To: Insurance

MISSISSIPPI LEGISLATURE
REGULAR SESSION 2001

By: Senator(s) Farris

SENATE BILL NO. 2218

AN ACT TO CREATE THE "PRE-NEED CEMETERY AND FUNERAL REGISTRATION ACT"; TO DEFINE CERTAIN TERMS; TO REQUIRE ALL PRE-NEED CONTRACTS SOLD TO BE EVIDENCED IN WRITING ON FORMS REGISTERED WITH THE SECRETARY OF STATE; TO PRESCRIBE THE CONTENTS OF SUCH WRITTEN PRE-NEED CONTRACT; TO PROVIDE FOR RECORD-KEEPING REQUIREMENTS; TO PROVIDE TRUSTING REQUIREMENTS IF THE PRE-NEED CONTRACT IS FUNDED BY A TRUST; TO PROVIDE CERTAIN REQUIREMENTS IF THE PRE-NEED CONTRACT IS FUNDED BY INSURANCE; TO REQUIRE REGISTRATION OF ALL PERSONS AND ESTABLISHMENTS SELLING PRE-NEED CONTRACTS; TO PROVIDE REPORTING REQUIREMENTS TO THE SECRETARY OF STATE; TO AUTHORIZE EXAMINATIONS OF THE BOOKS AND RECORDS OF REGISTERED ESTABLISHMENTS; TO PROVIDE CIVIL AND CRIMINAL PENALTIES FOR VIOLATIONS OF THIS ACT; TO CLARIFY THAT NOTHING IN THIS ACT SHALL BE CONSTRUED TO AUTHORIZE THE SALE OF LIFE INSURANCE POLICIES BY UNLICENSED AGENTS; TO REPEAL SECTIONS 75-63-1, 75-63-3, 75-63-5, 75-63-7, 75-63-9, 75-63-11, 75-63-13, 75-63-15, 75-63-17, 75-63-18, 75-63-19, 75-63-21 AND 75-63-23, MISSISSIPPI CODE OF 1972, WHICH REGULATE THE PRE-NEED SALES OF CEMETERY MERCHANDISE AND FUNERAL SERVICES; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. This act shall be known and may be cited as the "Pre-need Cemetery and Funeral Registration Act."

SECTION 2. As used in this act, unless the context requires otherwise:

(a) "Buyer" means the person who purchases the pre-need contract.

(b) "Cash advance item" means any item of service or merchandise described to a purchaser as a "cash advance," "accommodation," "cash disbursement" or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf. Cash advance items may include, but are not limited to: cemetery or crematory services; pallbearers; public transportation; clergy honoraria; flowers; musicians or singers; nurses; obituary notices; gratuities and death certificates.
(c) "Cemetery" means an organization as defined in Section 41-43-33, Mississippi Code of 1972.

(d) "Contract beneficiary" means the person upon whose death will initiate the performance of the pre-need contract. This person may also be the contract purchaser.

(e) "Contract provider" means the funeral home or cemetery indicated in the pre-need contract that will be responsible for performing the pre-need contract.

(f) "Financial institution" means a bank, trust company, savings bank, or savings and loan association located in this state.

(g) "Funeral home" means a business licensed under Section 73-11-55, Mississippi Code of 1972.

(h) "Inflation proof contract" means a pre-need contract that establishes a fixed price for funeral services and merchandise without regard to future price increases.

(i) "Insurance" means a life insurance policy or annuity contract, or other insurance contract or agreement in any form, issued by an insurance company authorized by law to do business in this state which, by assignment to a contract provider, has for a purpose the funding of a pre-need contract.

(j) "Merchandise" means personal property associated with the disposal of or memorializing a deceased human being, such as a casket, burial vault, burial clothes, urn or monument.

(k) "Pre-need contract" means any contract, agreement or mutual understanding, or any series or combination of contracts, agreements or mutual understandings, whether funded by trust deposits or insurance, or any combination thereof, which has for a purpose the furnishing or performance of funeral services, or the furnishing of delivery of merchandise, of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, but shall not mean the
furnishing of a cemetery lot, crypt, niche or mausoleum or the furnishing of merchandise that is delivered to the purchaser within sixty (60) days from the date of purchase.

(l) "Seller" means the person who sells the pre-need contract.

(m) "Services" means services of any nature in connection with the final disposition of a dead human body.

(n) "Standard contract" means a pre-need contract that applies the trust funds or insurance proceeds to the purchase price of funeral services and merchandise at the time of death of the contract beneficiary without a guarantee against future price increases.

