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## Beating the Grim Reaper, or Just Confusing Him - Examining the Harmful Effects of Viatical Settlement Regulation, 27 J. Marshall L. Rev. 581 (1994)

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## NOTE

### BEATING THE GRIM REAPER, OR JUST CONFUSING HIM? EXAMINING THE HARMFUL EFFECTS OF VIATICAL SETTLEMENT REGULATION

#### INTRODUCTION

John Smith, a twenty-five year old New York man,<sup>1</sup> is dying of AIDS.<sup>2</sup> His doctors tell him he has less than two years to live.<sup>3</sup> He cannot afford to pay his enormous hospital bills. He cannot afford to make his house or car payments. He desperately wants to travel around the world before he dies.<sup>4</sup> John Smith needs cash, and he needs it quickly. Although his resources are limited, John finds what seems to be the perfect solution. Under New York's Viatical Settlement Act,<sup>5</sup> John can get the money he needs by selling his life

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1. The demonstrative plight of John Smith is fictitious. John Smith's profile fits that of the age group most at risk for contracting AIDS. See Arnold H. Grossman, *The Faces of HIV/AIDS*, PARKS & RECREATION, Mar. 1993, at 44 (stating that the number of AIDS cases rises dramatically among those 20 to 24 years of age, i.e., 9,270 cases and in those 25 to 29 years of age, i.e., 37,206 cases); see also *Office of the Director, Centers for Disease Control & Prevention Business Responds to AIDS Program 1992-1993*, 269 JAMA 1370 (1993) (stating that "[o]f all acquired immunodeficiency syndrome (AIDS) cases reported through 1991 in the United States, 76% occurred among persons aged 25-44 years").

2. An individual can be HIV positive, meaning he has the AIDS-causing virus, without necessarily contracting the disease. See Cornelis A. Rietmeijer, *Cost of Care for Patients With Human Immunodeficiency Virus Infection: Patterns of Utilization and Charges in a Public Health Care System*, 269 JAMA 2476 (1993) (noting studies that trace health care costs of HIV patients who have had the disease for 13 years or more). Individuals who have not yet developed the disease incur a large part of HIV-related medical costs. *Id.*

3. Most people who currently viaticate their policies have less than two years left to live. Dottie Enrico, *Regulators Halt Death Investment: North Dakota Orders End to AIDS Scheme*, NEWSDAY, Aug. 20, 1992, at 53.

4. People who sell their life insurance policies at a discount rate can use the sale proceeds for anything they wish, "including the realization of lifelong and unaffordable dreams." Kara Swisher, *Allstate to Offer Discounts to Buy Policies of the Terminally Ill*, WASH. POST, Aug. 1, 1991, at B8.

5. See N.Y. INS. LAW §§ 7801-7810 (McKinney 1993) (allowing viatical settlement companies to pay compensation in return for policy owner's assignment). The word "viatical" means "to provide for a journey." *Viatication, a New Financial Tool for PWAs*, AIDS POLICY & LAW, Oct. 16, 1991, at 4 [hereinafter AIDS POLICY & LAW]. Richard W. Bandfield was the first person to apply viatication to third-party payment in contrast to insurance companies. *Id.* Some

insurance policy<sup>6</sup> for part of the policy's value in cash.<sup>7</sup>

A viatical settlement requires that John make the purchaser of his life insurance policy the beneficiary under the policy.<sup>8</sup> The purchaser pays an agreed upon price for the policy, takes over John's premium payments, and receives John's death benefits when he dies.<sup>9</sup> The less time John has left to live, the more money he is likely to receive for his policy.<sup>10</sup> John is now a viator. That is, he has sold his life insurance policy to continue his life's journey.

John Smith's perfect solution, however, is laden with difficulties. The viatical settlement market has recently become subject to stringent state regulation. Specifically, New York's Viatical Settlement Act limits those who may wish to purchase a viator's life insurance policy<sup>11</sup> and restricts the rate at which it may be sold.<sup>12</sup> Thus, the Act actually makes it more difficult for John to sell his policy to whom he wants for the price he wants.

This Note examines the stifling consequences of recent legislation regulating the viatical settlement market. Part I discusses the development of the viatical settlement market in response to the financial problems faced by people with AIDS. Part II examines the purposes and goals behind current viatical settlement statutes.

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insurance companies allow their policy holders to collect when the policy holder's life expectancy is one year or less. *Id.*

6. Life insurance is a contract in which an individual, the insured, agrees to pay another, the insurer, a certain sum, called a premium, in return for the insurer's agreement to pay another sum upon the death of the individual. 1 WARREN FREEDMAN, *FREEDMAN'S RICHARDS ON THE LAW OF INSURANCE* § 1:50, at 118 (6th ed. 1990). When the insured dies and the insurer pays the agreed upon amount, the contract terminates. *Id.* Before the insured dies, he pays designated premiums to the insurer. *Id.* at 119. Therefore, although the individual contract involves an element of risk, this risk is shifted from the occurrence of the condition precedent, the insured's death, to the source of funds created by the insured's premium payments. *Id.* at 118.

7. See Amey Stone, *Easing the Economic Burdens of Terminal Illness*, *BUS. WK.*, May 3, 1993, at 160 (stating that assigning life insurance policy is a way that terminally ill persons are obtaining cash to cover their increased expenses).

8. *Id.*

9. See William P. Barrett, *Doctors of Death*, *FORBES*, Dec. 7, 1992, at 160 (explaining that upon death of policyholder, the viatical settlement company collects the policy's full value).

10. See Peter Kerr, *Now AIDS Patients' Lives are Drawing Speculators*, *N.Y. TIMES*, Aug. 20, 1992, at 1 (stating that the shorter the life of the viator, the higher the return).

11. See N.Y. INS. LAW §§ 7801(a)-7802(a) (requiring viatical settlement brokers be licensed). See *infra* notes 45-46, 52-53 and accompanying text for a discussion of various statutory provisions requiring that viatical settlement brokers be licensed.

12. See N.Y. INS. LAW §§ 7810 (granting the state insurance commissioner the power to make any rules necessary to enforce the other statutory provisions). See *infra* notes 49-51 and accompanying text for a discussion of various statutory provisions granting state insurance commissions the power to set minimum discount rates.

Part III explains the development of the law regarding the free alienation of property. Part IV analyzes how viatical settlement statutes violate this preference for free alienation by restraining the ability of policyholders to sell their life insurance policies. In conclusion, Part V proposes two simple statutory changes to alleviate the harmful effects of the current statutory schemes.

#### I. THE DEVELOPMENT OF THE VIACICAL SETTLEMENT INDUSTRY IN RESPONSE TO THE HIGH COST OF LIVING WITH AIDS

The viatical settlement market appeared in response to the high cost of living with AIDS.<sup>13</sup> The market developed to offer AIDS victims and other terminally ill individuals a means of living their final years in greater financial security.<sup>14</sup> The market was left open to abuse, however, by viatical companies who seek to take advantage of vulnerable victims. In response, several states have passed legislation regulating the market.<sup>15</sup>

The viatical settlement market emerged in 1988.<sup>16</sup> The market developed to allow terminally ill individuals to get the money they need now by selling their life insurance policies for less than their

13. The United States population continues to be assailed by the devastating, tragic and enormously expensive AIDS virus. Grossman, *supra* note 1, at 44. There were 242,146 reported cases of AIDS through 1992. *Id.* Researchers estimate at least one million people are infected with HIV, the AIDS-causing virus. *Id.*

The economic impact of AIDS is one of its most devastating effects. *Id.* at 46. Professor Grossman's research reveals:

The annual cost of treating a person with AIDS is no[w] \$38,300, and the average cost of treating an HIV-infected person is about \$10,000. . . . The lifetime cost of treating a person with AIDS in the United States rose to \$102,000 in 1992, up from \$85,000 in 1991. By the year 2000, it is estimated that AIDS will siphon off between \$81 billion and \$107 billion—about one percent of the gross domestic product.

*Id.* at 44. See generally TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993) (assessing personal and societal costs of treating AIDS).

People with AIDS suffer numerous financial hardships due to the high cost of AIDS treatment and the debilitating nature of the disease. Scott Wilbanks, *New National Study Highlights the Financial Problems Facing the Seriously Ill*, AFFORDING CARE BULL., Jan./Feb. 1993, at 2. According to a nationwide survey by the National Association of People with AIDS "[f]inancial problems were listed by 57.3% of [those surveyed] as their biggest day-to-day concern, making problems with personal finances the number one problem facing this group of people with AIDS." *Id.*

14. See June R. Herold, *Death Benefits the Living: Industry Grows on Terminally Ill's Insurance*, HOUSTON CHRON., June 7, 1992, at 9 (noting that the use of this immediate financial security as the primary appeal to the terminally ill). Although about 95 percent of the people who sell their life insurance policies have AIDS, people with cancer and other terminal illnesses also viaticate their policies. *Id.*

15. See CAL INS. CODE §§ 10113.1-10113.2 (West 1992); N.Y. INS. LAW §§ 7801-7810 (McKinney 1993) (imposing regulations on viatical settlements); MODEL VIACICAL SETTLEMENTS ACT §§ 1-12 (proposed draft 1993).

16. Kerr, *supra* note 10, at 1.

full value.<sup>17</sup> The market grew virtually overnight, as the AIDS epidemic took hold. The market exploded from one company in 1988 to the fifty companies presently doing business.<sup>18</sup>

The viatical settlement market operates much like any other industry in the open market. A terminally ill person (viator) sells his life insurance policy to a viatical settlement company or an individual purchaser (purchaser) for a cash settlement.<sup>19</sup> A purchaser usually pays a viator fifty to eighty percent of the policy's value, depending upon the viator's life expectancy.<sup>20</sup> The shorter the individual's life expectancy, the more the purchaser will pay for the policy.<sup>21</sup>

The viator then names the purchaser as the policy's beneficiary.<sup>22</sup> While the viator still lives, the purchaser pays the premiums

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17. As people who suffer from full-blown AIDS find themselves in deeper and deeper financial difficulty, they also find themselves unable to work and suffer a significant drop in income. Telephone Interview with Parker Willson, President of The Gay and Lesbian Alliance of Central Texas, Inc. (Sept. 23, 1993) [hereinafter Interview with Parker Willson]. "Nearly three out of ten (27.7%) respondents [of the NAPWA survey] live on less than \$500 a month, and another three out of ten (28.1%) live on between \$500 and \$1000 a month." Wilbanks, *supra* note 13, at 2. The swiftly diminishing incomes of AIDS victims force them to devote their minimal funds solely to medication, doctor bills and rent. Interview with Parker Willson, *supra*. Consequently, AIDS victims are eventually unable to pay their life insurance premiums and their policies lapse. *Id.* When a life insurance policy lapses, the AIDS victim's insurance coverage ceases and the insurance company does not have to pay the death benefits when the former policyholder dies. *Id.*

18. See AFFORDING CARE, VIACIAL SETTLEMENT COMPANIES (1993); see also Stone, *supra* note 7, at 160 (explaining how quickly the viatical settlement market has grown since the first company was established).

19. Kathy M. Kristof, *Selling Your Insurance Policy If You're Dying*, L.A. TIMES, Oct. 20, 1991, at 4.

20. Stone, *supra* note 7, at 160.

21. Herold, *supra* note 14, at 9.

22. The insurance industry is concerned with the possibility that former beneficiaries may protest the loss of the insured's death benefits. AIDS writers, *Life Partners Offer Controversial Funding for AIDS Victims*, BUS. WIRE, Oct. 12, 1992, at 1. Therefore, some of these companies take the precaution of having the former beneficiary understand and approve the transaction. *Id.* Other companies require the viator to get written permission from previous beneficiaries. Kristof, *supra* note 19, at 4.

However, according to majority law regarding insurance, life insurance policyholders may change the beneficiary of their policy if the policy terms expressly reserve the right to change the beneficiary. 1 FREEDMAN, *supra* note 6, § 3:2[h], at 220-21. Allowing the named beneficiaries to acquire vested, or unchangeable, rights to the proceeds from the life insurance policy would make it virtually impossible for the insured to borrow on the policy in times of financial need. *Id.* The assignee of an insurance policy must acquire rights to the death benefits superior to those of the named beneficiaries. *Id.* Thus, when a life insurance policy authorizes the change of beneficiary without the former beneficiary's consent, courts will uphold the insured's right to change the beneficiary and assign his insurance policy. See *Resnek v. Mutual Life Ins. Co.*, 190 N.E. 603, 604 (Mass. 1934) (holding that the policyholder's former beneficiary, his mother, could not receive the policyholder's death benefits where the insured had changed the beneficiary to his sister before his death, and the terms of the

on the policy.<sup>23</sup> When the viator dies, the purchaser receives the death benefits and usually makes a twenty to forty percent profit on each policy.<sup>24</sup>

Not only have viatical companies formed for the purpose of buying life insurance policies for themselves or other private investors, but brokers have also established their own niche in the viatical industry.<sup>25</sup> Viatical brokers act as intermediaries between the policy purchasers and the viators.<sup>26</sup> When the broker's client enters into a viatical settlement, the brokerage firm exacts a fee for its services.<sup>27</sup> The profit margins are high and usually require only a few years for large returns.

