



The Florida Senate

Interim Project Report 98-39

October 1998

Committee on Regulated Industries

Senator James A. Scott, Chairman

FUNERAL AND CEMETERY REGULATION

SUMMARY

This report examines the continuing trend of consolidation in the funeral and cemetery industries and its effects on competitors and consumers. The degree of consolidation within the death care industry raises concerns about the potential negative impact on competition and consumer choice and the potential abuses against consumers. This report makes several recommendations: 1) to support public education campaigns, 2) to collect ownership data for monitoring antitrust concerns, 3) to require public disclosure of ownership by funeral homes and cemeteries; 4) to strengthen statutory trust fund and refund provisions, and 5) to consider establishing licensure standards for pre-need counselors and sales agents.

BACKGROUND

The death care industry is a multi-billion dollar business, and Florida's growing and aging population is expected to keep the industry thriving. By the year 2010, the 65 and older age group will represent almost 20% of Florida's total population, with the 85 and older age groups constituting one of the fastest growing age groups overall.

Most people choose funeral and cemetery services based on a religious, ethnic, communal or geographic affinity. However, the players and practices within the industry have undergone dramatic change over the years. Traditional family-owned and sole proprietor-owned funeral and cemetery establishments once dominated the market. Now, global corporations are claiming greater shares of the market. The current top five public-owned corporations are: Service Corporation International, The Loewen Group, Inc., Stewart Enterprises, Inc., Equity Corp International, and Carriage Services, Inc. These corporations are forming

alliances with churches or partnerships with religious and ethnic groups that adhere strongly to traditional funeral and burial rituals.

The degree of consolidation within the industry as small and independent businesses have been eliminated from the competitive market has drawn national and local media attention. Consolidation can benefit consumers by enabling efficient delivery and greater selection of products and services. Furthermore publicly traded national companies may be subject to greater scrutiny on the state and federal level, resulting in added protection for consumers. On the other hand, consolidation has not necessarily benefited consumers. In the past five years, funeral prices have risen three times as fast as the cost of living. Moreover, consumers are still subjected to aggressive marketing tactics and potential abuses. The challenge in proposing any legislation to address these concerns is to strike a balance between consumer and business interests.

State Regulation

Florida's regulation of the funeral and cemetery industry is divided between two boards, each located in a different state agency.

Under chapter 470, Florida Statutes, the Board of Funeral Directors and Embalmers within the Division of Professions at the Department of Business and Professional Regulation (DBPR) is responsible for the licensure and regulation of funeral directors, embalmers, direct disposers and their facilities. The 7-member Board consists of 5 funeral directors, and 2 consumer representatives (one of which has remained vacant since 1997). As of August 1998, there were 1,096 actively licensed funeral/cinerator/embalming facilities and 2,685 actively licensed funeral service personnel (*see* following table).

Statistics on Funeral Establishments (Active)

842	Funeral Home Establishments
108	Incinerators
87	Direct Disposal Establishments
4	Centralized Embalming Facilities
54	Removal Services
1	Refrigeration Facility

Statistics on Funeral Personnel (Active)

2,312	Funeral Directors/Embalmers
82	Funeral Directors
57	Embalmers
234	Direct Disposers

The Board of Funeral and Cemetery Services within the Division of Finance in the Department of Banking and Finance is responsible for the regulation of for-profit cemeteries and pre-need contracts for funeral and cemetery merchandise and services under chapter 497, Florida Statutes. The 7-member Board consists of 2 funeral directors, 2 cemeticians and 3 consumer representatives (one of whom must be over the age of 60). The Board processes all applications, issues licenses and renewals, and investigates consumer complaints regarding cemeteries and pre-need funeral sales establishments.

According to the Division of Finance in the Department of Banking and Finance, there are 173 licensed cemeteries in Florida. In addition, there are an estimated 3,000 or more unlicensed cemeteries that fall within the statutorily exempted categories of cemeteries, including church cemeteries of less than five acres, county and municipal cemeteries, community and nonprofit association cemeteries, fraternal organized cemeteries, and family graveyards. Cemeteries may be small, individually operated businesses or large multi-site operations. Cemetery corporations also may include crematories, mausoleums (an above ground building with spaces in it that are designed to hold bodies placed in a casket) and columbariums (an arrangement of niches erected for the sole purpose of accepting cremains usually stored in urns).

