

**WHO'S WATCHING THE CRYPTKEEPER?:  
THE NEED FOR REGULATION AND  
OVERSIGHT IN THE CREMATORY  
INDUSTRY**

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*Recent misconduct has turned the national spotlight on the crematory industry, prompting many legislators to reevaluate state and federal laws governing the industry. Lawmakers have been forced to acknowledge that regulatory gaps exist, which leave the general public inadequately protected from potential wrongdoing. This oversight is particularly harmful to the elderly, who are more frequently subject to exploitative practices within the industry. In this note, Keith E. Horton examines the existing federal and state regulations that govern the industry, including the proposed Federal Death Care Inspection and Disclosure Act. Mr. Horton also examines the crematory industry's self-regulation through death care industry associations that generate standards of conduct. He proposes increased regulation and oversight, recommending that Congress substantially adopt the proposed Act. In addition, Mr. Horton suggests that states promulgate laws with more severe punishments to deter misconduct. He also encourages families to take practical, proactive steps to avoid potential misconduct or mishaps during the cremation process. These added safeguards are necessary, Mr. Horton advises, to ensure that consumers are adequately protected.*

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## I. Introduction

In February 2002, investigators discovered hundreds of supposedly cremated bodies near a Georgia crematory.<sup>1</sup> The bodies were left in garages, vaults, the woods,<sup>2</sup> and at least one was still in the back of a broken-down hearse.<sup>3</sup> Tommy Ray Brent Marsh, the operator of Tri-State Crematory, is charged with 398 felonies, including theft by deception, for allegedly taking payment for cremations not performed and giving families wood chips or cement powder instead of ashes.<sup>4</sup>

Backlash from the Tri-State scandal has prompted many legislators to reevaluate state and federal laws governing the crematory industry.<sup>5</sup> Currently, the crematory industry is largely under-regulated.<sup>6</sup> Federal oversight consists of the Federal Trade Commission's (FTC's) "Funeral Rule"<sup>7</sup> and Environmental Protection Agency (EPA) regulations.<sup>8</sup> The Funeral Rule is primarily a pre-sale disclosure law for businesses providing *both* funeral goods *and* services.<sup>9</sup> Therefore, if a business sells only services, such as cremations, it is not

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1. E.g., CNN, *Crematory Operator Faces 100 New Counts*, at <http://www.cnn.com/2002/LAW/02/26/crematory.corpses/index.html> (Feb. 27, 2002) (stating that investigators have found 339 bodies on the property).

2. Chris Green, *State Cremation Laws Some of Toughest in U.S.*, ROCKFORD REG. STAR, Feb. 22, 2002, at 10A, available at 2002 WL 15182178.

3. CNN, *supra* note 1.

4. Norma Wagner, *Case Shows Differences in Cremation Laws*, DESERET NEWS (Salt Lake City), Feb. 21, 2002, at A02, available at 2002 WL 14563876; see CNN, *supra* note 1 (stating that Marsh is also charged with abuse of a body).

5. See Wagner, *supra* note 4.

6. *Id.* ("Other than EPA emissions regulations, crematories are seriously under-regulated."). But see Letter from Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association, to the Editor of U.S. News & World Report (Mar. 5, 2002), at [http://www.icfa.org/usnwr\\_letter.htm](http://www.icfa.org/usnwr_letter.htm). "[S]tate laws regulating the [death care] industry number approximately 10,000 pages in length, and a summary of citations to those laws numbers about 30 pages. In addition, a simple listing of citations to the federal laws and regulations applicable to cemeteries, funeral homes, and crematories runs almost three pages in length. Whatever the problem, to claim that industry members are underregulated is just plain wrong." *Id.*

7. 16 C.F.R. § 453 (2003).

8. See 40 C.F.R. § 229.1(a) (2002).

9. See *Examining Recent Accounts of Misleading Practices and Potential Violations of State and Federal Regulatory Standards in the Funeral Industry: Hearing Before the Senate Subcomm. on Children & Families of the Comm. on Health, Educ., Labor & Pensions*, 107th Cong. 10-12 (2002) [hereinafter *Hearings*] (statement of Eileen Harrington, Associate Director of Marketing Practices, Federal Trade Commission); see also SHARON HERMANSON, AARP PUB. POL'Y INST., *THE DEATHCARE INDUSTRY* 7 (2000), available at [http://research.aarp.org/consume/ib44\\_deathcare.pdf](http://research.aarp.org/consume/ib44_deathcare.pdf).

covered by the Funeral Rule.<sup>10</sup> The federal EPA regulations are aimed at preventing health hazards caused by ashes of cremated individuals.<sup>11</sup> States regulate the crematory industry via a patchwork of various laws with enforcement responsibilities spread across multiple state agencies, commissions, and boards.<sup>12</sup> Surprisingly, some states allow crematories to operate without a license or inspections.<sup>13</sup>

The lack of government oversight in the crematory industry is disproportionately harmful to the elderly. Older individuals are more frequently cremated<sup>14</sup> and are therefore subject to greater abuses. In addition, the older a person is, the more likely he or she is to have made arrangements in advance,<sup>15</sup> thus more frequently subjecting elderly consumers to exploitative practices. Because the elderly and the

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10. HERMANSON, *supra* note 9, at 7.

11. See 40 C.F.R. § 229.1(a)(3) (requiring cremated remains to be “buried in or on ocean waters . . . no closer than 3 nautical miles from land”); see also Michael R. Santiago, *The Industry of Death: Regulating Mortuary Services*, 30 MCGEORGE L. REV. 463, 469 (1999) (“[S]cattering cremains in public areas is a health hazard due to the radioactivity remaining in the ashes of cancer patients.”). But see CREMATION ASS’N OF N. AM., ENVIRONMENTAL/SAFETY ISSUES: EMISSIONS TESTS PROVIDE POSITIVE RESULTS FOR CREMATION INDUSTRY, at <http://www.cremationassociation.org/html/environment.html> (last visited Aug. 20, 2003) (“The EPA is required by the Clean Air Act to establish regulations for the year 2000 for several different types of combustion equipment, including crematories.”). To date, these regulations have not been enacted because the federal EPA no longer regulates crematoriums for air pollution. E-mail from Marsha Marsh, Health Scientist/Air Risk/Air Toxics Manager, U.S. Environmental Protection Agency, to Keith E. Horton, University of Illinois College of Law (Mar. 26, 2003, 09:13 CST) (on file with The Elder Law Journal).

12. See HERMANSON, *supra* note 9, at 7.

13. Al Karr, *Crematories Under Close Scrutiny as States Seek Tougher Regulations*, AARP BULL., May 2002, <http://www.aarp.org/bulletin/consumer/Articles/a2003-07-01-crem.html> (“Steven V. Sklar, director of Maryland’s Office of Cemetery Oversight, says many states only have environmental rules about ‘what goes up the smokestack’ and none on licensing and inspections.”). But see U.S. GEN. ACCOUNTING OFFICE, DEATH CARE INDUSTRY REGULATION VARIES ACROSS STATES AND BY INDUSTRY SEGMENT 9 (2003) [hereinafter GAO REPORT] (“[M]ost states require inspections of crematories at least annually.”), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-757>.

14. CREMATION ASS’N OF N. AM., 1996/97 CREMATION CONTAINER, DISPOSITION AND SERVICE SURVEY 2, <http://www.cremationassociation.org/docs/dreport.pdf> (last visited Oct. 18, 2003) (providing the mean and median age of individuals cremated as 69.4 and 74.0 years old, respectively).

15. Press Release, Cremation Association of North America, 1999 Study Shows 46% of Americans Will Choose Cremation, at <http://www.cremationassociation.org/html/pressrelease1.html> (last visited Oct. 18, 2003). “While only 15% of those under 40 have made some pre-arrangements, the percentage increases to 27% (22%, 1995) of those age 40–54 and 43% (44%, 1995) of those 55 and older.” *Id.*

decedent's next of kin<sup>16</sup> are intimately involved in the cremation process,<sup>17</sup> it is imperative that they are keenly aware of a wide range of issues, including licensing, inspections, recordkeeping, disposition and identification of remains, penalties for violations,<sup>18</sup> and fraud in the pre-arrangement.<sup>19</sup>

This note proposes increased regulation and oversight of the crematory industry. In support of that proposition, Part II provides an overview of the industry. Part III uses the *Tri-State* case<sup>20</sup> as a platform for discussing the elderly's cremation issues, namely consumer fraud, theft, and mishandling of corpses. Part III also analyzes existing and proposed federal regulatory standards and state laws. Part IV recommends adopting federal legislation that will provide minimum safeguards, and encourages states to enact additional regulations. Part V concludes by providing practical advice for those considering cremation of a loved one.

## II. Background

### A. History of the Crematory Industry

Many of the modern American funeral industry's techniques and practices developed in response to the large number of battle casualties during the Civil War.<sup>21</sup> In 1876, Dr. Julius LeMoyné built the first crematory in Washington, Pennsylvania.<sup>22</sup> By the turn of the

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16. For purposes of this note, "elderly" will refer to older individuals, as well as the decedent's next of kin or other individuals who are tasked with arranging the cremation.

17. R. Alta Charo, *Skin and Bones: Post-Mortem Markets in Human Tissue*, 26 NOVA L. REV. 421, 428 (2002). "[A] person may dictate the disposal of his or her remains through a will, and if she fails to do so, the decedent's family may exercise the power." *Id.*

18. See Karr, *supra* note 13.

19. Press Release, *supra* note 15 (summarizing "pre-arrangement" as people planning the details of their own funeral, burial, or cremation, including advance payments to death care providers).

20. *In re Tri-State Crematory Litig.*, No. MDL-1467 (N.D. Ga. filed Feb. 19, 2002); see also *In re Tri-State Crematory Litig.*, 206 F. Supp. 2d 1376 (J.P.M.L. 2002) (order granting centralization of actions); *State v. Marsh*, 30 Media L. Rep. 1507 (Ga. Super. Ct. 2002) (temporary order modifying court's order restricting extrajudicial statements and providing relevant facts of the case).

21. *Hearings*, *supra* note 9, at 2 (statement of Sen. Christopher J. Dodd, Chairman, Subcommittee on Children and Families).