Viatical settlements have become a popular way for terminally ill individuals to try to find peace of mind and financial security in

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policy provided for such a change); *Slocum v. Metropolitan Life Ins. Co.*, 139 N.E. 816, 817-18 (Mass. 1923) (noting that a life insurance policyholder has a right to change the beneficiary of his policy, providing that the terms of the policy permit such a change); *Hooton v. Hooton*, 203 N.W. 475, 476 (Mich. 1925) (holding that a wife did not have a vested right as beneficiary of her husband's life insurance policy, where the life insurance policy authorized change of beneficiary); *Stahel v. Prudential Ins. Co. of Am.*, 249 N.W. 713 (Minn. 1933) (holding that, even though the policy named a vested beneficiary, this beneficiary's right was subject to the policy provision granting the insured the right to borrow from the insurer using the policy as security); *Newport v. Newport*, 759 S.W.2d 630, 638 (Mo. Ct. App. 1988) (holding that a father could not be required to keep a life insurance policy in effect naming his minor children as beneficiaries); *Ivey v. Ivey*, 334 S.E.2d 123, 125 (S.C. Ct. App. 1985) (holding that the court will not force an individual to maintain a life insurance policy to support his minor children without a just, equitable, and compelling reason to do so); *but see Pierce v. Pierce*, 758 P.2d 252, 253-54 (Kan. Ct. App. 1988) (holding that a husband's change of beneficiary on his life insurance policy had no effect where a divorce decree provided that he maintain a life insurance policy naming his children as beneficiaries); *United Parcel Service v. Riley*, 532 N.Y.S.2d 473, 474 (N.Y. Sup. Ct. 1988) (holding that employee's attempt to change thrift plan beneficiary from his wife to his sister was invalid because he did not first receive his wife's consent pursuant to the Retirement Equity Act of 1984).

23. Barrett, *supra* note 9, at 160.

24. Enrico, *supra* note 3, at 53.

25. *Living Benefits Can Cure One of AIDS' Most Devastating Side Effects*, AFFORDING CARE BULL., Jan./Feb. 1993, at 8. Many viatical companies advertise in financial bulletins and other publications intended for AIDS patients, attempting to attract viators to their companies by promising the best price for their policy. *Id.* One such advertisement reads:

LIVING BENEFITS CAN CURE ONE OF AIDS' MOST DEVASTATING SIDE EFFECTS. The fight against AIDS is tough enough. What you don't need is a separate struggle with one of its most devastating side effects—a struggle with serious financial problems. For many people, a life insurance policy can provide an immediate and welcome source of cash to pay for medical care, housing, transportation or just a vacation to rest and relax. As a general rule, we can offer from 55% to 80% of the face value of our client's policies. The final amount depends on a variety of factors, including an evaluation of your medical records—which are held in strictest confidence—by our staff doctors.

*Id.*

26. Interview with Parker Willson, *supra* note 17.

27. *Id.*

the final months of their lives.<sup>28</sup> However, this new and largely unregulated industry has caused some concern over the possibilities for abuse, such as overreaching and undue influence upon vulnerable victims.<sup>29</sup> In response to these concerns, several states have passed statutes regulating the viatical settlement market.<sup>30</sup>

## II. REGULATION OF THE VIATICAL SETTLEMENT MARKET

Viatical settlement regulations attempt to alleviate problems and prevent potential abuses in the viatical settlement market. Statutes enacted in New York,<sup>31</sup> California,<sup>32</sup> Kansas,<sup>33</sup> and New Mexico<sup>34</sup> regulate the market by placing the viatical market under the control of state insurance commissioners or administrators.<sup>35</sup> In addition, the model statute proposed by the National Association of Insurance Commissioners (NAIC) contains similar provisions which other states may use in enacting their own legislation.<sup>36</sup>

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28. See Martha Groves, *Terminally Ill Cash In On Insurance Policies: For AIDS Patients, Money Helps Buy Medications*, WASH. POST, Oct. 30, 1990, at Z9 (stating that AIDS support groups support the purchasing of policies because the viatical settlements allow individuals to "die with dignity").

29. *States Probe Life Insurance Schemes: Firms Prey on AIDS Patients*, CHI. TRIB., Aug. 20, 1992, at C3. The Chicago Tribune reports that some viatical companies have engaged in schemes to violate the viators' privacy and lure investors into paying large amounts of money for "get rich quick" schemes at the viators' expense. *Id.* These companies promised risk-free returns on the purchasers' investments while neglecting to tell the purchasers about the potential for the viator to live longer than expected, and the potential for a cure to the viators' illnesses. *Id.* Additionally, the companies provided potential investors with "menus" of dying patients. *Id.* These menus predicted the number of months the viators had left to live and explained how much insurance the viators had. *Id.* For example, one case description provided, "[a]pplicant is being treated with (anti-viral drugs) AZT and DDI. While applicant has a low T-cell count, his life expectancy is estimated at 12-24 months, which could be shortened by the onset of any major opportunistic disease or infection."

The Tribune article further notes that the unregulated companies have virtually free reign to conduct their advertisements in any way they please. *Id.* Since there are no regulations which require the firms to register or receive a license, investors have no way to verify this information, and policyholders have no way to be sure they will receive payment for their policies. *Id.*

30. CAL. INS. CODE §§ 10113.1-10113.2 (West 1992); N.Y. INS. LAW §§ 7801-7810 (McKinney 1993); MODEL VIATICAL SETTLEMENTS ACT §§ 1-12 (proposed draft 1993).

31. N.Y. INS. LAW §§ 7801-7810 (McKinney 1993).

32. CAL. INS. CODE §§ 10113.1-10113.2 (West 1992).

33. KAN. STAT. ANN. §§ 40-2, 140-40-2, 152 (1992).

34. N.M. STAT. ANN. §§ 59A-11A-1 (Michie 1993).

35. Although four states have enacted legislation of the viatical settlement industry, this Note examines the provisions of the New York, California and model NAIC statutes.

36. MODEL VIATICAL SETTLEMENTS ACT §§ 1-12 (proposed official draft 1993). In June 1993, the National Association of Insurance Commissioners met to establish a draft of a model viatical settlement statute. Memorandum from the Viatical Settlement Working Group of the Life Insurance Committee to the National Association of Insurance Commissioners (June 21, 1993) (on file with *The John Marshall Law Review*). The NAIC is funded by insurance carriers in

Although state regulation of the viatical settlement market seeks to protect viators, these statutes all contain two problematic provisions. First, the statutes give state insurance commissioners the power to set minimum discount rates for the sale of the life insurance policies.<sup>37</sup> Second, the statutes require licensing for individual purchasers who do not represent viatical companies or brokers.<sup>38</sup> These statutory provisions limit the price viators may accept for their policies and limit the number of people to whom viators may sell their policies.

### A. General Statutory Provisions

Viatical settlement statutes delineate requirements and procedures for the process of buying and selling life insurance policies.<sup>39</sup> These requirements are designed to protect viators by ensuring that purchasers do not try enter into unfair transactions or take advantage of a viator's vulnerability.<sup>40</sup> The statutory procedures provide that the insurance commissioner of each state ensure compliance by viatical settlement companies and individual

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each state. Interview with Parker Willson, *supra* note 17. The draft was revised in August 1993 and is currently pending adoption by the NAIC. Interview with Carolyn Johnson, Representative of the National Association of Insurance Commissioners Legal Department, Kansas City, Mo. (Sep. 13, 1993). If adopted, the model statute will become the suggested model for all states wishing to regulate the viatical settlement industry. *Id.*

37. See, e.g., CAL. INS. CODE § 10113.2(f) (West 1992); N.Y. INS. LAW § 7810 (McKinney 1993); MODEL VIATICAL SETTLEMENTS ACT § 10(B) (proposed draft 1993); see also *infra* note 49 and accompanying text discussing the statutory minimum discount rate provisions in detail.

38. See, e.g., CAL. INS. CODE § 10113.2(b)(1); N.Y. INS. LAW § 7802(a); MODEL VIATICAL SETTLEMENTS ACT § 3(A). According to the California, New York, and NAIC statutes, any individual seeking to purchase a life insurance policy or to act as a broker for the sale of a life insurance policy must be licensed by the state in which he resides.

39. See generally CAL. INS. CODE §§ 10113.1-10113.2; N.Y. INS. LAW §§ 7801-7810; MODEL VIATICAL SETTLEMENTS ACT §§ 1-12. See, e.g., CAL. INS. CODE § 10113.2; N.Y. INS. LAW § 7802; MODEL VIATICAL SETTLEMENTS ACT § 3 (providing an extensive list of rules and regulations which settlement companies must comply in order to receive and retain their licenses); CAL. INS. CODE § 10113.2; N.Y. INS. LAW § 7808; MODEL VIATICAL SETTLEMENTS ACT § 9 (subjecting disclosure of medical records under viatical statutes to state laws concerning the confidentiality of medical information); CAL. INS. CODE § 10113.2(m)-(n); N.Y. INS. LAW § 7804, 7808; MODEL VIATICAL SETTLEMENTS ACT §§ 9, 11 (forbidding licensees to engage in false or misleading advertising and requiring a rescission period for any viatical settlement).

40. See *infra* notes 41-44 and accompanying text discussing statutory regulations protecting viators. In addition to the provisions outlined therein, the regulations also require full disclosure to viators of information about possible alternatives to viatical settlements, tax consequences of settlement, and possible cessation of public assistance due to the proposed increase in income. See, e.g., CAL. INS. CODE § 10113.2(d); N.Y. INS. LAW § 7807; MODEL SETTLEMENTS ACT § 8.



purchasers.<sup>41</sup>

The motivation behind viatical settlement statutes is paternalistic. Viatical statutes seek to ensure that viators understand and voluntarily agree to the viatical settlement contract and its provisions. The statutes require a purchaser to procure a witnessed, signed statement attesting that the viator freely and voluntarily consents to the viatical contract, acknowledges the terminal illness, understands both the settlement and the benefits of the life insurance policy, and releases his or her medical records to the viatical settlement company or broker.<sup>42</sup> Moreover, any purchaser entering into a viatical settlement contract with a viator must obtain a written statement from a medical professional affirming that the viator is not acting under undue influence.<sup>43</sup>

The statutes also attempt to protect viators by subjecting viatical companies and brokers to extensive oversight, regulation, and control by the insurance commissioner or administrator of each

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41. See, e.g., CAL. INS. CODE § 10113.2(b)(1); N.Y. INS. LAW § 7802(a); MODEL VIACICAL SETTLEMENTS ACT § 3(A) (providing that insurance commissioners control the issuing of licenses and the administrative oversight of all companies and individuals seeking to buy a terminally ill person's life insurance policy in the state).

The insurance commissioner has broad discretion in exercising his statutory authority. See, e.g., CAL. INS. CODE § 10113.2(c); N.Y. INS. LAW § 7804; MODEL VIACICAL SETTLEMENTS ACT § 5 (requiring that viatical companies submit settlement contracts to the commissioner, who must then disapprove any form if he deems its wording or provisions jeopardize the best interests of the public); CAL. INS. CODE § 10113.2(h); N.Y. INS. LAW § 7806; MODEL VIACICAL SETTLEMENTS ACT § 7 (requiring viatical companies submit to investigation by the insurance commissioner at any time he deems such an investigation necessary); CAL. INS. CODE § 10113.2(g); N.Y. INS. LAW § 7807; MODEL VIACICAL SETTLEMENTS ACT § 8 (requiring viatical companies to participate in full disclosure of company business records, investors and financial records at the commissioner's request); see also CAL. INS. CODE § 10113.2; N.Y. INS. LAW § 7806; MODEL VIACICAL SETTLEMENTS ACT § 7 (granting commissioners the power to issue orders to licensees, to examine any records, files, etc., of a company, and to impose fines for non-compliance with the statute itself or orders given pursuant to the regulations).

42. See CAL. INS. CODE § 10113.1(c)(1)-(2) (West 1992); N.Y. INS. LAW § 7808(a) (McKinney 1993); MODEL VIACICAL SETTLEMENTS ACT § 9(A)(2) (requiring a purchaser to procure a witnessed, signed statement attesting that the viator freely and voluntarily consented to the viatical contract, acknowledges the terminal illness, understands both the settlement and the benefits of the life insurance policy, and releases his or her medical records to the viatical settlement company or broker).

