

## **Arkansas Code Unannotated – Title 23 Subtitle 2**

### **Chapter 40 - Sale of Prepaid Funeral Benefits**

#### **23-40-101. Short title.**

This chapter shall be known as the "Arkansas Prepaid Funeral Benefits Law".

#### **23-40-102. Purpose.**

The purpose of this chapter is to provide for the regulation of the sale of prepaid funeral benefits by the Insurance Commissioner.

#### **23-40-103. Definitions.**

As used in this chapter, unless the context otherwise requires:

- (1) "Cash accommodation items" means flowers, honorariums, death certificates, sales taxes, grave opening and closing, cemetery charges, and other items incidental to the funeral and disposition of the beneficiary which are to be furnished or provided by a third party at the time of death;
- (2) "Contract beneficiary" means any natural person designated in a prepaid funeral benefits contract upon whose death funeral services or funeral merchandise, or both, shall be performed, provided, or delivered;
- (3) "Contract price" means the aggregate moneys to be paid and the aggregate stated value of all other direct or indirect consideration to be assigned by purchasers of prepaid funeral benefits as provided in the contract, exclusive of any finance charge;
- (4) "Contract proceeds" means the portion of the contract price collected by the seller from a contract for the sale of prepaid funeral benefits;
- (5) "Licensee" or "permittee" means a person holding a valid permit or license issued pursuant to this chapter;
- (6) "Liquid investments" means investments which can be sold at cost or greater, liquidated without penalty, and collected within five (5) banking days;
- (7) "Net investment income" means:
  - (A) All revenue and earnings of the trust fund, including, but not limited to, interest, dividends, and capital gains; minus
  - (B) Investment expenses, trustee's fees, capital losses, and all revenue and earnings on cash accommodation funds;
- (8) "Net worth" means the difference between the applicant's total assets and total liabilities as reflected in a balance sheet prepared in accordance with accounting principles and procedures approved by the Insurance Commissioner;
- (9)
  - (A) "Prearrangement" means an arrangement whereby a person, for himself or on behalf of some other person, makes arrangement for funeral and burial services prior to the death of the person, without consideration and without an agreement or itemization specifying any particular service or merchandise, or the cost thereof, through the assignment or transfer, including the conditions that the assignor or transferor may choose to impose, of ownership to a licensee of an insurance policy or annuity contract,

or proceeds thereof, or by the designation of a licensee as insurance policy or annuity contract, or proceeds thereof, or by the designation of a licensee as beneficiary of any such insurance policy or annuity contract.

- (B) An assignment of an insurance policy or annuity or the proceeds thereof to a funeral home or the designation of a funeral home as beneficiary as described in subdivision (9)(A) of this section is not a prepaid funeral benefits contract;
- (10) "Prepaid funeral benefits contract" or "prepaid contract" means a contract or agreement for the prepayment and sale in this state of funeral services or funeral merchandise, including caskets, grave vaults, and all other articles of merchandise and services incidental to funeral services, at an agreed-upon price, to be delivered at an undetermined future date depending upon the death of the contract beneficiary. It does not include a prearrangement;
- (11) "Seller" means the organization selling prepaid funeral benefits or owning any interest in any contract for prepaid funeral benefits pursuant to this chapter;
- (12) "Surplus" means the funds or other property in excess of the undistributed net investment income and aggregate contract proceeds held in the trust fund; and
- (13) "Trustee" means a state or national bank or savings and loan association in this state, or, in the reasonable discretion of the Insurance Commissioner upon the terms and conditions that he may require, a securities brokerage firm licensed and in good standing with appropriate state and federal regulatory authorities.

#### **23-40-104. Arkansas Insurance Code not affected.**

Nothing in this chapter shall apply to any licensed insurance company or alter or affect any provisions of the Arkansas Insurance Code.

#### **23-40-105. Burial associations exempted.**

Nothing in this chapter shall apply to organizations or associations operating in this state as burial associations pursuant to § 23-78-101 et seq.

#### **23-40-106. Violations -- Penalties.**

- (a)
  - (1) Any officer, director, agent, or employee of any organization subject to the terms of this chapter who makes, or attempts to make, any contract in violation of this chapter, or refuses to allow an inspection of the organization's records shall be punished by a fine of not less than one thousand dollars (\$1,000) and not more than ten thousand dollars (\$10,000), or by imprisonment in the county jail for not fewer than six (6) months and not more than twelve (12) months, or by both fine and imprisonment.
  - (2) Any officer, director, agent, or employee of any organization who collects contract proceeds on cash-funded prepaid funeral contracts and fails to deposit such funds with a trustee as required under § 23-40-114 shall be guilty of a Class D felony. A person convicted of a violation of § 23-40-114 shall be ordered to pay restitution to persons aggrieved by the violation. Restitution shall be ordered in addition to a fine or imprisonment.

- (b) Each violation of any provision of this chapter shall be deemed a separate offense and prosecuted individually.
- (c) The Criminal Investigation Division shall have jurisdiction to investigate and prosecute any officer, director, agent, or employee of any organization who collects contract proceeds on cash-funded prepaid funeral contracts and fails to deposit such funds with a trustee as required under § 23-40-114.

