

Original: 2459



03 MAR -7 PM 12:57

March 3, 2005

Michelle Smey, Administrator
State Board of Funeral Directors Association
P.O. Box 2649
Harrisburg, PA 17105-2649

RECEIVED
2005 MAR 17 AM 9:36
REVIEW COMMISSION

Re: Unprofessional Conduct regulation regarding embalming

Dear Ms. Smey:

The Board of Directors and Officers of the Pennsylvania Funeral Directors Association have asked that I correspond regarding the proposed amendment to the unprofessional conduct regulation regarding embalming which proposes to "permit the funeral director to provide necessary services, as long as the funeral director has no reason to think the family would refuse." The proposed amendment then goes on to say that "the proposed amendment would not allow a funeral director to charge for embalming provided prior to obtaining permission, unless the embalming is necessary and appropriate for other services (such as public viewing), and selected by the person paying for the funeral goods and services."

I have several concerns:

1) With respect to the first provision that the funeral director can embalm if he has no reason to think the family would refuse, how can he/she know unless he/she has served the family before and even if they have, families change their mind?

2) With respect to the second provision, if the funeral director does embalm without having talked to the person with rights to disposition, how does the funeral director know if there is to be a public viewing and therefore justify embalming? Once again, even if the family has been served in the past and had a public viewing, there are numerous circumstances that

might change in any given case. Now there are two assumptions being made both of which err on the side of the funeral director, not the public.

Both of these concerns stem from two basic principals. First, the Funeral Rule **mandates that express permission to embalm** be given. This proposed change seems to be in direct conflict with that provision. Second, the Funeral Rule is very specific as to what efforts must be made **prior** to embalming in order to justify embalming. The Rule requires that embalming be done only if the funeral director is “unable to contact a family member or other authorized person **after exercising due diligence**. In trying to contact the family, **you must exhaust all means known**, given the time constraints.”¹ [Emphasis added].

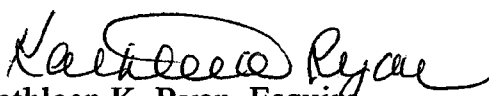
“Note: If refrigeration is available, you may be required to take more steps to contact the family and to obtain embalming authorization than if no refrigeration is available.” Today, a number of funeral homes have refrigeration in their funeral homes or can use the facilities of another that has it. Therefore, it would be contrary to the intent of the Funeral Rule to **assume** permission when the Funeral Rule imposes more strict standards. In addition, this new proposed regulation says nothing about the exercise of due diligence and exhausting all means known before proceeding.

3) The second provision allows for embalming with charge if selected by the person paying for the funeral goods and services. I am concerned that the person with rights to disposition may not always be the person who signs the statement of funeral goods and services and it is the person with rights to disposition that makes the call regarding what services are to be had, regardless of who signs the statement of funeral goods and services. Therefore, I would suggest that the latter phrase be changed to “and selected by **the person with rights to disposition**.”

¹ Complying with the Funeral Rule, Federal Trade Commission, Sept. 2000, p. 28

It is our position that the new proposed regulation is not consistent with the Funeral Rule and that it fails to include the due diligence and express permission requirements. It will lead to confusion and impossibility for anyone to presume or determine after the fact what a family may or may not want.

Very truly yours,


Kathleen K. Ryan, Esquire
General Counsel, PFDA

Comment on unprof. Conduct reg

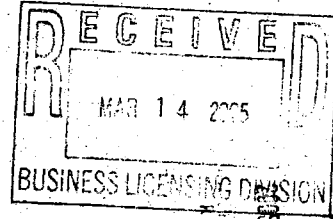
Original: 2459



17

March 8, 2005

Michelle Smey
 Administrator, State Board of Funeral Directors
 P.O. Box 2649
 Harrisburg, Pa. 17105-2649



RECEIVED
 MAR 28 AM 10:10
 BUSINESS LICENSING DIVISION

Re: Comments regarding proposed rulemaking in the Pennsylvania Bulletin
 Reference No. 16-A-4814

Dear Administrator Smey,

I'm writing in response to the proposed amendments of the Funeral Director Law. I feel that I am qualified to make suggestions, being a funeral director in the Commonwealth since 1971 and the partner of our family funeral home which has been in the funeral business since 1919.

We do our very best to keep the consumers interest as a priority and at the same time comply with all the regulations that govern our business. I do have some serious concerns about the proposed amendments.

If I may, I will comment on the following proposals:

- 1. Proposed 13.202(13)** would prohibit a funeral director from retaining funds for goods or services that the funeral director has not provided or that exceed the value of funeral goods and services that the funeral director has provided.

I understand the intent of this proposal; however, I don't understand why it is necessary. When a person dies, funeral homes are required, by current law, to disclose the cost of items contracted for and to have a goods and services contract signed by the responsible party and the funeral home representative prior to performing the funeral. This prevents any questions as to what is to be performed and the costs.

When a person pre-arranges a funeral a formal contract is established, presented and signed by two parties, making the contract a legal document. The items to be performed are very clear via a pre-arranged contract. This represents a binding contract. Pre-arranged contracts do stipulate that if the services and/or goods are not performed the funds are returned to the estate of the deceased. (Contract is enclosed for your benefit)

2. Proposed 13.202(14) would prohibit a funeral director from performing funeral director services on behalf of an establishment that the funeral director know, or should know, is not properly licensed to engage in funeral directing.

I do understand this proposal; however, I do feel that it is unfair to an employee to be under prosecutorial misconduct, simply because he/she is not kept up to date about the firm for whom he/she is employed. The fact that he/she "should have known" can be an unfair portion of the proposal.

The other concern is the term "funeral entity" is not clearly described. Does entity mean any place where a funeral can be held, i.e. a church, hall, cemetery, etc? This concerns me as to the limits that this rule is attempting to govern.

3. Proposed 13.202(15) would codify a funeral director refusing to release a decedent's remains as a means to enforce payment for services or merchandise.

Again, I understand the intent of this proposed amendment and in general I do agree, however, there are some shortfalls. Namely when a funeral home, in good faith and under the direction of a responsible family representative, performs services and possibly goods and is later relieved of his duties due to a variety of circumstances, i.e. a new responsible party is designated, I feel that FD 1 is entitled to receive fair compensation for the services and goods that were performed. The question is; should he hold the body until paid. There are times that this is a necessary evil, in order to receive the proper compensation, otherwise, FD 1 is never paid.

4. Proposed 13.202(16) would prohibit a funeral director from refusing a reasonable request of a member of the decedent's immediate family to pay final respects.

This proposed amendment places the funeral provider in a legal quagmire between the legal rights of the parties who have the legal control of the deceased and being in violation of this proposed regulation. In today's world of families not getting along and in many situations where there are second and third marriages and step-children and step-brothers etc. it is impossible for a funeral director to please all worlds. We often try, but the final issue is to whom we are responsible. The law clearly states who the next of kin is and to whom we must be responsible. There are times that the next of kin is not the responsible party, however, someone is and that person is the person that we get our orders.

This proposal will only cause problems for us and for the families for whom we serve.

5. Section 13.202(17) would prohibit a funeral director from aiding any person or entity that the funeral director has reason to believe is attempting through unlicensed persons or entities to engage in preneed sales.

I have some serious concerns about this proposal. First, we have a current law that very clearly handles this regulation. It states that "no person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed." Second, the proposed amendment does not prohibit insurance agents from selling life insurance to fund pre-arranged funerals. This proposal does not deal with or is legally able to govern other businesses i.e. cemeteries, memorial societies, and cremation societies from selling or funding pre-arranged funeral services and merchandise. By proposing that only licensed funeral directors can sell pre-arranged funerals limits funeral directors true sense of competition.

If and when a new licensing requirement exists as to licensing certified pre-need representatives, with appropriate laws to govern pre-need individuals and companies I feel that the proposed amendment is an unfair and unrealistic proposal.

6. Proposal 13.202(11) concerning the requirement that a funeral director obtain permission from the family prior to furnishing embalming or other services or merchandise.

I do agree with this proposal, in fact, it would be a good idea to allow funeral homes to receive permission via phone, fax, e-mail and get the written permission at a time when the actual contract is signed.

7. Impact of the Proposed Rulemaking.

I do have questions as to the compelling public interest as described in this preamble. I am unaware of the public questioning the current Funeral Law and do wonder if the time, effort and expense of the state is really necessary at this time.

Administrator Smey, it is my hope that you and your office clearly review the proposals and consider what is best for Pennsylvania consumers. I would certainly hope that prior to the proposed amendments going into effect that a hearing is held for additional input.

Sincerely,



Patrick J. Connell
President, Connell Funeral Home, Inc.

245 East Broad Street
Bethlehem, PA 18018
(610) 868-8531



Eugene J. Connell, Supervisor
Patrick J. Connell, Director

SECURITY AGREEMENT FOR FUNERAL SERVICES AND/OR MERCHANDISE
CONTRACT NO. _____ TELEPHONE NO. OF BUYER (S) (_____) SOC. SEC. # OF BUYER (S) _____
BUYER(S) NAME _____ BUYER (S) ADDRESS _____

THIS AGREEMENT IS MADE THE _____ DAY OF _____, 20____ BY AND BETWEEN THE BUYER, AND THE SELLER, CONNELL FUNERAL HOME, INC.
245 EAST BROAD STREET, BETHLEHEM, PA. 18018.

AGREEMENT OF SALE

By this contract, the BUYER agrees to pay for the funeral merchandise and/or services selected below. The SELLER agrees to deliver the merchandise and/or perform the services when needed, at the prices now stated. Details are printed on both pages of this form; they govern the contract.

BENEFICIARY

BUYER or someone BUYER names will be the BENEFICIARY of this contract. The SELLER will provide the merchandise and/or services upon BUYER'S death or the death of the person BUYER designates here: (Name of Beneficiary) _____

(Address/Phone if different than above) _____

Social Security No. of Beneficiary _____

For the purpose of this Security Agreement, the term "BENEFICIARY" means the person to whom such merchandise and/or services is to be delivered whether that person is the BUYER or the BUYER'S BENEFICIARY.

Consult the General Price List for a detailed description of the following items.

SECTION A: * GUARANTEED

BASIC SERVICES OF FUNERAL DIRECTOR AND STAFF .. \$ _____

TRANSFER OF REMAINS TO FUNERAL HOME \$ _____

EMBALMING \$ _____

If you selected a funeral that may require embalming, such as a funeral with a viewing, you may have to pay for embalming. You do not have to pay for embalming you did not approve, if you selected arrangements such as direct cremation or immediate burial. If we charged for embalming we will explain why below:

EMBALMING IS REQUIRED IF YOU:

- Selected a service with a viewing
- Arranged for shipment by common carrier
- Selected arrangements that require us to hold the remains for more than 24 hours provided no refrigeration is available or a hermetically sealed container is not used and provided that embalming does not conflict with religious beliefs or medical examination.

OTHER PREPARATION OF REMAINS \$ _____

USE OF FACILITIES AND STAFF FOR: \$ _____

FUNERAL CEREMONY, MEMORIAL SERVICE,
ENTIRE CEREMONY/MEMORIAL SERVICE ELSEWHERE
This includes visitation or viewing one hour prior to service.
Add \$125 for each additional hour.

USE OF FACILITIES AND STAFF FOR VISITATION \$ _____
(other than one hour prior to ceremony)

USE OF STAFF FOR COMMITMENT SERVICE AND/OR GRAVESIDE SERVICES \$ _____

OTHER: \$ _____
MOTOR EQUIPMENT: Add \$1.50 per loaded mile after 25 miles and add \$ 50.00 per loaded vehicle after four hours.
FUNERAL COACH \$ _____
FAMILY TRANSPORTATION \$ _____
OTHER: \$ _____

MISCELLANEOUS SUPPLIES & SERVICES AVAILABLE:

- Guest Register \$ _____
- Prayer Cards/Memorial Folders (_____) .. \$ _____
- Acknowledgment Cards (_____) \$ _____
- Cross (inside casket) \$ _____
- Crucifix (on exterior casket) \$ _____
- Temporary Grave Marker \$ _____
- Hairdresser \$ _____
- Other \$ _____

TOTAL MISCELLANEOUS SUPPLIES & SERVICES:..... \$ _____

MERCHANDISE SELECTED:

Casket: \$ _____

Outer Burial Container: _____

NAME OF CEMETERY _____
OUTER BURIAL CONTAINER _____ IS REQUIRED
IS NOT REQUIRED

Clothing: \$ _____

Urn: \$ _____

Alternate Container: \$ _____

TOTAL MERCHANDISE:..... \$ _____

TOTAL EXPENSES INCURRED

AT FUNERAL HOME: (Section A):..... \$ _____

BUYER'S RIGHT TO CANCEL

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION BY SO NOTIFYING US, THE SELLER, EITHER IN WRITING, BY TELEGRAM OR BY LETTER POSTMARKED NOT LATER THAN SUCH THIRD BUSINESS DAY, OR ORALLY, PROVIDED, THAT SUCH ORAL CANCELLATION IS CONFIRMED

SECTION B: * NON-GUARANTEED

OTHER EXPENSES: To provide continuity of service we will accept payments intended to pay for the items listed below. However, these costs are estimates and are completely beyond our control and cannot be price guaranteed.

_____ \$ _____
_____ \$ _____
_____ \$ _____
_____ \$ _____
_____ \$ _____

TOTAL OTHER EXPENSES \$ _____

NON-ITEMIZED FUNDING: We will accept payments intended for general, non-specified final expense funding. These funds will be used toward the then prevailing expenses incurred at the time of performance.

_____ \$ _____
_____ \$ _____
_____ \$ _____

TOTAL NON-ITEMIZED FUNDING: \$ _____

TOTAL SECTION B \$ _____

ITEMIZATION OF AMOUNT FINANCED SECTION A

- 1. CASH SALE PRICE \$ _____
- 2. DOWNPAYMENT (cash or check) \$ _____
- 3. _____ \$ _____
- 4. UNPAID BALANCE OF CASH PRICE \$ _____

FEDERAL TRUTH-IN-LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE The cost of your credit Yearly Rate _____ %	FINANCE CHARGE RATE The dollar amount your Credit will cost you \$ _____
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AMOUNT FINANCED The amount of credit provided to you or on your behalf. \$ _____	TOTAL OF PAYMENTS The amount you will have paid after you have made all payments as scheduled \$ _____	TOTAL SALE PRICE The total cost of purchase on credit including your downpayment of \$ _____
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Your Payment schedule for Section A- (Guaranteed) will be

Number of Payments _____	Amount of Payments \$ _____	Annual/Quarterly/Monthly Payments are due on the _____ day of each _____ beginning _____
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Security: You are giving a security interest in those funds paid under this Agreement held in an escrow or trust account with Bank (as hereinafter defined).

Prepayment: If you pay off early, you may be entitled to a refund of part of the finance charge. See the General Provisions of the Agreement for additional information about default, nonpayment, and required payment in full before the scheduled due date.

Payment schedule for OTHER EXPENSE and/or NON-ITEMIZED FUNDING EXPENSES (Section B)

Number of Payments _____	Amount of Payments \$ _____	Annual/Quarterly/Monthly Payments are due on the _____ day of each _____ beginning _____
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YOUR TOTAL PAYMENT SCHEDULE FOR AMOUNT FINANCED AND OTHER NON-ITEMIZED FUNDING EXPENSES (Sections A & B):

Number of Payments _____	Amount of Payments \$ _____	Annual/Quarterly/Monthly Payments are due on the _____ day of each _____ beginning _____
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TOTAL (Section A) Guaranteed..... \$ _____

TOTAL (Section B): Non-Guaranteed..... \$ _____

GRAND TOTAL SECTIONS A & B:..... \$ _____

AMOUNT RECEIVED: \$ _____ CASH/CHECK #: _____

DATE: _____

Buyer's Initials _____

General Provisions

1. CONSIDERATION: In consideration for SELLER binding itself to provide the merchandise and/or services set forth in this Agreement without regard to the actual costs and prices prevailing at the time of performance, the SELLER shall be entitled to receive the TOTAL CASH PRICE, including the amounts deposited in trust pursuant to this Agreement and all income earned thereon.

2. OTHER EXPENSES AND/OR NON-ITEMIZED EXPENSE FUNDING: Buyer understands, acknowledges and agrees that by execution of this Security Agreement that all payments made pertaining to SECTION B of this agreement shall, by Seller, be placed in Trust pursuant to paragraph 5 of this agreement. Seller shall be entitled to receive these funds, including the amounts deposited in escrow or trust pursuant hereto and all net income earned thereon. In the event that, upon performance excess funds are available as pertains to and only to SECTION B, such funds will be dispersed pursuant to paragraph 7 of this agreement. In the event that, upon performance a shortage of funds is available to pay for the then prevailing costs/expenses, a balance will be owing.

3. ENDING THE CONTRACT: The BUYER has the right to cancel this contract within three days of signing it, as advised on the first page. The BUYER and the SELLER agree there are only two other proper reasons for ending the contract: First, the BUYER may choose to end the contract if the BENEFICIARY'S principal residence is no longer in Pennsylvania.

Second, the contract will end automatically if the BENEFICIARY'S spouse, next of kin or personal representative, in good faith and without knowing of this contract, obtains merchandise and services from another burial provider upon the BENEFICIARY'S death.

In either case, any person with rights under this contract may request payment of the money held in trust under the irrevocable trust agreement. The Trustee will disburse to the BUYER or to BUYER'S personal representative, the total amount of that part of payments which have been deposited in the trust account. The trustee will disburse to the SELLER the remaining money in the account.

4. NECESSARY SUBSTITUTION: The BUYER understands that the exact merchandise specified in this contract may not be available to the SELLER at the time of BUYER'S death. The BUYER agrees that, if necessary, the SELLER may furnish merchandise substantially similar in material and workmanship to what is described in this contract.

5. TRUST PROTECTION FOR THE BUYER: Partial Deposit of Payments: When the BUYER makes payments as specified in this contract the SELLER will deposit into a trust account a percentage of the payment for merchandise and services. This will be the percentage which by law must be held in trust. The deposits will be made within the month payment is received. The trust account will be maintained with a Pennsylvania banking institution ("Bank") The Bank will hold the money as trustee to assure the performance of this contract.

6. SECURITY INTEREST: By signing this contract, the BUYER grants the SELLER what is known as security interest in all money deposited in the trust account described below. This security interest will secure payment of amounts BUYER owes under this contract.

7. TRUST AGREEMENT: The trust account with the Bank will be created under an irrevocable trust agreement. A blank copy of the trust agreement is available for inspection at the SELLER'S office during regular business hours. The Bank will disburse the funds held in trust only according to the terms and conditions of the trust agreement. BUYER SHOULD CAREFULLY REVIEW THE IRREVOCABLE TRUST AGREEMENT BEFORE SIGNING THIS CONTRACT.

8. SELLER'S NONPERFORMANCE: If the SELLER (or any assignee of SELLER'S obligations) fails for any reason to provide merchandise promptly for the benefit of the BUYER, then BUYER'S family or next of kin may seek reimbursement from the trustee all funds held in trust in accordance with the trust agreement. The order of priority in disbursement is as follows: (i) to the SELLER for any merchandise previously delivered but not yet paid for; (ii) to the person who actually paid for the merchandise; (iii) to the BUYER, or BUYER'S personal representative.

9. PAYMENT
A. Prepayment
Any payment made before it is due is a prepayment. The BUYER may at any time prepay the unpaid balance of the TOTAL OF PAYMENTS, including the finance charge, owed at the date of prepayment and as computed according to law. If BUYER prepays in full, BUYER may be entitled to a rebate of any unearned portion of the finance charge, as so computed. A rebate of less than \$1.00 will not be made. There is no penalty or additional charge for prepayment.
B. Late Payment
The BUYER will have to pay a late charge on each payment received by the SELLER more than 10 days after the date it is due. The charge will be \$5.00 or 5 percent of the payment, whichever is less, but not less than \$1.00. The SELLER may also take the steps set forth below concerning default.

C. Default
The BUYER will be in default if any installment is not paid on time. The SELLER will provide BUYER with written notice before taking action on a default. If this contract includes the purchase of burial space, the SELLER may take these steps upon BUYER'S default and after notice: (1) the SELLER may declare due and payable the entire balance owing for the burial space; (2) the SELLER may cancel BUYER'S registration for the space and sell it to another buyer; (3) the SELLER may exercise any, described above in the section dealing with TRUST PROTECTION OF THE BUYER. If this contract includes the purchase of funeral merchandise and services, the SELLER may, upon BUYER'S default and after notice, obtain from the trust account as liquidated damages the portion allowed by law.

