

In The
United States Court of Appeals
For The Fourth Circuit

LIFE PARTNERS, INCORPORATED,

Plaintiff – Appellant/Cross Appellee,

v.

**THEODORE V. MORRISON, JR.; MARK C. CHRISTIE;
ALFRED W. GROSS; JUDITH WILLIAMS JAGDMANN,**

Defendants – Appellees/Cross Appellants,

ROBERT F. McDONNELL,

Intervenor – Appellee

**VIATICAL SETTLEMENT PROFESSIONALS, INCORPORATED;
NORTH AMERICA SECURITIES ADMINISTRATORS ASSOCIATION, INCORPORATED;
NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS,**

Movants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND**

**NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS’
BRIEF AMICUS CURIAE IN SUPPORT
OF APPELLEE/CROSS APPELLANT’S BRIEF AND
SUPPORTING AFFIRMANCE OF THE JUDGMENT BELOW**

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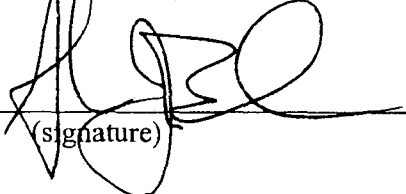
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 YES NO
2. Does party/amicus have any parent corporations?
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If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
 YES NO
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners (“NAIC”) is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Founded in 1871, it is the nation’s oldest association of state government officials.

The mission of the NAIC is:

[t]o assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members: ***protect the public interest; promote competitive markets; facilitate the fair and equitable treatment of insurance consumers; promote the reliability, solvency and financial solidity of insurance institutions; and support and improve state regulation of insurance.***¹

The NAIC performs numerous crucial services on behalf of state government, including: the development and publication of model laws, regulations, bulletins and financial and accounting standards; the coordination of quarterly national meetings and interim meetings of various NAIC committees, task forces and working groups; the creation and publication of white papers,

¹ See National Association of Insurance Commissioner, NAIC Mission Statement, available at http://www.naic.org/index_about.htm (last visited July 1, 2006).

consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*; the management of accreditation standards for, and coordination of, the review of insurance departments; the maintenance of financial and regulatory databases and regulatory analysis of insurance company financial data; the offering of education and training programs for state, federal and international financial regulators; and the operation of the Securities Valuation Office. Hundreds of state and federal laws assign duties to the NAIC and make reference to and incorporate NAIC standards, models and publications.

Any member of the NAIC may request the filing of an amicus brief. Such request requires approval by the Executive Committee of the NAIC. The members of the NAIC seek to appear as amicus to assist this Court on the pending appeal by presenting the regulatory, consumer protection and public policy concerns presented by the business of viatical settlements.

The NAIC's interest derives principally from having promulgated the Viatical Settlements Model Act and the Viatical Settlements Model Regulation ("NAIC Model"), the primary purpose of which is to provide protection to the life insurance consumer considering or undertaking a viatical settlement transaction.² The Virginia Viatical Settlements Act and related regulations ("Virginia Act")³ are

² The Model Act is found at JA 48-85 and the Model Regulation at JA 86-95.

³ Virginia Code Ann. §§ 38.2-6000 *et seq.*

based on the NAIC Model. State insurance regulators, including Commissioner Gross and the Commissioners of the Virginia State Corporation Commission, are uniquely positioned and qualified to provide these vital consumer protections.

In order to avoid duplication of arguments presented by appellees/cross-appellants, the NAIC limits its discussion here to the issue raised by appellants as to the District Court's application of a dormant Commerce Clause analysis to the Virginia Act. The NAIC focuses on the consumer protection interests that motivated the development of the NAIC Model upon which the Virginia Act at issue is based. The NAIC and its members submit that these interests protect the statute and regulation from invalidation under a dormant Commerce Clause analysis and that the District Court ruled correctly on this point.

The NAIC also endorses the arguments put forth by appellees/cross-appellants as their grounds for appeal. The NAIC supports the analysis of *United States Dep't of the Treasury v. Fabe*, 508 U.S. 491 (1993) and *Ambrose v. Blue Cross & Blue Shield*, 891 F. Supp. 1153, 1159-1162 (E.D. Va. 1995), *aff'd.*, 95 F.3d 41 (4th Cir. 1996), and the conclusion that the Virginia Act is protected from application of the Commerce Clause as a law enacted "for the purpose of regulating the business of insurance." This Court has previously stated that the laws of Title 38.2, of which the Virginia Act is a part, are "enacted for the purpose of regulating the business of insurance." *American Chiropractic v. Trigon*

Healthcare, Inc., 367 F.3d 212, 231 (4th Cir.), *cert. denied*, 125 S. Ct. 479 (2004). Once that conclusion is reached, the McCarran-Ferguson Act⁴ operates to insulate the Virginia Act from Commerce Clause challenge. The NAIC also supports the argument the District Court erred in not abstaining from exercising jurisdiction in this matter under the principles announced in *Middlesex County Ethics Com. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-432 (1982).