**23-40-107. Division of Prepaid Funeral Benefits -- State Insurance Department Prepaid Trust Fund.**

- (a) The Insurance Commissioner shall be responsible for the regulation of the sale of prepaid funeral benefits, and there is hereby established the Division of Prepaid Funeral Benefits within the State Insurance Department. This division shall be funded annually by the fees required to be paid by organizations subject to this chapter, which shall be placed in trust and disbursed pursuant to this chapter.
- (b) There is hereby established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State a fund to be known as the "State Insurance Department Prepaid Trust Fund" to be used to pay the expenses of the State Insurance Department in the discharge of its regulation of prepaid funeral benefits contracts.
- (c) No money shall be appropriated from this fund for any purpose other than to pay for personal services, operating expenses, maintenance and operations, and support of and improvements to the division, except as provided in § 23-40-119(f).
- (d) The fund established pursuant to this section shall be administered, disbursed, and invested under the direction of the commissioner and the Treasurer of State.
- (e) All income derived through the investment of the fund, including, but not limited to, interest and dividends, shall be credited as investment income to the fund.
- (f) All income derived through grants, refunds, and gifts to the fund shall be credited as income to the fund.
- (g) All moneys deposited to the fund shall not be subject to any deduction, tax, levy, or any other type of assessment, except as provided in this chapter.
- (h) All fees required to be paid by licensees pursuant to this chapter shall be deposited into the fund for the support, operation, and maintenance of the division and, when paid into the State Treasury by the commissioner, shall be maintained by the Treasurer of State as the State Insurance Department Prepaid Trust Fund, separate from all other funds, and available only for the payment of the expenses of the division, except as provided in § 23-40-119(f).
- (i) Upon proper voucher from the commissioner, the Auditor of State shall issue his or her warrant on the Treasurer of State in payment of all salaries and other expenses incurred by the division, or for any reparations awarded under § 23-40-119(f) in the administration of this chapter.
- (j) However, as needed, the commissioner shall transfer from the State Insurance Department Prepaid Trust Fund to the Prepaid Funeral Contracts Recovery Program Fund a sum or sums sufficient to administer and provide reparations to persons as provided under § 23-40-119 (d)(1)(A) and (f)(1). to administer and provide reparations to persons as provided under § 23-40-119 (d)(1)(A) and (f)(1).

**23-40-108. Administration.**

- (a) This chapter shall be administered by the Insurance Commissioner.
- (b) The commissioner is authorized to prescribe reasonable rules and regulations concerning keeping and inspection of records, the filing of contracts and reports, and all other matters incidental to the orderly administration of this chapter.
- (c) The commissioner is authorized to employ the personnel necessary to carry out the provisions of this chapter and to fix their compensation within the amounts made available by appropriation.
- (d) The commissioner may make and promulgate reasonable rules and regulations for the administration of this chapter and for the purpose of carrying out the intent hereof.

**23-40-109. Permit required.**

- (a) Any individual, firm, partnership, corporation, society, association, or other entity, hereinafter called an "organization", desiring to sell prearranged or prepaid funeral services or funeral merchandise, including caskets, grave vaults, and all other articles of merchandise incidental to funeral services, in this state under a sales contract providing for prepaid disposition or funeral benefits or merchandise to be delivered at an undetermined future date depending upon the death of a contracting party, hereinafter called "prepaid funeral benefits", or any organization desiring to purchase an interest in, or assume the liability of, any contract for prepaid funeral benefits, shall obtain a permit from the Insurance Commissioner authorizing the transaction of this type of business before entering into any such agreement or contract and prior to accepting money, property, or any other direct or indirect consideration and shall first apply for and obtain a prepaid funeral benefits permit or license pursuant to the provisions of this chapter.
- (b) An organization desiring to sell prepaid funeral benefits or otherwise own any interest in any contract for prepaid funeral benefits shall file proof of ownership of an establishment which is in the business of providing the funeral goods or services to be contracted for and proof that the establishment is duly authorized and licensed to do such business in the State of Arkansas.
- (c) It shall be unlawful to sell prepaid funeral benefits unless the seller holds a valid, current permit at the time the contract is made.

**23-40-110. Application for initial or renewed permit.**

- (a) Each organization desiring to sell prepaid funeral benefits or any organization desiring to purchase an interest in or assume the liability of any contract for prepaid funeral benefits shall file an application for a permit with the Insurance Commissioner. Each initial and renewal application for a permit shall contain such information which the commissioner by rule or regulation shall reasonably prescribe.
- (b) Each applicant shall, at the time of the application, pay a filing fee of three hundred dollars (\$300) for the initial application and two hundred dollars (\$200) for a renewal application.
- (c) Permits shall expire on June 1 of each year, unless a renewal application is filed with and approved by the commissioner prior to the permit expiration date. Each organization which has discontinued the sale of prepaid funeral benefits, but which still has outstanding

contracts, shall obtain a renewal of its permit until all those contracts have been performed or otherwise fully discharged. No filing fee shall be prorated.

- (d)
- (1) Each applicant for a permit pursuant to the provisions of this chapter shall, as of a date not preceding thirty (30) days of the application date, have a net worth in an amount equal to the greater of five thousand dollars (\$5,000) or three percent (3%) of the aggregate contract price of all contracts for prepaid funeral benefits outstanding and unfulfilled as of the end of the preceding calendar year, up to a maximum net worth of two hundred fifty thousand dollars (\$250,000).
  - (2) Each applicant shall, at the time of application, file a sworn and notarized certification of net worth form stating that the applicant satisfies the net worth requirements of this chapter, in a format as prescribed by the commissioner, as evidence that the applicant has, at a minimum, the required net worth.

