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## VIATICAL SETTLEMENTS IN MONTANA: NEW LEGISLATION SERVES THE TERMINALLY ILL

Bernard A. Jacobs\*

### I. INTRODUCTION

Montana has joined a growing number of states that have enacted viatical settlement laws and/or regulations.<sup>1</sup> In Latin, "viaticum" generally means "provision for the journey,"<sup>2</sup> a concept uniquely appropriate to this form of settlement. In a viatical settlement,<sup>3</sup> an investor pays a terminally ill holder of a life insurance policy a lump sum in consideration for being named the policyholder or beneficiary who will be paid the policy's death benefit upon the seller's death.<sup>4</sup> By selling his or her policy at a discount from face value,<sup>5</sup> a policyholder may obtain a lump sum settlement at a time when, most often, few other financial resources are available.<sup>6</sup>

This paper examines viatical settlements, in Montana and generally, from several perspectives. Part II provides a brief history and description of viatical settlements. Part III considers

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1. The Montana Viatical Settlement Act was passed by the 1997 legislative session and was signed by Governor Marc Racicot on April 17, 1997, becoming effective on October 1, 1997. At the time of passage, twenty states had enacted viatical settlement laws.

2. OXFORD LATIN DICTIONARY 2054 (P. G. W. Glare ed. 1982).

3. Although viatical settlements and accelerated benefits are often lumped together as "living benefits," the two are similar only in what they seek to accomplish. Accelerated benefits are offered to policyholders by (some) insurers as riders to many existing life policies. In contrast to viatical settlements, there is no discount from the policy's face value but, instead, often only an administrative fee is charged for processing the accelerated benefit claim. An additional premium for the rider is also charged while the rider is in effect. While other differences also exist, for purposes of this paper it is only important to be aware that the two forms of "living benefits" are vastly different in the way they provide funds to terminally ill people.

4. See June R. Herold, *Death Benefits the Living: Industry Grows on Terminally Ill's Insurance*, HOUST. CHRON., June 7, 1992, at 9 (noting that although about ninety-five percent of the people who viaticate their life insurance policies are afflicted with AIDS, people with cancer and other terminal illnesses also sell their life insurance policies).

5. See Carole C. Lamson, *Legal Introduction in Living Benefits in Life Insurance: New Perspectives and Developments*, 65 N.Y. ST. B.J. 16 (Nov. 1993).

6. See Herold, *supra* note 4 (reporting, for example, that one company, Living Benefits, Inc. of New Mexico, purchased 225 policies in 1991 worth \$25.7 million, with the average value of those policies being \$80,000.00).

the necessity for regulation of persons and entities offering these settlements. Part IV discusses the pros and cons of viatical settlements and Part V provides an overview of Montana's Viatical Settlement Act (VSA), codified as Montana Code Annotated Title 33, Chapter 20. Part VI concludes the paper by discussing the legislation in terms of public interest.

## II. HISTORY AND DESCRIPTION OF VIACICAL SETTLEMENTS

A viatical settlement first appeared in 1988<sup>7</sup> as a means for the terminally ill, most often those afflicted with AIDS, to obtain desperately needed funds.<sup>8</sup> As the AIDS epidemic spread,<sup>9</sup> a viatical settlement industry began to develop, expanding from one company in 1988 to at least forty such companies operating nationally today.<sup>10</sup> At present, no viatical settlement companies are known to be based in Montana.<sup>11</sup>

A viatical settlement occurs when a terminally ill person (the viator) irrevocably names as the beneficiary, on his or her life insurance policy, an investor willing to pay the viator a lump sum of money for that designation. The exact amount of the payment is calculated by discounting an agreed upon percentage from the face value of the policy, with the difference being paid to the viator. Typically, the amount paid is fifty to eighty percent of the face value of the policy, which results in the purchaser/beneficiary commonly realizing a twenty to forty percent profit

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7. See Jennifer Berner, *Beating the Grim Reaper, or Just Confusing Him? Examining the Harmful Effects of Viatical Settlement Regulation*, 27 J. MARSHALL L. REV. 581, 583 (1994).

