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FUNERAL RELATED INSURANCE SALES IN FLORIDA:

Three Regulatory Schemes + Three Regulators = Industry Confusion

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Florida's demographics make it an ideal state for the sale of funeral related life insurance policies. According to data from the 2010 U.S. Census, 17.3% of Florida residents are over the age of 65 (approximately 3.3 million persons).¹ Yet, the regulation of such sales is complicated and, perhaps, unnecessarily so. There are two types of funeral related life insurance sales in Florida: the sale of life insurance policies used to directly fund preneed contracts and the sale of final expense life insurance policies.

Life Insurance to Fund a Preneed Contract

Sales of life insurance policies to fund preneed contracts are regulated by three distinct sections of the Florida Department of Financial Services. The Office of Insurance Regulation (OIR) reviews and approves the life insurance policy forms and the accompanying rates. The Division of Agent and Agency Services (A&A) licenses the agents who sell the life insurance policies and the agencies at which such sales occur, and the Division of Funeral, Cemetery and Consumer Services (DFCCS) has adopted an administrative rule which must be complied with when a life insurance policy is used to fund a preneed contract.

Approval of Forms and Rates

There are few issues that have arisen recently in the context of form and rate approval for policies to be sold to fund preneed contracts. One form-related issue, however, that repeatedly generates concerns among industry members regards whether it is appropriate for a funeral establishment to be named beneficiary of a policy funding a preneed contract. The concerns pertain to the inconsistent treatment of the issue by the competing regulators – OIR and DFCCS.

Section 626.9541(1)(s), Florida Statutes, addresses, as an unfair trade practice, the following:

1. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured, or organize, promote, or operate any enterprise or plan to enter into any contract with any insured under which the freedom of choice in the open market of the person having the legal right to such choice is restricted as to the purchase, arrangement, and conduct of a funeral service or any part thereof for any individual insured by the insurer. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured as the owner of the policy.
2. No insurer shall contract or agree to furnish funeral merchandise or services in connection with the disposition of any person upon the death of any person insured by such insurer.
3. No insurer shall contract or agree with any funeral director or direct disposer to the effect that such funeral director or direct disposer shall conduct the funeral of any person insured by such insurer.
4. No insurer shall provide, in any insurance contract covering the life of any person in this state, for the payment of the proceeds or benefits thereof in other than legal tender of the United States and of this state, or for the withholding of such proceeds or benefits, all for the purpose of either directly or indirectly providing, inducing, or furthering any arrangement or agreement designed to require or induce the employment of a particular person to conduct the funeral of the insured.

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Generally, this law has been construed by the life insurance and the deathcare industries to prohibit naming a funeral home beneficiary of a policy funding a preneed contract. The OIR, however, has informally taken the position that the designation of a funeral home as beneficiary is allowable, because the language of the law, above, prohibits a “life insurer” from making a designation; it does not prohibit a consumer from making a designation of a funeral home as beneficiary. All life insurers of which I am aware, however, refuse to allow for such a designation by the applicant for the insurance, as the designation could negatively affect portability and could result in the payment of benefits to a funeral establishment that did not provide funeral goods and services upon the insured’s death.

The insurers’ interpretation is bolstered by Rule 69O-148.001(5)(b), Florida Administrative Code, which reads:

The aggregate amount of insurance proceeds payable under such life insurance or annuity contracts, for the benefit of any one life which may be paid to a *preneed certificate holder* licensed pursuant to Chapter 497, Florida Statutes, (the funeral establishment) shall not exceed the retail price of the services and merchandise which are provided at time of need. All other proceeds shall be paid to the *beneficiary* named in such contracts, or, if no beneficiary has been designated, to the estate of the insured or annuitant.

This rule draws a distinction between the funeral establishment (“preneed certificate holder licensed pursuant to Chapter 497, Florida Statutes”) and the beneficiary designated in the life insurance contract. Counsel for the Department of Financial Services, the OIR’s parent agency, read this rule to mean that the two identified parties (funeral establishment and beneficiary) cannot be one in the same. Yet, some OIR analysts see things differently.

Without exception, my clients are advised to have agents utilize an assignment of benefits form when selling the policy to fund a preneed contract. It is noteworthy, though, that many assignments of benefits forms have been disapproved by the OIR for including the word “funeral” on the assignment form. Such disapprovals are predicated upon the OIR’s argument that the assignment to a particular funeral home restricts the consumer’s freedom of choice in violation of the law set forth above. That position, however, cannot be reconciled with the OIR’s acceptance of the designation by the consumer of a particular funeral home as beneficiary. To date, no party has pushed for a formal reconciliation of the issue.