### **23-40-111. Issuance of permit -- Cancellation or denial.**

- (a)
- (1) The Insurance Commissioner may issue a permit conditioned upon satisfactory completion of all requirements of this chapter prior to the applicant's offering for sale or selling prepaid funeral benefits.
  - (2) In addition, prior to the issuance of either an initial or renewal permit, the applicant must be deemed by the commissioner to be competent, trustworthy, and financially responsible to engage in the sale of prepaid funeral contracts in this state.
- (b)
- (1) The commissioner may deny an initial application for failure to meet the requirements of subsection (a) of this section or for the applicant's failure to comply with any material provision of this chapter or any valid rule and regulation that the commissioner has prescribed, after:
    - (A) Thirty (30) days' notice to the applicant or permittee setting forth the grounds for the cancellation, the denial of application for initial permit, or refusal to renew; and
    - (B) A hearing if the applicant or permittee requests a hearing.
  - (2) After notice to the licensee and after a hearing, the commissioner may suspend any permit under this chapter for up to thirty-six (36) months or may revoke or refuse to continue any permit under this chapter if the commissioner finds that:
    - (A) The licensee has failed to comply with any material provision of this chapter or any valid rule and regulation or order that the commissioner has prescribed;
    - (B) The licensee has obtained its permit through misrepresentation or fraud;
    - (C) An officer, director, or owner of the licensee has improperly withheld, misappropriated, or converted any moneys or properties received in the course of prepaid funeral contracts business to the licensee's own use;
    - (D) An officer, director, or owner of the licensee has been found to have committed any unfair trade practice or fraud during the course of prepaid funeral contracts business;
    - (E) The licensee has failed to provide a written response after receipt of a written inquiry from the commissioner or his or her representative as to transactions under the license within thirty (30) days after receipt thereof unless the commissioner or

his or her representative knowingly waives the timely response requirement in writing;

- (F) The licensee has refused to be examined or produce any of his or her accounts, records, and files for examination or has failed to cooperate with the commissioner in an investigation when requested by the commissioner or his or her representative; or requested by the commissioner or his or her representative; or
  - (G) The licensee is in violation of any grounds under § 23-40-114(a) sufficient to subject the organization to delinquency proceedings.
- (3)
- (A) If the commissioner finds that one (1) or more grounds exist for the suspension or revocation of any license, the commissioner may impose upon the licensee an administrative penalty in the amount of up to one thousand dollars (\$1,000) per violation.
  - (B) If the commissioner finds willful misconduct or willful violation on the part of the licensee, the commissioner may impose upon the licensee an administrative penalty of up to five thousand dollars (\$5,000) per violation.
  - (C) In addition to either penalty imposed under subdivision (b)(3)(A) or (B) of this section, the commissioner may also order restitution of actual losses to affected persons.
- (4) If the commissioner finds in his or her order that the public health, safety, or welfare imperatively requires emergency action, the commissioner may summarily suspend any license issued by him or her but shall promptly hold an administrative hearing regarding the suspension.
- (5)
- (A) Upon notice and hearing, if the commissioner finds that the licensee has violated a provision of the prepaid funeral benefits laws of this state or any rule, regulation, or order of the commissioner and that the licensee has previously violated provisions of the prepaid funeral benefits laws of this state or any rule, regulation, or order of the commissioner, the commissioner may:
    - (i) Take judicial notice of previous orders against the licensee; and
    - (ii) Enhance or increase the penalties ordered in the current proceeding against the licensee.
  - (B) The commissioner may enter an order under subdivision (b)(5)(A) of this section by:
    - (i) The commissioner's own order; or
    - (ii) An order entered with the consent of the parties.
  - (C) The commissioner shall incorporate a finding under subdivision (b)(5)(A) of this section in any order issued under this subdivision (b)(5).
- (c) Any person aggrieved by the action of the commissioner may appeal therefrom to any state court of competent jurisdiction.

#### **23-40-112. Sales contracts for prepaid funeral benefits.**

- (a) The Insurance Commissioner shall approve forms for sales contracts for prepaid funeral benefits.
- (b) All contracts for sale of prepaid funeral benefits must be in writing and must set forth the specific merchandise and services to be provided by the seller and the contract price.