22. CREMATION ASS'N OF N. AM., HISTORY OF CREMATION, at <http://www.cremationassociation.org/html/history.html> (last visited Aug. 20, 2003).

twentieth century, twenty crematories were in operation.<sup>23</sup> This modest increase can be attributed to Protestant clergy's desire to reform burial practices and the medical profession's concern with health conditions around early cemeteries.<sup>24</sup> In the last century, the crematory industry has experienced tremendous growth, albeit for different reasons. Today there are approximately 1155 crematories in the United States.<sup>25</sup>

## B. Recent Trends

### 1. GROWING POPULARITY OF CREMATIONS

In recent years, the number of cremations has increased, while traditional funeral and burial arrangements have remained relatively constant.<sup>26</sup> In the latter quarter of the twentieth century, the percentage of cremations performed has increased five-fold.<sup>27</sup> In the year 2000 alone, 630,800 cremations occurred, accounting for more than twenty-six percent of all deaths in the United States—up from ten percent in 1980 and seventeen percent in 1990.<sup>28</sup> The Cremation Association of North America (CANA) projects that by 2025 approximately half of all people who die in the United States will be cremated.<sup>29</sup>

### 2. NATIONALIZING THE FUNERAL BUSINESS

Death care is a multibillion dollar industry.<sup>30</sup> Funeral arrangements are the third largest investment that people make during their

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23. *Id.*

24. *Id.*

25. HERMANSON, *supra* note 9, at 2.

26. *Id.*

27. See CREMATION ASS'N OF N. AM., HISTORICAL CREMATION DATA, <http://www.cremationassociation.org/docs/WebHistData.pdf> (Oct. 16, 2003) (showing an increase in the number of cremations performed from 123,918 in 1975, to 630,800 in 2000).

28. *Id.*

29. CREMATION ASS'N OF N. AM., CONFIRMED 2001 STATISTICS, <http://www.cremationassociation.org/docs/Web01Confirmed.pdf> (Oct. 16, 2003) (estimating that by 2025, approximately 43.57% of people who die will be cremated).

30. See HERMANSON, *supra* note 9, at 2 (“The nation’s funeral homes and cemeteries represent a \$12 billion industry.”). The death care industry is comprised of five segments: (1) funeral homes, funeral directors, and embalmers; (2) crematories and crematory operators; (3) cemeteries and cemetery operators; (4) sellers of pre-need funeral plans; and (5) third-party sellers of funeral goods. GAO REPORT, *supra* note 13, at 4 fig.1.

lifetimes.<sup>31</sup> Ten to twenty years ago, most funeral homes were owned locally, and community standards and state regulations were sufficient.<sup>32</sup> Within the last decade, large national corporations have acquired most funeral homes.<sup>33</sup> As a result, national funeral homes must be more aware of the local laws governing their own crematories, as well as the crematories with whom they subcontract.

### 3. PRIMARY REASONS FOR CHOOSING CREMATION

A recent national survey sponsored by the Funeral and Memorial Information Council revealed the primary reasons for choosing cremation rather than burial are to save money (24%), to save land (17%), and because it is simpler, less emotional, and more convenient (13%).<sup>34</sup> Cremation costs range from \$800<sup>35</sup> at the low end to \$4,500 in some markets,<sup>36</sup> as compared to funeral and burial costs that can easily reach as much as \$10,000.<sup>37</sup> Just as with traditional funerals, “[c]ost depends on the [goods and services] provided.”<sup>38</sup> Thus, a consumer’s choice of casket, the method of disposition, the type of urn, and whether a memorial service is performed, all impact the total cremation cost.<sup>39</sup>

The increase in the number of cremations also reflects the changing U.S. demographics. Specifically, “Americans are living longer, so more people die at retirement locales instead of at their homes.”<sup>40</sup> In response to this trend, many “relatives opt for the convenience of

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31. Press Release, AARP Foundation Litigation, AARP Foundation Attorneys Join Case Challenging Abuses in Pre-Need Funeral Contracts, at <http://www.aarp.org/litigation/releases/2001/bradyann.html> (July 2, 2001).

32. Dee Mcaree, *‘Death Care’ Actions Rise*, NAT’L L. J., Sept. 9, 2002, at A4.

33. *Id.*

34. Press Release, *supra* note 15 (citing a 1999 survey entitled, *A Study of American Attitudes Toward Ritualization and Memorialization*, performed by Wirthin Worldwide and supported by the Funeral and Memorial Information Council (FAMIC), a group of organizations representing nearly every segment of death care).

35. Green, *supra* note 2 (estimating that cremation prices range from \$800 to \$1500).

36. Tony Semerad, *Cremation Becomes a More Common Choice in U.S.*, KNIGHT-RIDDER TRIB. BUS. NEWS, Apr. 29, 2002, available at 2002 WL 20270727 (stating that according to the Utah Funeral Directors Association, the average cremation costs \$3500 to \$4500).

37. AARP, FUNERAL ARRANGEMENTS AND MEMORIAL SERVICES, at [http://www.aarp.org/griefandloss/articles/73\\_a.html](http://www.aarp.org/griefandloss/articles/73_a.html) (last visited Aug. 20, 2003).

38. Green, *supra* note 2.

39. See CREMATION ASS’N OF N. AM., *supra* note 14, at 3–4; see also Green, *supra* note 2.

40. Semerad, *supra* note 36.

holding memorial services months later.”<sup>41</sup> This comports with the cremation selection as a simpler, more cost-effective method of disposition. In addition, older people are more likely to make arrangements in advance.<sup>42</sup>

### C. Industry Participants

A “crematory authority” is the “legal entity or the authorized representative of the legal entity . . . licensed . . . to operate a crematory and perform cremation.”<sup>43</sup> Crematory authorities include: (1) funeral home directors; (2) cremation subcontractors; (3) direct cremators; and (4) cemetery cremators.<sup>44</sup> Each entity must adhere to a different set of regulations and thus has unique issues.

#### 1. FUNERAL HOME DIRECTORS

Funeral directors “preserve, prepare, and keep bodies for viewing before . . . cremation.”<sup>45</sup> The director works with the family to make arrangements, including providing customers with a list of products and services offered, and planning for the pick-up and disposition of the body.<sup>46</sup> The funeral director may incinerate the body on-site,<sup>47</sup> or subcontract with a cremator.<sup>48</sup> In either case, the funeral home collects the fees.<sup>49</sup>

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41. *Id.*

42. Press Release, *supra* note 15 (“While only 15% of those under 40 have made some pre-arrangements, the percentage increases to 27% (22%, 1995) of those age 40–54 and 43% (44%, 1995) of those 55 and older.”).

43. MODEL CREMATION LAW & EXPLANATION pt. I, No. 1M (Cremation Ass’n of N. Am. 1999) [hereinafter MODEL CREMATION LAW], available at <http://www.cremationassociation.org/docs/model-cremation-law.pdf>.

44. See generally David E. Harrington & Kathy J. Krynski, *The Effect of State Funeral Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets*, 45 J.L. & ECON. 199, 210 (2002); Duane Stanford, *Crematory Probe: Regulators Tried to Close Tri-State*, ATLANTA J. & CONST., Feb. 22, 2002, at C1, available at 2002 WL 3711587.

45. KIWI CAREERS, FUNERAL DIRECTOR/EMBALMER, TASKS AND DUTIES, at [http://www.careers.co.nz/jobs/14a\\_pcu/j44613a.htm](http://www.careers.co.nz/jobs/14a_pcu/j44613a.htm) (last updated Sept. 24, 2003).

46. See John W. Fletcher, *Cemeteries May Not Engage in Activities of “Funeral Director,”* LAW.J., Aug. 9, 2002, at 1, 1.

47. Green, *supra* note 2; Semerad, *supra* note 36.

48. See Joseph A. Gambardello, *Owner Seeks to Educate About Crematories*, PHILA. INQUIRER, Feb. 25, 2002, at B1, available at <http://www.philly.com/mld/inquirer/news/local/2740819.htm>.

49. Stanford, *supra* note 44.

## 2. CREMATION SUBCONTRACTORS

Funeral home directors, who do not own and operate incinerators, may subcontract cremation services to an entity that primarily provides cremations.<sup>50</sup> In some states, the cremation subcontractor coordinates the pick-up of the body from the funeral home.<sup>51</sup> Funeral homes are not always obligated to disclose whether they subcontract crematory services to a third party.<sup>52</sup>

## 3. DIRECT CREMATORS

Consumers may arrange a cremation directly with the cremator. A direct cremator picks up the body from the place of death, transports it to a crematory, provides a container for cremation, obtains all the necessary authorizations, carries out the cremation itself, and returns the remains to the family.<sup>53</sup> All states, except Florida, New Mexico, and Oregon, require individuals selling only direct cremations to be licensed as funeral directors.<sup>54</sup>

## 4. CEMETERY CREMATORS

At the turn of the twentieth century, cemetery owners and advocates of cremation formed an alliance that led most early crematories to be located in cemeteries.<sup>55</sup> Cemetery owners favored cemetery cremations based on the belief that this vantage point would motivate people to opt for traditional burials.<sup>56</sup> Conversely, advocates of cremation viewed cemeteries as open locations that would create greater public acceptance.<sup>57</sup> Today, in most of New England and Texas, state laws require cremations to be performed at cemeteries.<sup>58</sup> This has

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50. See Gambardello, *supra* note 48; Aurelio Rojas, *Tighter Controls Put on Cremation*, SACRAMENTO BEE, Jan. 2, 2003, available at <http://www.fresnobee.com/local/v-print/story/5771893p-6742121c.html>; see also Stanford, *supra* note 44.

51. John Duchemin, *Call for Cremation Rules Grows Louder*, HONOLULU ADVERTISER, Apr. 29, 2002, at A1, available at 2002 WL 24190799.

52. See, e.g., David Wichner, *Crematory Outrage Spurs Queries Here*, ARIZ. DAILY STAR, Mar. 12, 2002, at A1 (discussing proposed Arizona bill that would require funeral homes to disclose where bodies are to be cremated), available at 2002 WL 12817802.

53. Harrington & Krynski, *supra* note 44, at 206 n.22.

54. *Id.* at 203–06. Although Florida does not license crematory operators, the state does require a designated licensed funeral director or direct disposer to be in charge of each crematory. GAO REPORT, *supra* note 13, at 31.

