PRENEED FUNERAL PLANS: THE CASE FOR UNIFORMITY

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In this article, Professor Frank discusses a disturbing new trend in which elderly consumers are being victimized by exploitative practices in the funeral business. Although "preneed" funeral contracts offer many advantages, Professor Frank points out that there is a severe gap in consumer protections laws which leave the elderly vulnerable to abuse. Professor Frank begins her examination of this growing problem with a brief description of the concept of preneed funeral planning as well as a survey of the different regulatory responses taken by the states. Professor Frank then examines the common substantive provisions of the state regulations providing attorneys with a useful tool in scrutinizing such agreements and advising clients who have expressed an interest in such arrangements. Finally, the article summarizes the results of an informal survey of funeral directors, funeral director associations, attorneys, attorney generals, state departments of social services, and state officials of consumer affairs as to the frequency of abuse and whether or not state regulatory frameworks adequately address this "prime-time problem."

I. Introduction

A. Prime-time Problem

On February 1, 1993, the network television show Dateline NBC aired a segment entitled "Grief and Greed: Funeral Fraud" which uncovered several exploitative practices existing in the funeral business. One segment of the show exposed an overzealous preneed funeral salesperson obstructing a consumer's attempt to...
get a refund. For many viewers, this segment may have been their first exposure to the “preneed funeral” concept. Although preneed funerals have been marketed for many years, it is only recently that preneed funeral contracts sales have blossomed.

Recognizing the inadequacy of consumer protection in the preneed funeral contract arena, the American Association of Retired Persons (AARP), along with the Continental Association of Funeral and Memorial Societies and the Consumer Federation of America, released a fifteen-page report outlining a model preneed funeral sales act. AARP based its model law on what it perceived to be the “best” of the existing state statutes. To date, no uniform preneed funeral sales law exists. The consumer concerns addressed in the 1987 AARP report are just as valid today.

B. Statutory Response

As of 1995, all but one state and the District of Columbia had taken some form of statutory or administrative action to regulate “preneed funeral contracts.” The regulatory method varies from state to state.
to state. Some states have promulgated statutes that directly regulate preneed funeral contracts. Alaska has incorporated preneed funeral sales regulation within an existing statute enumerating unfair or de-


ceptive trade practices.\textsuperscript{10} Massachusetts regulates preneed funeral contracts exclusively through its administrative code.\textsuperscript{11} Other states have passed enabling statutes which are supplemented by more extensive administrative rules.\textsuperscript{12}

Regardless of the method used by the states, the regulation of preneed funeral contracts appears aimed at protecting the consumer. Exemplifying this aim, the New Mexico preneed funeral law states: "The purpose of this article is to regulate funeral plans and related matters as experience has proven necessary in order to protect against fraud and deceit and otherwise to accomplish and promote the protection and welfare of the public."\textsuperscript{13}

The level of protection actually afforded to consumers is highly dependent on the strength of the language of each preneed funeral regulation. The language of the state preneed regulations varies widely, leading to differing levels of consumer protection among the states.

C. Purpose of the Article

This article will describe briefly the concept of preneed funeral planning and survey the different methods that states use to regulate the sale of preneed funeral contracts. Additionally, this article will examine the common substantive provisions of the state regulations. This article does not discuss construction of the typical preneed funeral contract provisions except where necessary to illuminate potential consumer concerns.\textsuperscript{14} Finally, this article will summarize the results of an informal survey of funeral directors, staff attorneys, attor-

\textsuperscript{10} ALASKA STAT. § 45.50.471(24) (Michie 1995).
\textsuperscript{11} MASS. REGS. CODE tit. 239, §§ 4.00 to .10 (1993).
\textsuperscript{13} N.M. STAT. ANN. § 59A-49-2 (Michie 1995); see also MINN. STAT. ANN. § 149.11(c) (West 1989 & Supp. 1995). Section 149.11(c) states:
It is the intent of the legislature that the provisions of this section shall be construed as a limitation upon the manner in which a person or legal entity is permitted to accept funds in prepayment of funeral services . . . [and] to allow members of the public to arrange and pay for funerals . . . in advance of need . . . while . . . providing all possible safeguards so that the prepaid funds cannot be dissipated . . .
ceptive trade practices. Massachusetts regulates preneed funeral contracts exclusively through its administrative code. Other states have passed enabling statutes which are supplemented by more extensive administrative rules.

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nealy general, state departments of social services, funeral director associations, and state offices of consumer affairs.

II. Overview of Preneed Funeral Concept

A. The Idea

There is a difference between a preneed funeral plan and a preneed funeral contract. The term "preneed funeral plan" refers to any method a consumer uses to prearrange and prepay for the costs of a funeral. A preneed funeral contract is simply one type of commercial transaction which can be a part of a preneed funeral plan. AARP encourages its members to preplan their funerals. However, AARP wisely cautions its constituents to carefully consider the terms of a commercially available preneed funeral contract before purchasing one.

The concept of the preneed funeral contract has aptly been described as "pay now—die later." Typically, a consumer enters an agreement to presently pay for a package of funeral services and goods which will be delivered upon the death of a designated person. The consumer may prearrange his own funeral or arrange a funeral for another person. The lapse of time between paying for the funeral and the actual delivery of services and goods may raise consumer issues not associated with contracts for more contemporaneous exchanges of goods and services.

The preneed funeral concept is attractive, especially to older consumers. AARP reports that in 1991, the average purchaser was over the age of seventy. Preneed sellers market these programs as providing "peace of mind to the consumer." They advertise that the

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16. Id. at 14.
17. Id. at 12.
19. The use of the pronoun his or he is intended within this paper for simplicity and is intended to be gender neutral.
21. Id.
22. One network of funeral planners, the Forethought Group, states in its preneed funeral brochure that "In less than an hour, we can review the many fu-
plans eliminate the need for survivors to make funeral arrangements during a time of grief and eliminate unexpected financial costs associated with a funeral.

With many preneed contracts, the consumer may customize fully his funeral by specifying the exact services to be provided as well as the specific goods to be used in conjunction with the funeral. Alternatively, the consumer can leave the details to his survivors.23

One option available with many preneed funeral contracts is the “guaranteed price” or “inflation proof” contract.24 An inflation proof contract establishes a fixed price for specified goods and services and requires that the funeral home provide these goods and services at the price established at contract execution.25 In effect, the consumer has locked in the price of the services and goods regardless of any inflation that may occur between contract execution and future delivery.

A preneed funeral contract involves many parties, and the nomenclature and responsibilities of each of these parties vary widely from state to state. For the purpose of simplicity, this article will use the following terminology: (1) “Contract” means the formal agreement between the parties; (2) “Consumer” means the purchaser under the contract; (3) “Seller” means the person receiving payment and arranging to have the services and goods provided; (4) “Provider” means the party actually delivering the funeral services and goods; and (5) “Decedent” means the recipient of the funeral services and goods.

B. Funding Options

Although the state regulations may refer to preneed plans by a variety of names, these agreements maintain a contractual characteristic. As with other contracts, there is an exchange of consideration. Although the consideration paid for preneed funeral services and

24. See Product Report, supra note 15, at 6-7 (discussing inflation proof contracts and anticipated inflationary costs of funerals delivered in the year 2002).
goods is quite diverse, there are a limited number of funding methods available to consumers under state-regulated preneed funeral contracts. The most common funding methods recognized under state statutes are (1) the state-regulated trust and (2) the funeral insurance or annuity policy.

1. TRUSTS

The most common form of funding for a preneed funeral contract, and the primary focus of this article, is the state-regulated trust. Many states expressly require the creation of a trust account in connection with the sale of a preneed funeral contract. Other states, while not mandating the formation of a trust, recognize the validity of a trust as one possible option under a preneed funeral contract and regulate that trust. Even if not actually called a trust, the mechanism statutorily recognized to administer the funds is analogous to a trust.

26. But see, e.g., UTAH CODE ANN. § 58-58-8(4) (Michie 1994) (limiting the consideration paid to money, check, money order, credit card or negotiable instrument which can be liquidated within 30 days).


Some states call the mechanism an escrow account, and other states simply refer to the deposit of funds as a special account, trust account, or deposit. Many states allow the seller to deposit the preneed funeral sale proceeds into a “pooled” or “master” trust.

Regardless of the name given to the trust mechanism, the principle behind the option is for the trustee to protect the funds from abuse. The trustee has a fiduciary duty to the beneficiary of the trust. However, the mechanics of the trust vary from state to state. Under some statutes, the funds are kept in trust for the benefit of the consumer or the decedent. Under other statutes, the funds are held for the benefit of the “seller” or “provider” of the funeral services. Still other statutes do not clarify for whose benefit the funds are being


31. See infra part III.D.4 for a discussion of commingled trust accounts.


held. Other statutes indicate that the funds are held in trust for the
purpose of paying for the contracted services or goods.