10. CHANGE OF ADDRESS: The BUYER agrees to promptly notify the SELLER if either the BUYER or BUYER'S BENEFICIARY have a change of address.

11. CHANGING AND NOT CHANGING THE CONTRACT: This two-page contract and the irrevocable trust agreement contain the entire agreement and understanding between the BUYER and the SELLER. They take the place of everything written or said before they are signed.

Any later change in the terms of this contract must be in writing and signed by the SELLER. No oral changes are binding. The SELLER can delay or refrain from enforcing any of its rights under this contract without losing them. For example, the SELLER can extend the time for making some payments without extending the time for others. If any part of this contract is not valid, all other parts will remain enforceable.

12. APPLICABLE LAW: The substantive law of the Commonwealth of Pennsylvania governs this contract. Contrary conflict-of-laws rules of this or another state will not apply.

13. NOTICE: Any notice permitted or required by this contract will be reasonable if sent by certified mail to the latest address shown in the sender's records.

14. ASSIGNMENT: The BUYER agrees that the SELLER may, without BUYER'S consent, assign all or portions of the SELLER'S rights and obligations under this contract and the irrevocable trust agreement. The SELLER agrees that he will give the BUYER written notice of any assignment.

NO WARRANTIES
THE SELLER PROVIDES NO WARRANTY OF ANY MERCHANDISE OR SERVICES FURNISHED UNDER THIS AGREEMENT. THERE IS NO WARRANTY OF MERCHANTABILITY, THERE IS NO WARRANTY OF FITNESS FOR A PARTICULAR USE OR PURPOSE.

STATEMENTS MADE BY THE SELLER IN THIS CONTRACT, IN PRICE LISTS, BY MODELS AND SAMPLES, AND OTHERWISE, ARE NOT WARRANTIES AND DO NOT FORM PART OF THE BASIS OF THE BARGAIN BUT ARE MERELY MADE IN THE COURSE OF THE NEGOTIATIONS OF THE PARTIES. THE SELLER ASSUMES NO RESPONSIBILITY REGARDLESS OF ANY ORAL STATEMENTS ABOUT THE FUNERAL MERCHANDISE.

LIMIT ON DAMAGES
THE SELLER WILL NOT BE LIABLE FOR SPECIAL OR CONSEQUENTIAL DAMAGES. IF THERE IS ANY CLAIM BASED ON ANYTHING THE SELLER PROVIDES OR DOES UNDER THIS CONTRACT, THEN THE CLAIM SHALL NOT EXCEED THE PRICE CHARGED FOR THE PARTICULAR ITEM INVOLVED IN THE CLAIM.

ATTORNEY IN FACT AND TRUST FUNDS
By signing this contract below on this page, you, the BUYER, appoint the SELLER your agent and attorney in fact with a limited power of attorney. By this power of attorney the SELLER can establish the irrevocable Trust; deposit into the trust account the portions of your payments required by law to be held in trust; change trustee as permitted by law; and do all things necessary and expedient for these specific purposes. To make the trust irrevocable, the limited power of attorney is irrevocable. It will not be affected by your death, disability or incapacity. "BUYER also authorizes and directs Trustee (as defined in the IRREVOCABLE TRUST Agreement) to invest in a life insurance or annuity policy or policies ("Funding Vehicle"), the owner and beneficiary of which shall be the Trustee."

Signature (s) of all BUYER(S) _____

NOTICE TO BUYER
1. DO NOT SIGN THIS SECURITY AGREEMENT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACE.
2. YOU ARE ENTITLED TO A COMPLETELY FILLED-IN COPY OF THIS SECURITY AGREEMENT.
3. UNDER THE LAW, YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS TO OBTAIN A PARTIAL REFUND OF THE SERVICE CHARGE.

SELLER'S ASSIGNMENT

FOR VALUE RECEIVED, SELLER hereby sells, assigns and transfers to _____ and its successors, hereinafter referred to as "Creditor", this Security Agreement, and all title and interest in and to all monies due and to become due and all rights and remedies under this Security Agreement, with power in Creditor to assign this Security Agreement either in Creditor's own name or in the name of SELLER for Creditor's exclusive benefit, and to take all such proceedings as SELLER might have taken save for this assignment. To induce Creditor to purchase this Security Agreement, SELLER warrants that (1) this Security Agreement is a correct statement of the transaction evidenced hereby in every respect, and a copy of the same, signed by SELLER, has been given to BUYER, and that SELLER has fully complied with all Federal and State laws and regulations regarding this Security Agreement; (2) no part of the down payment was loaned to, arranged for or procured on behalf of BUYER by SELLER or anyone connected with SELLER; (3) SELLER now has the right and power to assign this Security Agreement (except for the rights of BUYER thereunder to Creditor, and (4) BUYER(s) named in this Security Agreement is (are) over 21 years of age and has (have) the legal capacity to contract and their signatures below are genuine. SELLER agrees that if any of the foregoing warranties are breached or if any of the foregoing representations are untrue, SELLER will, upon demand, repurchase this Security Agreement from Creditor and pay in CASH an amount equal to the entire unpaid balance due under this Security Agreement, together with accrued interest. Creditor is hereby authorized to correct any and all patent errors in these Security Agreement. This assignment is made with recourse.

THE BUYER HAS RECEIVED A COMPLETELY FILLED-IN AND SIGNED COPY OF THIS TWO-PAGE AGREEMENT. BOTH THE BUYER AND THE SELLER STATE THAT THEY SIGN THIS CONTRACT INTENDING TO BE LEGALLY BOUND BY IT.

NOTICE TO ASSIGNEES OF SELLER
ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR (BUYER) COULD ASSERT AGAINST THE SELLER OF THE GOODS OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR (BUYER) SHALL NOT EXCEED THE AMOUNT PAID BY THE DEBTOR (BUYER) HEREUNDER.

CONNELL FUNERAL HOME, INC.

BY: _____
(Authorized Representative)

BY: _____
(Approved By)

BY: _____
(Signature of Buyer)

BY: _____
(Signature of Buyer)

White Copy - Seller

Yellow Copy - Trustee

Pink Copy - Buyer

PENNSYLVANIA FUNERAL DIRECTORS



ASSOCIATION

RECEIVED

2005 MAR 28 AM 9:42

UNIVERSITY OF PENNSYLVANIA
REGULATORY
REVIEW COMMISSION

Original: 2459

March 24, 2005

The Honorable Robert M. Tomlinson
Pa Senate Box 203006
362 Main Capitol Building
Harrisburg, PA 17105

Re: State Board of Funeral Directors Proposed Unprofessional Conduct Regulations

Dear Senator Tomlinson:

The Pennsylvania Funeral Directors Association is the largest association of funeral directors in Pennsylvania. We currently represent over 1000 funeral homes across the Commonwealth which includes double or triple that amount of licensed funeral directors.

Both our Legislative Committee representing the overwhelming majority of our local districts and the Board of Directors of our organization met this week. The above referenced proposed regulations were discussed extensively. The representatives of the Legislative Committee and the Board of Directors have requested that I share with you the following comments regarding the regulations:

13.202 (11) – The Federal Trade Commission Rule ¹ clearly mandates that the funeral director must obtain express permission to embalm. The explanation to the Rule requires that the funeral director “exhaust all means known”² to contact a family member. PFDA’s Board and Legislative Committee believe that the State Board should adopt the language of the Funeral Rule rather than the proposed rule they have promulgated.

13.202 (13) – The Board and Legislative Committee suggest that the proposed regulation should be limited to: “A funeral director may not keep funds for goods and services they did not provide.” The remainder of the proposed regulation is confusing because funeral directors who have guaranteed contracts that allow them to keep excess funds upon performance of the funeral might potentially be in violation of the language of this regulation. This is something that should be clarified in the Pre Need Regulations that are working their way through the system. In addition, there is the underlying issue of portability of pre-need funerals whereby an arrangement made with one funeral home

¹ 16 C.F.R. 453.5

² Complying with the Funeral Rule, Federal Trade Commission, Sept. 2000, p. 28

The Honorable Robert M. Tomlinson
March 24, 2005
Page Two

should be portable to a second funeral home at the consumer's discretion without disturbing the irrevocability aspect of the trust. That is, the money could be transferred between qualified trustees and the consumer could change providers. The *Bean vs. State Board*³ case points out the need for statutory or regulatory guidance on this issue and the State Board is well within its statutory purview to promulgate such a regulation.


13.202 (14) (17) – The Board and Legislative Committee believe these regulations can be combined and that the words “know or should have known” and “has reason to believe” should be eliminated in order to be consistent with the strict liability provisions of the Funeral Law.⁴

13.202 (15) – The Board and Legislative Committee are in agreement with this regulation as promulgated.

13.202 (16) – The Board and Legislative Committee do not see the need for this regulation and propose that it be eliminated.

In summary, the Association's position is that it would be fruitless for any hearings to be held on these regulations at that time. The State Board should have an opportunity to review the regulations in the context of our comments and others. In addition, the Professional Licensure Committee should postpone any review until such time as the Board has had the chance to revise the regulations.

Very truly yours,


Kathleen K. Ryan, Esquire
General Counsel, PFDA

³ *Bean v. State Board of Funeral Directors*, 855 A.2d 148 (Pa. Cmwlth, 2004), on appeal to the Supreme Court.

⁴ 63 P.S. Sec. 479.13

c: Thomas Blackburn, Esquire
Mary S. Wyatte, Esq.



March 24, 2005

The Honorable Thomas P. Gannon
Pa House of Representatives
49 East Wing
Harrisburg, PA 17105

Re: State Board of Funeral Directors Proposed Unprofessional Conduct Regulations

Dear Representative Gannon:

The Pennsylvania Funeral Directors Association is the largest association of funeral directors in Pennsylvania. We currently represent over 1000 funeral homes across the Commonwealth which includes double or triple that amount of licensed funeral directors.

Both our Legislative Committee representing the overwhelming majority of our local districts and the Board of Directors of our organization met this week. The above referenced proposed regulations were discussed extensively. The representatives of the Legislative Committee and the Board of Directors have requested that I share with you the following comments regarding the regulations:

13.202 (11) – The Federal Trade Commission Rule ¹ clearly mandates that the funeral director must obtain **express** permission to embalm. The explanation to the Rule requires that the funeral director “exhaust all means known”² to contact a family member. PFDA’s Board and Legislative Committee believe that the State Board should adopt the language of the Funeral Rule rather than the proposed rule they have promulgated.

13.202 (13) – The Board and Legislative Committee suggest that the proposed regulation should be limited to: “A funeral director may not keep funds for goods and services they did not provide.” The remainder of the proposed regulation is confusing because funeral directors who have guaranteed contracts that allow them to keep excess funds upon performance of the funeral might potentially be in violation of the language of this regulation. This is something that should be clarified in the Pre Need Regulations that are working their way through the system. In addition, there is the underlying issue of portability of pre-need funerals whereby an arrangement made with one funeral home should be portable to a second funeral home at the consumer’s discretion without

¹ 16 C.F.R. 453.5

² Complying with the Funeral Rule, Federal Trade Commission, Sept. 2000, p. 28

The Honorable Thomas P. Gannon
March 24, 2005
Page Two

disturbing the irrevocability aspect of the trust. That is, the money could be transferred between qualified trustees and the consumer could change providers. The *Bean vs. State Board*³ case points out the need for statutory or regulatory guidance on this issue and the State Board is well within its statutory purview to promulgate such a regulation.

13.202 (14) (17) – The Board and Legislative Committee believe these regulations can be combined and that the words “know or should have known” and “has reason to believe” should be eliminated in order to be consistent with the strict liability provisions of the Funeral Law.⁴

13.202 (15) – The Board and Legislative Committee are in agreement with this regulation as promulgated.

13.202 (16) – The Board and Legislative Committee do not see the need for this regulation and propose that it be eliminated.

In summary, the Association’s position is that it would be fruitless for any hearings to be held on these regulations at that time. The State Board should have an opportunity to review the regulations in the context of our comments and others. In addition, the Professional Licensure Committee should postpone any review until such time as the Board has had the chance to revise the regulations.

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c: Thomas Blackburn, Esquire
Mary S. Wyattc, Esq.

FAX

TO: Mary S. Wyatte, Esq
Independent Regulatory Review Commission

FAX NUMBER: 783-2664

FROM: Kathleen Ryan

TOTAL PAGES: 5
(including cover)

DATE: 3/24/05

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REVIEW COMMISSION

Pennsylvania Funeral Directors Association
7441 Allentown Boulevard, Harrisburg, PA 17112
Phone (717) 545-7215 ♦ Fax (717) 545-7360 ♦ www.pfda.org

19

Original; 2459



RECEIVED
 2005 MAR 30 AM 9:08
 INDEPENDENT REGULATORY
 REVIEW COMMISSION

March 24, 2005

The Honorable Robert M. Tomlinson
 Pa Senate Box 203006
 362 Main Capitol Building
 Harrisburg, PA 17105

Re: State Board of Funeral Directors Proposed Unprofessional Conduct Regulations

Dear Senator Tomlinson:

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The Honorable Robert M. Tomlinson
March 24, 2005
Page Two

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In summary, the Association's position is that it would be fruitless for any hearings to be held on these regulations at that time. The State Board should have an opportunity to review the regulations in the context of our comments and others. In addition, the Professional Licensure Committee should postpone any review until such time as the Board has had the chance to revise the regulations.

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Kathleen K. Ryan, Esquire
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⁴ 63 P.S. Sec. 479.13

c: Thomas Blackburn, Esquire
Mary S. Wyatte, Esq.

Original: 2459

Pre-Need
Administrative Offices
1119 East King Street
P.O. Box 10391 Lancaster, PA 17605-0391

1-800-893-4455
1-717-394-2326

March 11, 2005

Michelle Smey, Administrator
State Board of Funeral Directors
Department of State
P.O. Box 2649
Harrisburg, PA 17105-2649

RECEIVED
2005 MAR 16 AM 10:15
REVIEW COMMISSION

RE: Proposed Rulemaking, Reference No. 16A - 4814

Dear Ms. Smey:

As an interested person, please allow this letter to serve as my response to the recently proposed rulemaking from the State Board of Funeral Directors.

I found some of the proposed regulations dubious in nature promoting an anti-competitive agenda rather than truly addressing issues of compelling public interest. Other proposed regulations seemed well meaning but conflict with existing laws and real life circumstances.

I have limited my comments to criticisms and concerns within the proposed regulations.

Proposed 13.202 (11):

- (i): "Reasonable attempts" should be operationally defined by way of specific actions and timelines. One might argue that simply making a phone call to a disconnected phone number is a "reasonable attempt." I certainly hope it isn't.
- (i): If a funeral director cannot locate family members or other persons authorized by law to make funeral arrangements, why is the funeral director performing "embalming or other services" at all? If no one is claiming the body, doesn't it become an issue for the coroner to decide? In the rare and isolated circumstance that a person with no know community ties or family membership passes away, wouldn't it be better for the law to allow funeral directors the ability to gain permission from another authorized individual or party such as a social worker or clergy?
- (i): "Legitimate need" should be removed from these proposed regulations. Using the term would give legislative endorsement that embalming is a legitimate need. According to the U.S. Center for Disease Control, there is no "legitimate need" to embalm a dead human body. There are Pennsylvania citizens that find the act of embalming repulsive or in conflict with religious or philosophical beliefs or simply unnecessary. Under current law, after the 24 hour period has elapsed, without appropriate permission funeral directors should refrigerate or place the body in a hermetically sealed container.
- (iii): Funeral directors should not embalm dead human bodies without permission from an authorized individual or party.

- (A): Embalming without permission should not be a statutory requirement under Pennsylvania law. Embalming should not be authorized without permission. Under the Federal Trade Commission's Funeral Rule, a funeral provider may not provide embalming services without permission. One must assume the FTC felt that permission should come from the next-of-kin or other authorized individual, not the state government.
- (B): Under what circumstances - and particularly under this paragraph - could embalming be considered "necessary and appropriate?" It isn't!

Proposed 13.202 (13):

While this proposal encroaches on contract law, moreover, this proposal smacks as a blatant attempt to reverse a recent Commonwealth Court decision regarding Irrevocable contracts (Kevin M. Bean v. State Board of Funeral Directors) and, for that reason alone, should be stricken.

Proposed 13.202 (14):

"Funeral Services" should be operationally defined. What constitutes a "funeral service?"

"Funeral entity" should be operationally defined. Is it meant to say "funeral establishment" as defined in the Pennsylvania Code?

"Or should have known" should be operationally defined. Under what conditions does the funeral director should have known? By way of legal notice, letter, newspaper article, television newscast, radio broadcast, rumor mill, intuition or osmosis?

This proposal unreasonably restricts potential trade with out-of-state companies, shipping services, cremation companies and other funeral homes that are not licensed in Pennsylvania.

Proposed 13.202 (16):

This proposed regulation seems admirable and righteous but is fraught with problems.

"Reasonable request" should be operationally defined.

"Opportunity to pay final respects" should be operationally defined.

What are "final respects?" What is considered as an "opportunity?" Both terms should be operationally defined.

Does the opportunity to pay final respects come with a specific timeline or time constraint? Does the action of paying final respects last five minutes or five hours?

Does the "opportunity to pay final respects" mean any known member of the decedent's immediate family can view the deceased before a funeral service? Or after the funeral service? Although the proposed

regulation doesn't say it, the explanation by the Funeral Board says the provision does not require the funeral director to permit these persons to participate in the funeral service. However, it is quite reasonable for the known member of the decedent's family to consider *attending* the funeral service the only correct opportunity to pay final respects.

If a person invokes their right for an "opportunity to pay final respects" but must fly back from Europe, must the funeral director (and other family member who has paid for the funeral service) wait until this person returns? For how long? One day, two days, three days, a week?

What if the decedent has left specific written instruction that they want certain immediate family excluded from paying "final respects?"


Proposed 13.202 (17):

This is another proposal that smacks as a blatant attempt to perform an end run around issues currently being argued in the United States District Court, Docket No. 4:01-02252. I understand the compelling profit interest of certain segments of the funeral director industry that would like to eliminate competition, but where is the compelling public interest to prohibit a funeral director from selling his product "directly, or indirectly, or through an agent" as the statute permits? This proposed regulation should be stricken.

Thank you for allowing me to comment on the proposed regulations.

Most sincerely,

PRE-NEED FAMILY SERVICES



COPY

David A. Heisterkamp
C.E.O.

c: Mary S. Wyatte, General Counsel
Independent Regulatory Review Commission
333 Market Street
Harrisburg, PA 17101

DAH/es

19

Original: 2459



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Fax: (412) 835-3608

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March 10, 2005

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2005 MAR 11 PM 1:54
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REVIEW COMMISSION

Mary S. Wyatte, General Counsel and Acting Executive Director
Independent Regulatory Review Commission
14th Floor, Harrisstown 2
333 Market St.
Harrisburg, Pa. 17101

Dear Mary,

I am a 3rd generation funeral director from southwestern Pennsylvania and own and operate 7 funeral homes in the area. To that end, I am responding to the most recent proposed regulations. The first question is, "where is the evidence that these proposed regulations are necessary at all?"

I will attempt to address each regulation as specifically as I can.

Section 11(a) and proposed 13.202 (13): This regulation addresses a funeral director coming into possession of funds of a decedent. This regulation encroaches on contract law and supercedes the authority of the Board. Has this been addressed in terms of contract law?

Section 8 and proposed 13.202 (14): What means could we possibly be privy to, that would ensure the funeral director is licensed? Further to 13.202 (16), why would the funeral director be involved in legal issues concerning the requests of the decedent's immediate family to pay final respects? My larger question is, "has anyone from the board reviewed the statute for rights of disposition etc?" My last incident like this entailed court intervention, as the statute was clearly open to subjectivity when it addressed who had the final decision or rights of disposition.

13.202 (17) This regulation is an attempt to, "once and for all", eliminate the possibility of an unlicensed individual from selling a pre-need contract. The statute in it's present form, clearly handles this issue adequately. Why the need to elaborate?

13.202 (11) Once again, this issue has been addressed adequately by way of present statute, as well as the FTC. My question is, "how may issues have their been with regard to this regulation?"



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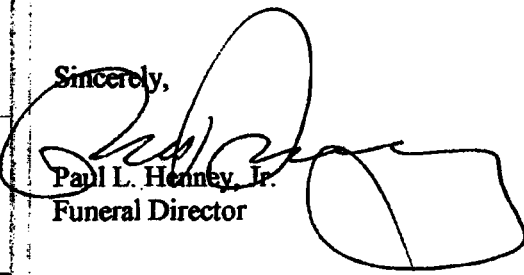
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Certainly, serious consideration should be given to rewriting the present statute and/or the regulations, particularly since we are working from statutes that are over 50 years old. However, there needs to be significant opportunity allowed to all funeral trade organizations as well as funeral directors to adequately address the antiquated laws and regs. I would suggest that there be a public hearing on the proposed regulations at the very least, before any decisions are made.

