

Case No. A101100

COPY

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT – DIVISION ONE**

SCOTT WILBANKS, WILBANKS & )  
ASSOCIATES, )

Plaintiffs/Appellants, )

v. )

GLORIA WOLK, BIALKIN BOOKS, )

Defendants/Respondents. )

San Francisco Superior  
Court Case No. 322652

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Court of Appeal First Appellate District  
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From the Order of the Superior Court of the State of California  
In and for the County of San Francisco  
Honorable James J. McBride, Presiding

**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION  
OF INSURANCE COMMISSIONERS**

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**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
THE NAIC AND THE HISTORY OF VIATICAL SETTLEMENTS .....	3
CONSUMER PROTECTIONS PROVIDED BY THE VIATICAL SETTLEMENTS MODEL ACT AND REGULATION.....	6
CONCLUSION.....	10

## TABLE OF AUTHORITIES

### **Statutes**

Code Civ. Proc., § 425.16, subd. (e) .....	1, 2
Ins. Code, § 10113.1 .....	6
Ins. Code, § 10113.2 .....	6

### **Other**

4 <i>NAIC Model Laws, Regulations and Guidelines</i> (2001), no. 697 .....	6, 7, 8, 9
Nat. Assn. of Insurance Comrs., 2002 Annual Report, < <a href="http://www.naic.org/about/docs/NAIC_AR_2002.pdf">http://www.naic.org/about/docs/NAIC_AR_2002.pdf</a> [as of Nov. 12, 2003]..	2
Nat. Assn. of Insurance Comrs., 4 <i>NAIC Model Laws, Regulations and     Guidelines</i> (2003).....	6
Nat. Assn. of Insurance Comrs., <i>Proceedings of the NAIC     (1st Quarter 1998)</i> .....	5
Nat. Assn. of Insurance Comrs., <i>Proceedings of the NAIC     (2d Quarter 2000)</i> .....	9
Nat. Assn. of Insurance Comrs., <i>Proceedings of the NAIC     (3d Quarter 1993)</i> .....	4
Nat. Assn. of Insurance Comrs., <i>Proceedings of the NAIC     (3rd Quarter 1999)</i> .....	5
Nat. Assn. of Insurance Comrs., <i>Proceedings of the NAIC     (4th Quarter 2000)</i> .....	5
Nat. Assn. of Insurance Comrs., <i>Summary Viatical Settlements Model Regulation     (Draft: 5/29/03)</i> , < <a href="http://www.naic.org/models_papers/models/htms/viatical_summary.htm">http://www.naic.org/     models_papers/models/htms/viatical_summary.htm</a> . [as of November 12, 2003] .....	6
Nat. Assn. of Insurance Comrs., <i>Viatical Settlements Model Regulation Draft     (Oct. 9, 2003)</i> , < <a href="http://www.naic.org/models_papers/models/docs/viatic14.pdf">http://www.naic.org/     models_papers/models/docs/viatic14.pdf</a> [as of November 12, 2003] .....	6

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Insurance Commissioners (NAIC) is a non-profit corporation whose membership consists solely of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it is the nation's oldest association of state government officials. The members of the NAIC completely control its actions.

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, 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.

The parties to the above-captioned appeal appear to dispute whether the alleged statements of defendant and respondent Gloria Wolk about a participant in the viatical settlements industry involve an "issue of public interest" or "public issue" under Code of Civil Procedure section 425.16, subdivisions (e)(3) and (e)(4) (the "Anti-SLAPP statute") or whether they involve a matter of "public concern" that invokes special protections (*i.e.*, proving "actual malice" by clear and convincing evidence) under

constitutional standards. (*See, e.g.*, Respondent’s Brief, pp. 28-39, 62; Appellants’ Reply Brief, pp. 15-21.) The NAIC and its membership take no position on: whether the underlying facts support a finding of a “public interest,” “public issue” or “public concern”; whether the Anti-SLAPP statute or the actual malice standard apply under these facts; the merits of the defamation cause of action or any other issue presented on this appeal. The NAIC nonetheless believes that its interest in, and knowledge of, the viatical settlements industry may be helpful to the Court in making its determination on any one or more of these issues.

By filing this *amicus curiae* brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill the mission of the NAIC, as set out in its Annual Report, to:

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:

1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
2. Promote the reliability, solvency, and financial solidity of insurance institutions; and
3. Support and improve state regulation of insurance.

(Nat. Assn. of Insurance Comrs., 2002 Annual Report, p.2

<[http://www.naic.org/about/docs/NAIC\\_AR\\_2002.pdf](http://www.naic.org/about/docs/NAIC_AR_2002.pdf).)