An important consideration with the formation of a trust is the
trust's revocability. For certain consumers to meet exempt property
requirements for public assistance eligibility, a trust must be "irrevo-
cable." Most states allow the consumer to declare his preneed fun-
eral contract irrevocable, and only a dozen states have not addressed
trust irrevocability within their regulations.

2. INSURANCE POLICY AND ANNUITY FUNDING

Another method of funding preneed funeral contracts is through
the use of an insurance policy or annuity plan. With insurance poli-
cies, the consumer purchases, either in a lump sum or by installments,
a funeral or burial policy. The consumer names the seller or the fun-
eral provider as the beneficiary of the insurance or annuity policy.
The benefit is paid out at the death of the consumer or the decedent.
An annuity plan works essentially the same way, except that the con-

funds to be held in trust pursuant to the preneed statute); 225 Ill. Comp. Stat.
§ 45/2 (West 1993 & Supp. 1995) (trust agreements must follow format approved
by the Comptroller); Mo. Ann. Stat. § 436.031(31) (Vernon 1992) (seller entitled to
all income and gain on funds in trust); Rules and Laws of the Vermont Board of
Funeral Service, pt. 5, §§ 5.3 to 5.6 (1993); Va. Code Ann. § 54.1-2822 (Michie
1995).

refund or full performance); Del. Code Ann. tit. V, § 302(b) (Michie 1993); Ga.
(1994) (funds not to be withdrawn except for refund or performance); Md. Code
Ann., Health Occ. § 7-405(e) (Michie 1995) (funds may not be withdrawn until
performance or refund); Mass. Regs. Code tit. 239, § 4.06(2)(a)(3) (1993); Minn.
§ 90-210.61(b) (Michie 1993) (funds remain in trust until full performance); N.D.

37. Alaska, Arizona, Arkansas, Georgia, Hawaii, Maine, Mississippi, New
Hampshire, New Mexico, North Dakota, Pennsylvania, and Virginia have not ad-
dressed trust irrevocability.

38. See Product Report, supra note 15, at 3-5.
39. Id.
40. Id.
sumer pays the seller or provider in installments over a specified period of time. 41

Some states regulate both the trust funding option and the insurance policy or annuity option within their preneed funeral regulations. 42 Other states have expressly exempted insurance policy funding from their preneed funeral contract statutes or recognize that the state insurance law is the appropriate regulatory arena. 43 In many states, the statutes are silent about insurance funding, leaving open the question whether insurance funding is to be included in preneed statutory regulation. 44

C. Scope of Coverage

What does a consumer actually get when he purchases a preneed funeral package? Every state statute recognizes that funeral services and funeral merchandise or goods are within the scope of a preneed funeral contract. However, the definitions of the terms “funeral services,” “funeral merchandise,” and “funeral goods” vary con-
siderably from state to state. The majority of state preneed funeral regulations expressly exempt or exclude burial plots, graves, and other real property traditionally associated with cemeteries. The definition of "funeral goods" under many of the statutes also excludes items such as crypts, niches, markers, tombstones, and mausoleums. Some states which exclude cemetery services and goods from their preneed funeral contract regulations have analogous statutes which are directed toward regulating the preneed sale of cemetery items.

Although the majority of preneed funeral statutes do not address cemetery merchandise and services, several states do regulate these items within their preneed funeral contract statutes. In other states,

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the statutory language is ambiguous about what funeral or cemetery services and goods are covered or exempted under the statute.49

D. Goods and Services

Under the typical preneed funeral contract, the consumer purchases professional undertaking and mortuary services as well as items of personal property associated with a funeral ceremony.50 Mortuary or undertaking “services” typically include the removal, preparation, and embalming of the body; funeral directing; use of the funeral home for viewing, visitation, and memorial services; transportation of the body to the cemetery; and limousine services.51 The primary funeral “merchandise” item included in a preneed contract is a casket, but “merchandise” also includes other personal property purchased for the funeral such as grave liners, funeral clothes, and guest books.52

Arkansas and Florida statutes address a third category of goods that are included in preneed funeral contracts. These goods are known as “cash accommodation” and “cash advance” items respectively. Under Arkansas law, cash accommodation items include flowers, death certificates, sales taxes, and honorariums.53 The Florida statute does not define a cash advance item. However, the Federal Trade Commission defines the term “cash advance” item within its Funeral Rule as including crematory services, pallbearers, clergy honorariums, flowers, musicians or singers, nurses, obituary notices, gratuities, and death certificates.54 Colorado defines “overhead items”


49. These states are Arkansas, Connecticut, Indiana, Maine, Montana, Nevada, New York, Rhode Island, South Dakota, Vermont, and Washington.

50. The scope of each preneed funeral contract differs from state to state, however a generalization as to the “typical” preneed contract can be gleaned from a reading of all 49 regulations.


52. See, e.g., S.D. Codified Laws Ann. § 55-11-1.1 (Michie 1988 & Supp. 1995) (including things such as cremation urns, flowers, stationary, caskets, clothing, guest books, and “other personal property incidental to a funeral or burial service”).


within their statute as including embalming fluid, sanitary supplies, and other items used "in the performance of funeral services."55

III. Regulatory Treatment

A. Nomenclature

The terminology used in state laws regulating preneed funeral contracts varies widely and can be quite confusing. The states are not uniform regarding the name of the overall preneed funeral contract program, the name of the actual contract, the titles of the parties to the contract, or the scope of coverage of preneed funeral contracts.

1. PRENEED REGULATION

Some states have formally titled their preneed regulatory provisions. For example, New York titled its statute the "New York State Preneed Funeral Consumer Protection Act."56 Florida calls its law the "Florida Funeral and Cemetery Services Act."57 The statute in Illinois is titled the "Illinois Funeral or Burial Funds Act."58 In Michigan, the statute is known as the "Prepaid Funeral Contract Funding Act."59 Several other states have also promulgated "short titles" for their preneed funeral contract statutes,60 while the remaining states have not formally entitled their regulatory provisions.

2. THE CONTRACT

The nomenclature for the actual preneed funeral contract varies from state to state. States use twenty-three different terms to designate a preneed funeral contract. Most statutes use terminology such as "preneed," "prepaid," or "prearranged" within the context of a "contract," "agreement," or "sales."61 Some states describe the contract

57. FLA. STAT. ANN. § 497.001 (West Supp. 1999).
61. The terms and the states using them are: "Preneed Contract" (Florida, Illinois, Missouri); "Preneed funeral contract" (Colorado, Delaware, Maine, North Carolina, Ohio, South Carolina, Virginia); "Preneed funeral services contract" (Georgia, Hawaii, North Dakota); "Preneed funeral arrangement" (California, Utah); "Preneed burial contract" (Kentucky, Maryland, West Virginia); "Preneed sale" (Nebraska); "Prepaid funeral benefit" (Arkansas, Oklahoma, Texas); "Prepaid
simply as a “contract” or an “agreement.” Two states, Alaska and Louisiana, have no specific terminology for their preneed funeral contracts, and instead, describe the purpose of the contract in narrative terms.

3. THE PARTIES

As with any traditional contract for goods and services, a preneed funeral contract has a buyer and seller. Because of the mandatory or optional trust provisions in many states, additional parties are associated with a preneed funeral contract. The terminology used to identify the parties to a preneed funeral contract varies as widely as the name of the actual contract. More than half of the state regulatory provisions define in detail the key parties.

Under the typical preneed funeral contract statute, the consumer is known as the contract “buyer” or “purchaser.” Some states have

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funeral agreement” (New Jersey); “Prepaid funeral arrangement” (Vermont); “Prepaid funeral plan” (Indiana); “Prepaid contract” (Nevada); “Prearranged funeral plan” (Maine, Minnesota, New Mexico); “Prearranged funeral service” (Arizona); “Prearranged funeral contract” (South Dakota); “Prearrangement funeral service” (Washington); “Contract for prearranged funeral service” (Montana); “Funeral service contract” (Connecticut, Rhode Island); “Funeral agreement” (Kansas); “Burial agreement” (Wisconsin); “Agreement” (Iowa, New Hampshire, New York); “Contract” (Mississippi, Pennsylvania, Wyoming) and “Contract for future services” (Tennessee).