8. See Russell J. Herron, *Regulating Viatical Settlements: Is the Invisible Hand Picking the Pockets of the Terminally Ill?*, 28 U. MICH. L.J. REF. 931, 932 (1995) (reporting that a 1992 survey revealed that over fifty percent of the respondents—people afflicted with AIDS—had difficulty paying for medicine, clothing, transportation, housing, and food. Almost thirty percent reported living on less than \$500.00 per month, while another thirty percent reported living on between \$500.00 and \$1,000.00 per month).

9. For example, the 242,146 cases of AIDS reported nationally at the end of 1992 has expanded to 554,093 as of August 31, 1995. In Montana those afflicted with AIDS has grown from one reported case in 1983 to 318 reported cases as of September 20, 1996—of which 197 are now deceased. Interview with Jim Murphy, Montana Department of Health and Environmental Sciences (Sept. 20, 1996).

10. See Lamson, *supra* note 5, at 22.

11. Interview with various officials in the Montana Insurance Commissioner's Office (Sept. 20, 1996). Because Montana did not license or otherwise regulate viatical settlement providers or brokers before passage of VSA, no estimates are available as to how many individuals and/or companies are presently operating in the state.

upon payment of the death benefit.<sup>12</sup> The shorter the viator's life expectancy when the settlement is executed, the more the purchaser is willing to pay to be named as the viator's beneficiary or policy holder.

In addition to individuals and companies that purchase beneficial rights to viators' life insurance policies, viatical settlement brokers have also carved out a niche in the viatical settlement market. These brokers act as intermediaries between viators and potential purchasers, and work principally toward identifying and contacting potential viators on behalf of purchaser clients. Once a viatical settlement is executed as a result of the broker's efforts, a fee is paid to the broker that is commonly a percentage of the negotiated settlement amount.

As the viatical settlement market has emerged and expanded, so also have the possibilities for abuse, mainly in the form of misrepresentation, misuse of confidential information, or the exercise of undue influence over vulnerable and often desperate terminally ill people.<sup>13</sup> The next section of this paper considers the potential for such abuses and regulatory efforts to prevent and/or address them.

### III. THE NEED FOR REGULATION

The need for viatical settlement regulation is most apparent when one considers the abuses that may attend this emerging enterprise. At the core of these potential abuses lies the ability of viatical settlement companies and brokers (VSCBs) to control information critical to those contemplating a viatical settlement. For example, only VSCBs can provide information about the solvency of the prospective purchasers of a viator's policies. By misinforming a viator (either by omission or commission), VSCBs may induce a viator to settle with a purchaser that, in the end, will not be able to perform as promised. Marginally solvent or insolvent VSCBs may also compound the harmful effect of this misinformation by luring viators away from opportunities to settle with solvent VSCBs. Even for a healthy person, the litigation arising from such misrepresentation would be both trying and

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12. See Lamson, *supra* note 5, at 16.

13. See Charles E. Schmidt, Jr., *Viatical Firms Fighting Outlaw Image*, Best's Review—Life-Health Insurance Edition, March, 1996, at 69-70 (reporting that one of the primary reasons the National Association of Insurance Commissioners adopted a model law relating to viatical settlements was to protect consumers from falling prey to the unethical and/or unlawful practices of unregulated viatical settlement providers).

lengthy. For a terminally ill person, it would not only underscore an immeasurable personal tragedy, but would also probably not be feasible—either financially or practically.

Beyond solvency considerations, other information critical to those contemplating viatical settlements is commonly within the expertise of VSCBs. For example, VSCBs are by their nature situated to know the potential impact viatical settlements may have on a viator's tax planning,<sup>14</sup> or on the viator's need-based public assistance,<sup>15</sup> or the fact that settlement monies may be subject to claims of creditors. Arguably, if VSCBs do not advise a potential viator of these considerations they may be acting in bad faith. More certainly, they would be acting in their own self-interest to the marked disadvantage of a person who is short on time and money. If VSCBs do not provide such information to a potential viator, it is highly unlikely the viator will otherwise become aware of it.