43. See CAL. INS. CODE § 10113.1(c)(1); N.Y. INS. LAW § 7808(a); MODEL VIACICAL SETTLEMENTS ACT § (9)(A)(1). Most viatical companies procure these affidavits from physicians whom the companies themselves hire in order to insure an accurate, unbiased estimate of the viators' life expectancy. Barrett, *supra* note 9, at 1. The medical professional and the viator must also attest that the viator possesses sufficient mental capacity to understand his actions with regard to the settlement. CAL. INS. CODE § 10113.1(c)(1); N.Y. INS. LAW § 7808(a); MODEL VIACICAL SETTLEMENTS ACT § 9(A)(1).

state.<sup>44</sup> Potential purchasers must apply for licenses from the insurance commissioner before transacting viatical settlements.<sup>45</sup> If a purchaser complies with the statute's regulations and the insurance commissioner's orders, the commissioner approves the licensing application.<sup>46</sup> Thus, the statutory procedures appear to adequately protect the interests of viators.

### B. Problems with Viatical Settlement Regulations

Although the general protections of viatical settlement statutes are warranted, the statutes contain provisions which harm viators by limiting their right to sell their insurance policies. There are two problematic provisions of viatical settlement statutes. First, the statutes delegate power to the insurance commissioners to set minimum discount rates for viatical settlements.<sup>47</sup> Second, the statutes require not only viatical settlement companies and viatical settlement brokers to be licensed, but also provide that individual purchasers who do not represent a company or a broker must obtain a license before purchasing a viator's insurance policy.<sup>48</sup>

#### 1. The Insurance Commissioner's Power to Set Minimum Discount Rates for the Sale of Insurance Policies

The California, New York, and NAIC statutes give state insurance commissioners the power to make any rules necessary to regulate the industry.<sup>49</sup> These rules include the regulation of discount rates used to determine the minimum amount paid on viatical set-

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44. See *supra* note 39 for examples of state insurance commissioners' broad statutory authority.

45. See CAL. INS. CODE §§ 10113.1-10113.2; N.Y. INS. LAW §§ 7801-7810; MODEL VIATICAL SETTLEMENTS ACT §§ 1-12. The commissioner has the discretion to approve or deny the application for a license. CAL. INS. CODE § 10113.2(c); N.Y. INS. LAW § 7802(f); MODEL VIATICAL SETTLEMENTS ACT § 3(F). Moreover, the commissioner may revoke any license after a hearing if he feels it is in the best interest of the public to do so. CAL. INS. CODE § 10113.2(j); N.Y. INS. LAW § 7803(a); MODEL VIATICAL SETTLEMENTS ACT § 4(A).

46. CAL. INS. CODE §§ 10113.1-10113.2; N.Y. INS. LAW §§ 7801-7810; MODEL VIATICAL SETTLEMENTS ACT §§ 1-12.

47. See *infra* notes 49-51 and accompanying text for an explanation of how the statutes delegate power to the insurance commissioner to set minimum discount rates.

48. See *infra* notes 52-56 and accompanying text for an explanation of the requirement that individual purchasers be licensed to purchase viators' insurance policies.

49. CAL. INS. CODE § 10113.2(f); N.Y. INS. LAW § 7810; MODEL VIATICAL SETTLEMENTS ACT § 10(B). Although the California and NAIC statutes explicitly give the insurance commissioner the power to set minimum discount rates for the insurance policies, the New York statute does not explicitly give him this power. However, section 7810 of the New York statute gives the commissioner the power to make any rules necessary to enact the other statutory provisions. N.Y. INS. LAW § 7810. Since the statutes are designed to protect the viators and ensure that they get fair prices for their policies, section 7810 can easily be extended to include the power to set minimum discount rates. Therefore, the

tlements.<sup>50</sup> This means, in effect, that the commissioner can set minimum rates for which viators may sell their life insurance policies. For example, the commissioner can dictate that every viatical settlement contract require payment of at least fifty percent of the face value of the policy. Consequently, the statutes limit the rate at which viators can choose to sell their insurance policies.<sup>51</sup>

Proponents of the provision intended minimum discount rates to assist viators in obtaining a respectable price for their life insurance policies.<sup>52</sup> Minimum discount rates prevent viatical settlement companies from offering prices below a certain rate.<sup>53</sup> Proponents assert that minimum discount rates are necessary because viators are in a highly emotional state due to the knowledge that they will soon die.<sup>54</sup> Consequently, minimum discount rates purportedly protect viators from accepting unreasonably low prices for their policies.<sup>55</sup> However, as will be discussed, these paternalistic protections often have the effect of harming potential viators with these restrictions.

## 2. *The Requirement that Individual Purchasers Be Licensed*

The California, New York, and NAIC statutes require that every purchaser entering into a viatical settlement be licensed by the state insurance commissioner to transact business within the state.<sup>56</sup> The statutes expressly provide that both viatical compa-

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New York insurance commissioners also have the power to set minimum discount rates for the insurance policies.

50. See Cal. Ins. Code § 10113.2(f); N.Y. INS. LAW § 7810; MODEL VIATICAL SETTLEMENTS ACT § 10(B).

51. See *infra* notes 91-129 and accompanying text for a discussion of the consequences of requiring life insurance policies be sold at minimum discount rates.

52. Interview with David Petersen, *supra* note 93 (discussing the purpose of minimum discount rates and how they are meant to help viators); see also S. 5303, 216th Legis., Reg. Sess. 1993 N.Y. LAWS, STAFF OF SENATOR GUY J. VELLELLA, 216TH LEGIS., REG. SESS., INTRODUCTORY MEMORANDUM IN SUPPORT OF BILL 5303, at 1-2 (1993) (discussing the overall purpose of the law, which is to protect viators).

53. Interview with David Petersen, *supra* note 93 (explaining the purpose of minimum discount rates).

54. Letter from Gay Men's Health Crisis to Senator Guy J. Vellella, (May 25, 1993) [on file with *The John Marshall Law Review*] (discussing the proposition that viators need special protection because they are vulnerable to overreaching).

55. Interview with David Petersen, *supra* note 93 (arguing against minimum discount rates, but explaining the purported reasons for including them in viatical settlement laws); see also Letter from Gay Men's Health Crisis to Senator Guy J. Vellella, (May 25, 1993) [on file with *The John Marshall Law Review*] (arguing that the statutory provisions protect the viators by making sure their viatical settlement contracts are fair in all aspects, including pricing).

56. See CAL. INS. CODE §§ 10113.1(a)-10113.2(a)-(b); N.Y. INS. LAW §§ 7801-7802(a); MODEL VIATICAL SETTLEMENTS ACT §§ 2-3(A).

nies and individual purchasers must be licensed.<sup>57</sup> Thus, under the broad language of the statute, a private investor involved in a single viatical settlement must comply with the same licensing requirements as a company in the business of buying and selling life insurance policies.

In addition, the New York Act requires viatical settlement companies, brokers and individual purchasers to inform viators of their options and the consequences of transacting a settlement.<sup>58</sup> Individual purchasers, like companies and brokers, also must advise viators to seek legal and financial advice before completing the settlement.<sup>59</sup> Finally, the Act requires individual purchasers to join viatical companies and brokers in full financial disclosure and the payment of yearly licensing fees to the commissioner.<sup>60</sup>

Both the minimum discount rates provisions and the individual licensing requirements stifle a viator's ability to take full advantage of the viatical settlement market. These statutory provisions impair a viator's right to sell their insurance policies. Consequently, a terminally ill individual's ability to combat his financial difficulties is frustrated by state regulations interfering with his right to freely alienate his property.

### III. THE PREFERENCE FOR FREE ALIENATION OF PROPERTY

The general rule in United States law is to allow the free alienation of real and personal property. Courts have carved out exceptions to this rule where policy considerations dictate the need for limitations on the right to sell one's property. In the context of viatical settlement statutes, however, these policy considerations do not mandate an exception.

#### A. *The Preference Against Restraints on Alienation of Property.*

In general, United States law demonstrates a preference for

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57. See CAL. INS. CODE §§ 10113.1-10113.2(a)-(b) (stating "[n]o person may enter into or solicit viatical settlements pursuant to Section 10113.1 unless that person has been licensed by the commissioner under this section."); N.Y. INS. LAW §§ 7801(a)-7802(a) (stating "[n]o individual, partnership, corporation or other entity may act as a viatical settlement company or broker or enter into or solicit a viatical settlement without first having obtained a license from the superintendent . . ."); MODEL VIATICAL SETTLEMENTS ACT §§ 2-3(A) (stating "[n]o individual, partnership, corporation or other entity may act as a viatical settlement provider or enter into or solicit a viatical settlement contract without first having obtained a license from the Commissioner.").

58. N.Y. INS. LAW § 7807; see also MODEL VIATICAL SETTLEMENTS ACT §§ 3-9.

59. See N.Y. INS. LAW § 7807; see also MODEL VIATICAL SETTLEMENTS ACT §§ 3-9.

60. See N.Y. INS. LAW §§ 7802-7809; see also MODEL VIATICAL SETTLEMENTS ACT §§ 3-9.

the free alienation of property<sup>61</sup> or entitlements.<sup>62</sup> Entitlements are rights or interests in property which receive protection from the state, such as the right to possess and transfer personal property without interference from others.<sup>63</sup> Owners of entitlements such as land, tangible personal property, and securities may transfer these protected rights by contract.<sup>64</sup>

Under basic property rules which protect entitlements, someone who wishes to take the entitlement from its owner must usually purchase it first from the owner for the owner's agreed upon price.<sup>65</sup> Usually, the government does not intervene by trying to decide the entitlement's value.<sup>66</sup> Instead, each party ultimately

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61. See Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 384-86 (1993) (arguing against restraints on the alienation of human capital and giving an overview of restraints on alienation in employment law, debtor creditor law, and family law); Richard A. Epstein, *Why Restrain Alienation*, 85 COLUM. L. REV. 970 (1985) ("The right of alienation, as part of the bundle of property rights, is set in opposition to the rights of possession and use. The types of property to which it can extend are real and personal, tangible and intangible."); see also *Citgo Petroleum Corp. v. Hopper*, 429 S.E.2d 6, 7 (Va. 1993); *Sheilds v. Moffit*, 683 P.2d 530, 533 (Okla. 1984); *Metro. Sav. & Loan Ass'n*, 652 S.W.2d 820, 822 (Tex. Ct. App. 1983); *McGinnis v. McGinnis*, 391 P. 2d 927 (Wyo. 1964); *Peiter v. Degenring*, 71 A.2d 87, 89 (Conn. 1949); *Keeling v. Keeling*, 203 S.W.2d 601 (Tenn. 1947).

62. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Alienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) (establishing an approach for examining the concept of entitlements and their alienability using both tort and property law principles); see also *Crosswell Enter., Inc. v. Arnold*, 422 S.E.2d 157, 159 (S.C. Ct. App. 1992); *Horse Pond Fish & Game Club, Inc. v. Cormier*, 581 A.2d 478, 480 (N.H. 1990); *Nat'l Consultants, Inc. v. Burt*, 366 S.E.2d 344, 348-49 (Ga. Ct. App. 1988); *Benson v. Greenville Nat'l Exch. Bank*, 113 S.W.2d 918, 923 (Tex. Ct. App. 1953); *In re Estate of Sahlender*, 201 P.2d 69 (1st Cir. 1949).

63. Calabresi & Melamed, *supra* note 62, at 1090; see also *Castriota v. Castriota*, 633 A.2d 1024, 1027 (N.J. Super. Ct. App. Div. 1993); *Dixie Pipe Sales, Inc. v. Perry*, 834 S.W.2d 491, 493 (Tex. Ct. App. 1992); *Gray v. Harris Land & Cattle Co.*, 737 P.2d 475, 476 (Mont. 1986); *Tracey v. Franklin*, 67 A.2d 56, 58-59 (Del. 1949); *Ramage v. First Farmers & Merchants Nat'l Bank of Troy*, 30 So. 2d 706, 711 (Ala. 1947).

64. See Sterk, *supra* note 61, at 383 ("[F]reedom of contract remains an organizing principal for much corporate and commercial law."); Richard A. Epstein, *Notice and Freedom in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1354 (1982) ("In general, there is a very strong case for applying the doctrine of freedom of contract to the rights and duties between the parties . . ."); see, e.g., *Hieb v. Opp*, 458 N.W.2d 797, 801 (S.D. 1989); *First Nat'l Bank of Vicksburg v. Caruthers*, 443 S.2d 861, 864 (Miss. 1983); *Johnson v. R.H. Donnelly Co.*, 402 So. 2d 518, 520 (Fla. Dist. Ct. App. 1981); *Memorial Gardens Ass'n v. Smith*, 156 N.E.2d 587, 595 (Ill. 1959); *Gazzam v. Bldg. Serv. Employees Int'l Union*, 188 P.2d 97, 102 (Wash. 1947); see also Sterk, *supra* note 61, at 383.

65. Calabresi & Melamed, *supra* note 62, at 1092; see also *Crosswell Enter., Inc. v. Arnold*, 422 S.E.2d 157, 159 (S.C. Ct. App. 1992); *Benson v. Greenville Nat'l Exch. Bank*, S.W.2d 918, 923 (Tex. Ct. App. 1953).

