giving rise to such a payment of pre-death benefits must also satisfy both the requirements of section 7702B(b)(1)(B),¹²² and the requirements (if any) applicable under subparagraph (B) entitled "Other Requirements."¹²³ These provisions relate to the treatment of qualified long-term care insurance contracts¹²⁴ and the consumer protection provisions promulgated by the NAIC under the Long-Term Care Insurance Model Regulation and the Long-Term Care Insurance Model Act.¹²⁵ In addition, a chronically ill individual must follow the standards adopted by the NAIC which specifically apply to chronically ill

¹¹⁷*Id.* (as determined under regulations prescribed by the Secretary of the Treasury in consultation with the Secretary of Health and Human Services).

¹¹⁸26 U.S.C.A. § 7702B(c)(2)(A)(iii) (1997).

¹¹⁹26 U.S.C.A. § 101(g)(3)(A)(i) (1997).

¹²⁰26 U.S.C.A. § 7702B(C)(1)(A) (1997).

¹²¹26 U.S.C.A. § 7702B(C)(1)(B) (1997).

¹²²26 U.S.C.A. § 101(g)(3)(A)(ii)(I) (1997) (under section 7702B(1), the term "qualified long-term care insurance contract" means any insurance contract if . . . (B) such contract does not does not pay or reimburse expenses incurred for services or items to the extent that such expenses are reimbursable under title XVIII of the Social Security Act (42 U.S.C.A. § 1395 (1997)) or would be so reimbursable but for the application of a deductible or coinsurance amount).

¹²³26 U.S.C.A. § 101(g)(3)(A)(ii)(II) (1997).

¹²⁴26 U.S.C.A. § 7702B(b)(1)(B) (1997).

¹²⁵26 U.S.C.A. § 7702B(g) (1997).

individuals.¹²⁶ Moreover, a chronically ill individual is required to follow the standards adopted by the state in which the policyholder resides.¹²⁷

Finally, a chronically ill individual may receive only a limited pre-death disbursement. Under section 101(g)(3)(D), payments of pre-death tax-free disbursements are limited to that allowable under section 7702B(d), which limits per diem disbursements to the excess (if any) of the greater of either: (1) \$175 per day (\$63,875 annually);¹²⁸ or (2) the costs incurred for qualified long-term care services provided for the insured¹²⁹ in excess of the aggregate payments received as reimbursements (through insurance or otherwise) for qualified long-term care services.¹³⁰ However, since chronically ill individuals are limited to payments for the unreimbursed costs for qualified long-term care services under section 101(g)(3)(A)(i), the maximum pre-death disbursement is limited to the unreimbursed expense of the long-term care services. In the event that such payments exceed this limitation, such excess shall be includable in gross income.¹³¹

HPAA also specifically defines what is meant by a "viatical settlement provider" and designates certain requirements that must be met before one can conduct the business of viatication. Under HPAA, a "viatical settlement provider" is any person regularly engaged in the trade or business of purchasing, or taking assignments of, life insurance contracts on the lives of terminally or chronically ill, provided that the person meets certain conditions.¹³² Generally, the person must be licensed for the purpose of purchasing, or taking assignments of, life insurance contracts in the state in which the insured resides.¹³³ However, if the state in which the insured resides does not require a license for such activity,

¹²⁶26 U.S.C.A. § 101(g)(3)(B)(ii) (1997).

¹²⁷26 U.S.C.A. § 101(g)(3)(B)(iii) (1997).

¹²⁸26 U.S.C.A. § 7702B(d)(2) (1997) (limits the periodic dollar amount to the amount in paragraph (4). Paragraph (4) characterizes the dollar amount as \$175 per day (or the equivalent amount in the case of payments on another periodic basis). Paragraph (6) defines periodic payments as payment (whether on a periodic basis or otherwise) made without regard to the extent of the costs incurred by the payee for qualified long-term care services).

¹²⁹26 U.S.C.A. § 7702B(d)(2)(A)(ii) (1997).

¹³⁰26 U.S.C.A. § 7702B(d)(2)(B) (1997).

¹³¹26 U.S.C.A. § 7702B(d)(1)(B) (1997).

¹³²26 U.S.C.A. § 101(g)(2)(B)(i) (1997).

