



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

**BILL ANALYSIS**

Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bills 512 and 513 (as reported without amendment)  
Sponsor: Senator Laura M. Toy  
Committee: Local, Urban and State Affairs

Date Completed: 6-11-03

**RATIONALE**

The cost of a funeral and interment, including all of the accompanying goods and services, is the last major expense of a person's life. Reportedly, in 2001, the average cost of an adult funeral was \$5,180. Dealing with that expense can be both financially and emotionally trying. To make funerals and the disposition of remains more affordable, and to allow advance planning for the expense, both funeral homes and cemeteries offer preplanning services and prepayment options. Prepaid funeral contracts and the sale of cemetery goods and services on a preneed basis, however, are regulated under two different statutes. As a result, the treatment customers receive depends on which services and merchandise they purchase, and from whom.

The Prepaid Funeral Contract Funding Act governs the sale of funeral goods and funeral services pursuant to prepaid funeral contracts, and regulates these contracts, their sellers, and the providers of the funeral goods and services. That Act specifically excludes land or interest in land, crypts, niches, and cemetery burial vaults and other outside containers and merchandise sold by a cemetery. All funds received in connection with a prepaid funeral contract (except for a maximum additional 10% of the contract price, which may be charged as a commission) must be held in escrow by an escrow agent for the benefit of the contract beneficiary (the individual for whom the goods will be furnished or the services performed after death). A contract buyer may cancel a prepaid contract before the contract beneficiary's death. After receiving notice of cancellation, the escrow agent must disburse at least 90% of the principal and income in the escrow account to the contract buyer.

The Cemetery Regulation Act governs the creation and management of cemeteries; requires the registration and audit of cemeteries; and regulates the sale of burial, entombment, or columbarium rights, cemetery services, and cemetery merchandise. Under the Act, a cemetery and an agent authorized to sell cemetery merchandise or services on a cemetery's behalf must establish a merchandise trust account and deposit in it a percentage of the price, as determined by the Cemetery Commissioner (the Director of the Department of Consumer and Industry Services or the Director's designee). Money deposited in connection with a sale must be repaid within 30 days, upon written demand of a purchaser. Although cemeteries and their agents may sell cemetery products and services on a preneed basis, the Cemetery Regulation Act, unlike the Prepaid Funeral Contract Funding Act, does not require that the proceeds of those sales be held in escrow or that the principal and income be refundable to a contract buyer.

Reportedly, many customers of cemetery preneed sales have been denied refunds or alternative arrangements when they have decided to change their plans, or their survivors have been charged additional amounts when the time came to use the prepaid arrangements. Some people believe that the Prepaid Funeral Contract Funding Act should govern the advance sale of both funeral and cemetery services and merchandise, so that that Act's consumer protection measures would be available regardless of whether funeral and/or cemetery services and products bought on a preneed basis were purchased from a cemetery or from a funeral home.

## CONTENT

**Senate Bill 512 would amend the Prepaid Funeral Contract Funding Act to do all of the following:**

- **Extend the Act to the provision of cemetery services and merchandise.**
- **Require a provider of merchandise or services under a prepaid contract to be licensed or registered under Chapter 18 (Mortuary Science) of the Occupational Code (as currently required) or under the Cemetery Regulation Act.**
- **Require a person to establish a trust fund and present a performance bond before developing or constructing a mausoleum or columbarium and selling crypts; and set a deadline for the completion of construction.**
- **Specify that a purchaser would be responsible for notice requirements upon the sale of a business registered under the Act.**
- **Prohibit certain business activities.**
- **Make failure to place funds in escrow or trust a felony.**
- **Revise receivership provisions.**

**The bill also would rename the Act the "Prepaid Funeral and Cemetery Sales Act".**

**Senate Bill 513 would amend the Cemetery Regulation Act to do all of the following:**

- **Require the Cemetery Commissioner to inspect cemetery facilities and grounds at least every three years, and allow him or her to charge up to \$1,000 for an inspection.**
- **Increase from \$100 to \$1,000 the maximum amount the State may charge a cemetery for audits and inspections of books.**
- **Expand the circumstances under which the Cemetery Commissioner may take disciplinary action against a registrant or applicant, and allow the Commissioner to impose an administrative fine of up to \$5,000 for each violation of the Act.**

**The bills also would move requirements for endowment care trust funds from the**

**Cemetery Regulation Act to the "Prepaid Funeral and Cemetery Sales Act", and revise those requirements.**

The bills are tie-barred.

