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## There Is a New Trend of Corporate “Death Care:” Let the Buyer Beware

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## I. INTRODUCTION

Recently, funeral and cemetery related scandals in Georgia, Florida, Tennessee, and California have caught the attention of the media, the Federal Government, and the American public.<sup>2</sup> This attention has led to

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1. The AARP defines the "deathcare industry" as "the array of providers of funeral and burial goods and services, such as funeral directors, cemeterians, and third-party sellers." SHARON HERMANSON, AARP PUBLIC POLICY INSTITUTE, THE DEATHCARE INDUSTRY 1 (2000), available at [http://research.aarp.org/consume/ib44\\_deathcare.pdf](http://research.aarp.org/consume/ib44_deathcare.pdf).

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2. Mary Deibel, *Senate Hears Corpse Issues Role in Funeral Industry Studied*, AUGUSTA CHRON., Apr. 27, 2002, at D5.

investigations into the expansive funeral industry.<sup>3</sup> It is estimated that nearly 2.5 million Americans died in 2001, leaving the daily toll at approximately 6,849.<sup>4</sup> In the State of Florida alone, roughly 160,000 people die each year.<sup>5</sup> Even though death is a natural part of life, and it happens so often around us, it is still a difficult subject for many people to talk about.<sup>6</sup> “Those who have never had to arrange for a funeral frequently shy away from its implications . . . . Those who have acquired personal and painful knowledge of the subject would often rather forget about it.”<sup>7</sup> Because of this taboo, many Americans are probably unaware that the business of death has risen to a \$25 billion industry.<sup>8</sup> Although arguably, most Americans and small independent funeral homes have not entertained thoughts of making huge sums of money from another man’s death, a few large corporations have.<sup>9</sup> Corporate chains, predominately “the Big Three,” Loewen Group, Service Corporation International, and Stewart,<sup>10</sup> have now become the owners of one-fifth of America’s 22,000 funeral homes, and at least a quarter of the 880 funeral

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- Georgia officials brought 266 criminal charges against Brent Marsh in connection with the discovery of 339 corpses at his Tri-State Crematory in Noble.
  - California prosecutors charged Riverside crematory operator Michael Francis Brown with 156 counts for unauthorized sale of body parts for medical research through another Brown-owned business, Bio-Tech Anatomical.
  - Tennessee authorities investigated complaints that bone fragments and casket parts were found at a fresh grave at Mount Carmel-Hollywood Cemetery in Memphis.
  - Florida Authorities probed charges that mortuary students at Lynn University in Boca Raton embalmed people in violation of family preferences and religious practices.
  - Reports of bodies buried in the wrong graves and scattered in nearby woods at two Menorah Gardens & Funeral Cemeteries in Florida brought in state investigators atop class-action suits against cemetery owner Service Corp. International.

*Id.*

3. *Id.*
4. *Births, Marriages, Divorces, and Deaths: Provisional Data for October 2001*, 50 NAT’L VITAL STAT. REP. 11 (June 26, 2002), at [http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50\\_11.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_11.pdf).
5. FLA. DEP’T HEALTH, PUBLIC HEALTH DATA INDICATOR SYSTEM, TOTAL DEATHS FROM ALL CAUSES (2000), at <http://hpeapps.doh.state.fl.us/phids/Phids1.asp>. (statistics from 1998–2000)
6. JESSICA MITFORD, *THE AMERICAN WAY OF DEATH REVISITED* 17 (1998).
7. *Id.*
8. Mirian Horn, *The Deathcare Business: The Goliaths of the Funeral Industry Are Making Lots of Money Off Your Grief*, U.S. NEWS & WORLD REP., Mar. 23, 1998.
9. *Id.*
10. *Id.*

homes in the State of Florida.<sup>11</sup> These corporate chains have gained this share by craftily purchasing many of the family owned "mom and pop" funeral homes around the country, often paying up to thirteen times what they are worth, and retaining customers by deceptively continuing to operate under the previous owner's name.<sup>12</sup> One would think that since consolidation allows many funeral homes owned by the same corporation to share hearses, share staff, and embalm bodies at a central processing unit, that the savings would be passed on to the consumer in the form of cheaper prices for funerals and funeral goods.<sup>13</sup> Nevertheless, this has not been the case. Due to increased pressures by management, prices have been on the incline.<sup>14</sup>

In the last three years alone, funeral costs have risen three times faster than the rate of inflation.<sup>15</sup> Taking a back seat only to a house and a car, a funeral will most likely be the third largest purchase made by most Americans,<sup>16</sup> with an average cost of \$5,000.<sup>17</sup> However, if this purchase is made from one of the "big national chains" rather than a small independent funeral home, the price is likely to be over two thousand dollars more.<sup>18</sup> When confronted, one large corporation justified the large discrepancy in prices by analogizing the sale of funerals to that of an automobile stating, "It's like the difference between a Cadillac and a Ford."<sup>19</sup>

The rising cost of funerals and the increased pressures to sell funeral services and goods has led to creative ways to increase profits.<sup>20</sup> Just as any other business that offers shares of stock to the public, there are always pressures to increase revenues and keep investors happy.<sup>21</sup> These pressures

11. John Tuohy, *Dying in Florida: Independents vs. Chains*, FLA. TODAY, Apr. 30, 2002, at 1. Service Corporation International currently has the biggest share of the market with 4000 plus facilities. *Id.* The Loewen Group of British Columbia is the second largest, owning 920 funeral homes. *Id.* Stewart Enterprises is the smallest of the three with only 674 funeral homes. *Id.*

12. Mary McLachlin, *The Big Business of Death*, PALM BEACH POST, Feb. 24, 2002, at 1A [hereinafter McLachlin I].

13. Horn, *supra* note 8.

14. *Id.*

15. *Id.*

16. Funeral Industry Practices, 47 Fed. Reg. 42,260 (Sept. 24, 1982) (to be codified at 16 C.F.R. pt. 453).

17. *Final Arrangements*, CONSUMER REP., May 2001, at 28.

18. *Id.*

19. Horn, *supra* note 8.

20. *See Final Arrangements*, *supra* note 17, at 33.

21. *See Dianne Curry, Death Industry Needs Policing*, TAMPA TRIB., Mar. 2, 2002, at 21.

have also brought about a change in the way business is done.<sup>22</sup> Some of the large corporations now require that the staff working in their funeral homes meet sales quotas.<sup>23</sup> Those who meet these quotas are often given special awards to recognize their accomplishments.<sup>24</sup> For those not so fortunate, there may be termination.<sup>25</sup> To fulfill these goals, funeral salesmen often turn to fraudulent and deceptive sales practices.<sup>26</sup> These practices have had a spiraling effect on the industry, presenting independent funeral homes with the classic “sink or swim” scenario and putting pressure on them to follow these tactics in order to compete.<sup>27</sup>

This article examines the current state of Florida regulations that are designed to protect consumers in the “death care” industry, and proposes solutions to those areas in which protection is lacking. Part II of this article briefly overviews the recently emerging concept of preneed funerals, and distinguishes prepaying for a funeral from preplanning a funeral by listing the benefits and dangers of both. Part III of this article overviews the current federal and state regulations that serve to protect Florida’s consumers from fraudulent and misleading practices involved in the sale of funeral goods and services. Part IV investigates three areas which are currently under regulated, and proposes changes that will better serve to protect Florida’s consumers. Part V of this article is a summary and conclusion.