66. Calabresi & Melamed, *supra* note 62, at 1092; see also *Castriota v. Castriota*, 633 A.2d 1024, 1027 (N.J. Super. Ct. App. Div. 1993); *Crosswell Enter., Inc. v. Arnold*, 422 S.E.2d 157, 159 (S.C. Ct. App. 1992); *Nat'l Consultants, Inc. v. Burt*, 366 S.E.2d 344, 348-49 (Ga. Ct. App. 1988); *Benson v. Greenville Nat'l Exch. Bank*, S.W. 2d 918, 923 (Tex. Ct. App. 1953); *Tracey v. Franklin*, 67 A.2d

reaches an agreed upon exchange by independently determining how much the entitlement is worth to him.<sup>67</sup>

The preference for free alienability rests on three principles.<sup>68</sup> First, unlimited alienability of property ensures that property will go to those individuals who value it most.<sup>69</sup> Second, free alienabil-

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56, 58-59 (Del. 1949); *Gazzam v. Bldg. Serv. Employees Int'l Union*, 188 P.2d 97, 102 (Wash. 1947).

67. *Calabresi & Melamed*, *supra* note 62, at 1092; *see also* *Hieb v. Opp*, 458 N.W.2d 797, 801 (S.D. 1989); *Nat'l Consultants, Inc. v. Burt*, 366 S.E.2d 344, 348-49 (Ga. Ct. App. 1988); *Johnson v. R.H. Donnelly Co.*, 402 So. 2d 518, 520 (Fla. Dist. Ct. App. 1981); *Gazzam v. Bldg. Serv. Employees Int'l Union*, 188 P.2d 97, 102 (Wash. 1947).

68. *Sterk*, *supra* note 61, at 383, 384.

69. For example, both English and American courts have long exhibited a preference against restrictive covenants, or covenants not to compete, because such covenants operate as restraints on trade, and prevent individuals from selling their property to those whose market behavior shows they value the property most. *Sterk*, *supra* note 61, at 387. Several states have statutes which provide that these restrictive covenants and other general restraints on alienation are unenforceable. *See, e.g.*, ALA. CODE § 35-4-4 (1993) (applying common law rule against restraints on alienation to personal property); ARIZ. REV. STAT. ANN. § 33-261 (1993) (applying rules against restraints on alienation to personal property); CAL. CIV. CODE § 711 (West 1993) (mandating that conditions restraining alienation are void); MONT. CODE ANN. § 70-1-405 (1991) (providing that conditions restraining alienation are void).

Often, courts will refuse to enforce restrictive or non-competition covenants that prevent individuals from selling their property to those who value the property most. *See, e.g.*, *Cagan v. Intervest Midwest Real Estate Corp.*, 774 F. Supp. 1089, 1093 (N.D. Ill. 1991) (holding that as a general rule, restraints against alienation are void); *Hapney v. Cent. Garage, Inc.*, 579 So. 2d 127, 134 (Fla. Dist. Ct. App. 1991) (holding that covenants not to compete *per se* violate public policy and are void, and an employer must prove an underlying protected interest such as trade secrets and customer lists in order to enforce such a covenant); *Gale v. York Center Community Coop., Inc.*, 171 N.E.2d 30, 33 (Ill. 1961) (holding that restraints on alienation are generally void even when limited in time, and mandating that restraints on alienation will only be enforced when reasonably designed to achieve accepted social or economic ends); *Low v. Spellman*, 629 A.2d 57, 59 (Me. 1993) (holding that right of first refusal to buy property for a certain sum was void as an unreasonable restraint on alienation because it extended to heirs and assigns); *Village of Pinehurst v. Regional Inv. of Moore*, 412 S.E.2d 645, 647 (N.C. 1992) (holding that the right of first refusal for the sale of sewage and water systems created an unenforceable restraint on alienation, because this first refusal right was unlimited in duration); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 187 (1979) ("A promise to refrain from competition that imposes a restraint that is not ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade."). However, courts enforce restrictive covenants in some situations, providing the covenants not to compete and restraints on alienation are reasonable. *Sterk*, *supra* note 61, at 387; *see also* *Kerley v. Nu-West, Inc.*, 762 P.2d 631, 635 (Ariz. Ct. App. 1988) (holding a restraint on alienation will be upheld when it does not restrict alienation for an unreasonable duration); *All Stainless, Inc. v. Colby*, 308 N.E.2d 481, 485 (Mass. 1974) (holding that a covenant not to compete will be enforced if it is reasonable, based on all the circumstances); *Stenke v. Masland Dev. Co., Inc.*, 394 N.W.2d 418, 422 (Mich. Ct. App. 1986) (holding that a contract giving an individual the right of first refusal for the purchase of a gas station did not constitute an unreasonable restraint on alienation because the agreement did not limit the price of the premises); *Orthotic & Prosthetic Lab, Inc. v. Pott*, 851 S.W.2d 633, 639-40 (Mo. Ct. App. 1993) (holding that noncom-

ity helps to control the market system by increasing the production of goods that buyers want and decreasing the production of unwanted goods.<sup>70</sup> Third, free alienability increases an individual's ability to make choices concerning the quality of his life.<sup>71</sup>

### B. Situations Where Government Allows Restraints on Alienation

In situations which involve certain economic and social policy

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petition covenant in agreement to sell defendant's business was enforceable and assignable under the terms of the agreement); *Metro. Transp. Auth. v. Bruken Realty Corp.*, 492 N.E.2d 379, 385 (N.Y. 1986) (holding that restraints on alienation will be enforced providing that they are reasonable in terms of duration, price, and purpose); *Reed, Roberts Assoc., Inc. v. Strauman*, 353 N.E.2d 590, 593 (N.Y. 1976) (holding that restrictive covenants are enforceable to the extent necessary to stop disclosure of trade secrets or privileged customer information).

70. See *Sterk*, *supra* note 61, at 383, 384; see also ALA. CODE § 8-1-1 (1993) (providing that contracts restraining business are void); ALA. CODE § 8-10-1 (1993) (making price fixing illegal); ALA. CODE § 8-10-3 (1993) (making monopolies of businesses or industries illegal); ALASKA STAT. § 45.50.562 (1992) (making combinations in restraint of trade unlawful); CAL. BUS. & PROF. CODE § 16600 (West 1992) (making contracts in restraint of trade and free market action illegal); 740 ILCS 10/2 (Smith-Hurd 1993) (promoting growth of commerce by forbidding restraints on competition and trade); IND. CODE ANN. § 24-1-2-1 (West 1993) (making monopolies or combinations in restraint of trade illegal); IND. CODE ANN. § 24-1-2-3 (West 1993) (forbidding schemes or contracts to restrain free competition for the letting of contracts for public or private work); KAN. STAT. ANN. § 50-101 (1992) (declaring trusts which carry out restraints on competition and market activity void); MICH. COMP. LAWS ANN. § 445.772 (West 1993) (making combinations in restraint of trade and market competition illegal); N.Y. GEN. BUS. LAW § 340 (McKinney 1993) (making contracts in restraint of trade illegal); N.Y. GEN. BUS. LAW § 369-a (McKinney 1993) (forbidding price fixing in the resale of commodities); RESTATEMENT (SECOND) OF CONTRACTS § 186 (1979) ("A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade. A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation."); *Epstein*, *supra* note 61, at 972. *Epstein* wrote that:

Most voluntary transactions move property from lower to higher value uses. The purchase price is greater than the value of the property to the seller, else he will not part with it. Yet it must be less than the value of the property in use to the buyer, else he will not purchase it. When total transaction costs exceed the difference in values to the buyer and the seller, then the exchange cannot go forward, since both parties no longer will emerge as net winners.)

*Id.* See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1889 (1987) ("[I]mplied in property' is the right to whatever a producer can get for her products 'in a fair market.'" (quoting J.S. Mill, *PRINCIPLES OF POLITICAL ECONOMY* BK. II 221 (Washley ed. 1909))).

71. See *Sterk*, *supra* note 61, at 382, 384; see also *Potter v. Chamberlain*, 73 N.W.2d 844, 846 (Mich. 1955) (holding that a property owner may dispose of her property as she sees fit, providing she is competent to do so and is subject to no undue influences); *Berthouine v. Sczewczyk*, 26 N.W.2d 770, 772 (Mich. 1947) (holding that a property owner who does not act under undue influence and who is mentally competent may dispose of her property as she wishes).

considerations, lawmakers limit the alienation of entitlements.<sup>72</sup> An entitlement is inalienable when the law prevents its transfer from a willing seller to a willing buyer.<sup>73</sup> In these situations, the government dictates who owns the commodity and how much that individual must be paid if the entitlement is taken or destroyed.<sup>74</sup> The government may also forbid the entitlement's sale under some or all circumstances.<sup>75</sup> In determining whether to restrain alienation, courts balance the preference toward free alienation against the interest in protecting the general public's rights.<sup>76</sup>

Courts apply inalienability rules in three situations.<sup>77</sup> First, courts limit alienability of an entitlement when the transaction creates economic inefficiencies in the form of externalities, or costs to third parties.<sup>78</sup> Economically inefficient externalities occur when the sale of one person's entitlement reduces the value of someone else's entitlement.<sup>79</sup> Costs to third parties also occur when it is difficult or undesirable to determine an objective value of the prop-

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72. Calabresi & Melamed, *supra* note 62, at 1092; *see also* Daigle v. Clemco Indus., 613 So. 2d 619, 620 (La. 1993); First Nat'l Bank of Vicksburg v. Caruthers, 443 So. 2d 861, 864 (Miss. 1983); Gale v. York Ctr. Community Coop., Inc., 171 N.E.2d 30, 33 (Ill. 1960); Memorial Gardens Ass'n v. Smith, 156 N.E.2d 587, 595 (Ill. 1959); Autumn Corp. v. Lederman, 95 N.Y.S.2d 57, 61 (N.Y. App. Div. 1949); Hooten v. Carson, 209 S.W.2d 273, 275 (Tenn. 1948); Bounty Ballroom v. Bain, 211 S.W.2d 248, 251 (Tex. 1948); Callanan Rd. Improvement Co. v. Colonial Sand & Stone Co., Inc. 72 N.Y.S.2d 194, 196 (N.Y. App. Div. 1947); Blum v. Engelman, 57 A.2d 421, 423 (Md. 1948); Carlton v. Manuel, 187 P.2d 558, 562 (Nev. 1947); Jorgenson v. Metro. Life Ins. Co., 55 A.2d 2, 4 (N.J. 1947).

73. *See* Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373 (1935) ("Restrictions upon the grantee's right to transfer the property, at any time, to whomsoever he may choose, and in whatever manner he may select, are called 'restraints on alienation.'").

74. Calabresi & Melamed, *supra* note 62, at 1092, 1093; *see also* Memorial Gardens Ass'n v. Smith, 156 N.E.2d 587, 595 (Ill. 1959); City of Akron v. Public Util. Comm'n, 78 N.E.2d 890, 895 (Ohio 1948); Hooten v. Carson, 209 S.W.2d 273, 275 (Tenn. 1948); Bounty Ballroom v. Bain, 211 S.W.2d 248, 251 (Tex. 1948); Blum v. Engelman, 57 A.2d 421, 423 (Md. 1948).

75. *Id.*

76. Manning, *supra* note 73, at 373; *see also* Cagan v. Intervest Midwest Real Estate Corp., 774 F. Supp. 1089, 1093 (N.D. Ill., 1991) (holding that a restraint "may be sustained . . . when it is reasonably designed to attain or encourage accepted social or economic ends").

77. Calabresi & Melamed, *supra* note 62, at 1111.

78. *See, e.g.*, Custer Pub. Power Dist. v. Loup River Pub. Power, 75 N.W.2d 619, 628 (Neb. 1956); Hooten v. Carson, 209 S.W.2d 273, 275 (Tenn. 1948); Carlton v. Manuel, 187 P.2d 558, 562 (Nev. 1947); Jorgenson v. Metro. Life Ins. Co., 55 A.2d 2, 4 (N.J. 1947).

79. This occurs, for example, when A sells his property to B, who will then proceed to pollute A's former property. C, who lives next door to A, will suffer a decrease in the value of his property due to A's complete freedom to alienate his property to B, a polluter. *Id.*; *see also* Epstein, *supra* note 61, at 1354 ("A conveyance that states that a prospective purchaser shall not be liable for nuisances caused to third parties will have no effect upon the right of any third party to maintain a cause of action for nuisance.").



erty, as in the case of human capital such as degrees or licenses.<sup>80</sup>

Second, restraints on alienation result when private contracting creates undesirable external consequences, as in the case of monopolies which hurt the public.<sup>81</sup> External costs may also take the form of moralisms, where third parties take offense at the prospect of an individual selling an entitlement.<sup>82</sup> For example, courts may protect a property owner's liberty by refusing to allow him to alienate his human capital, or to sell himself into slavery.<sup>83</sup>

The third concern which prompts restraints on alienability is self paternalism, where rules exist to prevent individuals from

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80. Calabresi & Melamed, *supra* note 62, at 1112; *see also* Sterk, *supra* note 61, at 385 ("[A] variety of well-established legal rules impede the transfer of human productive capacities, often called 'human capital.'").