The licensing process for a cemetery applicant can be lengthy, averaging 1.5 to 2 years. In the last five years,

only three cemeteries have been licensed. Prior to licensure of a cemetery applicant, the Board decides whether certain financial criteria are met while the Department of Banking and Finance determines whether a need exists in the community for the new cemetery. Two criteria used to determine need for a cemetery are being eliminated in a proposed rule. *See* Proposed Rule 3F-5.004, Fla. Admin. Wkly, August 21, 1998, Vol. 24, No. 34. The proposed rule recently was challenged. Cemetery applicants must own a minimum of 15 acres, pay an initial \$5,000 fee and establish a minimum \$50,000 maintenance and care trust fund for cemetery property. The Department of Banking and Finance must issue a license within 12 months after the applicant's satisfaction of the statutory criteria. The annual renewal fee is based on the amount of annual sales.

The Board separately regulates and licenses monument establishments, brokers of burial rights, and pre-need sellers. Only persons or agents (in the case of a corporate entity) who hold licenses as a funeral establishment, cemetery company or a direct disposer can obtain a certificate of authority to sell pre-need contracts. There are 334 licensed certificate of authority holders in Florida, and an additional 343 licensed certificate of authority holders for cemetery branches. In turn, a certificate holder can appoint one or more registered sales agents. As of July 1998, there were 2,448 active pre-need sales agents in Florida. There is no training requirement to sell pre-need contracts.

Under chapter 497, Florida Statutes, a certificate of authority holder for a pre-need contract is required to maintain a trust account or bond to protect the money paid by the consumer. Only 70% of the purchase price collected for services from a pre-need funeral or cemetery contract is required to be set aside in trust, whereas most states require 100% placement in trust. Only 30% of the purchase price collected for any merchandise (or 110% of the wholesale cost of the merchandise) is required to be placed in trust. Finally, only 10% of the grave, columbaria or mausoleum price must be set aside in a care and maintenance trust fund. As an added measure of protection for consumers whose pre-need plans are breached by a certificate of authority holder's failure to provide benefits or a refund, or financial insolvency due to bankruptcy, the Legislature enacted the Preneed Funeral Contract Consumer Protection Trust Fund (*see* s. 497.413, Florida Statutes). The Fund is funded by a fee set by statute that each certificate holder must submit for

each preneed contract executed (and not canceled within 30 days). The fee amount is based on the purchase price and the funding mechanism for the sale of the preneed contract.

Some benefits attributed to pre-need arrangements include locked-in prices of services and products, peace of mind, opportunity for comparison shopping and potential savings by avoiding decision-making under the stress of bereavement. Some drawbacks cited include a company's failure to honor a yet unpaid pre-need agreement, no guarantee as to a company's future economic viability, no relocation provision, limited refund policies, no accrued interest on money deposited, money not placed in trust, and penalties assessed for late payments on installment plans.

Other Regulatory Agencies

On the federal level, the Federal Trade Commission (FTC) exercises some regulatory powers over the funeral and cemetery industry. In 1984, the FTC adopted the "Funeral Rule" relating to funeral industry practices. Until 1994, the rule was only moderately enforced. The funeral rule requires all funeral providers to give consumers accurate, itemized price information and various other disclosures about funeral goods and services. In addition, it prohibits certain representations in six areas: 1) misrepresenting legal, crematory and cemetery requirements for the purchase of a particular good or service; 2) requiring embalming for a fee without permission; 3) requiring the purchase of a casket for direct cremation; 4) requiring a consumer to buy unneeded or unwanted funeral goods or services, 5) making preservative and protective value claims, and 6) failing to disclose certain cost information on cash advance items. It applies to pre-need and at-need contracts. However, cemetery services providers and other death care services providers are not subject to the regulations, creating a loop-hole as funeral and cemetery providers consolidate ownership.