## Senate Bill 512

### Cemetery Merchandise & Services

Currently, a person may not sell, provide, or agree to provide funeral goods or funeral services pursuant to a prepaid funeral contract unless the person is registered with the Department of Consumer and Industry Services (DCIS) and has received a certificate of registration. The bill, instead, would prohibit a person from selling, providing, or agreeing to provide "merchandise" or funeral or "cemetery services" pursuant to a "prepaid contract" unless that person was registered with the DCIS.

Under the Act, "funeral goods" means items of merchandise sold or offered for sale or lease to consumers that are used in connection with a funeral, alternative to a funeral, or final disposition of human remains. Funeral goods may not include land or interest in land, crypts, or niches sold by a cemetery or cemetery burial vaults or other outside containers, markers, monuments, urns, or merchandise used for the purpose of memorializing a decedent and placed on or in proximity to a place of interment, entombment, or inurement and sold by a cemetery. The bill would delete that definition. Under the bill, "merchandise" would mean both cemetery burial vaults or other outside containers, markers, monuments, and urns, and items of merchandise sold or offered for sale or lease to consumers that would be used in connection with a funeral, an alternative to a funeral, or the final disposition of human remains, including caskets, combination units, and catafalques. "Merchandise" would not include land, interests in land, or interests in mausoleums or columbariums that were sold by a cemetery or funeral establishment that complied with endowment care trust fund requirements.

The Act defines "funeral services" as services customarily performed by a mortuary science licensee and include such things as care of human remains, embalming, preparation of

remains for final disposition, memorial services, and other services relating to a funeral or other final disposition of human remains. The bill would define "cemetery services" as cremations, grave openings and closings, and installation of markers and monuments.

"Prepaid funeral contract" currently means a contract requiring payment in advance for funeral services or funeral goods, delivery of which would occur after death under either a guaranteed price contract or nonguaranteed price contract. The bill, instead, would define "prepaid contract" as a contract that required payment in advance for funeral or cemetery services or merchandise, the delivery of which would occur after death under either a guaranteed price contract or a nonguaranteed price contract.

#### Registration

The Act requires that an application form for original or renewal registration contain certain information, as well as a statement made under oath that the registrant has an agreement that complies with the Act with each escrow agent with which it has deposited funds. Under the bill, an application would have to contain either this statement or, if the registrant were or intended to be an escrow agent for funds received in connection with a nonguaranteed price contract, a statement that the registrant would comply with the Act's escrow agent requirements (which involve agreeing to allow inspection and copying of records under certain circumstances).

The DCIS may deny a registration under certain circumstances. The bill also would allow denial if the registrant or applicant had violated the Act, Article 18 of the Occupational Code, or the Cemetery Regulation Act.

#### Prepaid Contracts

A prepaid contract under the Act must be either a nonguaranteed price contract or a guaranteed price contract and may be made and executed only pursuant to the Act. A guaranteed price contract must designate a provider who has agreed to furnish funeral goods or funeral services (or, under the bill, merchandise or funeral or cemetery services) specified in the contract, upon the death of the contract beneficiary. If the designated

provider is not the contract seller, the Act requires either of the following:

- The provider must have previously contracted with the contract seller to provide the goods and services specified in the contract and the contract must indicate the contractual relationship.
- The provider must be made a party to the contract before any consideration is paid and the contract may not be binding on the contract buyer until the provider has been made a party to the contract.

The bill would delete the first of those options.

In addition to registration under the Act, a provider in a guaranteed price contract must be licensed to provide funeral services under Chapter 18 of the Occupation Code. The bill would require that a provider be licensed under that chapter or registered under the Cemetery Regulation Act. If a provider were required to possess a license or registration in order to provide the services included in a prepaid contract, a contract seller who did not possess a license or registration would have to disclose to the contract buyer that it could not perform activities that required licensure or registration.