- (c) All forms of sales contracts for prepaid funeral benefits shall contain the provisions incidental to the orderly administration of this chapter as set forth in the rules as prescribed by the commissioner. No contract form shall be used without prior approval of the commissioner.
- (d)
  - (1) All contracts for sale of prepaid funeral benefits shall provide that the seller shall furnish to the buyer the merchandise and services as set forth in the contract at the contract price, regardless of the cost of the merchandise or services at the date of the beneficiary's death.
  - (2) However, the seller shall not be required to furnish at the contract price other items incidental to the funeral and disposition of the beneficiary that are clearly identified in the contract as cash accommodation items. The seller may charge the difference between the cash accommodation fund balance, including accrued interest, and the market price of the cash accommodation items as of the date of the beneficiary's death. In the event the total funds on deposit shall exceed the market price of the cash accommodation items, the seller shall return the excess to the buyer or his or her estate.
- (e) The seller shall not be entitled to enforce a contract made in violation of this chapter, but the purchaser, or his or her heirs, or his or her legal representative shall be entitled to recover all amounts paid to the seller under any contract made in violation hereof.
- (f)
  - (1) This chapter shall not prohibit the assignment or transfer of insurance contracts as consideration for prepaid funeral benefits furnished in accordance with the provisions of this chapter or the designation of an organization licensed pursuant to the provisions of this chapter as beneficiary of a funeral expense or other insurance policy.
  - (2) Such an assignment, transfer, or designation shall not be deemed to be a prepaid contract.
- (g) The prepaid contract shall contain a provision in substantially the following form:  
NOTICE: If this contract is irrevocable and you choose to transfer this contract to a substitute provider, the entire amount of the contract will not be transferred and you may have to pay more to obtain 100% of the services provided for in the contract.
- (h) Each seller shall provide advance written notice to the contract purchaser that the seller intends to procure a single payment whole life insurance policy or annuity on the contract beneficiary to fund the prepaid funeral benefit contract for less money than the total amount of the cash payment if:
  - (1) The prepaid funeral benefits contract was originally intended by the contract purchaser to be fully paid in cash; and
  - (2) The amount of the single premium payment to the insurer by the seller is less than the cash payment provided to the seller by the contract purchaser.

**23-40-113. Change of ownership.**

- (a) The seller shall apply for change of ownership or control when:
  - (1) The seller transfers all or a portion of the interest in any contract for prepaid funeral benefits;
  - (2) The seller transfers one (1) or more of its establishments for providing funeral goods or services;

- (3) All or a portion of the equity ownership of a seller has been transferred which will result in a change of:
  - (A) The controlling interest of a seller when the seller is a corporation;
  - (B) Ownership of a seller when the seller is other than a corporation;
- (4) The seller transfers all of its business assets relating to providing funeral goods or services; or
- (5) The seller terminates its business of providing funeral goods or services.
- (b) At least fifteen (15) days prior to the proposed occurrence of an event described in subsection (a) of this section, the seller shall file a verified change of ownership application with the Insurance Commissioner which shall contain the following:
  - (1) The name and address of the seller;
  - (2) The name and address of the organization proposing to acquire property of the seller, hereinafter referred to as the "transferee";
  - (3) A description of the property and of the proposed transaction, as set forth in subsection (a) of this section;
  - (4) An accounting of the trust fund and all outstanding contracts, which accounting shall contain all the information required in the annual report, prepared as of a date within thirty (30) days of the required application filing date;
  - (5) Any required documents or amendments thereto relating to the trust fund;
  - (6) A copy of any notice proposed to be sent to the contract buyers after the transfer;
  - (7) A filing fee of five hundred dollars (\$500); and
  - (8) Any other information which may reasonably be required by the commissioner pursuant to rule or order.
- (c) The commissioner shall approve the seller's application for change of ownership by written authorization if:
  - (1) The transferee or transferees set forth in the application hold a valid, current permit pursuant to the provisions of this chapter;
  - (2) The accounting required is complete, accurate, and reflects the trust fund whole and intact; and
  - (3) All required information and documents are filed with and approved by the commissioner.
- (d) The commissioner shall have the authority by rule or order to waive or reduce any or all of the requirements contained in subsection (b) of this section as not being necessary or appropriate in the public interest or for the protection of the contract buyers.
- (e) The seller, or interest therein, shall remain liable for all funds and transactions to the effective date of the transfer. The commissioner shall recover from the seller, for the benefit and protection of contract buyers, all contract proceeds which the seller has not properly accounted for and deposited into the trust fund.

**23-40-114. Trust funds -- Creation -- Deposits, withdrawals, and transfers of funds.**

- (a) All contract proceeds collected under contracts for prepaid funeral benefits, including funds collected under contracts entered into before June 28, 1985, shall be deposited with a trustee within twenty (20) business days after receipt of proceeds, to be held, invested, and administered in a trust fund for the benefit and protection of the contract purchasers pursuant to this chapter.

- (b) Each trust fund shall be created by a letter or written agreement which shall be filed with and approved by the Insurance Commissioner prior to placement of funds.
- (c) The seller may deposit money or property as surplus at any time.
- (d) The commissioner shall prescribe by regulation proper affidavits and forms for the withdrawal of funds from the trust fund.
- (e) The commissioner shall first approve and authorize in writing any transfer of funds from an existing trustee to a proposed new trustee if the proposed new trustee meets the requirements of this chapter and the rules and regulations promulgated thereunder.
- (f) The licensee shall file a request for a transfer of funds, together with a filing fee of two hundred fifty dollars (\$250), and any other information required by rule or regulation.
- (g) This section shall not apply to the proceeds of insurance policies or contracts, and it shall not be necessary to establish a trust for the payment of such proceeds to the beneficiary designated in the policy or contract or the assignee or transferee thereof.
- (h) Pending a promptly scheduled hearing, the commissioner or his or her authorized representative may immediately suspend or prohibit disbursements or withdrawals from the trust fund by an organization if the commissioner or his or her authorized representative determines that the organization has violated § 23-40-114(a) in a manner sufficient to subject the organization to delinquency proceedings.