Sincerely,


Paul L. Henney, Jr.
Funeral Director



Bean Funeral Homes & Cremation Services, Inc.

North 16th & Rockland Sts
Hampden Heights
Reading, PA 19604
Robert E. Bean, Supv.
(610) 376-0985

129 East Lancaster Avenue
Shillington, PA 19607
Kevin M. Bean, Supv.
(610) 376-1120

Bean Funeral Homes & Crematory, Inc.

425 Penn Avenue
Sinking Spring, PA 19608
Terrence J. Shannon, Supv.
(610) 376-1129

6 Fairlane Road
Exeter Township
Reading, PA 19606
Joseph G. McCullough, Supv.
(610) 779-2800

www.beanfuneralhomes.com

March 11, 2005

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Ms. Michelle Smey, Administrator
State Board of Funeral Directors
P. O. Box 2649
Harrisburg, PA 17105-2649

2005 MAR 21 AM 9:29

REVIEW COMMISSION

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REGULATORY DIVISION

05 MAR 15 AM 9:57

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RE: Proposed Regulations

Dear Ms. Smey:

In response to the invitation of Mr. Joseph A. Fluehr, III, Funeral Director and Chairperson of the State Board of Funeral Directors, (Board) I hereby write to submit objections and comments including factual background information, regarding proposed rulemaking published February 11, 2005 in the *Pennsylvania Bulletin*, Reference No. 16A-4814 (Unprofessional conduct).

Because I was the named petitioner in a precedent-setting lawsuit involving this Board and recent legal interpretations of this current Board, I feel compelled to comment separately and in detail to proposed subsection (13) of the proffered regulatory changes. As discussed more fully below, that precedent-setting lawsuit dealt with this Board's efforts to legislate out of existence irrevocable pre-need agreements whose forms had been reviewed and approved by this Board for many years.

This Board, through its counsel, agreed with me, through my counsel, that a process would be put in place to secure a resolution of the question whether irrevocable pre-need agreements can be declared irrevocable or rescindable at the whim of a consumer. This Board agreed on the record before Commonwealth Court that a hearing and adjudication process would be implemented such that all parties would be bound by the ultimate resolution of the issue on appeal to the appellate courts.

The above referenced process took place and Commonwealth Court, en banc, made very clear that the Board's efforts to eliminate irrevocable pre-need agreements was not authorized under statutory law.

Thus, inasmuch as proposed subsection (13) seeks to effectuate an end run on that Commonwealth Court decision and the Board's agreement to be bound by Commonwealth Court's decision, I am constrained to comment and to explain in detail my reasons why I am so adamant in my opposition to proposed subsection (13).

In addition to the fact that the Pennsylvania Commonwealth Court affirmed that proposed subsection (13) is not authorized under statutory law, proposed subsection (13) if implemented, would have the following consequences:

- Tens of thousands of pre need purchasers will never be assured that their wishes will be followed (IE: Their prepaid “contract” will be fulfilled, even though they may have prepaid years prior to their death.) as their prepaid “contract” could be “yanked” immediately upon their death.
- Medicaid requires an irrevocable prepaid contract to shelter pre need funeral monies from nursing home expenses. Conceivably, if the Board undoes these “contracts” via proposed subsection (13), the monies of thousands of people who have prepaid would be in jeopardy of no longer being exempt assets for Medicaid purposes. They could conceivably die indigent absent any assets for final expenses.
- There would be less competition in the pre need marketplace, thus reducing competition, artificially inflating funeral costs and placing consumers in a more likely position to have to make arrangements at the time that a death occurs when they are under great emotional duress.
- It would bring into question the taxation of “Irrevocable Qualified Funeral Trusts” under Federal Tax Law and create havoc with Trust Institutions.
- It would virtually eliminate the availability of price guaranteed prepaid funeral contracts, a consumer driven product that ten of thousands of Pennsylvania consumers have found very attractive for a variety of reasons.
- It would place investment and inflation risk on pre need consumers, many of whom are nursing home residents.
- It would benefit a select group of funeral directors, many of whom are members of the Pennsylvania Funeral Directors Association trade organization, who have neglected to make a market in the pre need arena.

In the *Proposed Rulemaking*, the State Board of Funeral Directors writes under “Background, Need and Description of the Proposed Amendment”; *Section 11(a)(5) of the act authorizes the Board to discipline licensees for “misconduct in the carrying on of the profession” of funeral director. Recent disciplinary cases before the Board concerning professional misconduct have inspired the Board to expand that list.*”

With all due respect, I submit that the following proposed regulation has nothing to do with any disciplinary case before the Board.

In fact, in the words of the Board to Commonwealth Court as recently as March 18, 2004, the Board called circumstances directly relevant to the following proposed regulation “speculative and hypothetical” see [Board Brief, p. 10.] *Bean v. State Board of Funeral Directors*. In other words, as briefly as less than

one year ago, this Board's position was that there was no disciplinary action relevant to the proposed regulation; and that any circumstances pursuant to the same were hypothetical! In this Board's most recent words, "**Recent disciplinary cases before the Board concerning professional misconduct have inspired the Board to expand that list.**"

I ask that this Commission require the Board to provide such list of all disciplinary cases that have come to being between the dates of March 18, 2005 and February 10, 2005.

Furthermore, I submit that the following proposed regulation is ill considered, is diametrically opposed to, and would have the net affect of dramatically changing the Pennsylvania Funeral Director Law (act) (63 P. S. §§ 479.13(c) as enacted by Pennsylvania's General Assembly.

Due to a recent Commonwealth Court Ruling (RE: *Kevin M. Bean, Licensed Funeral Director v. State Board of Funeral Directors*) the current Board is fully and intimately aware of the fact that the proposed regulation is diametrically opposed to Section 13 (c) of the funeral director law and has issued the following proposed regulation with full and comprehensive knowledge of this fact. In reality, the Board's actual intent and desire is to issue a regulation that diametrically alters Section 13 (c) of the Funeral Director Law and in addition overturns the recent Commonwealth Court ruling affirming that preneed contracts are legal and binding contracts under law.

Perhaps the most insidious element of the following proposed regulation is that the verbiage appears "consumer friendly" when taken at face value. However, it is clear to those knowledgeable on certain background issues of the Board that the regulation is contrary to law and is a wily attempt intentionally fashioned to quietly empower the Board and enable it to fulfill the self-serving wishes of the Pennsylvania Funeral Director's Association and of the Board itself.

Understanding the true intent of the proposed regulation necessitates a through understanding of background issues relevant to the intent and desire of the Board and of the Pennsylvania Funeral Director's Association with regard to pre funded funeral contracts. That is, funeral contracts which are funded and paid for prior to the death of the Beneficiary of the contract. Furthermore, a through understanding of the background issues will expose the Regulation for what it is; an insidious and saponaceous endeavor to outmaneuver the recent ruling of Commonwealth Court in *Bean v. State Board of Funeral Directors*, and to undermine the funeral director law as written by the Pennsylvania legislature.

As contained in the Proposed Rulemaking and referenced above, the following is language as submitted by the Board:

A funeral director might come into possession of funds of a decedent or intended for a decedent, even if the funeral director does not provide funeral goods or services for that decedent. Proposed § 13.202(13) would prohibit a funeral director from retaining funds for goods or services that the funeral director has not provided or that exceed the value of funeral goods and services that the funeral director has provided.

In addition, contained in the Proposed Rulemaking, the Board's actually proposed regulation reads as follows:

- (13) Retaining funds intended to pay for funeral goods and services when the funeral director and establishment have not provided any funeral goods and services or when the amount of funds retained is in excess of the value of funeral goods and services actually provided by the funeral director or establishment. A funeral director may preserve the funds for a reasonable amount of time for a person to demonstrate a legal entitlement to receive the funds or to receive payment of funds owed to the decedent.***

The language of the Board and the Proposed Regulation referenced above as submitted in the Proposed Rulemaking raises three questions:

Q: One, how might a funeral director “come into possession of funds of a decedent or intended for a decedent, even if the funeral director does not provide funeral goods or services for that decedent”?

The answer is that this might occur in a circumstance whereby a purchaser enters into a prepaid burial contract. The funeral director would “*come into possession of funds*” upon the consummation of a contractual agreement, and, at that point in time, and until the time of the actual performance of the funeral services and the delivery of the funeral merchandise, the funeral director would not have provided “*any funeral goods and services*”.

Q: Two, how could a funeral director come into a circumstance whereby he or she could retain “funds for goods or services that the funeral director has not provided”?

Again, the answer is that in a circumstance whereby a purchaser of a prepaid funeral contract, enters into a present day legal and binding contract and pays for funeral services and funeral merchandise prior to the death of the Beneficiary of the contract. Subsequently upon the inevitable death of the Beneficiary, the funeral director might, through no fault or action of his own, be restricted from

performing the services and providing the merchandise. In this hypothetical situation, (Which again, the Board itself called "speculative and hypothetical"), the funeral director might find himself inextricably bound to a circumstance whereby funds that are contractually available to him could be retained under present day law even though he or she did not provide the funeral services or funeral merchandise.

As an example: Under the proposed regulation, if an individual entered into a preneed funeral contract with a funeral director, and died say 20 years later, with the only surviving relative being an estranged niece or nephew, (or any next of kin for that matter) the niece or nephew would be empowered under this regulation to cancel the funeral, have the body disposed of in the cheapest way possible, and have the money forwarded to them to go on a cruise or for any other purpose that they wish.

Q. The third question raised is in what circumstance could a funeral director retain funds "*that exceed the value of funeral goods and services that the funeral director has provided*".

Typically many prepaid funeral contracts are price guaranteed. In this circumstance, the funeral director, upon execution of the preneed contract, guarantees that, when the Beneficiary of the contract dies at some future date, the funeral services and funeral merchandise will be delivered without additional charge or fees, regardless of the then current cost. The funeral director is able to enter into this type of a contract because upon completion of the contract he receives the funds plus earnings that are held in trust or in escrow under the funeral directors contract in compliance with current day law.

In certain instances, the funeral director may receive less than the current cost of the services and merchandise delivered. In certain instances the funeral director may receive more. Here, the Board is again attempting to interfere with the funeral director's present day legal and binding contractual relationships by creating an economically unviable environment in which the funeral director could conduct business.

In other words, under the Board's proposed regulation, the funeral director would have everything to lose and nothing to gain when entering into a then regulatory mandated "quasi-agreement" with a consumer, as no binding contractual agreement could exist.

To understand the ramifications of the proposed Board Regulation, it must be known that the concept of a pre need funeral contract is a concept that is consumer driven and is *very* much desired by consumers. In the recently released January 27, 2005 *Wirthlin Worldwide Report*, the latest installment of a uniquely

valuable 15-year consumer research study of the market for death-related products and services, the *Wirthlin Report* cites that, incredibly, greater than half of Americans say they are likely or somewhat likely to prearrange their own funeral, burial or cremation within the next five years!

Indeed, this proposed Regulation will have the effect of chilling the sales of preneed contracts and force consumers to purchase such services and merchandise at the time a death occurs, under urgent time constraints and under great emotional stress. Also, the Proposed Regulation will limit consumer options that are available to consumers today to “shop” for a funeral in advance at a time when they are not under time pressure and emotional stress and can make rational decisions. In addition, the Proposed Regulation surely would limit, and will certainly provide an enormous disincentive for funeral directors not to offer “price guaranteed” prepaid funeral contracts, as the funeral director would have nothing to gain and everything to lose.

Not coincidentally, this exact position, namely that no “guaranteed” preneed contracts be offered by funeral directors” has been advocated by the Pennsylvania Funeral Director’s Association (PDFA) in recent years, specifically since 2002. This “new” position was initiated in the midst of substantial prepaid funeral trust fund investment losses in the millions of dollars that occurred in the Pennsylvania Funeral Director Association’s *for profit* subsidiary SecurChoice prepaid funeral trust.

This new Proposed Regulation would have the net effect of putting investment and inflation risk on the consumer, many, if not the majority of whom are nursing home residents!

It must be emphasized that, pursuant to an irrevocable pre-need contract, the funeral director gives very valuable consideration to the consumer in the form of price guarantees and stated merchandise and service guarantees.

Furthermore, the Board’s new proposed regulation essentially does away with pre-need contracts and actually encourages the opportunity for competing funeral directors to prey upon those who become more prone to fall prey to marketing efforts to “change funeral directors.” For example, although an individual may have executed a pre-need agreement while healthy with a funeral director of his or her choice, the Board’s Decision encourages a competitor funeral director to solicit that individual at a point in time when that individual may become vulnerable, such as, while residing in a nursing home, as that person advances in age, or, perhaps, even after suffering from some type of illness.

This Proposed Regulation benefits the majority of PFDA member funeral directors who have experienced trust fund losses and/or who have failed to make a market in preneed contracts. This proposed regulation hurts consumers, the

majority of whom are elderly, and is shamelessly written to benefit certain funeral directors. It simply cannot be sanctioned.

This position that would inherently be implemented by the above stated Proposed Regulation, of discouraging people from shopping and from entering in prepaid contracts at a time when they can think clearly and are not under time and emotional duress, is manifestly unacceptable in an industry in which a five times markup on merchandise is not unheard of .

Clearly the Proposed Regulation only would serve the financial interests of certain funeral directors, is contrary to Pennsylvania and Federal Law, and will have devastating effects upon current Beneficiaries of preneed contracts as will be outlined further.

Current law in Pennsylvania states as follows:

Section 479.13(c) of the Funeral Director Law states that:

(c) No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed. If any such licensed funeral director shall accept any money for such **contracts**, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust to, a banking institution in this Commonwealth, **conditioned upon its withdrawal or disbursement only for the purposes for which such money was accepted.** This subsection does not apply to a contract by a bona fide institution that it will provide professional funeral services for persons who may die while inmates of the institution, if such contract is made as a part of its contract for housing, maintaining and caring for its inmates. ((c) added July 25, 1953, P.L.592, No.163)

Because a funeral director, under law, is required to deposit funds under a prepaid funeral contract into trust or escrow “only for the purposes for which such money was accepted”, the Board cannot under law promulgate a saponaceous type of regulation in order to circumvent the Funeral Act for the whims and desires of the Board and of the Pennsylvania Funeral Director’s Association.

The Board cannot, under the guise of clarifying statutory law, make statutory changes to existing law.

The fact that the Board must promulgate regulations consistent with the Act is clarified in Section 479.16(a) of the Act.

Section 479.16(a) *Duties of Board.*—(a) *The board shall be charged with the enforcement of this act. **It shall be empowered to formulate necessary rules and regulations not inconsistent with this act** for the proper conduct of the business or profession of funeral directing and as may be deemed necessary or proper to safeguard the interests of the public and the standards of the profession.*

To further clarify matters, Section 13.224 (a) of the existing Pennsylvania Code, Funeral Board Rules & Regulations state as follows:

*(a) A funeral director shall deposit in escrow or transfer in trust to a banking institution in this Commonwealth, the entire amount of monies received by the funeral director under a **prepaid contract** for funeral services or merchandise, including additional service fees or arrangement fees.*

It is further noted that Section 13.224 (f) clarifies that preneed contracts are indeed contractual agreements under law and, in fact, the actual contracts have been approved and reviewed by the Board for many years. Section 13.224 (f) reads as follows:

Section 13.224 (f) **Prepaid burial contracts or preneed contracts** to be used by a funeral director **shall be reviewed and approved by the Board** and should reflect whether or not an additional service fee or arrangement fee is charged. **Prepaid burial contracts or preneed contracts** used by a funeral director may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director.

In addition it is noted that Section 13.226 refers to preneed agreements as “**contracts**”. To follow is Section 13.226:

§ 13.226. Nature and description of escrow or trust accounts for prepaid burial contracts.

*(a) Funds received for prepaid burial **contracts** shall be placed in an escrow or trust fund account which shall be separate and distinct from the business and personal accounts of the funeral director.*

*(b) If funds received by a funeral director for **preneed burial contracts** are deposited in a banking account which bears interest, or are invested by the trustee bank and produce earnings, the interest or earnings shall be retained in the account with the principal and shall be held, accounted for and transferred in the*

same manner as the principal amount, to assure delivery of the same quality of service and merchandise for which the contract was made.

- (c) *In the event of a sale or transfer of the business of a funeral director, prepaid burial contracts and prepaid burial accounts shall immediately be transferred to the control of the licensee who will assume responsibility for completion of the prepaid burial contracts. The licensee-transferee shall notify the Board in writing of the licensee's willingness to accept responsibility for completion of the prepaid burial contracts.*

To again reiterate for the purpose of emphasis, the Board cannot, under the guise of clarifying statutory law, make statutory changes to existing law.

History and Background:

Prior to August 2002, the Pennsylvania Funeral Director's Association began disseminating information that *all* preneed contracts are cancelable by the purchaser, beneficiary, next of kin, etc., prior to or following the death of the beneficiary of a preneed contract!

Later however, in August of 2002, a communication transpired between Board counsel Thomas Blackburn and State Representative/Attorney Michael Hanna, whereby Mr. Michael Hanna made inquiry on behalf of his brother, Mr. John V. Hanna, a licensed funeral director, concerning the transfer of pre-need funds.

In pertinent part, Board counsel in his e-mail communication to legislator/attorney Hanna opined:

. . . the Board *believes* that all pre-need funds belong to the customer, and not to the funeral director, until the time of death and services are provided. Also, despite any contrary language drafted into the contract by the funeral director, while the contract may be irrevocable as to the use of the funds, it is revocable as to which funeral director or funeral home is to provide services. Accordingly, a pre-need customer may rescind a pre-need contract and demand the funeral director to forward the entire principal and all earnings to date to a subsequent funeral home for a pre-need contract with that subsequent funeral director. With the exception of any reasonable arrangement fees which may not be finally collected until the customer's death, a funeral director may not retain pre-need funds after the customer has rescinded the pre-need contract.

Despite this disclosure of the Board's "belief", Board counsel conceded, in that very same e-mail, that neither the Funeral Director Law nor the current regulations support the "belief" set forth in Board counsel's e-mail. Specifically, after being advised of the Board's "belief" by Board counsel Blackburn, legislator/attorney Hanna sent the following e-mail to Board counsel:

Tom, I've now had an opportunity to review the statue [sic] and the code. I don't see anything that expressly says that the trust must be transferable to another funeral home, other than in the case of the buyer moving out of state. Am I missing something? Mike

In response, Board counsel replied:

No, you are not missing anything. That conclusion is what the Board draws from the statute and the Board's regs.

Unfortunately, this absence of legal authority continued to be ignored by this Board, and by Kathleen Ryan, Counsel for the Pennsylvania Funeral Director's Association, hence necessitating an action seeking declaratory relief filed January 10, 2003; RE: KEVIN M. BEAN, A Licensed Funeral Director, Petitioner v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, STATE BOARD OF FUNERAL DIRECTORS, Respondent, in light of: (1) a dispute that arose between myself (Petitioner) and a consumer who demanded the return of his pre-need monies; (2) the fact that our funeral homes have a multitude of pre-need contracts outstanding and continue to offer pre-need services; (3) the statement of Board counsel opining as to the Board's "belief" on the revocability of pre-need agreements despite the explicit terms in the agreement to the contrary; and (4) the absence of any law precluding a funeral director from entering into an irrevocable pre-need contract.

The matter was docketed at 26 M.D. 2003. [R. 636a - 661a.] In response, counsel for the Board filed preliminary objections, asserting that the Commonwealth Court did not have jurisdiction and that the case was not ripe for review. A response thereto was filed, briefs were submitted and the matter was ultimately argued in front of the Honorable Dan Pellegrini. Ultimately, via Order dated March 21, 2003, Judge Pellegrini issued an Order remanding this matter to the Board for a hearing to address the following legal question:

Whether, under the current law, a pre-need customer may, for any reason, rescind an irrevocable pre-need agreement and demand the funeral director to forward the entire principal and the earnings to date to a subsequent funeral director for a pre-need contract with the subsequent director, even if the initial pre-need contract expressly provides that it shall be irrevocable and noncancelable except for the three-day right of rescission provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-7?