(o) "Trust" means an express trust created by a trust instrument whereby a trustee has the duty to administer a trust asset for the benefit of a named beneficiary.

(p) "Trustee" means an original, added, or successor trustee including its successor by merger or consolidation.

SECTION 3. (1) No person, firm, partnership, association or corporation may directly or indirectly, or through an agent, engage in the sale of pre-need contracts except as authorized under this act. All pre-need contracts sold shall be evidenced in writing on forms registered with the Secretary of State. These forms shall be in twelve-point type and clearly indicate the names and addresses of the buyer, contract beneficiary, contract provider and seller.

(2) The contract shall clearly indicate all merchandise covered by the contract and the total cost of all merchandise covered by the contract. The contract shall list all services covered by the contract and the total cost for all services covered by the contract. The contract price shall not exceed the sum of the total cost for all merchandise, the total cost for all services and any interest.
(3) All pre-need contracts sold shall be funded by trust or insurance as defined in this act or evidenced by a warehouse receipt.

(4) If the pre-need contract is funded by insurance, the following information shall be adequately disclosed at the time the contract is executed:

(a) The fact that a life insurance policy is involved or being used to fund the contract, and the name, address and telephone number of the insurance company issuing the insurance;

(b) The nature of the relationship among the soliciting agent or agents, the provider of the funeral or cemetery merchandise or service, the administrator and any other person;

(c) The relationship of the life insurance policy to the funding of the pre-need contract and the nature and existence of any guarantees relating to the pre-need contract;

(d) The impact on the pre-need contract:

   (i) Of any changes in the life insurance policy including, but not limited to, changes in the assignment, beneficiary designation or use of the proceeds;

   (ii) Of any penalties to be incurred by the policy holder as a result of failure to make premium payments; and

   (iii) Of any penalties to be incurred or monies to be received as a result of cancellation or surrender of the life insurance policy.

(e) A list of the merchandise and services which are applied or contracted for in the pre-need contract and all relevant information concerning the price of the funeral services, including an indication that the purchase price is either guaranteed at the time of purchase or to be determined at the time of need;

(f) All relevant information concerning what occurs and whether any entitlements or obligations arise if there is a
difference between the proceeds of the life insurance policy and
the amount actually needed to fund the pre-need contract; and

(g) Any penalties or restrictions, including, but not
limited to, geographic restrictions or the inability of the
provider to perform, on the delivery of merchandise, services or
the pre-need guarantees.

(5) If the pre-need contract is funded by trust, the
contract shall indicate the name, address and telephone number of
the trustee; the amount to be paid; the frequency of payment; and
the length of time payments will be paid into the trust. In
addition, the contract should clearly indicate any exclusions or
limitations of the pre-need contract including, but not limited
to, any additional payments that may be owed if the contract
beneficiary dies before the agreed upon payment period is
completed.

(6) The pre-need contract shall indicate whether it is a
standard contract or an inflation proof contract, and whether it
is revocable or irrevocable. The contract shall clearly indicate
which merchandise and services are guaranteed as to price, and
which cash advance items are not guaranteed as to price. Upon
written disclosure to the buyer, inflation-proof contracts may
permit the contract provider to retain all of the pre-need
contract trust funds or all insurance proceeds, even those in
excess of the retail cost of the merchandise and services provided
when the contract provider has fully performed the pre-need
contract.

(7) The pre-need contract shall contain the address and
phone number of the Secretary of State with instructions that
consumer complaints may be filed with the Secretary of State.

(8) If the pre-need contract is paid in multiple payments,
the contract should indicate the amount, frequency and duration of
the payments and the amount of any interest charged. The contract
shall also include the impact on the contract if payments are not
made.

(9) Any use or attempted use of any oral pre-need contract,
or any written contract in a form not registered with the
Secretary of State, shall be a violation of this act.

SECTION 4. (1) The contract provider or its successor shall
maintain a copy of all pre-need contracts entered into by the
contract provider for a period of the lifetime of each contract
beneficiary and for two (2) years after the death of a contract
beneficiary. In addition, the contract provider shall maintain a
log of pre-need contracts in force. The log shall be maintained
in chronological order of when contracts are sold.

(2) The log shall indicate whether the pre-need contract is
standard or inflation proof, whether the contract is funded with
trust or insurance, and whether the contract is revocable or
irrevocable. If the contract is funded by trust, the log shall
indicate the trustee. If the contract is funded with insurance,
the log shall indicate the name of the insurance company and the
policy number of the insurance policy.