**23-40-115. Trust funds -- Investments.**

- (a)
  - (1) The trustees shall invest the trust fund only in the following:
    - (A) Demand deposits, savings accounts, certificates of deposit, and all other accounts which are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation;
    - (B) Bonds and obligations which are insured by, fully guaranteed as to principal and interest by, and due from the United States government or any of its agencies, including the Federal National Mortgage Association and the Government National Mortgage Association, and any repurchase obligations which are secured by any of the foregoing;
    - (C)
      - (i) Corporate, state, municipal, or political subdivision bonds or obligations which are rated Aa or better by Moody's or AA or better by Standard & Poor's rate services; or
      - (ii)
        - (a) Bonds of any school district in this state.
        - (b) Provided, however, no more than thirty percent (30%) of the total trust assets may be invested in such school bonds; and
    - (D)
      - (1) Mutual funds or common trust funds whose portfolio is made up of investments that are described in subdivisions (a)(1)(A)-(a)(1)(C) of this section.
      - (2) Investments described in subdivisions (a)(1)(B)-(a)(1)(D) of this section shall be purchased and held by the trustee which has trust powers under a trust agreement filed with and approved by the Insurance Commissioner.

- (b) The trustee shall maintain the trust fund in a manner consistent with the following investment policies:
- (1) Not less than one hundred thousand dollars (\$100,000) of the trust fund shall be invested in investments described in subdivision (a)(1) of this section. However, if the total amount of the trust fund is less than one hundred thousand dollars (\$100,000), then all of the trust fund shall be invested in investments described in subdivision (a)(1) of this section;
  - (2) The trust fund shall contain at all times liquid investments having a cost basis not less than thirty percent (30%) of the total contract proceeds disbursed from the trust fund as described in § 23-40-116(1)-(3) during the preceding calendar year;
  - (3) No investment shall be sold, exchanged, or liquidated at less than its cost if it would result in the aggregate cost basis of the trust fund minus undistributed net investment income being less than the aggregate amount of contract proceeds held in the trust fund. However, this prohibition shall not the aggregate amount of contract proceeds held in the trust fund. However, this prohibition shall not apply if the seller contemporaneously deposits with the trustee a sum of money or other property in an amount equal to the loss realized upon the sale, exchange, or liquidation of such investment; and
  - (4) The portion of the contract proceeds collected for cash accommodation items pursuant to the terms of a contract shall be deposited in a separate account which shall be clearly identified as "cash accommodation funds" and shall set forth the name of the contract buyer. All income earned on the cash accommodation funds shall become a part of the principal of the respective accounts.

**23-40-116. Trust funds -- Disbursements.**

The trustee shall disburse money or other property from the trust fund only as follows:

- (1) Upon the death of the contract beneficiary and upon proper proof and documentation being submitted to and approved by the Insurance Commissioner, or pursuant to such other method as may be permitted under valid rules and regulations adopted by the commissioner, in which event the contract proceeds shall be paid to the seller;
- (2) Upon cancellation of the prepaid contract pursuant to § 23-40-122 and upon proper proof and documentation being submitted to and approved by the commissioner, or pursuant to such other method as may be permitted under valid rules and regulations adopted by the commissioner;
- (3) Upon the breach of contract by either party, in which event the contract proceeds shall be paid according to a judgment of a court of competent jurisdiction; or
- (4) Upon the withdrawal of net investment income or surplus by the seller, which may be made at any time and from time to time.

**23-40-117. Trust funds -- Exemption from attachment, etc.**

- (a) All contract proceeds held in trust pursuant to the provisions of this chapter and all income derived therefrom shall be exempt from attachment, garnishment, execution, and claims of creditors, receivers, or trustees in bankruptcy. The trust fund shall not be seized, taken, appropriated, or applied to pay any debt or liability of the seller by any legal or equitable process or by operation of law.

- (b) The seller shall notify the Insurance Commissioner within ten (10) days upon the filing of bankruptcy or upon becoming insolvent. Upon receipt of notification, the commissioner shall notify the trustee of the trust fund, and all income earned after that date shall be held in trust by the trustee and disbursed only upon the direction of the commissioner.

**23-40-118. Agent for deposit of contract proceeds.**

- (a) Each organization subject to this chapter shall designate an agent or agents, either by names of the individuals or by titles of their offices or positions, who shall be responsible for the deposit of contract proceeds collected under contracts for prepaid funeral benefits. The organization shall notify the Insurance Commissioner of the designation within ten (10) days after it becomes subject to this chapter and shall also notify the commissioner of any change in the designation within ten (10) days after the change occurs.
- (b) If any person acting on behalf of the seller collects any contract proceeds under a contract for prepaid funeral benefits and fails to deliver it within ten (10) days after collection to a designated agent, or if any designated agent fails to deposit the contract proceeds within twenty (20) days after receipt of proceeds, he or she shall be punished as prescribed in § 23-40-106(a)(2).