55. Harrington & Krynski, *supra* note 44, at 210.

56. *See id.*

57. *See id.*

58. *See id.* at 203–05 tbl.1; see also Wagner, *supra* note 4.

likely mitigated the occurrences of misconduct because the operations are highly visible.<sup>59</sup>

#### D. Industry Regulation

The crematory industry is regulated through a hodgepodge of federal and state laws.<sup>60</sup> As a result, criminal and civil penalties for misconduct vary widely between jurisdictions.<sup>61</sup> Although the FTC and EPA coordinate with state agencies regarding regulatory and enforcement concerns,<sup>62</sup> no national regulatory agency is solely responsible for this industry.<sup>63</sup> Death care industry associations attempt to fill this void by promulgating model laws and providing procedural and operative guidelines to guide state lawmakers.<sup>64</sup>

##### 1. FEDERAL LEGISLATION AND REGULATIONS

As mentioned earlier,<sup>65</sup> federal legislation governing the industry consists of EPA and FTC regulations. Although environmental concerns are immensely important, as well as relevant, the debate surrounding federal crematory regulations has centered on consumer protection issues. Therefore, this section will focus on the Funeral Rule.

The FTC regulates the funeral industry through consumer protection guidelines promulgated under the Funeral Rule.<sup>66</sup> This rule is primarily a pre-sale disclosure law.<sup>67</sup> The Funeral Rule requires sellers of funeral goods and services to give itemized price lists to consumers who inquire about purchasing such goods or services and to disclose which fees are declinable.<sup>68</sup> It also authorizes the FTC to regulate crematories that are owned and operated by funeral directors; but if a business sells only cremations, it is not covered by the

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59. Wagner, *supra* note 4.

60. See HERMANSON, *supra* note 9, at 7. See generally *Hearings*, *supra* note 9.

61. See generally *Hearings*, *supra* note 9.

62. See generally *id.*

63. See *id.* at 2. "Congress has never directly legislated [the death care industry]." *Id.*

64. See MODEL CREMATION LAW, *supra* note 43.

65. See *supra* Part I.

66. 16 C.F.R. § 453 (2003).

67. *Hearings*, *supra* note 9, at 10 (statement of Eileen Harrington, Associate Director of Marketing Practices, Federal Trade Commission).

68. See *id.* at 11 (statement of Eileen Harrington, Associate Director of Marketing Practices, Federal Trade Commission).

Funeral Rule.<sup>69</sup> It does, however, prohibit funeral directors from requiring customers to purchase unnecessary goods and services, such as caskets for bodies that are to be cremated.<sup>70</sup> Therefore, the cremation subcontractor discussed earlier<sup>71</sup> can avoid the enforcement authority of the FTC, whereas the traditional funeral director cannot.

## 2. STATE REGULATIONS

Statutes governing the crematory industry vary vastly between states and regions.<sup>72</sup> Eighteen states have adopted the Funeral Rule in

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69. HERMANSON, *supra* note 9, at 7.

70. Harrington & Krynski, *supra* note 44, at 206.

71. See *supra* Part II.C.2.

72. E.g., ALA. CODE § 13A-11-13 (Supp. 2002) (“[K]nowingly and willfully signing a certificate as having . . . cremated . . . a human body for disposition when, in fact, the services were not performed as indicated” constitutes abuse of a corpse, a class C felony.); ALASKA STAT. §§ 08.42.090, .200 (Michie 2002) (authorizing revocation of Department of Community and Economic Development license when immediately before impending death the licensee has accepted payment for recommending a body to be disposed of in a specific crematory); ARIZ. REV. STAT. ANN. § 32-1307 (West 2002) (requiring an inspection at least once every five years); ARK. CODE ANN. § 17-29-207 (Michie 2001) (stating licensing and inspection violations constitute Class A misdemeanors); CAL. BUS. & PROF. CODE § 9715.1 (West Supp. 2003) (requiring cemetery managers to obtain a state license); CONN. GEN. STAT. ANN. § 19a-320 (West Supp. 2003) (authorizing the Department of Public Health to inspect a crematory whenever it deems advisable); DEL. CODE ANN. tit. 16, § 3162 (1995) (allowing a family member or representative to be present at the time the cremation is being carried out); FLA. STAT. ANN. § 470.025 (West 2001) (requiring a licensed funeral director or registered direct disposer to supervise incinerator facility); GA. CODE ANN. § 43-18-46(8) (2002) (authorizing state funeral board to discipline cremators for “gross or willful malpractice or gross neglect”); HAW. REV. STAT. ANN. § 841-16 (Michie 1999) (authorizing cremation of decomposed remains that constitute an immediate menace to the public health); IDAHO CODE § 54-1103 (Michie 2003) (requiring crematory establishment operating license); 410 ILL. COMP. STAT. ANN. 18/55-(4.15) (West Supp. 2003) (stating that willfully and knowingly destroying or damaging the remains of a deceased human being is a Class 3 felony); IND. CODE ANN. § 23-14-31-39 (West Supp. 2003) (prohibiting simultaneous cremations of more than one individual in the same cremation chamber absent prior written consent of authorizing agents); IOWA CODE ANN. § 156.10 (West 1997) (authorizing the director of public health to inspect all places where dead human bodies are held for cremation); KAN. STAT. ANN. § 65-1766 (Supp. 2001) (authorizing the state board of mortuary arts to revoke, suspend, refuse to issue or renew crematory license for violating regulations governing the care of dead human bodies or cremated remains); KY. REV. STAT. ANN. § 525.120 (Michie Supp. 2002) (stating failure to cremate a corpse in accordance with contract constitutes “abuse of a corpse,” a Class A misdemeanor); LA. REV. STAT. ANN. § 8:651 (West 1986) (requiring decent cremation within a reasonable time after death); ME. REV. STAT. ANN. tit. 32, § 1455-A (West 1999 & Supp. 2002) (authorizing civil and criminal penalties for “[a]buse or disrespect in the handling of human remains”); MD. CODE ANN., HEALTH OCC. § 7-411 (2000) (requiring metal or plastic identification tag to be placed in the cremains container); *id.* § 7-505 (prohibiting cremator from misrepresenting need for casket); MASS. ANN. LAWS ch. 114, § 48

(Law. Co-op. 2002) (prohibiting an undertaker from burying human ashes without obtaining a certificate from the cremator, which verifies burial permit and medical examiner certificate having been duly presented); MICH. COMP. LAWS ANN. § 456.210 (West 2002) (requiring crematory to keep records of every person incinerated, the cremation permit number, and the name of the officiating undertaker); MINN. STAT. ANN. § 149A.95 (West Supp. 2003) (enumerating cremation procedures, requirements, and regulations); MISS. CODE ANN. § 73-11-69 (Supp. 2003) (compliance and licensure violations constitute a felony); MO. ANN. STAT. § 193.175 (West 1996) (establishing standards by which the cremator shall identify the deceased); MONT. CODE ANN. § 37-19-703 (2001) (establishing crematory, crematory operator, and crematory technician licensure requirements); NEB. REV. STAT. § 71-1333(1)(d) (1996) (authorizing the Department of Health and Human Services Regulation and Licensure to take disciplinary measures against applicants or licensees found guilty of "soliciting or accepting any remuneration, commission, bonus, or rebate in consideration of the recommending or causing a dead human body to be placed in any crematory"); NEV. REV. STAT. ANN. 451.715 (Michie 2000) (operating crematory in violation of regulations set forth by the state board of funeral directors, embalmers and operators of cemeteries and crematories may constitute public nuisance); *id.* 451.040 (obstructing or detaining person engaged in carrying or accompanying dead body to place of cremation constitutes misdemeanor); N.H. REV. STAT. ANN. § 325:49 (2003) (prohibiting crematories from soliciting prearranged funeral service or plan); *id.* § 325:29 (requiring persons assisting in cremation to hold apprentice license); N.J. STAT. ANN. § 26:7-12 (West 1996) (requiring cremators to obtain a license from the State Department of Health); N.M. STAT. ANN. § 61-32-11 (Michie Supp. 2003) (establishing licensure requirements and empowering the professional and occupational license board to adopt additional rules in the interest of public health, safety, and welfare); N.Y. PUB. HEALTH LAW § 4145 (McKinney 2001) (requiring the person in charge of the cremation to keep a record, which shall be open to official inspection, of all bodies disposed of on the premises under his charge); N.D. CENT. CODE § 43-10-25 (2001) (requiring an annual operating license); OHIO REV. CODE ANN. § 4717.06 (Anderson 2003) (requiring cremators to obtain an operating license from the board of embalmers); OKLA. STAT. ANN. tit. 63, § 1-331.1 (West Supp. 2003) (authorizing the Oklahoma State Board of Embalmers and Funeral Directors to "adopt and promulgate rules necessary for the licensing, inspection, and regulation of crematories"); OR. REV. STAT. § 692.275(5) (2001) (providing that "the recommendation of the Cremation Association of North America shall be used in adopting rules regulating crematoriums"); PA. STAT. ANN. tit. 63, §§ 479.1-20 (West 1996 & Supp. 2003) (prohibiting people/entities from engaging in the business of a "funeral director," including providing crematory services, without a license); R.I. GEN. LAWS § 5-33.2-13(b) (1999) (requiring inspections at least twice a year of licensed crematories); S.C. CODE ANN. § 17-5-600 (Law. Co-op. 2003) (failure of person requesting cremation to secure a permit constitutes a misdemeanor punishable by fine); *id.* § 16-17-600 (immunizing a crematory operator from civil and criminal liability for cremating a body which "(1) has been incorrectly identified by the funeral director, coroner, medical examiner or person authorized by law to bring the deceased to the crematory; or (2) the funeral director has obtained invalid authorization to cremate"); S.D. CODIFIED LAWS § 34-26A-18 (Michie 1994) (prohibiting simultaneous cremations absent written authorization); *id.* § 34-26A-5 (Michie Supp. 2003) (performing cremation in an unlicensed facility is a Class 2 misdemeanor); TENN. CODE ANN. § 62-5-107 (Supp. 2002) (requiring funeral directors to use only licensed crematory facilities); UTAH CODE ANN. § 58-9-501 (Supp. 2003) (requiring cremations to be performed by a licensed "funeral service director" or "funeral service apprentice"); VT. STAT. ANN. tit. 26, § 1212(b) (Supp. 2002) (requiring the office of professional regulation to adopt rules regarding minimum standards for

whole or in part, either by reference or verbatim.<sup>73</sup> While some states have enacted comprehensive legislation mandating inspection, training, and operating licenses,<sup>74</sup> other states focus primarily on pre-sale disclosure violations.<sup>75</sup> Because industry oversight is largely handled on a state-to-state basis,<sup>76</sup> legal remedies addressing misconduct differ vastly between states. Various death care industry associations try to promote uniformity by promulgating model laws and procedures.<sup>77</sup> The key regulatory differences between selected states are discussed in Part III.B of this note.