Agent and Agency Licensing

Once a life insurer’s forms and rates are approved for use in this market, the questions of “who can sell the life insurance policies?” and “from where?” arise.

Section 626.785, Florida Statutes, establishes which persons qualify for licensure to sell life insurance products. In pertinent parts, the law reads:

(1) The department shall not grant or issue a license as life agent to any individual found by it to be untrustworthy or incompetent, or who does not meet the following qualifications:

(d) Must not be a funeral director or direct disposer, or an employee or representative thereof, or have an office in, or in connection with, a funeral establishment, except that a funeral establishment may contract with a life insurance agent to sell a preneed contract as defined in s. 497.005. Notwithstanding other provisions of this chapter, such

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insurance agent may sell limited policies of insurance covering the expense of final disposition or burial of an insured in the amount of \$12,500, plus an annual percentage increase based on the Annual Consumer Price Index compiled by the United States Department of Labor, beginning with the Annual Consumer Price Index announced by the United States Department of Labor for the year 2003.

(3) Notwithstanding any other provisions of this chapter, a funeral director, a direct disposer, or an employee of a funeral establishment that holds a certificate of authority pursuant to s. 497.452 may obtain an agent's license to sell only policies of life insurance covering the expense of a prearrangement for funeral services or merchandise so as to provide funds at the time the services and merchandise are needed. The face amount of insurance covered by any such policy shall not exceed \$12,500, plus an annual percentage increase based on the Annual Consumer Price Index compiled by the United States Department of Labor, beginning with the Annual Consumer Price Index announced by the United States Department of Labor for 2003.

In plain language, what the law prohibits is the licensing of funeral directors (licensed under Chapter 497, Florida Statutes, i.e., the cemetery, funeral and preneed law), direct disposers (also licensed under Chapter 497, Florida Statutes) and employees of licensed funeral establishments as life insurance agents for *general* life insurance sales. Such persons can obtain a "limited" license to sell only life insurance policies to fund preneed contracts. And, a deathcare industry licensee² can contract with a non-employee life insurance agent to sell policies in connection with the deathcare licensee's preneed contract sales. All policies contemplated under Section 626.785, Florida Statutes, must have a face value of not more than a certain figure agreed upon yearly by the relevant life insurance industry and the Office of Insurance Regulation.³

The prohibition against general life insurance sales by deathcare industry related persons is based on, in my opinion, an outdated idea that people within the community saw the local funeral director as a person of such trust and in such a status, that the funeral director would have an unfair advantage in selling life insurance to members of the community. The suggestion that the funeral director would be capable of "taking advantage" of members of the community has been successfully perpetuated by those who desire to continue the prohibition, notwithstanding efforts to the contrary.

Inasmuch, only the limited face amount policies can be sold by persons who hold Chapter 497, Florida Statutes licenses; each policy must be sold in connection with a preneed contract sale, and no policy with a face amount exceeding the agreed upon yearly figure can be used to fund a preneed contract.

The question of where such policies can be sold is one that generates much discussion within the relevant industry. Section 626.015(8), Florida Statutes, defines an "insurance agency" as "a business location at which an individual, firm, partnership, corporation, association, or other entity... engages in any activity or employs individuals to engage in any activity which by law may be performed only by a licensed insurance agent."

Prior to 2005, Florida did not license or register insurance agencies, *per se*; rather, the foregoing definition of "insurance agency" alone drove the analysis. An insurance agency was any place at which a licensed insurance agent sold insurance policies. Therefore, a person holding the limited life insurance agent's license, discussed above, was able to sell insurance within a funeral establishment (and, arguably, to share commissions with the funeral establishment), because the funeral establishment was, by definition, an insurance agency.

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However, when the agency licensing law became effective, notwithstanding that a funeral establishment or other deathcare licensee's establishment at which insurance sales occur falls squarely into the definition of an insurance agency, the Division of Agent and Agency Services confused the industry with a back and forth position on whether funeral establishments must obtain agency licensure when sales of life insurance policies to fund preneed contracts occur there. Since 2005, the Division of Agent and Agency Services' Frequently Asked Questions webpage has changed positions on whether a deathcare licensee's location need be licensed as an insurance agency. In years past, the answer posted was that no agency licensing was required. Currently, although the FAQ page answers the question correctly as to the requirement of agency licensing, it goes on to make a wholly inaccurate statement. The FAQ excerpt reads:

If a funeral director or direct disposer, or an employee of a funeral establishment that holds a certificate of authority under Florida Statute 497.058 is licensed to sell life insurance policies covering the expense of funeral services and products, does the funeral establishment have to be licensed or registered as an insurance agency? Yes. Every location where an insurance agent engages in the business of insurance is an insurance agency and every insurance agency is required under Florida Statute 626.112 (7) (a), to obtain an insurance agency license or registration. There is no exemption for agents that work at funeral establishments or for agents that work for any other business that primarily engages in business transactions unrelated to insurance such as banks and securities broker-deals.