Yet another significant area of information controllable by VSCBs relates to the medical information provided to them by a viator or by the medical practitioners who have treated the viator. Misuse of this information could leave a viator unable to obtain credit, or possibly affect the viator's potential or existing employment. As in the previously described scenarios, a terminally ill person whose confidentiality rights have been violated will find the availability of statutory or civil remedies of little use or comfort. Realistically, legal remedies will not be available to a potential viator nor will the person be able to overcome the harmful effects of unauthorized disclosures in other ways. A terminally ill person simply do not have time to pursue remedies for or outlive this kind of personal damage. For those who might intentionally or inadvertently breach or abuse their possession of such confidential information, there is little at risk in terms of adverse response by those affected.

The potential for such abuses, coupled with the unlikely proposition that those who might be injured by them will live long enough to recover any damages or receive the benefit of

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14. Although the federal enactment of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 331(a), 110 Stat. 1936, 2067-69 (1996), provides that proceeds from viatical settlements after December 31, 1996, are now tax free, the need for tax planning to consider other factors associated with the use of such proceeds remains advisable. See I.R.C. § 101(g) (1997).

15. See William Doyle, *Life Insurance Buyouts Can Gouge the Terminally Ill*, HOUS. CHRON., Feb. 1, 1995, at 3 (reporting that large lump sum payments from insurance companies could negatively affect Medicaid and Social Security disability benefits).

their bargains, suggests that VSCBs must be policed by means other than the threat of being sued. Simply stated, government oversight of VSCBs may be the only way to ensure that a potential viator does not become victims of abuses such as the ones described above. Moreover, the presence of such regulatory oversight may actually eliminate some level of anxiety that the terminally ill person might otherwise experience as he or she contemplates viatical settlements. With governmental oversight in place, a viator at least will know that the VSCBs with whom the person might negotiate a settlement have met statutory standards to do business in Montana.

#### IV. PROS AND CONS OF VIATICAL SETTLEMENT REGULATION

While many arguments exist either favoring or disfavoring viatical settlement regulation, it is beyond the scope of this paper to explore all of them. Instead, this section of the paper presents a synopsis of the prevailing points of view.

##### A. Arguments for Regulation

In addition to the reasons set forth in Part III of this paper, those favoring regulation of viatical settlements also offer an "industry protection" argument.<sup>16</sup> They contend the best interests of the industry are served because regulation prevents informational inequalities, thereby protecting against "market failure."<sup>17</sup> This position is based on the notion that "markets need adequate information on prices, quality and terms if they are to function efficiently."<sup>18</sup> Those who subscribe to this position believe that generalized requirements to provide information are less restrictive than requiring specific terms of disclosure, and they also allow the industry to remain flexible in terms of responding to customer preferences and changing information-based technologies, such as the expanding use of the Internet. Put another way, if VSCBs are driven to provide information to consumers by a desire to remain competitive rather than by (or at least in addition to) regulations setting out in rigid terms everything that must be disclosed, they will not be impeded by

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16. See Lamson, *supra* note 5, at 17; Lee Ann Dean, Note, *Acquired Immune Deficiency Syndrome, Viatical Settlement, and the Health Care Crisis: AIDS Patients Reach Into the Future to Make Ends Meet*, 25 RUTGERS L.J. 117, 144 (Autumn 1993).

17. Herron, *supra* note 8, at 938.

18. *Id.* at 936-37 (quoting IAIN RAMSEY, CONSUMER PROTECTION TEXT AND MATERIALS 36-37 (1989)).

those regulations when consumer demands and technologies change. Thus, while this argument does not support imposition of regulations to provide "perfect information"<sup>19</sup> to consumers, it does support the proposition that "adequate information"<sup>20</sup> must be provided to consumers if the market is to remain viable.<sup>21</sup>