### 3. INDUSTRY SELF-REGULATION

Crematory authorities are self-regulated through industry associations and quasi-government agencies. Some states empower local funeral boards to establish rules governing the crematory industry.<sup>78</sup> These boards possess agency power to determine the standards, rules, and business conduct appropriate for a crematorium.<sup>79</sup> Death care industry associations also provide procedural and operative guidelines for states. For example, the International Cemetery and Funeral Asso-

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crematory establishments); *id.* § 1213 (authorizing the office of professional regulation to inspect a crematory establishment “at any reasonable time” and requiring inspection at least once every two years); VA. CODE ANN. § 32.1-284 (Michie 2001) (prohibiting cremation absent medical examiner postmortem examination); WASH. REV. CODE ANN. § 68.05.185 (West 1998) (requiring crematorium operation permit); *id.* § 18.39.217 (authorizing cemetery board to regulate crematories not affiliated with a funeral establishment); W. VA. CODE ANN. §§ 30-6-1, -11 (Michie 2002) (requiring training and certification of crematory operators); WIS. STAT. ANN. § 979.10 (West 1998 & Supp. 2002) (requiring a cremation permit issued by the coroner or medical examiner); WYO. STAT. ANN. § 33-16-403 (Michie 2003) (requiring annual inspections by the state board of embalming); 2003 Colo. Legis. Serv. 1232 (West) (stating it is unlawful to tell a person that a casket is required for immediate cremation); S.B. 550, 2003 Gen. Assem., 2003 Sess. (N.C. 2003) (providing that an authorized crematory licensee shall not be held liable for cremating human remains in compliance with state law, “except for such crematory licensee’s gross negligence”); 2003 Tex. Sess. Law Serv. 253-64 (Vernon) (requiring licensing of all crematories, training and certification of all crematory operators, tracking and verification of human remains’ identities through the entire cremation process, and mandatory state inspection of cremation facilities).

73. HERMANSON, *supra* note 9, at 7-8.

74. Karr, *supra* note 13.

75. *E.g.*, NEB. REV. STAT. § 71-1333; 2003 Colo. Legis. Serv. 1232 (West).

76. *See generally* HERMANSON, *supra* note 9, at 7-8.

77. *See generally* Hearings, *supra* note 9 (providing overview of National Funeral Director Association and International Cemetery and Funeral Association involvement in regulating the crematory industry).

78. *See* Stanford, *supra* note 44 (listing Georgia as one state where the funeral board governs).

79. *See id.*

ciation (ICFA) published model guidelines for state laws and regulations addressing practically every aspect of the cremation process.<sup>80</sup> The ICFA even provides model contracts to funeral homes and cemeteries for their use when retaining a third party for cremation services.<sup>81</sup> In addition, the National Funeral Directors Association (NFDA), the oldest and largest funeral service organization in the world, has assembled death care industry representatives to develop model state guidelines for crematories.<sup>82</sup> CANA has also established specific cremation protocols and conducts annual Cremator Operator Certification Programs to ensure these procedures are being carried out.<sup>83</sup> Crematory authorities are not required to be members of an industry association, and the model laws that these associations promulgate do not constitute enforceable state law.<sup>84</sup>

### E. The Problem

The rise in the number of cremations, coupled with inadequate oversight, loopholes, and nationalization of funeral businesses has led to a situation where the elderly are vulnerable to various forms of cremator misconduct.<sup>85</sup> Recently, cremators have been accused of

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80. See MODEL GUIDELINES FOR STATE LAWS & REGULATIONS: HANDLING OF HUMAN REMAINS IN CONJUNCTION WITH FINAL DISPOSITION (Int'l Cemetery & Funeral Ass'n 1998), [http://www.icfa.org/cremation\\_guidelines2.htm](http://www.icfa.org/cremation_guidelines2.htm) (last visited Mar. 27, 2003) [hereinafter MODEL GUIDELINES, FINAL DISPOSITION]; see also MODEL GUIDELINES FOR STATE LAWS & REGULATIONS: HANDLING OF HUMAN REMAINS IN CONJUNCTION WITH THE CREMATION PROCESS (Int'l Cemetery & Funeral Ass'n 1998), [http://www.icfa.org/cremation\\_guidelines1.htm](http://www.icfa.org/cremation_guidelines1.htm) (last visited Mar. 27, 2003) [hereinafter MODEL GUIDELINES, CREMATION PROCESS].

81. *Hearings*, *supra* note 9, at 85 (prepared statement of Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association).

82. *Id.* at 39 (prepared statement of Diana Kurz, Executive Board Member of the National Funeral Directors Association).

83. Press Release, Cremation Association of North America, at [http://www.cremationassociation.org/html/press\\_tri-state.html](http://www.cremationassociation.org/html/press_tri-state.html) (Feb. 2002); see CREMATION ASS'N OF N. AM., RECOMMENDED PROCEDURES FOR HANDLING DEAD HUMAN BODIES BY AN AUTHORIZED CREMATORY AUTHORITY 2, 3, available at <http://www.cremationassociation.org/docs/handling-procedures.pdf> (last visited Oct. 18, 2003) (stating under sections 1 and 3 that when the crematory authority is unable to cremate human remains immediately upon taking custody, the crematory shall provide a holding facility that complies with public health laws and preserves the dignity of the human remains).

84. See generally MODEL CREMATION LAW, *supra* note 43.

85. This note focuses primarily on consumer fraud, theft, and mishandling of corpses. Cremator misconduct, however, involves a broad spectrum of legal issues. The issues outside of the primary scope of this note that have not been covered in-depth include: (1) inadequate consumer protection and exploitation in

theft by deception,<sup>86</sup> returning more or less remains than were actually removed from the cremation chamber,<sup>87</sup> and harvesting of body parts or items of value without specific written authorization.<sup>88</sup> Although it is not known whether the media reports of misconduct are indicative of widespread abuses, legislators, industry associations, and consumers agree that additional regulatory safeguards are necessary.<sup>89</sup> However, lawmakers and practitioners disagree on whether increased federal, state, or industry self-regulation is the solution.

### III. Analysis: Regulatory Standards and Enforcement Gaps

#### A. The *Tri-State* Case:<sup>90</sup> Investigatory, Enforcement, and Regulatory Shortcomings Exposed

The highly publicized *Tri-State* case nicely illustrates the vulnerability of the crematory industry to consumer fraud and the need for oversight.<sup>91</sup> Decentralized investigation and enforcement efforts keep potential violations from being reported to the proper authorities. Additionally, loopholes in state and federal laws shield wrongdoers.

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pre-need contracts; (2) the sale of unnecessary products and services (i.e., tacking on additional cost items that are not provided to the consumer in advance or offering pallbearers for cremations); (3) vagueness of laws (i.e., whether the power of attorney translates into a right to choose cremation over burial); and (4) collusion between crematory operators and decedent's family to undermine decedent's wishes.

86. See *In re Tri-State Crematory Litig.*, 206 F. Supp. 2d 1376 (J.P.M.L. 2002) (where plaintiff was accused of taking payment for cremations and giving back wood chips or cement powder instead of ashes).

87. AARP, FUNERAL AND BURIAL PRACTICES, at <http://www.aarp.org/press/testimony/2000/041000.html> (Apr. 10, 2000) [hereinafter *Funeral and Burial Practices*] (providing testimony of Dr. Robert Shreve, past AARP Chairman, before the U.S. Senate Special Committee on Aging who described problems encountered when preplanning, arranging, and conducting funeral and burial activities); see also Leonora LaPeter, *Lawsuits Mount over Remains*, ST. PETERSBURG TIMES, Aug. 14, 2002, at 1B (discussing pending Florida lawsuits where plaintiffs have accused funeral homes of delivering more human remains than possible based on decedent's weight at death), available at 2002 WL 25545568.

88. See generally *Funeral and Burial Practices*, supra note 87; see also Karr, supra note 13 (discussing Lake Elsinore, California, case where cremator is accused of selling body parts to medical schools without the knowledge of the families or regulators).

89. See generally *Hearings*, supra note 9.

90. *State v. Marsh*, 30 Media L. Rep. 1507 (Ga. Super. Ct. 2002).

91. See *id.*

**1. DECENTRALIZED INVESTIGATION AND ENFORCEMENT EFFORTS**

In April 2001, a driver for Blossman Oil Company reported seeing decomposing bodies while making a delivery to Tri-State Crematory in Noble, Georgia.<sup>92</sup> Blossman's General Manager informed the Walker County, Georgia Sheriff,<sup>93</sup> who "saw the matter as a regulatory issue" and did not investigate further.<sup>94</sup> Seven months later, the same driver saw more bodies and informed a secretary in a local Federal Bureau of Investigation (FBI) office.<sup>95</sup> The secretary informed the U.S. EPA's Criminal Investigative Division, instead of the FBI.<sup>96</sup> The EPA, in turn, contacted the sheriff's department,<sup>97</sup> which did not conduct an official search.<sup>98</sup> The same FBI secretary called the EPA again, and in February 2002, their investigation revealed 339 bodies in the surrounding woods, stacked in storage buildings, stuffed in burial vaults and buried in pits.<sup>99</sup> Presumably, if state and local authorities were aware of a single agency responsible for investigating alleged crematory misconduct, Marsh's operation would have been shut down months earlier. Instead, nearly seventy entities have been involved in the investigation, clean-up, and prosecution of Tri-State,<sup>100</sup> while the

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92. Associated Press, *Authorities Got Tips Months Before Crematory Probe Began* (Sept. 20, 2002), at <http://www.cnn.com/2002/LAW/09/20/ga.corpses.ap/index.htm> (on file with The Elder Law Journal).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See Buzz Weiss, *Grisly Discovery Sparks Massive Response*, EMERGENCY MANAGER (Ga. Emergency Mgmt. Agency, Atlanta, Ga.), Summer 2002, at 15, 16 ("Ultimately, more than 500 personnel from nearly 70 federal, state and local agencies, the private sector, and volunteer organizations were sent to Walker County."), available at [http://rome.gema.state.ga.us/WebGema/resources.nsf/0/4b3315bfe13600b885256c91006765a4/\\$FILE/Summer\\_2002.pdf](http://rome.gema.state.ga.us/WebGema/resources.nsf/0/4b3315bfe13600b885256c91006765a4/$FILE/Summer_2002.pdf). The agencies involved in the operation include: Walker County; 911 Communications Center; Coroner's Office; Department of Family and Children Services; District Attorney's Office; Emergency Management Agency; Health Department; Fire-Rescue; Public Works; Sheriff's Office; Alabama District Attorney's Office; Alltel Corporation; American Red Cross; Armed Forces Institute of Pathology; Best Manufacturing; Catoosa County EMA; Center Point Baptist Church; Chattooga County EMA; Cherokee-DeKalb County; Alabama District Attorney's Office; Cingular Wireless; City of LaFayette; Critical Incident Stress Management Team, Federal Bureau of Investigation; Federal Aviation Administration; Georgia Baptist Disaster Relief Team; Georgia Bureau of Investigation; Georgia Correctional Industries; Georgia Department of Corrections; Georgia Department of Human Resources—Mental Health and Public Health; Georgia Department of Natural Resources—Environmental Protection and Law Enforcement, Safe Dams; Georgia Department

agency likely to be best equipped to prevent the problem did not have authority over the crematory.