However, per Florida Statute 626.785(1)(d), a life insurance agent that is not affiliated with a funeral establishment may obtain a preneed license with the Bureau of Funeral and Cemetery and may contract with a funeral establishment to sell a preneed contract, "...limited policies of insurance covering the expense of final disposition or burial of an insured in the amount of \$12,500..." Therefore, per Florida Statute 626.112(7)(a), the life insurance agent would be required to obtain an insurance agency license or registration, there are no exemptions for agents that contract with funeral establishments.⁴

The second paragraph, beginning with "However," is simply incorrect. A person that is not affiliated with a Chapter 497, Florida Statutes licensee may *not* obtain a preneed license. Chapter 497, Florida Statutes, limits preneed sales to those entities that can fulfill the preneed contracts once sold. In other words, an entity cannot sell "pre-need" that which it cannot deliver "at-need."⁵ What the FAQ is attempting to convey is that a person holding a life insurance agent's license can be appointed by a preneed licensee to serve as a *preneed sales agent*, even if the person is not an employee of the preneed licensee, and the person can then sell preneed contracts and life insurance policies to fund such contracts.⁶

Ultimately, the FAQ reaches the correct conclusion; i.e., that each location at which insurance sales occur must be licensed as an insurance agency. Some funeral related sales programs operate solely within funeral establishments. In those scenarios, one deathcare sales establishment is licensed as the agency, and other establishments, owned by the same or a corporately related entity, are licensed as branch agencies of the agency.⁷ The same licensed agent may be "in charge" of the agency and the branch agencies, so long as insurance is only transacted at each location when an insurance agent is present.⁸ Other funeral related sales programs require that all insurance policy sales occur outside of the funeral home in an unlicensed location, such as the consumer's home or a retirement community gathering place. No insurance agency licensure is required for programs that operate in that manner, of course.

Preneed Contract/Life Insurance Policy Sale Transaction

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With forms and rates approved, agent and agency licensing in place, preneed contract related life insurance sales can commence. The Florida “insurance” regulators (OIR and A&A) have historically taken a hands-off approach to market conduct issues related to these sales in the absence of consumer complaints, which are infrequent for the reasons discussed below.

The DFCCS promulgated an administrative rule many years ago addressing preneed contracts funded by life insurance. Rule 69K-8.005, Florida Administrative Code,⁹ sets forth the requirements imposed on deathcare licensees that sell preneed contracts to be funded by life insurance policies. The rule also reaches the life insurers that prepare preneed contracts for use by deathcare licensees that offer the insurer’s policies as preneed contract funding vehicles.

The rule requires that the preneed contract, funded by a life insurance policy, notify the purchaser of the contract that complaints should be addressed to the DFCCS using the address and telephone number included on the preneed contract. Therefore, consumers’ complaints regarding the life insurance funded preneed contracts are typically addressed by the DFCCS before they become market conduct issues for the life insurer. And, it is noteworthy that such complaints are very infrequent as confirmed by representatives of the DFCCS.

Final Expense Life Insurance

Sales of final expense life insurance policies are regulated by the OIR and by A&A but not by the DFCCS. In fact, the trickiest part of final expense life insurance sales is the mandatory disconnect between the final expense policy sale and the deathcare industry on which the policy proceeds will ultimately be spent. Before addressing that difficulty, however, one preliminary issue requires attention.

Approval of Forms and Rates

The final expense policy forms and rates must, of course, be reviewed and approved by the OIR. The face amount of the policy is not limited by Section 626.785, Florida Statutes, as it is for policies sold in connection with preneed contracts.

The “only” issue of significance regarding final expense policies is similar to the issue discussed above regarding the designation of a funeral home as beneficiary of the policy. Because a final expense life insurance policy is sold independently from funeral arrangements, it is not appropriate to designate a funeral provider as the beneficiary of the policy. Additionally, as described more fully below, an assignment of the policy benefits to a funeral provider should not be made in conjunction with a final expense sale, as it contradicts the required disconnection between insurance sale and funeral.