Finally, the NAIC agrees that Congress clearly contemplated and approved state regulation of viatical settlements when it exempted from federal income tax the proceeds of viatical settlements where the provider is licensed by the state or the settlement otherwise meets certain requirements of the NAIC Model.⁵ Because of the Congressional authorization, the Virginia Act is immune from Commerce Clause challenge and the District Court erred in not so holding.

⁴ 15 U.S.C. § 1011, *et seq.*

⁵ 26 U.S.C. § 101(g)(2)(B)

ARGUMENT

A. The NAIC Model and the Virginia Act Were Adopted to Protect Consumers.

Although viatical companies have been in existence for less than twenty (20) years, their business has prompted the enactment of numerous laws and regulations to protect viators, who have been, traditionally, chronically ill persons. In 1989, the first viatical company was formed to buy life insurance policies of terminally ill individuals for a percentage of the face value. To facilitate an alternative to these transactions, the NAIC developed a model regulation establishing the parameters for insurance companies to offer accelerated benefits. By 1992, it became clear that an accelerated death benefit was not always going to be available to the insured and that viatical companies would continue to exist and flourish.

Those who took advantage of offers to purchase their policies were generally ill and uninformed about their rights and the safeguards they should expect. Policyholders were paid less than they should have accepted and in some cases were not paid at all because they did not know they should insist on an escrow account to hold the settlement proceeds.

In the face of these activities, the NAIC undertook to develop a model law on viatical settlements to protect consumers who sold their policies at a time when they were not in an optimal bargaining position. A committee was appointed in the spring of 1992 to develop an initial draft for discussion. (Nat. Assn. of Insurance

Comrs., *Proceedings of the NAIC* (2nd Quarter 1992), p. 667). Input was received from various interested parties during the drafting process, including the viatical settlement industry, the life insurance industry and associations of people suffering from AIDS.

The NAIC adopted the Viatical Settlements Model Act (the “Model Act”) in 1993 and the Viatical Settlements Model Regulation (the “Model Regulation”) in 1994. (Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (3rd Quarter 1993), pp. 7, 30; Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (2nd Quarter 1994), pp. 13, 39, 53.) One of the most important parts of the Model Act is a set of protections for insurance consumers. These provisions include mandatory disclosure requirements, payment of proceeds into an escrow account, and confidentiality of medical information. The Model Regulation addresses the most challenging issue, which is how to assure a fair percentage of the face value of the policy is paid to the policyholder.

A number of states quickly adopted statutes based on the Model Act to address ongoing and emerging problems, however, due to continuing dramatic changes in the industry, the models that had been developed were already out of date and incomplete by the late 1990’s. As a result, the NAIC again appointed a committee to address evolving concerns about viatical settlements. The life insurance companies and viatical settlement companies worked together to develop

forms for communication between them about the viaticated policies. Extensive revisions were completed to the Model Act in 1998 and to the Model Regulation in 1999. (Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (1st Quarter 1998), pp. 8-9, 14, 17; Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (3rd Quarter 1999), pp. 25-26 [amended to add three appendices].)

At the same time, viatical settlement providers modified their practices and the character of the purchases they were making. While the first purchases of life insurance focused on AIDS patients, as the medical treatments for AIDS improved, providers broadened their market to include cancer, heart disease and other ailments. By late 1997, providers began to purchase policies from individuals who were not terminally ill. These transactions became known as “senior settlements” or “life settlements” because they typically involved older people who no longer needed their policies. Because these policies were generally of higher face amount and would take longer to mature, it was more difficult to market these to individual investors. As a result, viatical settlement providers began to solicit institutional investors to provide funding for purchases.

In response to these ongoing changes, in March 2001, the NAIC adopted a revised Model Act to include provisions on fraud, advertising, optional investor protections, enhanced examination powers and increased disclosures. (Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (4th Quarter 2000), pp. 16-17.) The

revised Model Act included clarifications regarding the status of institutional investors and the life settlement market was folded into the definition of covered viatical settlements.

State insurance regulators worked with state securities regulators, who have taken steps to address investor fraud in most states, and received valuable input from the life insurance industry and viatical settlement providers. The Model Act and Model Regulation now include requirements for sharing of information between viatical settlement providers and insurers in order to increase the capacity to identify and address fraud in the industry.

Additional revisions to the NAIC Model were adopted in 2004. These revisions included as an appendix a “Verification of Coverage” form, which form is to be completed by providers and verified by insurers to make certain that the coverage upon which the provider is bidding is understood clearly.

