

2639

Cooper, Kathy

From: Ernie Heffner [ernieheffner@hotmail.com]
Sent: Tuesday, October 02, 2007 11:55 AM
To: IRRC
Cc: Jewett, John H.; Wilmarth, Fiona E.; Emery, Heather; msturla@pahouse.net; mtremmel@pahouse.net; cline@pahousegop.com; dmorabito@state.pa.us; ssaylor@pahousegop.com; rvirag@ameriservfinancial.com; epetersen@ameriservfinancial.com; jkutz@postschell.com
Subject: Additional Comments RE Proposed Reg 16A-4815

RECEIVED

2007 OCT -2 PM 1:16

Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor,
Harrisburg, PA 17101

Dear Chairman Coccodrilli,

Yesterday I provided my comments on Proposed Pre-Need Regulation # 16A-4815 (Pre-Need Funeral Arrangements). The purpose of this letter is to offer a response to what I perceive to be tortured representations made by the Pennsylvania Funeral Directors Association (PFDA) in a letter to Representative Michael Sturla, Chairman, House Professional Licensure Committee dated 9.27.07, which was copied to IRRC. A copy of that letter is attached.

I continue to hope that IRRC will see fit to not approve either of the proposed pre-need regulations. Thank you for considering this additional perspective.

Sincerely,
Ernie Heffner
Heffner Funeral Chapels & Crematory
1551 Kenneth Road,
York, PA 17408
Ph. 717-767-1551

10/2/2007



HEFFNER

Funeral Chapel & Crematory, Inc.

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INDEPENDENT REGULATORY REVIEW COMMISSION

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Ernie Heffner, President
John Katora, Vice-President
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AFFILIATES**

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Everhart-Jackson-Heffner

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Beaver Ulrich

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Kniffen O'Malley

AVOCA
Kniffen O'Malley

MILTON
Ranck

ADVANCE PLANNING
Preneed Associates, Inc.

**NEW YORK STATE
AFFILIATE**

WELLSBURG
Roberts

October 2, 2007

Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor,
Harrisburg, PA 17101
Phone 717-783-5417

Submitted Via Email To: irrc@irrc.state.pa.us

RE: Response to PFDA Comments on
Proposed Pre-Need Regulation # 16A-4815 (Pre-Need Funeral
Arrangements) published 8.25.07

Dear Chairman Coccodrilli,

Yesterday I provided my comments on the above regulation. The purpose of this letter is to offer a response to what I perceive to be tortured representations made by the Pennsylvania Funeral Directors Association (PFDA) in a letter to Representative Michael Sturla, Chairman, House Professional Licensure Committee dated 9.27.07, which was copied to IRRC. A copy of that letter is attached.

I continue to hope that IRRC will see fit to not approve either of the proposed pre-need regulations. Thank you for considering this additional perspective.

Sincerely,

Ernie Heffner
Licensed Funeral Director

Copies via Email To:

- John H. Jewett, Regulatory Analyst, IRRC
- Fiona E. Wilmarth, Director of Regulatory Review, IRRC
- Heather Wimbush Emery, Assistant Counsel, IRRC
- Representative P. Michael Sturla, Chairman, House Professional Licensure Committee
- Marlene Tremmel, Executive Director, House Professional Licensure Committee
- Christine Line, Counsel, House Professional Licensure Committee
- Donald F. Morabito, D. Ed, Office of Public Liaison
- Representative Stanley Saylor, House Professional Licensure Committee
- Ron Virag, President and CEO, Ameriserv Trust and Financial Services Company,
- Ernie Peterson, Ameriserv Trust and Financial Services Company,
- James J. Kutz, Esquire
- PCCFA

1551 Kenneth Rd., York, PA 17408

October 2, 2007

Arthur Coccodrilli, Chairman

Independent Regulatory Review Commission

RE: Proposed Pre-Need Regulation # 16A-4815 (Pre-Need Funeral Arrangements) published 8.25.07

Comments from Ernie Heffner submitted in response to the 9.27.07 comments of the PFDA

In as much as the Pennsylvania Funeral Directors Association [PFDA] has seen fit to create a representation of their perspective in response to "concerns mentioned at the meeting of the House Professional Licensure Committee on September 26th," I am compelled to offer the rest of the story. Although a copy is attached, for your convenience I am sequentially providing PFDA's perspective followed by my applicable comments.

PFDA wrote:

1) First and foremost, this proposed regulation is not anti-consumer. It is important to note that consumers who wish to transfer their pre-arrangement from the initial funeral director are the rare exception to the rule. Indeed, in the very hearing that preceded the Commonwealth Court opinion in Bean, Mr. Bean testified that in his 22 years of practicing as a funeral director, he had only been asked four times to move a pre-arrangement to another funeral director.¹ In a poll conducted by Polk-Lepson Research Group in 2005, 83% of the public polled favored portability of their pre-arranged contracts.² That is because, making arrangements for funeral services is frequently based upon the personal relationship between the funeral director and the consumer. Therefore, if a funeral director moves from one funeral home to another, or if the funeral home changes ownership, a consumer may indeed wish to follow the original funeral director. 83% of the polled population certainly qualifies as a "compelling public interest" in terms of revising the regulations to be consistent with adequately serving the public.

