

SPOTLIGHT

Laws Concerning Segregating Guaranteed and Nonguaranteed Price Contracts and Statutorily Required Price Contract Language

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The Prepaid Funeral and Cemetery Sales Act (the “Act”), MCL 328.211 *et seq.*, and its administrative rules regulate prepaid funeral and cemetery contract sales transactions. The Corporations, Securities and Commercial Licensing Bureau within the Department of Licensing and Regulatory Affairs (the “Department”) administers the Act. A “prepaid contract” is a “contract requiring payment in advance for funeral or cemetery services or merchandise, physical delivery and retention of which would occur after death under a guaranteed price contract or a nonguaranteed price contract.” MCL 328.215(d). The Act requires that all prepaid contracts be either guaranteed or nonguaranteed. MCL 328.220.

Guaranteed Price Contracts

A prepaid contract is guaranteed if the price of the contract is a

. . . fixed price for which specified merchandise or funeral or cemetery services are required to be sold to or made available for a contract buyer or for a contract beneficiary, regardless of the cost or value of the merchandise or funeral or cemetery services at the time of death of the contract beneficiary. MCL 328.214(g).

No additional consideration is charged for the originally contracted for merchandise or funeral or cemetery services at the time of delivery of the services. *Id.*¹

Nonguaranteed Price Contracts

Unlike a guaranteed price contract, a nonguaranteed price contract does not obligate the contract beneficiary’s estate or authorized representative to purchase the specific services selected in the contract or expend a specific amount for funeral or cemetery services. MCL 328.215(a). However, if a prepaid contract is nonguaranteed, the contract must clearly indicate that it is nonguaranteed, and that the actual costs of merchandise or funeral and cemetery services delivered at the time of death may be greater or less than the amount of principle and income in the escrow account. MCL 328.225(7).

A Prepaid Contract Must be One or the Other

Because a prepaid contract must either be a guaranteed price contract or nonguaranteed price contract, a prepaid contract may not offer both guaranteed and nonguaranteed merchandise or services within the same contract. Rather, a prepaid contract must either be guaranteed or nonguaranteed in its entirety. The guarantee provided by the contract seller in a guaranteed price

¹ The Act states that contract sellers and providers may not serve as escrow agents under a guaranteed price contract, MCL 328.222(4)(b), but may serve as the escrow agent under a nonguaranteed price contract. MCL 328.222(4)(a).

contract is that “additional consideration is not charged for the originally contracted for merchandise or funeral or cemetery services at the time of delivery of the merchandise or funeral and cemetery services.” MCL 328.214(g). While in a nonguaranteed price contract, the contract buyer is put on notice that no such guarantees are made. MCL 328.225(7). Accordingly, to comply with the Act, guaranteed price contracts must not contain nonguaranteed items that would charge the contract beneficiary’s estate or authorized representative additional consideration for merchandise or services at the time of the delivery. *Id.*

Required Language

Not only is it imperative that all prepaid contracts comply with the above-mentioned provisions, but they must also contain the requisite language regarding cancellation of contracts, prices or quotation of prices, and commission charged, if any. MCL 328.225; *see also* 16 CFR §453.

Under section 15(3) of the Act, all prepaid contracts must include the statement:

. . . [A] contract buyer may revoke the prepaid contract within 10 business days after entering into the prepaid contract and that upon revocation, all funds paid to the contract seller or provider shall be refunded. MCL 328.225(3).

This provision must be conspicuously placed in the contract immediately before the place where the contract buyer signs his or her name. *Id.* Additionally, the Act requires a prepaid contract to have the following language:

This contract may be canceled either before death or after death by the buyer or, if the buyer is deceased, by the person or persons legally authorized to make funeral or cemetery arrangements. If the contract is canceled, the buyer or the buyer's estate is entitled to receive a refund of ____% of the contract price and any income as required by law. MCL 328.225(4).

Prepaid contracts must also include the following language immediately after the above disclosure:

After the death of the contract beneficiary, the contract buyer or the contract buyer's estate may cancel the prepaid contract only where there are no remains of the deceased; where the remains of the deceased cannot be recovered; or where a prepaid contract was not utilized due to lack of knowledge by the person or persons entitled to make funeral arrangements of the existence of the prepaid contract . . . Mich Admin Code, R 339.23.

The prepaid contract must then specify the refund provisions contained in sections 13(1) and (2) of the Act, as appropriate. ²

² The refund provision of section 13(1) requires that an escrow agent refund at least 90% of the principal and income held in escrow if no commission was charged; 95% of the principal and income if a 5% or less commission was

If a commission is charged by a contract seller, the prepaid contract must state the amount of commission paid to the contract seller, and that such commission is a charge in addition to the prepaid funeral contract price. MCL 328.225(4). This disclosure must be in boldfaced type. *Id.* Please note that a contract seller or provider may only charge an additional commission of not more than 10% of the contract price, which is not subject to the depository requirements of section 12 of the Act. MCL 328.222(3).

The Department strongly encourages every registrant under the Act to review all language in the prepaid contracts it uses to ensure compliance with the above provisions and consult with their own legal counsel. Sample contracts may also be available through the Michigan Funeral Directors Association, www.mfda.org.

charged; and 100% of the principal and income if greater than 5% commission was charged. MCL 328.223(1). If the cancellation was for a contract containing cemetery merchandise escrowed under section 12(2) of the Act, 100% of the amount of the contract price must be refunded, plus an amount equal to any increase in the Detroit consumer price index.