## 2. REGULATORY LOOPHOLES PRESUMABLY SHIELDED CREMATORY SUBCONTRACTORS

Georgia's Funeral Services Board (a seven-member panel of mostly funeral industry professionals, all appointed by the governor) is responsible for regulating and inspecting crematories in the state.<sup>101</sup> Since 1994, the Board twice investigated Marsh for cremating bodies without a state license.<sup>102</sup> The first investigation ended in the summer of 1994 because lawmakers had given Marsh a temporary exemption from state cremation laws.<sup>103</sup> Shortly thereafter, the Board commenced another probe that lasted about two years.<sup>104</sup> The attorney general's office dropped the case in 1996 because of a loophole in Georgia's crematory law, which made existing regulations only applicable to crematories owned by a funeral director or funeral establishment and that are open to the public.<sup>105</sup> Because funeral homes sub-contracted with Tri-State, and Marsh was not a trained funeral

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of Transportation; Georgia Emergency Management Agency; Georgia Forestry Commission; Georgia Funeral Home Association; Georgia Secretary of State's Office; Georgia State Patrol—Aviation and Law Enforcement; Georgia Technology Authority; Governor's Office of Consumer Affairs; Hewlett Packard; Home Depot [sic]; Hutcheson Medical Center; Independent Funeral Home Association of Georgia; International Incident Counseling Service (Cherokee County); International Critical Incident Stress Foundation Tri-State CISM; Lane Funeral Home and Crematory; Lookout Mountain Community Services, Inc.; North Georgia Electric Membership Corporation; Northwest Georgia Technical College; Region IV Federal Disaster Mortuary Operations Team; Rock Spring Favorite Mart; Salvation Army; Sam Bernard Partners and Associates, P.C.; Southern Baptist Convention Disaster Relief; Southern LINC; SWS Recovery Service; United States Forestry; United States Public Health Services; Stokes Timber Company; Mashburn Tree Services; W.L. Wilson & Sons. GA. EMERGENCY MGMT. AGENCY, TRI-STATE CREMATORY FREQUENTLY ASKED QUESTIONS, at <http://rome.gema.state.ga.us/webgema/piocommon.ns4/pages/Walker2> (last visited May 19, 2003) (on file with *The Elder Law Journal*). It is important to commend the valuable contributions made by the private sector and volunteer organizations with respect to the clean-up effort. This note neither proposes that these entities should have prevented the problem, nor that these organizations should have authority over crematories regarding regulations, investigations, and enforcement efforts.

101. Stanford, *supra* note 44.

102. *Id.*

103. *Id.* (stating Rep. Mike Snow (D-Chickamauga), a family friend of Marsh, proposed a law granting the investigation exemption for Tri-State).

104. *Id.*

105. *Id.* at 3. "Crematory means a place that is owned by a funeral director or funeral establishment where cremation is performed and which is open to the public." *Id.*

director, Tri-State did not fit the state's definition of a crematory and thus did not fall under the funeral board's jurisdiction.<sup>106</sup>

## B. State Crematory Laws

Georgia is not the only state vulnerable to misconduct. Recently, the news media has reported stories alleging death care industry misconduct in Connecticut, California, Hawaii, and Florida.<sup>107</sup> Because government supervision over the crematory industry varies vastly between jurisdictions, business practices that constitute criminal behavior in one state do not necessarily violate laws in another. Some states have limited laws, merely requiring a clean air permit to operate a crematorium.<sup>108</sup> Other states have comprehensive laws mandating inspections and training, in addition to operating licenses.<sup>109</sup> To better illustrate the range of protections in different jurisdictions, this section will briefly summarize selected states' cremation laws.

### 1. STATES WITH LIMITED REGULATIONS

States with limited regulations are at greater risk for cremator misconduct. Alabama, Colorado, Hawaii, Maryland, Mississippi, Nebraska, Ohio, Pennsylvania, Utah, Vermont, and West Virginia offer few legal protections.<sup>110</sup> Colorado is the only state without a regulatory board or licensing requirements for crematories and funeral homes.<sup>111</sup> In Pennsylvania, where the State Board of Funeral Directors is responsible for enforcing its death care law, cremators need only a license to sell their services.<sup>112</sup> In Utah, crematories are regulated and

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106. Associated Press, *supra* note 92; *see also* Stanford, *supra* note 44.

107. *Hearings*, *supra* note 9, at 2.

108. *See, e.g.*, Duchemin, *supra* note 51 ("Most Hawaii crematorium operators must apply for a federally mandated clean air permit, which gets renewed once every five years, but there are no licensing or inspection requirements . . .").

109. *See, e.g.*, Rojas, *supra* note 50 (citing California as one example).

110. *See* Wagner, *supra* note 4; *see also* Howard Pankratz, *Insiders Debate Need for Cremation Laws*, DENVER POST, Feb. 19, 2002, at A1 ("Colorado is the only state with no government regulations or licensing for crematories and funeral homes."), *available at* 2002 WL 6560935; Semerad, *supra* note 36 ("Utah is one of only four states with no cremation laws.").

111. Pankratz, *supra* note 110.

112. PA. STAT. ANN. tit. 63, §§ 479.1–.20 (West 1996 & Supp. 2003). This law prohibits people/entities from engaging in the business of a "funeral director" without a license. Fletcher, *supra* note 46, at 1. Pennsylvania has a specific definition of funeral director that includes anyone engaged "in the care and disposition of the human dead, or in the practice of disinfecting and preparing by embalming the human dead for the funeral service, burial or cremation, or the supervising of

licensed by the Department of Occupational and Professional Licensing.<sup>113</sup> The Utah Division of Air Quality conducts inspections to ensure that cremators comply with state EPA emission regulations,<sup>114</sup> however, the state has “no specific laws mandating standards or procedures in cremation.”<sup>115</sup> Ohio has a 1998 law requiring inspections of crematory records,<sup>116</sup> but it has not been enforced because licensing of inspectors has not been completed.<sup>117</sup> In Hawaii, cremation is almost totally unregulated under state law.<sup>118</sup> Although clean air permits are required, there are no licensing or inspection requirements to make sure a crematorium works properly.<sup>119</sup> Hawaiian funeral homes do, however, oversee the transport of bodies to the crematories.<sup>120</sup>

Nebraska currently has no laws regulating the administration of crematoriums, but the state is considering legislation. In 2002, Nebraska State Senator Dennis Byars introduced Legislative Bill 862, proposing standards for cremation.<sup>121</sup> This bill failed amid opposition from Senator Ernie Chambers, who voiced concerns regarding the rights of the deceased in deciding what to do with their remains.<sup>122</sup> Currently, Nebraska lawmakers are considering a revised proposal, Legislative Bill 59, the Cremation of Human Remains Act.<sup>123</sup> The amended bill would make “misrepresentation or fraud in the operation of a crematory,” punishable by fine, as well as other civil penalties.<sup>124</sup>

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burial, transportation or disposal of deceased human bodies . . .” PA. STAT. ANN. tit. 63, § 479.2. Therefore, selling crematory goods and services requires a license under the Funeral Director Law.

113. Wagner, *supra* note 4.

114. *Id.*

115. Semerad, *supra* note 36.

116. OHIO REV. CODE ANN. § 4714.28 (Anderson 2003).

117. Wagner, *supra* note 4.

118. Duchemin, *supra* note 51.

119. *Id.*

120. *Id.*

121. L.B. 862, 97th Legis., 2d Sess. (Neb. 2002), LEXIS 2001 Bill Text NE L.B. 862; Robynn Tysver, *Cremation Standards for State Are Proposed*, OMAHA WORLD-HERALD, Feb. 1, 2002, at 7B, available at 2002 WL 5326092.

122. Michael Montgomery, *Proposed Act to Regulate Crematoriums Gains Steam*, DAILY NEBRASKAN (Lincoln), Jan. 22, 2003, available at <http://www.dailynebraskan.com/vnews/display.v/ART/2003/01/22/3e2e314c010ce>.

123. L.B. 59, 98th Legis., 1st Sess. (Neb. 2003), LEXIS 2003 Bill Text NE L.B. 59; Montgomery, *supra* note 122.

124. L.B. 59, 98th Legis., 1st Sess. (Neb. 2003), LEXIS 2003 Bill Text NE L.B. 59; Montgomery, *supra* note 122.

## 2. STATES WITH MODERATE REGULATIONS

States with moderate regulations are better prepared, but not immune from misconduct. Georgia did not opt to regulate crematories until 1990, and the regulations adopted that year were not as strict as those recommended by the industry.<sup>125</sup> Since then, the state has adopted laws that separate funeral directors and crematorium authorities, establish stricter penalties, and require more regular inspections.<sup>126</sup> New England states require crematories to be located at not-for-profit cemeteries, thus avoiding misconduct that can occur in more hidden locations.<sup>127</sup> Massachusetts requires a state medical examiner to visit the crematory, inspect paperwork, and view the body.<sup>128</sup> Legislators from Texas recently passed a bill that promises stiffer regulation of the cremation process.<sup>129</sup> Texas House Bill 587 requires licensing of all crematories, training and certification of all crematory operators, tracking and verification of human remains' identities through the entire cremation process, and mandates state inspection of all cremation facilities.<sup>130</sup>

## 3. STATES WITH COMPREHENSIVE LAWS

Twenty-three states have "comprehensive" cremation laws.<sup>131</sup> CANA recognizes that California, Florida, Georgia, Idaho, Illinois, Louisiana, North Carolina, and Ohio have addressed all aspects of the cremation process in great detail and cites those laws as good sources for lawmakers contemplating enacting cremation legislation.<sup>132</sup> Flor-

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125. Michael Pearson, *Crematory Investigation: Why Didn't Tri-State Just Cremate the Bodies?*, ATLANTA J. & CONST., Feb. 24, 2002, at C1, available at 2002 WL 3711953.