**23-40-119. Annual report and fee.**

- (a) Each organization shall file an annual report and an annual report fee with the Insurance Commissioner on or before March 15 of each year in such form as the commissioner may require, showing the:
  - (1) Names or account numbers, or both, of all persons with whom contracts for prepaid funeral benefits have been made prior to January 1 of that year that had not been fully discharged on January 1;
  - (2) Date of contract;
  - (3) Name of the trustee holding the trust fund; and
  - (4) Amount in the trust fund under each contract on the preceding December 31.
- (b) If any officer of any organization fails or refuses to file an annual report or to cause it to be filed within thirty (30) days after he or she has been notified by the commissioner that the report is due and has not been received, then, upon a finding of such failure by a court of competent jurisdiction, he or she shall be guilty of a violation.
- (c)
  - (1) Effective on and after March 15, 1997, the annual report fee shall be based on the total amount of aggregate contracts for prepaid funeral benefits outstanding and unfulfilled as of December 31 of each year and shall be payable at the time the annual report is filed.
  - (2) The fee shall be based on the following schedule and shall be payable to the State Insurance Department Prepaid Trust Fund:
- (d)
  - (1) (A) (i) (a) Effective for all prepaid funeral benefits contracts executed on and after April 1, 1997, each licensee selling a prepaid funeral benefits contract shall remit to the State Insurance Department a one-time per-contract fee of not less than five dollars (\$5.00) for each prepaid funeral benefits contract, including any amendments thereto, entered into by the licensee, whether cash or trust



- (B) Determined by either the commissioner or a state or federal court of competent jurisdiction to have fund account deficiencies.
- (2) Purchasers of prepaid funeral contracts requesting any discretionary relief from the Prepaid Funeral Contracts Recovery Program Fund after July 1, 2001, may include the contract holder or his or her surviving family representative or such other person as described in rules and regulations of the department.
- (3) The commissioner may by rule and regulation describe the procedures, claim forms, qualifications, and process of filing a claim for aggrieved purchasers desiring to make a claim for reparations from any excess funds.
- (4) No purchaser is provided in this section with any administrative right or legal or equitable right to any funds collected from fees collected under this section to satisfy any judgment or economic loss of the purchaser from a prepaid funeral organization, except to the extent that the commissioner, in his or her discretion, has set aside funds to provide discretionary relief to purchasers of prepaid funeral contracts from insolvent prepaid funeral organizations or those organizations with trust fund account shortages, and subject to limits of the Prepaid Funeral Contracts Recovery Program Fund and the claimant's actual contract payments made, excluding additional damages or interest or other equitable relief, or noneconomic damages.

**23-40-120. Records required -- Examination.**

- (a) Each organization which has outstanding contracts for prepaid funeral benefits shall maintain within this state any records which the Insurance Commissioner may require to enable him or her to determine whether the organization is complying with the provisions of this chapter.
- (b)
  - (1) The records shall be subject to examination by the commissioner, or his or her representatives, as often as he or she deems advisable and not less frequently than every three (3) years. However, the commissioner shall determine the date of original examination without regard to the date of the original permit.
  - (2) Each permittee examined shall pay the actual meals, hotel, and traveling expenses of each authorized examiner from Little Rock and return. The expenses shall be prorated if more than one (1) examination is made on an examination trip.
  - (3)
    - (A) All working papers, recorded information, documents, and copies produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination made under this chapter:
      - (i) Shall be treated as confidential;
      - (ii) Are not subject to subpoena; and
      - (iii) May not be made public by the commissioner or any other person, except to the extent provided in § 23-61-205.
    - (B) All working papers, financial statement analyses, ratio calculations, and any other materials produced by State Insurance Department financial examiners or analysts, or documents submitted or disclosed to the department by an insurer in response to a request from a department financial examiner or analyst during the course of

reviewing or investigating the financial solvency, condition, or affairs of the organization:

- (i) Shall be treated as confidential;
  - (ii) Are not subject to subpoena; and
  - (iii) May not be made public by the commissioner or any other person, except to the extent provided in § 23-61-205.
- (C) A recipient of information under this section other than the commissioner or department personnel must agree in writing to provide the confidential treatment required by this section prior to receiving the information, unless the prior written consent of the company to which the information pertains has been obtained.

### **23-40-122. Cancellation.**

A purchaser may cancel or transfer a prepaid contract as provided under this section, whether revocable or irrevocable, or whether cash funded or funded by insurance or an annuity, at any time prior to performance of the contract by the seller, subject to the following conditions:

- (1) In the case of a cash or trust funded prepaid contract:
  - (A) Prior to the death of the contract beneficiary, if the prepaid contract is revocable, the purchaser shall be entitled to receive a refund of not less than one hundred percent (100%) of all sums paid to the seller by the purchaser, not to exceed the contract price;
  - (B) After death, if the prepaid contract is revocable, the purchaser or his or her representative shall be entitled to receive one hundred percent (100%) of the amount paid to the seller by the purchaser, not to exceed the contract price; or
  - (C) If the prepaid contract is irrevocable, the purchaser shall not have the right to a refund of any funds paid by him or her or proceeds paid to the seller, but shall have the right to change the provider of the contract services and merchandise to a substitute provider, in which event the seller shall transfer to the substitute provider not less than one hundred percent (100%) of the amount paid to the seller by the purchaser, not to exceed the contract price;
- (2) In the case of a prepaid contract funded by life insurance:
  - (A) Prior to the death of the contract beneficiary, if the prepaid contract is revocable, the purchaser shall have the right to receive not less than one hundred percent (100%) of the cash surrender value of the policy used to fund the prepaid contract, not to exceed the premium paid by the purchaser;
  - (B) After the death of the contract beneficiary, if the prepaid contract is revocable, the purchaser or his or her designee shall be entitled to receive not less than one hundred percent (100%) of the policy proceeds paid to the seller, not to exceed the original face amount of the policy; or
  - (C)
    - (i) Prior to the death of the contract beneficiary, if the contract is irrevocable, the prepaid contract purchaser shall not have the right to a refund of any funds paid to the seller but shall have the right to change the provider of the prepaid contract services and merchandise to a substitute provider, in which event the seller shall assign or transfer to the substitute provider, as directed by the contract owner, the life insurance policy used to fund the prepaid contract or funds in an amount not

