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August 21, 1986

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THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Gregersen:

You have inquired whether the "Price Guaranteed Funeral Service Contract," a copy of which is attached, may be lawfully sold in Idaho. Based on the information provided, it is our preliminary opinion that the contract is unlawful.

The contract is intended to be used between a Purchaser and a Seller. The Purchaser agrees to finance the contract by obtaining a policy of whole life and/or annuity insurance from and paying premiums to American Guaranty Life. The Seller, who must be a "funeral home," agrees to provide various goods and funeral services upon the death of a Beneficiary named by the Purchaser. The "funding vehicle" for this pre-paid funeral service plan is the insurance policy under which the Purchaser assigns all rights to policy benefits over to the Seller. The contract contains provisions that American Guaranty Life is not a party to the contract, is not responsible for its validity and is held harmless for all payments made under it.

The "professional services" to be provided by the funeral home upon the death of the beneficiary include:

First call--no additional charge within a 50 mile radius
Preparation of necessary papers
Securing legal certificates and permits

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Memorial record booklet
Acknowledgement cards
Insurance forms and government forms
Receive, identify and display floral offerings
Arrange music
Complete embalming and preparation
Professional, technical restoration work
Cosmetology and hair dressing
Funeral coach
Flower car
Limousine
Transportation of necessary equipment for church services
State room or reposing room
Chapel
Religious and fraternal paraphernalia

The Purchaser agrees to pay the Seller a "gross amount" for these funeral goods and services, as well as for "merchandise" (i.e., a casket and vault) and for a "contingency fund" to "defray additional expenses for services and merchandise not provided by SELLER funeral home." A "discount" is then applied to arrive at the "net cash price."

The goods and services to be provided by the Seller "upon the death of the Beneficiary" are quite plainly within the statutory language defining "mortician services." Idaho Code § 54-1102. That definition includes:

- (1) Caring for or preparing dead human bodies for burial disposal.
- (2) Disinfecting or preparing dead human bodies by embalming, or otherwise, for funeral service, transportation, burial or disposal.
- (3) Directing or supervising the burial or disposal of dead human bodies.
- (4) Arranging for funeral services for dead human bodies.
- (5) Selling funeral supplies to the public.
- (6) Conducting, directing or supervising a funeral service.
- (7) Arranging for or selling mortician services to the public.

Under Idaho Code § 54-1103(A), it is unlawful "for any person to perform, offer to perform or hold himself out as performing mortician services or any of the acts of a mortician, unless he shall first obtain a mortician license or resident trainee license as provided in this act; . . ." Thus, it would clearly be

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unlawful for any person to contract to provide the package of goods and services outlined in the Price Guaranteed Funeral Service Contract unless that person were a licensed mortician. Anyone offering to provide such services who is not a licensed mortician would be guilty of violating the Mortician Act and could be enjoined by the local district court from engaging in such conduct. Idaho Code § 54-1127.

Assuming that the Seller offering to provide funeral services under the Price Guaranteed Funeral Services Contract is a licensed mortician, the contract must still comply with the provisions of the statutes governing "advance funeral agreements." Idaho Code §§ 54-1122 to 1125. Two important provisions of the statute appear to be violated by the contract you have submitted for analysis.

First, Idaho Code § 54-1122 provides that "all money paid, directly or indirectly thereto, shall be held in trust for the purpose for which it was paid until the obligation is fulfilled according to its terms; . . ." The "trustee" of such money must be a "bank, trust company or savings institution in the State of Idaho insured with the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation; . . ." Idaho Code § 54-1123. According to the contract, the agreement is funded by paying premiums on the underlying insurance policy with American Guaranty Life Insurance Company. No provision is made for depositing such premium payments in trust with a "trustee" authorized to act as such under Idaho Code § 54-1123.

Second, Idaho Code § 54-1124 provides cancellation rights to the beneficiary as follows: "the said agreement shall further provide that the beneficiary or his duly appointed guardian may, in writing, demand the return of the money, together with accrued interest, if any, less costs incurred in the operation of such trust. . . ." The contract you have provided does not comply with this requirement. On the contrary, if a Purchaser cancels the contract after the first thirty (30) days, "an amount up to the legal limit representing liquidated damages may be retained by 'Seller/Assignee'." The "legal limit" of these "liquidated damages" is not specified; neither is there any express provision for accruing of interest or for payback of accrued interest to the beneficiary upon demand.

It is our preliminary opinion, therefore, that the Price Guaranteed Funeral Services Contract violates the "advance funeral agreements" provisions of the Idaho Code, which provisions have been expressly upheld by the Idaho Supreme Court in Messerli v.

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Monarch Memory Gardens, Inc., 88 Idaho 88, 397 P.2d 34 (1964). Our opinion is preliminary because we have not been provided with a copy of the underlying insurance policy or seen the full package of signed documents (including, perhaps, additional written modifications as provided for under section 9 of the contract).

Assuming that the legal principles outlined above have in fact been violated, the board may take disciplinary action against any licensed mortician or funeral director, under Idaho Code § 54-1116. That section provides that the board may suspend or revoke the license of any mortician or funeral director who engages in "unprofessional conduct," which is defined to include:

(3) Solicitation of dead human bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs before death or after death;

(4) Employment by the licensee of persons known as "cappers," or "steerers," or "solicitors," or other such persons to solicit or obtain agreements with the public for the performance of mortician services;

(6) The direct or indirect payment, or offer of payment, of a commission by the licensee, his agents, assistants, or employees for the purpose of securing business;

(10) Violation of any of the provisions of this act;

(15) Violation of any statutes of any state having to do with prearrangement or prefinancing of mortician services or funeral supplies.

The contract in question here might also violate the particular prohibition in Idaho Code § 54-1116(15) against "solicitation or acceptance, directly or indirectly, or a request, before need to provide mortician services or funeral supplies at a price less than that offered by such person to others at time of need; . . ." We have not been provided with sufficient detail to make such a judgment at this time. Nor have we analyzed the Price Guaranteed Funeral Services Contract for possible violations of the Idaho Consumer Protection Act or of applicable insurance laws.

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In addition to the disciplinary actions available to the board against licensed morticians and funeral directors, the Mortician Act also provides more stringent remedies. Whether licensed or not, individuals who knowingly violate the law may be charged criminally under Idaho Code § 54-1128. Finally, injunctive relief against continuing violations is available from the local district court. Idaho Code § 54-1127.

If our office can be of further assistance, please contact us.

Sincerely,



JOHN J. McMAHON
Chief Deputy

JJM/tkg