126. Montgomery, *supra* note 122.

127. Wagner, *supra* note 4. Although Vermont is a New England state, it does not require cremations to be performed at a cemetery. Harrington & Krynski, *supra* note 44, at 204-06 tbl.1. Michigan and New Jersey require cemetery cremations. *Id.* Texas requires crematories to be "constructed on or adjacent to a perpetual care cemetery or adjacent to a funeral establishment." 2003 Tex. Sess. Law Serv. 254 (Vernon).

128. Wagner, *supra* note 4.

129. 2003 Tex. Sess. Law Serv. 253-64 (Vernon); Tamarind Phinisee, *New Law Shaking Things Up in State's Funeral Industry*, SAN ANTONIO BUS. J., Aug. 11, 2003, <http://www.bizjournals.com/sanantonio/stories/2003/08/11/story7.html>.

130. 2003 Tex. Sess. Law Serv. 253-64 (Vernon); *Cremation Legislation Could Be Modeled by Other States*, DALLAS BUS. J., Jan. 29, 2003, <http://dallas.bizjournals.com/dallas/stories/2003/01/27/daily25.html>.

131. Karr, *supra* note 13.

132. MODEL CREMATION LAW, *supra* note 43, pmb1. CANA recognized Georgia in the preamble to its model law in 1999, prior to the *Tri-State* case in Noble, Geor-

ida and California are known by the industry for having the most protective laws because they require inspections.<sup>133</sup> California currently requires that crematory operators pass training programs,<sup>134</sup> and the state has recently passed legislation that will require crematory managers to obtain a state license.<sup>135</sup> Under the new legislation, licensees who refuse or fail to furnish accurate information will be subject to punishment of up to one year in jail, a \$10,000 fine, or both.<sup>136</sup> Fortunately, some states are beginning to adopt stricter, more uniform laws. For example, lawmakers in Arizona and Illinois mandated that all state crematory operators be licensed, a requirement that used to solely exist in Florida.<sup>137</sup>

Illinois recently updated its existing laws by passing the Crematory Regulation Act.<sup>138</sup> This legislation provides criminal penalties for the operation of a cremation service by an untrained person and for the willful or knowing destruction or damaging of human remains or the desecration of human remains.<sup>139</sup> Additionally, the law authorizes the State Comptroller to investigate unlawful practices under the Act and to investigate the actions of any person providing cremation services or holding or claiming to hold a license under the Act.<sup>140</sup>

### C. Proposed Federal Legislation: The Federal Death Care Inspection and Disclosure Act<sup>141</sup>

The negative publicity generated from *Tri-State* has prompted legislators to reevaluate state and federal laws governing the crematory industry. These legislators have recognized a disconnect between enforcement agencies, as well as the need to establish industrywide standards to close gaps between funeral and crematory industry regulations.<sup>142</sup> Not surprisingly, federal legislators have advocated addi-

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gia. *Id.* CANA also recognized Ohio, but this state's law requiring inspections has not been enforced because inspector licensing is incomplete. Wagner, *supra* note 4.

133. Wagner, *supra* note 4.

134. *Id.*

135. CAL. BUS. & PROF. CODE § 9715.1 (West Supp. 2003); Rojas, *supra* note 50.

136. Rojas, *supra* note 50.

137. *Cremation Industry Makes Changes*, AUGUSTA CHRON., Feb. 25, 2003, [http://augustachronicle.com/stories/022503/met\\_029-8009.001.html](http://augustachronicle.com/stories/022503/met_029-8009.001.html).

138. See 410 ILL. COMP. STAT. ANN. 18/1-100 (West 1997 & Supp. 2003).

139. *Id.* 18/55.

140. *Id.* 18/10.

141. S. 3168, 107th Cong. § 103 (2002).

142. See Montgomery, *supra* note 122.

tional federal laws.<sup>143</sup> Alternatively, industry associations favor comprehensive state laws.<sup>144</sup>

#### 1. SYNOPSIS OF THE FEDERAL LEGISLATION

In November 2002, Senator Christopher Dodd, Chairman of the Subcommittee on Children and Families, introduced a bill that for the first time would establish federal regulation of the death care industry, including cemeteries, funeral homes, crematories, monument retailers, and any business that sells funeral-related goods or services.<sup>145</sup> “Tentatively titled, ‘The Federal Death Care Inspection and Disclosure Act of 2002,’ the proposal would regulate industry members in addition to existing state laws.”<sup>146</sup>

Title I of the proposed legislation “would establish a new ‘Office of Funeral, Burial and Disposition Services’ within the U.S. Department of Health and Human Services.”<sup>147</sup> The director of the office would develop standards for registering and inspecting crematories.<sup>148</sup> These proposed minimum standards and requirements with respect to each crematory include: (1) registration or licensing with the unit of state government charged with the inspection and monitoring of crematories; (2) the physical inspection, on at least an annual basis, by a state inspector to determine compliance with state regulations; (3) record-keeping procedures and annual reporting to the unit of state government charged with the inspection and monitoring of crematories; (4) the receipt, investigation, mediation, or other resolution of consumer complaints directed at crematories operating in the state; and (5) witnessing of cremation.<sup>149</sup>

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143. See generally *Hearings*, *supra* note 9.

144. See *id.* at 83–85 (prepared statement of Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association, advocating uniform regulation of death care industry members through comprehensive state laws and regulations, coupled with strict enforcement efforts).

145. ROBERT M. FELLS, INT’L CEMETERY: FUNERAL ASS’N, WASHINGTON REPORT, DODD PLANS TO INTRODUCE HISTORIC LEGISLATION TO REGULATE INDUSTRY (Nov. 2002), at <http://www.icfa.org/washrpt11.02.htm> (Nov. 2002). Congressman Mark Foley (R-FL) introduced the companion bill in the House of Representatives. H.R. 5743, 107th Cong. (2002).

146. FELLS, *supra* note 145.

147. *Id.*

148. *Id.*

149. S. 3168, 107th Cong. § 103 (2002). This proposed legislation also states that the Coordinator should “licens[e] death care facilities; [] inspect death care facilities . . . [enforce] State regulations governing the operation and practices of funeral

Title I also provides for a grant program, whereby individual states could apply for funding to enforce federal standards.<sup>150</sup> This funding will enable state agencies to (1) establish registration or licensing systems to properly account for all crematories; (2) hire crematory inspectors; (3) train crematory inspectors; (4) hire or train consumer advocates to resolve disputes between consumers and death care providers; (5) implement a new system or enhance an existing system for receiving, investigating, mediating, or otherwise resolving complaints against crematories; or (6) implement a new system or enhance an existing system for enforcing state regulations governing the operation and practices of crematories.<sup>151</sup> The bill's proponents have neither stipulated sources of funding, nor targeted specific dollar goals for the grant program.<sup>152</sup>

Title II of the legislation would essentially codify the FTC's Funeral Rule into a federal statute and extend the rule's coverage to all death care providers.<sup>153</sup> The Act does so by expanding the definition of funeral services to include "any services which may be used to care for and prepare deceased human bodies for burial, *cremation*, or other final disposition . . . and services provided by funeral directors, morticians, cemeterians, *cremationists*, and memorial retailers."<sup>154</sup> In addition, Title II of the proposed Act includes several provisions specifically targeted at required disclosure for cremationists.<sup>155</sup> For example, providers of cremation services must include, in immediate conjunction with the price of embalming, the following statement: "You do not have to pay for embalming you did not approve if you selected arrangements such as direct cremation . . ."<sup>156</sup> In order to discourage fraud in the pre-arrangement, the proposed legislation requires the following disclosure in conjunction with the price of direct cremations: "If you want to arrange a direct cremation, you can use an al-

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homes, cemeteries, crematories, or other death care providers in the State; and [] other matters determined appropriate by the Coordinator." *Id.*

150. *Id.* § 102.

151. *Id.*

152. *See* S. 3168, 107th Cong. (2002).

153. *Id.* §§ 201–217; FELLO, *supra* note 145.

154. S. 3168 § 201 (emphasis added).

155. *See id.* § 202.

156. *Id.*

ternative container. Alternative containers encase the body and can be made of materials like fiberboard or composition materials.”<sup>157</sup>

Title II of the proposed Act outlines several protective measures to minimize material misrepresentations by death care providers.<sup>158</sup> For example, the Act would make it a deceptive trade practice to inaccurately represent that state or local law requires that a deceased person be embalmed; or to fail to disclose that embalming is not required for direct cremation; or to require a casket for direct cremation.<sup>159</sup> The bill also prohibits crematory authorities from charging for embalming, if the family or other authorized person selects direct cremation.<sup>160</sup> The proposed Act even prohibits door-to-door direct offers and unsolicited telephone offers to sell crematory services.<sup>161</sup> Additionally, this legislation would establish a private right of action for individuals to sue cemeteries, funeral homes, and other death care providers for Funeral Rule violations.<sup>162</sup> Under this provision, plaintiffs could receive the greater of actual damages or \$5,000 per violation.<sup>163</sup>

*a. Effect of Codification* Codifying the Funeral Rule into a federal statute will give the rule full force of the law by making it a federal law under the jurisdiction of the FTC, rather than a FTC regulation.<sup>164</sup> Legislators hope that codifying the Funeral Rule will relieve states and the FTC of the burden to both regulate the industry and prosecute those who violate the law.<sup>165</sup> Some commentators believe that codification would also allow Congress to modify the rule on a faster timetable than the current FTC review procedure.<sup>166</sup> The FTC favors codification and expansion of the Funeral Rule.<sup>167</sup> The NFDA has also publicly supported codification.<sup>168</sup>

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157. *Id.* (implying alternative containers made of fiberboard are cheaper than traditional caskets).

158. *Id.* § 204.

159. *Id.*

160. *Id.* § 206.

161. *Id.* § 209.

162. *Id.* § 213.

163. *Id.*

164. See *Hearings, supra* note 9, at 3 (statement of Sen. Christopher J. Dodd, Chairman, Subcommittee on Children and Families). See generally Kates-Boylston, *Senator Pushing for Stricter Regulation of Funeral Service* (on file with The Elder Law Journal).