1. The proposed regulation is absolutely ANTI-consumer. Taking away a consumer's right to choose between the type of arrangement [irrevocable or revocable] that they prefer is NOT a positive for the consumer.
2. The reference to 4 consumers in 22 years makes the OPPOSITE point in that to deny the right of choice to what is likely more than 1000 irrevocable trust, price guaranteed consumers to have an arrangement of their choosing is ridiculous. 4 out of 1000 is the statistical equivalent of ZERO!
3. The polling statistic of 83% is meaningless, if not misleading. It fails to provide the credibility of the question. I am confident any survey company would confirm that a desired result can be achieved by manipulating the structure of the question. I doubt consumers surveyed were provided with the benefits and disadvantages in order to make an informed decision.
4. The 83% statistic indicates exactly how flawed the question must have been giving the fact that **100% of our pre-need trust customers** have selected an irrevocable arrangement with an inflation proof, written price guarantee as opposed to a revocable plan with no guarantees.
5. The credibility of my 100% statistic is that it represents real world experience, with real customers who have made our firm unquestionably and by significant margin, the #1 most frequently selected service provider in York County year after year.
6. The only "compelling public interest" is that the majority of consumers would prefer that the Professional Licensure Committee and IRRC not be duped into believing the premises presented by PFDA.

October 2, 2007

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2) There is no risk to the consumer who has set aside funds in the process of spend-down for SSA or Medicaid benefits. That is because the irrevocability of the monies, i.e. the trust, remains irrevocable. The only thing that changes is the provider of the funeral. Thus, monies can be moved safely from one qualified trustee bank to another without jeopardizing the irrevocability of the funds, while at the same time assuring the consumer, the right to use the funeral director of their choice.

Attorneys disagree with this statement and I would reference a letter from Attorney James J. Kutz (copy attached) in which he wrote;

Beyond these concerns, this Regulation, if adopted, will create absurd and prejudicial effects on consumers. For example, the Social Security Administration currently permits a pre-need customer to exempt funds from estate taxes and other attachments if pre-need arrangements are irrevocable by their terms. Inasmuch as these draft Regulations will allow consumers to "undo" contracts they have entered into, they are, by definition, not irrevocable and will be the subject of the evils set forth above.

In addition, I refer you to the *Question and Answer* portion of a website that belongs to arguably the largest Pennsylvania funeral service provider who I would also point out is a Professional Member of the State Board of Funeral Directors, Mr. Bennett Goldstein.

<http://goldsteinsfuneral.com/prefuneralarrangements.html> On Mr. Goldstein's funeral home website as of October 1st, 2007 appeared the following;

"What happens to the money for the funeral I have pre-arranged?

The monies are placed in an irrevocable trust in an FDIC insured banking institution. Also, just as a related aside, all licensed nursing homes in the state now require funeral pre-arrangements for residents covered under its Medicaid benefits program."

Seems Mr. Goldstein and his customers also see the benefits of an irrevocable trust.

3) The concern that the proposed regulation would prohibit funeral directors from having ownership in other entities involved in the sale of funeral merchandise is not a new concept. Beginning with the case of PFDA vs. State Board of Funeral Directors,³ the Court made clear that funeral directors were held to a higher standard of trusting (100% under the Funeral Law), not 70% as required under the Merchandise Trust law. Since that case, numerous adjudications have occurred before the State Board that have sanctioned individuals for engaging in the practice of funeral directing through third party companies.⁴ Clearly, these parties, even though licensed funeral directors, set up these corporations for the sole purpose of avoiding the 100% trusting requirement. Thus, this proposed regulation is merely formalizing that which case law has held for years.

This is particularly misleading and in fact a perfect example the regulatory capture of the State Board of Funeral Directors and their historic vacillation, depending on the wishes of PFDA. In 1994 and more explicitly in the minutes of a State Board meeting in 1998, you will find the Board proclaiming that the Funeral Board has no jurisdiction over cremation. If you investigate the cases referenced above, I believe you will find that they involved prosecutions of NON-funeral directors selling direct cremation services to the public. An ever growing percentage of consumers are choosing cremation and in many cases, specifically NOT wishing to deal with a funeral director for fear they would be pressured into buying

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goods and/or services that the did not want. These prosecutions did NOT involve consumer complaints! The prosecutions were an effort to eliminate competition and channel all death care revenue back to funeral directors. The effort was effective, albeit shameful.

4) It is important to note that tens of millions of dollars are funded each year through preneed insurance. In each of those cases, the insurance company pays who provides the funeral, even if that is not who the funeral was prearranged with.

The statement is false for a number of reasons, including ownership and assignment issues. I am surprised that PFDA would put forth this statement given the quote from their 2001 PFDA news letter (copy attached).

SecurChoice Insurance Trust Funeral directors and consumers are discovering the benefits of this new program. Many consumers have paid-up insurance policies and want to use them to pay for their funeral expenses. A number of these people also want to qualify for public assistance to pay for nursing home care. By assigning ownership of their policies to PNC Bank, Trustee, they protect the policy death benefit by not having to cash surrender the policy for a lesser amount of money. The pre-need contract is cleaner for the funeral home if policy ownership is assigned to PNC Bank.

