OAST & HOOK

# ELDER LAW NEWS

*Legal power for seniors.*

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INSIDE THIS ISSUE



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## VIRGINIA VIATICAL SETTLEMENTS ACT UPHELD

The U.S. Supreme Court recently declined to rule on a case that tested whether Virginia can regulate the sale of life insurance by policyholders to investors, otherwise known as viatical settlements. The Court's refusal to take the case lets stand the ruling by the U.S. Court of Appeals for the Fourth Circuit that the Virginia Viatical Settlements Act is constitutional.

Viatical settlements permit life insurance policyholders to sell their policies for less than face value to third parties for an immediate cash benefit. These third parties include investors. The policyholders often need the funds to pay for healthcare costs for a terminal illness. Once the policyholder ("viator') sells the policy to the third party ("provider"), the provider assumes the responsibility for paying the premiums, and designates itself as the beneficiary of the policy. Upon the viator's death, the provider collects the face value of the policy, with the provider's profit being the difference between the face value of the policy and the price paid to the viator, premiums paid to the insurance company, and administrative expenses incurred. Providers hire independent doctors to examine the viator and the viator's medical records prior to settlement, and monitor the viator's health until death.

The viatical settlements industry was an outgrowth of the AIDS crisis in the 1980s, and the market grew to include other terminal illnesses, like cancer, heart disease, and Alzheimer's disease. States began to regulate the industry during the early 1990s because of the power imbalance between the viator and provider, with the result that chronically or terminally ill persons may be particularly vulnerable to fraud or low prices. The National Association of Insurance Commissioners developed the Viatical Settlements Model Act in 1993 and the Viatical Settlements Regulations in 1994, in order to guide states in regulating the viatical settlements industry. The Virginia Viatical Settlements Act was enacted in 1997. The core provisions of the Act ensure that providers are reliable, require full disclosures to viators, protect the privacy of viators, establish minimum prices for policies, and prohibit fraud.

The case at issue began when a terminally ill Virginia resident ("Jane Doe") sold her life insurance policy to Life Partners Inc., a Texas corporation, at a deep discount to provide her with cash she needed for the remainder of her life. After the transaction was completed, Jane Doe tried to improve the sale price of the policy by invoking the minimum pricing provisions of the Act. Life Partners offered to rescind the transaction; Jane Doe refused, and filed a complaint with the Virginia Bureau of Insurance ("the Bureau"), which is the relevant agency under the Virginia State Corporation Commission ("SCC"). After the Bureau's inquiry, Life Partners commenced the initial action to declare the Act unconstitutional, and to enjoin its enforcement. The Commonwealth defended the Act as serving a legitimate and important local interest in regulating viatical settlements with its residents. The Commonwealth also argued that it acted properly pursuant to powers conferred on it by the McCarran-Ferguson Act. This act authorizes states to enact laws relating to or for the purpose of regulating the business of insurance. The U.S. District Court for the Eastern District of Virginia entered judgment for the Commonwealth, holding that the Act was constitutional. The district court concluded that: (1) the Act did not discriminate against interstate commerce, (2) that the Act served a legitimate and important local purpose, and (3) that any burden on commerce was only incidental. On appeal by Life Partners, the U.S. Court of Appeals for the Fourth Circuit affirmed the judgment of the district court (*Life Partners, Inc. v. Morrison*, No. 06-1370, 06-1371, April 30, 2007).

The Court of Appeals discussed the passage of the McCarran-Ferguson Act in 1945 when Congress declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." The Act explicitly protects from a dormant Commerce Clause challenge (1) any state law that "*relates* to the regulation of the business of insurance," or (2) any state law "enacted *for the purpose of* regulating the business of insurance." The court said that a viatical settlement fractures the two-part insurance contract between the insurer and insured, and creates a new "tripartite arrangement" among the insurer, the insured, and the insured's assignee (the provider). The Virginia Viatical Settlements Act addressed concerns of all three of these parties, as well as the interest of the Commonwealth in ensuring that its residents are not subjected to unscrupulous conduct by the providers. The court determined that the matters regulated by the Act "relate to" the business of insurance as defined in McCarran-Ferguson, that the Act was enacted for "the purpose of regulating the business of insurance," and that the Act "regulates directly and substantially the actual business of insurance." The court also said that the Act implements the licensing regime that Congress relied upon to confer tax benefits to viators under the Internal Revenue Code. The court affirmed the judgment of the district court.

Oast & Hook can assist clients with viatical settlements and other types of life settlements, as well as with other estate, long-term care, insurance, and financial planning needs. The September 15, 2006, issue of the *Elder Law News* provides more information regarding life settlements.

## Speakers

If you are interested in having an elder law attorney from Oast & Hook speak at an event, then please call Jennifer Lantz at 757-399-7506.

## Oast & Hook

Oast & Hook is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, investment and insurance advice, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid, Medicare, Social Security, and SSI, disability planning, income tax planning and preparation, bill paying, account management and reporting, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at **www.oasthook.com**.

Oast & Hook is a Virginia member of the Special Needs Alliance, a nationwide network of disability attorneys. As members of this alliance, we assist personal injury attorneys in resolving their cases to enhance the judgments and awards of their disabled clients and to maintain the eligibility of these clients for SSI and Medicaid. We are experienced in protecting the public benefits of persons with special needs and in assisting with the management of their assets. For more information about the Special Needs Alliance, visit its website at **www.specialneedsalliance.com**.

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