The NAIC currently is considering additional revisions to the NAIC Model to address consumer protection issues presented by investor-initiated life insurance, premium financing arrangements and related transactions. As with previous efforts related to the NAIC Model, this effort is being undertaken with input from the viatical and life settlements industry, the life insurance industry, and consumer groups. The NAIC and state insurance regulators are committed to

working with those industries to make sure consumers who enter into viatical settlements or similar transactions are adequately protected.

Recognizing the important consumer protections embodied in the NAIC Model, the majority of states have adopted the NAIC Models or similar legislation. As of April 2006, 39 of the 54 NAIC member jurisdictions, including Virginia, have adopted a version of the Model Act or related legislation to address the area of viatical settlements. (Nat. Assn. of Insurance Comrs., 4 *NAIC Model Laws, Regulations and Guidelines* (2006), p. 697-33.)

B. The Model Act and Virginia's Act Focus on Licensing and Disclosure to Meet Their Consumer Protection Goal.

The primary consumer protection provided by the Model Act is the licensing requirement for viatical settlement providers⁶ and brokers.⁷ Prior to operating as a provider or broker in a state, a person must obtain a license through that state's insurance commissioner. If the applicant is a viatical settlement provider, the commissioner must find that the applicant: (1) has provided a detailed plan of operation, (2) is competent and trustworthy, (3) intends to act in good faith in its

⁶ A "provider" is defined as "a person, other than a viator, that enters into or effectuates a viatical settlement contract." Certain parties are excluded from the definition of provider. (Model Act, § 2N, 4 *NAIC Model Laws, Regulations and Guidelines* (2006), p. 697-5.)

⁷ A "broker" is defined as "a person that on behalf of a viator and for a fee, commission or other valuable consideration offers or attempts to negotiate viatical settlement contracts between a viator and one or more viatical settlement providers." (Model Act, § 2K, *supra* note 1, p. 697-4.)

capacity as a provider, (4) has a good business reputation and (5) has had experience, training or education relevant to the licensure sought. A legal entity seeking licensure must provide a certificate of good standing from its state of domicile. A viatical settlement provider or broker seeking licensure pursuant to the Model Act must have provided the commissioner an anti-fraud plan as further detailed in § 12G of the Model Act. (Model Act, § 3F, *supra* note 1, pp. 697-7 - 697-8.)⁸

Virginia's licensing requirements are set forth in Virginia Code Ann. § 38.2-6002. The requirements apply to persons acting as a viatical settlement provider with a resident of the Commonwealth. Virginia Code Ann. § 38.2-6002(A). The Commission must investigate each applicant to determine their qualifications as described in the Model Act and set forth above. Further, if the applicant for a viatical settlement provider license is a nonresident, the Virginia statute requires the applicant to designate a resident of the Commonwealth for service of process. Id. at § 38.2-6002(E).

⁸ Appellant's Brief states at p. 47 that "in 2002, the NAIC told the United States Congress that there was very little fraud against "insurance policyholders [i.e. viators]." A review of the NAIC letter included at JA 370 reveals that what the NAIC actually told Congress in 2002 is that state insurance regulation has done a good job of protecting against consumer fraud in viatical settlement transactions. Undoing the consumer protections that Virginia and 37 other states have put in place creates the likelihood that the fraud those protections have prevented will return.

The Model Act requires a licensee's compliance with annual reporting requirements and discretionary examination by the commissioner so that the commissioner may determine and verify the financial solvency of a licensed viatical settlement provider or broker. (Model Act, §§ 6-7, *supra* note 1, pp. 697-9 - 697-15.) A viatical settlement provider or broker may not, except as required by law, disclose the identity of an insured or the insured's financial or medical information to any other person, with certain exceptions defined in the Model Act. (Model Act, § 6B, *supra* note 1, p. 697-9.) These conditions constitute an additional layer of consumer protection that is effective before and after the execution of a viatical settlement contract.

The Virginia Act also contains reporting requirements and a provision regarding examinations. Va. Code Ann. §§ 38.2-6004, 6006. These are balanced against privacy concerns that prohibit the disclosure of the insured's identity, financial or medical information, unless certain exceptions apply. Va. Code Ann. § 38.2-6005.

Section 8 of the Model Act contains a list of disclosures that the provider or broker is required to provide the viator in a separate document "no later than the time the application for the viatical settlement contract is signed by the parties." (Model Act, § 8A, *supra* note 1, p. 697-15.) One mandatory disclosure under the model law is a statement that "[t]here are possible alternatives to viatical

settlement contracts including any accelerated death benefits or policy loans offered under the viator's life insurance policy.” (Model Act, § 8A(1), *supra* note 1, p. 697-15.) The provider is required to inform the viator that the proceeds of the transaction may be taxable and subject to creditors' claims. (Model Act, § 8A(2), *supra* note 1, p. 697-15.)