63. Iowa, New Hampshire, and New York use “agreement.”

64. ALASKA STAT. § 45.50.471(b)(24) (1994); LA. REV. STAT. ANN. § 37:861A (West 1988).

65. See supra part II.B.1 for a discussion of which states mandate or recognize state-regulated funding options in connection with preneed funeral contracts.

different terminology for the consumer. California’s preneed statute refers to the contract consumer as the “trustor.”⁶⁹ The Delaware and Maine statutes use the terminology of “payor.”⁷⁰ Wisconsin uses the term “depositor” in its statute,⁷¹ and Indiana identifies the contract consumer as the “settlor.”⁷² Some states have no express statutory terminology for the consumer and refer to the consumer as either the “person who has contracted,”⁷³ the “party who paid funds,”⁷⁴ or the “person who made payment.”⁷⁵ The statutes of Alaska and New Mexico have no language identifying the consumer.

Although many funeral homes sell preneed funeral contracts, all preneed contract sellers are not necessarily licensed mortuaries.⁷⁶ When the contract seller is not a funeral business, an additional party, the “provider”⁷⁷ or “performer”⁷⁸ of the actual funeral services and goods, is involved in the preneed contract.


69. CAL. BUS. & PROF. CODE § 7735 (West 1995).


72. IND. CODE ANN. § 30-2-9-1(b) (West 1994).


75. N.Y. GEN. BUS. LAW § 453(3) (West Supp. 1995); N.D. CENT. CODE ANN. § 23-06-03.1 (Michie 1993) (“person making the payment”).

76. See infra part III.D, for a discussion of which states require the seller and provider to be the same entity.

When a consumer enters into a preneed funeral contract, he may be prepaying the funeral services and goods for the benefit of someone else, such as a parent or a spouse. Under these circumstances, the person for whom the services will be rendered may be known as the “beneficiary,” the “decedent,” the “intended funeral recipient,” or the “designee.” Several states use narrative language to describe the beneficiary.


When a trust or analogous arrangement is created by statute or by consumer choice, more parties to the preneed funeral contract must be identified. In the context of the trust-funded preneed funeral contract, the states have identified the fiduciary of the preneed funds as a "trustee" or an "escrow agent," or have simply described the duties of the fiduciary without providing a formal title. In New Hampshire and Maine, the trustee has the special title of "mortuary trustee."

B. Consideration

As with ordinary contracts, the consideration paid by the consumer under a preneed funeral contract may be quite diverse. Only three states expressly limit the type of consideration a preneed funeral


contract seller may accept. In Virginia, the preneed statute requires that the preneed contract be recorded as an attachment to the deed “[w]hen the consideration consists in whole or in part of any real estate,” and that a written declaration of trust be executed in the event of a delivery of personal property to the seller. In California, the preneed statute requires that “[a]ll securities purchased by the trustor for deposit in trust . . . shall be placed in trust . . . within 30 days.”

C. Roles of the Parties

The role of the consumer is to choose the funeral services and goods he wants for the funeral and to pay the agreed consideration. The consumer may have the option to choose between the trust account or insurance policy funding mechanism for his preneed contract. In many states, the preneed funeral contract statute expressly recognizes a consumer’s ability to pay for his contract in either a lump sum or in installments.

For every preneed funeral contract, an entity acts as the seller. The seller helps the consumer choose from available preneed funeral plans, arranges for the receipt of consideration, and sets up either the

90. See supra note 70 (“trustor” being the terminology that California uses to identify the preneed funeral contract consumer).
92. See supra part II.B for a discussion of which states regulate both trust and insurance funding options.
trust account or arranges for any necessary insurance policy underwriting.94

Perhaps the most important party to the preneed funeral contract is the actual provider of the funeral services and goods. Several states require that the provider, if not the same entity as the seller, actually be in contractual privity with the seller before a preneed funeral contract can be validly enforced.95 The provider delivers, according to the terms of the contract, the personality and funeral services.

When a trust account is established in connection with preneed funeral contract sales, the role of the trustee is to protect the funds in trust for the duration of the contract96 and to disburse the funds in the appropriate manner.97

D. Regulatory Bodies and Licensing

The states are not uniform in assigning the governmental body which has regulatory oversight of preneed funeral contract sales. In many states, regulation of preneed funeral contracts is placed with the same entity which regulates the funeral industry within that state.98

94. See Product Report, supra note 15, at 3, 13 (for further discussion of sales techniques).
96. See infra part III.D.6 for more in depth discussion of the trustee’s fiduciary duty to the funds in trust.
97. See infra part III.D.7 for a discussion of trust funds disbursement mechanics.
In other states, oversight has been placed under the auspices of such diverse bodies as the State Insurance Commissioner,\textsuperscript{99} the State Banking Commissioner,\textsuperscript{100} the Attorney General,\textsuperscript{101} the Secretary of State,\textsuperscript{102} the Department of Commerce,\textsuperscript{103} and the State Securities Commissioner.\textsuperscript{104} In Pennsylvania and Mississippi, regulation of preneed funeral contract trust funds has been delegated to the "orphan's court" and the "chancery court" respectively.\textsuperscript{105} In some states, the statutory language does not specify who has oversight of preneed funeral contracts.\textsuperscript{106}

In many states, the seller must be a licensed funeral business\textsuperscript{107} or an affiliated agent working for a licensed funeral home.\textsuperscript{108} In some states, the language of the statute is not clear but implies that the preneed funeral contract seller must also be the provider.\textsuperscript{109} The Ohio


\textsuperscript{100} ARIZ. REV. STAT. ANN. § 32-1391.02 (West 1986 & Supp. 1994) (state banking department has oversight over preneed funeral trust funds only); DEL. CODE ANN. tit. V, § 306(a) (Michie 1993); TEX. REV. CIV. STAT. ANN. art. 548b, §§ 1(b)(3), 2 (West 1973 & Supp. 1995).


\textsuperscript{102} KAN. STAT. ANN. § 16-310(a) (1988) (auditing of trust funds).

\textsuperscript{103} MONT. CODE ANN. § 72-37-103 (1993) (trustees must report annually).

\textsuperscript{104} ARK. CODE ANN. § 23-40-105(a) (Michie 1994).

\textsuperscript{105} PA. STAT. ANN. tit. 63, § 480.6 (1968); MISS. CODE ANN. § 75-63-17 (1991).

\textsuperscript{106} New Hampshire, Rhode Island, and Wisconsin have such statutes.


\textsuperscript{109} ME. REV. STAT. ANN. tit. 32, § 1402 (West 1988) (the language of this solicitation provision sets limits on licensed funeral homes, funeral establishments, or
Preneed funeral contract statute requires licensure as a funeral director when a funeral contract involves funeral services. However, this licensure is not required when the contract is only for the sale of funeral goods.\textsuperscript{100}

Many states do not restrict who can engage in the sale of preneed funeral contracts but do require governmental authorization such as a license,\textsuperscript{111} permit,\textsuperscript{112} certificate,\textsuperscript{113} registration,\textsuperscript{114} filing of notification of intent to sell,\textsuperscript{115} or annual reporting.\textsuperscript{116} Some state statutes are silent regarding licensure requirements.\textsuperscript{117}

Many states have additional statutory requirements before a person can engage in selling preneed funeral contracts. Several states require that a potential seller post a bond.\textsuperscript{118} Other state statutes require a statement of net worth or fiscal solvency by the potential seller.\textsuperscript{119}

persons holding a license under the Funeral Directors and Embalmers chapter of the statutes); PA. STAT. ANN. tit. 63, § 480.2(d) (1968 & Supp. 1995) (mandating that the seller furnish the trustee of preneed sales proceeds with a copy of the contract and the "personal property and services to be furnished by the seller thereunder." (emphasis added)); WS. STAT. ANN. § 445.13 (West 1988) (explains the power of the examining board to revoke licensure of funeral directors, their apprentices, and funeral establishments for violations of the preneed funeral act).


113. OKLA. REV. STAT. ANN. § 128.400(2) (Butterworth 1991); W. VA. CODE § 47-14-3(a) (Michie 1995).


115. KAN. STAT. ANN. § 16-310(e) (1988).

116. MINN. STAT. ANN. § 149.13(2) (West 1989).

117. Alaska, Mississippi, Missouri, Montana, and New York have no statutory licensure requirements.


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\footnote{113} OR. REV. STAT. ANN. § 128.400(2) (Butterworth 1991); W. VA. CODE § 47- 14-3(a) (Michie 1995).

\footnote{114} MICH. COMP. LAWS ANN. § 328.216(1) (West 1992); TENN. CODE ANN. § 62-5-405(d) (Michie 1990).

\footnote{115} KAN. STAT. ANN. § 16-310(e) (1998).

\footnote{116} MINN. STAT. ANN. § 149.13(2) (West 1989).