### B. Arguments Against Regulation

The main opposition to viatical settlement legislation centers on a "free alienation of property" argument. Advocates of this position assert, first, that the commonly held preference for free alienation of property in this country rests upon the following three principles: "(1) unlimited alienability of property ensures that property will go to those individuals who value it most; (2) free alienability helps to control the market system by increasing the production of goods that buyers want and decreasing production of unwanted goods; and (3) free alienability increases an individual's ability to make choices concerning the quality of an individual's life."<sup>22</sup> With these principles in mind, opponents of viatical settlement legislation also note that courts balance the preference toward free alienability against the interest in protecting the rights of the general public.<sup>23</sup> Accordingly, courts limit alienability when: (1) a transaction "creates economic inefficiencies in the form of externalities, or costs to third parties;"<sup>24</sup> (2) "private contracting creates undesirable external consequences," such as the creation of publicly harmful monopolies, or when such contracts alienate human capital;<sup>25</sup> and (3) contracts to alienate property are the product of "harmful momentary temp-

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19. Proponents make the distinction between "perfect information" and "adequate information" by pointing out that "perfect information" would be too costly to provide and, even if it were provided, would be so complex that viators would have great difficulty understanding it. "Perfect information" would include such things as actuarial justifications or consideration of other variables that influence development of settlement offers.

20. As opposed to "perfect information," "adequate information" is comprised of data such as that which is commonly required by viatical settlement statutes—like tax implications, subjectivity to creditor's claims, etc.

21. See Herron, *supra* note 8, at 939.

22. Berner, *supra* note 7, at 593-94, (primarily citing Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 384-86 (1993); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985); and Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Alienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972)).

23. See Berner, *supra* note 7, at 594-95.

24. *Id.* at 595.

25. See *Id.* at 596.

tations," such as those contracts completed by intoxicated individuals.<sup>26</sup>

In light of the above, opponents of viatical settlement legislation find fault with legislation that imposes either minimum discount rates for settlement agreements or licensing requirements for individual purchasers.<sup>27</sup> Each is discussed below.

### 1. *Discount Rates for Settlement Agreements*

On this point, opponents argue that regulating minimum discount rates violates the principle of free alienation in the three ways. First, mandatory minimum rates prevent goods (the purchaser's capital investment) from going to those who value them the most because the mandated minimum rates will, in effect, become the maximum that purchasers will likely offer. Second, minimum rates prevent free alienation from controlling the price system because, as a form of price controls, they interfere with the basic law of supply and demand. Finally, opponents argue that the imposition of minimum discount rates prevents both viators and purchasers from making choices about the quality of their lives. For example, they argue that the inability of purchasers to go below a certain rate will effectively encourage them to purchase only policies that will offer the quickest return, that is, policies from those viators that have the shortest life expectancies. When such choices are made, those potential viators with longer life expectancies—who may wish to obtain a viatical settlement to fund activities that would be otherwise impossible—will be excluded from the market because purchasers will not be able to justify offering a discount rate that is commensurate with their life expectancies.

### 2. *Licensing Requirements for Individual Purchasers*

Opponents argue that by requiring individuals to become licensed in the same manner as viatical settlement companies before they enter into settlement agreements, many potential purchasers are deterred from entering the market. As a result, they continue, competitive pricing in the market is reduced and

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26. *See Id.* at 596-97.

27. While Montana's VSA does not impose minimum discount rates, it does allow the Commissioner to promulgate rules which quite probably would address this potentially troublesome area of viatical settlements. The legislation does require individual providers of viatical settlements to become licensed if they are involved as a third party in more than one viatical settlement in a calendar year.



many if not all viators will be unable to realize a maximum rate of return on the sale of the beneficiary rights on their policies. Additionally, this type of legislation reduces a viator's choice for a purchaser of those policy rights. For example, a viator may prefer to deal with an individual whom the viator knows to be trustworthy and reputable rather than with a large company or a stranger. Such choices may be impossible, however, if that person is unwilling to submit to licensing procedures, or is unqualified for a license despite being willing and able to perform as a purchaser in a viatical settlement. Thus, opponents of regulation argue that the net effect of this situation is that licensing requirements prevent free alienation by limiting the quality of life choices that a viator can make.