Recognizing the need to resolve this issue as quickly as possible given the demands placed on Petitioner, Judge Pellegrini ordered the Board to hold a hearing within thirty (30) days of the date of its Order, after which hearing the Board had thirty (30) days to render a decision. [R. 1a - 2a.] Moreover, the Order expressly recognized Petitioner's right to file a Petition for Review to this Court in the event that Petitioner was not satisfied with the decision and even set the briefing and argument schedules in that Order, presumably to ensure the expeditious review of the above issue. [R. 2a.]

On April 8, 2003, the Board held a hearing to address the question presented by the Commonwealth Court. [R. 184a - 796a.] Inexplicably, although the Board is a nine (9) member Board, comprised of: (1) the Commissioner of the Bureau of Professional and Occupational Affairs; (2) the Director of the Bureau of Consumer Protection, or his designee; (3) two consumer members; and (4) five licensed funeral directors who shall have been actively engaged in the practice of funeral directing for at least ten (10) years [63 P.S. §479.19], only the five professional members of the Board were present for the hearing. Additionally, PFDA, the entity whose contract Petitioner had been utilizing for years, intervened in the proceeding and advocated against the plain language of that contract it had previously submitted to the Board for approval which by its terms provided for irrevocability! Moreover, and quite curiously, the prosecuting arm of the Bureau also intervened in the matter despite the fact that no one was being "prosecuted," but, instead, the Board was simply deciding a question of law. Not surprisingly, the "prosecutor" sided with the position articulated by Board counsel as being the position of the Board and with the Board members' organization, PFDA.

Although counsel for Petitioner implored the Board to try to set aside its preconceived position and any bias that it may have [R. 196a-199a; 553a-560a.], it soon became apparent that the outcome was, in fact, pre-ordained. The Board allowed the Commonwealth and PFDA to present testimony and argument on completely irrelevant issues, with most substantive rulings being rendered in favor of the Commonwealth and PFDA. Indeed, at least one or two critical and substantive legal issues were ruled on by the specially appointed hearing examiner, who is a learned counsel of many years with the Bureau, in favor of Petitioner, only to have the five funeral directors of the Board, none of whom are attorneys, overrule her!

After nine hours of testimony consisting of, collectively, eight witnesses, sixteen exhibits and a host of arguments, very little of which was relevant to the actual issue to be decided by the Board, the hearing was concluded. [R. 1560.a] Briefs were filed and on May 7, 2003, the Adjudication and Order (the "Decision") was issued [R. 118a-139a.] Not surprisingly, consistent with the representations made by Board counsel in his August 22, 2002 e-mail to the legislator/attorney as to the Board's "belief" on this issue, the Board concluded that, under current law, a pre-need customer may, for any reason, rescind an irrevocable pre-need agreement

and demand the funeral director to forward the entire principal and the earnings to date to a subsequent funeral director, even if the initial pre-need contract provides that it shall be irrevocable and non-cancelable except for the three-day right of rescission provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-67 (and implicitly even though the Board had previously approved the contract which provided for irrevocability).

As more fully set forth below, the Board's Decision later was reviewed by Commonwealth Court and reversed.

AND NOW, this 7th day of May, 2003, the State Board of Funeral Directors, having duly convened and considered the entire record of the proceedings, and based upon the foregoing findings of fact, conclusions of law and discussion, hereby responds to the Commonwealth Court's legal question as follows:

Whether, under current law, a pre-need customer may, for any reason, rescind an irrevocable pre-need agreement and demand a funeral director to forward the entire principal and the earnings to date to a subsequent funeral director, even if the initial pre-need contract provides that it shall be irrevocable and noncancelable except for the three-day right of rescission provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-67?

Answer: Yes.

On May 16, 2003, a Petition for Review was filed to Commonwealth Court through which Petitioner sought a review of the Board's Decision.

Notably, on May 28, 2003, the Board granted, in part, Petitioner's supersedeas request pending appeal. Inexplicably, however, it refused to stay the effect of the Order to the extent a pre-need customer has died and another funeral director, despite the existence of the pre-need contract, went ahead and performed the funeral services at the request of the customer's next-of-kin or executor!

The State Board of Funeral Directors has been in existence for more than 50 years during which time it has never issued an Adjudication, statement of policy or other ruling implying, let alone declaring, that pre-need contracts, despite their irrevocability, are nevertheless "rescindable" at the unilateral whim of the customer, or upon the death of the consumer.

Despite its "conclusion" that customers, under current law, can rescind pre-need agreements and direct that monies be transferred to another funeral director, there

is not one iota of Pennsylvania statutory, regulatory or case law which supports this desired position of the current “professional” members of the subject Board. Indeed, if such were the case, this Board, as a governmental instrumentality, would not have approved, over the last many years and decades, pre-need agreements which are irrevocable in their nature and which irrevocability makes sense in that it permits both the funeral director and the customer to live up to their respective parts of the contractual bargain. (IE: Price and performance guarantees, paid for in advance)

The simple fact is, a consumer should have the right to decide whether he or she wants to execute a revocable or irrevocable pre-need agreement.

Both have their benefits and their detriments. Critically, through irrevocable pre-need agreements, goods and services for a fixed price in today’s dollars can be guaranteed at some unknown date in the future. Such consideration is significant. If a consumer wants this guarantee, he or she should have the right to bargain for the same. If a consumer does choose that option, then that agreement is irrevocable and should be enforced. Conversely, the consumer should also have the right to select a revocable agreement if he or she so desires. Frankly, given the fact that a pre-need agreement is a contract, the Board’s, and PFDA’s position is an insult to consumers. It is not disputed that if a pre-need agreement is induced by fraud, then the same can be rescinded; it is not disputed that if an individual executing a pre-need agreement does not have the mental capacity to execute the same, then that pre-need agreement may be rescinded; it is not disputed that if a pre-need agreement is executed under duress, then that pre-need agreement can be rescinded. However, if a consumer, without any incapacity, fully and freely executes an irrevocable pre-need agreement, then both the consumer and the funeral director are entitled to have that agreement enforced, save for the three-day right of rescission under the UTPCPL. Other than that law, nothing in neither the Funeral Director Law nor any principles of contract construction support the Board’s conclusion that a pre-need agreement can be rescinded at the whim of a consumer or at the whim of a family member after the consumer’s death. The Board has failed to provide any legal authority for their arguments to the contrary. Frankly, such authority simply does not exist.

The Board has yet to explain how a contract, fully rescindable by one party for any reason, is not void for an absence of mutuality; i.e., it is illusory! This new interpretation of “law” by this current set of Board members has been reversed by Commonwealth Court. Now however the Board has proposed a saponaceous Regulation in a thinly veiled effort to “overturn” the Commonwealth Court decision. This conduct is outrageous and offensive.

If our General Assembly intended to prohibit pre-need contracts from being irrevocable, our General Assembly would have said so but it did not. Obviously, there are a host of common law reasons why any contract can be changed, modified or rescinded if certain facts and circumstances are present. However,

for this Board to "legislate" by declaring that existing, irrevocable pre-need contracts are nevertheless rescindable at the whim of the customer, is indeed an abuse of discretion and, as set forth more fully below, geared more to protect the funeral director and PFDA rather than the consumer. Indeed, at the same time this Board was declaring that customers could rescind pre-need agreements, it was approving a new PFDA pre-need contract which by its express terms, allowed the funeral director to terminate the agreement at any time and, in conjunction with that, to refund to the customer only the then-current market value in the customer's account (which by reason of investment experience) could be far less than the tendered principal amount). This new PFDA pre-need contract Board approval circumstance must be viewed particularly in light of the before mentioned preneed investment losses experienced by the PFDA affiliate *SecurChoice*.

In short, this the Proposed Regulation is self-serving to a certain segment of funeral directors; it has no support under law; the Board itself has acknowledged that there is no support for the Regulation under law; (the Board called circumstances pertaining to the same "speculative and hypothetical") and the Proposed Regulation must be denied because it is indeed contrary to law.

Prior to the issuance of the May 2003 Decision, the Funeral Board never issued an adjudication concluding that a pre-need consumer has a right to demand that a pre-need contract be rescinded for any reason and that the funds be moved to another funeral home. [R. 336a (T.H., p. 153).] Indeed, as noted above, both Petitioner's form agreement and PFDA's SecurChoice form agreement were approved by the Board. Although the form agreements clearly and unequivocally reflected that the terms are irrevocable and that the monies paid pursuant thereto will be placed into an irrevocable trust, no concern whatsoever was expressed by the Board that such provisions were, somehow, contrary to law, and the agreements were approved. [R. 625a-626a.] Certainly, if these agreements were contrary to law, and more specifically, the Funeral Director Law, the same would not have been approved by the Board.

However, in the Spring of 2002, following substantial market losses in the PFDA-affiliate's SecurChoice Funeral Trust, the Board (some of whose members are believed to be a part of SecurChoice) and, in conjunction with input from PFDA's counsel, began drafting new regulations which would declare that pre-need agreements are always rescindable. [R. 341a - 343a (p.158-160).] Thereafter, and not so coincidentally, SecurChoice, PFDA's affiliate, submitted a new form pre-need agreement to the Board for approval, which agreement expressly states that either the consumer or the funeral home may terminate the pre-need agreement at any time. [R. 408a - 414a.] Curiously, the new PFDA SecurChoice contract was circulated to PFDA members via another affiliate, UniChoice on or about July 15, 2002, prior to receipt of Board approval. [R. 664a.] Even more curious is the cover letter enclosing that agreement, which states that changes have been made to the documents "...to come into compliance with recent rulings

by the State Board of Funeral Directors...” [R. 664a.] Critically, as of July 15, 2002 no "recent ruling" had been made by the Board concerning the rescindability of pre-need agreements. Moreover, the cover letter also reflects that “[t]he major change is that the purchaser of a pre-need contract can cancel the agreement for any reason and receive all of their money back including interest less fees,” conspicuously failing to disclose that the funeral director can also cancel at any time. [R. 664a (most emphasis omitted.)]

It is noteworthy that in testimony Board counsel first claimed that he does not review the form contracts submitted to the Board for approval for these critical provisions. Specifically, Board counsel stated that he does not review the form contract to determine if it identifies a consumer’s three-day right of rescission [R. 349a, lines 14-15]; he admitted that he has not reviewed the form contract to determine whether the agreement is irrevocable after the three-day right to rescind has expired [R. 349a, lines 16-20]; he admitted that he has never looked to determine whether the agreement allows for an election of whether or not it is irrevocable or revocable [R. 349a, lines 21-25]; he admitted that he does not review the documents to determine whether the agreement allows for an election of whether the services or the goods are guaranteed or not guaranteed [R. 350a, lines 1-6]; he also admitted that he has not ever looked at an agreement to determine whether, in the form terms and conditions, the agreement reflects that it is subject to termination at the whim of the customer or the funeral director. [R. 350a, lines 7-13.] Critically, Board counsel admitted that he has never issued to anyone a letter refusing to approve his or her forms where the form agreement reflected that the agreement was irrevocable after three days. [R. 348a, lines 15-23.] Certainly, if issues pertaining to a consumer’s absolute right to transfer pre-need monies from one funeral home to another are covered by the Funeral Director Law and its regulations, then the form agreements which a funeral director is obligated via regulation to submit to the Board for approval should be reviewed to assess the form agreement’s consistency with those rights. Board counsel, however, never reviewed an agreement to assess the revocability or irrevocability of the same. [R. 349a, lines 16-20.] The reason for such is patent--neither the Funeral Director Law nor its regulations address or govern the irrevocability of a pre-need agreement, and Board counsel forthrightly acknowledged this. [R. 379a - 380a.]

At or around this time, demands were suddenly placed upon Petitioner to transfer monies paid to Petitioner pursuant to an irrevocable pre-need contract to another funeral home. [R. 246a, lines 6-13.] When Petitioner, along with at least one other colleague who was suddenly faced with similar demands and who also believed that a Board-approved irrevocable pre-need agreement was enforceable, advised their consumers of the same, Board counsel’s August 22, 2002 e-mail surfaced as the "authority" behind these demands.

To be direct, the overwhelming evidence leads to the inescapable conclusion that PFDA and the Board concocted this new interpretation after 52 years of existence

and years of approving irrevocable pre-need contracts to “hide” the big change in PFDA’s (SecurChoice’s) new contract; i.e., now, if the funeral director wants to terminate his obligations under the pre-need contract, he too can do so. [See e.g., R. 356a-357a; 361a-363a.]

No portion of Section 479.13(c) precludes a pre-need agreement from being irrevocable and nothing set forth therein requires a funeral director to transfer monies received pursuant to a pre-need agreement and placed into an irrevocable trust to another funeral home at the direction of the consumer. In other words, nothing in the Funeral Director Law sanctions a consumer’s breach of an irrevocable agreement by requiring a funeral director, who has placed pre-need funds pursuant to an irrevocable agreement into an irrevocable trust, to remit those monies to the consumer or another funeral home or another trust at the demand of the consumer.

The new proposed regulation now seeks to overturn the Commonwealth Court Decision in *Bean v. State Board of Funeral Director’s*, utilizing language that cloaks the maligned objective of the Proposed Regulation however accomplishes the same ends.

Consistent with Executive Order 1996-1, if the law already provides that a pre-need customer may cancel an irrevocable pre-need contract for any reason and demand that the monies be either returned to the consumer or transferred to another funeral director or funeral entity, as the Board so concluded in the Decision, then the proposed new regulation would not be needed. The fact is, however, that as the law currently exists, nothing in the Funeral Director Law nor in the regulations precludes a pre-need contract from being irrevocable; nothing therein allows a consumer to cancel that irrevocable agreement for any reason; and nothing therein requires the funeral director to transfer the pre-need funds paid pursuant to an irrevocable pre-need agreement to another funeral home at the direction of the consumer.

Thus, neither the Funeral Director Law nor its regulations in any way either preclude a pre-need contract from being irrevocable or require that monies paid pursuant to a pre-need agreement be tendered to the consumer and/or transferred to another funeral director on demand. Further support for this conclusion is found in a related statute, the Future Interment Law of August 14, 1963, P.L. 1059, 63 P.S. §§ 480.1 et seq. (the “Future Interment Law”).

The Future Interment Law deals with the sale of cemetery and funeral merchandise and services. The Future Interment Law also includes provisions pertaining to pre-need contracts and the deposit of pre-need funds into trust accounts. See e.g., 63 P.S. § 480.2, § 480.4-§ 480.7. Like the Funeral Director Law, nothing in the Future Interment Law precludes a pre-need contract from being irrevocable. Indeed, the Future Interment Law permits a pre-need

purchaser to cancel a pre-need contract under one specific, enumerated circumstance. Specifically, Section 5 of the Future Interment Law provides:

After final payment, if the purchaser moves out of the State and upon written notice to the seller and to the trustee, the purchaser may cancel any such contract for the furnishing of personal property or services prior to performance by seller and to the death of the person for whose benefit such contract was made, in which event the purchaser shall be entitled to receive from the trustee the principal amount of money on deposit to the credit of that particular contract less the interest which shall be returned to the seller.

63 P.S. § 480.5

Thus, the Future Interment Law acknowledges the right of a consumer to cancel a pre-need contract if the purchaser moves out of state and upon written notice to the seller and to the trustee; under such circumstance the purchaser is entitled to receive the principal amount of money on deposit, less interest. *Id.* No similar provision is contained in the Funeral Director Law or its regulations. The inclusion of this specific, albeit limited, right of a consumer to terminate a pre-need agreement in the Future Interment Law compels the conclusion that the absence of a similar provision in the Funeral Director Law evidences an intent by the Legislature not to extend such authority to consumers who enter into pre-need agreements under the Funeral Director Law.

With respect to this point, one cannot dispute in good faith that the Funeral Director Law and the Future Interment Law relate to the “. . . same persons or things or to the same class of persons or things.” Indeed, both statutes govern persons and conduct associated with the death industry. Hence, pursuant to rules of statutory construction, the Funeral Director Law and the Future Interment Law are in *pari materia*.

Discussing this basic rule of statutory construction, the Pennsylvania Supreme Court has observed:

“Statutes in *pari materia* shall be construed together, if possible, as one statute.” 1 Pa. C.S.A. § 1932(b). Moreover, wherever possible effect shall be given to both the general and specific provisions. It is only where the conflict between the provisions is irreconcilable that the specific provision prevails over the general. 1 Pa. C.S.A. § 1933. Thus, it is clear that statutes are to be construed together whenever possible and, unless an irreconcilable conflict exists, effect is to be given to all provisions.

Hamilton v. Unionville-Chadds Ford School District, 552 Pa. 245, 249, 714 A.2d 1012, 1014 (1998).

Clearly, the General Assembly has chosen to create one, and only one, exculpatory, statutory avenue for individuals who enter into pre-need agreements relating to the provision of funeral or cemetery merchandise and/or services and that, as expressly provided for under Section 5 of the Future Interment Law,

relates to the situation where the consumer moves out of state. If our General Assembly had intended to allow consumers to alter, beyond the three-day right of rescission allowed by the Consumer Protection Law, pre-need agreements which are irrevocable by their terms for any other reason, our General Assembly could have and would have so stated. Significantly, the Funeral Director Law has been in existence as early as 1952, some eleven (11) years prior to the enactment of the Future Interment Law. Moreover, long after the enactment of the Future Interment Law, our General Assembly enacted comprehensive additions, changes, and deletions to that 1952 funeral legislation. See e.g., Act of 1968, July 31, P.L. 1008, No. 295; Act of December 22, 1983, P.L. 354, No. 88. Under the well-founded maxim of *expressio unius est exclusio alterius*, we must assume that, because our General Assembly set forth in one statute, which must be read *in pari materia* with another, the circumstances under which a customer can unilaterally rescind a pre-need agreement, the failure of our Legislature to identify any other bases for unilateral action in either the Funeral Director Law or the Future Interment Law should be understood as our General Assembly intending that there are to be no other bases for unilateral revision, modification or termination of the existing terms of pre-need agreements which are defined as irrevocable. See e.g., Commonwealth v. Charles, 270 Pa. Super. 280, 411 A.2d 527 (1979).

There is nothing in the Funeral Director Law, however, which prohibits the execution of a pre-need agreement which irrevocably commits both the customer and the funeral director to carrying out their respective obligations under the terms and conditions of the pre-need agreement. There is nothing in the Funeral Director Law which declares that a customer's pre-need monies are always transferable or portable. There is nothing in the Funeral Director Law which prohibits retaining funds intended to pay for funeral goods and services when the funeral director and establishment have not provided any funeral goods and services. There is nothing in the Funeral Director Law which prohibits the delivery of funeral merchandise to another funeral home. There is nothing in the Funeral Director Law that prohibits retaining funds in excess of the value of funeral goods and services actually provided by the funeral director or establishment. There is nothing in the Funeral Director Law that requires a funeral director, as part of a pre-need agreement, to do anything other than deposit the pre-need monies in either an escrow account in, or transfer the same in trust to, a banking institution in this Commonwealth, conditioned upon its withdrawal or disbursement only for the purposes for which such money was accepted. See, 63 P.S. § 479.13(c). If anything, § 13(c) of the Funeral Director Law makes clear that the monies paid pursuant to a pre-need agreement can only be withdrawn or disbursed "for the purposes for which such money was accepted," meaning for funeral director "A" to provide customer "B" the services which customer "B" paid for and which funeral director "A" committed to provide! In this regard, § 1921 of the Pennsylvania Statutory Construction Act comes into play in that, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S.A. § 1921(b).

In an effort to re-write the Funeral Director Law and reach the conclusion that it so desperately wants to reach, the Board completely ignores the explicit language of the Funeral Director Law, the explicit language of the Future Interment Law and now the explicit language of Commonwealth Court. Additionally, the Board also ignores the fact that it does not have the authority to rewrite legislation. Indeed, it is axiomatic that “[a]dministrative agencies are creatures of statute and cannot exercise powers not explicitly given them by the legislature....”) Plumstead Township Civic Association v. Commonwealth of Pennsylvania, Department of Environmental Protection, 684 A.2d 667, 670 (Pa. Commw. 1996). See also, Northern Associates, Inc. v. State Board of Vehicle Manufacturers, Dealers and Salespersons, 725 A.2d 857, 859 (Pa. Commw. 1999) (“We have already stated that the power and authority to be exercised by administrative commissions must be conferred clearly and unmistakably by the Legislature.”) The Legislature has not conferred on the Board the authority to rewrite the Funeral Director Law, to promulgate regulations inconsistent with the same or to declare what it believes the law should be on any particular day, as it did in this case and is still trying to do in this case.