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22. See HERMANSON, *supra* note 1, at 5, available at [http://research.aarp.org/consume/ib44\\_deathcare.pdf](http://research.aarp.org/consume/ib44_deathcare.pdf).

23. McLachlin I, *supra* note 12. The Service Corporation International manual states, “[n]ew salespeople are expected to average at least \$1 in pre-need sale for every ‘at-need’ dollar ... after six months, the minimum goes up to \$1.50 for every \$1.” *Id.*

24. See *Final Arrangements*, *supra* note 17, at 28; McLachlin I, *supra* note 12. “A former [Florida Service Corporation International Manager] said the company rewarded its top sellers, members of the ‘Million Dollar Club,’ with banquets, prizes and trips to Hawaii, Jamaica and the Bahamas.” *Id.*

25. McLachlin I, *supra* note 12. The Service Corporation International sales manual states that, “[f]ailure to sell a required amount of pre-need sales may result in the termination of a family service counselor, regardless of his/her at-need volume.” *Id.*

26. See Horn, *supra* note 8. Some fraudulent and deceptive sales tactics used include borrowing guest books to obtain contact information about people who have the topic of death fresh in their minds, pursuing sales while loved ones are visiting a friend or family member’s grave, showing the deceased’s body in a cardboard box to persuade the family to buy a more expensive casket, giving expensive gifts to Intensive Care Unit nurses to entice them to contact their funeral home when a patient passes away, and paying priests money and providing them with benefits in return for the Priest’s recommendation of their funeral home’s services upon the death of a church member. *Id.*

27. *Id.*

## II. PREPLAN V. PREPAY

The purchase of a funeral after a loved one's death is a unique transaction.<sup>28</sup> It places a grieving consumer in a position "to make several important and potentially costly decisions under tight time constraints."<sup>29</sup> Consumers can ease the burden of having to plan a funeral under the above circumstances through the use of a preneed funeral plan or a preneed funeral contract.<sup>30</sup> A preneed funeral plan has been described as "any method a consumer uses to prearrange and prepay for the costs of a funeral."<sup>31</sup> A preneed funeral contract is one form of a preneed funeral plan, it presents a classic "pay now—die later" scenario.<sup>32</sup> The consumer meets with the funeral provider to evaluate and arrange the specific type of service and goods he or she desires and pays for these services prior to his or her death, which may be many years in advance.<sup>33</sup> Prepaid funerals are not a new concept, having been around since the 1940s, but they did not become heavily marketed or sold until the 1980s when three large chains emerged in the industry.<sup>34</sup> It is now common for many funeral industry associations and consumer protection groups to encourage families to arrange their funerals in advance.<sup>35</sup>

Nevertheless, consumers thinking about purchasing a funeral in advance should proceed with great caution. The preneed funeral market has become a booming business.<sup>36</sup> The volume of money that is currently being held in preneed trusts alone exceeds \$25 billion, with unknown amounts of additional money held by other funding mechanisms.<sup>37</sup> Further, many of the large corporations have employees who specialize in selling preneed funerals

28. See Funeral Industry Practices, 47 Fed. Reg. at 42,260.

29. *Id.*

30. Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L.J. 1, 5 (1996) (citing *Pre-Paying Your Funeral?*, 2 AARP PRODUCT REP. 1 (1992)).

31. *Id.*

32. *Id.* (citations omitted).

33. *Id.*

34. *Final Arrangements*, *supra* note 17, at 32.

35. NAT'L FUNERAL DIRS. ASS'N, FACTS ABOUT NFDA STATE PRENEED GUIDELINES, available at <http://www.nfda.org/resources/preneedguidelines.pdf> (last visited July 25, 2000) [hereinafter NFDA].

36. See Lisa Carlson, *Consumer Fraud Affecting the Elderly*, ATLA ANN. CONVENTION REFERENCE MATERIALS, (July 2000).

37. See HERMANSON, *supra* note 1, at 5, available at [http://research.aarp.org/consumer/ib44\\_deathcare.pdf](http://research.aarp.org/consumer/ib44_deathcare.pdf).

and work on commission.<sup>38</sup> A recent survey revealed that “two in five persons age 50 and older had been contacted about the advance purchase of funerals (43%) or burial goods and services (39%).”<sup>39</sup> One advantage to prepaying for a funeral is that it is a way to provide “peace of mind” for loved ones, by removing the stress and decisions that are involved with planning a funeral.<sup>40</sup> Another major motivator for purchasing a preneed funeral is the possibility of potential savings that may result due to increasing prices for goods and services or inflation.<sup>41</sup> Medicaid applicants may benefit by prepaying for funeral arrangements because money spent on prepaid funeral arrangements is not used as a factor to determine Medicaid eligibility.<sup>42</sup>

However, there is also a downside to paying for a funeral in advance.<sup>43</sup> Financially, prepaid funerals are considered to be a lousy investment.<sup>44</sup> Further, there is always a chance that the purchaser may move away or get divorced.<sup>45</sup> The funeral home could be sold before the purchaser’s death.<sup>46</sup> In the early years one funeral and memorial society promoted preplanning of a funeral, yet warned against prepaying for them on their bulletin stating: “It always pays to plan ahead. It rarely pays to pay ahead.”<sup>47</sup>

### III. CURRENT REGULATIONS OF THE FLORIDA “DEATH CARE” INDUSTRY

To gain a better understanding of the need for change in the Florida “death care” industry, it is important to discuss the current consumer oriented regulations and laws that have an effect on it. Making a funeral purchase immediately after a loved one’s death subjects consumers to vulnerability due to the expense and emotionally charged atmosphere

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38. Carlson, *supra* note 36.

39. See HERMANSON, *supra* note 1, at 5, available at [http://research.aarp.org/consumer/ib44\\_deathcare.pdf](http://research.aarp.org/consumer/ib44_deathcare.pdf).

40. Jeff Harrington, *Prepaid Peace of Mind?*, ST. PETERSBURG TIMES (Fla.), Oct. 28, 2001, at 1H; Carlson, *supra* note 36.

41. Carlson, *supra* note 36.

42. Michael W. Porter, *Florida Medicaid Eligibility Requirements*, Jan. 2003, available at, <http://michaelporter.lawoffice.com/article8.htm>.