## V. MONTANA'S NEW REGULATORY SCHEME

Montana's "Viatical Settlement Act"<sup>28</sup> is comprehensive in its approach to protecting consumers from abuse. First, it provides for licensure of VSCBs that wish to do business in Montana.<sup>29</sup> Second, it sets forth numerous items that must be disclosed to viators.<sup>30</sup> Third, it establishes confidentiality standards for VSCBs operating in this state.<sup>31</sup> The following subsections describe these provisions, and others, in more detail.

### A. Licensure of VSCBs

The VSA requires licensure of both viatical settlement providers and brokers by the Insurance Commissioner.<sup>32</sup> It stipulates that the Commissioner must be confident of a license

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28. At the request of Honorable Mark O'Keefe, Montana's State Auditor and Insurance Commissioner, the author of this paper researched and drafted the viatical settlement legislation which Mr. O'Keefe submitted to the 1997 Montana legislative session.

29. See MONT. CODE ANN. § 33-20-1303(1) (1997).

30. See MONT. CODE ANN. § 33-20-1311 (1997).

31. See MONT. CODE ANN. § 33-20-1313(3) (1997).

32. See MONT. CODE ANN. § 33-20-1303 (1997). As the viatical settlement market emerged, a controversy also developed concerning whether these settlements qualified as investment contracts that would be subject to federal securities laws. As a result of litigation which started in August, 1995, concerning this issue, the U.S. Court of Appeals for the District of Columbia ruled not only that viatical settlements are not exempt from laws as insurance contracts, but also that they are not securities subject to federal securities laws either—pursuant to the three tiered Howey test. See *Securities and Exch. Comm'n v. Life Partners, Inc.*, 102 F.3d 587 (D.C. Cir. 1996). Given this ruling—which confirmed the predominant state-level thinking on the subject—regulatory control of viatical settlements has fallen within the purview of state insurance commissioners almost by default.

applicant's financial responsibility and good business reputation before a license is issued.<sup>33</sup> To satisfy this standard, the Commissioner may request applicants to provide a wide range of background information, along with a statement of either a business plan or plan of operation.<sup>34</sup> This information may be verified by the Commissioner before any license is issued.<sup>35</sup> The VSA also enables the Commissioner to verify and/or monitor the financial fitness of licensees by requiring them to file annual reports with the Commissioner,<sup>36</sup> and also by allowing the Commissioner to examine the business and practices of any licensee or applicant whenever the Commissioner determines such examinations are necessary.<sup>37</sup>

The VSA also requires a VSCB applicant to file with its application for licensure a copy of the viatical settlement agreement the applicant intends to use if the license is issued.<sup>38</sup> These contract forms must be pre-approved by the Commissioner before being used, even if the VSCB applicant receives a license.<sup>39</sup> Additionally, the legislation requires that licensees immediately notify the Commissioner of any material changes in ownership or control of the licensed company that affects its qualification for the license.<sup>40</sup> It also requires that nonresident applicants appoint the Commissioner as their attorney for purposes of receiving any service of process upon the licensee.<sup>41</sup> The VSA sets forth numerous grounds which permit the Commissioner to suspend, revoke, refuse to issue or refuse to permit or renew any license applied for or granted relating to viatical settlements.<sup>42</sup>

Montana's VSA exempts many persons and entities from

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33. See MONT. CODE ANN. § 33-20-1304(1)(c) (1997).

34. See MONT. CODE ANN. § 33-20-1303(3) (1997).

35. See MONT. CODE ANN. § 33-20-1304(1) (1997).

36. See MONT. CODE ANN. § 33-20-1309 (1997).

37. See MONT. CODE ANN. § 33-20-1310(1) (1997).

38. See MONT. CODE ANN. § 33-20-1303(3) (1997).

39. See MONT. CODE ANN. § 33-20-1304(1) (1997).

40. See MONT. CODE ANN. § 33-20-1306 (1997).

41. See MONT. CODE ANN. § 33-20-1304(2) (1997).

42. See MONT. CODE ANN. § 33-20-1307(1)-(3) (1997). Included among the grounds for such action by the Commissioner are: falsifications on applications for licenses; conduct resulting in felony convictions; refusal of licensees to allow examination of their accounts and records by the commissioner; and, dishonesty or fraud in the conduct of business as a licensee. Notably, the VSA allows the Commissioner to suspend or refuse to renew a license without a hearing if the Commissioner determines the licensee is insolvent or in such poor financial condition as to pose an imminent threat to the public health, safety, or welfare of the residents of this state.

