



**House
Legislative
Analysis
Section**

Vol 20 1990

Manufacturer's Bank Building, 12th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

**House Bill 5571 as introduced
First Analysis (5-1-90)**

**Sponsor: Rep. Joseph Young, Sr.
Committee: State Affairs**

THE APPARENT PROBLEM:

In 1986, in response to a boom in the sales of prepaid funeral agreements and concern over the potential for abuse in this area, the Prepaid Funeral Contract Funding Act was created to regulate the sales of funeral goods and services under contracts requiring payment in advance of the death of the beneficiary. Among other provisions, the act requires that those who sell funeral goods or services be registered with the Department of Licensing and Regulation; that 100 percent of the funds from all prepaid contract funds be held in an income generating escrow account (except for the commission, limited to ten percent of the contract price, that the contract seller is authorized to charge); and that a customer may cancel a contract and receive a refund of up to 100 percent of the amount paid. The act also defines a "prepaid funeral contract" as a contract requiring payment in advance for funeral services which are delivered after death. This latter provision was designed to include under the act all prepaid funeral contracts, unique to the funeral business, where arrangements are made to purchase some, or all, of one's funeral expenses, in advance. On the practical side, many consider this to be a prudent part of estate planning: it relieves relatives of the burden of making business decisions relating to funeral needs and expenses while they are under the stress of bereavement.

Although proponents of the act predicted that these improved consumer protections would encourage advance purchases and would benefit industry and consumer alike, cemetery owners claimed that, in reality, the act was designed to make it unprofitable for them to sell catafalques. (A catafalque is a casket with a fiberglass inner liner that substitutes as a burial vault. The catafalque is reusable, since only the liner is interred, thereby reducing the cost of a funeral to the consumer.) Cemeteries are regulated by the Cemetery Regulation Act, which permits catafalques to be sold as cemetery merchandise and requires that 130 percent of the wholesale cost of cemetery merchandise sold under a prepaid funeral contract be placed in trust. Thus, for example, for a unit costing \$250 wholesale, and \$1,200 retail, \$325 would have to be placed in trust and the remainder could be used by the cemetery to pay commissions to salespersons. Under the Prepaid Funeral Contract Funding Act, however, catafalques were redefined as "funeral merchandise," and advance sales of these units were therefore subject to the act's requirement that all funds received for them, other than a commission, be placed in escrow. Without the ability to place 130 percent of the wholesale cost into escrow, cemetery owners, it was claimed, had no financial incentive to sell catafalques on a prepaid basis.

Cemetery owners continued to enter into prepaid funeral contract selling, but did so by means of a method called "warehousing." "Warehousing" refers to the practice of selling goods under a prepaid contract; arranging for their storage until needed; and providing the customer with a

warehouse receipt. Argument has been made that "warehousing" is exempt from the requirements of the Prepaid Funeral Funding Act, since "constructive delivery" occurs when the customer is provided with the receipt, and therefore exempt from the requirements that money received under these contracts be placed in trust. (The act merely defines a "prepaid funeral contract" as "a contract requiring payment in advance for funeral services or for funeral goods, physical delivery and retention of which would occur after death.") Critics of this practice point out that "warehousing" could conceivably leave the customer "holding the bag," should the cemetery or casket dealer involved go bankrupt. The argument has also been made that "warehousing" constitutes a final sale, and that once this sale occurs the customer owns the merchandise and there is no possibility of a refund. The act, it is argued, was designed to protect consumers' interests in the prepaid funeral market, and should therefore be amended to clarify the original intent of the law, and to eliminate this loophole by providing a definition of "delivery" that would not allow these funds to escape the requirement that they be placed in trust.