Noteworthy is the fact that the Supreme Court of Arkansas addressed an issue substantially similar to that before this Court. In Arkansas Securities Department v. Roller Funeral Home, 263 Ark. 123, 562 S.W.2d 611 (1978), the Supreme Court of Arkansas reviewed the validity of an order issued by the Arkansas Securities Commissioner which provided that the funeral home at issue had to revise its pre-need contracts to provide that a buyer had the right to cancel the contract at any time, with or without cause, and to withdraw all funds, less interest paid, into the trust account. Although the Supreme Court acknowledged the Securities Commissioner’s rulemaking authority, the Court observed that “. . . rule-making authority does not give the commissioner authority to make a rule or regulation that is not authorized or is contrary to Arkansas law.” Arkansas Securities Department, 263 Ark. at 124, 562 S.W.2d at 611. Examining the statute at issue, the Supreme Court stated that “. . . We can find nothing in the statutes to authorize a rule which would permit a buyer of prepaid funeral benefits to withdraw all the money paid into the trust fund without cause or reason at any time.” Id. at p. 612. The lower court’s decision reversing the order of the Commissioner was affirmed.

Although this decision by the Arkansas Supreme Court is not binding precedent, it is certainly persuasive, factually it is nearly identical; and its analysis is consistent with Pennsylvania law. In all candor, the Board’s conduct in this case is more egregious than that in the Arkansas case. It is the “belief” of the Board, as initially expressed in an e-mail, which was one of the factors that triggered this controversy and which was relied upon by certain consumers in support of their demand for pre-need monies. Like the Arkansas case, nothing in the Funeral Director Law permits a buyer of prepaid funeral benefits to withdraw all the money paid into the trust without cause or reason at any time.

The Funeral Director Law is not the only law implicated by the Board's Proposed Regulation. Indeed, other fields of Pennsylvania jurisprudence are also implicated and infringed by the Proposed Regulation. Specifically, the Board's proposed regulation is not supported by basic principles of the Funeral Director Law, contract law or trust law. Addressing the former, the current Regulations acknowledge that a pre-need agreement is a contract. Indeed, the Regulations expressly define a "prepaid burial contract" as being "[a] contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death or the death of another designated individual and for which the consumer pays to the funeral director moneys at the time of the contract or at a time prior to the rendition of these services." [49 Pa. Code § 13.1 (emphasis added).] Expressly acknowledging the fact that pre-need agreements are contracts, contract principles must be applied to these agreements

It is axiomatic that "[a] contract must be construed according to the meaning of its language." Empire Sanitary Landfill, Inc. v. Riverside School District, 739 A.2d 651, 654 (Pa. Commw. 1999). According to Pennsylvania Commonwealth Court:

"The intention of the parties must be ascertained from the document itself, if its terms are clear and unambiguous." . . . The Court's inquiry should focus on what the agreement itself expressed and not on what the parties may have silently intended . . . "It is not proper, under the guise of construction, to alter the terms to which the parties, whether in wisdom or folly, expressly agreed." . . . The law assumes that the parties chose the language of their contract carefully. [Id.] (citations omitted.)

Fundamental principles of contract law, absent a proven claim of fraud, duress or illegality, it is not proper, "under the guise of construction," to alter the terms of an irrevocable pre-need agreement simply because a consumer, for any reason whatsoever, no longer wants that specific agreement. Indeed, any conclusion to the contrary would cause the contract to be illusory and, hence, unenforceable, as a whole. See Geisinger Clinic v. Di Cuccio, 414 Pa. Super. 85, 91, 606 A.2d 509, 512 (1992) ("A contract is evidenced by a mutuality of obligation. A mutuality of obligation exists when both parties to the contract are required to perform their respective promises. . . . A promise to perform or to forbear from performing must be supported by consideration. . . . If the promise is entirely optional with the promisor, it is said to be illusory and, therefore, lacking consideration and unenforceable.") Basic principles of Pennsylvania contract jurisprudence preclude such result.

Turning to the law of trusts, similar to contract law, to ascertain the nature of a trust, ". . . the writing itself must be considered the best and controlling evidence of that question." Appeal of Gannon, 428 Pa. Super. 349, 369, 631 A.2d 176, 186 (1993) (citation omitted). Moreover, the Pennsylvania Supreme Court, almost

four decades ago, opined that “[w]here property of any kind (with exceptions hereinafter discussed) is placed in the name of the donor or settlor *in trust for a named beneficiary*, unless a power of revocation is expressly or impliedly reserved, the *general principle* of law is well settled that such facts create a trust which is prima facie *irrevocable*.” In re: Estate of Brose, 416 Pa. 386, 394, 206 A.2d 301, 306 (1965) (italics in original) (citations omitted). See also Rebidas v. Murasko, 450 Pa. Super. 546, 550, 677 A.2d 331, 333 (1996) (questioned on other grounds) (“Generally, a trust executed without reservation of power by a settlor to revoke or reform the trust is irrevocable.”)

Clearly, the irrevocable pre-need agreements used by multitudes of funeral directors create an irrevocable trust if nothing in the documents reserves to the pre-need consumer the right to revoke or reform that trust. Given the fact that no provision of either the Funeral Director Law or the Regulations pertain to the revocability of a pre-need agreement or the right (or lack thereof) of a consumer to demand, at the consumer’s whim, that the funeral director transfer the pre-need monies placed in an irrevocable trust to another funeral director, the foregoing basic principles of law cannot be ignored.

Finally, the impact of the Board’s Proposed Regulation on certain rights of Funeral Directors as guaranteed by the Constitution of the Commonwealth of Pennsylvania, as well as the United States cannot be ignored. Specifically, the Board’s Proposed Regulation infringes on rights as guaranteed by Article I, Sections 1, 10, 17 and 26 of the Constitution of the Commonwealth of Pennsylvania and Article I, Section 10 and the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is axiomatic that “[t]he Contract Clauses of the United States and Pennsylvania Constitutions protect contracts freely arrived at by the parties from subsequent legislative impairment or abridgement.” Lynn v. Prudential Property & Casualty Ins. Co., 422 Pa. Super. 479, 484, 619 A.2d 779, 781 (1993). According to the Courts:

A later law cannot abridge rights under a prior contract. Only the substantive laws that are in effect when the parties enter into a contract are implicitly incorporated into it.

Second Federal Savings and Loan Association v. Brennan, 409 Pa. Super. 581, 588, 598 A.2d 997, 1000 (1991).

The United States Supreme Court has noted:

“[The Contract Clause] was made part of the Constitution to remedy a particular social evil – the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts – and thus was intended to prohibit States from adopting ‘as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them . . .’”

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 503, fn. 30, 107 S. Ct. 1232, 1251, fn. 30, 94 L. Ed. 2d 472, 500, fn. 30, (1987) (citation omitted).

Here, the Board's Proposed Regulation constitutes the precise "social evil" against which the Contract Clause is to guard. The Proposed Regulation impinges upon the ten of thousands of existing pre-need agreements that funeral directors statewide have with a multitude of customers by effectively relieving their obligations there under and denying funeral directors a means to enforce those agreements. Indeed, the Proposed Regulation effectively rewrites the terms of pre-need agreements by obliterating the obligation of the consumer as to the irrevocability of the agreement and allowing the consumer to rescind the agreement, for any reason whatsoever, simply by choosing another funeral home. Frankly, one cannot dispute in good faith that the retroactive application of the Board's proposed regulation impairs existing contractual obligations.

In addition to the foregoing, the Board's proposed regulation violates rights to due process of law. It is well-established that "retroactive application of a law is not *per se* prohibited. It is prohibited only if it offends due process." Sanders v. Loomis Armored, 418 Pa. Super. 375, 379, 614 A.2d 320, 322 (1992) (citations omitted). According to the Superior Court:

Laws which are applied retroactively offend the due process clause if, "balancing the interests of both parties, such application would be unreasonable."

...Retroactive laws which have been deemed reasonable are those which "impair no contract and disturb no vested right, but only [vary] remedies, cure defects in proceedings otherwise fair, and do not vary existing obligations contrary to their situation when entered into and prosecuted"... If no vested right or contractual right is involved, an act is not retroactively construed if applied to a condition existing on its effective date, even though the condition results from events that occurred prior to that date....

Sanders, 418 Pa. Super. at 380, 614 A.2d at 322. (citations omitted). See also, Cook v. Covey, 415 Pa. Super. 353, 609 A.2d 560 (1992).

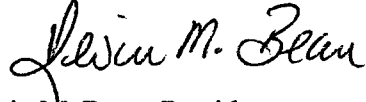
In the case sub judice, the pre-need contracts involve definitive obligations and constitute a definitive property interest. It is abundantly clear that there is no support in law for the Board's Proposed Regulation and that the Board's Proposed Regulation, if enacted, constitutes "new" law. If this Proposed Regulation is applied retroactively, it is abundantly clear that contractual and vested rights will be impaired and disturbed. This infringement is wholly improper. The proposed regulation must be denied.

As a licensed funeral director practicing for more than 20 years in Pennsylvania, I thank you for allowing me the opportunity to share my thoughts, insights, experiences and legal trials and tribulations with the State Board of Funeral Directors and with the Pennsylvania Funeral Director's Association.

Any additional documentation will readily be provided at your request.

I urge you to unequivocally deny this saponaceous proposed regulation. In the absence of such, I request that formal hearings be held.

Sincerely,

A handwritten signature in cursive script that reads "Kevin M. Bean".

Kevin M. Bean, President
Bean Funeral Homes & Cremation Services, Inc.

CC Independent Regulatory Review Commission
Mary S. Wyatte, General Counsel and Acting Executive Director
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101



HEFFNER

Funeral Chapel & Crematory, Inc

PHONE 717-767-1551
Fax 717-764-9919
Toll Free 888-767-1551
C. Frederick Koller, Supervisor
Ernie Heffner, President
John Katora, Vice-President
Scott Mahkovec, CPA, Controller

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**PENNSYLVANIA
AFFILIATES**

March 9th, 2005

RED LION
Olewiler & Heffner

✓ Independent Regulatory Review Commission
Mary S. Wyatte, General Counsel and Acting Executive Director
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

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Scureman

Michelle Smey, Administrator
State Board of Funeral Directors
P. O. Box 2649,
Harrisburg, PA 17105-2649

RE: Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278

TROY
Vickery

Dear General Counsel Wyatte and Administrator Smey,

LOCK HAVEN
Helt Chapel

My name is Ernie Heffner. I am a second generation, licensed funeral director and the president of our family owned funeral business. More than twenty licensed funeral directors are affiliated with our firm. I am submitting one set of comments rather than inundate you with a barrage of duplicate concerns.

RENOVO
Maxwell

In the event that the proposed Rules and Regulations are not denied, I hereby request a public hearing at which time I will be obliged to offer substantial testimony from numerous parties as further evidence in support of my comments.

WILLIAMSPORT
Allen & Redmond

In addition to my enclosed comments and the websites referenced therein, you will also find the following three exhibits in further support of my comments.

WILKES-BARRE
Kniffen O'Malley

1. Commonwealth Court - Opinion of seven Judge panel July 22, 2004 in Kevin M. Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001 for Constitutional Violations by the Funeral Board
3. January 13, 2005 Memorandum and Order from Federal Court

AVOCA
Kniffen O'Malley

As named defendants, the Funeral Board and/or its members already have this information. In light of this, it is all the more outrageous that they have presented the proposed Rules and Regulations which I believe to be unconstitutional and violate my civil rights and the civil rights of those like me. This Board's erroneous actions and ill conceived judgments in the past appear to continue.

MILTON
Ranck

Please do not hesitate to call or write if you need any further information.

Sincerely,

Ernie Heffner

Cc: James J. Kutz, Esquire
Bc:

1551 Kenneth Rd., York, PA 17404

Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278

March 9th, 2005 Comments from Ernie Heffner with three exhibits

1. Commonwealth Court Opinion, Seven Judge panel July 22, 2004, Bean V State Board of Funeral Directors
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3. January 13, 2005 Memorandum and Order from Federal Court

Annex A

**TITLE 49. PROFESSIONAL AND
VOCATIONAL STANDARDS**

PART I. DEPARTMENT OF STATE

**Subpart A. PROFESSIONAL AND
OCCUPATIONAL AFFAIRS**

**CHAPTER 13. STATE BOARD OF
FUNERAL DIRECTORS**

STANDARDS OF PRACTICE AND CONDUCT

§ 13.202. Unprofessional conduct.

Unprofessional conduct includes the following:

* * * * *

(11) Furnishing embalming, other services or merchandise without having obtained written permission from a family member or other person authorized by law to make funeral arrangements for the deceased. Oral permission to embalm, followed by a confirmatory e-mail, fax, telex, telegram, mailgram or other written confirmation will be acceptable.

COMMENTS

The following proposals regarding embalming are anti-consumer and if passed will stand to give unscrupulous licensees an opportunity to charge for unnecessary and/or unwanted services under the guise of being "the law." (Please see additional website information in support of this statement and further comments below.)

(i) A funeral director who has made reasonable attempts, without success, to locate family members or other persons authorized by law to make funeral arrangements for a deceased may provide embalming or other services without having obtained permission when there is a legitimate need to provide that service at that time and no facts known to the funeral director suggest that any authorized person, if requested, would refuse to give permission.

COMMENTS

- √ The failure to exactly define "reasonable attempts" puts consumers at a distinct disadvantage.

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Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278

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- √ There is no "legitimate need" according to U.S. Centers for Disease Control. (see Funeral Consumers Alliance at <http://www.funerals.org/faq/embalm.htm>)
- √ "No facts known to the funeral director" is a loophole that can lead to an unwanted, unnecessary and inappropriate charge for unauthorized services in violation of a consumer's religious beliefs. It is unreasonable to imagine that a licensee could possibly possess "facts known" without having talked with a consumer. Therefore, a licensee would know whether or not a consumer would choose to decline embalming due to religious reasons for example Orthodox Jewish and Muslim consumers. This proposed regulation gives the licensee an inappropriate excuse to charge fees and then hide behind an unnecessary, inappropriate and anti-consumer regulation.

(ii) A funeral director who has provided funeral service without obtaining prior permission may not charge for the service unless:

(A) The provision of services without prior permission is authorized by this paragraph.

(B) The person paying for funeral goods and services agrees to pay for the previously unauthorized service.

(iii) A funeral director who has embalmed without obtaining prior permission may not charge or accept payment for the embalming unless:

(A) The embalming without prior permission is authorized by this paragraph.

(B) Embalming is necessary and appropriate for other services, such as a public viewing, subsequently selected by the person paying for funeral goods and services.

COMMENTS

- √ "Necessary and appropriate" is a vague and untruthful description that implies a need that the U.S. Centers for Disease Control has proclaimed simply does not exist! It is outrageously deceptive and ant-consumer to state or imply otherwise. (see Funeral Consumers Alliance at <http://www.funerals.org/faq/embalm.htm>)
- √ "Other services, such as a public viewing" could only occur if indeed a family member or other person authorized by law to make funeral arrangements for a deceased person had been found and would have authorized such a service and therefore the consumer would have and should have the opportunity to elect or decline embalming and the associated cost.
- √ The Federal Trade Commission has been very clear about embalming.
FTC website <http://www.ftc.gov/bcp/online/pubs/services/funeral.htm>

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Embalming

Many funeral homes require embalming if you're planning a viewing or visitation. But embalming generally is not necessary or legally required if the body is buried or cremated shortly after death. Eliminating this service can save you hundreds of dollars. Under the Funeral Rule, a funeral provider:

- √ May not provide embalming services without permission.
- √ May not falsely state that embalming is required by law.
- √ Must disclose in writing that embalming is not required by law, except in certain special cases.
- √ May not charge a fee for unauthorized embalming unless embalming is required by state law.
- √ Must disclose in writing that you usually have the right to choose a disposition, such as direct cremation or immediate burial, that does not require embalming if you do not want this service.
- √ Must disclose in writing that some funeral arrangements, such as a funeral with viewing, may make embalming a practical necessity and, if so, a required purchase.

* * * * *

(13) Retaining funds intended to pay for funeral goods and services when the funeral director and establishment have not provided any funeral goods and services or when the amount of funds retained is in excess of the value of funeral goods and services actually provided by the funeral director or establishment. A funeral director may preserve the funds for a reasonable amount of time for a person to demonstrate a legal entitlement to receive the funds or to receive payment of funds owed to the decedent.

COMMENTS

- √ The Funeral Board's past erroneous attempt to tortuously interfere with Irrevocable, Non-Cancelable contracts between consumers and licensees has recently been reversed by a seven Judge Commonwealth Court panel. (See attached exhibit of Commonwealth Court Opinion of seven Judge panel July 22, 2004 in Kevin M. Bean V State Board of Funeral Directors)
- √ On page 15 of the exhibit, the Courts Opinion, Judge Pellegrini wrote, "not only is there nothing in the Funeral Director Law or the implementing regulations that allows the Board to change irrevocable contracts to revocable ones when it has

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approved the contracts, but that is not a rationale for making all contracts revocable." (see page 15 of the exhibit), " , "

- √ This proposed regulation appears to be an outrageous backdoor attempt to circumvent the ruling of the Court and ignore existing laws passed by the legislature. I perceive this proposed Rule and Regulation to be a dubious effort to slip through a regulation that would be contradictory to existing law and the recent validation of current law by the seven Judge Court.

- (14) Performing funeral services on behalf of a funeral entity that the funeral director knew, or should have known, was not in compliance with section 8 of the act (63 P. S. § 479.8), regarding conduct of business.**

COMMENTS

- √ This is an unreasonable restraint of trade that precludes a licensee from dealing with out-of-state companies, including funeral homes, cremation companies and shipping services, some of which are national publicly owned firms, who would not be licensed in the Commonwealth.
- √ This proposed regulation is anti-competitive and anti- consumer.

- (15) Refusing to release remains until consideration, whether earned or not, has been paid.**

COMMENTS

- √ This proposed regulation is too broad in that it overreaches by denying a licensee the right to expect and receive consideration for services that have been authorized by the consumer.

- (16) Refusing the reasonable request of any known member of a decedent's immediate family the opportunity to pay final respects, regardless of who is paying for funeral services or merchandise. For purposes of this paragraph, the immediate family includes spouse, sibling, parent, grandparent, child and grandchild.**

COMMENTS

- √ Ironically, the Funeral Board has historically taken the exact opposite position! When a mother complained to the Board of being denied the right to see her child prior to cremation, the Funeral Board did not consider this inhumanity to be unprofessional conduct. Does the Board now believe they need an unnecessary regulation in order to treat consumers with basic dignity?
- √ More egregiously, this proposed regulation flies in the face of existing statute, specifically, the PA Probate, Estates & Fiduciaries Code, 20 Pa. C.S.A. Section

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305, which allows for an individual to make a designation for the express purpose of insuring that their wishes are carried out. Such a document, duly executed, is "an allegation of Contrary Intent" as set forth in the Statute.

- (17) **Aiding any person or entity that the funeral director has reason to believe is attempting through unlicensed persons or entities to engage in the sale of funeral services for a person then living.**

COMMENTS

- √ This Board is currently charged in Federal Court for constitutional violations of commercial free speech due to its inappropriate restrictive actions and statements in the past via an adopted Resolution, now rescinded.
- √ The Federal Court has noted that, "Moreover we would be remiss if we did not admonish Defendants (the Funeral Board) that in our view their pos hoc attempt to eliminate Plaintiffs' claim, by withdrawing the Resolution, gave the appearance of being both clumsy and disingenuous." (see page 13 and 14 of the copy of Memorandum and Order, January 13, 2005 attached)
- √ The Federal Court went on to state, "While we believe that the Board could promulgate clearly drafted guidelines or resolutions which might serve to obviate the necessity of our deciding this challenge of on the merits, its actions to this point have not demonstrated either clarity or continuity, nor have they indicated a willingness by the Board to speak in a more cogent fashion on this issue."
- √ In spite of the January 13, 2005 Memorandum and Order of the Federal Court, this Board has chosen to submitted proposed regulations that again restrict commercial free speech. (A copy of the Federal Complaint dated November 27, 2001 is attached.)
- √ A final ruling from the Federal Court is pending.

SUMMARY OF COMMENTS

- √ The proposed Rules & Regulations are vexatious, anti-consumer, anti-competitive, contrary to existing law and contrary to the intent of the legislature.
- √ Portions of the proposed Rules & Regulations are unnecessary as documented by U.S. Centers for Disease Control and the Federal Trade Commission.
- √ The proposed Rules & Regulations are shamefully crafted to restrict competition and American free enterprise all to the detriment of Commonwealth consumers.

Proposed Funeral Rules & Regulations Pa.B. Doc. No. 05-278

March 9th, 2005 Comments from Ernie Heffner with three exhibits

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√ As a licensee, I perceive the proposed Rules & Regulations to be unconstitutional and an absolute targeted effort to violate my civil rights and the civil rights of those like me.