(3) The Secretary of State shall promulgate rules and
regulations governing the form, maintenance and location of such
logs.

SECTION 5. (1) If the contract is funded by trust, the
contract beneficiary shall be given a copy of the trust document
and shall be informed in writing as to how the assets of the trust
are held. In the event of any change in the assets of the trust,
or change in the trustee, the contract beneficiary and Secretary
of State shall be informed of these changes within ten (10) days.

(2) The trustee shall not be the contract provider, the
seller, or an officer or director of the contract provider if the
contract provider is a corporation.

(3) Within ten (10) days from receipt of the funds, the
contract seller shall place in a trust account at least fifty
percent (50%) of the funds received. If the contract seller places less than one hundred percent (100%) in the trust account, the pre-need contract shall fully disclose to the contract purchaser the amount deposited in trust and the amount withheld by the contract seller.

(4) The trustee shall obtain a surety bond for the full amount of deposits in the trust account. If the trust funds are held in a financial institution whose deposits are insured by an agency of the United States government, the trustee shall be exempt from the bonding requirement to the extent these deposits are insured.

(5) Reasonable annual trust fees including any income taxes owed to the State of Mississippi or the United States Treasury may be withheld from the earnings of the trust.

(6) At the time of death, if the contract provider provides the merchandise and services indicated in the contract, the contract provider shall furnish to the trustee a copy of the buyer’s death certificate and a letter of performance indicating that the contracted merchandise and services were provided by the contract provider to the contract beneficiary. Upon receipt of the letter of performance and death certificate, the trustee shall pay to the contract provider all funds plus accumulated interest in the trust.

(7) If the contract provider does not furnish merchandise and services as provided in the pre-need contract, the trustee shall pay to the estate of the contract beneficiary or the substitute provider the amount deposited in trust plus any accumulated interest in the trust within ten (10) days from notification of the death of the contract beneficiary.

SECTION 6. (1) If the pre-need contract is funded with insurance, and payment is made to the contract seller rather than directly to the life insurance company, the contract seller shall
send to the insurance company all premiums collected from the
contract purchaser.

(2) At the time of death, the proceeds of the policy shall
be settled in accordance with the policy. If the contract
provider furnishes merchandise and services as indicated in the
contract, the contract provider is entitled to retain the proceeds
of the policy in accordance with the pre-need contract. If the
contract provider does not furnish merchandise and services as
provided in the pre-need contract, the contract provider shall pay
to the estate of the contract beneficiary or the substitute
provider of the merchandise and services the entire proceeds of
the policy within ten (10) days of receipt of these proceeds.

SECTION 7. At any time prior to the performance of the
contract, the contract beneficiary or his representatives may name
a substitute provider for the pre-need contract. The naming of
the substitute provider shall be in writing. If the pre-need
document is funded by trust, the notice of substitution shall be
made in writing to the trustee and the Secretary of State. If the
pre-need contract is funded by insurance, the notice of
substitution shall be made in writing to the insurance company.
Upon receipt of the notice of substitute provider, the original
provider shall be relieved of all obligations to perform the
contract including all obligations of reporting and accounting,
and the substitute provider shall assume all obligations to
perform the contract including all obligations of reporting and
accounting.

SECTION 8. (1) No person may offer or sell pre-need
contracts or offer to make or make any funded pre-arrangements
without first being registered with the Secretary of State.

(2) There shall be two (2) types of registration: a
pre-need establishment registration and a pre-need sales
registration. The Secretary of State shall establish regulations
to register each funeral home or cemetery selling pre-need
merchandise or services including the fees to be paid for each
registration. No establishment shall be registered to sell
pre-need merchandise or services that the establishment cannot
lawfully provide at the time of a person's death. The Secretary
of State shall also maintain a record of all individuals who are
registered to sell pre-need merchandise or services through the
registered establishment.

(3) The Secretary of State shall establish regulations to
register each person selling pre-need contracts, including the
establishment through which the seller will be selling. No person
shall be registered to sell pre-need contracts without indicating
which establishment he or she is selling.

SECTION 9. Every registered pre-need establishment shall
annually submit a written report to the Secretary of State of its
pre-need contract sales and performance of such contracts. This
report shall be filed on or before March 31 of each year for the
calendar year ending the preceding December 31. The Secretary of
State shall adopt regulations concerning the content and filing
procedure of this report.

