STORAGE NAME: h0991.ba.doc
DATE: March 16, 2001

HOUSE OF REPRESENTATIVES
COMMITTEE ON
BANKING
ANALYSIS

BILL #: HB 991

RELATING TO: Preneed Funeral Contracts

SPONSOR(S): Representative(s) Mayfield

TIED BILL(S): HB 1399

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) BANKING
(2) GENERAL GOVERNMENT APPROPRIATIONS
(3) COMPETITIVE COMMERCE COUNCIL
(4)
(5)

I. SUMMARY:

To protect the financial and often emotional investment consumers make when they contract for preneed funeral and cemetery services and merchandise, Ch 497, F.S., requires the establishment of trust funds or the procurement of surety bonds relating to the receipt of funds from such contracts. This bill repeals the authority to procure any type of surety bond as an alternative to the trusting requirements of Ch. 497, F.S., for preneed contracts written after July 1, 2002. The bill provides language to address the maintenance of surety bonds written prior to that date until the obligations the bonds are to cover are fulfilled, however, a portion of the language may be in conflict with other provisions of the bill.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [X]
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes []	No []	N/A [X]
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

For any principle that received a “no” above, please explain:

B. PRESENT SITUATION:

To protect the financial and often emotional investment consumers make when they contract for preneed funeral and cemetery services and merchandise, Ch 497, F.S., requires the establishment of trust funds or the procurement of surety bonds relating to the receipt of funds from such contracts. Chapter 497, F.S., also establishes a methodology by which specified cemeteries must set aside a portion of the cost of their services in a trust to provide for perpetual care and maintenance of gravesites.

Section 497.405, F.S., requires all persons who may sell a preneed contract for services, merchandise or burial rights, to apply to the board for a valid certificate of authority, but makes very specific exemptions for trust institutions receiving funds in trust for the sale of a preneed contract, certain qualified Florida corporations, and certain churches offering specific preneed services that are located in counties with less than 960,000 in population on July 1, 1996. Section 497.407, F.S., requires each certificateholder to pay a one-time fee at an amount set by the board, not to exceed $10, for each preneed contract entered into no later than 60 days after the end of each quarter. Fees are paid to the DBF and deposited into the Regulatory Trust Fund.

Section 497.417, F.S, requires all persons who collect funds under a preneed contract for funeral services or merchandise to deposit a prescribed amount of the monies collected into a trust account. These monies may not be used as loans to certificate holders or their affiliates nor can they be used as collateral.

In 1987, the Internal Revenue Service ruled (Ruling 87-127) that in certain situations where preneed contract purchasers retained some control and dominion over funds held in trust relating to their contracts, they would have to be provided with Form 1099s on an annual basis and they would be responsible for paying income tax on the earnings accrued on those funds. In 1988, the Florida Legislature amended Ch. 639, F.S., which governed preneed funeral and cemetery services contracts to provide an alternative to the trusting requirements so that the funeral or cemetery company could be responsible for the tax on those assets. The provisions of former Ch. 639, F.S., were subsequently revised under Ch. 497, F.S.

One of the statutorily provided alternatives to establishing a preneed contract trust fund (s. 497.423, F.S.) allows a certificateholder to petition the Department of Banking and Finance’s Board of Funeral and Cemetery Services to secure a surety bond in a prescribed amount. The bond must be conditioned in a way as to secure the “faithful performance of all conditions of any preneed contracts" the certificateholder is required to have covered by the bond. This includes refunds that are requested by consumers under certain conditions. The bond must also guarantee the financial responsibility of the company against defaults arising out of fulfilling preneed contracts. These types of surety bonds are commonly referred to as "performance bonds" because they must guaranty the performance of the service for which the preneed purchaser contracted.

Another alternative to the trust requirement id provided in s. 497.425, F.S. This section of the statutes provides that certificateholders may purchase a surety bond in a amount not less than the aggregate value of outstanding liabilities on undelivered preneed contracts for merchandise and services. These bonds are to be secured annually, and coverage increased or decreased depending on changes in the outstanding liabilities. These types of bonds are commonly known as "payment bonds" because the contract purchaser can file a claim against the surety company for payment. The bond must be maintained or the certificateholders must stop selling preneed contracts. In some cases, with board approval, a certificateholder may file a letter of credit in lieu of a surety bond.

Section 497.429, F.S., provides another alternative to the trusting agreements required on behalf of preneed contract purchasers. Under this section of the statutes, a certificate holder can establish a trust on behalf of the purchaser. In this instance, the certificateholder does not have any dominion or control over the trust or its assets until the contract has been fulfilled. Section 497.429, F.S., does provide for use of 10 percent of the funds collected or paid, 10 percent of liquidated damages, and for the cancellation of contracts under certain circumstances. Since earnings from the trust assets could have federal income tax implications for the purchaser, this section requires preneed contracts governed by this section to contain information relating to this tax implication.

At the current time, DBF reports that in excess of $1,045,133,629 in preneed trust funds are maintained by approximately 330 certificateholders; four certificateholders, pursuant to s. 497.425, F.S., have payment-type surety bonds of approximately $160,890,000 covering preneed contracts; and two certificateholders, pursuant to s. 497.425, F.S., have board-approved letters of credit. There are currently no companies with performance-type surety bonds held pursuant to 497.423, F.S. The department further reports that one licensee using a surety bond reorganized under Chapter 11 in July of 2000, and came out of bankruptcy in December of that year. To date, the department says that no claims against surety companies have been filed against certificateholders for failure to deliver merchandise and services upon need. Finally, the department reports that five certificate holders have failed to deposit sufficient funds in trust.