81. Sterk, *supra* note 61, at 387. To prevent contracts whereby parties agree to create a monopoly of a particular industry or to fix prices on a certain commodity, many states make such agreements illegal. *See supra* note 70 (listing the state statutes and each relative prohibition).

82. Calabresi & Melamed, *supra* note 62, at 1112. A situation involving a moralism would be, for example, where a state allows A to sell herself into prostitution, to take undue risks of becoming penniless, or to sell a kidney. As a result, B may be harmed because he hates to see someone selling her body for money, becoming a pauper, or someone who suffers because she has sold a vital organ. *See also* CAL. PENAL CODE § 266f (West 1992)(making the sale of a person for immoral purposes illegal); MICH. COMP. LAWS ANN. § 750.454 (West 1993)(making the leasing of premises for the purpose of prostitution illegal); MICH. COMP. LAWS ANN. § 750.457 (West 1993)(making accepting the earnings of a prostitute illegal); MICH. COMP. LAWS ANN. § 750.462 (West 1993)(making the keeping of a female in a house of prostitution illegal); N.Y. PENAL LAW § 230.04 (McKinney 1993)(making patronizing a prostitute illegal); WASH. REV. CODE ANN. § 9.6A.100 (West 1992) (making patronizing a juvenile prostitute illegal); WASH. REV. CODE ANN. § 9A.88.030 (West 1992)(making prostitution in general illegal); WASH. REV. CODE ANN. § 9A.88.080 (West 1992)(making the promotion of prostitution illegal).

83. Sterk, *supra* note 61, at 387. In order to prevent individuals from contracting to sell themselves into slavery, courts refuse to enforce involuntary servitudes and do not order specific performance of personal service contracts. *See, e.g.,* Woolley v. Embassy Suites, Inc., 278 Cal. Rptr. 719, 727 (Cal. Ct. App. 1991) (holding that courts will not compel specific performance of personal service contracts, because this would violate the thirteenth amendment's provision against involuntary servitude); Montaner v. Big Show Prod., 620 So. 2d 246, 248 (Fla. Dist. Ct. App. 1993) (holding that the remedy of specific performance is not available to compel a singer to perform, because courts will not compel personal service on the part of an individual); Clark v. Clark, 288 N.W.2d 1, 11 (Minn. 1979) (refusing to order specific performance of an individual's promise to make a will); American Broadcasting Co., Inc. v. Wolf, 420 N.E.2d 363, 366 (N.Y. 1981) (holding that courts are reluctant to enforce by specific performance personal service contracts not to compete); State v. Brownson, 459 N.W.2d 877, 880 (Wis. Ct. App. 1990) (holding that criminalizing the breach of a labor contract constitutes involuntary servitude in violation of the Thirteenth Amendment); RESTATEMENT (SECOND) OF CONTRACTS § 367 (1979)("A promise to render personal service will not be specifically enforced."); *but see* Johnson v. Calvert, 19 Cal. Rptr. 2d 494, 496 (Cal. 1993) (holding that gestational surrogacy contracts do not constitute involuntary servitude); Warwick v. Warwick, 438 N.W.2d 673, 679 (Minn. Ct. App. 1989) (holding that a court order requiring a former husband to find employment did not constitute involuntary servitude).

yielding to harmful momentary temptations.<sup>84</sup> For example, courts commonly refuse to enforce contracts completed by intoxicated individuals.<sup>85</sup>

Inalienability rules may also exist to prevent sales agreements which do not reflect what the parties would have agreed to had they possessed the same information or equal bargaining power.<sup>86</sup> Courts restrain alienability where the owner of an entitlement owner cannot choose for himself whether to sell his entitlement.<sup>87</sup> For example, courts place restrictions on contracts formed by mi-

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84. These restraints on alienation simply allow the individual to choose what is ultimately best for him, despite the fact that such a choice deprives him at first of some freedom to alienate his entitlements. Calabresi & Melamed, *supra* note 62, at 1113. Self-paternalism may cause us to mandate that certain conditions must be fulfilled before an entitlement may be sold. *Id.*

85. Calabresi & Melamed, *supra* note 62, at 1113; *see also* *Miner v. Walden*, 422 N.Y.S.2d 335, 339 (N.Y. Sup. Ct. 1979) (holding that contract between doctor and patient where patient agreed to arbitrate all claims against the doctor and the doctor agreed to arbitrate all claims for payment was unenforceable and unconscionable due to unequal bargaining power and the fact that only the doctor benefitted from the agreement); RESTATEMENT (SECOND) OF CONTRACTS § 16 (1979) ("A person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction."); E. ALLAN FARNSWORTH, CONTRACTS § 4.6, at 227 (1982) ("Intoxication may also render a party unable to understand the nature and consequences of the transaction.")

86. Sterk, *supra* note 61, at 387; *see also* *Wilson v. World Omni Leasing, Inc.*, 540 So. 2d 713, 716 (Ala. 1989) (holding that rescission of contract due to unconscionability is a remedy reserved for the unsophisticated and uneducated); *Lloyd v. Service Corp. of Alabama, Inc.*, 453 So. 2d 735, 741 (Ala. 1984) (holding that a lessor seeking to enforce an exculpatory clause must prove that the lessee understood the provisions and there was an actual and voluntary meeting of the minds with regard to the clause); *General Bargain Ctr. v. American Alarm Co., Inc.*, 430 N.E.2d 407, 411 (Ind. Ct. App. 1982) (holding that exculpatory clauses will not be enforced where the parties have unequal bargaining power, or where contract is unconscionable); RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 208 (1979). The *Restatement* provides, in pertinent part, as follows:

A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms. If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

*Id.* § 178. The courts consider contemporary social attitudes when determining whether restraints on alienation will protect incompetent and unwise individuals. Manning, *supra* note 73, at 374.

87. Calabresi & Melamed, *supra* note 62, at 1113; *see, e.g.*, *Bulter v. Harrison*, 578 A.2d 1098, 1100 (D.C. 1990); *In re Keiss*, 353 N.E.2d 13, 16 (Ill. App. Ct. 1976); *Charles Melbourne & Sons, Inc. v. Jesset*, 163 N.E.2d 773, 776 (Ohio Ct. App. 1960); *Potter v. Chamberlain*, 73 N.W.2d 844, 846 (Mich. 1955); *Berthouine v. Scewczyk*, 26 N.W.2d 770 (Mich. 1947).

nors,<sup>88</sup> mental incompetents and incapacitated individuals.<sup>89</sup>

Restraints on alienation are generally disfavored. Notwithstanding, courts have carved out specific exceptions restricting free alienation where overriding policy considerations dictate. An individual's right to sell his life insurance policy, however, is not one of those exceptions.

#### IV. RESTRAINTS ON ALIENATION AS APPLIED TO THE VIATICAL SETTLEMENT MARKET

Viatical settlement statutes seek to protect viators from unfair and overreaching activities of purchasers. Admittedly, these are valid goals. As a whole, regulatory statutes serve a valuable purpose. However, minimum discount rates and individual licensing requirements imposed by regulatory statutes restrict a viator's ability to sell his life insurance policy. Thus, these provisions interfere with a viator's right to freely alienate his property.

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88. Calabresi & Melamed, *supra* note 62 at 1113; *see also* D.H. Holmes Co. v. Rena, 34 So. 2d 813, 815 (La. Ct. App. 1948) (holding that a contract for the purchase of property by a seventeen year old girl was void when made and did not render her liable for the purchase price); Hines v. Cheshire, 219 P.2d 100, 104 (Wash. 1950) (holding that an infant disaffirming his contract is required to return only what remains of the item which the infant received as consideration for the contract, and the infant is not responsible for that portion disposed of, lost, or wasted during his infancy); RESTATEMENT (SECOND) OF CONTRACTS § 14 (1979) ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

89. *See* Taylor v. United States, 113 F. Supp. 143, 148 (W.D. Ark. 1953) (holding that, in order to be capable of effecting a valid change of beneficiary under an insurance policy, a person should know the nature of his property, the nature of the act he is about to perform, and his relationship to his new beneficiary); Harrison v. City Nat'l Bank of Clinton, 210 F. Supp. 362, 368 (S.D. Iowa 1962) (holding that a person cannot form a trust when he is incapable of understanding the nature and effect of the trust, and is incapable of understanding and acting with discretion in the ordinary affairs of life); Butler v. Harrison, 578 A.2d 1098, 1099 (D.C. 1990) (holding that the "[t]est of mental capacity to contract is whether the person in question possessed sufficient mind to understand, in reasonable manner, nature, extent, character, and effect of the particular transaction in which she is engaged, and whether or not she is competent in transacting business generally."); *In re* Keiss, 353 N.E.2d 13, 16 (Ill. App. Ct. 1976) (holding that a contract entered into by a person lacking mental capacity to contract is voidable); Charles Melbourne & Sons, Inc. v. Jesset, 163 N.E.2d 773, 775 (Ohio Ct. App. 1960) (holding that the contract of a mentally incompetent person is voidable); RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 15 (1979). The Restatement states:

No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances. A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

The statutory provisions do not fit into any one of the three situations in which courts allow restraints on alienation.<sup>90</sup> To the contrary, the basic premise of the viatical settlement market is consistent with the three underlying principles of free alienation.<sup>91</sup> Thus, to the extent that minimum discount rates and individual licensing requirements limit a viator's ability to sell his life insurance policy, these statutory regulations place a restraint on a viator's right to freely alienate his property.

A. *Statutory Minimum Discount Rates Violate the Rule Requiring Free Alienation*

Statutory provisions allowing state insurance commissioners to set minimum discount rates violate each of the principles of free alienation. First, these provisions prevent goods from going to those who most value them. Second, minimum discount rates prevent free alienation from controlling the price system. Third, minimum discount rates prevent both viators and purchasers from making choices about the quality of their life. Thus, minimum discount rates are a restraint on the alienation of property and should be abrogated.

1. *Minimum Discount Rates Prevent Goods From Going to Those Who Value Them Most*

Minimum discount rates violate the first underlying principle of free alienation because they prevent a purchaser's capital investment from going to those who value them most, viators. Viators place the greatest value on purchasers' capital, because they need the cash to live.<sup>92</sup> Minimum discount rates prevent viators from getting as much of a purchaser's capital as possible because any minimum discount rate likely becomes the maximum price purchasers will offer for viatical insurance policies.<sup>93</sup> Minimum rates become maximum rates because purchasers realize that they can save money by offering to purchase insurance policies only at the minimum rate.<sup>94</sup>

The number of AIDS victims continues to rise astronomically,

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90. See *supra* notes 72-89 and accompanying text discussing the three situations in which overriding policy considerations allow limited restraints on the alienation of property.

91. See *supra* notes 68-81 and accompanying text discussion the three principles underlying the free alienation of property.

92. See *supra* note 13 for an explanation of the high cost of living with AIDS.

93. Interview with David Petersen, President of Affording Care, New York, NY (Sep. 9, 1993).

94. *Id.*; see also Interview with Parker Willson, *supra* note 17.

as does the cost of living with this disease.<sup>95</sup> As a result, purchasers find themselves inundated with a host of viators needing to sell their policies.<sup>96</sup> The influx of viators allows purchasers to save money by buying a large number of policies at the same minimum discount rate. Purchasers have no incentive to offer higher prices because they can make large profits by simply buying more policies without raising their offering price.<sup>97</sup> Consequently, viators are unable to get larger settlement amounts for their policies, which they need to combat their illness.

Moreover, by discouraging higher settlement offers, the operation of minimum rate regulations denies viators the benefits of the competitive nature of the open market.<sup>98</sup> Of course, competitive prices will develop if one company in a regulated state begins to offer higher prices. However, since the number of needy AIDS victims virtually guarantees each company a steady and profitable clientele, it is unlikely that one company will upset the profitable balance by increasing the prices it offers. As a result, viators face a host of companies who engage in collusion by offering identical minimum prices while using the minimum discount regulations as an excuse to do so.

Furthermore, minimum discount rates allow companies to complacently offer only the mandated minimum discount rate because it allows them to minimize their overhead costs and risk factors. Viatical settlement companies purchase life insurance policies in order to make as large a profit on their investment as possible.<sup>99</sup> When a company buys a policy, it incurs certain costs, such as regular premium payments on the policies it has purchased<sup>100</sup> and annual license fees.<sup>101</sup>

In addition, the ability to offer absolute minimum prices allows purchasers to make a virtually guaranteed profit. The minimum rates are often so low that a purchaser may avoid factoring in risk

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95. See *supra* notes 1 and 13 for recent statistics on the reported number of AIDS cases and the costs of living with the disease; see also Grossman, *supra* note 1, at 44 (explaining the projected rapid increase in AIDS victims in the very near future).