(A guaranteed price contract has a guaranteed fixed price for which specified funeral goods or services must be sold to or made available for a contract buyer or a contract beneficiary, regardless of the cost or value of the goods or services at the time of death of the contract beneficiary. Additional consideration may not be charged at the time the goods or services are delivered.

Under a nonguaranteed price contract, the funds received by an escrow agent are applied to the cost of funeral goods or services, which may be selected by the contract buyer when the contract is signed or by a person legally authorized to procure the goods or services when the contract beneficiary dies. A nonguaranteed price contract does not obligate the contract beneficiary's estate or the person who is legally entitled to make funeral arrangements to purchase specific goods or services that were selected before the beneficiary's death, or to spend a specific amount on funeral goods or services.

The bill essentially would retain the current definitions but apply them to merchandise or funeral or cemetery services.)

### Escrow Agents

Under the Act, all funds received in connection with a prepaid contract must be held in escrow by an escrow agent for the benefit of the contract beneficiary. If the prepaid contract is a nonguaranteed price contract, the contract seller or provider may serve as the escrow agent. If the contract is a guaranteed price contract, the contract seller or provider may not serve as the escrow agent. In the case of either a guaranteed or a nonguaranteed price contract, any of the following may serve as an escrow agent:

- A depository (a State- or nationally chartered bank or a State- or Federally chartered savings and loan association, savings bank, or credit union, whose deposits are Federally insured).
- A trust company.
- A Michigan nonprofit corporation in which the majority interest is held by 250 or more funeral establishments licensed under Chapter 18 of the Occupational Code.
- A Michigan nonprofit corporation in which the majority interest is held by 250 or more cemeteries licensed and operated pursuant to the Cemetery Regulation Act.

If the prepaid contract is a nonguaranteed price contract, the escrow agent may be selected by either the contract seller or the provider. If the prepaid contract is a guaranteed price contract, the escrow agent must be selected by the provider who has been designated to furnish funeral goods or services. Under the bill, the provider designated to furnish funeral services would have to select the escrow agent in a guaranteed price contract. If the prepaid contract did not include funeral services, any provider could select the escrow agent.

### Trust Funds

Endowment Care Trust Fund. The bill would require that a cemetery establish and maintain an irrevocable endowment care trust fund. The fund would have to be administered by a trustee that was a depository or a trust company. A cemetery would have to deposit with the trustee at least 15% of the proceeds

it received during the previous month from the sale of burial, entombment, or columbarium rights. The principal and interest in the trust would have to be held in compliance with Section 7302 of the Estates and Protected Individuals Code (EPIC), which requires that trustees "act as would a prudent person in dealing with the property of another". Earnings from the trust could be used only for the purpose maintaining the ground, graves, mausoleums, columbariums, and other facilities and beautifying the cemetery grounds, and the principal would have to remain invested.

Before July 1 of each year, the trustee would have to report information regarding the endowment care trust fund as the DCIS considered pertinent in the public interest. The report would have to be made on forms approved and furnished by the Department.

Each person engaged as an agent or a seller in the selling of burial rights, entombment rights, or columbarium rights owned by a party other than a cemetery or person subject to the trust fund requirements of other laws, would have to deposit 15% of all gross proceeds received from the sales of those rights into the irrevocable endowment care trust fund of the cemetery in which the rights were located, if an endowment care trust fund existed for that cemetery.

In addition to all other remedies at law or in equity that any interested party may have, the Attorney General and the circuit court of the county in which a cemetery was located would have all the powers and jurisdiction granted to them for trusts covered under Public Act 280 of 1915. The remedies granted would include all endowment care trust funds without regard to uncertainty or indefiniteness of the funds' beneficiaries. (Public Act 280 of 1915 grants to the circuit court jurisdiction and control over gifts, grants, bequests, or devises for the purpose of providing for the care or maintenance of any part of a cemetery, that are invalid by reason of indefiniteness or uncertainty of the object of the trust or those people designated as beneficiaries. The Act also requires the Attorney General to represent the people of the State and the beneficiaries in such cases.)