The Reporter

5) PFDA has no objection to addition of a definition for the term "rollover."

Rollover is something of a slang reference that to some indicates a transition from a trust vehicle to an insurance product. This is not a term that needs dignified by defining it within a regulation.

6) PFDA supports the suggestion that civil immunity be provided to a consumer who wishes to take advantage of the portability component of the regulation.

Beware the quid-pro-quo. Recently in a document PFDA demanded be executed in order for them to transfer funds from their wholly owned for profit entity, they inserted dubious language that indemnified them from any wrong doing including fraud and criminal acts.

7) PFDA does not agree with the suggestion that a non-compete clause be incorporated into the regulation. This is because, as previously stated, individual consumers' relationship with their funeral director is a personal one that is not likely to be influenced by a competing funeral director. Secondly, consumers will be disinclined to move their pre-arrangement, for example, due to a lesser price offer by another, since to do so, can and will jeopardize the price guarantee supplied by the first funeral director.

Again, I would refer you to a letter from Attorney James J. Kutz (copy attached) in which he wrote;

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RE: Proposed Pre-Need Regulation # 16A-4815 (Pre-Need Funeral Arrangements) published 8.25.07

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As an initial point, PCCFA wishes to go on record as being strongly opposed to the subject Regulations for a host of reasons. Specifically, these proposed Regulations constitute what is now a third attempt by the State Board and the Pennsylvania Funeral Directors Association ("PFDA") to legislate in an area which should be left for the General Assembly and to render nugatory a comprehensive and well-reasoned Commonwealth Court *en banc* decision authored by Judge Dan Pellegrini, wherein he reversed an Adjudication of the State Board of Funeral Directors, with direction that the Board could not declare irrevocable, pre-need agreements revocable at the whim of the customer and/or urging of another funeral director who is simply trying to harass an existing pre-need customer and pirate the business therefrom. See *Bean v. Department of State, State Board of Funeral Directors*, 855 A.2d 148 (Pa. Cmwlth. 2004), appeal denied, 584 Pa. 696, 882 A.2d 479 (2005) (holding that the Board's proffered "rationale" for requiring revocability or transferability is not supportable). Indeed, there is simply no need to detrimentally overhaul an existing pre-need contract scheme which has worked quite well over the last several decades. In other words, there is nothing "broke" whatsoever; there is little or no genuine consumer benefit to be derived by these proposed changes; and if promulgated, the end result will simply be to benefit the funeral director financially and expose pre-need customers, who have made final arrangements, to constant telemarketing and other harassment by those who

ALLENTOWN HARRISBURG LANCASTER PHILADELPHIA PITTSBURGH PRINCETON WASHINGTON, D.C.
A PENNSYLVANIA PROFESSIONAL CORPORATION

Michelle T. Smey, Board Administrator

September 24, 2007

Page 2

currently do not have pre-need business but are willing to attempt to lure existing customers from funeral directors who have lawfully and fairly secured pre-need business.

I would suggest the PFDA position is transparent and consistent with the facts outlined in Mr. Kutz's letter.

Finally, it should be noted that should the consumer decide to move to another funeral director, it may well be because he/she is offered something better than they had with the first. This is something that is clearly to the consumers' benefit, not their detriment.

This summary is a fabricated dream. The benefit of these regulations is NOT to the consumer. The benefit is to the PFDA coffers and ultimately its members who participate in the trust scheme that pays trust fee kickbacks to the participating members.

I continue to sincerely hope that you will NOT approve either of the pre-need regulations coming before you.

Thank You.



The

Reporter

Dear Members,

October, 2001

District Meetings Canceled in Light of September 11 Tragedies On September 11, PFDA President Shelby Ferguson II, Executive Director John Eirkson and PFDA counsel Kathleen Ryan were in attendance at the New Jersey State Convention. Early that morning they were as shocked as the rest of the nation to see what was happening to the World Trade Center, the Pentagon and ultimately the crash of Flight 93 in Pennsylvania. Immediately, the decision was made to cancel the September PFDA district meetings. Since the district meetings will not be rescheduled, PFDA is offering to have John Eirkson and Shelby Ferguson II bring their portion of the program out to each local association after January 1. They would also like to share their firsthand view of PFDA's involvement with the United Airlines tragedy in Somerset.

Kathleen Ryan, PFDA's In-house legal counsel, is also available to present a separate program to locals upon invitation. Ms. Ryan's presentation includes compliance with the law and staying out of trouble with the State Board. She will also be giving updates on a new program being made available through SecurChoice™ and PFDA regarding Medicare and Medicaid spend down. Ms. Ryan is already scheduled to present in Erie on October 18 and in Altoona on October 23.

All requests to Ms. Ryan, PFDA staff and officers to come to local meetings should come through the PFDA office. Every attempt will be made to attend your local meeting, so please give ample notification. We apologize for the delays, but believe that this will be the best way to provide you with the most up-to-date information.