165. See *Hearings, supra* note 9, at 7 (statement of Florida Rep. Mark A. Foley).

166. Kates-Boylston, *supra* note 164.

167. See *Hearings, supra* note 9, at 13–27 (statement of Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau

b. *Expansion of the Funeral Rule Under the APA*<sup>169</sup> The Federal Death Care Inspection and Disclosure Act proposes expanding the federal government's role under the Administrative Procedure Act (APA) instead of under section 18 of the FTC Act.<sup>170</sup> Section 18 lays out rulemaking requirements that the Commission must meet when it regulates pursuant to the statutory authority granted it by Congress.<sup>171</sup> Consistent with section 18 of its Act, the FTC is required to demonstrate by a preponderance of record evidence that a deceptive or unfair practice has occurred on an industrywide basis before imposing any regulatory provision.<sup>172</sup> The Commission must then demonstrate that the regulatory provision it proposes is likely to cure the problem.<sup>173</sup> Finally, the Commission is required to perform a cost-benefit analysis and conclude that the benefits of the regulatory provision outweigh any burdens it imposes.<sup>174</sup>

Alternatively, by granting the FTC regulatory authority under the APA, Congress would allow the FTC to avoid the substantial rulemaking requirements imposed by section 18 of the FTC Act.<sup>175</sup> In doing so, proponents of the proposed legislation contend that Congress can empower the Commission to address loopholes, while simultaneously preserving the flexibility to proactively promulgate regulations necessary to keep up with the changing industry.<sup>176</sup> It is argued that this method will enable legislators to entrust the FTC with powers to resolve known problems, without granting overbroad regulatory authority.<sup>177</sup>

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of Consumer Protection). Ms. Harrington expressed support for codification, however, her views do not necessarily reflect the views of the FTC or any individual Commissioner. *See id.* at 10–12.

168. *See id.* at 36. Diana Kurz, elected member of the executive board of the National Funeral Directors Association, is not opposed to codification if the FTC rule is not expanded to include internet and non-profit organizations. *Id.*

169. The Administrative Procedure Act is codified at 5 U.S.C. § 500 (2000).

170. *See* S. 3168, 107th Cong. § 215 (2002); *see also Hearings, supra* note 9, at 64–65 (statement of Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection).

171. *See Hearings, supra* note 9, at 11 (statement of Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection).

172. *See id.*

173. *See id.*

174. *See id.* at 11–12.

175. *See id.* at 11, 64–65.

176. *See generally id.*

177. *See generally id.*

## 2. OPPOSITION TO THE PROPOSED FEDERAL LEGISLATION

Two death care industry associations, the International Cemetery and Funeral Association and the National Catholic Cemetery Conference (NCCC), are lobbying against codification and expansion of the Funeral Rule.<sup>178</sup> They argue that the new legislation will be difficult to administer because of the potential for (1) a cumbersome and costly dual reporting structure<sup>179</sup> and (2) additional amendment hurdles.<sup>180</sup> Opponents of the proposed legislation also contend that expeditious codification of the Funeral Rule is premature, absent a comprehensive fact-finding effort.<sup>181</sup>

*a. Federal Law May Create an Ineffective and Costly Reporting Structure* The strongest opponent of the proposed federal legislation, the ICFA, does not believe that codification would have prevented abuses, such as the one in Noble, Georgia.<sup>182</sup> Robert Fells, ICFA's External Chief Operating Officer and General Counsel, attributes the "root cause" of the *Tri-State* scandal to the "lack of on-site inspection."<sup>183</sup> Irwin Shipper, chairman of ICFA's Government

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178. *Id.* at 107 (prepared statement of the National Catholic Cemetery Conference) ("The [NCCC] opposes any codification of the Funeral Rule. In addition, the . . . Conference opposes any expansion of the Funeral Rule to include Catholic cemeteries."); *see also id.* at 83–85 (prepared statement of Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association, opposing expansion and codification of the Funeral Rule).

179. Interview by unnamed representative of ICFA with Irwin Shipper, Chairman of the ICFA Government and Legal Affairs Committee (on file with The Elder Law Journal).

The problem with a federal approach to regulation is that we have little reason to believe federal law would be imposed in lieu of state laws. The states have shown little interest in giving up their regulation of our industry. I am concerned that it is more likely that federal regulation would be imposed in addition to state regulation, not in place of it. So industry members would find themselves grappling with a dual layer of regulation—and compliance. . . . [A] dual level of regulation will be cumbersome, expensive and confusing to both industry members and the public alike.

*Id.*

180. *See Hearings, supra* note 9, at 84 (prepared statement of Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association).

181. *See id.* at 85.

182. *See id.*

183. *See id.* (prepared statement of Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association, stating that "[t]he root cause of the cremation scandal in Georgia involved the lack of on-site inspection").

and Legal Affairs Committee, also contends that there is little reason to believe federal law would be imposed in lieu of state laws.<sup>184</sup> Instead, Shipper argues that codification or expansion of the Funeral Rule will subject industry participants to two levels of cumbersome regulation and compliance.<sup>185</sup> Similarly, the National Catholic Cemetery Conference opposes codification and expansion, citing the increased administrative costs associated with federal regulation that will divert the Church's funds away from charity.<sup>186</sup>

*b. Codification May Create Amendment Hurdles* Opponents of codification predict that it will deprive the FTC of the flexibility required to amend the rule. Currently, the Funeral Rule can be amended by a majority vote of the five Commissioners.<sup>187</sup> Amendments are, however, governed by relatively strict due process requirements under the APA and the FTC Rules of Practice in title 16 of the *Code of Federal Regulations*.<sup>188</sup> If codified, an amendment to the Funeral Rule would require a majority vote of both houses of Congress and approval of the President of the United States.<sup>189</sup> Ironically, ICFA is lobbying Congress to keep the rule within the purview of the FTC to prevent others from lobbying Congress to amend the Rule.

*c. Premature Codification Undermines Fact-Finding Effort* Industry associations opposed to codification contend that amendments are more difficult to enact once the Rule is codified, thus codification should be based on a complete record.<sup>190</sup> In response to requests from Senator Dodd and Congressman Foley, the U.S. General Accounting Office (GAO) recently released a study on the death care industry that examined (1) the structures used by states for regulating the death

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184. Interview by unnamed representative of ICFA with Irwin Shipper, *supra* note 179.

185. *Id.*

186. See *Hearings*, *supra* note 9, at 107-09 (prepared statement of the National Catholic Cemetery Conference). Presumably, the NCCC believes that it will expend additional funds in compliance costs.

187. *Id.* at 84 (prepared statement of Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association).

188. *Id.*

189. *Id.*

190. See *id.*

care industry and (2) the mechanisms used by states for enforcing their regulations covering the industry.<sup>191</sup> The report found that

[s]ince January 1, 2000, only a minority of the states that regulate crematories have taken enforcement actions against crematories or crematory operators for violations of state rules or regulations. Of the 32 states that responded to [the GAO's survey of state regulators], 13 have taken a variety of enforcement actions for violations, ranging from issuing notices of noncompliance, to revoking licenses and prosecution.<sup>192</sup>

The study, however, does not provide comprehensive data on complaints that would indicate the overall nature and extent of problems that consumers experience.<sup>193</sup> Not surprisingly, industry associations have downplayed the report's findings.<sup>194</sup>

*d. The Industry Is Not Underregulated* The ICFA has rebuffed allegations that the crematory industry is underregulated, stating, "relevant state laws . . . number 10,000 pages in length, and a summary of citations to those laws numbers about 30 pages."<sup>195</sup> According to the ICFA, industry model laws and guidelines have long addressed crematory inspection issues.<sup>196</sup> Interestingly, the ICFA does not recommend that its guidelines be codified into law.<sup>197</sup> Instead, the ICFA intends its guidelines to be used by legislators to address specific concerns or gaps in existing state laws,<sup>198</sup> as well as to promote high standards among cremators.<sup>199</sup>

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191. GAO REPORT, *supra* note 13, at 1. The study also provides information on the resources available to help consumers make informed choices regarding death care transactions. *Id.*

192. *Id.* at 9.

193. *Id.* at 4.

194. See Press Release, Robert M. Fells, ICFA External Chief Operating Officer and General Counsel, Sen. Dodd Releases GAO Report on State Death Care Regulation and Enforcement (Sept. 11, 2003), *available at* [http://www.icfa.org/GAO\\_pressrelease1\\_2003.htm](http://www.icfa.org/GAO_pressrelease1_2003.htm). ICFA Vice President of Industry Relations Paul M. Elvig stated: "After reading the GAO report from cover to cover, I concluded that some states need to do a better job but I saw no mandate for the federal oversight of our industry." *Id.*

195. Letter from Robert M. Fells, *supra* note 6.

196. *Id.*

197. MODEL GUIDELINES, FINAL DISPOSITION, *supra* note 80; MODEL GUIDELINES, CREMATION PROCESS, *supra* note 80.

198. MODEL GUIDELINES, FINAL DISPOSITION, *supra* note 80; MODEL GUIDELINES, CREMATION PROCESS, *supra* note 80.

199. INT'L CEMETERY & FUNERAL ASS'N, RECOMMENDED PROCEDURES FOR HANDLING HUMAN REMAINS FOR CREMATION BY MORTUARIES, CEMETERIES AND CREMATORIES (1985), *available at* [http://www.icfa.org/cremation\\_procedures.htm](http://www.icfa.org/cremation_procedures.htm).

As mentioned previously,<sup>200</sup> not all cremators are members of industry associations that abide by model laws. Furthermore, unlike state-law offenders, violators of model laws are not subject to public reprimand. Therefore, while the volume of state laws and existence of model laws promulgated by industry associations support the ICFA's claim that the industry is not underregulated, a more accurate characterization of the industry is that many of its existing laws are inadequate. Regardless of the number of state laws, when gaps exist, the public should not have to rely on model laws for protection from and prevention of misconduct. Because industry associations and legislators agree that the loopholes in the Funeral Rule should be closed, the debate over the future of the cremation industry should focus on which regulatory body is best equipped to close the gaps and protect consumers.

#### **IV. Recommendations**

Allowing crematory operators to continue to straddle FTC regulations, state laws, and non-enforceable industry guidelines is unacceptable. The federal government must intervene to ensure minimum safeguards and to close loopholes present in existing laws. This intervention should not, however, strip states' abilities to adopt more protective measures. This section recommends that: (1) Congress adopt the proposed Federal Death Care Inspection and Disclosure Act, subject to a revised grant program that would provide incentives for states adopting more protective measures; (2) states focus on efforts most likely to deter misconduct; and (3) consumers take practical steps to avoid mishaps throughout the cremation process.