43. Harrington, *supra* note 40.

44. *Id.*

45. *Id.*

46. See Carlson, *supra* note 36.

47. MITFORD, *supra* note 6, at 256.

involved.<sup>48</sup> Due to this increased vulnerability, both the federal and the state government regulate the industry.<sup>49</sup>

#### A. *Federal Trade Commission Funeral Rule*

In 1982, a plan was envisioned to “lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice.”<sup>50</sup> Two years later this vision became a reality when the Federal Trade Commission (FTC), in an effort to better protect consumers, promulgated the Funeral Rule.<sup>51</sup> Being careful to minimize the intrusion on the industry’s day-to-day operations, the commission set out to eliminate many of the deceptive practices in the funeral industry.<sup>52</sup> Given the “force and effect of law,”<sup>53</sup> the rule establishes preventative requirements that combat unfair or deceptive acts or practices that may be used by funeral providers while selling funeral goods or services.<sup>54</sup> For the purposes of this article, these requirements have been categorized into two groups: 1) mandatory disclosures, and 2) misrepresentations made to consumers about funeral goods or services.

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48. OFF. OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY & THE AUDITOR GEN., FLORIDA’S REGULATION OF THE DEATH CARE INDUSTRY HAS MANY WEAKNESSES, Rep. No. 02-21 1, 2 (Mar. 2002) available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf> [hereinafter DEATH CARE INDUSTRY ANALYSIS].

49. *Id.*

50. Funeral Industry Practices, 47 Fed. Reg. at 42,260.

51. Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule*, 7 J. L. & POL. 1, 4 (1990).

52. Funeral Industry Practices, 47 Fed. Reg. at 42,261.

53. *Funerals and Burials: Protecting Consumers from Bad Practices: Hearing on FTC Funeral Rule Before S. Spec. Comm. on Aging*, 106th Cong. 106-27, 119 (2000) (statement of Eileen Harrington, Assoc. Dir. for Mktg. Practices, FTC’s Bureau of Consumer Prot.).

54. 16 C.F.R. § 453.8 (2002). The Funeral Rule defines a funeral provider as “any person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public.” § 453.1(i). The Funeral Rule defines funeral goods as “the goods which are sold or offered for sale directly to the public for use in connection with funeral services.” § 453.1(h). The Funeral Rule also defines funeral services as “any services which may be used to: (1) Care for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.” § 453.1(j).



## 1. Mandatory Price Disclosures

The Funeral Rule provides that consumers receive accurate prices on products they are inquiring about before any discussion can begin about the actual purchase of the funeral goods or services.<sup>55</sup> The funeral provider must furnish a price list reflecting the accurate retail prices of the particular items being inquired about, or they must supply a general price list of the goods and services that are offered.<sup>56</sup> Even if the conversation regarding the prices of goods or services takes place over the telephone, the funeral provider is still obligated to disclose the accurate prices.<sup>57</sup> Additionally, the Funeral Rule requires that before the embalming of a body, funeral providers inform and receive approval from the family before the body may be embalmed;<sup>58</sup> this prevents consumers from having the bodies of loved ones embalmed against their will.<sup>59</sup> Also, if the consumer purchases cash advance items, funeral providers cannot charge them more than what was actually paid for these items without revealing this to the consumer.<sup>60</sup>

## 2. Misrepresentations

The Funeral Rule also prohibits funeral providers from participating in many of the deceptive practices that have become associated with the industry over the years. Funeral providers may no longer deceptively represent that goods or services will delay decomposition for an indefinite period of time, or that the protective features included with a casket will protect the deceased's body if such is not the case.<sup>61</sup> Further, funeral providers may not create an illegal tying agreement by placing a consumer's ability to purchase one good or service on the purchase of another when it is not necessary to do so, but rather, funeral providers must disclose to

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55. § 453.2(a).

56. § 453.2(b)(2)(i) (requiring a casket price list); § 453.2(3)(i) (requiring an outer burial container price list); § 453.2(b)(4)(i)(A) (requiring a general price list.).

57. § 453.2(b)(1).

58. § 453.3(b)(2).

59. Funeral Industry Practices, 47 Fed. Reg. at 42,283.

60. § 453.3(f)(1). The Funeral Rule defines a cash advance item as "any item obtained from a third party and paid for by the funeral provider on the purchaser's behalf." § 453.1(b).

61. § 453.3(e)(1) (requiring funeral providers not to represent that goods or services will delay decomposition indefinitely); § 453.3(e)(2) (requiring funeral providers not to represent that caskets have protective features when such is not the case).

consumers that they can choose only the items they desire.<sup>62</sup> In the past, funeral providers may have forced consumers to pay the expense of embalming by erroneously informing them the law requires it, when it does not. Under the Funeral Rule, funeral providers are obligated to notify the consumer if the law does not require embalming.<sup>63</sup> If a direct cremation is to be performed, containers other than caskets must be presented as an option for consumers.<sup>64</sup> Furthermore, a funeral provider may not portray that outer burial containers are required when they are not.<sup>65</sup> If the law does not require outer burial containers, this information must be disclosed to the consumer.<sup>66</sup> Not only must the funeral provider disclose that the law does not require embalming or an outer burial container, they must not inform customers that the law requires any good or service when it does not.<sup>67</sup>

### B. *The Funeral Rule and Florida Law*

Under the Funeral Rule all state laws affording consumer protection, at least equal to or greater than the protection offered by the FTC Funeral Rule, take precedence over the Funeral Rule if they are properly administered and enforced.<sup>68</sup> Though the Funeral Rule has heightened the protection of consumers through the increase in regulations on the funeral industry, eighteen states across the country, including Florida, have taken it upon themselves to tighten these protections even further.<sup>69</sup>

Two chapters of the *Florida Statutes*, Chapter 470 and Chapter 497, comprise to regulate the "death care" industry.<sup>70</sup> The principal focus of Chapter 470 is to create a requisite level of qualification for all embalmers, funeral directors, and direct disposers, and to "provide for swift and effective

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62. § 453.4(b)(1)(i) (requiring funeral providers not to create illegal tying agreements); § 453.4(b)(2)(i)(A) (requiring funeral providers to disclose that customers may choose only those items they want).

63. § 453.3(a)(1)(ii).

64. § 453.3(b)(2).

65. § 453.3(c)(1)(i).

66. § 453.3(c)(1)(ii).

67. § 453.3(d)(1).

68. § 453.9(b).

69. HERMANSON, *supra* note 1, at 7-8, available at [http://research.aarp.org/consumer/ib44\\_deathcare.pdf](http://research.aarp.org/consumer/ib44_deathcare.pdf). Other states that have adopted the FTC Rules in whole or in part are Arizona, Georgia, Maine, Minnesota, Nevada, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin. *Id.*

70. FLA. STAT. chs. 470, 497 (2001).

discipline for those practitioners who violate the law.”<sup>71</sup> Chapter 497, more commonly known as the “Florida Funeral and Cemetery Services Act,”<sup>72</sup> pertains to cemetery companies<sup>73</sup> and sellers of preneed funeral services and goods.<sup>74</sup> It was created with the understanding that consumers of preneed funeral services or merchandise “may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser and that the failure to maintain cemetery grounds properly may cause significant emotional stress.”<sup>75</sup>

Though these chapters focus primarily on different aspects of the industry, the common theme found throughout each is strong regulation aimed toward protecting Florida’s consumers. All of the same requirements that were established to protect consumers under the Funeral Rule are similarly required within Chapters 470 and 497 of the *Florida Statutes*.<sup>76</sup> However, the Florida Legislature has gone beyond the scope of these minimum standards and adopted stricter requirements for those members of the “death care” industry who conduct business in the State of Florida.<sup>77</sup> To assist in the enforcement of these requirements and to monitor the industry’s day to day operations, both Chapter 470 and Chapter 497 also call for the creation of regulatory boards.<sup>78</sup> Chapter 470 created the Board of Funeral Directors and Embalmers, and Chapter 497 created the Board of Funeral and Cemetery Services.<sup>79</sup>

### 1. Mandatory Disclosures

One of the areas in which the Florida Legislature has chosen to adopt stricter requirements for those members of the “death care” industry who operate in the State of Florida is in the amount of information that is required to be disclosed. In addition to the mandatory requirements under the Funeral Rule, Florida law requires sellers to disclose all other merchan-

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71. § 470.001.