¹³³26 U.S.C.A. § 101(g)(B)(i)(I) (1997).

the viatical settlement provider must meet certain explicit requirements governing the care for the terminally or chronically ill set forth below.¹³⁴

To viaticate a terminally ill person's policy when the insured's state does not require licensing of the VSP, a VSP must meet the requirements of sections eight and nine of the NAIC Model Act,¹³⁵ which involve the disclosure, certification, and consent requirements described above.¹³⁶ In addition, such unlicensed VSPs must follow the requirements of the NAIC Model Regulations relating to the standards for evaluation of reasonable payments in determining the disbursement amounts for the terminally ill insured.¹³⁷ Since the NAIC currently does not distinguish between the terminally or chronically ill in its standards for evaluation of reasonable payments, a chronically ill Viator should be presumed to receive the same reasonable payments as any other Viator.

ANALYSIS AND IMPACT

Effectively, this new law only partially increases the viability of viatical settlements and ADBs as estate planning tools. Although HPAA allows the exclusion of such disbursements from gross income, it does not go far enough in creating real benefits for the terminally and chronically ill. According to a recent study published by the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (JAMA), more than 100 million Americans live with chronic conditions¹³⁸ and their direct health care costs account for three-fourths of U.S. health care expenditures.¹³⁹ Including indirect costs, the amount spent on chronic conditions in 1990 was a staggering \$659

¹³⁴26 U.S.C.A. § 101(g)(B)(i)(II) (1997).

¹³⁵26 U.S.C.A. § 101(g)(B)(ii)(I) (1997).

¹³⁶See Osborn, *supra* note 13, at 477-78.

¹³⁷26 U.S.C.A. § 101(g)(B)(ii)(II) (1997); see 1994-2 NAIC *supra* note 57, at 698-1 (§ 4).

¹³⁸Catherine Hoffman, et al., *Persons with Chronic Conditions: Their Prevalence and Costs*, 276 JAMA 1473, 1477 (1996) (defining "chronic condition" as being a self-reported condition classified under the rules of the International Classification of Diseases, Ninth Revision (ICD-9) and meeting the criteria of (1) being identified as an "X" code, as defined by the National Medical Expenditure Survey (NMES) and National Health Interview Survey (NHIS) as an impairment; and (2) if not an "X" code, then was a 3-digit ICD-9 code for a disease which is not self-limiting, but creates persistent and recurring health consequences, lasting for periods of years (not days or months). However, such a definition does not include conditions which may also be acute, such as unspecified bronchitis).

¹³⁹*Id.* at 1476.

billion dollars.¹⁴⁰ Moreover, the study concluded that the majority of these persons are not disabled nor are they elderly.¹⁴¹ Since some predict the baby-boom population will live longer with chronic illnesses,¹⁴² it should be anticipated that expenditures for chronic conditions may increase exponentially in the coming years.¹⁴³ Consequently, health care reform should be directed at curbing the growth of such expenses and discouraging reliance on government assistance. Although chronic sufferers seem to be the population most in need of financial assistance, and the population most likely to rely on Medicaid or Medicare for such aid, HPAA does little to address the needs of the chronically ill or to curb their dependence on government assistance.

In contrast, increased viatication among terminally ill individuals may theoretically cause a reduction in government reliance and an actual growth in federal revenue. Assuming that terminally ill Viators pay for their own medical expenses with their distributions, they will not need to rely on Medicaid for their medical care.¹⁴⁴ In addition, since they will likely pay full price for medical services, rather than the discounted Medicaid rate, they will generate greater tax revenues.¹⁴⁵ Furthermore, assuming such funds are used to pay caregivers, tax revenues from wages will theoretically increase.¹⁴⁶ Finally, since VSPs will presumably generate more revenue and pay more taxes, some speculate HPAA could generate as much as \$390 million dollars for the federal government between 1995 and 1999.¹⁴⁷

In addition, HPAA does provide some consumer protection by granting tax-free treatment only when licensed individuals make the purchase or assignment of life insurance policies. Unfortunately, some ambiguities in HPAA leave open opportunities for fraud and abuse. Even

¹⁴⁰*Id.* at 1477.

¹⁴¹*Id.* at 1477-78.

¹⁴²S.B. Fowler, *Health Promotion in Chronically Ill Older Adults*, 29(1) J. NEUROSCI. NURS. 39, 39-43 (Feb. 1997).

¹⁴³See Hoffman, *supra* note 138, at 1478 (stating that the aging population will result in growing numbers of persons with chronic conditions requiring medical and long-term care so as to have a significant absolute impact on health care use and expenditures).

¹⁴⁴See Crites-Lenoni, *supra* note 13, at 74.

¹⁴⁵*Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.*

though HPAA extends the marketability of such arrangements to those with chronic illnesses such as Alzheimer's or Parkinson's disease, the nature of chronic disease will severely limit the number of chronically ill individuals who can benefit from HPAA.