licensure requirements.<sup>43</sup> For example, banks, savings and loan associations, credit unions and other licensed lending institutions that take assignments of life insurance policies as loan collateral only are not required to be licensed under VSA's legislation.<sup>44</sup> Similarly, insurance companies offering accelerated benefits are not required to be licensed as viatical settlement providers,<sup>45</sup> nor are individuals who enter into only one viatical settlement per calendar year as a third party purchaser.<sup>46</sup> Corporations, partnerships and partners may also purchase life insurance contracts of employees, retirees of a corporation, or of partners without having to be licensed under this act, so long as other provisions of the act are honored.<sup>47</sup>

### B. Disclosure Requirements

The VSA requires disclosure by viatical settlement providers of several important points prior to the date on which the viatical settlement contract is signed by all parties.<sup>48</sup> First, alternatives to viatical settlements—such as accelerated benefits—must be presented to viators.<sup>49</sup> Second, the possible tax implications must be discussed and the viator must be told of the advisability of seeking assistance from a personal tax advisor.<sup>50</sup> Third, neither viatical settlement providers and brokers, nor their employees and/or agents, may act as personal tax advisors in this regard.<sup>51</sup> Fourth, viators must also be advised that settlement proceeds may be subject to claims of creditors,<sup>52</sup> and that viators' public entitlements, if any, also may be adversely affected by the settlement.<sup>53</sup> Fifth, the right of a viator to rescind the settlement contract not later than thirty days after execution of the contract or no later than fifteen days after the viator receives the settlement proceeds must also be disclosed.<sup>54</sup> Finally, the viator must be advised of the date by which the

43. See MONT. CODE ANN. § 33-20-1302(3)(c) (1997).

44. See MONT. CODE ANN. § 33-20-1302(3)(c)(i) (1997).

45. See MONT. CODE ANN. § 33-20-1302(3)(c)(ii) (1997).

46. See MONT. CODE ANN. § 33-20-1302(3)(c)(iii) (1997).

47. See MONT. CODE ANN. § 33-20-1302(3)(c)(iv) (1997).

48. See MONT. CODE ANN. § 33-20-1311 (1997).

49. See MONT. CODE ANN. § 33-20-131(1) (1997).

50. See MONT. CODE ANN. § 33-20-1311(2) (1997).

51. See MONT. CODE ANN. § 33-20-1311(2) (1997).

52. See MONT. CODE ANN. § 33-20-1311(3) (1997).

53. See MONT. CODE ANN. § 33-20-1311(4) (1997).

54. See MONT. CODE ANN. § 33-20-1311(5) (1997); see also MONT. CODE ANN. § 33-20-1308(3) (1997).

viator will receive settlement proceeds and, most importantly, that the settlement contract will become void if the provider fails to tender payment of the proceeds as agreed upon in the settlement contract.<sup>55</sup>

### C. Confidentiality Standards

Confidentiality standards relating to viatical settlements are established by direct reference to those set forth in sections 33-19-101 through 33-19-409 of the Montana Code.<sup>56</sup> Chapter 19 of Montana's Insurance Code is entitled "Insurance Information and Privacy Protection" and, although all four parts of the chapter pertain to the confidentiality concerns relating to viatical settlements, parts three and four are most germane to this paper. To facilitate the incorporation by reference to chapter 19, the VSA specifies that viatical settlement licensees are to be considered "insurance support organizations" (ISOs) as defined in the Montana Insurance Code.<sup>57</sup>

