

Texas Department of Banking

115#12481 MS

Kenneth W. Littlefield
Commissioner

May 3, 1991

RO-82

RECEIVED

MAY 14 91

The Honorable Dan Morales
Texas Attorney General
P. O. Box 12548 Capital Station
Austin, Texas 78711

Opinion Committee

Re: Request for Opinion regarding the Sale of Prepaid Funeral Services and
Funeral Merchandise Act, Article 548b, V.T.C.S.

Dear General Morales:

Pursuant to Article 402-042, of the Texas Government Code, I respectfully request your opinion regarding the powers and duties of the Banking Commissioner and the Guaranty Fund Advisory Council pursuant to the above referenced Act. The relevant provisions of the Act are as follows:

Section 2 - This section authorizes the Department to administer the Act and to prescribe reasonable rules and regulations in regard to matters incidental to the enforcement and orderly administration of the Act. In addition, this section creates the contractual obligations between the purchaser, the seller and the provider of the funeral services, whether such seller and provider are the same or different entities.

Section 4 - This section permits the Department to cancel a permit or refuse to renew a permit for failure of the seller to comply with the provisions of the Act or the Department's rules.

Section 8 - Section 8(b) provides that, following the cancellation of the permit, the Commissioner may seize all prepaid funeral funds, including earnings, of the prior permit holder, place them in a state bank under the sole control of the Commissioner, and cause the funds to be maintained under that arrangement for the benefit of the purchasers, including receiving payments.

Section 8A - Section 8A(a) requires the Department by rule to create and maintain a fund to guarantee performance by sellers of prepaid funeral contracts of their obligations to purchasers under the provisions of the Act governing funeral trusts. Such a fund was established by Department rule at 7 TAC Section 25.17, effective May 16, 1988. The current Council members are myself as Banking Commissioner, Edna Butts, Assistant Attorney General as your representative, and Groner Pitts of Davis-Morris Funeral Home, Inc., Brownwood, Texas, as funeral industry representative. Section 8A(c) of the Act charges the Council with supervision of the operation and maintenance of the fund. Section 8A(d) provides that, notwithstanding any other law, the Department may assert a claim against a seller or trust depository that commits a violation of the Act that could result in a claim against the fund.

Headquarters Office

2601 N. Lamar Boulevard, Austin, Texas 78705-4294 ■ (512) 479-1200

Regional Offices

2201 N. Collins, Suite 220, Arlington, Texas 76011-2615 ■ (817) 261-4773

4200 N. Lamar Boulevard, Suite 108, Austin, Texas 78756-3430 ■ (512) 459-1715

9525 Katy Freeway, Suite 142, Houston, Texas 77024-1413 ■ (713) 932-6146

4413 82nd Street, Suite 215, Lubbock, Texas 79414-3366 ■ (806)792-0793

Background

The Commissioner's duty to regulate preneed sellers under the Act authorizes him to cancel a seller's permit and seize the seller's preneed trust funds. However, the Act is silent as to what the Commissioner's duties are after seizure, other than to maintain the funds for the benefit of the purchasers and to continue to receive payments on the contracts. As you know, the Department is not equipped to provide funerals. Nor does it have the resources to indefinitely manage the contracts seized after cancellation. Historically, the Department has sought out a funeral home in the permitholder's area which agrees to perform the funerals at a pre-determined price. The funeral home benefits from the interest accumulated on the contracts, if any, and from spin-off business from servicing the contracts. The purchasers can cancel their contracts or accept the services of the new provider. The effect of the agreement is to relieve the Commissioner from management of the contracts, although he retains his regulatory authority over the provider of services through the agreement reached with that funeral home. He may also retain exposure to liability if the funeral home provider misapplies the trust funds or fails to perform.

As a substitute or alternate procedure, the Commissioner is considering refunding to the purchaser on a pro rata basis his purchase price to the extent such amount remains available in the trust fund after the seller's permit has been cancelled and the trust funds seized. The purchaser could then seek performance of the contract provider obligated on the contract, if the provider is someone other than the seller, or apply the funds to the provider of his choice. If the trust fund is insufficient to reimburse the purchaser's price, the purchaser could make a claim to the Guaranty Fund.

Several options regarding this proposal are available to the Commissioner which will be determined after consideration of the Attorney General's opinion:

1. The amount reimbursed by the Commissioner to the purchaser would be amount to which the purchaser would be entitled if he canceled on his own initiative pursuant to Section 5(5) of the Act; or (2) the purchase price and earnings, to which the purchaser would be entitled if he cancelled on the solicitation of the seller.

2. The Commissioner might make arrangements with one or more funeral homes in the area to perform the contracts at a price determined by the Commissioner and the funeral home. The Commissioner would then notify the purchaser of the availability of the services but the purchaser would not be obligated to utilize any of the funeral homes agreeing to perform the services.