One provision for taking funds out of trust is that the merchandise contracted for has been delivered. Section 497.337(2), F.S., provides parameters for when merchandise and services may be considered delivered. Permanent outer burial receptacles that are delivered to the cemetery company may only be considered "delivered" if they are stored in a protected environment so that they won't deteriorate prior to the time the purchasers need them. For sales to cemetery companies and funeral establishments and only those sales, paragraph (2)(c) of s. 497.337, F.S., allows a manufacturer that has FCS board approved merchandise to elect to comply with the provisions of this section by annually submitting to the board proof of its financial responsibility, as established by the provisions in ss. 497.423, and 497.425, F.S.

C. EFFECT OF PROPOSED CHANGES:

See SECTION-BY-SECTION.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 repeals subsection (5) of s. 497.417, F.S., relating to the authority given to a preneed funeral and cemetery services contract seller/certificateholder to revest in itself title to trust assets or its pro rata share of such assets if it has procured a surety bond under s. 497.423, F.S., or s. 497.425, F.S. Removing this alternative to the trust relationship between purchaser and seller will most likely result in sellers no longer paying the income tax on earnings of the trust, but rather issuing IRS form 1099's to each purchaser of preneed contracts for individual reporting of this income.

Section 2 amends s. 497.429, F.S., conforming a reference to the subsection repealed (s.497.417(5), F.S.,) in section 1 of this bill.

Section 3 repeals ss. 497.423, and 497.425, F.S., which relate to provisions authorizing certificateholders to procure surety bonds to cover either performance of all services and merchandise contracted for or the aggregate outstanding liabilities on undelivered preneed contracts for funeral and cemetery services and merchandise. This repeal will be effective July 1, 2002. Because the surety bonds procured under s. 497.425, F.S., are annual and maintainable only for the year in which they exist, no new bonds could be procured after the effective date if this section of the statutes no longer exists.

Section 4 provides that surety bond [agreements] entered into pursuant to s. 497.423, F.S., prior to July 1, 2002, are to remain unimpaired until all the obligations secured pursuant to s. 497.423(7), F.S., are fulfilled. With the repeal of s. 497.423, F.S., this provision reinstates the requirement that performance-type bonds allowed under s. 497.423, F.S., prior to July 1, 2002, must be maintained by the company, unimpaired. This section of the bill then prohibits the writing of any new preneed contracts unless the trusting agreements required under s. 497.417(1), F.S., or s. 497.429, F.S., are fulfilled. Since there are no bonds written under s. 497.423, F.S., repealing this section would only impact certificateholders who wanted to have this alternative to trusting available for future contracts.

This section then provides that surety bond [agreements] entered into pursuant to s. 497.425, F.S., prior to July 1, 2001, are also to remain unimpaired until all the obligations secured under that section of the statutes are fulfilled, and that all the requirements relating to such obligations, provided under subsection (1) of s. 497.425, will remain in effect for those obligations until they are fulfilled. Unlike performance-type bonds that operate off of a one-time agreement, payment-type surety bonds under s. 497.425, F.S., are annually renewed based on the amount of the aggregate outstanding liabilities and not based on the situation of each individual preneed contract. Consequently, it is unclear as to how new agreements could be secured if the sections of the statutes authorizing this practice are repealed.

Finally, this section provides that no preneed contracts written after July 1, 2002, may be secured by the surety bond alternative to trusting provided for in s. 497.425, F.S.

Sections 5 and 6 state the language of ss. 497.423 and 497.425, F.S., that are being repealed.

Section 7 repeals, effective July 1, 2002, s. 497.337(2)(c), F.S., s. 497.409(2), F.S., and s. 497.427, F.S., which reference ss. 497.423 and 497.425, F.S. One of these sections, s. 497.337(2)(c), F.S., also provides for the delivery of certain goods and services by manufacturers of permanent outer burial receptacle merchandise. Repealing this whole paragraph would impact current requirements for consideration of delivery of merchandise, which would then impact certain abilities to withdraw funds from trust accounts.

Sections 8 and 9 conform ss. 497.413 and 497. 429, F.S., by removing references to repealed ss. 497.423 and 497.425, F.S.

Section 10, provides that this act will take effect July 1, 2001, unless otherwise specified.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

As reported by the Department of Banking and Finance, there are four funeral and cemetery service companies, which have procured annual surety bonds under s. 497.425, F.S. Should these companies have to restructure their financial situations to return the required amount of funds to trust accounts by July 1, 2002, it could cause severe financial hardship on such companies, subsequently putting at risk the investments of their customers.

Without the alternatives to trusting, IRS Ruling 87-127 would cause preneed contract purchasers to be responsible for the tax on trust assets.

D. FISCAL COMMENTS:

N/A

III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority the counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The title of HB 991 expresses that this bill is relating to preneed funeral contracts, when in fact, the bill addresses preneed contracts for cemetery merchandise and services. Consequently, it could be perceived that the title does not meet the constitutional requirement that "…the subject of the bill be briefly expressed in the title."(Article III, Section 6, Florida Constitution)

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VI. SIGNATURES:

COMMITTEE ON BANKING:

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