Presumably, HPPA was designed to make money more accessible to those with terminal or chronic illnesses.¹⁴⁸ Non-taxable income provides the freedom to travel, pay bills, or provide for loved ones after death. Subject to their ability to enjoy the money, a terminally ill individual may do virtually anything she wishes with the money she receives from such a tax-free disbursement.

Chronically ill individuals are limited to using the money to pay for unreimbursed, qualified long-term care and are restricted by a cap which limits the total amounts distributable.¹⁴⁹ Therefore, chronically ill individuals may not enjoy the money as much as someone who is destined to die; instead, they are permitted to use the money only for services which ease, yet prolong their misery. As a result, HPAA will not benefit chronically ill individuals as much as it will the terminally ill.

Unfortunately, HPAA does not specify who will monitor how the money is spent. Therefore, it is conceivable that a chronically ill individual could use the money for any purpose. In addition, it is unclear whether the money may be commingled into other accounts, because once commingled, it is obviously very difficult to track precisely how the money is spent. Because there is no provision that requires the insurance company or VSP to pay for such long-term care services directly, the insured receives such funds and is responsible for claiming them as gross income. As a result, a chronically ill person can easily abuse the system by depositing the money into her general account without reporting the transaction to the IRS.¹⁵⁰

¹⁴⁸See H.R. Conf. Rep. 104-350 (Nov. 16, 1995) (indicating that the intended definition of chronically ill should include those with Parkinson's disease, Alzheimer's disease, or symptomatic AIDS); see also *Beyond the Minimum: How New Laws Affect Nest Eggs, Insurance*, CHI. TRIB., Oct. 6, 1996 (claiming that the tax benefits make this something where people with heart disease or Alzheimer's or any condition will see a real alternative for handling their money at the end of their lives).

¹⁴⁹26 U.S.C.A. § 101(g)(3)(A)(i) (1997) (however, pursuant to 26 U.S.C.A. § 7702B(d)(5) (1997) the dollar amount limitation shall be adjusted for inflation in the calendar years after 1997 in the same manner as amounts are increased pursuant to section 26 U.S.C.A. § 213(d)(10)).

¹⁵⁰But see 26 U.S.C.A. § 6050Q(a) (1997).

Additionally, HPAA provides that a person must be certified by a physician¹⁵¹ as being either terminally or chronically ill. The new law, however, fails to state who is responsible for the physician certification.¹⁵² While it is presumed that the taxpayer is responsible for obtaining such a certification, viatical settlement providers may still encourage potential Viators to visit "viatication friendly" physicians. Although such fraudulent certification may jeopardize a physician's license, the lure of considerable fees paid for such services may be enough to persuade some unscrupulous physicians to embellish their diagnoses.¹⁵³

While the new legislation extends the marketability of pre-death arrangements to those with chronic illnesses, the definition of "chronic illness" is so broad that it allows a wide range of individuals to qualify for pre-death distributions. Clearly, the intent of this definition was to allow those individuals with disorders such as Alzheimer's¹⁵⁴ or Parkinson's disease to be able to take advantage of tax-free pre-death arrangements.¹⁵⁵ However, under the present definition, individuals with conditions such as depression, asthma, or arthritis may be certified as having a chronic illness which would entitle them to such tax-free pre-death benefits. Although such conditions are often serious, they are usually manageable by drug therapy and are usually not debilitating conditions that warrant the acceleration or viatication of a life insurance policy.

In practice, however, the definition of chronic illness is effectively irrelevant. Because the nature of the pre-death settlement industry

¹⁵¹26 U.S.C.A. § 101(g)(4)(D) (1997) (having the meaning given by section 1861(r)(1) of the Social Security Act (42 U.S.C.A. § 1395x(r)(1) (1997)), HPAA defines a "physician" as a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such a function or action).

¹⁵²Life Insurance, *supra* note 12, at d10.

¹⁵³215 I.L.C.S. 158/45 (1997) (noting that certain legislation prohibits VSPs from paying commissions, referral fees, or other compensation to physicians).

¹⁵⁴Charlette Snow, *Facing Alzheimer's Healthcare Issues: Medicare HMOs Develop Plan for Future of Alzheimer's Programming*, Modern Healthcare Special Rept., Sept. 23, 1996, at 66 (estimating \$80 billion to \$100 billion a year in costs associated with Alzheimer's disease, making it the third most expensive disease in the country, just behind heart disease and cancer. In addition, the report indicates that in 1990, the average cost for professional home health care for Alzheimer's patients was \$12,572, 63% of which was paid out-of-pocket. For institutionalized care, the annual average cost was \$42,049 about 60% of which was paid out-of-pocket).