- less than one hundred percent (100%) of the cash surrender value of the policy used to fund the prepaid contract, not to exceed the premium paid by the purchaser.
- (ii) After the death of the contract beneficiary, the seller shall transfer to the substitute provider not less than one hundred percent (100%) of the policy proceeds paid to the seller, not to provider not less than one hundred percent (100%) of the policy proceeds paid to the seller, not to exceed the original face amount of the policy; or
- (3) In the case of a prepaid contract funded by an annuity:
- (A) Prior to the death of the contract beneficiary, if the prepaid contract is revocable, the purchaser shall be entitled to receive a refund of not less than one hundred percent (100%) of the annuity value, not to exceed the premium paid by the purchaser for the annuity funding the prepaid contract;
  - (B) After the death of the contract beneficiary, if the prepaid contract is revocable, the purchaser or his or her designee shall be entitled to receive not less than one hundred percent (100%) of the annuity proceeds received by the seller, not to exceed the premium paid by the purchaser; or
  - (C)
    - (i) Prior to the death of the contract beneficiary, if the prepaid contract is irrevocable, the purchaser shall not have the right to a refund of any funds paid to the seller but shall have the right to change the provider of the prepaid contract services and merchandise to a substitute provider, in which event the seller shall assign or transfer to the substitute provider, as directed by the contract owner, the annuity policy used to fund the prepaid contract, which shall be in an amount of not less than one hundred percent (100%) of the annuity value, not to exceed the premium paid by the purchaser.
    - (ii) After the death of the contract beneficiary, the seller shall transfer to the substitute provider not less than one hundred percent (100%) of the annuity proceeds received by the seller, not to exceed the premiums paid by the purchaser.

**23-40-123. Delinquency proceedings.**

- (a) The Insurance Commissioner may apply to a court of competent jurisdiction for an order appointing him in his official capacity as receiver of and directing him to conserve, rehabilitate, or liquidate a prepaid funeral benefits contracts licensee upon one (1) or more of the following grounds:
  - (1) The licensee has not maintained trust funds received from contracts in the manner required by § 23-40-114;
  - (2) The licensee has allowed its permit to lapse or be revoked in accordance with this chapter and has not made a full and complete accounting and restitution, if appropriate, of all prepaid funeral benefits contracts funds deposited with it;
  - (3) The licensee is impaired or insolvent;
  - (4) The licensee has refused to submit its books, records, accounts, or affairs to reasonable examination by the commissioner;
  - (5) The licensee or any officer, director, or manager of the licensee has refused to be examined under oath concerning the licensee's affairs;
  - (6) There is reasonable cause to believe that there has been embezzlement, misappropriation, or other wrongful misapplication or use of trust funds or fraud

affecting the ability of the licensee to perform its obligations under prepaid funeral benefits contracts sold or assumed by the licensee; or

- (7) The licensee has failed to file its annual report within the time required by law and, after written demand by the commissioner, has failed to promptly give an adequate explanation for such failure.
- (b) Circuit courts shall have original jurisdiction of all delinquency proceedings under this chapter, and any such court is authorized to make all necessary or appropriate orders to carry out the purposes of this chapter.
- (c) The venue of delinquency proceedings against a licensee shall be in the Circuit Court of Pulaski County.
- (d) Delinquency proceedings instituted pursuant to this chapter shall constitute the sole and exclusive method of liquidating, rehabilitating, or conserving a licensee, and no court shall entertain a petition for the commencement of such proceedings unless the petition has been filed in the name of the state on the relation of the commissioner.
- (e)
  - (1) The commissioner shall commence any such proceeding by application to the court for an order directing the licensee to show cause why the commissioner should not have the relief paid for in the application.
  - (2) On the return of the order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the prepaid contracts purchaser, contract beneficiaries, or the public may require.
- (f) An appeal shall lie to the Arkansas Supreme Court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every other order in delinquency proceedings having the character of a final order as to the particular portion of proceedings embraced therein.

#### **23-40-124. Compliance.**

Compliance with this act shall be required for all licensees on and after March 16, 1997.

#### **23-40-125. Prepaid Funeral Contracts Recovery Program Fund -- Created -- Prepaid Funeral Contracts Recovery Program Board -- Established.**

- (a) There is established within the State Insurance Department Prepaid Trust Fund an account to be known as the "Prepaid Funeral Contracts Recovery Program Fund", hereinafter "fund".
- (b) No money is to be appropriated from this fund for any purpose except for expenses and payment of claims of the Prepaid Funeral Contracts Recovery Program at the direction of the Insurance Commissioner and Prepaid Funeral Contracts Recovery Program Board.
- (c) The fund shall be invested under the direction of the commissioner and the Treasurer of State, with advice from the Chief Fiscal Officer of the State as needed from time to time.
- (d)
  - (1) All income derived through investment of the fund, including, but not limited to, fees, interest, and dividends shall be credited as investment income to the fund and deposited therein.