Final Expense Related Market Conduct Inquiries

Market conduct issues related to final expense life insurance policy sales are rare. Those that have occurred in recent years relate mainly to the potential confusion of consumers, which can be the result of presentations for final expense sales referring to deathcare businesses and pricing. Other inquiries have been the result of office arrangements between agents and deathcare licensee locations.

The A&A interprets Section 626.785(1)(d), Florida Statutes, set forth above, to prohibit an agent selling final expense policies from maintaining an office within a deathcare licensee’s location. Put simply, final expense sales agents may not maintain an office within a funeral home or cemetery office. Stated even more broadly, a final expense agent should not make or return calls to potential insureds or engage in final expenses related tasks from within a deathcare licensee’s location.

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Also addressed within the unfair trade practices law, Section 626.9541(1)(t), Florida Statutes, is the following:

2. No life insurer shall:
 - a. Affix, or permit to be affixed, advertising matter of any kind or character of any licensed funeral director or direct disposer to such policies of insurance.
 - b. Circulate, or permit to be circulated, any such advertising matter with such insurance policies.
 - c. Attempt in any manner or form to influence policyholders of the insurer to employ the services of any particular licensed funeral director or direct disposer.
3. No such insurer shall maintain, or permit its agent to maintain, an office or place of business in the office, establishment, or place of business of any funeral director or direct disposer in this state.

Guidelines for Insurers Selling Final Expense Policies

As a result of the market conduct inquiries, some insurers have established guidelines for their agents selling final expense policies. Sometimes, the agents are the same agents that sell the policies discussed above as independently contracted preneed sales agents for preneed licensees, and, thus, providing such agents with clearly delineated rules for final expense sales versus preneed contract related sales is important.

Suggested guidelines include, but certainly are not limited to, the following:

- The agent must clearly inform the potential insured that the policy can be “used” at the funeral home of the customer’s choosing.
- The agent’s presentation must not refer to any funeral home, specifically.
- The agent’s presentation must not refer to the prices of any funeral home, specifically. Instead, community-average pricing figures can be utilized to assist with the determination of an appropriate amount of insurance.
- No assignment of benefits to any funeral establishment should be made at the time of the policy sale.

The key to lawful final expense sales is that they are completely disconnected from any specific deathcare provider (funeral home or cemetery).

Conclusion

Whether selling life insurance to fund a preneed contract being entered into, or for use by the insured’s family to cover the insured’s final expenses, the regulatory schemes imposed on licensees doing business in the funeral related insurance sales arena are anything but simple.

Endnotes

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1. U.S. Census Bureau: State and County QuickFacts. Data derived from Population Estimates, American Community Survey, Census of Population and Housing, State and County Housing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Survey of Business Owners, Building Permits, Consolidated Federal Funds Report (<http://quickfacts.census.gov/qfd/states/12000.html>; January 17, 2012)
2. The law refers only to a “funeral establishment,” but it has been interpreted to reach other Chapter 497, Florida Statutes, deathcare licensees. Put another way, there is an unwritten agreement among deathcare industry members and insurance regulators that only the limited face amount policies described within Section 626.785(3), Florida Statutes, may be sold in conjunction with a preneed contract written under Chapter 497, Florida Statutes.
3. For 2012, the agreed upon face amount of such policies is \$15,625.
4. Department of Financial Services, Agent and Agent Services, Frequently Asked Questions #49 (www.myfloridacfo.com/Agents/Licensure/General/index_FAQ.htm; June 1, 2012).
5. There is no need herein to fully describe the complex regulatory scheme for preneed sales set forth within Chapter 497, Florida Statutes, but it bears mentioning that the most significant requirement for a preneed license is that the entity also have a “qualifying license,” which is the license which entitles the entity to provide at-need services to families (i.e., cemetery, funeral establishment or direct disposal establishment license). Section 497.452(3), Florida Statutes.
6. A preneed sales agent may be appointed by more than one preneed licensee. Section 497.466(7), Florida Statutes.
7. See Section 626.172(2)(d), Florida Statutes and Department of Financial Services, Agent and Agency Services, Frequently Asked Question #17 (www.myfloridacfo.com/Agents/Licensure/General/index_FAQ.htm; June 1, 2012).
8. See Section 626.172(2)(e), Florida Statutes and Department of Financial Services, Agent and Agency Services, Frequently Asked Question #27 (www.myfloridacfo.com/Agents/Licensure/General/index_FAX.htm; June 1, 2012). Note that Frequently Asked Question #28 generates further confusion among entities establishing insurance funded preneed contract sales programs. The FAQ reads:
If a branch location does not hold its self out as being a location where insurance is being transacted but only to serve as a place for the agent (from a licensed or registered location) to meet with consumers with whom the agent has made a prior appointment, does the branch have to be licensed or registered? If the location is not a business, or is a business that engages in commerce other than the business of insurance (such as a restaurant) and does not hold itself out as being a place where a consumer can go to purchase insurance but may serve as a place for an agent to meet with consumers with whom the agent has made a prior appointment, the location is not an insurance agency and would not be required to have an agency license or registration.