United Airlines Flight 93 Involvement PFDA has been involved with the tragedy in Somerset almost immediately following the announcement on television that the flight had crashed in Somerset County. PFDA Past President Jim Pinkerton, who is a part of the national DEMORT team, was in touch with county coroner Wallace Miller, offering his and PFDA's assistance in whatever capacity needed.

As pointed out in a memo to all PFDA members in September, PFDA's involvement with the United tragedy was significantly different than its involvement with the USAir crash. PFDA's involvement this time included establishing a mortuary care center, in which volunteers participated with the DEMORT team to help interview families. Funeral directors assisted the DEMORT team as well by entering data at the site. PFDA was also instrumental by setting up offices at Seven Springs and the armory in Somerset.

The use of volunteers from PFDA has been limited. PFDA staff and officers have been utilizing members within a reasonable geographic area of the site to come in and assist. The workflow, in terms of interviews and data entry, varied hour-to-hour and day-by-day, from fairly active to total inactivity. Again, as pointed out in the memo, since this was a crime scene with many layers of agency involvement, PFDA's role in this crash was significantly different. On Friday, September 21, PFDA along with Blairsville Wilbert Burial Vault Company helped to properly place all of the artifacts into a vault, which will be held in an undisclosed location for later interment at a memorial site. PFDA is still involved with the activities in Somerset and will continue to be until notified otherwise. John Eirkson and Shelby Ferguson II will discuss United Flight 93 details with members at future local meetings.

Beware of Collect Calls Recently, some PA funeral directors have complained of \$22 charges on their phone bills for 2-minute collect calls. There is a scam going around where a person, claiming to be from a cremation service, makes collect calls to funeral homes, requesting a cremation price list. In one case a funeral director received the call from a payphone in Providence, RI. Zero Plus Dialing and US Long Distance both appear to be linked to the scam. Funeral directors: please warn your secretaries and answering services to watch out for collect calls from cremation services asking for price lists. If you receive one of these calls, the best thing to do is to reject it or hang up immediately.

Dodge Embalming Seminars Just Around the Corner Don't forget to register for the upcoming Dodge seminars in Pittsburgh and Harrisburg. PFDA is a co-sponsor of these programs, which are designed for embalmers who wish to enhance their embalming and restorative techniques.

The first seminar will be held in Pittsburgh at Robert Morris College on **Monday, October 22, 2001**, from **9:00 a.m. to 3:45 p.m.** John Callahan, a licensed funeral director and embalmer, will be discussing topics such as Organ Procurement and Restoration, Skin Slip, Edema, and Emaciated Eye Restoration. *Preregistration costs are \$65 until October 12 and \$90 after that date.*

The second seminar will be held in Harrisburg at the Holiday Inn on **Friday, November 2, 2001**, from **9:00 a.m. to 3:45 p.m.** Jack Adams, CFSP, will be talking about Successful Organ, Tissue and Bone Donor Restoration. *Preregistration costs are \$60 until October 23 and \$85 after that date.*

You should be receiving a seminar flyer with details and registration information shortly, if you have not gotten one already. For additional information on the seminars, call **Bob Buhrig, CFSP**, at **1-888-BEEP-BOB** or e-mail him at **EmailBeepBob@aol.com**.

PFDA Board Member Biographies **Shelby D. Ferguson II** is currently the President of PFDA. His term as a board member will end in June of 2002. He is the owner of Ferguson Funeral Home, Inc. in Belle Vernon, PA, which has been in business since 1954. His father, Shelby D. Ferguson, previously owned the funeral home and retired in February of 2001. Shelby Ferguson II was born in North Charleroi, PA and grew up in Belle Vernon. He is married to Sue Ferguson and they have three children, Laura, Adam and Karlee.

Mr. Ferguson attended college at the California University of PA and Westmoreland County Community College. He went to mortuary school at the Pittsburgh Institute of Mortuary Science. He is active in the Belle Vernon Fire Department, having served as Past Assistant Chief and Past President. He is a member of the First United Methodist Church and the Masonic Lodge #643. Presently, he is serving as the treasurer of the Belle Vernon Lions Club. Mr. Ferguson is also a Past President and member of the Westmoreland/Indiana/Armstrong board.

Frank E. Schmidt is one of the new PFDA District Governors. His term began in June of 2001 and will end in June of 2005. He has been the Supervisor at King Funeral Home, Inc. in Hampton Township since 1987, but has been employed at the funeral home since 1975. Frank Schmidt was born in Pittsburgh and grew up in a suburb of Millvale. He is married to Mary Ann Schmidt and they have three children, Tiffany, Dan and Justin.

Mr. Schmidt went to college at the Community College of Allegheny County. He attended mortuary school at the Pittsburgh Institute of Mortuary Science. He is a Past President and current Secretary/Treasurer of the Butler County Funeral Directors. He belongs to the Butler County Funeral Directors Legislative Committee and is a charter member of the Hampton Rotary Club. Mr. Schmidt is also a member of the Hampton Business Association, the Richland's Sportsman Club, and the 4th Degree Knights of Columbus, Pittsburgh HOG Chapter.