Other disclosures are mandated by the time the viatical settlement contract is signed by all parties. These include information about any affiliation between the provider and the issuer of the policy to be viaticated, the method of calculating the broker's compensation and the implication of viaticating a policy that provides coverage of any other life in addition to the insured's. (Model Act, § 8B, *supra* note 1, p. 697-16.)

Virginia's Act also specifies disclosures required prior to entering a viatical contract and at the time the contract is signed. Va. Code Ann. §§ 38.2-6007. The Virginia requirements mirror those set forth above.

In addition to the disclosures required by Section 8 of the Model Act, Section 9 enumerates other compulsory conditions of completing a viatical settlement transaction. For example, if the viator is the insured, the provider shall obtain a physician's written statement that the viator is of sound mind and under no undue influence with regard to the transaction. (Model Act, § 9A(1)(a), *supra* note 1, p. 697-19.) The Model Act would also require that the viator deposit the

executed documents with an independent escrow agent. Within three days of the deposit, the provider must transfer the proceeds of the settlement into an escrow account. (Model Act, § 9E, *supra* note 1, p. 697-19.) Virginia adopted these general rules concerning the sale of insurance policies and incorporated them in Virginia's Act. Va. Code Ann. §§ 38.2-6008.

A subsequent section of the Model Act governs the advertisement of viatical settlements and contains a wide variety of specific prohibitions and directions about the advertising of viatical settlements to consumers. (Model Act, § 11, *supra* note 1, p. 697-22-697-26.) Virginia's Act sets forth similar advertising parameters. Va. Code Ann. §§ 38.2-6010.

All of the requirements of the NAIC Model and the Virginia Act described above are the result of several years of attention from and discussion between state insurance regulators, life insurance and viatical settlement industry representatives and consumer representatives. The NAIC Viatical Settlements Model Act and Viatical Settlements Model Regulation constitute a considered response to the rapid changes that have occurred since the emergence of viatical settlements in the late 1980s. The Model Act and Model Regulation pertaining to this area have been subject to a relatively high degree of scrutiny and interest in their fifteen years of existence, which indicates the importance of information about viatical settlements and the protection of consumers pursuing such settlements.

C. Virginia's Viatical Settlements Act Protects Viators or Viatical Settlement Customers Without Discriminating Against Viatical Providers.

The Virginia Act does not favor resident viatical settlement providers over foreign viatical settlement providers, on its face, or in its purpose or practical effect. Application of the Virginia Act is tied to the residence of the insurance consumer entering into the regulated transaction. A non-resident viatical settlement provider is not treated any differently than a resident provider.

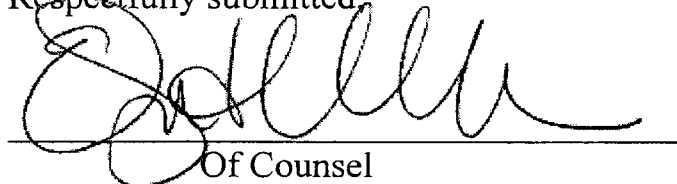
CONCLUSION

Under a dormant Commerce Clause analysis, Virginia's Viatical Settlements Act is protected from invalidation because it treats viatical settlement providers the same, regardless of where they are domiciled, and the state interests behind the law outweigh any incidental burdens on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). There can be no doubt that state insurance regulators, like Commissioner Gross and the Commissioners of the State Corporation Commission have a valid interest in protecting the interests of elderly or chronically ill residents of the Commonwealth. State insurance regulators have as their primary mission the protection of insurance consumers. This mission necessarily extends to all aspects of the insurance transaction, including any sale of the insurance benefit through a viatical settlement. The consumer protections embodied in the Virginia law constitute a compelling state interest sufficient to

prevent invalidation of the law under a dormant Commerce Clause analysis. The NAIC joins appellees in asking this Court to affirm the judgment below.

Dated: July 11, 2006

Respectfully submitted,



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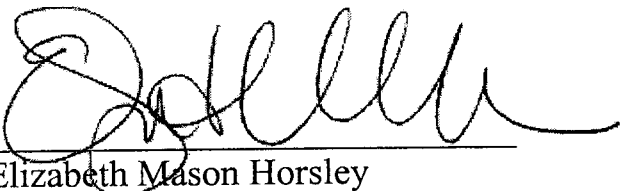
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I hereby certify that on this 11th day of July, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand delivery, the required number of copies of this Brief Amicus Curiae in support of Appellee/Cross Appellant, and I further certify that I served the required copies, via hand delivery, to:

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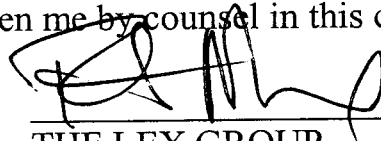
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