The Executive Committee of the NAIC voted to apply for leave to file its brief describing the NAIC’s effort to assist in the regulation of the viatical settlement practices underlying this action. The members of the NAIC are uniquely qualified and situated to assist the Court by presenting the regulatory and public policy concerns involved to the extent this action touches on the business of viatical settlements. As noted above, the NAIC

and its membership take no direct position on the merits of the underlying defamation cause of action or this appeal.

The NAIC's interest derives principally from having promulgated the Viatical Settlements Model Act and the Viatical Settlements Model Regulation, the primary purpose of which is to provide protection to the life insurance consumer considering or undertaking a viatical settlement transaction.<sup>1</sup> Because consumer information is an essential component of consumer protection, the NAIC believes that it is important that consumer information about viatical transactions be available to the public. The NAIC's position is that as the viatical settlements industry continues to develop and evolve, there remains the potential for abuse that makes it important to protect and educate the public about the business of viatical settlements.

### **THE NAIC AND THE HISTORY OF VIATICAL SETTLEMENTS**

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 this viatical transaction, 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

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<sup>1</sup> Copies of these models are provided in the accompanying Appendix of *Amicus Curiae* National Association of Insurance Commissioners ("AA").

face of these activities, the NAIC decided to adopt 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.

Although viatical settlements did not fit within the definition of the insurance activity regulators usually focused on, insurance consumers were being harmed, and insurance regulators felt compelled to take action. Because it was a new industry, there was little regulatory experience with the activities and problems. The Viatical Settlements Model Act (the "Model Act") was adopted in 1993 and the Viatical Settlements Model Regulation (the "Model Regulation") followed close behind in 1994. (Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (3d Quarter 1993), pp. 7, 30; Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (2nd Quarter 1994), pp. 13, 39, 53.) The most important part of the Model Act is a set of protections for insurance consumers, including 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 put the Model Act in place to address emerging problems.

Due to continuing dramatic changes in the industry, the models that had been developed only a few years before were already out of date and incomplete. As a result, the NAIC again appointed a committee to address evolving concerns about viatical settlements. Interested parties from the life insurance and viatical settlements industries grew more involved in the process, and they assisted in developing the revised models. The initial distrust between the two industries gave way to some extent as they 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 an enhanced 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.) Clarifications regarding the status of institutional investors were included, and the life settlement market was folded into the definition of covered viatical settlements. Regulators worked with state securities regulators, who have taken steps to address investor fraud in most states, and received valuable input from the insurance and viatical settlements industry. 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.

As of October 2003, 38 of 54 jurisdictions served by the NAIC, including California, 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* (2003), p. 697-33; Ins. Code §§ 10113.1, 10113.2.) In addition, revisions to the Model Regulation are currently under consideration by a NAIC working group. Proposed changes include a new “Verification of Coverage” form, which would be completed by providers and verified by insurers to make certain that the coverage upon which the provider is bidding is clearly understood. The working group has also discussed uniform reporting forms for brokers and providers. (Nat. Assn. of Insurance Comrs., *Viatical Settlements Model Regulation Draft* (Oct. 9, 2003), <[http://www.naic.org/models\\_papers/models/docs/viatic14.pdf](http://www.naic.org/models_papers/models/docs/viatic14.pdf) [as of November 12, 2003].) The working group plans to complete drafting the revised model regulation by early December 2003. (Nat. Assn. of Insurance Comrs., *Summary Viatical Settlements Model Regulation (Draft: 5/29/03)*, <[http://www.naic.org/models\\_papers/models/htms/viatical\\_summary.htm](http://www.naic.org/models_papers/models/htms/viatical_summary.htm). [as of November 12, 2003].)

### **CONSUMER PROTECTIONS PROVIDED BY THE VIACIAL SETTLEMENTS MODEL ACT AND REGULATION**

The primary consumer protection provided by the Viatical Settlements Model Act is the licensing requirement for viatical settlement providers<sup>2</sup> and brokers.<sup>3</sup> Obtaining licensure through the respective state

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<sup>2</sup> 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* (2001), p. 697-5 [AA 7].)

<sup>3</sup> 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

insurance commissioner is a prerequisite to operating as a provider or broker. The Model Act requires the commissioner to investigate each applicant and verify certain qualities. If the applicant is a viatical settlement provider, the commissioner must find that it: (1) has provided a detailed plan of operation, (2) is competent and trustworthy, (3) intends to act in good faith in its 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 [AA 9-10].)