- (2)** All income derived from fund transfers, subrogation awards, grants, orders or judgments of restitution, refunds, voluntary reimbursements or restitution, and gifts shall be credited as investment income to the fund and deposited therein.
- (e)** Further, all moneys deposited into the fund shall not be subject to any deduction, tax, levy, or any other type of assessment except as may be provided in this subchapter.
- (f)**
  - (1)** The fund shall be administered by the commissioner, with advice from the Prepaid Funeral Contracts Recovery Program Board, hereinafter "board".
  - (2)** The purpose of the fund is to reimburse purchasers of preneed funeral contracts who have suffered financial loss as a result of the impairment, insolvency, business interruption, or improper inactivity of a prepaid funeral organization licensed in this state under this chapter.
- (g)**
  - (1)** From the fee for each preneed funeral contract as required by § 23-40-119(d)(1)(A) and from any funds transferred to the fund pursuant to § 23-40-119(f)(1), the commissioner with board advice and consultation shall administer the Prepaid Funeral Contracts Recovery Program.
  - (2)** The commissioner may suspend fees or unused funds transfers or deposits into the fund at any time and for any period for which the commissioner determines that a sufficient amount is available to meet likely disbursements and to maintain an adequate reserve in compliance with a rule and regulation of the commissioner.
- (h)** The commissioner with board assistance shall adopt procedures governing management of the fund, the presentation and processing of applications for reimbursement, and subrogation or assignment of the rights of any reimbursed applicant.
- (i)**
  - (1)** The commissioner may expend moneys in the fund for the following purposes:
    - (A)** To make reimbursements on approved applications; and
    - (B)** To pay related expenses involved in operating the program as permitted under state law.
  - (2)** Reimbursements from the fund shall be made only to the extent to which such losses are not bonded or otherwise covered, protected, or reimbursed, and only after the applicant has complied with all applicable rules of the fund.
- (j)**
  - (1)** The commissioner shall investigate all applications made and may reject or allow the claims, in whole or in part, to the extent that moneys are available in the fund.
  - (2)** The commissioner may approve one (1) application that includes more than one (1) reparation claim for the benefit of purchasers of prepaid contracts of a licensee ordered liquidated under § 23-40-123, as part of a plan to arrange for another licensee to assume the obligations of the licensee being liquidated, if:
    - (A)** The commissioner finds that the plan is reasonable and is in the best interests of the contract beneficiaries; and
    - (B)** The plan is approved by a court.
- (k)**
  - (1)** In the event reimbursement is made to an applicant under this section, the commissioner, on behalf of the state, shall be subrogated in the reimbursed amount and

may bring any action the commissioner deems advisable for the program against any person, including a prepaid licensee.

- (2) The commissioner may enforce any claims that the program, on behalf of the state, may have for restitution or otherwise and may employ and compensate consultants, agents, legal counsel, accountants, and any other persons that the commissioner deems appropriate. Payments shall be made from the fund for such services.

(l)

- (1) There is created the Prepaid Funeral Contracts Recovery Program Board.

(2)

- (A) Members of the board shall consist of no fewer than five (5) nor more than nine (9) members of various licensed Arkansas prepaid funeral organizations, including one (1) consumer member selected from the Arkansas public at large.
- (B) The members of the board shall be selected by member licensees, subject to approval of the commissioner.
- (C)
  - (i) Each member of the board may serve up to two (2) consecutive four-year terms.
  - (ii) Vacancies on the board shall be filled for the remaining period of the term by a majority vote of the remaining board members, subject to approval of the commissioner.
- (D) In approving selections to the board, the commissioner shall consider, among other things, whether all member licensees are fairly represented.

(m)

- (1) The board shall assist the commissioner and come under the immediate supervision of the commissioner and shall be subject to the applicable provisions of the laws of this state.

- (2) The fund, as well as board action, shall be subject to examination and regulation by the commissioner.

(3)

- (A) The board shall prepare and submit to the commissioner each year, not later than one hundred twenty (120) days after the program's fiscal year, a financial report in a form approved by the commissioner and a report of program activities during the preceding fiscal year.
- (B) Upon request of a licensed prepaid funeral organization in this state, the commissioner shall provide the member prepaid funeral organization with a copy of the report.

- (n) There shall be no liability on the part of and no cause of action of any nature shall arise against any member of the board, the commissioner, or his or her representatives, agents, or employees for any act or omission by them in the performance of their powers and duties under this chapter, or in its administration, dispensation, handling, or collection of funds for the program.

### **23-40-126. Unfair competition or unfair or deceptive acts or practices prohibited -- Penalties.**

An unfair method of competition or an unfair or deceptive act or practice under §§ 23-66-206(1)-(4), 23-66-206(6)-(8), and 23-66-207 -- 23-66-213 in the sale of a prepaid funeral benefits

contract is a violation of this chapter and may be punished under this chapter or the = Trade Practices Act, § 23-66-201 et seq.