Ohio Eliminates Indigent Burial Program Through indigent burial funds, funeral directors were being paid up to \$750 per burial. The law in Ohio now requires townships and municipalities to bury or cremate the poor at local government expense. The burial plot will include a concrete or stone marker with the person's name, age and date of death.

-Death Care Business Advisor, September 2001

CANA Releases Annual Cremation Statistics The Cremation Association of North America (CANA) ranks PA as #4 for its number of cremations in 2000. According to the National Vital Statistics, the 2000 estimated death count totaled 133,250 in PA. From this total there were 25,511 cremations. These statistics show that 19% of Pennsylvanians chose cremation over the traditional burial, compared to 16% in 1995.

-Death Care Business Advisor, September 2001

Stewart Enterprises Steers Away from Aggressive Acquisition Stewart is attempting to become a more settled cemetery and funeral home operator. The CFO, Kenneth Budde, says that the company has refinanced to extend the maturity of past debts, which will improve Stewart's ability to negotiate sales of foreign assets.

-Death Care Business Advisor, September 2001

Loewen Group Inc. Suffers Loss The company claims to have lost \$116.7 million, or \$1.60 a share in the second quarter, compared to last year's loss of \$76.3 million, or \$1.06 a share in the same quarter. According to John Lacey, Loewen's chairman of the board, the reorganization process is taking longer than expected but in the meantime the company is strengthening corporate structure, completing asset dispositions, and cleaning up their balance sheets.

-Death Care Business Advisor, September 2001

Two-for-One Stock Split On August 7, 2001, Matthews International Corporation declared a two-for-one stock split on its Class A and Class B common stock. This stock distribution gives shareholders one new share of Class A common stock for each share of outstanding A common stock and one share of Class B common stock for each share of outstanding Class B common stock.
-CFSA Newsletter, September 2001

York Shareholders in Favor of Merger Over 99% of votes cast by shareholders were in favor of the merger between the York Group and Matthews International Corporation. According to the merger agreement, the share price will be \$10. However, based on excess cash remaining on York's balance sheet as of Oct. 31, 2001, Matthews agreed to pay an extra \$1 per share.
-CFSA Newsletter, September 2001

How Long Funeral Home Documents Should Be Retained

Funeral Service Documents

Copies of Death Certificates – 3 years
Price List – 1 year after date of last distribution
State of Funeral Goods and Service Selected – 2 years
from date of arrangements conference

Personnel Records

Wage and Hour Logs – 3 years
Personnel Decisions (Hire/Fire) – 2 years
Payroll Records – 6 years

Accounting Documents

Bank Statement and Deposit Slips – 6 years
Checks – 6 years
Expense Reports – 4 years (after date of tax return is filed)
Monthly Trial Balances – 3 years
Vouchers for Payment to Vendors, Employees, etc. – 3 years
Subsidiary Ledger Including Payables and Receivables – 6 years
Audit Reports and Financial Statements – Permanent
General Ledgers and Journals – Permanent
Tax Returns – Permanent

Insurance Documents

Accident Reports – 6 years
Fire Inspection Reports – 6 years
Group Disability Records – 6 years
Safety Reports – 6 years
Claims (after settlement) – 3 years
Expired Policies – 3 years

OSHA Documents

Formaldehyde Monitoring Records – 30 years
Employee OSHA Training Records – 3 years
Employee Medical Records – 30 years (after last
date of employment)

Correspondence

License, Traffic and Purchase – 1 year
General – 3 years
Legal and Tax – 6 years

Corporate Records

Bylaws, Charter and Minute Books – Permanent
Capital Stock and Bond Records – Permanent
Checks Regarding Taxes, Property and Fulfillment
of Major Contracts – Permanent
Contract and Agreements – Permanent
Copyright and Trademark Registrations – Permanent
Deeds and Easements – Permanent
Labor Contracts – Permanent
Patents – Permanent
Retirement and Pension Records – Permanent
Tax Returns, Supporting Documents – Permanent
Expired Mortgages, Notes, Leases – 6 years

Other Records

Shipping and Receiving – 1 year
Purchasing and Sales – 7 years

Information furnished by Scott Gilligan, NFDA General Counsel – from *KFDA Journal*, June 2001

PinnacleHealth Hospice Schedules Volunteer Training Applications are now being accepted for individuals interested in providing companionship and support to hospice patients and their families. The training program has been scheduled at PinnacleHealth Hospice (3705 Elmwood Drive, Harrisburg) for three consecutive Tuesdays: Oct. 30, Nov. 6 and Nov. 13 from 10:00 a.m. until 1:00 p.m. For more information, call Lisa Thomas at (717) 671-3700 or 1-800-889-1098.

Charges Brought Against Florida Unlicensed Funeral Operator Anthony Damiano, 33, of South Florida, pleaded no contest to 23 third degree felony charges for selling pre-need funerals without a license. Damiano was ordered to make immediate restitution of \$7,618, in connection with an individual funeral service. He must also make restitution to the state for \$18,500. Terms of his plea include three years probation and one year of house arrest.