In order for a commissioner to determine and verify the financial solvency of a licensed viatical settlement provider or broker, the Model Act requires that licensee comply with annual reporting requirements and discretionary examination by the commissioner. (Model Act, §§ 6-7, *supra* note 1, pp. 697-9 - 697-15 [AA 11-17].) However, except as required by law, a viatical settlement provider or broker may not 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 [AA 11].) These conditions concerning the disclosure of the insured's personal and medical information constitute an additional layer of consumer protection that is effective before and after the execution of a viatical settlement contract.

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  

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viatical settlement providers." (Model Act, § 2K, *supra* note 1, p. 697-4 [AA 6].)

signed by the parties.” (Model Act, § 8A, *supra* note 1, p. 697-15 [AA 17].) 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 [AA 17].) 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 [AA 17].)

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 [AA 18].)

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 [AA 21].) 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 [AA 21].)

A subsequent section of the Model Act governs the advertisement of viatical settlements. (Model Act, § 11, *supra* note 1, p. 697-22-697-26 [AA 24-28].) The section begins with the following statement of its purpose:

The purpose of this section is to provide prospective viators ... with clear and unambiguous statements in the

advertisement of viatical settlements and to assure the clear, truthful and adequate disclosure of the benefits, risks, limitations and exclusions of any viatical settlement contract[.] This purpose is intended to be accomplished by the establishment of guidelines and standards of permissible and impermissible conduct in the advertising of viatical settlements to assure that product descriptions are presented in a manner that prevents unfair, deceptive or misleading advertising and is conducive to accurate presentation and description of viatical settlements through the advertising media and material used by viatical settlement licensees.

(Model Act, § 11, 4 *NAIC Model Laws, Regulations and Guidelines*, *supra* note 1, p. 697-22 [AA 24].) When proposed, the language of Section 11 was described as “an amalgamation of the best language from a number of state codes.” (Nat. Assn. of Insurance Comrs., *Proceedings of the NAIC* (2d Quarter 2000), p. 70.) This section contains a wide variety of specific prohibitions and directions about the advertising of viatical settlements to consumers. For example, depending on whether an advertiser emphasizes the speed with which the viatication may occur or the dollar amounts available to viators, legislation based on the model would require the advertisement to disclose the average time frame for completion of the transaction or the average purchase price as a percent of face value during the most recent six months. (Model Act, §§ 11O, 11P, *supra* note 1, p. 697-26 [AA 28].)

The advertising controls, along with the other requirements and disclosures described above, are the result of several years of attention from 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 enjoyed a relatively

high degree of scrutiny and interest in their approximate ten years of existence, which indicates the importance of information about viatical settlements to the public. The original charge of the drafting body was to elucidate and expand the specific consumer protections due viators, and that charge remains effective as the model regulation undergoes revision at the current time.


### CONCLUSION

Although the members of the NAIC take no position on the ultimate legal issues to be decided by the Court, the NAIC believes consumer information is an essential component of consumer protection. It is therefore important that consumer information about viatical transactions be available to the public. The NAIC's position is that as the viatical settlements industry continues its rapid development, it presents the potential for abuse and that it is important to protect and educate the public about the business of viatical settlements.

Dated: November 13, 2003

Respectfully submitted,

**BRYAN CAVE LLP**  
David H. Raizman

By: 

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Attorneys for *Amicus Curiae*  
National Association of  
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## PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 120 Broadway, Suite 300, Santa Monica, California 90401.

On November 14, 2003, I served the foregoing document, described as **BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS**, on each interested party in this action, as follows:

FIRST AMENDMENT PROJECT James R. Wheaton, Esq. David Greene, Esq. Matthew J. Zimmerman 1736 Franklin Street, 9th Floor Oakland, California 94612  Attorneys for Defendants/Respondents Gloria Wolk, Bialkin Books	Steven Ames Brown 69 Grand View Ave. San Francisco, California 94114-2741  Attorneys for Plaintiffs/Appellants Scott Wilbanks, Wilbanks & Associates
Supreme Court of California 350 McAllister Street, Room 1295 San Francisco, CA 94102	The Honorable James J. McBride San Francisco County Superior Court 400 McAllister Street, Dept. 301 San Francisco, CA 94102

(BY MAIL) I placed a true copy of the foregoing document in a sealed envelope addressed to each interested party as set forth above. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Bryan Cave LLP, Santa Monica, California. I am readily familiar with Bryan Cave LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

(BY OVERNITE EXPRESS) I deposited in a box or other facility maintained by Overnight Express, an express carrier service, or delivered to a courier or driver authorized by said express carrier service to receive documents, a true copy of the foregoing document, in an envelope designated by said express service carrier, with delivery fees paid or provided for.

Executed on November 14, 2003, at Santa Monica, California.

I declare under penalty of perjury that the foregoing is true and correct.

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Grace Pizarro