##### **A. Substantially Adopt the Federal Death Care Inspection and Disclosure Act**

Congress should substantially adopt the Federal Death Inspection and Disclosure Act. As currently written, the proposed legislation addresses four key gaps in existing regulations. First, the Act will subject all crematory authorities to the same regulations as funeral directors; thereby closing state loopholes that allow third-party cremators to operate without a license or inspections.<sup>201</sup> Second, the Act bol-

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200. See *supra* Part II.D.3.

201. S. 3168, 107th Cong. §§ 201, 202 (2002).

sters FTC consumer protection laws by mandating that crematory operators disclose consumer rights in writing.<sup>202</sup> Third, the proposed Act centralizes registration and inspection efforts under the umbrella of the U.S. Department of Health and Human Services.<sup>203</sup> This will effectively remove investigatory hurdles created by multiple, disjointed state and local enforcement agencies. And fourth, establishing a private right of action for individuals suing death care providers for Funeral Rule violations will ensure that every consumer has a legal remedy, regardless of where the offense occurs.<sup>204</sup>

Expansion of the Funeral Rule under the APA will enable the FTC to quickly evaluate and implement proposals from practitioners and legislators. Closing loopholes and setting up a federal fund are two such proposals that have been identified and could potentially have an immediate impact on misconduct if enacted under expanded FTC authority. One of the opponents' main concerns with codification is that the law creates amendment hurdles. This concern was voiced in a Senate subcommittee meeting when codification under section 18 of the FTC Act was being considered.<sup>205</sup> However, the legislation in its most recent form does not propose codifying under section 18. Instead, the legislation proposes allowing the FTC to regulate crematories under APA authority.<sup>206</sup> As a result, the Commission does not have to show by a preponderance of the evidence that a deceptive or unfair practice has occurred on an industrywide basis before amending the Act. In effect, codification under the APA lowers the burden of proof necessary to make amendments, thus rendering arguments based on "amendment hurdles" moot.

Congress should revise the federal grant provision of the Act discussed in Part III,<sup>207</sup> and section 102 of the legislation to include funding for states that adopt more protective laws than those enumerated in the Act. For instance, Massachusetts should receive additional funding because the state medical examiner visits the cremation facility, inspects paperwork, and views the body.<sup>208</sup> Likewise, based

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202. Wagner, *supra* note 4.

203. See Fells, *supra* note 145.

204. *Id.*

205. See *Hearings*, *supra* note 9, at 84 (prepared statement of Robert M. Fells, External Chief Operating Officer and General Counsel, International Cemetery and Funeral Association).

206. S. 3168 § 215(b); *Hearings*, *supra* note 9, at 65.

207. See *supra* Part III.C.1.

208. Wagner, *supra* note 4.

on its progressive licensing requirements discussed earlier,<sup>209</sup> California should receive additional federal funding.

### **B. Promulgate State Laws Most Likely to Deter Misconduct**

Two options have been debated as the best means to deter misconduct: (1) enhancing the FTC's enforcement authority by allowing the Commission to levy special penalties and issue immediate cease and desist orders<sup>210</sup> and (2) promulgating state laws with more severe punishments.<sup>211</sup> This section endorses the latter proposal.

The FTC's primary activity in pursuing its consumer protection mission within the funeral industry is enforcement of the Funeral Rule.<sup>212</sup> The FTC views incidents involving sellers who provide cremation services as essentially criminal in nature.<sup>213</sup> As a result, the FTC has deferred to state criminal-law enforcement agencies.<sup>214</sup> Interestingly, under section 5 of the FTC Act, the Commission may address acts that are essentially criminal in nature as unfair or deceptive practices.<sup>215</sup> Currently, the Commission may seek and obtain orders imposing civil penalties only in federal district court cases where violations of either a Commission trade regulation or a litigated administrative cease and desist order are alleged.<sup>216</sup> Allowing the FTC to issue immediate cease and desist orders would give the Commission powers analogous to criminal law enforcement agencies. However, this alternative is likely not necessary, as state law enforcement agencies are already in place and capable of doing so.

The equitable sanctions available to the FTC as a civil law-enforcement agency probably will not deter the conduct to the extent of state criminal law-enforcement efforts. Thus, enhancing the FTC's enforcement authority would be ceremonial more than anything else. State legislators can enact or amend laws to more effectively deter

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209. See *supra* Part III.B.3.

210. See *Hearings, supra* note 9, at 4 (statement of Sen. Christopher J. Dodd, Chairman, Subcommittee on Children and Families).

211. See Wagner, *supra* note 4.

212. See *id.* at 14–15 (prepared statement of Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection).

213. See *id.* at 15 (prepared statement of Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection).

214. See *id.*

215. See *id.*

216. See *id.* at n.4.

misconduct. For example, states should consider broadening the definition of mistreating the dead to include abandoning or throwing away a body intended to be cremated. One Michigan lawmaker (who is also a funeral director) recommended making negligent disposal of human remains punishable by up to ten years in prison and a \$50,000 fine.<sup>217</sup> To date, his proposal has not been enacted. Even allowing a cause of action for emotional distress based upon negligent mishandling of a corpse<sup>218</sup> may deter misconduct.

### C. Practical Steps Regardless of New Legislation

Regardless of whether the proposed federal Act is enacted, there are several practical steps that families can take in order to avoid mishaps during the cremation process. Because the probability of misconduct likely increases with the number of parties involved with handling the deceased, elder consumers should remain involved with the cremation process throughout. Family members can mitigate the risk of mix-up by identifying their loved one when the funeral director has removed him or her from the place of death.<sup>219</sup> "It is rare, but not impossible, for a hospital, medical center, or health care facility to confuse the identification of the deceased."<sup>220</sup> Some commentators have even recommended accompanying the body to the crematory.<sup>221</sup>

As discussed earlier,<sup>222</sup> funeral homes may subcontract cremations to a third party. Therefore, it is important to find out whether the funeral home one is choosing owns its crematory or if it is using a subcontracted one.<sup>223</sup> Because third-party contractors are not regulated to the same degree as funeral providers, buyers may wish to avoid this arrangement altogether. Even if the funeral home has its own facility, it may not be at the same location. In any case, it is important to ask whether the funeral director has inspected the crema-

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217. Wagner, *supra* note 4.

218. Kevin E. Bry, *Genuinely Distressing: Illinois Failure to Allow a Cause of Action for Emotional Injuries Caused by Negligent Mishandling of a Corpse*, 23 J. MARSHALL L. REV. 353, 353 (1990) (advocating tort remedy of negligent infliction of emotional distress when corpses are mishandled by funeral homes or morticians).

219. Doug Higgs, *Cremation Guidelines to Consider*, HERALD & NEWS (Klamath Falls, Or.), Mar. 24, 2002, <http://news.mywebpal.com/partners/670/public/news274653.html> (citing recommendations published in *Funeral Insider* and modified by Lancaster).

220. *Id.*

221. *Id.*

222. See *supra* Part II.C.2.

223. Higgs, *supra* note 219.

tory<sup>224</sup> and whether certified operators will remain on site until the process is complete.<sup>225</sup>

Customer and funeral director inspections can reveal attributes of crematories that increase the likelihood of mistakes. For example, some crematories do not cremate daily as a cost-saving measure.<sup>226</sup> These operations often have refrigeration units to store bodies in until the day they are going to run their cremations.<sup>227</sup> As the number of cremations performed daily increases, so does the chance of mix-ups.<sup>228</sup> Furthermore, the longer the time between the crematory receiving the body and the actual cremation, the greater the chance of a mistaken identity.<sup>229</sup> Thus, determining the exact timeline between receipt of the body and cremation is important; especially considering that, in some jurisdictions, a crematory is prohibited from holding any remains longer than forty-eight hours before the cremation takes place.<sup>230</sup>

It is not necessary to rely solely on the funeral director for information regarding the cremation process. Consumers may be well served by researching whether the cremator is a member of an industry association.<sup>231</sup> CANA has established specific procedures for the handling of dead human bodies by cremators and conducts annual Crematory Operator Certification Programs to ensure these proper procedures are being carried out.<sup>232</sup>

Even if the cremator is a member of an industry association, it is also a good idea to visit the facility, find out when they will perform the cremation, and watch the container or casket go into the retort.<sup>233</sup> In the event that the consumer is not comfortable with viewing the cremation, asking the operator how the body and the remains are tracked<sup>234</sup> is a viable alternative. Specifically, consumers should in-

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224. *Id.*

225. *Id.*

226. *Id.*

227. *See id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *See Green, supra note 2.* Tri-State Crematory was not a member of the Cremation Association of North America. *Id.*

232. Press Release, *supra* note 83.

233. Green, *supra* note 2.

234. *Id.*

quire whether the crematory staff monitors the complete process from the start to the final processing and inurnment.<sup>235</sup>

After the cremation is complete, the remains should be delivered to the final location without any undue delay.<sup>236</sup> “Too often, consumers are in a hurry to have a body removed and cremated, but in no rush to have the cremated body delivered to the final location. The longer it takes to complete this process, the greater chance there is of making mistakes.”<sup>237</sup> In case a person has questions regarding what he or she has received from the crematory, it is advisable to have a different crematory company look at the cremated remains to confirm the contents.<sup>238</sup>

## V. Conclusion

The cremation business is rapidly growing. Now is the time to enact responsible legislation to ensure that all consumers are protected. Although the number of reported cases of misconduct is admittedly small, the potential for another Tri-State debacle will continue to exist, absent additional regulations.

Legislators and industry insiders are both in favor of reforms for the crematory industry. These groups differ, however, on the best method for change. If every state adopted the model rules promulgated by industry associations, federal legislation would not be necessary. Because states have chosen not to do so, the federal government must intervene. The federal government should adopt broad guidelines to ensure minimum safeguards for each and every state. The proposed Federal Death Care Inspection and Disclosure Act, as currently promulgated, meets this objective. The Act does not, however, do enough to encourage states to provide additional safeguards. The general public will be better served by: (1) Congress adopting the Act (subject to a revised grant program that would provide incentives for states adopting more protective measures); (2) states focusing on efforts most likely to deter misconduct; and (3) consumers taking practical steps to avoid mishaps throughout the cremation process.

Because elderly consumers, more often than not, are responsible for handling the arrangements upon a loved one's death, it is particu-

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235. Higgs, *supra* note 219.

236. *Id.*

237. *Id.*

238. *Id.*

larly important that this demographic group is aware of potential problems. Obviously, disrespecting the dead cannot further harm the deceased. However, inadequate protections for the dead can cause actual harm and concern to the elderly. Additional regulation and oversight in the industry is therefore a necessary step to avoid the harm before it happens.