-Florida Funeral Director, July/August 2001

SecurChoice™ Insurance Trust Funeral directors and consumers are discovering the benefits of this new program. Many consumers have paid-up insurance policies and want to use them to pay for their funeral expenses. A number of these people also want to qualify for public assistance to pay for nursing home care. By assigning ownership of their policies to PNC Bank, Trustee, they protect the policy death benefit by not having to cash surrender the policy for a lesser amount of money. The pre-need contract is cleaner for the funeral home if policy ownership is assigned to PNC Bank.

SecurChoice™ Pre-need Trust Due to the recent terrorist attacks and market fluctuations, many funeral directors are concerned about their pre-need accounts and personal investments. We have been through volatile market and interest conditions before, but those who have "stayed the course" have benefited from the stability of the SecurChoice™ pre-need trust program. Over the years, the short-term fund has produced average net yields in excess of 4.0% compounded on deposits, which has out-paced inflationary price increases. Other investment options have yielded higher annual returns.

As you know, PFDA benefits directly from the profits and business administrated by the Unichoic Cooperative. Your continued use of the pre-need trust program is vital to the success of PFDA. In addition, Unichoic™ has paid out more than \$600,000 in dividends to Unichoic™ participants and PFDA members in 1998, 1999 and 2000.

SecurChoice Pre-need Insurance Many funeral directors are now submitting insurance funded pre-need contracts to Funeral Directors Life Insurance Company (FDLIC). Most funeral directors have chosen the 4.0% compounded growth product over the 4.2% simple interest product. Many have told us the forms are very easy to use and FDLIC is providing them with excellent customer service. The Kentucky and Minnesota funeral director associations have recently endorsed FDLIC. Because FDLIC is owned by funeral directors, they can provide outstanding service to funeral directors.

If you have any questions, please call the Unichoic™ office at 877-468-4824 or 717-545-7335.

CLASSIFIEDS

POSITION AVAILABLE: Pennsylvania licensed funeral director needed, small town atmosphere in northwestern PA. Seeking a full-time position in all areas of the profession, 150 calls, benefits, salary, and apartment available. Please reply to file #104-01.

POSITION AVAILABLE: At-need funeral director with minimum of 5 years experience wanted for firm serving approximately 150 families a year in York County, PA. Please respond to file #105-01.

POSITION AVAILABLE: Supervisor/funeral director wanted for a not too small town funeral home. This is a long-term position in a great central PA environment with excellent schools, diverse entertainment, clean air, recreation and golf. Please respond to file #106-01.

POSITION AVAILABLE: Naples, Florida – Thinking about relocating? Southwest Florida independently owned funeral home has immediate opening for dedicated, responsible, caring Funeral Director/Embalmer. Regularly scheduled hours, benefits and 401K. Call Fuller Funeral Home at 800-941-4434 or fax resume to 941-592-1619.

POSITION AVAILABLE: Independently owned Central PA funeral home seeks funeral director or resident intern to join us. Competitive salary, paid vacation, medical benefits and flexible on call schedule. For more information, contact PFDA file #102-01.

POSITION AVAILABLE: Licensed funeral director wanted to be an administrative assistant to the owner of several small town PA funeral homes. You must be detail orientated, flexible, able to function on your own and have enough experience to be helpful to me. Approximately 70% of your time will be non at-need funeral and non pre-arrangement funeral related. Please reply to file #AA-01.

SERVICE AVAILIABLE: INDEPENDENT AUTOPSIES for any reason by certified pathologists licensed in PA. Immediate Services. 7 Days, 1-800-343-2135 A-MEDI-LEGAL NATIONAL AUTOPSY SERVICE.

PRODUCT AVAILABLE: Casket Shells, Inc., Eynon, PA (near Scranton), approaching its 50th anniversary as premier independent family owned casket manufacturer of a full line of metal caskets, including special sizes, offers its products through leading distributors – funeral supply specialist and service centers – throughout the Commonwealth. Call 1-800-516-3340 for product availability.

SOFTWARE & WEB SITES: Team up with the leading company that specializes in Software and Web sites for Funeral Homes, SRS Computing Solutions. The Software system, starting at \$800 is fully customized, user friendly and available with NO SERVICE FEES. The Web site, starting at \$600 offers original, customized designs that advertise your Funeral Home and provides a service to your families by posting obituaries. For more information, call us at 1-800-797-4861 or visit us at www.srscomputingsolutions.com.



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September 24, 2007

Via Hand Delivery

Michelle T. Smey, Board Administrator
State Board of Funeral Directors
Department of State
2601 North Third Street
Harrisburg, PA 17110

RE: Comments of Pennsylvania Cemetery Cremation & Funeral Association to Proposed Regulations of State Board of Funeral Directors Published August 25, 2007 Re: Pre-Need Funeral Contracts

Dear Ms. Smey:

On Saturday, August 25, 2007, the State Board of Funeral Directors published Notice of Proposed Rulemaking, inviting public comment within 30 days of that publication. Allow this letter to serve as notice that the undersigned represents the Pennsylvania Cemetery Cremation & Funeral Association ("PCCFA"), and the comments that follow have been authorized by that entity and its members, who comprise every aspect of the death-care industry.

