

**Texas Department of Banking
Testimony**

**Testimony Presented To Texas House Of Representatives Financial
Institutions Committee By Catherine A. Ghiglieri, Commissioner, Texas
Department of Banking**

Date: March 11, 1997

H.B. 1843 by Marchant Sale of Prepaid Funeral Services or Funeral Merchandise
TEX. REV. CIV. STAT. ANN. Art. 548b (Vernon Supp. 1996)

LOVERVIEW OF LAWN CRYPT REGULATION:

The Department of Banking regulates preneed funeral sales and perpetual care cemeteries, among other industries. The Department has joint jurisdiction over the regulation of prepaid funeral contracts with the Texas Department of Insurance and the Texas Funeral Services Commission. However, it is the only state regulator of cemeteries in Texas, although its jurisdiction is limited to perpetual care cemeteries.

Over the past few years, the Department has found that some cemeteries engage in deceptive trade practices by selling lawn crypts on a prepaid basis to the consumer at a high price, and delivering a much cheaper concrete box at the time of death.

A lawn crypt is an underground outer burial receptacle constructed in multiple units of at least ten, which contains a drainage system for heightened moisture control.

Lawn crypts are at all times cemetery merchandise under Chapter 711 of the Texas Health & Safety Code. All other outer burial containers sold on a preneed basis are prepaid funeral merchandise regulated under Article 548b of Vernon's Texas Civil Statutes. Unfortunately, neither the prepaid funeral laws nor the perpetual care cemetery laws define a "lawn crypt" with specificity. As a consequence, without corrective legislation, the Department is seriously hampered in regulating the sale of preneed products that are not true lawn crypts and in protecting the consumer from these deceptive trade practices.

Companion bills, HB 1915 and HB 1843, have been filed to rectify the problems the Department has identified in the sales of lawn crypts. Under HB 1915 and HB 1843, lawn crypts that are constructed and installed according to express criteria will be cemetery merchandise under Chapter 711; merchandise sold on a prepaid basis that does not meet these specifications will be prepaid funeral merchandise under Article 548b. Article 548b requires consumer payments to be placed in trust or used to purchase insurance. Since, in fact, no cemetery uses insurance funding for this purpose, all further references to prepaid funeral funding in this testimony will be to trust funding. assuring funds are available to pay for funeral services or, as in this case, funeral merchandise, at the time of need.

Many Texas consumers have complained to the Department that state regulations relating to lawn crypts are ineffective and that they have lost money, without meaningful recourse, to fraudulent practices. Unfortunately, this is true. However, the proposed statutory changes would rectify this situation and enable the Department to better protect the consumer's interests in this area.

A. Lawn Crypt Problems

Deceptive trade practices in the cemetery industry involve distinctions between lawn crypts, which are fabricated and installed according to well-established industry standards. In 1974, the Department of Banking adopted an order. This order, styled "Order Promulgating Certain Rules and Regulations under Section 2 of Article 548b," was entered after a public hearing attended by members of the cemetery industry. The order sets out criteria for fabricating and installing lawn crypts. Although this order was not binding after adoption of the Administrative Procedure and Texas Register Act in 1975, most cemeteries have followed the criteria it sets out. These criteria have, by and large, become the accepted industry standard.

and other outer burial containers, e.g., concrete boxes, which, when sold preneered, are not required to meet these standards. Detection of lawn crypt violations is difficult because families rarely disturb grave sites once the deceased is buried. However, as a result of the Department's routine examinations of cemeteries and reports from whistle-blowers and consumers, the Department has documented several examples of deceptive trade practices relating to the sale of lawn crypts.

One of these involves a cemetery's representation that its lawn crypts have been pre-installed according to the Department's guidelines when, in fact, it has no lawn crypts at all. A cemetery often shows the purchaser a marketing brochure of the drainage systems of a true lawn crypt; the cemetery also represents that its "crypts" provide a means of moisture control. The purchaser is generally told to select any location in the cemetery for his lawn crypt site. At burial, however, the cemetery merely places the coffin in a concrete box that is set in the grave site shortly before the service. This scam has proven lucrative for cemeteries that use it, especially when the practice goes undetected for many years: lawn crypts typically sell for about \$800 to \$1,000 each, whereas a concrete box sells for about \$250 to \$450.

The Department has been able through "moral suasion" to convince these cemeteries to provide corrective options to purchasers. These options have included: 1) refunding the lawn crypt purchase price; 2) providing the purchaser with a lawn crypt in a true lawn crypt section; 3) delivering an outer burial container as prepaid funeral merchandise and trusting the applicable funds; 4) or providing some combination of these options.

In one case, however, a cemetery that sold non-existing lawn crypts was placed in receivership. Unfortunately, the prior owner had spent cemetery funds, and there was no money available to correct the problem. The new owner has agreed to provide purchasers with a concrete box at the time of death. Although this arrangement has helped alleviate the problem, in this instance purchasers have still paid far more for an inferior product than it is worth.