The FTC also is responsible for monitoring market practices and products to ensure consumer protection and competition for all industries. It shares overlapping jurisdiction with Department of Justice over antitrust and unfair and deceptive business practices. Both agencies work under the Sherman Act to prohibit monopolization that lessens competition through unfair or unreasonable activities. Additionally, the agencies rely on the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. s.18a), amending the

Clayton Act, 15 U.S.C. ss. 12-27, to require companies to file premerger notices with the FTC and the Anti-trust Division of the Department of Justice and to establish waiting periods for information-gathering and investigations. However, the premerger notice requirement applies only to certain proposed transactions. The Act is triggered only in transactions involving, at a minimum, acquisition of securities or assets between a person whose annual net sales or assets total \$10,000,000 or more and another person whose assets or annual net sales total \$10,000,000 or more where as a result the acquiring person would hold 15% or an aggregate total of at least \$15 million of the voting securities and assets of the acquired person.

On the state level, the Department of Legal Affairs often is called upon to assist the federal agencies regarding antitrust investigations.

Legislative Initiatives

There has been no major rewrite of the state statutes relating to funeral and cemetery services since 1993. Chapter 93-399, Laws of Florida, substantially revised chapter 470, Florida Statutes, relating to funeral directing, embalming, and direct disposition and merged chapter 639, Florida Statutes, relating to preneed funeral contracts, into chapter 497, Florida Statutes, relating to cemeteries. It also moved jurisdiction under this chapter from the Department of Insurance to the Department of Banking and Finance. Bills to provide greater consumer protection through revised trust fund account and refund requirements for pre-need contracts have been introduced but not enacted.

In 1996, the Legislature enacted Chapter 96-355, Laws of Florida, amending Chapter 497, Florida Statutes, to require cinerator facilities to place human remains in alternative containers or caskets for cremation. The provisions apply to all at-need and pre-need contracts entered after July 1996. An alternative container is an unfinished box or other non-metal receptacle or enclosure without ornamentation or lining that can be made of cardboard, knock-down-wood, pressboard, fiber board, or composition materials.

In 1998, the neglected and abandoned state of many cemeteries across Florida prompted the Legislature to enact the Cemetery Preservation and Consumer Protection Act. *See* Chapter 98-268, Laws of Florida. The law created an 11-member task force within the Department of Banking and Finance to survey and categorize cemeteries throughout Florida and report its findings and recommendations. The act also added a

statutory duty of care and maintenance by licensed cemeteries. A report is due in February 1999. The Legislature also enacted Chapter 98-298, Laws of Florida, amending Chapter 470, Florida Statutes, to address certain practices of funeral directing, embalming and direct disposition of human remains. It also added language relating to communicable disease courses, visitation chapels and identification requirements on human remains. A provision to require ownership disclosure failed to pass.

METHODOLOGY

Committee staff solicited comments from representatives of the industry, public interest groups, and regulatory agencies regarding the current trends and recommendations for change. Committee staff researched and reviewed legislation, reports, and other literature on the death-care industry. In addition, committee staff reviewed data regarding complaints against the industry from various regulatory agencies, data regarding ownership by the top five conglomerates in Florida from the Department of Business and Professional Regulation, and cemetery data from the Department of Banking and Finance.

FINDINGS

The national death rate is projected to rise from 8.7% per 1,000 to 9.3% per 1,000 by the year 2010. Consequently, the potential for profits and economic growth in the death care industry is also increasing. Funeral and cemetery services typically rank third behind homes and cars as the most costly expenditure that a consumer will make in a lifetime. Unlike most other purchases, these purchases are usually made under the stress of heightened emotion and time constraints, which place consumers in an unusually vulnerable posture when solicited or seeking out services for themselves or loved ones.

Mirroring the wave of mergers in many industries during the last 5-10 years, the death care industry also is showing a significant consolidation trend. Many sole proprietors or family-owned establishments are approached or actively seek to sell the business to a corporation either because the owner is at or near retirement or there is no family member willing or able to continue the family tradition. Certain geographical regions in Florida are already dominated by the presence of corporate conglomerates.