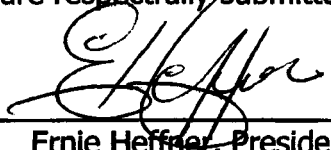
EXHIBITS TO COMMENTS AND WEBSITES REFERENCED

1. Commonwealth Court - Opinion of seven Judge panel July 22, 2004 in Kevin M. Bean V State Board of Funeral Directors
2. Federal Complaint filed November 27, 2001
3. January 13, 2005 Memorandum and Order from Federal Court
4. Funeral Consumers Alliance at <http://www.funerals.org/faq/embalm.htm>
5. Federal Trade Commission at <http://www.ftc.gov/bcp/conline/pubs/services/funeral.htm>

[Pa.B. Doc. No. 05-278. Filed for public inspection February 11, 2005, 9:00 a.m.]

Comments are respectfully submitted

By: _____


Ernie Heffner, President
Heffner Funeral Homes & Crematory
1551 Kenneth Road,
York, PA 17404
Phone 717-767-1551

Cc: James J. Kutz, Esquire

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin M. Bean,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1088 C.D. 2003
	:	Argued: June 9, 2004
Department of State, State Board of	:	
Funeral Directors,	:	
Respondent	:	

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BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
 HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE DORIS A. SMITH-RIBNER, Judge
 HONORABLE DAN PELLEGRINI, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Judge
 HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
 HONORABLE RENÉE L. COHN, Judge

OPINION BY JUDGE PELLEGRINI FILED: July 22, 2004

Kevin M. Bean (Bean), a licensed funeral director, appeals from a decision and order of the Department of State, State Board of Funeral Directors (Board) that irrevocable pre-need agreements are subject to rescission at the request of a customer who has previously agreed to the terms of that agreement and are transferable to another funeral director.

At issue in this case are two pre-paid burial contracts or "pre-need agreement" forms as they are referred to herein which are used by Bean in his business. They allow a customer to purchase merchandise, services or other benefits that are rendered at the time of death. Both forms have been approved by the Board as required by the Board's regulations at 34 Pa. Code §13.224 which provide that "prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board..." One form clearly states

that it is irrevocable and only allows the customer of Bean's services to cancel the transaction within three business days of signing the agreement. The other form, which was endorsed by SecurChoice, an affiliate of the Pennsylvania Funeral Directors Association, not only allows for the three-business day cancellation, but also gives the customer of Bean's services the option to revoke the agreement by checking a specified box marked "revocable."¹ If that box is checked, then the agreement may be terminated by either the buyer or the funeral home at any time prior to the customer's death. This does not mean that the customer can revoke the nature of the contract, i.e., the funeral or burial services, but he or she may transfer the services for another funeral director to carry out upon his or her death. If the "irrevocable" box is checked, the agreement cannot be terminated unless done so within the first three days after signing.

In 2002, Bean received a demand from a customer who wanted money returned that had been paid pursuant to an irrevocable agreement. Bean was aware of communications between the Board and a state representative regarding the licensing of another funeral director, the gist of the communications being that the Board believed that all pre-need funds belonged to the customer and not to the funeral director.² As a result of his dispute with the customer and the

¹ The revocable form further provides that the agreement could be terminated by either the customer or the funeral home at any time prior to the beneficiary's death if any of the following conditions are met: "(1) You checked the "Revocable box" on the front of this agreement and; (2) You or the beneficiary move and reside outside the Commonwealth of Pennsylvania."

² More specifically, Thomas Blackburn (Blackburn), counsel to the Board, received an e-mail from the Honorable Michael K. Hanna, State Representative (Representative Hanna), who stated that a constituent funeral director had been approached by a potential client who had (Footnote continued on next page...)

communications between the Board and the state representative, on January 10, 2003, Bean filed a petition for review in the nature of a declaratory judgment³ action in this Court's original jurisdiction seeking a declaration that the Board could not interfere and direct that irrevocable pre-need agreements were subject to rescission at the request of the customer who had agreed to the terms of the agreement. In response, the Board filed preliminary objections alleging that this Court did not have original jurisdiction and that the case was not ripe for review as there was no case or controversy.

Because we had jurisdiction over the declaratory judgment action but believed that this was an area within the Board's expertise, with the agreement of the parties, we invoked the doctrine of primary jurisdiction and referred the

(continued...)

previously entered into a pre-need contract with another funeral director but now wanted to transfer the funds to the constituent funeral director and the originating funeral director refused to transfer the funds. Representative Hanna requested the Board's opinion regarding the refusal. Blackburn advised him that "the Board believes that all pre-need funds belong to the customer, and not to the funeral director, until the time of death and services are provided. Also, despite any contrary language...[in] the contract, while the contract may be irrevocable as to the use of the funds, it is revocable as to which funeral director or funeral home is to provide services. Accordingly, a pre-need customer may rescind a pre-need contract and demand the funeral director to forward the entire principal and all earnings to date to a subsequent funeral home for a pre-need contract with that subsequent funeral director. With the exception of any reasonable arrangement fees which may not be finally collected until after the customer's death, a funeral director may not retain pre-need funds after the customer has rescinded the pre-need contract..." Blackburn stated the Board's conclusions were based on Section 13(c) of the Funeral Director Law, Act of January 14, 1952, P.L. (1951), 1898, *as amended*, 63 P.S. §479.13(c), and the Board's regulations at 49 Pa. Code §13.224(a) and 13.226.

³ See the Declaratory Judgments Act, 42 Pa. C.S. §§7531-7541.

primary legal question involved to the Board. As part of that order, we directed the Board to hold an administrative hearing for the purpose of addressing whether a customer could rescind an irrevocable pre-need agreement and to issue an adjudication within 30 days. More specifically, the order required the Board to address:

Whether, under the current law, a pre-need customer may, for any reason, rescind an irrevocable pre-need agreement and demand the funeral director to forward the entire principal and the earnings to date to a subsequent funeral director for a pre-need contract with the subsequent director, even if the initial pre-need contract expressly provides that it shall be irrevocable and non-cancelable except for the three-day right-of-rescission provided for under the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-7?

The Board held a timely hearing on the matter. Then, relying on Section 13(c) of the Funeral Director Law, 63 P.S. §479.13(c), and its regulations found at 49 Pa. Code §§13.224(a) and 13.226, the Board concluded that a customer could rescind an irrevocable pre-need agreement reasoning that because a funeral director who entered into a pre-need contract with a customer and received funds in advance acted as a fiduciary or a trustee of the funds received, the funds remained the property of the consumer until the services were provided. It also reasoned that neither the Funeral Director Law nor the Board's regulations prohibited the transfer of those funds to another funeral director by the customer to provide those services. Bean then filed a petition for review with this Court appealing that determination and arguing that the Board erred in holding that a customer could rescind an irrevocable pre-need agreement. The Board, reneging on the agreement

and representation it made to the Court, maintained that there was no controversy and this Court lacked subject matter jurisdiction to hear the matter. This appeal by Bean followed.⁴

I.

Initially, we must address the Board's position that our order referring the matter to the Board was in error because no actual controversy existed, and the doctrine of primary jurisdiction remanding the matter to the Board for consideration was improperly invoked.

This matter originally came before the Court as a request for declaratory action⁵ in which Bean alleged that there was a controversy because the Board had indicated to a state representative that the pre-need agreements were rescindable, and because Bean had been contacted by a client to rescind an irrevocable pre-need agreement which he believed was irrevocable under the contract which the Board had previously approved. Preliminary objections were filed and the Board agreed to an order by this Court that the matter be referred to the Board, which, by doing so, essentially conceded that there was a controversy to

⁴ Our scope of review of the Board's decision is limited to determining whether constitutional rights have been violated, whether findings of fact are supported by substantial evidence and whether errors of law have been committed. *Firman v. Department of State, State Board of Medicine*, 697 A.2d 291 (Pa. Cmwlth. 1997), *petition for allowance of appeal denied*, 550 Pa. 722, 706 A.2d 1215 (1998).

⁵ Declaratory relief may be granted for the purpose of affording relief from uncertainty and insecurity regarding legal rights, status and other relations. *Faldowski v. Eighty Four Mining Co.*, 725 A.2d 843 (Pa. Cmwlth. 1998).

be resolved. By acquiescing to this Court's order to hold a hearing on the issue of the revocability of the pre-need agreement rather than appealing that order, the Board agreed that there was a controversy and waived the argument it now makes. Not only did the Board waive that argument, but by its letter to the state representative indicating that the irrevocable pre-need agreements were rescindable, it created doubt in an area that it was charged to administer, and neither funeral directors nor customers know how to conduct their affairs. All of this is confirmed by the adjudication it issued under the consent order.⁶

As to the Board's argument that we improperly invoked the doctrine of "primary jurisdiction," "primary jurisdiction" is a judicially created doctrine that allows courts to make a workable allocation of business between themselves and

⁶ If Bean had not returned the money, he could have been subject to discipline under Sections 11 and 17 of the Funeral Director Law, 63 P.S. §§479.11 and 479.17 (pertaining to suspension/revocation of license and penalties, respectively.) Although Bean has yet to be disciplined, the record is clear that Bean has already received at least one demand from a customer that money paid pursuant to an irrevocable pre-need agreement be returned and the same demand has been made of another funeral director as evidenced by the inquiry of Representative Hanna. This Court has previously determined that:

If differences between the parties concerned, as to their legal rights, have reached the state of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.

Mid-Centre County Authority v. Boggs, 384 A.2d 1008, 1011 (Pa. Cmwlth. 1978). Because litigation for the return of the pre-paid funds is a distinct possibility as the next logical step for dissatisfied customers, a controversy does, in fact, exist.

agencies responsible for the regulation of certain industries, and arises where the original jurisdiction of the court is being invoked to decide the merits of the controversy. Rather than exercising its own jurisdiction, the Court declines jurisdiction because it is proper to defer to the administrative agency's jurisdiction. Primary jurisdiction is exclusive jurisdiction because the agency has jurisdiction over the cause of action to which a decision of the court is relevant, and the jurisdiction of the court will extend to the remaining issues and the relief to be granted. Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964).

Although the primary jurisdiction doctrine was originally a federal doctrine that was established by the United States Supreme Court in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, (1907), our Supreme Court adopted it in *Weston v. Reading Co.*, 445 Pa. 182, 282 A.2d 714 (1977), and further explained it in *Elkin v. Bell Telephone of Pa.*, 491 Pa. 123, 132-133, 420 A.2d 371-376 (1980), as follows:

The principles of the doctrine of primary jurisdiction are well settled. The United States Supreme Court "...recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge. The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed." The doctrine "...requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." (Citations omitted.)

Our Supreme Court went on to explain its effect, stating:

It is equally important to realize what the doctrine is not—it is not simply a polite gesture of deference to the agency seeking an advisory opinion wherein the court is free to ignore the agency's determination. Rather, once the court properly refers a matter or a specific issue to the agency, that agency's determination is binding upon the court and the parties (subject, of course, to appellate review through normal channels), and is not subject to collateral attack in the pending court proceeding. "The common law doctrine of *res judicata*, including the subsidiary doctrine of collateral estoppel, is designed to prevent the relitigation by the same parties of the same claim or issues." K.C. Davis, *Administrative Law*, §181.10 (1972). Once the administrative (155 Pa. Cmwlth. 93) tribunal has determined the issues within its jurisdiction, then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and outcome of the agency determination. *Feingold v. Bell of Pennsylvania*, *supra* [477 Pa. 1] at 22, 383 A.2d [791] at 801 (1977) (Pomeroy, J., dissenting).

In *Poorbaugh v. Pennsylvania Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 544 Pa. 678, 678 A.2d 367 (1996), we further explained the doctrine as follows:

Essentially, the doctrine creates a workable relationship between the courts and administrative agencies wherein, in appropriate circumstances, the courts can have the benefit of the agency's view on issues within the agency's competence. (Citations omitted.)

The doctrine of primary jurisdiction requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. (Citations omitted.) Our Supreme Court stated in *Elkin* that the doctrine serves several purposes, chief of which are the benefits to be derived by making use of the agency's special experience and expertise in complex areas with

which judges and injuries have little familiarity. *Id.* Another important consideration is the need to promote consistency and uniformity in certain areas of administrative policy. *Id.* at 133, 420 A.2d 376. Once the administrative tribunal has determined the issues within its jurisdiction, then the temporarily suspended civil litigation may continue, guided in scope and direction by the nature and outcome of the agency determination. *Elkin*, 491 Pa. at 133-34, 420 A.2d at 377.

Id., 666 A.2d at 749. Therefore, when primary jurisdiction is conferred on an administrative agency, usually the following elements are present:

1. The industry is a heavily regulated industry;
2. To resolve the matter at issue requires a special expertise that resides within the agency;
3. The issue is fact specific and ordinarily requires voluminous and conflicting testimony to resolve it;
4. The administrative agency was created to address and focus on problems similar to the one for which its primary jurisdiction is being advanced;
5. It has jurisdiction to issue the relief requested;
6. Overriding all other factors, the regulatory system will work better if the administrative agency hears the matter rather than the courts.

Because the issue of the pre-need contracts was given to the Board to regulate and would better balance the interests involved, the doctrine of primary jurisdiction permitted this Court to send the matter to the Board for a determination on that specific issue. This Court's order requiring an administrative hearing *and* an

adjudication gave the Board jurisdiction to hear the matter and now gives this Court jurisdiction to review the final adjudication of the Board. See Pa. R.A.P. 1551 (review of quasi-judicial orders shall be heard by the court on the record).

II.

As to the merits, whether the Board erred in finding that irrevocable pre-need agreements may be revoked by a customer at any time prior to death, Bean argues that determination is not supported by the Funeral Director Law or the Board's regulations. The Board argues that both the Funeral Director Law and its regulations create a trustee relationship between the customer and the funeral director, thereby allowing the customer to terminate its relationship with the funeral director at any time regardless of whether the contract is "irrevocable."

The only section in the Funeral Director Law pertaining to pre-need agreements⁷ is Section 13(c) which does not address whether irrevocable pre-need agreements may be rescinded. That section provides, in relevant part, the following:

No person other than a licensed funeral director shall, directly or indirectly, or through an agent, offer to or enter into a contract with a living person to render funeral services to such person when needed. If any such licensed funeral director shall accept any money for such contracts, he shall, forthwith, either deposit the same in an escrow account in, or transfer the same in trust *to a*

⁷ There is also a section addressing pre-need agreements relative to future interment, but that also does not address whether an irrevocable pre-need agreement may be rescinded at any time. See Section of 1 of the Funeral Director Law, 63 P.S. §480.1.

banking institution in this Commonwealth, conditioned upon its withdrawal or disbursement only for the purposes for which such money was accepted. (Emphasis added.)

63 P.S. §479.13(c). Similarly, nothing in the Board's regulations provide any direction or comment on pre-need agreements regarding rescission.

While the Board acknowledges that nothing in the Act or implementing regulations makes irrevocable pre-need agreements revocable, the Board argues that a trustee relationship allows for the rescission of an irrevocable agreement. It relies on the following regulations which it has issued which govern the sale and safeguard of funds for pre-arranged burial needs. 49 Pa. Code §13.224, titled "Funding and reporting of prepaid burial contracts," provides in relevant part:

(a) A funeral director shall deposit in escrow or transfer in trust to a *banking institution in this Commonwealth*, the entire amount of monies received by the funeral director under a prepaid contract for funeral services or merchandise, including additional service fees or arrangement fees.

* * *

(f) *Prepaid burial contracts or preneed contracts to be used by a funeral director shall be reviewed and approved by the Board and should reflect whether or not an additional service fee or arrangement fee is charged.* Prepaid burial contracts or preneed contracts used by a funeral director may not incorporate a contract for funeral merchandise entered into by a person or entity other than a funeral director. (Emphasis added.)

49 Pa. Code §13.226, titled "Nature and description of escrow or trust accounts for prepaid burial contracts," provides the following:

(a) Funds received for prepaid burial contracts shall be placed in an escrow or trust fund account which shall be separate and distinct from the business and personal accounts of the funeral director.

(b) If funds received by a funeral director for preneed burial contracts are deposited in a banking account which bears interest, or are invested by the trustee bank and produce earnings, the interest or earnings shall be retained in the account with the principal and shall be held, accounted for and transferred in the same manner as the principal amount, to assure delivery of the same quality of service and merchandise for which the contract was made.

(c) In the event of a sale or transfer of the business of a funeral director, pre-paid burial contracts and prepaid burial accounts shall immediately be transferred to the control of the licensee who will assume responsibility for completion of the prepaid burial contracts. The licensee-transferee shall notify the Board in writing of the licensee's willingness to accept responsibility for completion of the prepaid burial contracts.

Contrary to the Board's argument, under the Board's regulations at 49 Pa. Code §13.1, the pre-need agreements are defined as "a contract executed between a consumer and a licensed funeral director which provides that the funeral director will provide funeral merchandise and render services to the consumer upon the consumer's death." Because pre-need agreements are defined as contracts, contract principles apply. In *Empire Sanitary Landfill, Inc. v. Riverside*

School District, 739 A.2d 651 (Pa. Cmwlth. 1999), we stated that a contract had to be construed according to the meaning of its language, and:

"The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties." *Sun Co., Inc. (R & M) v. Pennsylvania Turnpike Commission*, 708 A.2d 875, 878 (Pa. Cmwlth. 1998). "The intention of the parties must be ascertained from the document itself, if its terms are clear and unambiguous." *Id.* The Court's inquiry should focus on what the agreement itself expressed and not on what the parties may have silently intended. *Delaware County v. Delaware County Prison Employees Independent Union*, 552 Pa. 184, 713 A.2d 1135 (1998). "It is not proper, under the guise of construction, to alter the terms to which the parties, whether in wisdom or folly, expressly agreed." *Id.* at 190, 713 A.2d at 1138. The law assumes that the parties chose the language of their contract carefully. *Liazis v. Kosta, Inc.*, 421 Pa. Super. 502, 618 A.2d 450 (1992).

Id., 739 A.2d at 654. While the Board contends that contract law⁸ recognizes a distinction between a purely commercial contract and one for professional services,

⁸ The Board relies on Section 367 of the Restatement (Second) of Contracts which provides:

- (1) A promise to render personal service will not be specifically enforced.
- (2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

whereby the latter will not be specifically enforced, this argument ignores that the significant portion of the pre-need agreement is not for professional services but for the merchandise to be provided, i.e., a casket, urn, vault, etc. In this case, both the revocable and irrevocable pre-need agreements are unambiguous and, specifically, on the form endorsed by SecurChoice, the customer is able to choose whether he or she wishes to enter into a revocable or irrevocable agreement by signing the appropriate box.

Even if we were to agree with the Board that trust laws apply, they would not apply in this case to create a trustee relationship between Bean and the customer. The regulations specify that the money given by the customer to Bean must be placed in escrow or trust in a banking institution, thereby making the banking institution the trustee, not Bean, and the trust is both for the benefit of Bean and the customer. Again, assuming that a trust existed, in *In re: Estate of Agostini*, 457 A.2d 861 (Pa. Super. 1983), our Superior Court held that where property of any kind is placed in the name of the donor or settler in trust for a named beneficiary, *unless a power of revocation is expressly or impliedly reserved*, the general principle of law is that such facts create a trust which is *prima facie irrevocable*. Therefore, a customer's funds for pre-need arrangements accepted in trust does not give the customer the right to rescind that agreement at any time.⁹

⁹ Because a customer may not rescind an irrevocable pre-need agreement even if a trust is created, the Board's argument comparing the funeral director/customer relationship to a attorney/client relationship where the client can discharge an attorney at any time is non-persuasive.

While we agree with the Board that by not allowing contracts to be revoked there would sometimes be serious problems created, i.e., if he or she dies in another location in Pennsylvania far away from where the first funeral director is located, not only is there is nothing in the Funeral Director Law or the implementing regulations that allows the Board to change irrevocable contracts to revocable ones when it has approved the contracts, but that is not a rationale for making all contracts revocable.¹⁰ Consequently, the Board erred in determining that the Funeral Director Law and its regulations allow customers to rescind irrevocable pre-need agreements.

Accordingly, the decision of the Board is reversed.

DAN PELLEGRINI, JUDGE

President Judge Colins concurs in result only.