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E. Trust Regulation

1. OVERVIEW

Most of the state statutes regulate the creation and operation of a preneed funeral trust. The actual language of these regulations varies from state to state. Some common issues addressed in the various state statutes covering trust provisions are the protocol for the creation of the trust, the amount of funds required to be trusted, the oversight and ownership of interest accruals of funds in trust, and the mechanism for proper disbursement of funds from the trust. Although many similarities exist among the various state statutes regarding trust regulation, each state law has its own nuances which affect the level of consumer protection.

In the simplest preneed funeral trust, the consumer pays the seller the agreed consideration for the future funeral services and goods. The seller in turn deposits the funds into a special account. Over the life of the agreement, the trust funds grow. Upon the death of the recipient, the provider performs the funeral. After giving proof of performance to the trustee, the provider seeks reimbursement out of the trust funds.

2. TRUSTEES

All but a handful of states expressly restrict who can act as a trustee over preneed funeral contract trust funds. Many states allow the seller or provider to assume the role of trustee, while other

120. See supra notes 28-29 and accompanying text (discussing which states regulate preneed funeral trusts).

121. Arizona, Georgia, Kansas, Louisiana, Nevada, New York, North Dakota, Oregon, Tennessee, Wisconsin, and Wyoming have no expressed restrictions.

states restrict the role of trustee to financial institutions. California provides that either a financial institution or three or more persons together act as trustees. Hawaii allows a neutral board of trustees as well as financial institutions to act as fiduciaries. In Ohio, anyone who posts a surety bond or financial institutions may act as trustee. Regardless of who assumes the duties of the trustee, the role of the trustee is to protect the funds while in trust.

3. USE OF SALE PROCEEDS

One of the major consumer concerns associated with preneed funeral contracts is the safety and security of the consumer’s money once payment has been made. Many of the states’ statutes have concentrated their regulatory thrust in this area, and only one state statute does not express any limitations on where proceeds from preneed funeral contracts sales may be invested.

The vast majority of states require that preneed funeral contract sale proceeds be entrusted to a fiscal institution as trustee or placed directly into some other financial depository. Many statutes permit


124. CAL. BUS. & PROF. CODE § 7736 (West 1975 & Supp. 1995) (funds must be deposited within a financial institution when three or more persons assume the role of trustees).


127. See supra parts II.B.1 and III.D.2 for further discussion of the nomenclature of the trustee and the trustee’s role.

128. See Product Report, supra note 15, at 5-6 (discussing security concerns of preneed funeral planning).

129. MISS. CODE ANN. § 75-63-17 (1991) (requiring “corporate entities” to act as trustee without defining what a corporate entity is and leaving investment oversight to the chancery courts).

130. ALASKA STAT. § 45.50.471(24) (1995); ARIZ. REV. STAT. ANN. § 32-1391.04(A) (West 1986 & Supp. 1995) (The trustee must be a state or national bank or savings and loan. The statute enumerates the type of allowable investments.); CAL. BUS. & PROF. CODE § 7736 (West 1995); COLO. REV. STAT. ANN. § 10-15-102(17) (West 1994 & Supp. 1995) (limiting trustees to state regulated financial institutions); CONN. GEN. STAT. ANN. § 42-202(c) (West 1992); DEL. CODE ANN. tit. V, § 302 (Michie 1993); GA. CODE ANN. § 84-4506(a) (Harrison 1994); HAW. REV. STAT. § 441-
the deposit of funds into credit unions, savings and loans, building and loans, and trust companies.


The statutes in Florida and Iowa have provisions for preneed funeral contract funding options that escape any statutory investment prescriptions. In both states, the preneed seller has the option of posting a bond in lieu of satisfying statutory trusting provisions. Iowa additionally allows for the Commissioner of Insurance to approve any other trust deposit method “upon a finding that the other method provides equivalent safety of the principal.”

Several states limit who can act as a trustee over preneed funeral contract proceeds but grant broad investment powers to the trustees. The Rhode Island preneed statute enumerates several allowable investment vehicles but further states that the escrow agent may invest in “any other deposit account, insurance contract, of a quality, safety and expense comparable to those set forth.” In Michigan, an escrow agent’s investment options are determined by whether the contract is a guaranteed or nonguaranteed price contract. The Oklahoma statute allows the organization accepting preneed funeral contract proceeds to invest in any “interest-bearing investments authorized by . . . the Insurance Code” as long as the Insurance Commission has not deemed that investment “inappropriate.” In Ohio, any person who posts a corporate surety bond equal to the amount held in trust, and who keeps exact records, may serve as trustee and invest the proceeds freely.

4. AMOUNT IN TRUST/POOLED TRUSTS

Although regulating the proceeds of preneed funeral contracts appears to be aimed at protecting the consumer, one of the most va-
ried provisions among the statutes is the percentage of preneed funeral sale proceeds required to be placed in trust.

Half of the states require one hundred percent of sale proceeds to be placed in trust. Other states require a lesser percentage to be placed in trust. Some states base the depository requirement on the nature of the item sold, the funding mechanism used, or whether the preneed contract is a guaranteed price contract or nonguaranteed price contract.


145. FLA. STAT. ANN. § 497.417(1) (West 1988 & Supp. 1995) (30% of merchandise proceeds, 70% of service proceeds, and 100% of cash advance item proceeds must be entrusted); IDAHO CODE § 54-1134(A) (1994) (50% of cash advance proceeds are entrusted); IDAHO CODE § 54-1134(A) (1994) (50% of grave marker proceeds are entrusted); IDAHO CODE § 54-1134(A) (1994) (50% of cash advance proceeds are entrusted); IOWA CODE ANN. § 523A.7(1) (West 1988 & Supp. 1995) (no funds placed in trust if surety bond posted); N.C. GEN. STAT. § 90-210.51(a)(1), (2) (Michie 1992) (100% of insurance policy funding and 90% of funeral trust funding placed in trust).

146. IOWA CODE ANN. § 523A.7(1) (West 1988 & Supp. 1995) (no funds placed in trust if surety bond posted); N.C. GEN. STAT. § 90-210.51(a)(1), (2) (Michie 1992) (100% of insurance policy funding and 90% of funeral trust funding placed in trust).

147. S.D. CODED LAWS ANN. §§ 55-11-3, -3.1 (Michie 1988 & Supp. 1995) (85% for guaranteed price contract, 100% for nonguaranteed price contract); OKLA. STAT. ANN. tit. 36, § 6125(A)(1) (West 1990 & Supp. 1996); OR. REV. STAT. ANN. § 128.423(1) (Buttsworth 1991); VA. CODE ANN. § 54.1-2822 (Michie 1994) (90% of guaranteed price contract proceeds and 100% of nonguaranteed price contract proceeds must be entrusted); see also supra part IV.
Many states expressly allow for the placement of preneed funeral proceeds into a "commingled,"148 "common,"149 "master,"150 or "pooled"151 trust account. Several of these states additionally require separate accounting procedures for each preneed funeral contract.152

5. EARNINGS ON TRUST FUNDS

Preneed funeral consumers are often concerned with use of earnings on the trust funds over time.153 The state preneed funeral statutes regulate the ownership and control of these earnings differently.

The vast majority of states require that any earnings on funds in trust remain with the principal, with only a handful of states allowing the seller/provider access to the earnings while the contract is executory.154 Although interest must remain with the corpus of the trust under one of the available funding options in Florida, the statutory


153. See Product Report, supra note 15, at 6-8 (discussing the effect of inflation on preneed funeral plans).

language makes it clear that the certificate holder (seller) is the owner of funds paid into trust and that the trustee takes title "for the purpose of investing, protecting, and conserving it for the certificate holder." Texas also requires that interest remain with the corpus of the trust but does allow the seller to withdraw any interest earned beyond 110% of the contract value.

In several states, cancellation of or refund on the contract at the disposition of earnings on trust funds. In Oregon, after full formance of the contract, earnings on trust funds are distributed to the seller under a guaranteed contract and distributed to the purchaser's estate under a nonguaranteed contract.

Although the majority of states require preneed funeral proceeds to remain in trust accruing interest, most states allow distributions from the trust to pay for administrative and trustee's fees.