It is the Guaranty Fund Advisory Council's duty to supervise the maintenance and operation of the Guaranty Fund. Inherent in this duty is the determination of how much money should be in the Fund. Pursuant to Section 8A(b) and Rule §25.17 of the Department's regulations, on January 15, 1988 the Council assessed \$1.00 for each unmaturred preneed contract existing on January 1, 1988, and as of August 31, 1990, \$313,649.08 was on deposit in the Guaranty Fund. On March 7, 1991, the Council made an additional assessment of \$1.00 on each preneed contract sold since the January 1, 1988. A \$1.00 assessment is to be made annually as to each contract sold after the previous assessment.

The amount required to be maintained in the Guaranty Fund is driven by what types of claims can be made against the Fund. In turn, what claims may be honored depends in part on the method chosen by the Commissioner to dispose of the contracts and funds after a seller's permit has been cancelled. The Council is currently considering rules governing the types of claims which can be made, but wishes to consider the Attorney General's advice before adopting the rules for publication for comment in the Texas Register. A copy of the draft proposed rules currently under consideration is attached for your information.

In regard to these issues, the Commissioner requests your opinion on the following questions:

A. Disposition of Contracts and Performance of Funerals after Cancellation and Seizure

1. Is the Commissioner authorized by the statute to return the funds to the purchasers after cancelling the seller's permit and seizing the funds?
2. After seizure, is the Commissioner under a duty or does he have any obligation to guarantee the performance of the contracts by obtaining the services of another funeral home where the seller was the funeral home obligated on the contract? Even if no duty exists, was it the intent of the Legislature for the Commissioner to select a funeral home service provider or for the purchaser to receive his refund and be free to select the provider of his choice? Does the Commissioner have the authority to make an agreement with a funeral service provider which was not selected by the purchaser and is not a party to the contract to which the purchaser agreed? Even if the purchaser would be benefitted by a selection of a funeral home by the Commissioner to deliver the services provided in the contract, should the Commissioner refund the purchaser's money and leave the selection of a provider to the purchaser to avoid any potential liability?
3. If the Commissioner is permitted to cancel the contracts and refund the moneys pro rata to purchasers after cancellation and seizure, is the proper amount due to each purchaser the purchase price or the purchase price plus earnings?

B. Claims against the Guaranty Fund in Proposed Rule §25.18:

1. Does a purchaser of a fully paid funeral services contract whose contract is not honored by the funeral service provider obligated on the contract to perform such services (whether or not the provider is the seller) have a legitimate claim to the Guaranty Fund? If the amount returned to the purchaser by the Commissioner under any formula for pro rata reimbursement is less than the amount of the contract, is the purchaser entitled to make a claim against the Guaranty Fund? If the reimbursement is less than what he would obtain if he cancelled? If the amount is less than he needs to obtain a funeral from another provider?
2. Third party providers of funeral services (i.e., non-sellers) which are obligated as parties to the contract may not receive any reimbursement from the preneed trust fund if the seller has mismanaged the fund. However, the third party provider is obligated on the contract regardless of a claim against the Guaranty Fund. Since a

claim by a third party provider would guarantee the performance by sellers of prepaid funeral contracts of their obligations to purchasers under the Act, should the third-party provider be entitled to recover from the Guaranty Fund?

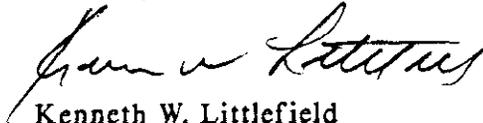
3. The council has proposed to honor claims of providers of funeral services which are not parties to the contract but which have provided services under the contract after the provider obligated by the contract has refused or become unable to fulfill its obligations. The provider would be reimbursed to the extent of cost of merchandise not to exceed the price paid by the purchaser. Does such a claim guarantee the performance by sellers of prepaid funeral contracts of their obligations to purchasers under the Act?

4. Can the Council honor claims of purchasers, third party or non-party providers if the seller never was assessed for the Guaranty Fund? Such a circumstance may arise if the contracts were sold before the Guaranty Fund was established or were sold without a permit.

The Department has attached for your information the opinion of the Deputy Commissioner of the State Board of Insurance regarding the relationship of the Insurance Guaranty Fund to the preneed Guaranty Fund. The statutes concerning the Insurance Guaranty Fund and this letter may be of interest to you in formulating your opinion.

The Department appreciates your assistance in these matters, which affect not only the resources of the Department, but the needs of preneed contract purchasers who are the victims of sellers who violate the Act. If you need further information or assistance regarding this request, please do not hesitate to contact Edna Butts of your office or Cynthia N. Milne, Assistant General Counsel for the Department.

Sincerely,



Kenneth W. Littlefield
Banking Commissioner

KWL/CNM/shc

c: Groner Pitts
Davis-Morris Funeral Home, Inc.
P. O. Box 61
Brownwood, Texas 76804

Edna Butts
Chief of Finance
Attorney General's Office
Executive Office Building
411 W. 13th Street, Suite 700
Austin, Texas 78701