96. See *supra* text accompanying notes 19-41 for an explanation of how the viatical settlement market provides financial assistance to save AIDS victims from prospective poverty.

97. See MILTON & ROSE FRIEDMAN, *FREE TO CHOOSE* 13-24 (1980) (explaining the laws of competition, supply and demand, and market behavior).

98. See MILTON & FRIEDMAN, *supra* note 97, at 13-24 (explaining the response by one company to the competition of other companies).

99. See *supra* text accompanying notes 25-27 for a discussion of the purpose of viatical settlement companies.

100. Barrett, *supra* note 9, at 160.

101. CAL. INS. CODE § 10113.2 (West 1992); N.Y. INS. LAW § 7802 (McKinney 1993); MODEL VIATICAL SETTLEMENTS ACT § 3 (Proposed Official Draft 1993).

factors and overhead costs.<sup>102</sup> Like the buying and selling of any commodity, viatical settlements carry an element of risk.<sup>103</sup> These include the risks that a cure for AIDS may be found<sup>104</sup> or that the viators may live beyond their projected life expectancy, necessitating additional premium payments.<sup>105</sup> However, minimum discount rates virtually guaranty purchasers at least a 50% profit on their investment. This gives viatical settlement purchasers an advantage over not only viators, but other participants in the open market. Moreover, purchasers have no incentive to offer competitive settlement amounts to viators. Thus, statutory minimum discount rates afford purchasers an unfair advantage in the open market.

Minimum discount rates should be eliminated to encourage competitive pricing. Competitive pricing will allow viators to obtain the best price for their policies. Under the current statutory scheme, mandated minimum discount rates offer each company an excuse and defense for offering the same minimum price. Removing statutory minimum discount rates will reduce purchasers' protections from collusive price fixing or impeding free competition.<sup>106</sup> Additionally, dispensing with minimum discount rates will increase competitive prices by reducing the companies' sense of complacency and willingness to accept one minimum price for all policies.<sup>107</sup> Thus, eliminating minimum discount rates will allow a viator to realize the maximum amount a purchaser is willing to pay for his life insurance policy. As a result, a purchaser's capital investment will go to someone who values it most, a viator.

The legislators' assertions that minimum discount rate provisions are necessary to protect the viators is misguided.<sup>108</sup> Viators will be adequately protected from under-pricing by the competitive nature of the open market. The fact that despairing and frightened viators are willing to take only what they think they can get for their policies supports the argument that minimum discount rates are unfair to viators. Moreover, eliminating minimum discount rates sparks competitive prices among viatical companies and viators will become aware of the difference in prices through competi-

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102. *Id.*; see also Interview with David Petersen, *supra* note 93 (explaining the danger of minimum discount rates as a minimizing effect on purchaser offers).

103. Interview with Parker Willson, *supra* note 17.

104. *Id.*

105. *Id.*

106. See *supra* note 39 (listing state statutes making monopolies and collusive price fixing illegal).

107. Interview with David Petersen, *supra* note 93; see also Interview with Parker Willson, *supra* note 17 (arguing against minimum discount rates because they will lower the prices viators will receive for their policies).

108. See *supra* notes 31-38 for a discussion of the legislative history explaining the purpose for enacting viatical settlement legislation.

tive advertising and word of mouth.<sup>109</sup> Companies offering the minimum rates will get less business. Viators will then be able to hold out for a higher price. Therefore, eliminating minimum discount rates will help viators get better prices for their policies.

## 2. *Minimum Discount Rates Prevent the Natural Working of the Market and Price System*

Minimum discount rates violate the second underlying principle of free alienation in that they prevent free alienation from controlling the market system. Minimum rates are price controls. Price controls violate the basic law of supply and demand.<sup>110</sup> According to this basic economic principle, if more viatical companies want to purchase policies than people with AIDS want to sell them, the prices offered will increase.<sup>111</sup> Conversely, if more people with AIDS want to sell their policies than viatical companies want to buy, the prices paid for the policies will decrease.<sup>112</sup> With the increasing numbers of needy AIDS victims, it correlates that the supply of viators will exceed the number of buyers.<sup>113</sup>

Although the great profit potential in viatical settlements has caused a considerable increase in the number of viatical companies since 1988, it is unlikely that the demand viatical companies will ever rise above the supply of viatical insurance policies.<sup>114</sup> Some states with viatical regulatory statutes have seen less growth in viatical settlement companies than states without regulation.<sup>115</sup>

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109. See *supra* note 29 (discussing the advertising which viatical settlement companies do). In addition, many organizations exist to provide financial counseling for people with AIDS. Interview with David Petersen, *supra* note 93. One agency is Affording Care, which publishes a newsletter and provides representatives who will caution viators to beware of unfair viatical companies. *Id.*

110. John W. Merline, *What You Need to Know About Price Controls*, CONSUMERS' RES. MAG., Mar. 1993, at 16; see also FRIEDMAN, *supra* note 93, at 13-24 (explaining how the price system functions and how market prices are important in transmitting information about commodities).

111. See Merline, *supra* note 106, at 16-17 (explaining the basic principles of supply and demand); see also MILTON & FRIEDMAN, *supra* note 97, at 13-24 (explaining the laws of supply and demand and the importance uncontrolled pricing for a commodity to ensure the correct transmission of information about that commodity).

112. Merline, *supra* note 110, at 16-17.

113. See Grossman, *supra* note 1, at 44 (stating that "[b]y the year 2000, it is also estimated that at least 40 million worldwide will be carrying HIV . . ."). "At the present time," says William Haseltine, chief of the human retrovirology division at the Dana-Farber Cancer Institute in Boston, "there is nothing standing in the way of this happening." *Id.*

114. *Id.*

115. See Interview with David Petersen, *supra* note 93 (explaining that the Kansas licensing statute is so confusing that no viatical companies have developed).

Since viatical settlement regulation is itself rapidly increasing,<sup>116</sup> it is unlikely that the number of viatical purchasers will increase as quickly as the number of viators. Also, at least one state has explicitly forbidden the sale of life insurance policies for cash.<sup>117</sup> This presents the possibility that other states will do the same, thereby further decreasing the number of viatical purchasers.

Minimum discount rates also create potential problems for viators willing to sell below the statutory cap. The market may eventually reach an equilibrium. At that point, purchasers may not be willing to pay the statutory cap. More importantly, viators are precluded from accepting a price lower than the statutory minimum. Thus, the market will break down because viators will be unable to adjust their prices below the minimum rate to coincide with the demands of purchasers.<sup>118</sup> Consequently, the statutory scheme will deprive viators of their ability to alienate their personal assets by preventing them from selling their life insurance policies at a price purchasers are willing to pay on the open market.<sup>119</sup> Therefore, the second principle underlying the preference toward free alienation is thwarted because statutory minimum rates will not allow free alienation to control the market system.

### 3. *Minimum Discount Rates Prevent Individuals from Making Choices About Their Life Quality*

Minimum discount rates violate the third underlying principle for free alienation of property by preventing viators from making their own life quality choices. As discussed above, minimum rates prevent viators from choosing the price to accept for their insurance policies.<sup>120</sup> Many individuals who sell their insurance policies have already used up all other available cash in living with their illness.<sup>121</sup> A viatical settlement may be their only means of obtaining cash. Thus, AIDS victims not only need the maximum amount of money they can realize from the sale of their policies, but also in a declining market they may be willing to settle for an amount below the statutory cap out of desperation.

Individuals entering into viatical settlements have generally been living with their illness for several years. Although these indi-

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116. See Interview with Carolyn Johnson, *supra* note 36 (explaining that the goal of the National Association of Insurance Commissioners is to prompt all states to develop viatical settlement regulation).

117. UTAH CODE ANN. §§ 31A-21-104 (1993).

118. See Merline, *supra* note 110, at 16-17 (explaining that when demand is low, the supply will rise); see also FRIEDMAN, *supra* note 97, at 13-24 (explaining the importance of allowing the laws of supply and demand to function freely).

119. See Merline, *supra* note 110, at 16 (stating that fixing an artificially high price discourages buyers from purchasing).

120. Interview with David Petersen, *supra* note 93.

121. See *supra* note 17 for a discussion about living with AIDS.



viduals usually have only one or two years left to live, advances in medicine often prolong the inevitable.<sup>122</sup> Moreover, a growing number of people with AIDS want to make viatical settlements before they reach the last two years of their lives.<sup>123</sup> AIDS victims may want to use the money from a viatical settlement to purchase a home or take a trip while they are still well enough to enjoy it.<sup>124</sup>

Minimum discount rates stifle individuals' life quality choices. As discussed above, minimum discount rates limit an individual's ability to realize the highest price available for their life insurance policy. Conversely, minimum discount rates preclude an individual from settling for a price below the statutory minimum. Because an AIDS victim's life insurance policy is one of his most liquid assets, it is often his only avenue to enjoying his final years. Thus, the choice an AIDS victim has as to the quality of his life is severely deterred.

Moreover, individuals with a life expectancy of greater than two years are ironically at a grave disadvantage.<sup>125</sup> Since purchasers must pay a minimum rate for viatical settlements, they prefer viators with a shorter life expectancy.<sup>126</sup> Consequently, purchasers are encouraged to buy numerous policies which give them a two year return on their investments. They are unwilling to pay the same price for policies which give them a five or six year return.<sup>127</sup>

Finally, minimum discount rates prevent price scaling for policies with a longer investment return. Although the differences in investment periods is often minimal, minimum rates discourage purchasers from buying policies from individuals with longer life expectancy.<sup>128</sup> Common business sense prefers a higher return over a shorter investment period. Thus, the elimination of minimum rates would allow purchasers to pay a lower price for policies with a longer investment period.<sup>129</sup>

#### *B. Licensing for Requirements for Individual Purchasers Violates the Rule Requiring Free Alienation*

Like minimum discount rate provisions, the requirement that individual purchasers be licensed to purchase a viator's insurance policy frustrates the principles of free alienation. First, strict licensing requirements prevent goods from going to those who most value them. Second, these requirements artificially control the

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122. Enrico, *supra* note 3, at 53.

123. Interview with David Petersen, *supra* note 93.

124. *Id.*

125. *Id.*

126. *Id.*

127. Interview with Parker Willson, *supra* note 17.

128. Interview with David Petersen, *supra* note 93; *see also* Merline, *supra* note 110, at 16-17 (explaining the incentive to maximize profit as much as possible by purchasing the most valuable property).

129. Grossman, *supra* note 1, at 44.

market system by excluding willing purchasers. Third, licensing requirements prevent both viators and purchasers from making choices about their quality of life. Thus, subjecting individual purchasers to the same requirements as viatical settlement companies is a restraint on the alienation of property and should be abrogated.

1. *Licensing Requirements for Individual Purchasers Prevent Goods from Going to Those Who Value Them Most*

The requirement that individual purchasers be licensed removes a significant portion of purchasers from the market.<sup>130</sup> By excluding potential purchasers from the market, these requirements violate the principle which allows goods to go to those who value them most. Stated another way, the exclusion of prospective purchasers reduces the possibility of competitive pricing and, thus, prevents a purchaser's investment capital from going to those who value it most, *viz.* viators.

Viators need to sell their life insurance policies so that they can live with the cost of their illness. The more money a viator can get for his life insurance policy, the more comfortable and worry-free he can make the last years of his life. In addition, many viators state that the large sums of money they receive for their life insurance policies set their minds at ease to such an extent that the money increases their will to live and overcome their illness.<sup>131</sup> Accordingly, it is essential that viators realize the highest return possible for their life insurance policies.

2. *Licensing Requirements for Individual Purchasers Prevent the Natural Working of the Market and Price System*

Licensing requirements for individual purchasers frustrate free alienation because they artificially control the market system by excluding willing purchasers. Whereas viatical settlement companies have the resources and assets to comply with the statutory provisions and licensing procedures, individual purchasers are unwilling and often unable to pay the large application fees in addition to the regular premium payments on a viator's former policy.<sup>132</sup>

Individual purchasers are also unwilling to participate in full financial disclosure, potential investigations by the insurance commissioner, and constant oversight of their contracts and transac-

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130. Interview with Parker Willson, *supra* note 17.