156. Fla. Stat. Ann. § 497.417(1) (West 1988 & Supp. 1995). But see § 497.429 (which is an "alternative preneed contract" funding option, for the certificate holder's dominion and control over funds in trust); infra note 157 and accompanying text.
158. Cal. Prof. & Bus. Code § 7735 (West 1975 & Supp. 1995) (allowing 5% of the proceeds to be set aside for a cancellation fee); Fla. Stat. §§ 497.419(2), 429(5) (West 1988 & Supp. 1993) (allowing seller to retain all interest accrued upon contract cancellation); Ill. Comp. Stat. § 45/4 (West 1995 Supp. 1995) (allowing for seller to retain all funds in trust upon cancellation of the purchase contract); Ind. Code Ann. §§ 30-2-9-4, 6 (allowing seller to retain the lesser of 10% of the price paid or $3,000 as liquidated damages upon buyer default); Ohio Rev. Code § 1107.33(C) (Anderson 1988 & Supp. 1994) (80% of interest to seller if contract is canceled after seven days); Okla. Stat. Ann. tit. 36, §§ 6125(B), 6125(C) (West 1990 & Supp. 1996) (seller retains all excess interest beyond the insurer's interest under the mir contract, which is applied interest upon contract cancellation of a nonguaranteed price contract); also infra part III.E.2.b (discussing termination of preneed funeral contracts).
160. See supra note 154 and accompanying text.
Another deduction allowed under several statutes is for payment of taxes on trust income.\textsuperscript{162} Several states allow withdrawals from trust funds to reimburse mandated auditing and accounting,\textsuperscript{163} or reporting \textsuperscript{164} duties. Some states require that any approved deductions come from trust earnings and not the principal.\textsuperscript{165} In Illinois, the taxes due on trust income earned is held "in suspense" until performance or refund under the contract.\textsuperscript{166}

6. STANDARD OF CARE/INVESTMENT LIMITATIONS

Another area that may concern a preneed funeral contract consumer is the standard of care the trustee overseeing his funds must uphold. Many state statutes either address the standard of care a preneed funeral trustee must uphold or, alternatively, expressly restrict the type and quality of investment activity in which the trustee is allowed to engage.


\textsuperscript{166} 225 Ill. Comp. Stat. § 45/4a(c) (West 1993 & Supp. 1995).
Several state statutes expressly address the fiduciary standard of care of a preneed funeral trustee as the prudent investor or prudential person. A handful of states have taken a further step toward protecting the consumer by regulating the particular type of investment activity in which a preneed funeral trustee may engage. Texas has an extensive statutory provision detailing exactly in what kind of investments a trustee may participate. This statute requires a written investment plan specifying the "quality, maturity, and diversification of investments." The statute further requires an annual review of the trustee's investment plan and mandates the financial rating of any stocks and bonds.

7. DISBURSEMENT MECHANICS

Once the preneed trust fund or insurance policy has been established, what happens when the decedent dies and it is time for funeral or burial? How does the funeral provider get paid? The logistics of performance and reimbursement to the provider are surprisingly similar among the states.

The Arizona preneed statute is representative of other state statutes regulating disbursement of preneed contract proceeds when the recipient dies. Under the Arizona statute, the funeral provider must submit a certification of performance to the financial institution holding the preneed funds. Additionally, the financial institution must receive a death certificate before funds may be released. After proof of death and performance, the trustee may release the funds to the funeral provider.


170. Id. §§ 5A(d)(1)-(11).


172. Id.

173. Id.

174. Id.
8. EXCESS AND SHORTFALL

Many statutes commonly require that a trustee receive proof of the decedent’s death and performance by the provider before releasing funds. Because of the lapse in time between purchase of the plan and the consumer’s death, there may be an excess of funds in trust after the provider’s costs have been covered. On the other hand, there may be a shortfall of funds in trust to cover the provider’s costs. The statutes differ from state to state in how to handle any excess funds left in trust or any shortfall of funds.

a. Excess Funds State preneed funeral statutes handle excess funds in a trust after the funeral provider has been paid in three primary ways. They (1) disburse the surplus to the estate of the decedent, or (2) pay the excess to the seller/provider, or (3) distribute the excess depending on whether there was an “inflation proof” contract.

About a dozen states expressly require the distribution of any funds left in trust to the estate of the decedent. Many statutes allow the seller/provider to retain any excess funds left in trust. Other statutes do not specifically address the distribution of “excess” funds but indicate that upon performance, the trustee must distribute all the funds in trust to the seller. Some states allow the distribution of funds after performance to be negotiated in the contract.


Eight states treat the distribution of excess trust funds differently when the preneed contract is a guaranteed price contract. The trustee distributes the excess to the estate of the decedent under a nonguaranteed price contract and distributes the excess to the seller/provider under a guaranteed price contract.179

b. Shortfall of Trust Funds How is a preneed contract performed if there are insufficient funds to pay for the funeral services when the recipient dies? Few states directly address the shortfall situation, and those that do deal with it in different ways.

In Arkansas and West Virginia, the seller/provider must perform the contract even in the face of a shortage of funds.180 In Georgia, North Carolina, and South Carolina, the provider is under no obligation to perform the contract but may negotiate with the decedent’s estate to either use the existing funds as a credit toward funeral expenses for which the estate is liable, or cancel the contract and provide a refund to the estate.181 In Maryland, a shortfall of funds automatically voids the contract with the funeral provider obligated to refund any money paid to the decedent’s estate.182

In Massachusetts and New Jersey, the shortfall outcome depends on whether the contract was a guaranteed contract, and the result is different in both states.183 In Massachusetts, if the contract was a guaranteed price, the funeral home is obligated to provide the merchandise and services regardless of the shortfall of funds.184 If the contract was not a guaranteed price, the provider may bill the decedent’s estate for the shortfall.185 New Jersey’s preneed statute also obligates...
the funeral provider to perform a guaranteed contract. The New Jersey provider may not bill the decedent's estate under a nonguaranteed price contract, but may negotiate with the estate to credit any existing funds toward the funeral services or cancel the contract and refund the payments.

Under New York's preneed funeral statute, the terms of trust disbursements may be negotiated within the contract. Additionally, in many of the states with a difference between guaranteed and nonguaranteed price contracts, the statutory language is not clear about whether a provider must perform a guaranteed contract when there is a shortfall of funds.

F. Contract Requirements

1. Overview

As with any traditional contract for goods and services, a preneed funeral contract might have an infinite variety of terms and conditions. However, with an aim toward consumer protection, the various state statutes have several similar requirements as to the contents of the contract.

All but a dozen statutes expressly require preneed funeral contracts to be reduced to writing. Many states require that a regulatory department approve the form of the preneed funeral contract before the seller uses the form. Several states require disclosure of certain material provisions on the face of the contract such as the

187. Id.
189. Arizona, Colorado, Idaho, Illinois, Iowa, Maryland, Michigan, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, and Virginia have unclear statutory language.
funding terms\textsuperscript{192} or whether the contract is for a guaranteed price.\textsuperscript{193} Beyond these few features, the actual terms of any preneed funeral contract will differ depending on the statutory requirements particular to that state. However, all agreements for funeral services must adhere to the minimum federal standards of fair trade in the funeral business as laid out in the Federal Trade Commission’s “Funeral Rule.”\textsuperscript{194} The FTC requires price disclosures for all merchandise and services sold by funeral merchants.\textsuperscript{195} The Funeral Rule also has provision that if states promulgate stricter consumer policies, then stricter policies must be followed.\textsuperscript{196} The federal regulation does not directly address preneed funeral contracts.

2. \textbf{SUBSTANTIVE TERMS}

\textit{a. Transferring a Contract} One area where the lack of uniformity, particularly problematic is the transferability of preneed contracts.\textsuperscript{1} If consumers want to transfer their preneed contracts when they move to other states, several questions are raised. If a consumer moves, his contract transferable? If the contract is transferable, when must the transfer happen? If transfer is not available, what happens to the

\begin{itemize}
  \item [195] Id.
  \item [196] Id. § 453.9; see also Fred S. McChesney, Consumer Ignorance and Consumer Protection Law: Empirical Evidence from FTC Funeral Rule, 7 J. L. & Pol. 1 (1990) comprehensive article examining the legislative history of federal funeral business regulation.
  \item [197] See Product Report, supra note 15, at 10.
\end{itemize}
contract and the consideration paid? Only seventeen states have transfer provisions within their preneed funeral statutes.\textsuperscript{198} Of these seventeen states, ten allow a consumer to transfer only an irrevocable contract.\textsuperscript{199} The remaining seven allow a transfer of any preneed contract regardless of revocability, but most place limitations on the transfer\textsuperscript{200} or allow transfer terms to be negotiated and stated within the contract.\textsuperscript{201}

West Virginia's statute provides the most transfer flexibility: "[t]he contract buyer may, on acceptance in writing by a transferee, transfer the obligations of the seller, provider . . . to other persons within or without this state."\textsuperscript{202} The only limitation under this provision is that a transferee must approve of the transaction prior to the change. Additionally, the West Virginia code requires that the transferees comply with any preneed funeral contract law within their own states.\textsuperscript{203}

Another liberal transfer provision is found under Minnesota law which states:

The buyer of either a revocable or irrevocable pre-arranged funeral or burial contract retains the right to designate as trustee a different funeral establishment at any time before the death of the person for whose benefit the money was paid. Upon the death of that person, the next of kin . . . retains the right to designate as trustee a different funeral establishment.\textsuperscript{204}


\textsuperscript{201} 225 ILL. Comp. Stat. \S 45/1-1(a)(6)/(D) (West 1993 \& Supp. 1995).