With the foregoing in mind, part three of chapter 19 authorizes release of personal information to VSCBs/ISOs upon "proper identification" of an individual or entity who submits a written request for that information.<sup>58</sup> Similarly, VCSBs and ISOs may release medical information upon request to either the individual or to a medical professional designated by the individual.<sup>59</sup> Immediately upon doing so, however, the VCSBs and ISOs must also advise the individual that they have released information and to whom.<sup>60</sup> Finally, eighteen separate limitations and conditions are listed which pertain to disclosure of information about insured individuals.<sup>61</sup>

Part four of chapter 19 provides for enforcement by the Commissioner of the first three parts of chapter 19. Briefly, it gives the Commissioner the power "to examine and investigate" as the Commissioner deems necessary to determine if violations of

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55. See MONT. CODE ANN. § 33-20-1311(6)-(7) (1997).

56. See MONT. CODE ANN. § 33-20-1313(3) (1997). In conjunction with passage of the VSA, various other sections of the Montana Code Annotated, including Chapter 19, were modified consistent with references thereto made in the VSA.

57. See MONT. CODE ANN. § 33-19-104(12) (1997); see also MONT. CODE ANN. § 33-20-1313(3) (1997).

58. See MONT. CODE ANN. § 33-19-301(1) (1997); see also MONT. CODE ANN. §§ 33-19-104(10), 33-20-1313(3) (1997).

59. See MONT. CODE ANN. § 33-19-301(3) (1997).

60. See MONT. CODE ANN. § 33-19-301(3) (1997).

61. See MONT. CODE ANN. § 33-19-306(1)-(18) (1997).

chapter 19 have occurred.<sup>62</sup> Part four also provides for the Commissioner to hold hearings pertaining to alleged violations of this chapter, and for the Commissioner to reduce any findings and conclusions arising from those hearings to writing.<sup>63</sup> Service upon respondents by the commissioner of those findings and conclusions is also required by this part.<sup>64</sup> Civil penalties, judicial review of orders and reports, remedial options, and immunity from suit for providing information in accordance with this chapter are also addressed in part four.<sup>65</sup>

Perhaps most notable among the part four provisions, however, is section 33-19-407 of the Montana Code. This section, entitled "Individual Remedies," provides the additional right to seek equitable relief or damages—depending on the violation—in the district court to any person whose rights are violated, as enumerated in part three.<sup>66</sup> In addition to establishing a two-year statute of limitations for bringing such actions,<sup>67</sup> recovery of the cost of the action and reasonable attorney's fees may be allowed to the prevailing party.<sup>68</sup>

#### *D. Additional Noteworthy Provisions*

The VSA gives the Commissioner rule-making authority to determine and set allowable fees, commissions, or other valuable consideration that may be charged or received for services rendered by viatical settlement brokers or providers.<sup>69</sup> Also included in this authority is provision for regulation of discount rates used to determine the amount to be paid to viators in exchange for assignment of the beneficial rights to their life insurance policies.<sup>70</sup> In establishing these rates, however, the VSA requires the Commissioner to consider payments made in regional and national viatical settlement markets as well as model standards developed by the National Association of Insurance Commissioners.<sup>71</sup>

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62. See MONT. CODE ANN. § 33-19-401(1) (1997).

63. See MONT. CODE ANN. §§ 33-19-402, -404 (1997). Hearings conducted under this section are governed by MONT. CODE ANN. §§ 2-4-101 to -711 (1997) and §§ 33-1-701 to -708 (1997).