If the location is a branch office of a business that is required to be licensed or registered but for whatever reason the branch office is not licensed or registered, the branch office can not advertise or contain signage or other indicia of being a business that engages in activity as an insurance agency. In addition, an agent from the licensed or registered agency could not have an office in the unlicensed location or be available to solicit or otherwise transact insurance at the unlicensed location with anyone other than an individual with a prior appointment with the agent. The agent cannot transact any other insurance at the location that is unrelated to the customer with the prior appointment.

It is my opinion that utilization of the nuance of this law is unnecessarily risky for the affected licenses

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(appointing life insurer and deathcare), especially since insurance agency licensure is FREE, and the addition of branch licenses to the agency's license is done very simply online.

9. 69K-8.005 Preneed Contracts Funded by Life Insurance

(1) A preneed contract may be funded by a life insurance policy payable upon death of the preneed contract beneficiary, provided that no such policy may be sold if its maturity value is less than the amount of the services, merchandise or burial rights to be provided under the preneed contract. For purposes of this rule, maturity value shall mean the amount payable on the policy when all premiums for the policy have been paid, or all conditions for full payment of the policy amount have been met, and must at least equal the cost to the preneed purchaser of the services, merchandise, or burial rights established at the time the preneed contract is executed.

(2) Preneed contracts funded by life insurance may be sold only by persons holding a valid preneed license pursuant to Section 497.452, F.S.

(3) Any insurance policy used to fund a preneed contract must be sold in a manner that complies with Section 626.785, F.S.

(4) All preneed contracts funded by insurance must meet the requirements of Section 497.282, F.S., and with regard to Section 497.282(8), F.S., the contract must contain the following provisions:

(a) Disclosure of the purchase price, itemized to reflect the specific costs allocated to each service, cash advance or merchandise purchased. Where applicable, merchandise specifications shall be included;

(b) Disclosure that a life insurance policy has been purchased to fund the monies needed for some or all of the purchase price and will be used to fund the contract at the time of the purchaser's death in one of the following ways:

1. The life insurance policy proceeds will constitute the full payment for the contract purchase price at purchaser's death; or

2. Where the insurance will constitute only a portion of the full payment for the purchase price at purchaser's death, the contract shall clearly disclose that the purchaser has an obligation to pay the difference between the proceeds of the life insurance and the purchase price of the prearranged funeral.

(c) A clear disclosure that no funds are being paid into trust under the preneed contract and that the funding of the contract is through the payment of premiums to purchase life insurance;

(d) What penalties will occur in the event purchaser fails to make premium payments on the funding insurance policy;

(e) A clear disclosure of the impact upon the preneed contract and any penalty to be incurred or monies to be received as a result of cancellation or surrender of the life insurance policy;

(f) That all purchasers are entitled to terminate or cancel their preneed contract at any time and that all purchasers are entitled to terminate or cancel the funding insurance policy within 30 days of purchase and receive a full refund of all monies paid for the contract or funding insurance policy;

(g) The following statement in bold print: **The Board of Funeral, Cemetery, and Consumer Services regulates preneed contracts in Florida. Should you have a complaint, you should contact the Board at the Division of Funeral, Cemetery, and Services, 200 East Gaines Street, Tallahassee, Florida 32399-0361 or by calling (800) 323-2627.**

(5) All preneed contracts shall be sequentially prenumbered.

(6) Each preneed licensee shall identify all insurance products currently used in connection with the sale of its preneed contracts. Such identification shall be provided in list format to be kept on file at the Board office.

The identification shall include the following information for each insurance product listed:

(a) Name and address of insurer;

(b) Form number of master insurance policy;

(c) Form number of any accompanying endorsements, riders, and application forms.

(d) Evidence of approval by the Florida Office of Insurance Regulation.

(7) The Board may request for reference purposes a sample copy of any insurance policy or accompanying forms it does not currently have on file.