Consumer Protection

Consumers historically have been unprepared, reluctant, or unwilling to discuss preparations for death, let alone comparison shop for funeral and cemetery services and products within or outside their immediate vicinity. They often will return to a familiar-named or previously used funeral and cemetery establishment regardless of costs. Additionally, their state of bereavement makes many consumers susceptible to potentially aggressive sales tactics by the death care industry and to suggestions that the amount spent is a reflection of the survivors' feelings for the deceased.

The cost of funeral and cemetery services and products easily escalates. The average cost of a funeral alone rose 28% from \$3,742 in 1991 to \$4,782 in 1997 (source: The National Funeral Directors Association 1997 General Price List survey). These costs basically include the non-declinable professional service fee, transportation of body to the funeral home, use of the funeral home facilities, embalment, the provision of cosmetology, restoration and dressing of the body, purchase of the casket, use of the hearse, and acknowledgment cards. They do not include cemetery or other alternative burial expenses such as burial plots or urns, opening and closing of the grave sites, and monuments or markers, which usually are not purchased through a funeral home but can represent significant additional expenses. An assortment of ancillary expenses such as burial and transit permit, newspaper death notices, extension of credit, completion of death certificate, clergy's honorarium, music, extra limousines, flowers, burial clothes, telegrams, burial vault or grave lines, and perpetual-care charges inflate the total price even more.

While the federal "Funeral Rule" expressly prohibits conditioning the purchase of funeral goods and services upon the purchase of unwanted or unneeded goods and services, a 1994 amendment permitted funeral providers to add automatically a nondeclineable fee for basic services and overhead. There is no statutory cap for this nondeclineable fee, which usually ranges from \$500 to \$2,000 and up. Despite extensive price list requirements imposed by the federal rule, consumers still may get locked into costly package deals. Many consumers are unaware that they may decline services and products, provide them directly, or obtain them through alternative sources, often at substantially discounted prices. For example, although most states, including Florida, do not require embalming unless the body will be placed for viewing or transported across state lines, embalming

ing is promoted heavily in the United States, and many consumers still pay for it, believing that it is required.

Some consumers are responding to increasing costs and consolidation in the industry by exploring alternative funeral and cemetery services and products. For the first time in Florida's history, more people opted for cremation (65,810) than burial (63,682) in 1997. This is exclusive of bodies shipped out-of-state. The demand is spawning a market responsive to alternatives to traditional funeral and cemetery goods and services, by forcing some companies to compete through expansion or acquisition of other similar or related businesses, and by creating cottage industries offering a broader range of services and products.

The promotion of funeral and cemetery pre-need plans and other death care arrangements by various local and national advocacy groups also is assisting consumers to be on more equal footing with the providers of services or products. By discussing beforehand cemetery services, products and preferences for or against an extravagant or simple funeral, consumers minimize the possibility of making hasty, uninformed and costly decisions later during the grieving period. This effort dovetails with the current national movement addressing end-of-life care issues. (Note: In 1998, the Florida Legislature created a 22-member panel in connection with the Florida State University's Pepper Institute on Aging and Public Policy to study end-of-life care issues. *See* Chapter 98-327, Laws of Florida). One type of advocacy group is the network of memorial societies, which formed as nonprofit organizations during the Depression. They actively advocate and assist their members by negotiating discounts, providing pre-planning, and sorting through the options for funeral or other death care arrangements. There are more than 200 memorial societies in the United States and Canada. The Florida Federation of Funeral and Memorial Societies is a member of a national network called the Funeral and Memorial Societies of America.

There are a number of state, federal, and local government agencies that address consumer concerns through complaint processes, enforcement, and public education. In conjunction with the Department of Legal Affairs, the Division of Consumer Services within the Department of Agriculture and Consumer Services enforces Florida's "Little FTC Act," prohibiting fraud, and deceptive and unfair trade practices. The law specifically authorizes higher penalties for violations committed against elder citizens and mentally or

educationally incapacitated persons (*see* Part II of Chapter 501, Florida Statutes). Additionally, the Division acts as a clearinghouse for consumer protection issues. During the period from January 1, 1995 through June 23, 1998, the Division processed 138 complaints relating to a variety of issues including contract refund disputes, solicitations, advertisements, and misrepresentations by funeral homes and cemeteries. Unless the complaints were clearly within the jurisdiction of the Division, the complaints were forwarded to the appropriate regulatory agency.