¹⁰ See Section 5 of the Funeral Director Law, 63 P.S. §480.5, which allows for the revocation of a pre-need agreement if the customer moves out of state prior to his or her death.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL WALKER, ERNIE HEFFNER, :
JEFFERSON MEMORIAL FUNERAL :
HOME and BETTY FREY, :
Plaintiffs :
:

v. :

Docket No. :

JODI FLITTON, JOSEPH A. FLUEHR, III, :
ANDREW MAMARY, JANICE :
MANNAL, GARY L. MORRISON, :
MICHAEL D. MORRISON, DONALD J. :
MURPHY and JAMES O. PINKERTON, :
Defendants :

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U.S. DEPARTMENT OF JUSTICE

COMPLAINT

1. INTRODUCTION

1. Plaintiffs' claims arise out of a dispute over the role that persons not licensed as funeral directors can play in selling financial packages that cover the funeral expenses of the insured. The crux of that dispute involves the issue of whether persons who are not licensed as funeral directors may provide potential customers accurate information regarding funeral services and merchandise. Plaintiffs claim that by prohibiting anyone who is not licensed as a funeral director from providing information to others regarding funeral services and merchandise, Defendants, members of the State Board of Funeral Directors, and, in most cases, direct competitors of Plaintiffs, have violated Plaintiffs' right to freedom of speech under the First Amendment. Plaintiffs also claim that Defendants have violated their First Amendment

right to freedom of speech by limiting the right of licensed funeral directors to share accurate information about the funeral services and merchandise which they provide. Defendants' restraints apply to price information which is required by federal law to be provided to anyone who seeks it. Those restraints also apply to price and other information which is already available to the public from a number of different sources. Plaintiffs believe that Defendants, who are competitors of Plaintiffs, took these actions based solely on their own self interest in limiting their competition. Plaintiffs bring this action pursuant to 42 U.S.C. §1983 to enjoin the continued violation of their Constitutional Rights.

2. THE PARTIES.

2. Plaintiff Michael Walker is an individual who resides at 488 Lois Drive, Pittsburgh, PA 15236.

3. Plaintiff Ernie Heffner is an individual who resides at 435 Melrie Drive, York, PA 17403.

4. Plaintiff Jefferson Memorial Funeral Home ("Jefferson") is a licensed funeral home located at 301 Curry Hollow Road, Pittsburgh, PA 15236.

5. Plaintiff Betty Frey is an individual who resides at 2064 Aslan Drive York, PA 17404.

6. Defendant Jodi Flitton, Esq., is a member of the Pennsylvania State Board of Funeral Directors with her principal place of business at 132 Kline Plaza, Harrisburg, PA 17104.

7. Joseph A. Fluehr, III, is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 800 Newtown-Richboro

Road, Richboro, PA 18954.

8. Andrew Mamary is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 59 Parrish Street, Wilkes-Barre, PA.18702.

9. Janice Mannal is a member of the Pennsylvania State Board of Funeral Directors with her principal place of business at 6925 Frankford Avenue, Philadelphia, PA 19135.

10. Gary L. Morrison is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 825 Stockbridge Drive,Erie, PA 16505.

11. Michael D. Morrison is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 110 Petroleum Street, Oil City, PA 16301.

12. Donald J. Murphy is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 348 N. 24th Street, Camp Hill, PA 17011.

13. James O. Pinkerton is a member of the Pennsylvania State Board of Funeral Directors with his principal place of business at 1014 California Avenue., Pittsburgh, PA 15202.

14. Defendants are sued in their individual capacities.

3. JURISDICTION AND VENUE

15. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 and 1343(3) because Plaintiffs seek to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

16. Venue is proper in this Court pursuant to 28 U.S.C. §1391(b) because the events giving rise to the claim occurred in Harrisburg, Pennsylvania.

4. FACTUAL BACKGROUND

17. Plaintiff Walker is a licensed insurance agent who sells life insurance policies that cover the funeral expenses of the insured (“funeral insurance”). He is not licensed as a funeral director by the Commonwealth of Pennsylvania.

18. Funeral insurance policies are those which are purchased by living people for the purpose of funding their own funeral.

19. Plaintiff Betty Frey is an employee of Preneed Associates Inc. whose duty is to sell merchandise and financial packages intended to finance funeral services sold by Heffner Funeral Home.

20. Plaintiff Heffner is a licensed funeral director who sells pre-need funeral services which are to be funded through irrevocable trusts sold by Plaintiff Frey.

21. Pre-need funeral services and merchandise (“pre-need plans”) are funeral services and goods which are purchased by or on behalf of a person still living.

22. Plaintiff Jefferson is a licensed funeral home that sells pre-need funeral services and merchandise which are to be funded by funeral insurance policies sold by Plaintiff Walker.

23. Defendants, acting under color of state law, have enacted the following resolution (the “Resolution”):

The State Board of Funeral Directors believes that the showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for any commercial purpose whatsoever, except as may be specifically necessary to comply with regulations of the Federal Trade Commission, for funeral services needed for a person then living, constitutes the practice of funeral directing by engaging in pre-need sales. Section 13(a) of the [Law] limits this practice to licensed funeral directors. The Board may consider it to be unprofessional conduct for any funeral director to authorize or permit any such activity constituting the practice of funeral directing.

24. In addition, Defendants, acting under color of state law, have issued two adjudications (the “Adjudications”) finding that the distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for any commercial purpose whatsoever (except as may be

specifically necessary to comply with regulations of the Federal Trade Commission), for funeral services needed for a person then living, constitutes the practice of funeral directing.

25. In one of those Adjudications, Defendants held that one not licensed as a funeral director by the Commonwealth of Pennsylvania is guilty of the unlicensed practice of funeral directing if, for a commercial purpose, he or she participates in the distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for funeral services needed for a person then living. Based on that holding, Defendants imposed a substantial fine.

26. In the other adjudication, Defendants held that a funeral director who, for a commercial purpose, assisted a person not licensed as a funeral director to distribute or summarize any price list of a specific funeral home or explain the funeral services or merchandise available from any specific funeral home whatsoever for funeral services needed for a person then living was guilty of aiding and abetting the unlicensed practice of funeral directing.

27. In neither of the Adjudications did Defendants make an inquiry into whether the information conveyed by the unlicensed insurance agent or the funeral director was true or false.

28. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, Plaintiffs Walker and Frey would meet with potential customers and show them price lists for funeral services and merchandise from specific funeral homes and also describe and explain those services and merchandise to those potential customers.

29. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, it is likely that at the conclusion of the discussions described

Paragraph Twenty-eight (28) above, many potential customers would decide which funeral services and merchandise they required and arrange a method of payment for those services and merchandise with Plaintiffs Walker and Frey in the form of funeral insurance or some other method of payment sufficient to pay for the services and merchandise selected.

30. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, after the method of financing had been purchased, Plaintiff Frey would then arranged with Plaintiff Heffner, or another funeral home selected by the customer, a contract to provide the selected services and merchandise for an amount equal to or less than the amount of the financing purchased.

31. But for the adoption of the aforesaid Resolution and the issuance of the Adjudications described above, after the method of financing had been purchased, Plaintiff Walker would then arrange with Plaintiff Jefferson or another funeral home selected by the customer, a contract to provide the selected services and merchandise for an amount equal to or less than the amount of the insurance.

32. Under the Resolution and the Adjudications, the acts described in Paragraphs Twenty-eight (28) through Thirty-one (31) above would constitute the unlicensed practice of funeral directing by Plaintiffs Walker and Frey and aiding and abetting the unlicensed practice of funeral directing by Plaintiffs Heffner and Jefferson.

33. In light of the Resolution and the Adjudications, Plaintiffs Walker and Frey are afraid to engage in the showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services and merchandise available from

any specific funeral home. They assume that if they do so they will be prosecuted and found guilty by Defendants of the unlicensed practice of funeral directing.

34. In light of the Resolution and the Adjudications, Plaintiffs Heffner and Jefferson are afraid to share any information with Plaintiffs Walker or Frey or other persons who are not licensed as funeral directors regarding the funeral services and merchandise which Plaintiff Heffner provides. They are afraid that he will be prosecuted and found guilty by Defendants of aiding and abetting the unlicensed practice of funeral directing by Plaintiffs Walker and Frey.

35. Federal Trade Commission's Funeral Rule, 16 C.F.R. §453.2, requires funeral directors to disclose their prices whenever asked without regard to who makes the request and the purpose of the request. A failure to do so is deemed an unfair or deceptive trade practice.

36. Defendants' Adjudications that it is illegal for a funeral director to provide accurate price information to an insurance agent who then uses that accurate information to sell insurance is inconsistent with that Rule.

37. Defendants' restraints appear to apply to accurate information which many funeral homes make available to the general public, including Plaintiffs Walker and Frey, by publishing that information on the internet and in other media.

38. Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton are all owners and/or operators of licensed funeral homes and all are licensed in Pennsylvania as funeral directors.

39. Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton are all members of the Pennsylvania Funeral Directors Association ("PFDA").

40. As members of PFDA, they share in any revenues generated by PFDA's wholly owned for-profit subsidiary, Pennsylvania Funeral Services Corporation.

41. PFDA is an organization which exists to inform and educate the funeral director, public and government about the value of funeral service and licensed funeral directors on a pre-need, at need and post-need basis.

42. To this end, the PFDA markets and sells pre-need plans to the public through several entities, including the Pennsylvania Funeral Services Corporation.

43. The pre-need plans marketed and sold by the PFDA through the Pennsylvania Funeral Services Corporation include SecurChoice and Unichoice.

44. As part of the process of selling pre-need plans, PFDA also sells life insurance intended to fund those plans.

45. PFDA uses licensed funeral directors who are also licensed insurance agents to sell those policies.

46. PFDA is a direct competitor of Heffner and Jefferson via its agents and members.

47. Defendant Mamary is a direct competitor of Heffner.

48. By enacting resolutions and issuing adjudications which punish those who are not licensed as funeral directors for discussing pre-need plans with the public, Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton have acted solely on the basis of their own self interest in limiting their competition.

49. By enacting resolutions and issuing adjudications which punish those funeral directors who share information about the funeral services and merchandise which they

offer with persons, such as Plaintiffs Frey and Walker, who are not licensed as funeral directors, Defendants Fluehr, Mamary, Mannal, Michael Morrison and Pinkerton have acted solely on the basis of their own self interest in limiting their competition.

V. LEGAL CLAIMS

50. The showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home is speech which concerns lawful activity, the purchase of insurance and the purchase of funeral services and merchandise.

51. The showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home is speech protected by the First Amendment.

52. Defendants have acted to bar such speech without regard to whether it is true or misleading.

53. Defendants have no substantial interest in regulating such speech.

54. Defendants' limitation on such speech serves no valid governmental interest.

55. To the extent that their purpose is to prevent false and misleading speech, Defendants have failed to tailor their action to accomplish that goal.

56. Defendants' limitation on such speech is more extensive than is necessary to serve any valid governmental interest.

57. In taking the actions complained of above, Defendants have acted solely on the basis of their own self interest in limiting their competition.

58. By prohibiting Plaintiffs Walker and Frey from showing, distributing or summarizing any price list of a specific funeral home or explaining of the funeral services or merchandise available from any specific funeral home, Defendants, acting under color of state law, have chilled Plaintiffs Walker and Frey from exercising their right to free speech under the First Amendment and, therefore, have violated the First Amendment to the United States Constitution.

59. By prohibiting Plaintiffs Heffner and Jefferson from sharing any information with Plaintiffs Frey and Walker and other persons who are not licensed as funeral directors regarding the funeral services and merchandise which Plaintiffs Heffner and Jefferson provides, Defendants, acting under color of state law, have chilled Plaintiffs Heffner and Jefferson from exercising their right to free speech under the First Amendment and, therefore, have violated the First Amendment to the United States Constitution.

60. In taking the actions complained of above, Defendants have acted solely on the basis of their own self interest in limiting their competition.

61. Plaintiffs bring this action under 42 U.S.C. §1983 to enjoin the continuing violation of their rights under the First Amendment.

WHEREFORE, Plaintiffs respectfully request that this Court enjoin Defendants from taking any action that would limit their right to disseminate accurate information regarding funeral services and merchandise, including the cost thereof.

Respectfully submitted,

Allen C. Warshaw, Esq.

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(717) 237-5500

Dated:

Attorneys for Plaintiffs

HBG83110.3

CERTIFICATE OF SERVICE

On this 27th day of November, 2001, I, Patricia Z. Glusko, a secretary in the law offices of Duane, Morris & Heckscher LLP, hereby certify that I have served this day true and correct copies of the attached document in the above-captioned case, by depositing same in the United States First Class Mail, postage prepaid, in Harrisburg, Pennsylvania, to those persons and addresses indicated below, along with two copies of a Waiver of Service of Summons:

Jodi Flitton, Esq.
Pennsylvania State Board Of Funeral Directors
132 Kline Plaza
Harrisburg, PA 17104

Joseph A. Fluehr, III
Pennsylvania State Board Of Funeral Directors
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Richboro, PA 18954

Andrew Mamary
Pennsylvania State Board Of Funeral Directors
59 Parrish Street
Wilkes-Barre, PA 18702

Janice Mannel
Pennsylvania State Board Of Funeral Directors
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Philadelphia, PA 19135

Gary L. Morrison
Pennsylvania State Board Of Funeral Directors
825 Stockbridge Drive
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Michael D. Morrison
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Donald J. Murphy
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Pennsylvania State Board Of Funeral Directors
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Office of the Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

Patricia Z. Glusko

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL WALKER, ERNIE :
HEFFNER, JEFFERSON MEMORIAL : Docket No. 4:01-02252
FUNERAL HOME and BETTY FREY, : (Judge Jones)
Plaintiffs, :
 :
 :
v. :
JODI FLITTON, JOSEPH A. FLUEHR, III :
MICHAEL J. YEOSOCK, JANICE :
MANNAL, ANTHONY SCARANTINO, :
MICHAEL D. MORRISON, DONALD J. :
MURPHY, and JAMES O. PINKERTON, :
Defendants, :

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REVIEW COMMISSION

MEMORANDUM AND ORDER

January 13, 2005

Before us is a Motion for Summary Judgment filed by the Defendants, Jodi Flitton, Joseph A. Fluehr, III, Andrew Mamary, Janice Mannal, Gary L. Morrison, Michael D. Morrison, Donald J. Murphy, James O. Pinkerton, (“Defendants”) seeking dismissal of the case as moot (doc. 34).¹ Plaintiffs Michael Walker, Ernie Heffner, Jefferson Memorial Funeral Home, and Betty Frey (“Plaintiffs”), have also filed a Motion for Summary Judgment (doc. 30).

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

¹These Defendants either are or were members of the Pennsylvania Board of Funeral Directors and are named parties in their capacity as members of this Board.

In an Order dated October 28, 2004 we granted Plaintiffs' Motion to substitute as Defendants the individuals who were no longer members of the Pennsylvania State Board of Funeral Directors (the "Board") with the new members of the Board. Thus, Andrew Mamary and Gary L. Morrison have been replaced as named defendants by their successors, Michael J. Yeosock and Anthony Scarantino.

For the reasons stated herein, we will deny the Defendants' Motion for Summary Judgment insofar as we hold that this case is not moot, because it is a facial challenge to a state statute, as interpreted by the Board. We will defer judgment on the merits of the case as argued within the parties' motions for summary judgment and the submissions of the parties related thereto.

PROCEDURAL HISTORY:

On November 27, 2001, Plaintiffs filed a Complaint against the Defendants, who are all present or former members of the Board. The Defendants filed a Motion to Dismiss, which this Court granted on September 24, 2002. Following a reversal by our Third Circuit Court of Appeals, this Court denied Defendants' Motion to Dismiss on October 7, 2003. Discovery followed, which included depositions of certain Board members. The Defendants filed their Motion for Summary Judgment on July 30, 2004. The Plaintiffs responded with a Brief in

Opposition on August 31, 2004. The Defendants filed a Reply Brief on September 2, 2004. The Plaintiffs filed a Motion for Summary Judgment on July 29, 2004. The Defendants filed a Brief in Opposition on August 16, 2003. The Plaintiffs filed their Reply Brief on September 15, 2004. We requested oral argument on the mootness issue raised in Defendants' Motion for Summary Judgment, and this was held on December 23, 2004.²

STANDARD OF REVIEW:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED .R. CIV. P. 56(c); see also Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). The party moving for summary judgment bears the burden of showing "there is no genuine issue for trial." Young v. Quinlan, 960 F.2d 351, 357 (3d Cir. 1992). Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982).

Initially, the moving party has a burden of demonstrating the absence of a

²We will note that as a result of counsels' professionalism and high degree of preparation, oral argument was expanded and covered a number of issues beyond the mootness question. This exercise was most helpful, and therefore greatly appreciated by the Court.

genuine issue of material fact. Celotex Corporation v. Catrett, 477 U.S. 317, 323 (1986). This may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. Id. at 325.

Federal Rule of Civil Procedure 56 provides that, where such a motion is made and properly supported, the non-moving party must then show by affidavits, pleadings, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue for trial. FED. R. CIV. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in its favor. Celotex Corp., 477 U.S. at 322-23.

It is important to note that "the non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact." Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994) (citation omitted). However, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993)(internal citations omitted).

Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(emphasis in original). "As to materiality, the substantive law will identify which facts are material." Id. at 248. A dispute is considered to be genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

STATEMENT OF RELEVANT FACTS:

This case involves the extent to which non-licensed employees or agents of a licensed funeral director in Pennsylvania can show, distribute, or summarize price information regarding funeral services or merchandise. Plaintiff Ernie Heffner is a licensed funeral director. Plaintiff Michel Walker is a licensed insurance salesman who sells life insurance policies that cover funeral expenses. Finally, Betty Frey is an non-licensed employee of Heffner. Together, they are requesting declaratory relief in order to prevent the Board from taking any actions that limit Plaintiffs' rights to disseminate information about funeral services and merchandise. Defendants now argue that because Plaintiffs' action is based upon a certain resolution passed by the Board, and since that resolution has been rescinded, the claim has been rendered moot. Plaintiffs counter that their dispute is predicated on

something more than the now withdrawn resolution.

The Board's primary responsibilities include forming the necessary rules and regulations of funeral directing in Pennsylvania, pursuant to the Pennsylvania Funeral Director Law. See 63 P.S. § 479. On September 1, 1999 the Board passed a non-binding resolution that stated:

The State Board of Funeral Directors believes that the showing, distribution or summarization of any price list of a specific funeral home or any explanation of the funeral services or merchandise available from any specific funeral home for any commercial purpose whatsoever, except as may be specifically necessary to comply with Regulations of the Federal Trade Commission, for funeral services needed for a person then living, constitutes the practice of funeral directing by engaging in pre-need sales. Section 13(a) of the [Funeral Director] Law limits this practice to licensed funeral directors. The Board may consider it to be unprofessional conduct for any funeral director to authorize or permit any such activity constituting the practice of funeral directing.

Def. St. of Material Facts at 8 (the "Resolution"). The application by the Board of this Resolution is at the heart of Plaintiffs' challenge. In their Complaint, the Plaintiffs allege that the Resolution impermissibly violates the First Amendment to the U.S. Constitution (in particular, the Central Hudson test for commercial speech). See Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980)(holding that the First Amendment protects commercial speech from unwarranted governmental regulation, albeit with lesser protections than other

speech).

During discovery and as noted, the Board repealed the Resolution, leading to the mootness argument Defendants now interpose. The Plaintiffs' response to this argument is twofold. First, they argue that a case or controversy exists because individuals similar to the Plaintiffs could argue that there still exists a threat of prosecution from the Board, despite the fact that the Resolution has been repealed. Second, they argue that the Resolution's rescission did not moot the litigation because many Board members believe that the Resolution remains an accurate statement of the law. Thus, even though the Resolution no longer exists, the Plaintiffs fear that it remains the Board's actual interpretation of the law, and thus the First Amendment conduct of individuals such as the Plaintiffs will remain chilled for fear of being cited for the same activities.

According to Pennsylvania law, "[n]o person other than a licensed [funeral] director shall, directly or through an agent, offer to enter into a contract with a living person to render funeral services to such a person..." 63 P.S. § 479.13(c). It is clear to us that the Resolution was an attempt by the Board to interpret this statute as it relates to conduct engaged in by the Plaintiffs. It now devolves to us to determine whether Plaintiffs' claim is obliterated by the repeal of the Resolution. For the reasons set forth, we find that it is not.

DISCUSSION

We will resolve in this opinion the question of whether the Plaintiffs do in fact have standing, and thus will not pass judgment on whether they have brought a successful First Amendment challenge. See National Council for Improved Health v. Shalala, 122 F.3d 878, 881 (10th Cir. 1997)(holding that when there is a First Amendment challenge, standing is a separate inquiry from whether there exists a constitutional violation). As noted, that analysis will be deferred.