72. § 497.001.

73. § 497.005(11). A cemetery company is defined as “any legal entity that owns or controls cemetery lands or property.” *Id.*

74. § 497.002.

75. § 497.002(1).

76. See HERMANSON, *supra* note 1, at 7, available at [http://research.aarp.org/consumer/ib44\\_deathcare.pdf](http://research.aarp.org/consumer/ib44_deathcare.pdf).

77. FLA. STAT. chs. 470, 497 (2001).

78. § 470.003 (creating the Board of Funeral Directors and Embalmers); § 497.101 (creating the Board of Funeral and Cemetery Services).

79. *Id.*

dise and services that are available before a casket is selected.<sup>80</sup> Similarly, if a consumer inquires about alternatives to traditional funeral services, such as graveside service, direct disposition, or body donation without a service, the sellers are required to disclose this information to them.<sup>81</sup> Prior to the purchase of funeral merchandise or services, a "good faith" estimate of all fees and costs that a buyer may incur must be disclosed.<sup>82</sup> When making a purchase, all purchasers are to receive the seller's policy on cancellation and refunds.<sup>83</sup> The signature pages of all contracts for the purchase of merchandise or services are required to disclose information about how much money is required to be placed into trust, the amount of money a customer will receive if a refund is requested, the department's toll free hotline number, and a statement informing the customer of a thirty-day window, beginning when the contract was signed and initiated, to cancel the contract and still retain a full refund.<sup>84</sup>

## 2. Misrepresentations

Another area where the standards adopted by Florida have surpassed those that are required by the Funeral Rule is in the prevention of deceptive sales tactics. Under Florida law, all caskets on display are required to be displayed in the same manner regardless of price.<sup>85</sup> Similarly, all caskets displayed must clearly include the price on the casket itself, or if presented in a photo album or brochure, directly on the picture in which it is presented.<sup>86</sup> All representations that goods or services are for sale must be "bona fide" offers.<sup>87</sup> Discouraging a consumer's selection of a funeral good or service in order to entice them to purchase a more expensive good or service is prohibited.<sup>88</sup> Sellers may not fraudulently mislead consumers that a particular item is unavailable or that there will be a delay in obtaining it when such is not the case.<sup>89</sup> Making a consumer feel that it is "improper" or "inappropriate" to worry about the expense of a loved one's funeral is

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80. § 470.034(2).

81. § 470.034(4)(a)-(c).

82. § 497.333(4).

83. § 497.333(7).

84. § 497.333(8)(a)-(f).

85. § 470.033(1).

86. § 470.033(4).

87. § 470.033(2).

88. § 470.033(3).

89. *Id.*

prohibited.<sup>90</sup> All costs that a customer may incur must be given and, if estimated, must be good faith estimates.<sup>91</sup> Solicitations made after a loved one has already passed away are prohibited.<sup>92</sup> The purchase of a monument may not be tied to the purchase of a grave space.<sup>93</sup> Consumers may not be misled about the terms or advantages of a preneed contract.<sup>94</sup> Sellers of preneed contracts may not engage in misleading or deceptive advertising.<sup>95</sup> All visits by lot owners that the company requires to be made must be necessary and not for the purpose of soliciting business.<sup>96</sup> Any method of solicitation that is overreaching or takes advantage of a customer's ignorance or vulnerable state is prohibited.<sup>97</sup>

### 3. Regulatory Boards

The Board of Funeral Directors and Embalmers, created pursuant to Chapter 470 of the *Florida Statutes*, is a regulatory agency within the Department of Business and Professional Regulation.<sup>98</sup> This seven member board whose members serve a term of four years is comprised of funeral directors and Florida residents that are appointed by the Governor.<sup>99</sup> Five of the members serving on the board must be funeral directors that are licensed in Florida.<sup>100</sup> No greater than two of those five funeral directors may be in any way associated with a cemetery company.<sup>101</sup> The other two members are Florida residents who have never been funeral directors and are in no way connected with any aspect of the "death care" industry.<sup>102</sup> One of the two consumer members of the board must be at least sixty years of age.<sup>103</sup> The board's members are charged with "adopt[ing] rules which establish

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90. *Id.*

91. § 497.515(3) (requiring the disclosure of all costs and fees attached to the purchase of burial rights or merchandise); § 497.333(4) (requiring that estimations must be given in good faith).

92. § 497.321(5).

93. § 497.325(1).

94. § 497.445(1)(a).

95. § 497.445(2).

96. § 497.515(1).

97. § 497.515(2).

98. § 470.003(1).

99. § 470.003(1)–(3).

100. § 470.003(2).

101. *Id.*

102. *Id.*

103. *Id.*

requirements for inspection of direct disposal establishments, funeral establishments, and incinerator facilities and the records directly relating to the regulated activities of the licensee to ensure compliance with the provisions of [chapter 470]."<sup>104</sup>

The other regulatory agency that oversees the Florida "death care" industry is the Board of Funeral and Cemetery Services, which was created under the Florida Funeral and Cemetery Services Act.<sup>105</sup> Though the members of this board also serve a term of four years and are appointed by the Governor, its composition is different from that of the Board of Funeral Directors and Embalmers.<sup>106</sup> Two of the board members must be funeral directors who are licensed in Florida.<sup>107</sup> Two members must be owners or operators of a cemetery that is licensed in Florida.<sup>108</sup> The remaining three members must be residents in the State of Florida who have never been licensed funeral directors, and are in no way connected to the "death care" industry.<sup>109</sup> One consumer member of the board must be at least sixty years of age.<sup>110</sup> The board is charged with establishing requirements for the inspection of cemeteries, the adopting and enforcing of the rules, which must be published and distributed, and examining the finances of cemetery companies and preneed contract certificate holders.<sup>111</sup>

#### IV. PROBLEMS AND PROPOSED CHANGES

In many ways, Florida's regulation of the "death care" industry provides consumers with valuable protection. However, there are still several ways in which funeral consumers are left defenseless. This section of the article explores a few of those areas that remain under regulated, and proposes solutions that will allow consumers to play on a level playing field with funeral providers.