If, after a DCIS audit, a deficit were found in the amount of required deposits to the

endowment care trust fund, the DCIS would have to order replenishment of the deficit and could assess a penalty of up to 10% of the deficit amount. The cemetery or entity of a cemetery could request an administrative hearing before the DCIS within 30 days after being notified of a deficit. If, following notice and an opportunity for a hearing, the DCIS determined that a deficit did exist, an additional penalty of up to 1.5% could be assessed each month on the unpaid monthly balance until the deficit was paid in full.

A cemetery for earth interment of 10 acres or less in size that was owned and operated entirely and exclusively by an existing nonprofit entity and in which a burial had taken place before September 15, 1968, would be exempt from the endowment care trust fund requirements, except as to the trust fund report requirements if the cemetery maintained care or memorial funds.

Mausoleum or Columbarium Trust Fund. The bill would prohibit a person from developing or building a mausoleum or columbarium and engaging in preconstruction sales of crypts or niches unless that person did all of the following:

- Placed at least 50% of the funds received pursuant to preconstruction sales into a trust fund and, annually before July 1, reported on DCIS forms trust fund information that the Department considered pertinent in the public interest.
- Presented a performance bond to the DCIS in an amount equivalent to 100% of the funds received pursuant to preconstruction sales minus the percentage of funds placed in the trust.
- Began construction once 50% of the interment rights were sold.

The trust fund would have to be administered by a depository or a trust company. The funds placed into the trust fund would have to be held in compliance with Section 7302 of EPIC.

Construction of a mausoleum or columbarium would have to be completed within four years after the first sale of an entombment or inurement right. If construction or development of the mausoleum or columbarium were not completed within that time, or if the person for whom the interment

right was purchased died before completion, the purchaser or his or her estate immediately would have to be given a refund of 100% of the proceeds of that sale, including interest as determined by the "adjusted prime rate" (as defined in the revenue Act), compounded annually since the year the money was deposited.

Principal and income in a trust account could be withdrawn only upon completion of construction or development of the mausoleum or columbarium or to make a required refund.

#### Assignment or Transfer of Obligations

The Act requires a contract seller or provider to notify the contract buyer in writing if the seller or provider assigns or transfers its obligations under a prepaid contract to another provider. If the contract buyer cancels the contract within 30 days of the notification, the buyer is entitled to a refund of 100% of the remaining principal and income, plus any commission charged. An assignment or transfer of a provider's obligations under a prepaid contract that is made in connection with the sale of a business is subject to the notice and refund provisions only if more than 50% of the ownership interest in the business is transferred within a 12-month period.

The bill specifies that, upon sale of the business, the notice requirement would be the responsibility of the purchaser. The bill also specifies that, except as otherwise provided, these requirements would not apply to burial rights or other land interests, crypts, inscribed monuments, inscribed markers, or niches, for which no refunds were available.

#### Violations & Penalties

A person selling or offering to sell goods or services under the Act, whether registered or not, is prohibited from engaging in certain activities. The bill also would prohibit all of the following:

- Engaging in door-to-door canvassing at a private residence for the purpose of selling merchandise or funeral or cemetery services without the occupants' advance written consent.
- Refusing the use of merchandise bought from another vendor or discriminating by

price, burial fee, or otherwise for not purchasing merchandise from or under the direction of the funeral establishment or cemetery.

- Requiring the purchase of a cemetery burial vault or other outside container from a particular person as a condition to burial in a Michigan cemetery (although this prohibition would not limit the right of a cemetery to require the use of a crematory burial vault or other outside container).

(If the violator is not a registrant, the DCIS must refer the matter to the Attorney General or a prosecuting attorney for criminal or civil action. If the violator is a registrant, the DCIS must either refer the matter or institute administrative proceedings. The DCIS may impose certain sanctions, including suspension or revocation of registration, civil fines, and probation, on a registrant.)

Under the Act, converting funds paid pursuant to a prepaid contract for a person's own use or benefit, other than as authorized by the Act, is a felony punishable by a fine of \$5,000 and/or up to five years' imprisonment for each violation. The bill would extend that penalty to failure to escrow or trust funds according to the Act.