One cemetery has a small pre-existing lawn crypt garden that is always fully submerged by water. Prior to a funeral service in this section, the water is pumped to keep mourners from seeing that the grave site is submerged and that a proper drainage system is not in place. Currently, this cemetery is providing its lawn crypt purchasers with the option of accepting a refund of the purchase price or a true lawn crypt in a new section the cemetery has built.

B. Ineffectiveness of Current Statutes

Currently, statutory law is unclear. Neither Article 548b nor the Health & Safety Code defines "lawn crypt" sufficiently for the Department to adequately regulate the prepaid sale of other types of outer burial containers. Not only does Article 548b fail to define lawn crypt, it specifically excludes lawn crypts from the definition of prepaid funeral merchandise. Furthermore, the definition of lawn crypt in Chapter 711 is vague and does not specify the criteria of the industry-wide standard. Chapter 711 defines "lawn crypt" as "a subsurface concrete and reinforced steel receptacle installed in multiple units for burial of human remains." Therefore, if a lawn crypt is sold on a prepaid basis, but a concrete box is delivered, the Department has no clear authority to require the cemetery to obtain a prepaid funeral permit, trust funds collected from the purchaser, and deliver the merchandise sold or reimburse the consumer.

As a consequence, a cemetery can sell anything meeting the limited definition in Chapter 711 as a lawn crypt. In essence, the consumer's only recourse would be through a private suit against the cemetery (which would prove too costly) or a class-action suit brought by the Attorney General's Office under the Deceptive Trade Practices Act.

C. Benefits Derived from Proposed Statutory Amendments

HB 1915 expressly defines "lawn crypt;" and HB 1843 references the definition of "lawn crypt" in the Health and Safety Code and gives the term the same meaning for purposes of Article 548b. Both bills provide definitions of "lawn crypts" that set uniform standards for cemeteries regarding the fabrication and installation of lawn crypts. If enacted, there will be a number of benefits to industry and the consumer. First, all cemeteries will be on the same playing field. Furthermore, industry will benefit from the elimination of potential liability problems associated with the sale of lawn crypts. Additionally, if the Department determines that a cemetery has sold prepaid funeral merchandise (e.g., a concrete box) as a lawn crypt, we can require the cemetery to obtain a prepaid funeral permit and trust prepaid funds for the protection of the purchaser and provide the purchaser with other options to make him whole. In fact, where it is necessary, the Department can require a cemetery to take corrective action using statutory enforcement actions, e.g., civil-money penalties and cease-and-desist orders. Finally, and of great importance, consumers will be more likely to get the product that they purchase.

II. OVERVIEW OF INVESTMENT LIMITATIONS:

The second section of HB 1843 concerns the investment limitations of prepaid funeral trust funds. Section 5A of Article 548b, outlines how trust funds from preneed funeral contracts should be invested. A written investment plan is required with an annual review. Limitations are outlined on the instruments in which trust funds can be invested. For example, investment in state or local government bonds is restricted to those with a rating of AA or better; preferred

stock must be rated Baa or BBB or better; corporate bonds must be rated A or better; and investment in common stock of companies is restricted to those with net worth in excess of \$1 million.

There are also percentage limitations which restrict the investment of trust funds to no more than 10% in real estate, oil and gas interests, or limited partnerships; and no more than 20% in a single issue of any investment, except insured deposits and government securities.

One section concerning percentage limitations is currently the subject of a lawsuit between the Department and Restland of Dallas and is the impetus for this amendment of the statute. The statute states:

At no time may more than 70% of the prepaid funeral benefits trust funds related to a single permit holder be invested in:

- (1) bonds, evidences of indebtedness,
OR [Emphasis added]
- (2) common or preferred stock

The Department has taken the view that the 70% relates to investment in both bonds and common/preferred stocks. Restland takes the view that 70% can be invested in bonds and 70% in stocks.

The proposed amendment in HB 1843 gives the Commissioner the ability to waive the limitation regarding the percentages if she concludes that the waiver does not threaten an unreasonable risk of loss to the trust funds. This amendment would settle the lawsuit and would give the Department some flexibility in this area without endangering the safety of the trust funds. The provisions for timely action by the Commissioner and the hearing provisions parallel those in the Banking Act passed in the last legislative session.

III. CONCLUSION

Enactment of HB 1843 and HB 1915 will help protect the public from deceptive trade practices related to lawn crypts. With a clear definition of a lawn crypt, purchasers are more likely to receive a lawn crypt that is properly fabricated and installed. In addition, adoption of these amendments will formalize the department's policy, in place for more than 20 years, recognizing that lawn crypts which meet industry-wide standards are cemetery merchandise under the Health and Safety Code and recognizing other merchandise as prepaid funeral merchandise that is regulated under Article 548b. Enactment of HB 1843 will also give discretion to the Commissioner in granting exceptions to the percentage limitations regarding the investment of prepaid funeral trust funds where the Commissioner concludes that the waiver does not threaten an unreasonable risk of loss to the trust funds. This would settle current litigation between the Department and the industry and would provide flexibility in investment practices.

Thank you for the opportunity to appear before this committee.