Under Section 497.301, Florida Statutes, the Department of Banking and Finance also operates a toll-free telephone hotline to receive complaints and provide information relating to the regulation. Additionally, section 497.333, Florida Statutes, requires any licensee offering burial rights, merchandise or services to:

- disclose accurate retail prices upon request, and all services and merchandise available and their prices before a consumer decides;
- refrain from making false or misleading statements regarding the legal necessity for a casket or outer burial container (compare with Section 470.025(13), Florida Statutes, which requires humans remains to be placed in an alternative container or casket);
- furnish good faith estimates of total costs and the licensee's bylaws upon request; and
- to provide a board-approved written burial right, service or product contract including clear and conspicuous itemization of all costs, description of merchandise or services, and cancellation and refund policies, as well as certain statutorily required information on the signature page.

A person also may have a civil cause of action against any person or company violating any provision of chapter 497, Florida Statutes, in which he or she may recover actual damages or \$500, whichever is greater. *See* Chapter 497.527, Florida Statutes.

Pre-Need Contracts and Trust Funding

More and more businesses including small and independent establishments are aggressively marketing the sale of pre-need contracts and packaged deals in order to compete. Many consumers, however, are unaware

of pitfalls in the purchase of pre-need contracts and packaged deals.

Although a Certificate of Authority is required to sell pre-need plans in Florida, there is no competency or financial training requirements for a pre-need licensee or sales agent. As a measure of consumer protection, most states, including Florida, require that a certain percent of monies paid under a funeral or cemetery service contract be deposited into a trust account. Consumers are not entitled to interest. A consumer may receive a full refund of all monies paid under a contract for funeral and cemetery services if the contract is canceled within 30 days after its execution.

A company still may fail to deliver on pre-paid funeral or cemetery plans. For those consumers who do not cancel, a refund is available, but on a limited basis. It is the pre-need contract holder's discretion how to apply the payments to the various products and services contracted. Thus, if the consumer changes his funeral or cemetery services arrangements or cancels the contract after 30 days, the refund amount will depend on how the payments were first applied. Under Florida law, only the purchase price payments made to the services, facilities and cash advance items portions of a preneed contract are fully refundable. The purchase price payments made to the merchandise portion of a preneed contract are refundable only if the certificate holder is unable to fulfill his or her obligation to deliver the merchandise. These refund provisions can be problematic for some consumers. For example, if the payments were first applied to the purchase of the merchandise and a consumer dies before the contract is paid, the survivor may learn that services will not be rendered until the services portion of the contract is paid in full. Similarly, if the payments were first applied to the purchase of the merchandise and a consumer dies but it is decided that the body will now be buried elsewhere other than originally planned, the survivor may be required to take possession of unusable merchandise.

According to staff of the Board of Funeral and Cemetery Services, the number of complaints from consumers regarding unlicensed firms has risen. Over the past four years, consumers filed 213 claims to the Preneed Funeral Contract Consumer Protection Trust Fund against 18 firms, 14 of which were never licensed to sell preneed contracts. Financial exposure to existing and future claims on the unlicensed firms may exceed \$500,000.

An alternative to the purchase of a pre-need plan includes the establishment of a Totten trust, which allows a person to designate and direct a beneficiary to pay for services at the time of need from the savings in an interest-bearing bank account. Another alternative is the purchase of life insurance policies equal to the value of a funeral or prepaid burial policies. However, a common problem has been the latent discovery that the insurance policy inadequately covers the costs of a funeral or the burial policy does not provide the expected or paid for service of body transportation when the death occurs in a region other than where the policy was purchased.

Despite existing state and federal regulatory measures to protect consumers, consumers still are vulnerable and warrant a heightened level of protection due to the emotional timing and sensitivity surrounding the consideration or need for funeral and cemetery services.