SECTION 10. (1) Whenever it appears to the Secretary of
State that any person has engaged, or is about to engage, in any
act or practice constituting a violation of any provision of this
act or any rule or order hereunder, he may, in his discretion,
seek any or all of the following remedies:

(a) Issue a cease and desist order with or without a
prior hearing against the person or persons engaged in the
prohibited activities directing them to cease and desist from
further illegal activity;

(b) (i) Issue an order in the case of any person,
partnership or, if a corporation, the officers and directors who
sell or offer to sell pre-need contracts, or other person who
violated this act, imposing an administrative penalty up to a
maximum of One Thousand Dollars ($1,000.00) for each offense and
each violation shall be considered as a separate offense in a single proceeding or a series of related proceedings; to be paid to the Secretary of State and requiring reimbursement to the Secretary of State for all costs and expenses incurred in the investigation of the violation(s) and in the institution of administrative proceedings, if any, as a result thereof;

(ii) For the purpose of determining the amount or extent of a sanction, if any, to be imposed under paragraph (b)(i) of this subsection, the Secretary of State shall consider, among other factors, the frequency, persistence and willfulness of the conduct constituting a violation of this act or a rule promulgated thereunder, or an order of the Secretary of State, the number of persons adversely affected by the conduct and the resources of the person committing the violation;

(c) Bring an action in chancery court to enjoin the acts or practices to enforce compliance with this act or any rule or order hereunder. Upon a proper showing, a permanent or temporary injunction, restraining order or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant’s assets. In addition, upon a proper showing by the Secretary of State, the court may enter an order of rescission, restitution or disgorgement directed to any person who has engaged in any act constituting a violation of any provision of this act or any rule or order hereunder, or the court may impose a civil penalty up to a maximum of One Thousand Dollars ($1,000.00) for each offense and each violation shall be considered as a separate offense in a single proceeding or a series of related proceedings. The court may not require the Secretary of State to post a bond.

(2) The Secretary of State may, with or without a prior hearing, suspend or revoke any pre-need establishment or sales registration for violation of statutes or regulations established under this act.
(3) Any person, partnership or, if a corporation, the officers and directors who sell or offer to sell a pre-need contract with a suspended or revoked reward to reflect registration or without a license shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine not less than Two Hundred Dollars ($200.00) nor more than Five Hundred Dollars ($500.00) or by imprisonment for a term of not more than one (1) year, or both fine and imprisonment.

(4) Any person, partnership or, if a corporation, the officers and directors who embezzle or fraudulently or knowingly and willfully misapply or convert pre-need funds shall, upon conviction, be punished by imprisonment in the custody of the Mississippi Department of Corrections for a term of not less than ten (10) years, or be fined not more than One Thousand Dollars ($1,000.00) and imprisoned in the county jail not more than one (1) year, or both fine and imprisonment. Each such violation shall constitute a separate offense.

(5) Upon reasonable belief that a person or corporation is acting in violation of the portions of this act requiring fines or imprisonment, the Secretary of State shall immediately report this violation accompanied by all relevant records to the district attorney in the county where the violations may have taken place. If the violations may have taken place in multiple counties, the case shall be reported to the county of residence of the violator, or if not a resident of the State of Mississippi, the District Attorney of Hinds County.

(6) No order shall be entered under this section without the following:

(a) An appropriate prior notice to the applicant or registrant;

(b) An opportunity for a hearing; and

(c) Written findings of fact and conclusions of law.
SECTION 11. The information contained in or filed with any registration, statement, application or report may be made available to the public under such rules as the Secretary of State prescribes. Information in the possession of, filed with or obtained by the Secretary of State in connection with any investigation or examination under this act shall be confidential and exempt from the requirements of the Mississippi Public Records Act of 1983. No such information may be disclosed by the Secretary of State, or any of his officers or employees, unless necessary or appropriate in connection with a particular investigation or proceeding under this act or for any law enforcement purpose.

SECTION 12. For the purpose of any investigation or proceeding under this act, the Secretary of State, or any officer designated by him, may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements or other documents or records which the Secretary of State deems relevant or material to the inquiry.

SECTION 13. Nothing in this act shall be construed to authorize the sale of life insurance policies by unlicensed agents which is prohibited by Section 83-17-105, Mississippi Code of 1972.

SECTION 14. Sections 75-63-1, 75-63-3, 75-63-5, 75-63-7, 75-63-9, 75-63-11, 75-63-13, 75-63-15, 75-63-17, 75-63-18, 75-63-19, 75-63-21 and 75-63-23, Mississippi Code of 1972, which regulate the sales of cemetery merchandise and funeral services, are hereby repealed.

SECTION 15. This act shall take effect and be in force from and after July 1, 2001.