The parties clearly disagree as to what conduct would be prohibited by the Board under its current interpretation of Pennsylvania law. The Plaintiffs fear that if they or others similarly situated were to go forward with the same conduct as engaged in by them prior to the passage of the Resolution, the funeral director for whom they were selling could face serious disciplinary action from the Board.³ Thus, they seek a court ruling as to whether the Board can constitutionally restrict their conduct. As noted, the Defendants respond by arguing that there is no dispute pending for the Court to resolve and that the case has accordingly been rendered moot. The Defendants' inability to agree on what conduct by Plaintiffs

³From the record before us and based on the admissions by the parties, it is clear that the Board has no jurisdiction to sanction individuals who are not licensed funeral directors. The Plaintiffs in this action include individuals who are not licensed funeral directors but who intend to disseminate information on behalf of Plaintiff Heffner, who is a licensed funeral director in Pennsylvania, as noted.

might trigger disciplinary action by the Board is telling as it relates to the issue of mootness.

Neither party disputes that the U.S. Constitution allows this Court to resolve only live “cases and controversies.” U.S. CONST. art. III, § 2. Specifically, to satisfy this requirement, a case must present: “a legal controversy that (1) is real and not hypothetical, (2) [] that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) [that] sharpen[s] the issues for judicial resolution.” Armstrong World Indus. by Wolfson v. Adams, 961 F.2d 405, 410 (3d Cir. 1992).⁴ In Armstrong, the court was asked to invalidate a Pennsylvania anti-takeover statute that was not applicable to the Plaintiffs, as a takeover had not yet been attempted. The Third Circuit held that this challenge was improper because the repealed statute was no longer pending. Id.

A defendant has the burden of showing that a particular case is moot. Sutton v. Rasheed, 322 F.3d 236, 248 (3d Cir. 2003). Since this litigation began in 2001, two events occurred that the Defendants argue render the case moot. The first was the Commonwealth Court’s decision in Ferguson v. Pennsylvania State Board of Funeral Directors, 768 A.2d 393 (Pa. Commw. Ct. 2001), which

⁴These requirements continue throughout the entirety of the litigation, from pre-trial proceedings through the final appeals. See Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990).

Defendants argue makes any resolution of the Board irrelevant because it mandates the Board's conduct in similar situations.⁵ The second was the repeal of the Resolution. As a result of the repeal by the Board, the Defendants argue that its legality can no longer be contested, as it has ceased to exist.

The Plaintiffs have raised, inter alia, a challenge pursuant to the First Amendment under the Central Hudson test. There are two types of First Amendment challenges: facial and as applied challenges. An as applied challenge contends that a statute is unconstitutional as applied to a particular factual circumstance. See e.g. Belitskus v. Pizzigrilli 343 F.3d 632, 648 (3d Cir 2003). A facial challenge involves conduct that a statute is unconstitutionally overbroad regardless of how the statute is applied. An overbroad statute is one that is designed to burden or punish activities that are not constitutionally protected but the statute includes within its scope activities that are protected by the First Amendment. See e.g. Hill v. City of Houston, 764 F.2d 1156, 1161 & n.16 (5th Cir. 1995). A facial challenge is permitted following a

showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' Broadrick v. Oklahoma, 413 U. S. 601, 615 (1973)[. A successful

⁵Because Ferguson did not deal with the constitutional issues raised in the case sub judice, and based on the Third Circuit's mandate in reversing our prior determination, this argument by Defendants is without merit.

facial challenge] suffices to invalidate all enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression ...

Virginia v. Hicks, 539 U.S. 113, 118-19, 123 S. Ct. 2191 (2003)(Scalia, J.)(internal citations omitted). Facial challenges are used by courts when the intended law will chill constitutionally protected speech even if evidence of conduct violating the statute is not before the court. Id. A facial challenge is particularly useful when there is a significant possibility of criminal or other punishments if the law is violated.

The purpose of a facial challenge is to prevent legal conduct from being chilled by an unconstitutional statute. Id. (“Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.”(internal citations omitted)).

As Justice Scalia explained in Hicks, an overbroad challenge is not to be used if the chilling effect of the law is overwhelmed by the need to enforce that law.

Id. (“there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law”). In **Hicks**, the plaintiff challenged a local housing authority’s ability to prosecute him for trespassing, after he had been evicted due to his drug convictions. The Court held that the statute allowing the housing authority to prosecute the plaintiff for trespassing was not unconstitutionally overbroad because to invalidate it under a facial challenge would result in significant social costs in exchange for a limited protection of speech.

In contrast with **Hicks**, we have before us a facial challenge to the Funeral Director Law as interpreted by the Board which, if the Plaintiffs’ allegations are true, would significantly restrict commercial speech by eliminating their ability to solicit a large avenue of potential business. Based on their analysis of the Board’s public expressions, as well as statements by certain individual members of the Board made during discovery in this litigation, Plaintiffs contend that it is unclear to them whether Heffner would be sanctioned by the Board if Walker and Frey, who as noted are his non-licensed employees or agents, attempted to disseminate certain information regarding funeral services or merchandise. Thus, as it currently stands, their speech is being chilled due to an articulated fear of the Board’s possible actions.

The statements made by various Board members during depositions regarding how they currently interpret the Funeral Director Law certainly provide a basis for Plaintiffs' apprehension. For example, Board member Janice H. Mannal stated, "I concluded that [the Funeral Director Law] was pretty clear ... that only a licensed funeral director should be presenting material." (Mannal Dep. at 11 (doc. 48)). Mannal also stated that the now-repealed Resolution was nonetheless a proper statement of the law. (*Id.*). Another Board member, Joseph A. Fleuhr, III, stated that he primarily voted to rescind the Resolution so that we would render this action moot. (Fleuhr Dep. at 17 (doc. 48)). It is clear to us that there is every reason to believe that the Board, despite having rescinded the Resolution, still considers the Plaintiffs' conduct in question to be prohibited by the Pennsylvania Funeral Director Law. Unquestionably then, Plaintiffs' conduct is chilled because Heffner faces a direct threat to his livelihood in the event of Board action.

Were we to rule that this action is moot, we would place Plaintiffs in an untenable circumstance. Their choices would be to either continue to refrain from engaging in the conduct in question to the detriment of their business for fear of being prosecuted by the Board, or to proceed to disseminate the information and thus face the risk of a Board prosecution. Among the purposes of a facial challenge is to remove Hobbsian choices of this type. Moreover, we would be

remiss if we did not admonish Defendants that in our view their post hoc attempt to eliminate Plaintiffs' claim, by withdrawing the Resolution, gave the appearance of being both clumsy and disingenuous.

While we believe that the Board could promulgate clearly drafted guidelines or other resolutions which might serve to obviate the necessity of our deciding this challenge on the merits, its actions to this point have not demonstrated either clarity or continuity, nor have they indicated a willingness by the Board to speak in a more cogent fashion on this issue. In the absence of any formal action by the Board in the interim, which we assume the parties will bring to our attention, we will fulfill our mandate and render a timely decision on the merits.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Defendants' Motion for Summary Judgment (doc. 34) is DENIED to the extent that we find that Plaintiffs' claims are not moot. Judgment on the remaining aspects of the Defendants' Motion is DEFERRED.
2. A ruling on Plaintiffs' Motion for Summary Judgment (doc. 30) is DEFERRED.

s/ John E. Jones III
John E. Jones III
United States District Judge



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Hand Delivered - 3/14/05

March 9, 2005

Michelle Smey, Administrator
State Board of Funeral Directors
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Harrisburg, PA 17105-2649

PENNSYLVANIA
PHILADELPHIA
PITTSBURGH
HARRISBURG
LANCASTER
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PRINCETON

RE: Comments of Pennsylvania Cemetery Funeral Association to Proposed Regulations of State Board of Funeral Directors

Dear Ms. Smey:

On behalf of the Pennsylvania Cemetery Funeral Association ("PCFA"), allow this correspondence to serve as comments of PCFA to recently proposed regulatory changes and additions to the existing set of Regulations which governs conduct involving the State Board of Funeral Directors and those who are licensed by the Board. Whereas the Regulations, as proposed, touch upon a number of different areas, the focus of our comments relates to two entirely new regulatory proposals that involve two separate but important concepts: the first of which deals with a funeral director's retention of monies paid to him and the second of which deals with funeral directors interacting in any manner with unlicensed individuals to the extent those interactions involve the provision of factual information concerning funeral merchandise or services to consumers.¹

Newly proposed subsection (13) declares that the following conduct would be "unprofessional":

(13) Retaining funds intended to pay for funeral goods and services when the funeral director and establishment have not provided any funeral goods and services or when the amount of funds retained is in excess of the value of funeral goods and services actually provided by the funeral director or establishment. A funeral director may preserve the funds for a reasonable amount of time for a person to demonstrate a legal

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¹ PCFA has also had an opportunity to review the comments of Kevin Bean, licensed funeral director and named petitioner in a proceeding before the Board. PCFA supports Mr. Bean's advocacy as set forth therein but wishes to submit a separate comment which follows herein.

Michelle Smey, Administrator
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Page 2

entitlement to receive the funds or to receive payment of funds owed to the decedent.

With all due respect to this Board, proposed subsection (13) is a clear and unequivocal affront to the Commonwealth Court of Pennsylvania and that Court's express, *en banc*, ruling which held, *inter alia*, the following:

There is nothing in the Funeral Director Law or the implementing regulations that allows the Board to change irrevocable contracts to revocable ones when it has approved the contracts...

See, Kevin M. Bean, Petitioner v. Department of State, State Board of Funeral Directors, Docket No. 1088 C.D. 2003 at Slip Opinion, p. 15.

Although subsection (13) is not couched directly in terms of the Board attempting to convert irrevocable pre-need agreements into agreements which are revocable at the will of the consumer (or next-of-kin), the transparent goal of proposed subsection (13) is to do precisely that! Indeed, it is hard to conceive of a scenario under which a funeral director would, in fact, be in possession of a consumer's "funds" unless, of course, that consumer had tendered those funds to a funeral director as part of a contractual commitment under which the funeral director agreed to perform certain services and provide certain merchandise for that consumer at the time of his or her death. For decades, this Board approved pre-need agreements pursuant to subsection (13)(c) of the Act and, time and again, it approved agreements that were irrevocable by their terms. A detailed confirmation of this fact is evidenced from the decision authored by Commonwealth Court Judge Dan Pellegrini in the aforementioned Bean decision. For whatever reason, a component of the current Board now seeks to run from its long-standing approval of irrevocable pre-need agreements and direct, instead, that regardless of its prior approval, and regardless of the consumer's willing and knowing commitment to enter into an irrevocable pre-need agreement, nevertheless, the funeral director now exposes himself or herself to charges of unprofessional conduct if he or she does not turn over monies which were received pursuant to a valid pre-need agreement and properly placed in trust with a banking institution of this Commonwealth, with the further understanding that those funds may be used only for the purpose of the pre-need agreement. See, again, subsection (13)(c).

Even assuming *arguendo* that the true motive of the current Board is to eliminate some unexplained hardship to a consumer who chooses to change his earlier executed pre-need wishes, the underlying, fundamental fact is that Commonwealth Court has already instructed this Board that such consideration, even if existing, does not provide a lawful rationale for this Board to make all irrevocable agreements revocable. Indeed, the Board's attention is directed to the final paragraph of Judge Pellegrini's *en banc* decision, wherein he notes the following:

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While we agree with the Board that by not allowing contracts to be revoked, there would sometimes be serious problems created, *i.e.*, if he or she dies in another location in Pennsylvania far away from where the first funeral director is located, not only is there nothing in the Funeral Director Law or the implementing regulations that allows the Board to change irrevocable contracts to revocable ones when it has approved the contracts, but that is not a rationale for making all contracts revocable.

Simply stated, the Board, through this Regulation, is attempting to make all pre-need contracts revocable. Indeed, all a consumer or a next-of-kin needs to do, subsequent to the consumer's execution of an irrevocable pre-need agreement, is to contract with another funeral director for the provision of services and merchandise, and then, upon completion of that, tender a notice to the funeral director who holds an approved pre-need agreement with a demand that, because that funeral director has not provided any funeral goods or services, he must return the monies. Subsection (13) violates the dictates of Commonwealth Court; it is a transparent attempt to circumvent the dictates of Commonwealth Court; and, as Commonwealth Court has made abundantly clear, there is no lawful rationale which allows this Board to, by executive fiat, declare that all irrevocable agreements are now revocable and rescindable.

Even more problematic with subsection (13) is the provision that a funeral director must return funds if they are "in excess of the value of funeral goods and services actually provided...". Again, with all due respect, this proposed Regulation would be a font for never-ending disputes between consumers, next-of-kin, and the funeral director who will battle, endlessly, as to whether the goods or services provided were or were not in excess of the value of those goods or services. Query: Who will make the decision in each instance? A Board prosecutor? The members of this Board? The 67 courts of common pleas around this Commonwealth? Simply stated, when a pre-need agreement is entered into, the funeral director commits to providing services if that contract is irrevocable and guaranteed. Either the contract is void ab initio because it was secured by fraud, duress or unconscionability or, alternatively, the contract is valid and the parties are bound by its terms. Again, as Commonwealth Court made clear time and again, this is an issue of the party's right to contract and the Board's efforts here, whatever its motive, seeks to impair, and will, in fact, impair the party's obligations under contract. That is a violation of both the state and federal Constitutions and cannot withstand legal scrutiny.

Even from a policy perspective, let's assume that a consumer enters into a pre-need agreement with a funeral director. Let's assume further that the consumer entered into the pre-need agreement because he or she did not want his next-of-kin fighting over how and in what manner his remains would be disposed of. Let's assume further that this consumer knows that

his next-of-kin would rather bury him in a pine box, than give him his desired full-blown ceremony and funeral as he or she wishes and has agreed to pay for. Under proposed subsection (13), unless there is an express provision in his or her Will, the consumer, who made these detailed pre-need arrangements, will have his wishes thwarted by a next-of-kin who simply directs that the consumer's deceased body be transported to a crematorium for an inexpensive cremation and a dumping of ashes without any ceremony. When viewed in this perspective, how can this Regulation be deemed in the public interest?

This brings PCFA to its next point. Regulations are not to be proposed and implemented, unless a decision has been made that a "compelling public interest" needs to be advanced. Indeed, under the "Impact" of the Proposed Rule-making" section of the proposal which appears in the Pennsylvania Bulletin, this Board acknowledges the need to reach this high standard before it decides to promulgate Regulations. Precisely what compelling public interest has now triggered which has not previously triggered over the last five decades? Simply stated, our General Assembly expressly authorized funeral directors to enter into pre-need agreements and this Board, for decades, has approved pre-need agreements which are irrevocable by their terms. There is not an iota of evidence to demonstrate that irrevocable pre-need agreements are inherently unfair or unconscionable. To the contrary, consumers benefit greatly by knowing that they have locked in a price and that their deceased body will be taken care of in a manner as they, rather than some next-of-kin, direct. If subsection (13) is adopted, it will not be more than a couple of weeks before advertisements will flourish in local newspapers urging existing pre-need customers to terminate their current agreements and to contract, instead, with another funeral director, only to have, some two years later, a third funeral director lobby that customer to leave the second funeral director and come with him or her. Preying on consumers under scenarios such as this is absurd and, frankly, it is a patent attempt by the Board to legislate out of law the future vitality of pre-need agreements. As proffered to this Board on numerous occasions, a contract whereby one party is obligated to do nothing (or forbear from nothing) is illusory, unenforceable, and, in fact, no contract at all. Subsection (13) should be stricken from the proposed Regulations and this Board should govern its actions and conduct consistent with its commitment to be bound by Commonwealth Court in the decision of Kevin Bean, as referenced above.

Turning to the second issue upon which PCFA wishes to comment, the Board, in proposed Subsection (17) declares that it is unprofessional conduct for a funeral director to aid any person or entity that the funeral director has reason to believe is attempting through unlicensed persons or entities to engage in the sale of funeral services for a person then living. In proposing this Regulation, the Board, in its "background" section of the proposal suggests that the Commonwealth Court decision of Ferguson v. State Board of Funeral Directors, 566 A.2d 670 (Pa. Cmwlth. 2001), appeal denied, 566 Pa 670, 782 A.2d 549, provides the impetus for this new regulatory provision. First, PCFA submits that Ferguson does not stand for the proposition set forth in proposed subsection (17). However, and more importantly, this Board, or more appropriately, the individual members of this Board are currently the

Michelle Smey, Administrator
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subject of ongoing litigation in the United States District Court for the Middle District of Pennsylvania at Docket No. 4:01-02252, captioned Michael Walker et al. v. Jodi Flitton, Joseph A. Fleurer, III, et al., Defendants.

At the heart of that litigation is the contention of Plaintiffs that this Board is attempting to unconstitutionally restrict individuals from disseminating accurate information regarding funeral services and merchandise, including the cost thereof. This lawsuit is not a frivolous claim and it is not in its infancy. To the contrary, despite efforts by the Board to have this suit dismissed, federal court Judge John E. Jones, III, has denied a Board motion to dismiss for failure to state a claim and he is currently contemplating cross-summary judgment motions which, if granted in favor of the plaintiffs, will affect significantly that which is proposed in subsection (17).

Notably, in the Court's most recent Order of January 13, 2005, Judge Jones noted the following:

While we believe that the Board could promulgate clearly drafted guidelines or other resolutions which might serve to obviate the necessity of our deciding this challenge on the merits, its actions to this point have not demonstrated either clarity or continuity, nor have they indicated a willingness by the Board to speak in a more cogent fashion on this issue. In the absence of any formal action by the Board in the interim, which we assume the parties will bring to our attention, we will fulfill our mandate and render a timely decision on the merits.

Slip Opinion at 14.

Rather than follow the suggestion of federal court Judge Jones, the Board, instead, has chosen to propose subsection (17) which, under any logical reading, precludes a funeral director from interacting or dealing with any non-licensed funeral director who disseminates accurate information concerning funeral merchandise or services. Perhaps stated differently, publishing subsection (17) as a proposed new dictate, constitutes a direct notification to the federal court that the Board is not about to address this matter with any concern for the First Amendment of the Constitution of the United States. Accordingly, PCFA respectfully submits that the promulgation of this Regulation (meaning subsection (17)), at a time when a federal court Judge is drafting a decision on the merits of whether the Board's directives and interpretations violate federal law is inappropriate and an affront to the federal court.

Without attempting to take a shot at the Board or any of its members, it is indeed an unusual situation where a regulatory Board would receive the type of condemnation which this Board has received from both Commonwealth Court and from the United States District Court for the Middle District of Pennsylvania. For example, in the Commonwealth Court *en banc*

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decision in Bean, Commonwealth Court concluded that this Board "renege" on an agreement and representation which the Board had made to Commonwealth Court. See, Slip Opinion at 4-5 ("The Board, renege on the agreement and representation it made to the Court, maintained that there was no controversy...")

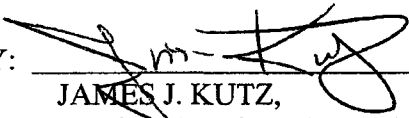
Similarly, federal court Judge Jones accused this Board of engaging in conduct which was, in his words, "both clumsy and disingenuous...". See, January 13, 2005 Memorandum and Order at 14. Our state appellate and federal courts do not use the words "renege" and "clumsy" and "disingenuous" very often when referring to members of a state regulatory board who have been nominated by the Governor and confirmed by our Pennsylvania Senate. The fact that two separate, yet highly regarded courts, within the recent past, have felt compelled to describe the Board's conduct in these terms demonstrates, in the opinion of PCFA, a need for measured reassessment of the current regulations, especially given the binding effect of the Bean decision and given the basic and fundamental understanding that our society is a society of "laws" and we should be obedient to those laws. Just as licensed funeral directors are obligated to follow the rulings of the State Board of Funeral Directors, the State Board of Funeral Directors should be obligated to following the teachings set forth in the Commonwealth Court decision in Bean and it should not attempt to circumvent its current involvement as a defendant in the Walker v. Flitton matter currently awaiting adjudication before the Honorable Judge Jones.

Subsections (13) and (17), as proposed, should be deleted from any final rule-making; thus, PCFA urges this Board to do the proper and honorable thing, thus removing these two subsections in any final rule-making.

On behalf of PCFA, I thank the Board for allowing me to share our candid, yet direct, comments on portions of the proposed Regulation.

Respectfully submitted,

POST & SCHELL, P.C.

BY: 

JAMES J. KUTZ,
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JJK/dlh

cc: PCFA Executive Board