\textsuperscript{202} W.Va. Code \S 47-14-8(h) (Michie 1995).

\textsuperscript{203} Id.

Massachusetts, South Carolina, and Vermont all provide for transfer of any preneed contract. However, all three states assess a penalty on the consumer for exercising the transfer.\textsuperscript{205} Massachus
ist allows preneed funds to be transferred minus all bank charges and administration fees.\textsuperscript{206} South Carolina requires that the seller "must paid a fee equal to ten percent of the contract face amount ... plus percent of the [interest earned] in that portion of the final year be transfer."\textsuperscript{207} Vermont law provides that the "funeral director who originated the contract may charge the buyer a transfer fee of no more than five percent of the principal amount of the assets."\textsuperscript{208} Washington allows a consumer transfer only if the funeral home has gone of business or become bankrupt.\textsuperscript{209}

Among the states that recognize the transferability of irrevocable preneed contracts, the requirements for transfer differ. Three states—Connecticut, Indiana, and Missouri, allow transfer upon the purchaser's request.\textsuperscript{210} Two other states, Kansas and North Carolina, require that the purchaser give written notice of the intent to transfer.

Eight state preneed statutes do not directly address transfer of a revocable preneed contract but have provisions that affect a preneed contract if the consumer moves away or dies outside the area of provider's services.\textsuperscript{212} In four of these states, if the beneficiary of the contract dies before his or her death, the contract is canceled and a refund must be given.\textsuperscript{213} In Nevada, North Carolina, and South Dakota, if the beneficiary dies out of state and has a local mortuary perform his fun
the provider must pay the out-of-state funeral home.214 In Missouri, the provider has an obligation to either arrange for the out-of-state funeral services or refund the money to the beneficiary's estate.215

b. Voiding or Canceling a Contract  Almost all of the states with preneed statutes provide for the cancellation of the contract. Only four states are silent on this issue.216 The cancellation provisions among the states can be placed into three general categories: (1) cancellation by the consumer or the seller, (2) cancellation by the consumer alone, and (3) cancellation by the seller/provider.

i. Cancellation by the Consumer or the Seller  The first category of cancellation provisions are referred to differently among the states. The nomenclature includes canceling,217 voiding,218 requesting to terminate,219 terminating,220 revoking,221 returning,222 or demanding a refund.223 Some states also say that a contract in violation of the preneed act is not enforceable by the seller224 or by anyone.225

A preneed contract can be voided in three different instances: (1) within a certain period of time after execution of the contract,226 (2) when the contract is in violation of statutory provisions,227 and (3)

216. Ind., North Dakota, Vermont, and Wyoming are silent.
when the contract is not in writing. Different combinations of these possibilities appear in the state statutes. Kentucky's statute even provides for voiding a contract provision which purports to waive statutory provisions.

### ii. Cancellation by the Consumer
Almost all states provide for canceling a preneed contract. Most states allow the purchaser to cancel the contract upon written notice. However, a few states do not even require written notice but allow the purchaser to cancel "upon demand." Some states will not allow the purchaser to cancel without the agreement of the seller. Hawaii requires cancellation to be provided for in the contract, but the statute lacks guidelines for these contractual provisions. Utah only allows cancellation by the purchaser in the case of a substantial breach by the contract seller, or upon substantial evidence that the provider is or will be unable to provide the services. A few states also allow for cancellation of the contract when the consumer has moved so far away that the seller will be unable to.

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230. See supra note 217 and accompanying text.


able to provide the services.\textsuperscript{236} The remaining few statutes, although mentioning cancellation, have no procedural requirements.\textsuperscript{237}

Many of the states which provide for the consumer cancellation of a preneed contract require that the seller refund the money within a certain number of days. The response time varies widely among these states.\textsuperscript{238}

The amount refunded to the consumer also varies from state to state. Many states mandate the return of all money to the purchaser including any interest earned.\textsuperscript{239} Other states allow for the return of the "net amount" paid by the consumer, which does not include interest.\textsuperscript{240} Hawaii makes no mention of how much money will be returned to the consumer because cancellation terms are negotiable.\textsuperscript{241}

Several states allow cancellation but assess a penalty on the consumer for exercising this right. For example, many states allow the seller to retain a certain percentage of the contract payments.\textsuperscript{242} Other

\textsuperscript{236} See supra note 212 and accompanying text.
\textsuperscript{240} MO. ANN. STAT. § 436.035(1) (Vernon 1992); NEV. REV. STAT. § 689.345 (1991); W. VA. CODE § 47-14-6(a) (Michie 1995).
\textsuperscript{241} See supra note 234 and accompanying text.
states charge the consumer some amount of money for canceling contract, with the amount varying from state to state. Some of
charges against a consumer include: (1) service fees,243 (2) costs and reasonably incurred,244 (3) administrative expenses
taxes,245 (4) reasonable expenses,246 and (5) costs incurred in the option of the trust.247 Illinois provides for a hefty liquidated dam

iii. Unilateral Cancellation by the Seller The third category of cancellation is fairly limited. Some states do permit the seller to cancel contract, but only if the purchaser defaults.248 South Dakota prov
that either party may cancel.250 Utah provides that the contract be canceled by either party according to the terms of the contra.
In addition, a few other states provide that the contract is auton

cally terminated in the event of the seller’s insolvency, dissolu
merger, bankruptcy, or in the event that the seller ceases to busi

G. Consumer Protection Programs

Recognizing that the administrative requirements in most st
are insufficient to stop preneed funeral providers from misapprop
ing the trust money, few states make an effort to provide consur
with more protection. However, these protections are a recent妥协
in the few states which include them.

Florida, North Carolina, Oregon, and Texas all have very sin
provisions, respectively called “Preneed Funeral Contract Consu

1992) (5% or 10% depending on how much of a sales commission was ini
charged); N.C. GEN. STAT. § 90-210.65 (Michie 1993); OHIO REV. CODE 


244. CONN. GEN. STAT. ANN. § 42-204 (West 1992); R.I. GEN. LAWS § 5-3 (Michie Supp. 1994).

245. IDAHO CODE § 54-1135A (1994); MASS. REGS. CODE tit. 239, § 4.06(8) (1


252. UTAH CODE ANN. § 5A 56-122(2)(b) (Michie 1994).

Protection Trust Fund," "Recovery Fund," "Funeral and Cemetery Consumer Protection Fund," and "Guaranty Fund." Each of these funds require the seller of a preneed contract to pay a certain amount into the fund for each preneed contract sold. The collected amounts are placed in trust to be used for consumer restitution.

The criteria for this restitution varies. In Oregon, the contract consumer needs only to have suffered a pecuniary loss. In Florida, the consumer's loss must be a result of the provider's "failing to provide the benefits or an appropriate refund, or that a provider ... has sold a preneed contract and has failed to fulfill the arrangement or provide the appropriate refund." In North Carolina, the consumer's loss must be a result of "the malfeasance, misfeasance, default, failure or insolvency" of the provider. The term "failure" as used in the Florida and North Carolina statutes is vague, and neither state gives any direction to its meaning.

Florida is the only state with a consumer protection fund which limits the use of the fund to fifty percent of the existing balance. The Florida statute also provides that restitution "shall not exceed the gross amount of the principal payments made by the purchaser of the contract." Oregon has a similar provison which states that restitution "shall not exceed the amount of the sales price paid plus interest at the statutory rate."

The statutes in Oregon and North Carolina make it clear that recovery from the consumer fund is not a right but a privilege which is granted at the discretion of the governing board. North Carolina takes a further step by forbidding the payment of attorney fees out of

254. FLA. STAT. ANN. § 497.413(2) (West Supp. 1995) ($2.50 or $5.00); N.C. GEN. STAT. § 90-210.66(b) (Michie 1993) ($2.00); OR. REV. STAT. § 128.435 (1993) ($5.00); TEX. REV. CIV. STAT. ANN. art. 548b, § 8A (West 1973 & Supp. 1995) ($1.00 for each contract until the fund reaches one million dollars).
257. FLA. STAT. ANN. § 497.413(7) (West Supp. 1995).
260. Id.
262. N.C. GEN. STAT. § 90-210.66(g) (Michie 1993); OR. REV. STAT. § 128.435(8) (1993) (restitution is a "matter of grace and not a right.").
such funds. Florida has a further proscription, forbidding the us
the consumer fund for “the purpose of sales, solicitation, or indi-
ment to purchase any ... preneed contract.”