Disclosure of Ownership

Within the funeral and cemetery industry, the established goodwill and business name in the community of a funeral or cemetery establishment is substantially weighted in the purchase value of a business. For example, in the case of family burials, the initial sale of one cemetery property is very likely to ensure the sale of other cemetery property because a family member already is or will be buried in the cemetery or because the consumer enjoys a familial, ethnic or religious affinity with the business. Therefore, following acquisition or merger, the corporation will typically retain the prior business' name and oftentimes the prior owner and employees for a period of time for transition purposes or for corporate management or daily operation of the establishment. [See Florida Cemetery Association, letter dated 7/17/98] This practice yields a higher probability that the conglomerate corporation will generate recurring business from a previous consumer unaware that the businesses is no longer owned by independent owners.

Therefore, in this climate of consolidation, consumers may unwittingly deal with a company that the consumer wanted to avoid or may shop around different establishments and find very little, if any, competitive pricing because, unknown to the consumer, the establishments all are owned by the same company. The unique circumstances surrounding the purchase of funeral and cemetery services and products may warrant explicit disclosure requirements regarding corporate ownership on letterhead, contracts, signage

or advertisements so that consumers can make informed decisions about whether and from whom to purchase their funeral and cemetery services and products.

Consolidation

Despite economies of scale, many companies’ prices have actually shifted upward rather than downward subsequent to a merger or buy-out. For example, the national average service charge levied by a chain-owned funeral home was 17% higher than the average cost at an independent funeral home and the average price of a steel casket was 16% higher at chained owned establishments.

The consolidation of the funeral and cemetery industry in Florida has been characterized as “creeping expansion” whereby a larger corporation buys one small or independent business at a time until the corporation’s acquisitions represent a substantial presence in a particular region. Due to the small amount of assets involved in these individual buy-outs, the transactions do not trigger automatically any federal or state anti-trust laws.

Four of the five largest publicly-owned funeral and cemetery corporations are present in Florida: Service Corporation International (SCI), The Loewen Group, Inc., Stewart Enterprises, Inc., and Carriage Services, Inc. A recent survey of 53 funeral homes in the Orlando area conducted by the Memorial and Funeral Society of Greater Orlando concluded that more than half were owned by these four national chains and that the chains performed 90% of Central Florida’s funerals. Statewide, SCI has the highest profile. It holds almost 14% of all licenses issued in the state based on preliminary data collected by the Department of Business and Professional Regulation. In some communities, SCI’s presence is more dominant. It owns 21% of all funeral establishments in Jacksonville (11 of 53) and 44% in Stuart (4 of 9). According to the staff of the Board of Funeral and Cemetery Services, 19 of the 20 cemetery acquisitions from 1996 through 1998 were affiliated with a “conglomerate” organization.

Neither the Department of Business and Professional Regulation nor the Department of Banking and Finance currently is required to collect comprehensive data in a manner that would verify geographical presence and market share of large death care corporations in Florida. More data collection and research by the respective regulatory agencies would help to determine whether a monopoly environment actually exists, and whether it is resulting in diminished availability and quality of services, higher costs to consumers, and curtailment of competition among business entities.

RECOMMENDATIONS

- Support public education campaigns with public interest groups about resources, organizations, and options available to assist consumers in making informed decisions to prepare for the need for funeral and cemetery services.
- Require the Department of Business and Professional Regulation and the Department of Banking and Finance to collect data regarding ownership of funeral homes and cemeteries that then would be available for legislative research, for monitoring consolidation trends within the industry, and for potential antitrust investigations by state and federal antitrust authorities.
- Establish requirements for public disclosure of ownership of funeral establishments and cemeteries.
- Strengthen statutory trust fund and refund provisions applicable to both the funeral and cemetery industries.
- Consider establishing licensure standards for pre-need counselors and sales agents.

COMMITTEE(S) INVOLVED IN REPORT *(Contact first committee for more information.)*

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MEMBER OVERSIGHT

Senator James A. Scott, Chairman, Senator Betty S. Holzendorf, and Senator Donald C. Sullivan