#### Receivership

If the DCIS determines that a registrant has not complied with the Act's investment and depositing requirements and that insufficient funds are available to meet the obligations of prepaid contracts, the Department may petition the circuit court of the county of the registrant's principal place of business, or of the County of Ingham, for appointment of a receiver. After notice to the registrant and a hearing, and upon its concurrence in the DCIS's findings, the court must appoint a receiver.

The bill specifies that the court would have to appoint "a qualified person" as a receiver. The bill would delete requirements that the receiver, under conditions prescribed by the court, take into possession the assets of the registrant for the purpose of liquidation, and that the court make provision for notice to creditors, filing of claims, and all other details necessary for an estate in receivership. Instead, the bill specifies that a receiver would have all the powers, authority, and remedies

of an assignee for the benefit of creditors under Chapter 52 (Assignments for the Benefit of Creditors) of the Revised Judicature Act. The bill also specifies that, under appropriate circumstances, a receiver could file for protection under the Bankruptcy Code.

### **Senate Bill 513**

#### Commissioner Responsibilities

The Cemetery Regulation Act requires the Cemetery Commissioner to institute and maintain a system of auditing trust funds required by the Act and of registering each cemetery authorized to be created, maintained, and operated under Public Act 12 of 1869 and Public Act 87 of 1855 (which regulate cemetery corporations), as well as any other cemetery operating under State law or local ordinance. The bill would extend that provision to cemeteries conducting sales under the "Prepaid Funeral and Cemetery Sales Act".

The bill also would require the Commissioner to inspect the facilities and grounds of a cemetery on a periodic basis that he or she determined appropriate, but not less than once every three years. The Commissioner could charge the cemetery for the actual expenses of the inspection, but not more than \$1,000.

#### Inspection or Audit Charge

The Act requires that a cemetery's books, papers, records, and documents be available for inspection or audit by the Commissioner, or a person he or she appointed, at any time during regular business hours with reasonable notice. One or more qualified people must conduct the audit, and their services must be charged to and paid by the cemetery at the rate of \$10 per hour, but not more than \$100 total. The bill would increase the total allowable charge to \$1,000.

#### Disciplinary Action

The Act allows the Commissioner to deny an application filed under the Act and refuse to issue a permit or registration, suspend or revoke a permit or registration, or reprimand, place on probation, or take other disciplinary action against an applicant if the Commissioner determines certain facts. Among those facts is that the applicant or its

officers or general manager has been guilty of a fraudulent act in connection with selling or otherwise dealing in cemetery lots, burial rights, or services of a type required to be registered under the Act. The bill, instead, would allow the Commissioner to take action if he or she determined that an applicant or its officers or general manager had been guilty of an unlawful or fraudulent act in connection with selling or otherwise dealing in funeral or cemetery merchandise or services regulated by the Prepaid Funeral and Cemetery Sales Act.

The bill also specifies that the Commissioner could take action if he or she found that the applicant or its officers or general manager had done any of the following:

- Violated Article 18 of the Occupational Code.
- Violated the Prepaid Funeral and Cemetery Sales Act.
- Failed to comply with Section 2080 of the Insurance Code (regulates the relationship between insurance companies and funeral service providers and generally prohibits a funeral establishment or cemetery from being licensed as an insurance agent).

In addition, the bill would allow the Commissioner to impose an administrative fine of up to \$5,000 for each separate violation of the Act.

#### Name of Operation

The bill specifies that a cemetery that operated under a name other than the name under which it was registered, would have to include its registered name in all printed matter or marketing material created by, at the direction of, or on behalf of the cemetery. In addition, the name of the person having a controlling interest in the cemetery would have to appear as the owner in all printed matter or marketing material created by, at the direction of, or on behalf of the cemetery. If the cemetery had a sales office, the name of the person having a controlling interest in the cemetery would have to be displayed conspicuously in the lobby of that office.

Under the Act, "controlling interest" means the capability to decide the cemetery company's operating and financial policies or to select a majority of its officers or directors. Under the

bill, that term would mean the capability to decide the cemetery company's operating and financial policies or to select the officers and directors with majority control of the cemetery company or the right to receive more than 50% of the dividends or profits.