H. Consumer Booklets

Two states, Illinois and Massachusetts, have taken an interest-
step toward ensuring that consumers are fully informed about the
ances of preneed funeral contracts. These states require that a se-
distribute booklets to the consumers prior to his entering int
preneed funeral contract.

In Massachusetts, the consumer booklet “Buyer’s Guide to
Need Funeral Contracts” must at a minimum inform the consu-
that: (1) a consumer can pre-plan without pre-paying; (2) goods
services may not be at a guaranteed price; (3) a variety of financ-
mechanisms exist, such as trusts, insurance and annuity policies
well as separate banking accounts; (4) there may be tax and Medica-
Medicaid eligibility consequences of each financing method; and
the consumer can cancel the contract within ten days with
penalty.

Under Illinois law, the State Comptroller is required to deve-
the consumer booklet or, in the alternative, approve the seller’s c
booklet. The Illinois booklet must contain a description of “the s
utory requirements, the different funding mechanisms, and all dis
sures required under this act.”

I. Penalties and Enforcement

If a consumer is deprived of the benefit of his bargain, or
seller/provider engages in an act contrary to the provisions of a s
preneed funeral contract statute, what are the remedies available
consumer? What is the seller/provider’s penalty? A survey of
state preneed statutes shows a variety of different remedies and p
alties, with only seven statutes utterly silent regarding the co

263. N.C. GEN. STAT. § 90-210.66(g).
265. 225 ILL. COMP. STAT. § 45/1a-1(e) (West 1993 & Supp. 1995); MASS. &
266. MASS. REGS. CODE tit. 239, § 4.04(2) (1993).
268. Id.
The majority of statutes have terms and conditions that ensure that providers and/or beneficiaries are entitled to remedies that are consistent with the applicable state laws. These remedies are designed to provide relief to individuals who have been harmed by the breach of contract or other violations of the terms of the plan.

One of the most important remedies is the right to pursue legal action against the provider or the plan for violations of the contract terms. This action can be brought in state or federal court, depending on the specific circumstances and the terms of the contract.

In addition to legal action, many statutes also allow for administrative proceedings to be conducted by an independent third party, such as a benefits or claims examiner. These proceedings are designed to provide a quicker and more informal resolution to disputes, and they are often less expensive than pursuing legal action.

Finally, some statutes allow for the termination of the provider's right to participate in the plan if it is found to be in violation of the terms of the contract. This can result in significant financial consequences for the provider, and it serves as a powerful incentive for providers to comply with the terms of the plan.

In conclusion, the remedies available under state laws are designed to ensure that providers and beneficiaries are protected against violations of the terms of the plan. These remedies range from legal action to administrative proceedings to termination of participation. Whatever the remedy, the goal is to ensure that the rights of both parties are protected, and that the plan operates in a fair and equitable manner.
ware, a fine is the sole punitive action under the statute.\textsuperscript{275} Jersey has designated the misappropriation of trust funds as a "crime," without further discussion of the implication of that label. Additionally, New Jersey has made it a crime of the fourth degree knowingly induce a Supplemental Security Income recipient or potential recipient into a preneed funeral contract with the intent to "cheat or charge more than the fair market value for prepaid funeral goods."\textsuperscript{277} Some states have made preneed statute violations a felony.\textsuperscript{278} Other states have both felony and misdemeanor penalties depending on the nature of the violation. Usually, any mismanagement of trust funds garners the higher penalty.\textsuperscript{279}

Several other statutory provisions to remedy wrongdoing appear among the many states. Eight states have provisions where an injunction may be sought to stop a seller/provider from engaging in violative conduct and possibly to stop that provider from participating in preneed funeral sales altogether.\textsuperscript{280} In two states that require a seller/provider to post bond, action can be taken against that bond if the seller/provider misconduct in connection with preneed funeral contracts.\textsuperscript{281} Several states have categorized violations of the preneed statutes as unfair trade practices, and a remedy may be sought as an action for other trade violations.\textsuperscript{282} In Iowa and Michigan, receivership over the business and assets of the seller is permitted.

\begin{itemize}
\item \textsuperscript{10} Michie Supp. 1994 ($500.00); S.C. Code Ann. § 32-7-100 (1991 & Supp $1,000.00).
\item \textsuperscript{275} Del. Code Ann. tit. V, § 310 (Michie 1993) ($500.00 - $1,000.00).
\end{itemize}
should be specific and broad, and should include meaningful terms.

A uniform funeral profession agreement should define what is

a uniform funeral profession agreement. Several issues covered by the ADRP Model Law should include several levels of consumer protection. The need for a uniform code covers a wide range of

issues which arise with the purchase of a preneed funeral agreement.

New consumer transactions involve the emotional and personal

values, and the emotional value may be awarded monetary

losses and damages. In Arizona and West Virginia, the preneed

business may be involved in multiple states, and any need for

government intervention may be more difficult to achieve because

of the complexity in many preneed sales may be found in Arizona.

Conclusion

services, and “cash advance” items. A uniform act should include cemetery goods and plots even if a state otherwise regulates the transactions.

Consumers should have viable remedies available in the event of nonperformance by the provider or breach by the seller. A uniform act should guarantee the consumer a range of effective remedies against sellers and providers. The statutes in Arizona, Oklahoma, West Virginia provide a wide variety of remedies and present a model.

Besides varied remedies, there should be uniformity in trust regulations. Regulations should restrict those who can act as trustee. The author prefers that the trustee be a financial institution or not-for-profit board, and not the seller or provider. In addition, regulations should limit the use of sale proceeds to investment or deposit into a fiscal institution or financial depository and should require a hundred percent of sales proceeds to be placed in trust.

Statutes should provide uniform treatment of “shortfalls” in trust funds, requiring the seller/provider to perform the contract even in the face of such a shortage, as in the Arkansas and West Virginia provisions.

Those states which do not require a preneed funeral contract be written should add such a requirement. This will add another level of protection for both the consumer, and the provider or seller.

Given an increasingly mobile society, preneed funeral regulations should include provisions regarding the transfer of contracts. The West Virginia and Minnesota codes contain desirable provisions in this area.

A uniform preneed funeral contract statute can provide greater protection to all parties involved in a transaction. Clearly then, much work to be done.

288. See supra part II.D.
289. See supra part III.H.
290. See supra part III.E.2.
291. See supra part III.E.3.
292. See supra part III.E.4.
293. See supra part III.E.8.
294. See supra part III.E.8.b.
295. See supra note 190.
296. See supra part III.F.2.a.
APPENDIX

Purchased Funeral Plans 47
board of funeral directors, banking commission, commission insurance, or securities commission.

Four of the respondents indicated that they participate in programs regarding preneed funeral plans. Three have programs which are coordinated with the funeral directors’ association. The group also provides its own educational program. One office indicated that it limits its dealings with preneed plans to refer problems to another state office for investigation.

Consumer Groups

A different survey was sent to state consumer protection offices. Fifteen states responded. Consistent with those from the office of aging, most of the responses indicated that existing statutes and regulations provide adequate protection for preneed plan consumer problems. Two states disagreed, citing sales misrepresentations as a common problem confronting consumers. Other problems included possession of nonconforming goods and services and the failure of sellers to obtain necessary licensing or certification for the purpose of selling preneed agreements.

Thirteen of the respondents had received complaints at preneed funeral plans in the preceding year. The number of complaints received ranged from two to thirty-five. The amount of money invested in the plans in dispute averaged $1,000.

303. Maine.
304. Delaware.
305. Georgia.
306. Arkansas.
307. Arkansas, Delaware, Kansas, and Rhode Island.
308. Arkansas, Delaware, and Kansas.
309. Kansas.
310. Rhode Island.
313. Ohio and Wisconsin.
Approximately one-half of the respondents had commenced court actions in preneed plan disputes, seeking license revocation, license suspension, mediation, or restitution.

Funeral Director Associations

The surveys sent to the states’ funeral director associations (FDAs) included questions about the profession’s efforts to protect purchasers of preneed plans. Fifteen states responded.

As with other groups, the FDAs were asked if they believed that existing state laws and regulations provided adequate protection for the purchasers. Twelve respondents said yes. Only one survey responded no. The subpart to this question asked if statutes provided adequate protection for the funeral professionals who sell such plans. Again, twelve answered yes, and only one said no. The FDA that responded in the negative did note that its state’s legislature was working on legislation to address the issue.

The FDA survey asked if the state’s laws provided more or less protection for the consumer than the federal Funeral Industry Practice Trade Regulation Rule (16 C.F.R. § 453). This question received a poor response. A number of respondents did not know what the rule was or exactly what it provided. Five FDAs said that their state’s regulations provided more protection than the federal rules.