131. Groves, *supra* note 28, at Z9.

132. *Id.* See also Letter from Parker Willson, President, The Gay and Lesbian Alliance of Central Texas, to Mark Hannay, Representative of Gay Men's Health Crisis (July 25, 1993) [on file with *The John Marshall Law Review*] (stating that "[s]hould buyers be included in this [viatical settlement] bill . . . their [sic] will be few buyers of policies, as has happened in California . . .").

tions.<sup>133</sup> Additionally, individual purchasers lack sufficient knowledge to educate viators as to their options and the ramifications of the viatical settlements.<sup>134</sup> Ultimately, the complicated and extensive licensing procedures deter individual purchasers from buying policies.<sup>135</sup>

Since the licensing requirements deter individual purchasers from purchasing the viators' insurance policies, the number of potential purchasers is significantly reduced.<sup>136</sup> Viators have a smaller pool of purchasers from which to choose when selling their policies.<sup>137</sup> The smaller number of purchasers reduces the competition for viators' policies and ensures that the prices offered for the policies level off at the minimum rate.<sup>138</sup>

Viatical settlements are necessarily more advantageous for viators when viatical companies know they are competing with other companies or potential purchasers—i.e., prices go up.<sup>139</sup> Consequently, if viatical settlement companies know that individual purchasers in the market will provide competitive offers for the viators, the companies will be more likely to increase their prices. However, requiring individual purchasers to be licensed impedes the action of the market system by arbitrarily excluding potential purchasers and competitors. Consequently, demand is reduced and there is no reason for competitive pricing.

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133. See Letter from Parker Willson to Mark Hannay, *supra* note 132 (stating that "[a]s the [New York] Bill now reads, a buyer will have to be licensed in the State of New York, with full disclosure, in order to provide the money to those seeking help through the selling of a private asset"); see also *supra* notes 31-56 and accompanying text for a discussion of these statutory provisions.

134. Letter from Parker Willson to Mark Hannay, *supra* note 132.

135. Letter from Parker Willson to Mark Hannay, *supra* note 132. See also Interview with Parker Willson, *supra* note 17 (explaining that requiring individual buyers to comply with the complicated licensing procedures will deter them from offering to buy the insurance policies).

136. Interview with Parker Willson, *supra* note 17. See also Letter from Parker Willson to Mark Hannay, *supra* note 132 (explaining the deterrent effect the individual licensing requirements will have on potential individual purchasers).

137. Interview with Parker Willson, *supra* note 17. See also Letter from Parker Willson to Mark Hannay, *supra* note 132 (explaining the reduction in buyers that will result from the statutory licensing provisions).

138. The number of people demanding the insurance policies will be reduced, because the buyers will be deterred from entering the market. See Merline, *supra* note 110, at 16 (stating that generally, when supplies are high, prices fall); cf. FRIEDMAN, *supra* note 97, at 16-17 (explaining the fact that the price of a commodity rises when there is a greater number of buyers, or greater demand).

139. Interview with David Petersen, *supra* note 93.

3. *Licensing Requirements for Individual Purchasers Prevent Viators From Making Choices About the Quality of their lives*

Licensing requirements for individual purchasers violate the principles of free alienation by preventing viators from making their own choices about the quality of their lives. When a viator decides to sell his life insurance policy, he makes the choice to improve the quality of his life by procuring needed funds to combat the expenses of his illness.<sup>140</sup> However, requiring individual purchasers to comply with the same licensing requirements as viatical companies reduces a viators choices.

As discussed above, the statutory requirements for obtaining a license deter individual purchasers from applying for licenses and, thus, deter potential purchasers from entering the market.<sup>141</sup> The removal of purchasers from the market consequently reduces competitive pricing of life insurance policies.<sup>142</sup> Thus, a viator is again unable to realize the maximum return for his policy. Consequently, a viator's choice as to his quality of life has been made by the state legislature.

In addition, a viator's choice as to whom to sell his policy is reduced because the pool of purchasers is reduced. The decision to sell one's life insurance policy is a very important one. Many viators may feel more comfortable dealing with an individual purchaser rather than a large, sophisticated company.<sup>143</sup> Viators may want to decide for themselves whether they want to deal with the person to whom they have chosen to sell their policies.<sup>144</sup> Individual licensing potentially eliminates this option because viators will be unable to find individual purchasers willing to purchase their policies.<sup>145</sup> Thus, viators will be unable to make choices about their own life quality because their choices will be so limited.

Although licensing requirements for individual purchasers do not prevent viators from entering a viatical settlement, the requirements limit their choices and their ability to improve the quality of their lives. Because purchasers are forced to go through the extensive licensing procedures, their ability to make money is hindered. The option to invest in a viatical insurance policy is less of an option

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140. See *supra* notes 13-29 and accompanying text explaining how viatical settlements help terminally ill individuals to get the money they need to improve the quality of their lives.

141. See *supra* notes 52-56 and accompanying text for a discussion of how requiring individual purchasers to be licensed will remove a significant number of purchasers from the market.

142. See *supra* notes 106-110 and accompanying text for an explanation of the consequences of removing individual purchasers from the market.

143. Interview with Parker Willson, *supra* note 17.

144. *Id.*

145. *Id.*

and more of a burden because the procedures for doing so are so extensive and difficult. As a result, viators are unable to choose to improve their life quality by selling their policies to individual purchasers rather than viatical companies. Therefore, although viators may still choose to participate in viatical settlements, licensing requirements for individual purchasers prevent free alienation by limiting the life quality choices viators can make.

V. CONCERNS WHICH PROMPT RESTRAINTS ON ALIENATION DO NOT APPLY TO THE STATUTORY RESTRICTIONS ON VIATICAL SETTLEMENTS

As discussed in the previous section, statutory restrictions on viatical settlements limit a viator's ability to sell his policy for the highest price possible. In some instances, the restrictions hinder a viator's ability to sell their policies at all. The protective concerns which prompt these restraining provisions do not outweigh the potential for harm to viators.

Although the goals of viatical settlement statutes are valid in their aim to protect the viators, the restrictive provisions are not necessary to achieve this goal. The broad protections of the other statutory provisions and alternative safeguards will sufficiently protect a viator's interests.

A. *The Statutory Restrictions are Not Necessary to Prevent Externalities of Viatical Settlements*

Since viatical settlements do not create significant externalities, the statutory restrictions are unnecessary to prevent external costs. The sale of life insurance policies does not create economic inefficiency by reducing the value of another's entitlement because the exchange does not have a continuous impact on the possessions of others.<sup>146</sup> Unlike the sale of a pollution-producing factory, which creates externalities by reducing the surrounding property values, a viatical transaction merely entails the transfer of one's insurance policy, a harmless possession, to another. This is similar to the sale

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146. See Letter from Parker Willson to Mark Hannay, *supra* note 132, comparing the sale of life insurance policies to real estate transactions, and emphasizing the simplicity of the transaction. *But see* Letter from Mark Scherzer, Representative of Gay Men's Health Crisis, New York, to Mario Cuomo, Governor of New York (July 27, 1993) [on file with *The John Marshall Law Review*] stating:

[T]he purchase of life insurance policies is not like the sale of tangible property in which all relationship ceases after the sale is made. The viatical settlement company develops an immediate financial interest in the prompt death of the insured person. It may remain in close touch with the viator to ascertain the moment of his or her death.

*Id.*

of a car.<sup>147</sup> As in the sale of a car, the sellers' possession and the buyers' possession will merely change hands because each individual has decided he has a better use for the other's possession. When this happens, each individual will use his new possession to his highest advantage, and will not detract from the possessions or entitlements of others.

In addition, viatical settlement transactions do not create economic inefficiencies by making it difficult for the courts to objectively determine the property's value. Since the sellers and the buyers are entering into a mutual agreement for the transfer of property, they independently determine the property's value, and the courts need not interfere.<sup>148</sup> The insurance policies are not intangible or unusual possessions, such as education degrees or other human capital.<sup>149</sup> Rather, they are concrete pieces of property which have an objective market value, i.e., the face value of the policy. Moreover, if a viator does claim overreaching by a purchaser, courts will have a definite reference point in determining the correct value. Courts will be able to look at the going rate for similar policies. Therefore, since it is possible for individuals and courts to objectively determine the value of these policies, these transactions will not create judicial economic inefficiencies.

Finally, if legislators eliminate minimum discount rates allowing maximum returns, these private contracts will not create unfavorable economic consequences such as monopolies and collusive price fixing. Rather, the law of supply and demand will protect viators from such occurrences.<sup>150</sup> The number of viatical settlement companies in this country is steadily increasing, as is the number of individual purchasers.<sup>151</sup> If legislators eliminate restrictive provisions which thwart competition, purchasers will compete with each other.<sup>152</sup> No matter how many viators there are, individual purchasers and viatical companies will work to attract the greatest number of viators by providing the best price for the poli-

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147. See Interview with David Petersen, *supra* note, comparing the sale of a life insurance policy to the sale of a used car.

148. See *supra* notes 13-29 and accompanying text for an explanation of how the viatical settlement process works.

149. See Sterk, *supra* note 61, at 383 (defining human capital to include only those items which are inseparable from the individual, not the personal property of the individual).

150. See MILTON & FRIEDMAN, *supra* note 97, at 13-24 (explaining how the laws of supply and demand work to the advantage and protection of buyers and sellers).

151. In just five years, the number of viatical settlement companies has increased from one to fifty. AFFORDING CARE, VIACIAL SETTLEMENT COMPANIES, *supra* note 18.

152. Merline, *supra* note 110, at 16; see also MILTON & FRIEDMAN, *supra* note 97, at 113-21 (explaining the laws of competition).

cies.<sup>153</sup> Thus, competitive pricing will result and viators will be able to shop around for higher offers.

Alternatively, if the AIDS epidemic subsides and the number of viators decreases, insurance policies will be scarce and prices will increase.<sup>154</sup> Consequently, without minimum discount rates, companies will be unable to monopolize the industry or fix prices because there will be too many purchasers competing for the policies. Moreover, the purchasers will not have the excuse of minimum discount rates to explain any price fixing tendencies.<sup>155</sup> Therefore, since viatical settlement transactions do not create economic inefficiencies, the statutory provisions are not necessary to alleviate these externalities.

In addition, the statutory restrictions are unnecessary to prevent external costs in the form of moralisms because the value of the viatical settlement industry outweighs the offense some people feel about the sale of death benefits.<sup>156</sup> The sale of life insurance policies provides viators with the money they need to live.<sup>157</sup> The sale of these policies will enable individuals to increase their financial freedom because the sales will help dying viators pay their creditors<sup>158</sup> and make their last days more secure.<sup>159</sup> Purchasers will benefit from the policy payouts, and the payouts will also allow an infusion of money into the economy.<sup>160</sup> Therefore, others' desire

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153. Merline, *supra* note 110, at 16; *see also* MILTON & FRIEDMAN, *supra* note 97, at 113-21 (explaining the laws of supply and demand and how price levels respond to increased demand for a commodity).

154. Merline, *supra* note 110, at 16-17; *see also* MILTON & FRIEDMAN, *supra* note 97, at 113-21 (arguing against price controls because they hamper the flow of information regarding the supply and demand of products).

155. *See supra* text accompanying notes 138-140 for the prospect of companies using minimum discount rates as legal excuses to offer maximum prices.

156. "This form of marketing is ghoulish, insensitive, possibly violative of confidentiality rights and flat-out illegal . . ." *Scams Cash in By Selling Policies of the Dying*, L.A. TIMES, Aug. 20, 1992, at 2.

157. Interview with Parker Willson, *supra* note 17; *see also* Interview with David Petersen, *supra* note 93 (explaining the importance of the viatical settlement industry to dying individuals who desperately need money).

158. The New York statute contains a provision which explicitly forbids any health care facility or practitioner to condition admission, treatment, or continuing care on the vatication of a life insurance policy. N.Y. PUB. HEALTH LAW § 20 (McKinney 1993). Neither the California nor NAIC statutes address the issue of payment of medical bills. CAL. INS. CODE §§ 10113.1-10113.2 (West 1992); MODEL VIACIAL SETTLEMENTS ACT §§ 1-12 (National Association of Insurance Commissioners, Proposed Official Draft 1993). Consequently, it remains unclear whether creditors such as hospitals have any claim to the proceeds received from a viatical settlement.

159. *See supra* notes 13-30 and accompanying text for an explanation of the viatical settlement industry and the uses to which the AIDS victims put the money.

160. *See supra* notes 13-30 and accompanying text discussing the fact that the purchasers pay the viators money, which the viators then use to pay bills and purchase necessary items.

to prevent alienation of this property, do not apply to viatical settlement transactions and do not mandate statutory restrictions.

