



BOB RILEY
GOVERNOR

STATE OF ALABAMA
DEPARTMENT OF INSURANCE
201 MONROE STREET, SUITE 1700
POST OFFICE BOX 303351
MONTGOMERY, ALABAMA 36130-3351
TELEPHONE: (334) 269-3550
FACSIMILE: (334) 241-4192
INTERNET: www.aldoi.gov

WALTER A. BELL
COMMISSIONER
ASSISTANT COMMISSIONER
REN WHEELER
DEPUTY COMMISSIONER
D. DAVID PARSONS
CHIEF EXAMINER
RICHARD L. FORD
STATE FIRE MARSHAL
EDWARD S. PAULK
GENERAL COUNSEL
REYN NORMAN
RECEIVER
DENISE B. AZAR
LICENSING MANAGER
JIMMY W. GUNN

BULLETIN

TO: Preneed providers holding certificates of authority under the Alabama Preneed Funeral and Cemetery Act

FROM: Walter A. Bell
Commissioner of Insurance 

DATE: August 21, 2008

RE: Certain forms of preneed transactions as "preneed contracts"

This Bulletin addresses whether certain types of "preneed" (before death) transactions constitute a "preneed contract" for purposes of the Alabama Preneed Funeral and Cemetery Act, Ala. Code §§ 27-17A-1 *et seq.* A Bulletin released on July 29, 2008, expresses the Department's view that a sale of interment rights only is not a "preneed contract" even if done on a preneed basis. Your attention is drawn to the following, which may represent a change in positions taken by the Department in the past:

1. Taken as a whole, the Act is not intended to generally regulate all "preneed" transactions between consumers and providers. Instead, in large part, the Act's intent is to regulate transactions in which a consumer pays a preneed provider on a current basis for merchandise and services that a provider has no contractual obligation to deliver or perform until need. The same intent underlies the mausoleum presale section [§ 27-17A-55]. Parts of the Act relating to endowment care cemeteries, however, are not tied to the sale of preneed contracts. Due to possibilities for fraud, future non-performance due to insolvency, and the like, there are public policy reasons to regulate transactions in which a consumer pays on a current basis but the provider has no contractual or other legal obligation to deliver what the consumer paid for until an undetermined time in the future. This explains the licensing, financial information, examination, and trusting requirements (or surety bond and letter of credit alternatives) which make up most of the Act. These public policy considerations are lessened if a buyer pays and the seller performs on a current basis.

2. A key concept in the Act is the definition of "preneed contract" since the certificate requirement [Ala. Code § 27-17A-10] and many other sections in the Act pertain to "preneed contracts." The Act defines a "preneed contract" as "[a] written contract to purchase funeral merchandise, funeral services, cemetery merchandise, or cemetery services from the seller on a preneed basis." Ala. Code § 27-17A-2(56). Though this is somewhat broadly worded, the definition must be read in conjunction with the remainder of the Act and the Act's intent. Most of the Act is really intended to address situations where contract buyers pay now (or at

some point before need) for merchandise and services that will not be delivered or performed until need (which is obviously at some undetermined time in the future).

3. In an effort to enforce the Act consistent with its intent, the Department considers a “preneed contract” for purposes of the Act to be a written contract (1) entered into on a “preneed basis” (before the buyer’s death); (2) under which the buyer pays to the seller, before need and in whole or in part, a purchase price for funeral or cemetery merchandise and services; and (3) under which the seller is not obligated to deliver the contracted-for merchandise or perform the services, in whole or in part, until need.