The focus of the survey then shifted to salesperson and licensing requirements. Twelve respondents indicated that there were qualifications for becoming a preneed funeral plan salesperson. These varied, but included requirements that a salesperson be a licensed

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316. Pennsylvania.
318. West Virginia.
322. District of Columbia.
323. Arkansas, Connecticut, Georgia, Illinois, Iowa, Kansas, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, and Utah.
324. District of Columbia.
Approximately one-half of the respondents had commenced court actions in preneed plan disputes,\textsuperscript{315} seeking license revocation,\textsuperscript{316} license suspension,\textsuperscript{317} mediation,\textsuperscript{318} or restitution.\textsuperscript{319}

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\textsuperscript{315} California, Hawaii, North Carolina, Ohio, Oklahoma, Pennsylvania, and West Virginia.
\textsuperscript{316} Pennsylvania.
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\textsuperscript{318} West Virginia.
\textsuperscript{319} Hawaii, Ohio, Pennsylvania, and West Virginia.
\textsuperscript{320} Arkansas, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, Oklahoma, Utah, and District of Columbia.
\textsuperscript{321} Arkansas, Connecticut, Georgia, Illinois, Iowa, Kansas, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, and Utah.
\textsuperscript{322} District of Columbia.
\textsuperscript{323} Arkansas, Connecticut, Georgia, Illinois, Iowa, Kansas, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, and Utah.
\textsuperscript{324} District of Columbia.
\textsuperscript{325} Georgia, Illinois, Minnesota, New Hampshire, and Utah.
\textsuperscript{326} Arkansas, Connecticut, Georgia, Illinois, Indiana, Iowa, Minnesota, New Hampshire, New Mexico, Oklahoma, Utah, and District of Columbia.
funeral director,327 pay a licensing fee,328 be affiliated with a regist-
funeral home,329 or be registered with a state agency, usually the
retary of state.330
The FDA survey results also indicated that generally there
reporting requirements for those selling preneed funeral plans. T.
cally these reports were annual statements submitted to a state age
for review.
A major portion of the FDA questionnaire was devoted to g
ering information on the funeral directors professional organiza-
Most states responding had a volunteer professional organization
with many members who are firms, not individuals. Most meml
do sell preneed funeral plans.332
The survey asked funeral directors for the average amoun
money invested by consumers in a preneed plan. Although the
sponse rate was poor, the numbers ranged from $3,000-$5,000.
average age of the purchaser ranged from sixty to seventy-five ye
Almost all of the FDA respondents indicated that they pro
continuing education for their members.333 These organizations j
vide written materials and educational seminars to keep members
formed about the current status of preneed funeral plans.334
The FDA survey also asked the respondents about specific p
available to their members' customers and which plans they pr
Funeral trust plans335 enjoyed slight advantage over insurance-fun
plans,336 although many respondents indicated that their state l
limited them to offering one plan or another. Warehousing337 w

328. Iowa and Oklahoma.
329. Illinois, Iowa, Oklahoma, and Utah.
336. Indiana, Minnesota, New Mexico, Oklahoma, and District of Columbia.
337. In a “warehousing” arrangement, the consumer purchases actual fu
goods, such as a casket, at the time of the contract. The seller or provider
iered in only one of the states.\textsuperscript{338} No respondents favored membership burial societies, although one state does offer this alternative.\textsuperscript{339}

Twelve of the fifteen responding FDAs said that they have a professional code of ethics.\textsuperscript{340} However, only seven of these groups monitor the professional conduct of their members.\textsuperscript{341} This usually involves a complaint process through a state agency or an ethics board.

\textbf{Attorneys General}

The attorney general survey focused on consumer problems with preneed plans and steps taken to deal with these problems. Sixteen attorneys general returned the survey.\textsuperscript{342}

Typically, the complaint process began with a letter or phone call to the attorney general’s office by the consumer. Most of the respondents had received complaints regarding preneed funeral plans within the last year,\textsuperscript{343} the number of complaints ranging from one to fifty-three. Six attorney general offices indicated they had commenced some sort of formal action based on a complaint.\textsuperscript{344} The “official action” included hearings which could result in a license revocation, mediation, private litigation, or criminal prosecution.

The problems reported to the attorneys general were diverse. They included misrepresentation by the salesperson, failure of the seller to perform the contract, cessation of business by the seller before performance, ability to transfer the contract, and general problems with the seller’s refusal to cancel the contract.

\textsuperscript{338} Iowa.
\textsuperscript{339} Oklahoma.
\textsuperscript{340} Arkansas, Connecticut, Georgia, Illinois, Indiana, Minnesota, New Hampshire, New Mexico, North Dakota, Oklahoma, Utah, and District of Columbia.
\textsuperscript{341} Arkansas, Georgia, Illinois, Iowa, Minnesota, New Mexico, and District of Columbia.
\textsuperscript{342} Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Montana, Nebraska, North Carolina, North Dakota, Oregon, Texas, Utah, Virginia, and Wisconsin.
\textsuperscript{343} Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Nebraska, North Dakota, Oregon, Texas, Utah, Virginia, and Wisconsin.
\textsuperscript{344} Idaho, Indiana, Kentucky, Oregon, Utah, and Virginia.
Social Service Offices

This survey sent to state social services agencies concentrates preneed funeral plans as exempt assets for the purposes of obtaining Food Stamps, Medicaid, General Assistance, and Aid to Dependent Children.

Social service agencies from twenty-nine states responded. The respondents considered some restricted types of preneed funeral agreements exempt assets, at least for some public aid programs. The individual states determine the requirements a preneed program must meet in order to be exempt and, most often, the plan must be irrevocable. Frequently, the plan must not exceed a specified dollar limit.

Only six of the social service offices responding indicated they had received any complaints about preneed funeral plans. The complaints dealt with exempt-status determinations; the use of high-pressure sales tactics, especially on nursing home residents; and the use of the irrevocable trusts by consumers to protect funds for their heirs.

Individual Funeral Directors

One questionnaire was directed to a random sampling of individual funeral directors. It focused on the types of plans the directors use and prefer. It also solicited directors' opinions of the current restrictions on the preneed funeral plan laws and regulations. Twenty-five surveys were returned.

345. Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Vermont, Virginia, Washington, and Wisconsin.

346. Arizona, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Texas, Vermont, Virginia, Washington, and Wisconsin.

347. Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Vermont, and Washington.


Most of the respondents offered funeral trust plans and insurance-funded plans. Some indicated that they also offered warehousing, contract plans, and memorial society participation plans.

Five directors had no preference as to the type of plan they sold. Six preferred insurance-funded plans. These respondents felt the insurance plans provide a greater return to and more protection for the customer, allow for easier transfer, and frequently qualify as exempt assets under social service programs.

Ten of the respondents prefer to sell trust plans. Some of those indicated they were required by law to sell only trust plans. However, the directors offering trusts did say they felt this plan was fairer to the consumer, provided the best return on the consumer’s investment, and generated less paperwork than alternative plans.

Thirteen directors offered guaranteed price plans, four offered guaranteed plans, and seven offered the purchaser a choice. If there were excess funds after the performance of the contract, most of the directors would return the money to the consumer’s estate or family. Seven directors indicated that, under certain circumstances, they would retain the excess amount. Respondents stated that these arrangements generally are controlled by contract, although some are regulated by statute.

The survey also inquired about the transferability of the plans. Twenty-six directors stated that their plans were transferable to another funeral provider, including one outside the state in which the contract was originally formed. Procedures for dealing with the transfer varied widely among the respondents.

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331. Iowa, Minnesota, Missouri, Oregon, and Pennsylvania.
336. California, Georgia, Iowa, Michigan, New Jersey, South Carolina, and Utah.
Consistent with all the other groups surveyed, a majority of the funeral directors indicated that they believe existing statutes and regulations adequately protect the purchaser of the preneed funeral plan. 359 Twenty-two directors felt that the existing laws adequately protected the professionals who sell such plans. 360 Six did not feel that sellers had adequate protection. 361

Thirteen respondents felt they were subject to unnecessary regulation. 362 Some felt the federal funeral rule and OSHA regulations are too burdensome for members of their profession. Some of these respondents felt that the preneed regulations were good and necessary to protect the public. 363

359. Alaska, Arizona, Arkansas, California, Georgia, Illinois (2 responses), Michigan (2 responses), Minnesota, Missouri, New Jersey, New York (2 responses), Ohio, Oregon, Pennsylvania, South Carolina (3 responses), Texas, Utah, Wisconsin (2 responses), and Wyoming.

360. Alaska, Arizona, Arkansas, California, Georgia, Illinois (2 responses), Michigan (2 responses), Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina (3 responses), Texas, and Wisconsin (3 responses).


363. Arizona, Iowa, Michigan, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, and Wisconsin (3 responses).