THE CONTENT OF THE BILL:

The bill would amend the Prepaid Funeral Contract Funding Act to clarify certain definitions. Under the act, a "prepaid funeral contract" is defined as a contract requiring payment in advance for funeral services or for funeral goods, physical delivery and retention of which would occur after the death of a contract beneficiary under a guaranteed price contract or a nonguaranteed price contract. Under the bill, a "prepaid funeral contract" could also include a contract where physical delivery and retention of the funeral goods had not been made prior to the death of the contract beneficiary and, as such, the funds paid pursuant to the contract would be subject to the act. In addition, the bill would define "physical delivery and retention" to mean actual control and possession of funeral goods that had been permanently relinquished by a contract seller or provider, or the agent of either, to the contract buyer or beneficiary. "Physical delivery and retention" could not occur if the contract seller or provider took either of the following actions:

- a) Arranged or induced the buyer to arrange for the storage or warehousing of funeral goods ordered under a prepaid funeral contract, with or without evidence that legal title had passed.
- b) Acquired or reacquired actual or constructive possession or control of funeral goods after their initial delivery to the contract buyer or beneficiary.

MCL 328.215

FISCAL IMPLICATIONS:

According to the Department of Licensing and Regulation, the bill would have no fiscal implications for the state. (4-30-90)

H.B. 5571 (5-1-90)

ARGUMENTS:

For:

The bill would benefit consumers by requiring all companies involved in the selling of prepaid funeral goods and services to comply with the requirement that funds received for these services be placed in trust. It is conceivable that an item, such as a funeral casket, that is stored for several years, could deteriorate. If the funds used to pay for the casket were not placed in trust, and if the customer had actually taken delivery of the casket on acceptance of a warehouse receipt, then either the customer, or — more likely — the customer's family, would have little recourse under present law. More important, the act was designed to protect consumers interests. Consumers have the right to expect a refund of at least some of the purchase price if they decide to move to another state, and a refund of the full purchase price if the goods they paid for are not delivered. At present, it is rumored that at least two cemeteries in the state are undergoing financial problems. Should these cemeteries go into receivership, those consumers who have purchased prepaid funeral contracts under the "warehousing" method will not be protected. Under the bill, those consumers who purchase caskets under prepaid contracts from cemeteries in the future would be protected.

The bill would also benefit the funeral industry. Since the purchase of a prepaid funeral is considered to be part of prudent estate planning, the bill would encourage advance purchases through improved consumer protections, and through provisions that would require all who sell funeral goods to "compete on the same playing field."

Against:

The bill is not in the best interest of either the funeral industry or consumers, and it would not permit all who sell funeral goods to compete on the same playing field. Instead, it would serve to eliminate competition by driving one part of the industry — cemeteries that employ salespersons to sell prepaid funeral contract under "warehousing" provisions — out of the market. These cemeteries already face stiff competition: from municipally-owned cemeteries and those run by religious organizations that are exempt from paying real estate taxes; and from funeral homes, which, they say, refuse to accept or charge a handling fee on caskets sold by cemeteries or by casket manufacturers or distributors that sell directly to the public. While funeral homes have an advantage, in that customers may walk into their place of business to buy a product or services, cemeteries must go to the public to sell, and they say that if the funds from their sales had to be placed in escrow they could not pay operating costs or sales commissions. Neither would consumers benefit from the requirements of the bill, since, without competition, funeral homes would have a monopoly on sales of funeral goods, and could charge exorbitant prices.

Against:

With the prepaid funeral industry reportedly worth billions of dollars nationwide, and coffins the industry's most profitable money-maker, the bill would simply contribute more fuel in what the media has dubbed the "casket wars." Allegations that caskets could deteriorate while in storage are untrue, since the caskets are not, in fact, stored, but merely reserved by model number. Since the Department of Licensing and Regulation reports that it has not received any complaints from consumers concerning the

warehousing of funeral merchandise, there would seem to be little reason to enact legislation that could have the result of eliminating competition in this market. Consumers would be better served if, rather than requiring that the funds from prepaid funeral contracts be held in escrow, a portion of these funds were instead placed into a special fund that could be utilized by the Department of Licensing and Regulation to audit these businesses.

POSITIONS:

The Michigan Funeral Directors Association supports the bill. (4-27-90)

The Michigan Consumers Council supports the bill. (4-26-90)

The Office of Services to the Aging supports the bill. (4-30-90)

The Department of Licensing and Regulation has no position on the bill. (4-26-90)

The Michigan Cemetery Association and the Michigan Chapter of the Pre-Arrangement Association of America (MPAA) oppose the bill. (4-27-90)