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104. § 470.005(3).

105. § 497.101(1).

106. § 497.101(1)-(3).

107. § 497.101(2).

108. *Id.*

109. *Id.*

110. *Id.*

111. § 497.103(2)-(4).

A. *Is the State of Florida “Too Trusting?”*

As discussed earlier, sales of preneed funerals have seen a significant increase in growth over the last twenty years.<sup>112</sup> This section discusses Florida’s current regulations of preneed funeral contract trust funds, the most common way that the increased sales have been funded.<sup>113</sup> Recognizing “that purchasers of preneed burial rights, funeral or burial merchandise, or funeral or burial services may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser,” the Florida Legislature found it necessary to implement regulations for money received on preneed contracts.<sup>114</sup> Current regulations for the state of Florida require sellers of preneed funerals to deposit in the service trust fund: 70% of the money received for all services they are to provide and facilities they have agreed to rent; 100% of the money received on all cash advance items sold; and the greater amount of 30% of the purchase price, or 110% of the wholesale cost to the retailer, of merchandise sold.<sup>115</sup>

To many people, a requirement that money received on all preneed funeral contracts be placed into a trust fund may appear as a safe and efficient way to prearrange a funeral. This was probably the understanding of the over 80,000 purchasers of preneed funerals who in recent years learned that their money had, in reality, been removed from the merchandise trust fund that was set up to ensure the payment of their funeral.<sup>116</sup> In September of 2000, two of the largest funeral providers in Florida, Service Corporation International and Stewart International, encountered serious financial problems.<sup>117</sup> They petitioned the Florida Board of Funeral and Cemetery Services for permission to remove preneed merchandise trust money that had been placed into merchandise trust funds by their compa-

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112. *Final Arrangements*, *supra* note 17, at 32.

113. Frank, *supra* note 30, at 7.

114. § 497.002(1).

115. § 497.417(1).

116. *Funeral Firms to Tap Prepaid Cash the State Ok'd Two Major Companies' Using \$84 Million Held for 80,000 Floridians, to be Replaced by Surety Bonds*, ORLANDO SENTINEL, Sept. 26, 2000, at C1 [hereinafter *Funeral Surety Bonds*].

117. *SCI and Stewart Raise Florida Cash by Raiding Consumers' Preneed Trusts*, FUNERAL MONITOR, Oct. 9, 2000, at 1 [hereinafter *SCI and Stewart Preneed Trusts*]. Service Corporation International had a debt of 3.8 billion dollars and was given a negative outlook by Moody's. *Id.* Similarly, Stewart had a debt of 963 million dollars. *Id.* Prime Succession had withdrawn nine million dollars and went on to file for chapter eleven bankruptcy. *Id.* at 3.

nies.<sup>118</sup> By a board vote of five to two,<sup>119</sup> this request was granted and the companies withdrew eighty-four million dollars that had been set aside to cover the costs for merchandise in over thirty funeral homes and cemeteries across the state.<sup>120</sup> The only condition on withdrawing the money was that the providers purchase surety bonds, which in the event the funeral providers were unable to fulfill their obligations, would cover the cost of the merchandise.<sup>121</sup>

As fraudulent as paying off debts with money that consumers believe is being held in a trust may seem, at the time these actions were taken, they were perfectly legal.<sup>122</sup> This statute has since been amended, but loopholes to withdraw money from preneed trust funds still remain.<sup>123</sup>

For those sellers of preneed funeral goods or services who qualify, Florida law provides alternatives to establishing a trust fund under section 497.417 of the *Florida Statutes*.<sup>124</sup> These include performance bonds and payment bonds.<sup>125</sup> All certificate holders may annually file a written request to the Board of Funeral and Cemetery Services to purchase a performance bond from a surety company as an alternative to a trust fund.<sup>126</sup> The bond must be "conditioned in such a manner to secure the faithful performance of all conditions of any preneed contracts for which the certificateholder was required to have covered by the amount of the bond."<sup>127</sup> In essence, the bond guarantees that all contracts entered into by the seller will be performed.<sup>128</sup>

118. *Funeral Surety Bonds*, *supra* note 116; *SCI and Stewart Preneed Trusts*, *supra* note 117 at 2; Shelby Opper, *Funeral Home Giants Seek Cash*, ST. PETERSBURG TIMES (Fla.), Sept. 23, 2000, at 1B.

119. *See Funeral Surety Bonds*, *supra* note 116.

120. *SCI and Stewart Preneed Trusts*, *supra* note 117, at 1; *Funeral Surety Bonds*, *supra* note 116; Opper, *supra* note 118 (states that the number of funeral homes was thirty).

121. *SCI and Stewart Preneed Trusts*, *supra* note 117, at 1; *Funeral Surety Bonds*, *supra* note 116; Opper, *supra* note 118.

122. FLA. STAT. § 497.425 (2000) (amended 2001).

123. FLA. STAT. § 497.417(5)(a)-(c) (2001).

124. *Id.*

125. § 497.423 (allowing certificate holders to file performance bonds); § 497.425 (allowing certificate holders to file payment bonds); Fla. S. Comm. on Banking & Ins., CS for SB 1610 (2001) Staff Analysis (April 16, 2001) (on file with comm.) [hereinafter S. Comm. SB 1610 Staff Analysis].

126. § 497.423(1)-(2).

127. § 497.423(5).

128. S. Comm. SB 1610 Staff Analysis, *supra* note 125.



Performance bonds are very difficult to acquire, and would most likely only be given to guarantee the performance on tangible goods like mausoleums.<sup>129</sup>

Another option that is available for some large companies to remove money from trusts created pursuant to section 497.417 of the *Florida Statutes* is a modified version of the same mechanisms both Service Corporation International and Loewen utilized in 2000. All certificate holders who have as of July 1, 2001 a total bonded liability of greater than \$100 million may file a written request to the Board of Funeral and Cemetery Services to purchase a “payment bond” from a surety company as an alternative to trust funds for all contracts written prior to December 31, 2004.<sup>130</sup> The payment bond must be “in an amount not less than the aggregate value of outstanding liabilities on” all goods or services that have been contracted for, but not delivered.<sup>131</sup> Payment bonds are easier to obtain than performance bonds because the company issuing them is only held financially responsible for any goods or services contracted on, but do not have to guarantee that the funeral service is actually carried out.<sup>132</sup>

Florida’s current regulatory standard, which allows for the surety bond option rather than 100% trust protection, has been argued as being bad policy.<sup>133</sup> The Florida Legislature “must give thought to the unthinkable.”<sup>134</sup> With the recent corporate scandals like Enron and WorldCom, it is becoming apparent that corporations can manipulate a balance sheet to mislead others.<sup>135</sup> Without 100% trust protection, the only guaranteed source that Florida consumers currently have, which offers some form of protection to purchasers of preneed funerals’ is the Preneed Funeral Contract Consumer Protection Trust Fund.<sup>136</sup> Regulated and administered by the Board of Funeral and Cemetery Services, this fund is maintained by predetermined deposits of money that are required to be paid on each preneed contract sold.<sup>137</sup> Money that accrues in the fund may be used to

129. Interview with Bill Stephenson, Licensed Funeral Director, in Leesburg, Fla., (July 1, 2002).

130. § 497.425(1)(a).