#### Deletion; Repeal

The bill would delete a provision allowing the Commissioner to promulgate rules regarding requirements for the establishment and maintenance of special trust funds to provide for cemeteries' future performance obligations and special care or decorations obligations.

The bill also would repeal Section 16 of the Act, under which the Commissioner must require each cemetery to establish and maintain an irrevocable endowment care fund and a merchandise trust account and to report fund and account information annually. Under Section 16, 15% of the proceeds of sales of burial, entombment, and columbarium rights must be deposited in the endowment care fund. Under certain circumstances, a cemetery may seek a modification or waiver of that the requirement. Section 16 also requires that a percentage of the proceeds of the sales of cemetery merchandise or services be deposited in a merchandise trust account.

MCL 328.211 et al. (S.B. 512)  
456.522 et al. (S.B. 513)

#### **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

#### **Supporting Argument**

By including prepaid sales of cemetery services and merchandise in the statute that governs prepaid funeral contracts, the bills would extend to people who buy preneed cemetery goods and services the same consumer protection measures that currently apply to prepaid funeral contracts, and would put funeral homes and cemeteries on a level playing field with respect to the sale of services and merchandise. Presently, when a person buys a prepaid *funeral* contract, he or she is protected by the requirements that the proceeds of the sale be placed in escrow and that a refund of at least 90% of the principal and income of that escrow account be

provided upon request. Those who purchase *cemetery* goods and services on a preneed basis have much more limited assurances that their funds will be used as they intend, and have little or no guarantee that their money will be refunded if they opt out of a cemetery preneed plan.

Evidently, some consumers have been taken advantage of in their transactions with cemeteries. For example, a Lansing area man testified before the Senate Committee on Local, Urban and State Affairs that he and his wife bought two cremation packages from a cemetery in 1970, with the understanding that the contract would cover all their postmortem needs. When his father-in-law, who had an identical cremation package, died in the 1990s, the man and his wife discovered that additional services were needed, and costs payable, upon death. Subsequently, the man and his wife decided to cancel their more-than-20-year-old contracts. They initially were told that they were not entitled to any refund, but eventually received \$2,100 of the \$6,200 fee that they had paid in 1970.

Another man who testified lives in Maine but was raised in Michigan. His parents, who had lived most of their lives in Michigan but retired to Florida, had purchased burial plots, caskets, burial vaults, and markers from an Oakland County cemetery in 1965. When the man's father died in Florida last year, the family decided that he should be buried in Maine, near the home of his children and grandchildren. The Oakland County cemetery did honor the preneed purchase of the casket, and shipped it to Florida for the transfer of the remains to Maine, and eventually agreed to ship the grave marker to Maine, but refused to refund the family the cost of the burial plots or burial vaults. The Maine resident was notified by Michigan's Cemetery Commissioner that, under this State's Cemetery Regulation Act, a cemetery is not required to offer a refund for unused burial rights or services, and advised him to try to sell the burial plots and vaults by advertising them in local newspapers.

Consumers should have the same protections regardless of whether they buy funeral and cemetery services and merchandise from a funeral home or from a cemetery operator. Those protections should be based on what goods and services are purchased, not from whom they are bought.

**Response:** Cemeteries and funeral service operations already operate on a level playing field with respect to advance sales of products and services that are regulated under the Prepaid Funeral Contract Funding Act. Although funeral homes and cemeteries generally offer different products and services, some merchandise and services (such as caskets and cremations) may be sold by either type of establishment. If the prepaid sale of those items and services, such as caskets, is regulated under the Prepaid Funeral Contract Funding Act, the seller of a prepaid contract must comply with that Act.

In addition, requiring 100% of preneed cemetery sale proceeds to be placed in escrow would not necessarily afford consumers greater protection. According to written testimony of the Cemetery Commissioner, the DCIS's experience shows that the *level* of the current trust requirement has not been responsible for cemeteries' failure to provide merchandise or services. Instead, in some cases, the money was never placed in trust at all.