4. In general, transactions which are current sales – the buyer pays and the seller delivers or performs upon payment – or which are nothing more than contracts to sell at a future time unaccompanied by any obligation on the buyer’s part to pay before need are not “preneed contracts” for purposes of the Act. Examples of such transactions are:

(a) A “prearrangement” through which a buyer specifies certain merchandise and services to be purchased at need, the seller agrees to sell that merchandise and those services at need, and there is a preneed agreement on price (or, for that matter, some agreement about how a price will be determined at need). The buyer, however, has no obligation to pay until need, the buyer does not in fact pay before need, the seller does not receive payments until need, and the seller has no obligation to perform until it is paid at need. Using the Act’s terminology, this is a “prearrangement” without “provisions for prefunding or prepayment” [Ala. Code § 27-17A-2(51)], at least in the sense of some contractual agreement, and is not a “preneed contract” otherwise regulated under the Act. Such a “prearrangement” cannot include an agreement through which a provider obtains, on a preneed basis, beneficiary status or ownership rights in a financial mechanism a buyer may want to set up to provide the buyer with the funds to pay at need (a life insurance policy or annuity, or a deposit of funds like a bank account, certificate of deposit, etc.).

(b) A straight retail sale of merchandise and immediate services – delivery and/or installation - directly relating to that merchandise where: the buyer pays immediately or agrees to an installment payment plan, the seller delivers the merchandise to the buyer immediately or within a contractually-defined reasonable time after payment not tied to need or to completion of installment payments, and no future service relating to the merchandise will be required to realize effective use of the merchandise. Practical examples include caskets and memorials and related services such as delivery and installation of the merchandise. The buyer must have legal title to and possession of the merchandise upon delivery, whether directly, through delivery into a storage arrangement controlled by the buyer, or by virtue of installation on property under the buyer’s control (like a cemetery space). In an installment payment arrangement where merchandise will be delivered before completion of payments, a seller may retain a security interest in the merchandise. Excluded are (i) arrangements through which the seller delivers the merchandise into some warehouse-type or other storage arrangement controlled by the seller or the seller otherwise maintains physical control over the merchandise until need; (ii) arrangements deferring delivery or performance until need or until completion of installment payments; (ii) vaults or other outer burial containers which, by their nature, require future service in the form of reopening, cleaning and/or repair or replacement, placement of the casket, sealing, closing and covering; and (ii) many forms of funeral or cemetery services which are not capable of being performed until need.

5. The transaction and its terms must be memorialized by a written contract or agreement signed by the parties. A contract or agreement that is not a "preneed contract" cannot represent that portions of a buyer's payments are being placed in trust (except as necessary to comply with the Act's requirements concerning cemetery endowment care funds).

6. Transactions which combine a current sale with an agreement for delivery or performance at need and in which the buyer assumes a current obligation to pay are "preneed contracts." A provider shall not "split" agreements or contracts for merchandise and services into "preneed" and non-"preneed" contracts or otherwise employ any artifice or scheme to evade the requirements of the Act.

7. Transactions which result in a preneed provider being designated, on a preneed basis, as a beneficiary or owner of a financial instrument intended to provide funds for payment of merchandise and service costs at need (a life insurance policy or annuity, or a deposit of funds like a bank account, certificate of deposit, etc.), whether revocable or irrevocable, are "preneed contracts."

8. Transactions that are not "preneed contracts" are not subject to the Act's requirements concerning deposits into funeral or cemetery merchandise and services trusts or the alternative surety bond or letter of credit requirements [Ala. Code §§ 27-17A-13, 27-17A-14, 27-17A-30 through 27-17A-34, and 27-17A-40 through 27-17A-44]. Such transactions, however, may be subject to the Act's requirements concerning deposits in a cemetery endowment care fund [Ala. Code § 27-17A-49].

9. Providers that do not sell "preneed contracts" are not required to have a certificate of authority. Current certificate holders that may consider restructuring their operations in light of the Department's construction of the Act in order to dispense with having a certificate are strongly cautioned to contact the Department before surrendering or non-renewing their certificates. Continuing receipt of payments on previously sold preneed contracts requires a certificate of authority [Ala. Code § 27-17A-10(b)(1)] and a certificate holder which becomes inactive by surrender or non-renewal must collect and deposit in trust all funds paid toward preneed contracts sold prior to becoming inactive [Ala. Code § 27-17A-16(b)].

WAB/JFM/bc