



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 introduced 5-21-03)
Sponsor: Senator Laura M. Toy
Committee: Local, Urban and State Affairs

Date Completed: 5-29-03

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 registrant under the Act to comply with requirements that apply to an escrow agent, under certain circumstances.
- 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.
- Allow an escrow agent in a guaranteed price contract to be selected by any provider, if a prepaid contract did not include funeral services.
- Require that, before developing or constructing a mausoleum or columbarium and selling crypts, a person establish a trust fund and present a performance bond; 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 (the Director of the Department of Consumer and Industry Services) 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".

The bills are tie-barred.

Senate Bill 512

The Prepaid Funeral Contract Funding Act provides for the sale of funeral goods or funeral services pursuant to a prepaid funeral contract, and the regulation of such contracts, their sellers, and the providers of the funeral goods and services. Cemetery burial vaults and other outside containers and merchandise used for memorializing a decedent and placed on or near a place of interment, and sold by a cemetery, are specifically excluded from the Act.

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 that are sold by a cemetery. "Funeral services" are 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. "Prepaid funeral contract" 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.

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. "Cemetery services" would mean cremations, grave openings and closings, and installation of markers and monuments. "Prepaid contract" would mean 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 (the individual for whom the goods will be furnished or the services performed after death). 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

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.

Commissioner Responsibilities

The Act requires the DCIS Director 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 DCIS Director to inspect the facilities and grounds of a cemetery on a periodic basis that the Director determined appropriate, but not less than once every three years. The Director 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 DCIS Director, 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 DCIS Director 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 Director 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 Director 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 Director 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 Director 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 DCIS Director 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 DCIS Director must require each cemetery to establish and maintain an irrevocable endowment care fund and to report fund information annually.

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

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

Senate Bill 512

The bill could increase some of the regulatory responsibilities of the Department 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

S0304\512sa

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.