#### **Opposing Argument**

While the average person might think of funeral homes and cemeteries as similar operations, they actually are very different businesses. A funeral operator must be licensed in the profession of mortuary science under the Occupational Code and provides goods and services related to the preparation of the corpse (such as embalming) and the funeral ceremony (such as providing a facility for viewing and visitation, a memorial service, and transportation). Cemeteries, on the other hand, provide services and merchandise relating to interment (such as grave openings and closings, burial plots and vaults, crypts and mausoleums, urns and columbariums, and markers and monuments).

Overhead costs apparently are much higher for a cemetery than for a funeral home. According to testimony before the Senate Committee by a cemetery operator, the revenue earned from burial plots and grave opening and closing fees is inadequate to sustain the financial needs of a cemetery business, and sales of cemetery products, often conducted on a preneed basis, provide cemeteries with the cash flow necessary to keep their businesses afloat. Under the Cemetery Regulation Act, cemeteries may use



part of the proceeds of those sales, as well as income generated from the portion of sales revenue deposited in trust, to help maintain their business. If cemeteries were required to deposit in escrow the entire proceeds from preneed sales agreements, and were prohibited from using the income generated from the account as it was earned, they would not have the financial resources necessary to maintain their facilities and pay for other operating expenses, such as salaries and advertising. Applying the Prepaid Funeral Contract Funding Act's escrow and refund requirements to the sale of cemetery goods and services likely would drive some cemeteries out of the preneed business and enable funeral service operators to capture a much larger share of the preneed market. That would leave consumers with fewer choices, and less competition in the market would drive up prices on services and merchandise.

**Response:** Cemeteries should not rely on the revenue stream from preneed sales to meet current cash flow needs. Doing so leaves the customer with no guarantee that the products and services he or she pays for today will be available in the future. Proceeds from those sales should be protected by escrow and refund requirements, as is the amount paid for prepaid funeral goods and services. As expressed in a *Detroit Free Press* editorial, if cemeteries decided to stop selling goods and services on a preneed basis, prices could rise, but the "benefits of these bills are more important to consumers than the possibility of losing some competition in the marketplace" ("Prepaid Funerals: Subject Cemeteries to Same Rules As Funeral Homes", 6-4-03).

### **Opposing Argument**

The bills should not revise the endowment care trust fund and the merchandise trust fund provisions that apply to cemeteries. The recodification of these provisions in the "Prepaid Funeral and Cemetery Sales Act" would severely restrict the investment, income, and operational capabilities of cemeteries.

When a cemetery sells a burial right, entombment right, or ash disposition right, it must deposit 15% of the proceeds into an irrevocable trust approved by the Cemetery Commissioner. A cemetery may withdraw only the income from the trust deposits, and

use it used only to maintain the cemetery grounds and facilities. Also, a cemetery's board of directors may appoint a trustee. The trustee must use the prudent investor standard in managing the trust fund, but may seek investment advice and manage the fund in his or her discretion as directed by the cemetery board. Senate Bill 512, however, would require that the endowment care trust fund be administered by a depository or a trust company. The cemetery would lose administrative control over the investment of its own endowment care fund.

In addition, under current law, if a cemetery's endowment care trust fund exceeds \$10,000 per developed acre, the cemetery may apply to the Commissioner for a modification or waiver of the 15% deposit requirement. If the Commissioner determines that the earnings generated by the endowment care fund meet the current cost of keeping the cemetery in good condition, he or she may grant the waiver or modification. The bills would eliminate the Commissioner's ability to grant a waiver, even if the endowment care fund were sufficiently capitalized to maintain the cemetery. According to the trustee of the endowment care trust fund for one large cemetery in southeastern Michigan, the value of that cemetery's endowment care fund is approximately \$7,250,000, including approximately \$1 million of earnings. As a result, the cemetery has not had to make a deposit into its endowment care fund for the last 10 years. This has provided extra capital for the cemetery to invest in further development of its grounds and expansion of its facilities, which has benefitted both the cemetery owners and consumers. Under the bills, that money would not be available to the cemetery because there would be no waiver provision.