64. See MONT. CODE ANN. § 33-19-403 (1997).

65. See MONT. CODE ANN. §§ 33-19-405 to -408 (1997).

66. See MONT. CODE ANN. § 33-19-407(1) (1997).

67. See MONT. CODE ANN. § 33-19-407(4) (1997).

68. See MONT. CODE ANN. § 33-19-407(3) (1997).

69. See MONT. CODE ANN. § 33-20-1315 (1997).

70. See MONT. CODE ANN. § 33-20-1315(1) (1997).

71. See MONT. CODE ANN. § 33-20-1315(1) (1997).

The VSA also sets forth conditions precedent to the execution of viatical settlements.<sup>72</sup> Principal among them is a requirement that the provider obtain a written statement from the attending physician that the viator is of sound mind and under no constraint or undue influence.<sup>73</sup> Similarly, a witnessed document must be obtained in which the viator consents to the settlement contract, acknowledges the terminal nature of the condition or illness, and represents that the viator has a full and complete understanding of the proposed settlement agreement and of the benefits of the life insurance policy which provides the basis of the settlement agreement.<sup>74</sup> This document also approves release of the viator's medical records that relate to the terminal illness or condition,<sup>75</sup> and acknowledges that the viatical settlement contract is being entered into freely and voluntarily.<sup>76</sup> Finally, a determination must be made by an attending physician that the illness or condition is, in fact, terminal.<sup>77</sup>

The legislation also addresses the method and timeliness of payment to viators upon execution of settlement agreements. In short, providers must pay a lump sum to an approved escrow agent immediately upon receipt of documents from the viator which effect the transfer of the underlying insurance documents.<sup>78</sup> Those proceeds are paid to the viator upon receipt by the escrow agent of documents from the insurer that acknowledge the changes agreed upon in the viatical settlement.<sup>79</sup> The requirement of a lump sum payment is effective only if another form of payment, such as installment payments or purchase of an approved annuity, has not been set out as part of the settlement agreement.<sup>80</sup>

## VI. CONCLUSION

Montana's viatical settlement law serves the public's interest. It balances regulatory constraints placed on the industry against the desires of terminally ill people in Montana to participate in these agreements. On the one hand, the legislation pro-

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72. See MONT. CODE ANN. § 33-20-1312 (1997).

73. See MONT. CODE ANN. § 33-20-1312(1)(a) (1997).

74. See MONT. CODE ANN. § 33-20-1312(1)(b)(i)-(iv) (1997).

75. See MONT. CODE ANN. § 33-20-1312(1)(b)(v) (1997).

76. See MONT. CODE ANN. § 33-20-1312(1)(b)(vi) (1997).

77. See MONT. CODE ANN. § 33-20-1312(2)(a)(b), (3) (1997).

78. See MONT. CODE ANN. § 33-20-1314(1) (1997).

79. See MONT. CODE ANN. § 33-20-1314(1) (1997).

80. See MONT. CODE ANN. § 33-20-1314(2) (1997).

vides assurance to those people, through the licensure requirements, that companies and brokers who operate in Montana are solvent and otherwise able to perform if their settlement offers are accepted. Moreover, by excepting from the licensing requirements a variety of persons and entities, this legislation ensures that, by its own terms, it is as minimally restrictive as possible in this regard.

Beyond the licensure requirements, the VSA's provisions against unlawful disclosure of confidential information also protect the public, but in a manner already proven workable and acceptable by another section of the Montana Insurance Code. Similarly, by mandating that certain very salient information be disclosed to viators by those offering viatical settlements, the Montana legislation ensures that citizens contemplating viatical settlements are well informed. This goal is accomplished at very little expense or inconvenience to the industry. The VSA provisions specifying the methods and conditions regarding payment of the settlement funds to viators are significant and serve the public's interest.

The absence of minimum rate requirements in the legislation militates against the free alienation argument put forward by opponents of viatical settlement legislation. Nonetheless, while the Commissioner has the ability to promulgate rules on this point, the administrative procedures for doing so will allow interested members of the public to participate fully in that process.

To summarize, no law promulgated in Montana or anywhere else will ever be completely acceptable to every segment of society or to every individual that such laws affect. Attempts to achieve a balance in formulating those laws that acknowledge this reality better serve the public's interest. Judged by this standard, especially in terms of the relatively small segment of Montana's population likely to be directly affected by this legislation, Montana's new viatical settlement law goes a long way toward serving the public's interest.<sup>81</sup>

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81. While such considerations are far beyond the scope of this paper, it is important to note that the general population is also served by this legislation because, as viators are able to successfully access this form of living benefit, the demand for public assistance and other entitlements is accordingly decreased.