131. *Id.*

132. Interview with Bill Stephenson, *supra* note 129.

133. *See Funeral Surety Bonds, supra* note 116.

134. *Id.*

135. *See generally* Eric Hanson & Mary Flood, *Ex-Enron Exec Found Shot Dead*, *Houston Chron.*, Jan. 26, 2002, at 1; Jared Sandberg et al., *Inside WorldCom’s Unearthing of a Vast Accounting Scandal*, *WALL ST. J.*, June 27, 2002, at A1 (deceptive accounting principles of large telecommunications company led to the companies bankruptcy).

136. § 497.413.

137. § 497.413(1)–(2).

provide restitution to any preneed contract purchaser or owner whose preneed contract was breached.<sup>138</sup> However, this fund currently only has between six and eight million dollars in it.<sup>139</sup> If another withdrawal the magnitude of Service Corporation International's and Loewen's were to take place, and those companies and the companies backing them were unable to perform on their promises, these funds would not be enough to cover the losses.<sup>140</sup> Florida should follow the lead of the states in this country that require 100% of the money received on a preneed contract to be placed into trust and remain there until the contract is performed.<sup>141</sup> The only guarantee consumers have for protecting their full investment in preneed contracts is to require 100% trust protection without removal until contract performance.

#### B. *Disclosure of Ownership: Never Judge a Book by its Cover*

In a time when it has become customary for "the Big Three"<sup>142</sup> to acquire funeral homes and cemeteries across the country, very few consumers are actually aware when a change of ownership has occurred between the trusted local family and the large corporation.<sup>143</sup> Properties are

138. § 497.413(6)-(7).

139. Telephone Interview with Funeral and Cemetery Hotline, Florida Comptrollers Office (July 5, 2002).

140. See *SCI and Stewart Preneed Trusts*, *supra* note 117 at 3.

141. Frank, *supra* note 30, at 26 (noting statutes from states that have chosen to require 100% trust protection include: ALASKA STAT. § 45.50.471(b)(24) (Michie 2000); ARK. CODE ANN. § 23-40-114(a) (Michie 2000 & Supp. 2001); ARIZ. REV. STAT. ANN. § 32-1391.05(A) (West 2001); CAL. BUS. & PROF. CODE § 7735 (West 1995 & Supp. 2002); CONN. GEN. STAT. ANN. § 42-202(a) (West 2000); DEL. CODE ANN. tit. 5, § 302(a) (1993); IND. CODE ANN. § 30-2-9-1(a) (Michie 2000); KAN. STAT. ANN. § 16-301 (1995); KY. REV. STAT. ANN. § 367.934(1) (Michie 2001); LA. REV. STAT. ANN. § 861(A)(1)(a) (West 2000); ME. REV. STAT. ANN. tit. 32 § 1401(1)(A) (West 1999 & Supp. 2001); MINN. STAT. ANN. § 149A.97(2) (West 1998 & Supp. 2002); MONT. CODE ANN. § 37-19-828(1)(a) (2001); N.H. REV. STAT. ANN. § 325:45 (1995 & Supp. 2001); N.J. STAT. ANN. § 2A:102-13 (West 1985 & Supp. 2002); N.M. STAT. ANN. § 59A-49-6(A) (Michie 2000); N.Y. GEN. BUS. LAW § 453(1)(a) (McKinney 1996 & Supp. 2002); OHIO REV. CODE ANN. § 1111.19(B) (Anderson 1996 & Supp. 2001); R.I. GEN. LAWS § 5-33.1-4(a) (1999); S.C. CODE ANN. § 32-7-20(A)(1) (Law. Co-op. 1991 & Supp. 2001); TENN. CODE ANN. § 62-5-401 (1997); UTAH CODE ANN. § 58-58-9(2) (1998); WIS. STAT. ANN. § 445.125(1)(a)1 (West 1998 & Supp. 2001)). *Id.* at n. 143. Statutes updated by author to reflect current law.

142. Horn, *supra* note 8.

143. John McKinnon, *Consolidation in Death Care Seen as Costly*, FLA. J., Oct. 28, 1998, at F1. Sen. Donald Sullivan thinks there is a need for legislation regarding disclosure of ownership, because "some of the facilities are deliberately disguising their ownership, so that consumers will think funeral homes or cemeteries are still family-owned and operated." *Id.*

purchased silently and physical appearances are rarely changed, particularly the local family name on the sign.<sup>144</sup> Most often, the new corporate owner follows standard operating procedures specifically to avoid drawing the attention of the community.<sup>145</sup> The corporate goal of course is internal changes that will overwhelmingly affect the local consumer.<sup>146</sup> Currently, it is perfectly legal in Florida for funeral home owners to operate under the previous family-owned name without having to disclose actual ownership.<sup>147</sup>

One way consumers may be able to distinguish a change in ownership is by examining the operational structure of each facility.<sup>148</sup> Large corporations often operate under a profit driven price structure, resulting in prices much higher than most “mom-and-pop” businesses.<sup>149</sup> In a survey conducted by one town’s local newspaper, corporations often charged up to sixty two percent more than many of the independent homes.<sup>150</sup>

Why are the corporately owned facilities so fixated on nondisclosure of true identity? In the 1990s when many corporations began to go on buying sprees purchasing properties all over the country, they were sometimes paying up to thirteen times the amount of actual worth.<sup>151</sup> Many funeral businesses in operation for several generations struggled with lack of enough capital to compete and no young family member to carry on tradition.<sup>152</sup> The corporate financial offers were too lucrative to decline.<sup>153</sup> In defending the failure to disclose, corporate owners argued that much of the premium price they paid for the business was calculated by factoring in the cost of the local name and goodwill that had been established over the years.<sup>154</sup> Further, if

144. David Corder, *Death Industry Consolidates*, TAMPA BAY BUS. J., Aug. 7, 1998, at P1.

145. *See id.*

146. *See id.*

147. *Id.*

148. *See Final Arrangements*, *supra* note 17, at 31.