Also, when a cemetery sells a marker, monument, or vault, it currently must deposit into a merchandise trust account 130% of the cost of the product to the cemetery. That money must remain in trust until the marker, monument, or vault is delivered, stored, or installed, or the contract is terminated. By including the sale of cemetery goods and services in the Prepaid Funeral Contract Funding Act, the bills would require that 100% of the sale price of cemetery goods be deposited in trust. This would unnecessarily restrict cemeteries' income and cash flow.

The trustee from the large southeastern Michigan cemetery testified that the cemetery would lose more than \$500,000 a year in cash flow as a result of this change, despite the fact that it maintains a healthy merchandise trust fund surplus of approximately \$1,250,000.

**Response:** In order to ensure that the payments made by contract buyers were used to provide the merchandise and services they purchased, it could be beneficial to consumers to have an independent party manage the trust accounts.

### **Opposing Argument**

Provisions in Senate Bill 512 that would restrict the funding and building of mausoleums and columbariums with the proceeds of preconstruction sales are confusing and excessive. According to written testimony by a cemetery official, current regulations require a cemetery to deposit into a special construction trust fund an amount equal to the cost of the unit being sold. The money deposited then can be used to pay construction costs. The remaining portion of the proceeds can be used for such things as paying sales commissions, making the 15% deposit to the endowment care trust fund, and paying other nonconstruction costs.

Under Senate Bill 512, however, those proceeds could not be used to pay for construction or other costs as they were incurred. The bill would require a cemetery to deposit in trust at least 50% of the funds received from preconstruction sales and to give the State a performance bond equal to the remainder of the proceeds. Principal and income in a trust account could be withdrawn only upon completion of the mausoleum or columbarium (or to refund customers if the facility were not completed within four years). Essentially, these requirements would prevent the construction of mausoleums and columbariums because revenue derived from the sale of entombment and inurnment rights would not be available to pay construction contractors or other related expenses until the job was completed. Also, financing for such projects would be practically impossible to secure, because the customers would have an absolute lien on the proceeds of the sale of the entombment and inurnment rights.

### **Opposing Argument**

The bills actually could diminish consumer protection. According to DCIS officials, the

Prepaid Funeral Contract Funding Act has major regulatory flaws, such as weak reporting and record-keeping requirements. Reporting on sales of merchandise and services only once every three years, as required under that Act, rather than on an annual basis, as required under the Cemetery Regulation Act, could deny the DCIS the opportunity to monitor a cemetery's sales activity and identify a potential problem in a timely manner. While Senate Bill 512 proposes some helpful consumer protection measures, such as refunds, a better way to address the situation from a regulatory perspective, would be to add those provisions to the Cemetery Regulation Act, rather than bringing cemetery sales into the weaker regulatory framework of the Prepaid Funeral Contract Funding Act.

Moreover, the Cemetery Commissioner believes that requiring inspections of cemetery grounds and facilities, as Senate Bill 513 proposes, is unnecessary since cemeteries and crematories are open to the public. In addition, the proposed \$1,000 fee for such inspections may be excessive. Also, the bill would increase the maximum allowable audit fee for inspection of a cemetery's books and records. Since the bills would move cemeteries' trust requirements to the "Prepaid Funeral and Cemetery Sales Act", however, it is unclear what audits would be conducted under the Cemetery Regulation Act.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

#### **Senate Bill 512**

The bill could increase some of the regulatory responsibilities of the Department of Consumer and Industry Services regarding the licensure of prepaid contract providers, but the license fee revenue would be used to offset any additional costs.

#### **Senate Bill 513**

The bill would increase the existing audit fee from \$100 to up to \$1,000 and create an inspection fee once every three years up to \$1,000, as well as create a \$5,000 administrative fine for violations.

In FY 2001-02, the Department licensed 147 cemeteries in the State. The increased audit fee could generate a maximum of \$132,300 in new revenue if every cemetery were audited in one year. The inspection fee could generate up to \$147,000 every three years. This revenue would be used to offset the costs of regulating this industry. The amount of revenue that would be generated through the administrative fine is indeterminate as the number and severity of violations are not known.

Fiscal Analyst: Maria Tyszkiewicz

A0304\512a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.