¹⁵⁵See H.R. Conf. Rep. 104-350 (Nov. 16, 1997) (indicating that the intended definition of chronically ill should include those with Parkinson's disease, Alzheimer's disease, or symptomatic AIDS).

depends on the actual death of the insured, it is unlikely that most chronically ill individuals (no matter how defined) would be granted a pre-death disbursement of their policy. More importantly, even those with Alzheimer's or Parkinson's disease will probably not benefit from this HPAA. Because there are no accurate actuarial tables for the lives of those with such disorders, it is too difficult to measure life expectancy, and thus, too risky to accelerate or viaticate these policies. Therefore, although HPAA's intent is to aid such individuals, the real effect will be negligible.

If Congress had truly intended to assist those with terminal or chronic illnesses through HPAA, there are a number of other methods that could have been employed to make cash more easily accessible. Since tax laws serve the purpose of encouraging or discouraging behaviors, serious efforts could have been made to reduce the burdens on the chronically ill, their families, and both state and federal governments. To reduce the burdens imposed on the government and the family of a chronically ill individual, tax incentives which encourage home health care could be provided to relatives or guardians of the chronically ill individual. Although such incentives may have the short term effect of reducing revenue, they would have the ancillary effect of reducing reliance on programs such as Medicare.

In addition, Congress could have allowed terminally or chronically ill individuals or their families a full deduction for all medical expenses, not just those above 7.5 percent of the adjusted gross income.¹⁵⁶ Although many terminally or chronically ill patients no longer work, and therefore have little or no income, there are a number of functional chronically ill individuals who would benefit from such a deduction. Again, such a

¹⁵⁶26 U.S.C.A. § 213(a) (there shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, her spouse, or a dependent (as defined in section 152), to the extent that such expenses exceed 7.5 percent of adjusted gross income); 26 U.S.C.A. § 152 defines a "dependent" as any of the following individuals over half of whose support ... was received from the taxpayer: (1) the son or daughter of the taxpayer, or a descendant of either, (2) a stepchild of the taxpayer, (3) a brother, sister, stepbrother, or stepsister of the taxpayer, (4) the parent of the taxpayer, or an ancestor of either, (5) a stepfather or stepmother of the taxpayer, (6) a son or daughter of a brother or sister of the taxpayer, (7) a brother or sister of the father or mother of the taxpayer, (8) a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer, (9) an individual who has their principal place of abode at the taxpayer's house and who is a member of the taxpayer's household).

deduction may initially decrease revenue, but such a loss in revenue could be offset by requiring that the deduction be available only if it reduced reliance on a government assistance program by the equivalent amount.

Finally, low interest federally insured loans collateralized by personal property, real property, or life insurance policies could be made available to chronically ill individuals. Again, such benefits would likely reduce the reliance on the government for medical care assistance and may be an effective means for individuals who lack family support to obtain necessary funds.

Despite its faults, HPAA will still benefit some individuals with terminal illnesses who need immediate cash. Because tax-free treatment is available only if the money is received from a qualified or licensed viatical settlement provider, a strong consumer protection incentive to use reputable representatives has been created. As a result, consumers with terminal illnesses will benefit because viatical settlement providers will need to comply with regulatory standards in order to maintain eligibility as "qualified viatical settlement providers."

CONCLUSION

In summary, only certain terminally ill individuals will significantly benefit from HPAA. Because it has become more difficult to predict the death of those with HIV or AIDS, VSPs are now reluctant to viaticate unless the individual's life has severely deteriorated. As a result, HIV/AIDS sufferers should not expect to enjoy the benefits of these pre-death arrangements until much later in the progression of their disease, when they may not be capable of fully enjoying the money. Because it is generally too difficult to determine the life expectancy of a chronically ill person, it is unlikely that VSPs will viaticate or insurance companies will accelerate the policies of such individuals. As a result, most people with chronic illnesses should not expect to enjoy the benefits of HPAA.

Ultimately, those with heart disease, cancer, or other non-AIDS related terminal illnesses might benefit most from HPAA. Since their life expectancy is reasonably determinable, and no cure or adequate treatment is in sight, VSPs and insurance companies should be more likely to offer pre-death disbursements to these individuals. Given the advances in the treatment of HIV/AIDS and the uncertainty of predicting death of the

chronically ill, sufferers should investigate other means of financial support before viaticating or accelerating a life insurance policy.