149. *Id.*

150. Robin Fields & Mitch Lipka, *Death Inc.: In Surprising Numbers, Chains are Buying up Funeral Homes but Keeping the Names*, SUN SENTINEL (Ft. Lauderdale, Fla.) Mar. 21, 1999, at 1A. Collecting price lists throughout Broward and Palm Beach counties, the *Sun Sentinel* found on average that Loewen and Service Corporation International charge sixty-two percent more than independent homes. *Id.* “[C]remation typically costs \$400 more at a Loewen home and about \$600 more at a SCI home than at an independent. The most basic burial averages \$1,251 at an independent [home], vs. \$2,026 at a Loewen mortuary and \$1,800 at an SCI mortuary.” *Id.*

151. McLachlin I, *supra* note 12.

152. *Id.*

153. *Id.*

154. Corder, *supra* note 144.

they were forced to disclose the corporate ownership, the consideration paid for this name and goodwill would be seriously devalued.<sup>155</sup> Another justification given by the corporate owners is that if disclosure were required, both the corporations and many of the independent homes would suffer by being "robbed" of their respective values.<sup>156</sup> The independents would lose the value of all the goodwill that in some cases has been passed down from generation to generation, and the corporations would in turn lose this same value of goodwill.<sup>157</sup> To combat the lack of disclosure by these corporate funeral homes, some local funeral providers have actually taken matters into their own hands by placing advertisements in the local paper to inform the community of properties sold and now owned by a corporation rather than a local family.<sup>158</sup>

In 1999, the Florida Senate Committee on Regulated Industries introduced a bill to resolve the issue of disclosureship.<sup>159</sup> In the interest of better protecting consumers, the bill proposed to require sellers of funeral goods and services, including publicly owned corporations, to clearly disclose their ownership.<sup>160</sup> If passed, all advertisements, sales to prospective purchasers, and contracts entered into would have to disclose the actual owners of the business.<sup>161</sup> Further, any contract entered into without the proper disclosures would be deemed voidable, with the seller having the burden of proof.<sup>162</sup> Though the Florida Legislature did not pass this legislation, several other states across the country, including Connecticut, Maine, Michigan, and Minnesota, have passed similar legislation.<sup>163</sup> Connecticut made it a requirement that persons or corporations who own 10% or more of the company disclose this information by visibly displaying it on a sign inside the business and including it on all contracts.<sup>164</sup> Similarly, Maine required that ownership information be disclosed on all contracts and agreements.<sup>165</sup> Additionally, to protect their consumers,

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155. *Id.*

156. McKinnon, *supra* note 143.

157. *Id.*

158. Corder, *supra* note 144.

159. Fla. CS for SB 196 (1999) (amending FLA. STAT. §470.034).

160. *Id.* at §1(5)-(7).

161. *Id.*

162. *Id.* at §4(7).

163. CONN. GEN. STAT. ANN. § 20-222(b) (West 1999); ME. REV. STAT. ANN. tit. 32 § 1407(1) (West 1999 & Supp. 2001); MICH. COMP. LAWS ANN. § 339.1809(1) (West 1992); MINN. STAT. ANN. § 149A.70(8) (West 1998 & Supp. 2002).

164. CONN. GEN. STAT. ANN. § 20-222b (West 2002).

165. ME. REV. STAT. ANN. tit. 32 § 1407(1) (West 1999 & Supp. 2001).

Michigan requires the owner's name to be displayed at the entrance of the funeral home,<sup>166</sup> and consumers in Minnesota are provided the name of the owner on "all business literature, correspondence, and contracts."<sup>167</sup> The State of Florida should follow suit and address these same issues with strong consumer protection laws.

Consumers have a right to know with whom personal business is transacted. Family members who are "in a daze, often pick [] a particular home because it . . . has a familiar name or once buried some other member of the family."<sup>168</sup> Regulations such as the federal rules governing the Funeral<sup>169</sup> and *Florida Statutes* Chapters 470 and 497<sup>170</sup> provide purchasers of funeral goods with the opportunity to compare prices with different sellers, but if they are unaware of the identity of the legal owner, comparing prices may serve no purpose. For example, a person living in South Florida desiring to purchase funeral goods or services can compare prices of all of the funeral homes in his or her county.<sup>171</sup> What this person probably does not realize is that the same corporation could own several or all of these funeral homes.<sup>172</sup> By not disclosing ownership, these corporations, in a very cruel and inconsiderate gesture, allow this person, who has just lost a loved one, to spend time and energy traveling to many of the same corporately owned facilities in the area comparing duplicated pricing structures and operating procedures.<sup>173</sup> Furthermore, many other factors consumers consider when deciding where to have funeral services may be irrelevant if funeral homes fail to disclose their ownership. Though the reasons behind making certain individual choices may vary, "[m]ost people choose funeral and cemetery services based on a religious, ethnic, communal or geographic

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166. MICH. COMP. LAWS ANN. § 339.1809(1) (West 1992).

167. MINN. STAT. ANN. § 149A.70(8) (West 1998 & Supp. 2002).

168. Erik Larson, *Fight to the Death*, TIME, Dec. 9, 1996.

169. 16 C.F.R. § 453 (2002).

170. FLA. STAT. chs. 470, 497 (2002).

171. Fields & Liptka, *supra* note 150.

172. *Id.* In the State of Florida, many of Broward and Palm Beach Counties' funeral homes that were previously owned by families have been purchased. *Id.* "Loewen has swallowed up all seven Kraeer homes, the five Levitt-Weinsteins and Fred Hunter's seven-home Broward empire." *Id.* Service Corporation International "picked off Babione's three Palm Beach County sites, as well as four Riverside homes, four Menorahs and three Baird-Cases." *Id.*

173. Fields & Liptka, *supra* note 150.

affinity.”<sup>174</sup> This could present problems in areas that have a large concentration of a certain religious or ethnic groups. Many religions and ethnic groups have certain procedures and formalities that are to be followed after death.<sup>175</sup> Consumers in areas where funeral homes have historically catered to certain religions or were owned by a member of that faith have no way of learning that ownership has changed hands. Since purchasing a funeral is a one shot deal, any lack of knowledge or expertise by a funeral director could have serious repercussions.

### C. *Inefficiencies and Consolidation*

The poor enforcement of regulations by the Board of Funeral and Cemetery Services, which operates under the Department of Banking and Finance, is another problem area.<sup>176</sup> The inadequacies of this board have been exposed through the media frenzied allegations brought against Menorah Gardens and Funeral Chapels.<sup>177</sup> Some of the allegations brought against the cemetery include burial of decedents in incorrect plots, errors within the burial records, and disinterring remains before receiving approval.<sup>178</sup> The Menorah Gardens case represents a perfect example of the deficiencies in the regulating powers of the Board of Funeral and Cemetery Services.<sup>179</sup> The board performed examinations at Menorah Gardens and found, in 1996 and 1998, that burial records contained errors,<sup>180</sup> and that descendants were buried in wrong burial plots.<sup>181</sup> After the first inspection, in 1996, the board sent a copy of the report to the company, but failed to make sure corrective actions were taken.<sup>182</sup> In 1998, the board only sent a

174. Funeral and Cemetery Regulation, S. Comm. on Reg. Industries, Interim Project Report 98-39 (Oct. 1998) available at [http://199.44.254.194/data/Publications/1998/Senate/reports/interim\\_reports/pdf/98-39ri.pdf](http://199.44.254.194/data/Publications/1998/Senate/reports/interim_reports/pdf/98-39ri.pdf).

175. See generally JEWISH FUNERAL PRACTICES COMMITTEE OF GREATER WASHINGTON, JEWISH FUNERALS, BURIAL AND MOURNING: JEWISH APPROACH, at <http://www.jewish-funerals.org/approach.htm> (last visited July 31, 2002).

176. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 4, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>.

177. *Id.* at 1.

178. *Id.*

179. Marian Dozier, *Audit Cites Regulators in Burial Woes*, SUN SENTINEL (Ft. Lauderdale, FL) Mar. 7, 2002, at 1B.

180. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 4–6, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>.

181. *Id.* at 1.

182. *Id.* at 6.

letter informing them that they violated Florida law, but again no action was taken to discipline the company for their irresponsible actions.<sup>183</sup> Menorah Gardens did not get their license suspended or revoked and did not even receive a fine for their misconduct.<sup>184</sup>

A majority of the faults with the Board of Funeral and Cemetery Services involves the need for improvement in the examination process.<sup>185</sup> “[E]xaminations of entities licensed under [Chapter] 497, *Florida Statutes*, [should] be conducted at least once every three years and that licensed cemeteries [should] be inspected each year.”<sup>186</sup> Often the examinations and inspections of cemeteries are not done on a timely basis,<sup>187</sup> they are not complete, and they do not check the accuracy and comprehensiveness of burial records.<sup>188</sup> Also, once the examinations are performed and the noncompliance of an entity is uncovered, there is often inadequate follow-up.<sup>189</sup> The board frequently relies on mere letters warning the entity or accepts promises made by the entity to address the issues, rather than disciplinary actions for violations.<sup>190</sup> Without timely follow-up by the department and no punishment for breaking regulations, there is absolutely no assurance for consumers that noncompliance or errors will ever be corrected.<sup>191</sup>

In addition to the problems the Board of Funeral and Cemetery Services has with its examination process, it is also lacking sufficient legal requirements for the disclosure of information to the department and consumers.<sup>192</sup> Currently there are minimal requirements for entities to survey the burial grounds and provide maps to identify each plot.<sup>193</sup> Cemetery companies are only required to provide a description of the cemetery, including acreage,

183. *Id.*

184. *Id.*

185. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 5–6, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Joel Englehardt, *Cemetery Violations Treated with Kid Gloves*, PALM BEACH POST, Mar. 6, 2002, at 1A.

191. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 6–7, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>.

192. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 11–12, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>.

193. *Id.*

and a map showing where the cemetery is located.<sup>194</sup> Without a correct survey of the land and the development of detailed maps, there is no means to properly identify plots. Decedants may possibly be buried in the wrong plot, and the same plot may be sold to two different consumers.<sup>195</sup> With the unrelenting marketing of prepayment for burial plots and the lack of disclosure of cemetery maps, consumers are vulnerable and could possibly have purchased a plot already owned by someone or one that does not exist.<sup>196</sup>

Florida State Senator Ken Pruitt requested an audit of the funeral industry to help answer questions regarding the increasing discoveries of misconduct by some of Florida's cemeteries,<sup>197</sup> and to provide support for his proposal that the regulation of the death care industry should be under one central agency rather than the two boards that currently oversee the industry.<sup>198</sup> Once the audit was released, Ken Pruitt stated, "[w]e've been treating this as historically a mom-and-pop industry. What the report tells me is we're dealing with a bunch of sophisticated operators and we have to be as sophisticated as they are."<sup>199</sup> Over the years, practitioners in the death care industry have seen major changes in its structure.<sup>200</sup> In the past, the industry had a pretty distinct separation between the two areas of business, which included family-owned funeral homes and cemeteries.<sup>201</sup> Today with the expansion of big corporations, the ownership and control of the funeral homes and cemeteries usually falls under one corporate entity.<sup>202</sup> Now that one owner typically controls the two business areas of the industry, the regulation should be under one governing body and board.<sup>203</sup> Currently the death care industry is overseen by two state agencies, the Department of Business and Professional Regulation and the Department of Banking and Finance.<sup>204</sup> Since the main purpose for regulating the death care industry is

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194. *Id.*

195. Englehardt, *supra* note 190.

196. Mary McLachlin, *Cemeteries Operate with Little Oversight*, PALM BEACH POST, Jan. 6, 2002, at 1A. [hereinafter McLachlin II].

197. Dozier, *supra* note 179.

198. *Id.*

199. Englehardt, *supra* note 190.

200. Interview with Bill Stephenson, *supra* note 129.

201. *Id.*

202. *Id.*

203. *Id.*

204. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 2, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>.



“to protect [the] consumer[] from economic harm and/or emotional distress,” and it currently is not fulfilling that need, some reforms need to be made.<sup>205</sup>

The current regulatory structure is the source of numerous inefficiencies, including both agencies having similar “licensing, support, and management systems.”<sup>206</sup> Also, “the dual regulations result in multiple visits to licensees and their businesses by state inspectors.”<sup>207</sup> In addition, businesses and consumers must contend with two separate agencies “for resolution of licensing, complaint, and enforcement issues.”<sup>208</sup> Many states including California, Minnesota, and Oregon have created one agency to regulate the death care industry and have managed to avoid the ineffectiveness of having two separate agencies.<sup>209</sup>

Although both agencies have expertise in different areas of regulation, the two existing boards that operate under the two agencies should be combined to form one unified, effective regulating body.<sup>210</sup> The Department of Business and Professional Regulation would be the superior agency under which the consolidation should take place.<sup>211</sup> Its expertise in the area of regulation would provide the perfect foundation for the consolidation, while simply transferring employees could easily shift the expertise of auditing by the Department of Banking and Finance to the new consolidated board.<sup>212</sup>

## V. CONCLUSION

There is one common absolute; every human being will experience death. No matter what a person accomplishes in life, or how much money or power he acquires, death will always win in the end. Traditionally, in this country, the care of the dead was delivered by the local, small, family-owned business. Genuine care, concern, and compassion were ministered to loved

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205. *Id.* at 1.

206. *Id.* at 12.

207. *Id.*

208. *Id.*

209. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 12, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>; CAL. BUS. & PROF. CODE § 7601 (West 1995 & Supp. 2002) (creating the State Board of Funeral Directors and Embalmers within the Department of Consumer Affairs); OR. REV. STAT. § 692.300 (2001) (creating the State Mortuary and Cemetery Board); MINN. STAT. ANN. § 149.A.02 Subd. 37a (West Supp. 2002-2003) (naming the commissioner of health the regulator of funeral providers).

210. DEATH CARE INDUSTRY ANALYSIS, *supra* note 48, at 12, available at <http://www.oppaga.state.fl.us/reports/pdf/0221rpt.pdf>.

211. *Id.*

212. *Id.*

ones from family to family. Never was the business of death care managed in the same manner as purchasing an automobile or any other American product. This "slippery slope" shift of mindset began several decades ago with the greedy realization that death care, as a product, would be an inevitable goldmine. The invasive deception of the "bigger is better and cheaper" corporate mantra has positioned American death care where it is today. Just as the configuration of the "death care industry has changed, so too must the rules that regulate this industry. The State of Florida, with its high death rate and many frail citizens, should take a leadership role in the investigation, evaluation, and ultimate solutions related to the laws and governing bodies that will protect its vulnerable consumers.