*B. Self Paternalism and True Paternalism Do Not Require the Statutory Restrictions*

Since other statutory provisions protect the viators from harmful momentary temptations from acting with insufficient information and from acting with insufficient mental capacity,<sup>161</sup> licensing requirements for individual purchasers are unnecessary to protect viators from these situations. The statutes' paternal goals are valid. However, the restrictive provisions which this Note discusses are not necessary to achieve these goals. The statutes as a whole are designed to protect viators from sophisticated companies and brokers who may take advantage of them and fail to inform them of the agreement's potential consequences.<sup>162</sup>

The laws require viatical companies and brokers to inform viators about the financial consequences of a viatical settlement, such

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161. The California statute uses the term "sound mind" when discussing the level of mental capacity a viator must indicate when seeking to viaticate his life insurance policy. CAL. INS. CODE § 10113.1(c)(1) (West 1992). The Model Viatical Settlements statute also uses this term. MODEL VIATICAL SETTLEMENTS ACT § 9(A)(1) (National Association of Insurance Commissioners, Proposed Official Draft 1993). The New York statute merely requires that the viator "represents that he or she has a full and complete understanding of the viatical settlement." N.Y. INS. LAW § 7808(a) (McKinney 1993). However, the statutes fail to define the terms they use when describing the viators' mental capacity. See CAL. INS. CODE § 10113.1(c)(1) (West 1992); N.Y. INS. CODE § 7808(a) (McKinney 1993); MODEL VIATICAL SETTLEMENTS ACT § 9(A)(1) (National Association of Insurance Commissioners, Proposed Official Draft 1993). The *Restatement (Second) of Property* requires an individual to have sufficient mental competency in order to validly give away his individual property as a gift. RESTATEMENT (SECOND) OF PROPERTY § 34.5 (1991). The Restatement defines mental competency as the ability to completely understand the importance of a donative transfer (the giving of a gift) with regard to the individual's own situation. *Id.* at cmt. a. "Stated another way, to be mentally competent a person must know and understand the extent of his or her property, comprehend to whom he or she is giving his or her property, and know the natural objects of his or her bounty." *Id.*

This definition can be used when attempting to determine whether a potential viator retains the mental capacity to understand the viatical settlement and its ramifications. The companies should use as a standard for sufficient mental capacity the determination whether the viator knows the extent of his insurance policy, comprehends to whom he intends to sell the policy and the price which he stands to receive for it, and knows the benefits he stands to lose from the sale of the policy.

However, the viatical companies and insurance commissioners alike should be cautious in ruling a viator mentally incompetent just because he suffers from a terminal illness. Interview with David Petersen, *supra* note 93. "These people are sick, but they are not stupid. They can understand how much money they are getting for their policies." *Id.*

162. CAL. INS. CODE § 10113.2 (West 1992), N.Y. INS. LAW § 7807 (McKinney 1993); MODEL VIATICAL SETTLEMENTS ACT § 8 (Proposed Official Draft 1993).



as potential loss of medicaid benefits<sup>163</sup> and the possible taxability of viatical settlement income.<sup>164</sup> Additionally, the statutes require that brokers and companies receive a statement from a medical professional confirming that the viator retains the mental capacity to understand the transaction and its ramifications.<sup>165</sup> Viators themselves must also sign a statement attesting to their illnesses, to their understanding of the transaction, and to the voluntariness of the settlement.<sup>166</sup> Finally, since the brokers and companies must be licensed, the insurance commissioner can oversee and regulate the transactions to prevent coercion and undue influence of the viators.<sup>167</sup>

The additional provision requiring licensing of individuals does nothing to further protect viators from unwise decisions or inadequate information because most individual purchasers will use a broker as an intermediary.<sup>168</sup> Consequently, viatical brokers will meet the statutory requirements, making it unnecessary for individual purchasers to do so.<sup>169</sup> Although viators who choose not to

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163. CAL. INS. CODE § 10113.2; N.Y. INS. LAW § 7807; MODEL VIATICAL SETTLEMENTS ACT § 8.

164. CAL. INS. CODE § 10113.2; N.Y. INS. LAW § 7807; MODEL VIATICAL SETTLEMENTS ACT § 8.

165. CAL. INS. CODE § 10113.1; N.Y. INS. LAW § 7808; MODEL VIATICAL SETTLEMENTS ACT § 9.

166. CAL. INS. CODE § 10113.1; N.Y. INS. LAW § 7808; MODEL VIATICAL SETTLEMENTS ACT § 9.

167. CAL. INS. CODE § 10113.2; N.Y. INS. LAW §§ 7801-7810; MODEL VIATICAL SETTLEMENTS ACT §§ 1-12.

168. See Letter from Parker Willson to Mark Hannay, *supra* note 132.

169. See *id.* stating:

In summarizing our concerns, let us move away from the concept of a terminally ill brother or sister which tends to color our logic with emotion, and look at the sale of a private asset we all take for granted, the selling of a home. In selling a home there is a seller, a broker, and eventually a buyer. The seller goes to the broker and lists his home on the market as being for sale. The broker then makes every effort to find a buyer for the seller and get the highest offer possible for the house based on the market, age of house, condition of the house, etc. When the broker finds a buyer, the broker brings together the seller and the buyer by offering to the seller a contract of sale, based on what the buyer is willing to pay, and negotiations begin. Eventually a price is agreed upon, or the seller says no and instructs the broker to continue to look. In the end, a satisfactory agreement is reached between the seller and the buyer through the broker and a deal is made. The buyer issues a check and when the check clears, the buyer has a house and the seller has his or her money. It is a simple process, and does have within it regulations which protect the seller from any adverse activity by the broker, and protects the buyer by calling for complete disclosure by the seller so the buyer may make an educated offer to the seller. This is a process that has been happening daily in this country for many years. If we were to put the constraints on this "home buying" scenario that are listed in Bill A.7817, we would then find the buyer of a home having to be licensed to buy a home in the State in which the home is being sold, being responsible to the seller for legal and financial advice, having to give full disclosure before being able to buy the home, and before the sale can be finalized, waiting to find out if a Real Estate Commissioner or Superinten-

go through a viatical broker, have greater potential for falling victim to undue influence and unfair practices by individual purchasers, there are other adequate safeguards to protect viators.

Most individuals who make viatical settlements still expect to live at least one or two years and are still competent to handle their affairs.<sup>170</sup> It is unlikely that an individual purchaser will be able to take advantage of a helpless and weak viator on his deathbed by convincing the viator to sell his policy for an outrageously low price. Although viators are ill, they are not mentally incapacitated.<sup>171</sup> If viators do not like the offer made by an individual purchaser, they always have the option to sell their policy to a company, or to work through a viatical broker. Additionally, if a viator wants financial counseling about the ramifications of a settlement, there are numerous financial advice agencies and other counseling groups which exist for just that purpose.<sup>172</sup> Also, the law provides remedies for viators who make unfair settlements with overreaching purchasers by allowing viators to appeal to the courts to invalidate illegal or unfair contracts.<sup>173</sup> Finally, most insurance companies require a showing of mental capacity on the part of the policyholder before allowing him to change the beneficiary of his life insurance policy.<sup>174</sup>

Although a viator's competency to handle his affairs does not necessarily mean that individual purchasers will not attempt to take advantage of him, most viator's are well aware of their vulnerability. Viators recognize that living with the knowledge of impending death and emotional impact of their disease will make them susceptible to manipulation and overreaching by individual buyers. However, most individuals who sell their life insurance policies

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dent will OK the sale at the price offered, or will raise the sale price, at which time the buyer will probably back out and the seller will be left with nothing. If the constraints were placed on the Real Estate industry, there would be very few for sale signs in the front yards of America, as there would be very few buyers.

*Id.*

170. Enrico, *supra* note 3, at 53.

171. See Interview with David Petersen, *supra* note 93 (stating that "[t]hese people are sick. They are not stupid. They can figure out when someone is trying to take advantage of them.")

172. Affording Care is just one of the protective groups which have developed to help people with AIDS deal financially with their disease. *Id.* Such groups offer counseling and advice on how best to budget limited funds. *Id.* In addition, the groups educate people with AIDS and other terminally ill individuals on the potential overreaching and unfair practices of some viatical companies. *Id.*

173. See *supra* notes 82-83 and sources cited for a discussion of the remedies courts will provide when the contract terms are unfair.

174. See *supra* note 22 and sources cited for a discussion of the feasibility and process of viators changing their life insurance beneficiaries).

have been living with their illness for several years.<sup>175</sup> They have become accustomed to the knowledge that their life expectancy is limited, and have, to some extent, come to terms with that knowledge. When they make the choice to viaticate their insurance policies, they have determined to live with their illness in the best way possible, for as long as possible. This fact, combined with counseling and support groups educate viators to beware of overreaching buyers,<sup>176</sup> will prevent viators from letting their grief make them the victims of unfair purchasers. Therefore, allowing individual buyers to enter the market more easily by foregoing the extensive licensing requirements for them will not defeat the paternal interest in protecting the viators.

## VI. PROPOSAL

Although minimum discount rates and licensing requirements for individual purchasers are intended to protect viators, they actually harm these individuals by making it more difficult or even impossible for viators to sell their life insurance policies.<sup>177</sup> At the same time, these well-meaning provisions are not necessary to achieve the intended protective goals. The supposed dangers are either non-existent, minimal, or alleviated by other safeguards.<sup>178</sup>

In order to combat the problems caused by minimum discount rates, legislators should simply remove the minimum rates provisions from viatical settlement statutes and allow free competition to regulate the prices viators receive for their policies. This will spark competitive prices among viatical purchasers by eliminating the incentive to complacently offer only the minimum discount rates.<sup>179</sup> It will also allow all viators to accept any price they choose for their policies, whether it is high or low.<sup>180</sup> In this way, needy viators with special circumstances, such as longer life expectancies, will not be excluded from the market. Even without minimum discount rates, viators will not fall victim to companies who refuse to offer fair prices because the increasing number of purchasers will make

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175. Enrico, *supra* note 3, at 53; *see also* interview with David Petersen, *supra* note 89 (discussing the fact that people who sell their life insurance policies usually have come to terms with their situation).

176. *See supra* notes 25, 105 and accompanying text for a discussion of advertising by viatical companies and the function of financial advice agencies for people with AIDS.

177. *See supra* text accompanying notes 86-141 for an explanation of the harm the statutory provisions will cause viators.

178. *See supra* text accompanying notes 136-172 for a discussion of the fact that the statutory provisions are not necessary to protect the viators.

179. *See supra* text accompanying notes 102-105 for a discussion of the free competition that will result if the minimum discount rate provisions are removed.

180. *See supra* text accompanying notes 102-105 for a discussion of the advantages of letting viators choose their own prices for their policies.

it disadvantageous for any one company to offer less than competitive prices.<sup>181</sup> In addition, the numerous protective special interest groups and counseling agencies will act quickly to warn viators to stay away from any particular company who offers unfair prices. Therefore, this Note proposes to alleviate the problems which minimum discount rates cause by simply removing this provision from the viatical settlement statutes, and allowing unrestricted pricing for the viatical settlement policies.

Similarly, legislators should also remove the term "individual" from the list of entities which must be licensed to transact viatical settlements. The new statutes should subject viatical companies to the current licensing requirements, companies being defined as those entities which exist solely for the purpose of making viatical transactions and viatical brokers. However, the new statutes should only govern individual purchasers by less extensive provisions.

The main problem with licensing for individual purchasers arises because the extensive and complicated nature of the statutes excludes individual purchasers from the market, especially if these purchasers only wish to make a limited number of viatical settlements.<sup>182</sup> Since increased numbers of purchasers in the market will help viators to get the best prices for their policies, the new statutes should not exclude individual purchasers.<sup>183</sup>

However, since it is arguably possible that individual purchasers may also try to take advantage of viators, they should not be completely unregulated. Rather, legislators should establish a special agency which will oversee transactions by individual purchasers. Pursuant to this agency's rules, individual purchasers will report the terms and content of each proposed viatical settlement transaction. In addition, purchasers should be required to submit a signed statement from the viator, a medical professional attesting to the viator's mental capacity and the viator's agreement to the terms of the settlement. The agency should act quickly to review the terms of the contract, and either approve or disapprove the transaction. In determining the fairness of the contracts' terms, the agency should use the same standard applied in reviewing settlements with viatical companies.

In this way, individual purchasers will not go completely unregulated because a system will be in place to discourage and prevent overreaching and unfairness. At the same time, however,

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181. See *supra* text accompanying notes 102-105 for a discussion of the free competition that will result from removing minimum discount rate provisions.

182. See *supra* notes 125-141 and accompanying text for a discussion of the harmful effects of deterring individual buyers from entering the market.

183. See *supra* notes 125-141 and accompanying text for a discussion of the importance of keeping individual buyers in the viatical market.

purchasers will not be deterred from making single transactions because they will not be subject to complicated, extensive, and cumbersome licensing procedures and oversight. Therefore, individual purchasers should not be included in the statutory licensing provisions, but should instead be subject to a more convenient, less extensive oversight procedure.

#### CONCLUSION

Viatical settlement statutes are intended to protect viators by making sure purchasers do not take advantage of them. However, statutory minimum rates and strict licensing requirements for individual purchasers harm viators by making it more difficult for them to get high prices for their policies. In the extreme, the statutory restrictions have the potential to prevent viators from selling their policies at all.

Thus, because the statutory restrictions are not necessary to protect viators from overreaching purchasers, legislators should abrogate minimum discount rate provisions. In addition, legislators should not require licensing for individual purchasers and should mandate less extensive oversight for these purchasers. These changes will allow the viatical settlement market to benefit all parties involved to its fullest ability.

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