As an initial point, PCCFA wishes to go on record as being strongly opposed to the subject Regulations for a host of reasons. Specifically, these proposed Regulations constitute what is now a third attempt by the State Board and the Pennsylvania Funeral Directors Association ("PFDA") to legislate in an area which should be left for the General Assembly and to render nugatory a comprehensive and well-reasoned Commonwealth Court *en banc* decision authored by Judge Dan Pellegrini, wherein he reversed an Adjudication of the State Board of Funeral Directors, with direction that the Board could not declare irrevocable, pre-need agreements revocable at the whim of the customer and/or urging of another funeral director who is simply trying to harass an existing pre-need customer and pirate the business therefrom. See Bean v. Department of State, State Board of Funeral Directors, 855 A.2d 148 (Pa. Cmwlth. 2004), *appeal denied*, 584 Pa. 696, 882 A.2d 479 (2005) (holding that the Board's proffered "rationale" for requiring revocability or transferability is not supportable). Indeed, there is simply no need to detrimentally overhaul an existing pre-need contract scheme which has worked quite well over the last several decades. In other words, there is nothing "broke" whatsoever; there is little or no genuine consumer benefit to be derived by these proposed changes; and if promulgated, the end result will simply be to benefit the funeral director financially and expose pre-need customers, who have made final arrangements, to constant telemarketing and other harassment by those who

currently do not have pre-need business but are willing to attempt to lure existing customers from funeral directors who have lawfully and fairly secured pre-need business.

These Regulations will also effectively gut the good will and value of any funeral business which holds pre-need contracts because the Regulations, as drafted, create a wholly illusory contract to which one of the parties is bound to no obligation and for which no funeral director could ever convey his funeral business with the pre-need asset. Adding insult to injury, these proposed Regulations would wreak havoc with the currently in-place banking institutions who have agreed to serve as the recipient and trustee of these pre-need monies. With respect, no banking institution would likely continue to serve if the entire pre-need trust account could be drained at any point in time, except, of course, as that arrangement exists with PFDA's for-profit affiliate.

Both Governor Directives and existing statutory law make clear that Regulations are not to be proposed and implemented, unless a decision has been made that a "compelling public interest" needs to be advanced. Here, the Board suggests, without any true basis, that the current Regulations must be updated to "conform to existing practices and to provide adequate protection to the consumer of pre-need services in the instance of changed circumstances." First, the Board never identifies what "existing" practice within the industry has done away with legitimate, irrevocable, pre-need agreements under which the funeral director binds himself to certain significant commitments upon the death of the customer. Indeed, the State Board of Funeral Directors has, for the last many years, reviewed and approved for use pre-need agreements which, by their terms, were irrevocable. Query: If the Board was approving these types of agreements, what new fact or change in circumstance has come into play? The simple answer is – this Regulation is simply another one of PFDA's efforts (and I might add, successful efforts) to utilize the State Board to change the law whenever it suits and helps PFDA. Indeed, for years PFDA pre-need agreements contained irrevocability provisions and they were approved for years by the Board. What truly appears to be the catalyst for this "automatic transferability" requirement is to either (a) create the opportunity for PFDA and its members to pirate away customers who have entered into pre-need agreements with individuals not aligned with PFDA, or (b) make pre-need so unattractive that it ceases to exist, thereby enabling the funeral profession to make more money when the at-need arrangements are made during a time of extreme familial grief. PFDA has its own pre-need affiliate; its own for-profit marketing arm; and PFDA, through its use of this Board (comprised entirely of PFDA members as professional members) now weaves its desired end result. It is certainly legitimate for a trade organization to proffer issues and positions to a regulatory agency. However, in this instance, the proposed Regulations reflect another patent example of PFDA's use of the Board to manufacture any financial end result desired by PFDA. Indeed, in the proceeding involving Bean and the State Board (wherein this irrevocability issue was first and finally litigated), PFDA sought intervention from the Board and was granted intervention. Predictably, PFDA lobbied for an Adjudication which would *defacto* void irrevocable agreements and predictably, the Board concluded precisely what PFDA told it to conclude.

The General Assembly knows where and when to impose restrictions on the otherwise existing right of two private parties to contract. For example, in the Future Interment Law, 63 P.S. § 480.1 *et seq.*, which provides a vehicle for the sale of funeral merchandise pre-need, the statute expressly states that, if the purchaser of a pre-need contract for goods or merchandise moves out of state, the holder of the pre-need agreement is entitled to receive the principal amount of money on deposit to the credit of that particular contract. See 63 P.S. § 480.5. Notably, although the Funeral Director Law has been amended several times since the enactment of the Future Interment Law in 1963, the General Assembly has chosen not to enact a statutory provision dealing with irrevocability for funeral director pre-need contracts. That silence by the Legislature strongly reflects that it has chosen not to intrude upon the right of two parties to contract. Yet, the State Board, by attempting to "legislate" these Regulations, seeks that end result. As the mission and authority of a state agency is to interpret law, and not make law, these Regulations must be rejected.

