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PhD abstract

Title: Viatical settlements and the life insurance market. Diagnosis of the phenomenon and the scale of threats from the perspective of American law

With a viatical settlement agreement, rights and obligations arising from a life insurance policy are transferred in exchange for a consideration which value does not exceed a death benefit payable upon the death of the person whose life is insured. Viatical settlements, by definition, are related to cases in which elderly people - in catastrophic or life threatening illness or condition - transfer the rights to the insurance contract in order to obtain funds to cover medical care expenses. However, the use of obtained funds or the health condition of the insured are not the essential terms of such contract. For this reason, viatical settlements are also referred to as "life settlements" ignoring their connection to short life expectancy of the insured. Despite this finding, it is still crucial to determine the insured's life expectancy as accurately as possible to minimise the widely questioned „gambling” or „randomness” feature of viatical settlements, as well as to calculate the value of the consideration given by the buyer in exchange for assigning rights to the policy.

The genesis of the viatical settlement industry is connected with high incidence of AIDS among young male homosexuals and the lack of effective medical treatment in the late 1980's and the first half of the 1990's. At the time in the United States it was observed that such people often had a life insurance policy and as a consequence, had an „asset” that could be „sold” in exchange for a fixed price. Obtained funds then covered the costs of medical care.

The first aim of the study is a multi-faced analysis of viatical settlements and related phenomena along with the identification of broadly understood threats accompanying the parties of such transactions. This determined the applied methodology and the dissertation construction which consists of six chapters. The first three provide a comprehensive discussion concerning viatical settlements in the light of the state and federal law of the United States of America. This is the result that viatical settlements in considered form - despite the earlier existence of such contract model itself in England - originated from the United States. Obtained conclusions are then analysed from the perspective of Polish law. This allows to achieve the second aim of the dissertation, i.e. determining the admissibility of concluding viatical settlements under Polish contract law (including the proposition of the structure of such contracts). Considerations in this area are

necessary due to numerous doubts arising from the possibility of use a life insurance contract to meet financial needs of the person whose life is insured, as well as the obvious conclusion that the earliest death of insured is the most beneficial for the viatical buyer.

The first chapter provides introductory information concerning viatical settlements and the secondary market for life insurance. The basic notions (like *viaticum*), parties to the contract (i.e. viator, provider, investor) and the genesis of such contracts are discussed. Important part is the description of the legal framework process dedicated to the viatical settlement industry. Despite expressed doubts, viatical settlements and the industry were separated from the insurance industry regulation and granted as exclusively competence of state law. Moreover, the analysis contains statistical data on the size of the secondary market for life insurance (about 1.8 billion USD in 2019) and forecast for its future development.

The second chapter contains a comprehensive analysis of the structures of viatical and life settlements. The first discussed issue concerns insurable interest concept in common law in the light of validity requirement of a life insurance contract. Afterwards, the comparison of this criterion with an absolute assignment of life insurance policy is made. In precedential ruling from 1911 (*Grigsby v. Russell*), the Supreme Court of United States allowed absolute assignment of the life insurance policy to the person without interest in life of the insured under condition that the policy was issued in good faith. This part of the dissertation also discusses other significant issues, especially the recognition of a life insurance policy as an intangible personal property, the conditions for qualification viatical settlements as securities, the intermediary in a secondary market as well as the alternatives to such settlements like medicaid life settlement. Moreover, there is also detailed case law analysis regarding the distinction between a legitimate viatical settlement and an agreement in which third party - with the intention to acquiring the policy in second market - initiates the life insurance contract between the insured and the insurer (i.e. stranger-originated life insurance).

The third chapter describes the potential threats associated with viatical settlements to the sellers (insured persons) and the buyers. The potential impact on the structure of surrender or expired (due to non payment of premium) policies justifies threat assessment also from insurers perspective. Identified types of threats to buyers (including the longevity risk, the risk of incorrectly calculated purchase price or the risk of voiding purchased life insurance policy) are included in the general viatical risk category, i.e. the risk arising from conducting activities in the field of acquisition of life insurance policies. The background of discussion is American case law and state statutes.

Chapter four deals entirely with Polish law. It mainly discussed the legal nature of life insurance contract, the construction of insurance contract on another person's account (policyholder

is different person than insured), the issue of insurable interest in life insurance in Polish law or the exclusion of death benefit from the insured's estate. From the buyer's perspective, particular attention should be given to the different opinions in Polish doctrine concerning the legal nature of right to designate the beneficiary as well as the revocable at any time position of the beneficiary during insured's life (there is no irrevocable beneficiary institution in Polish law).

The fifth chapter is an attempt to construct the viatical settlement agreement model with the use of institutions available in Polish law. The most appropriate model is based on both - assignment and change of debtor. With proper determination especially the scope of the transferred rights and considering death benefits as a future receivables - in my opinion - it is possible to construct, similar to American, satisfactory model of a viatical settlement contract. This chapter also discusses, among others, the performance of a viatical settlement after the death of the insured or a possibility of intermediation in concluding such settlements by insurance distributors.

The sixth chapter corresponds to the third chapter but discusses the threats arising from concluding viatical settlements for buyers, sellers and insurers from Polish perspective. In this case, therefore, those type of risk which are separate from the legal regulation (e.g. incorrect estimation of the life expectancy of the insured) are excluded. Among discussed issues there are especially the misrepresentation in policy application, the consequences of suicide committed by the insured or the possibility to abuse the construction of insurance contract on another person's account (dishonest buyer would be the policyholder in such case). With regard to the threats to interests of potential sellers, the exposure to exploitation should be especially noted. This is due to comparison the seller's position (i.e. the need to raise the funds) with the monopolistic - in principle - position of the buyer (in the absence of noticeable competition on the secondary market resulting from low scale of such market).

An Analysis conducted in the dissertation has led to the conclusion that viatical and life settlements should be considered as admissible under Polish law and the freedom of contract rule. The nature of a life insurance contract, including in particular the certainty of an insurance accident and no restrictions in designation a beneficiary, make it possible to qualify the rights to the policy in the term of seller's consideration under a viatical settlement. Presented conclusion, however, requires the adoption of specific interpretative assumptions which can be considered controversial by the Polish doctrine. Despite the findings concerning viatical settlements, the analysis shows numerous - known to Polish doctrine - deficiencies in the legislative framework, especially in the field of insurance contract regulation in the Civil Code from 1964.

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