Beyond these concerns, this Regulation, if adopted, will create absurd and prejudicial effects on consumers. For example, the Social Security Administration currently permits a pre-need customer to exempt funds from estate taxes and other attachments if pre-need arrangements are irrevocable by their terms. Inasmuch as these draft Regulations will allow consumers to "undo" contracts they have entered into, they are, by definition, not irrevocable and will be the subject of the evils set forth above.

The following scenario illustrates another absurd result. Assume customer "x" pays \$6,000 for a pre-need contract which guarantees him/her funeral services and merchandise at the time of death. Assume funeral director Smith, aware of this agreement, lobbies the customer to undo that existing contract and, instead, contract with him at a lower price. Under the Board's proposed scenario, the funeral director must turn over the then-existing balance in the account of that customer which, in many instances, will be less than the principal amount paid by reason of investment activity. In other words, the consumer, believing that he or she will get \$6,000, is not necessarily guaranteed that amount. Beyond that, the consumer then needs to enter into a second, new contract with a funeral director who may be far less worthy and law abiding than the original contracting funeral director. Then, to add insult, if the second agreement costs the consumer less, the monies are returned to the consumer, thus exposing those funds to the previous in-place protections of SSI.

Simply stated, proposed Section 13.228 is unnecessary; it is anti-competitive; anti-consumer; it will create uncertainty and confusion for the customer; and it will expose the customer to acts of preying by both in-state and out-of-state hustlers. Importantly, if the contract was secured through unfair marketing practices, the Attorney General can intervene, and common law rescission (or fraud) options exist.

There are a number of ways in which the Board could take appropriate steps, if it had a concern that consumers were entering into irrevocable pre-need agreements while not understanding the commitment. For example, a Regulation could arguably be proffered which requires some

separate disclosure of "irrevocability" to the consumer and its implications. Similar to the Pennsylvania Unfair Trade Practices Act, there could be some three-day right of rescission where applicable. Indeed, even with the sale of hearing aids, the General Assembly builds in a 30-day refund "for any reason" clause. Even a geographical provision, similar to the Future Interment Law might make some sense. There appears to be no other instance where an agreement is wholly rescindable by one party in the area of free enterprise and free market. In fact, even federally regulated banking institutions have the right to penalize a customer who seeks to terminate a Certificate of Deposit contract prematurely. These Regulations give the funeral director every disincentive to meet with customers and allow them to plan the type and form of funeral or other service they choose to commit to. Such end result is not pro-consumer. Rather, the end result will either be the harassment of existing pre-need customers by those who do not have pre-need business, or the beginning of the end of pre-need opportunities for Pennsylvania consumers, given the huge disincentive for legitimate funeral homes to commit resources, services and merchandise, only to have the plug pulled at the whim of the consumer. Judge Pellegrini said it best when he indicated there could be circumstances justifying concern within the Board, but the wholesale opportunity to rescind for any reason is simply not justified.

Another area of significant concern is this Board's effort to render illegal that which has been legal for years. Specifically, the Board now proposes that a funeral director may not have any ownership in any other entity involved in the sale of funeral merchandise or goods, even though the law nowhere prohibits same. It is simply unconstitutional and shocking that this Board, in 2007, would seek to render illegal many, many arrangements which funeral directors and others have put in place, wherein the funeral director has an interest in a corporation or other entity which can lawfully sell funeral goods or merchandise. Indeed, as late as 1999, PFDA (the Board's alter ego and vice versa) was disseminating statewide information and recommendations urging funeral directors to create a separate entity, so that funeral merchandise could be sold and trusted at 70%, consistent with the Future Interment Law. Indeed, PFDA went so far as to create an "Incorporation Kit" for use by the funeral directors within the state. Apparently realizing that its project did not get off the ground, PFDA has now convinced "its" State Board to make illegal that which PFDA recommended just some seven or eight years ago. Law should not be interpreted depending upon the whims of a trade organization and a regulatory board which demonstrates a "captured" status to that trade organization by doing whatever the trade organization wants at that particular point in time!

In closing, PCCFA regrets the zeal with which it has discussed the proposed Regulations and its concerns for those proposals. However, given the total absence of consumer "need" for these draft Regulations, and given the flip-flop approach of the Board to interpreting the Funeral Director Law, PCCFA believes it appropriate to "shoot straight" and urge this Board to do the honorable thing; *to wit*, withdraw the Regulations as unnecessary, anti-consumer, and protectionist. If the Board wishes to do away with legitimate pre-need contracting, it should seek legislative revision. However, it is not the province of the State Funeral Board to make major policy and business decisions which affect significantly and detrimentally businesses which have been operating within the bounds of law for decades. PCCFA is also fully aware that, on the

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heels of these proposed Regulations relating to revocability, the death industry will be met with additional anti-competitive Regulations prohibiting agents and employees of funeral homes from effectively communicating with prospective pre-need customers. The linkage between the current Regulations and those which are going to follow, cannot be ignored. The consumer is not benefitted when reasonable and legitimate pre-need is effectively abolished, in lieu of at-need decision-making where the next-of-kin are obviously emotional and frequently subject to decision-making processes which their deceased loved one would not have wanted, or, in the case of these Regulations, directed to be otherwise.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jim Kutz", written over a printed name.

James J. Kutz

JJK:dlh