

8006 Liberty



HENRY McMASTER  
ATTORNEY GENERAL

November 2, 2005

Mr. Louie A. Jacobs  
Commissioner of Banking  
Board of Financial Institutions  
1015 Sumter Street, Room 309  
Columbia, South Carolina 29201

Dear Mr. Jacobs:

You asked for an opinion whether purchasers of preneed funeral contracts that have suffered a covered loss may be reimbursed from the Preneed Funeral Loss Reimbursement Fund ("Fund") when the death triggering the reimbursement claim occurred prior to the effective date of the enabling legislation. 2004 Act No. 188, codified at S.C. Code Ann. § 32-7-60 (Supp. 2004) ("Act"), established the Fund effective March 17, 2004 ("Effective Date").

The Fund reimburses losses by the beneficiaries ("Beneficiaries") of preneed funeral contracts that result from the misfeasance, fraud, default, failure, or insolvency of a South Carolina funeral home or South Carolina funeral director. The Act is silent about its application when the decedent died prior to the Effective Date.

#### Law/Analysis

The legal presumption is that legislation applies prospectively rather than retroactively unless the General Assembly expressed clear intent to the contrary. Thus, there is a question of whether coverage exists when the decedent died prior to the Effective Date.

"[T]he primary purpose of statutory construction is to ascertain the intent of the legislature." *State v. Martin*, 293 S.C. 46, 48, 358 S.E.2d 697, 697 (1987). "In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific

Mr. Louie A. Jacobs  
November 2, 2005  
Page Two

provision in the enactment or clear legislative intent to the contrary." S.C. Dept. of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000).

Remedial or procedural statutes provide an exception to the rule of prospective application. "A principal exception to the ... presumption [of prospective effect] is that remedial or procedural statutes are generally held to operate retroactively." Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). In Smith v. Eagle Const. Co. Inc., 282 S.C. 140, 318 S.E.2d 8 (1984), the Supreme Court of South Carolina commented upon the "remedial" exception as follows:

Statutes are remedial and [retroactive], in the absence of directions to the contrary, when they create new remedies for existing rights ... enlarge the rights of persons under disability, and the like, unless [they] violate some contract obligation... Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts."

282 S.C. at 143, 318 S.E.2d at 9, citing Byrd v. Johnson, 220 N.C. 184, 16 S.E.2d 843, 846 (1941).

The Act states that:

The purpose of the fund is to reimburse the estates, or in the absence of an estate filing, the purchaser or applicant with payment jointly to the funeral home providing services or merchandise or both, of beneficiaries of preneed funeral contracts who have suffered financial loss as a result of the misfeasance, fraud, default, failure, or insolvency of a South Carolina funeral home or South Carolina funeral director.

§ 32-7-60.

The Act is remedial in nature because it provides the additional remedy of reimbursement from the Fund. Therefore, the Act should be interpreted to have retroactive application. The Fund creates a new source of funds for compensation to the Beneficiaries and; therefore, does not impair the obligations of existing contracts.

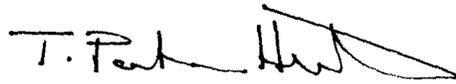
Mr. Louie A. Jacobs  
November 2, 2005  
Page Three

Conclusion

It is our opinion that the Act may be applied retroactively so that Beneficiaries who otherwise qualify for reimbursement from the Fund may be reimbursed when the decedent passed away prior to March 17, 2004.

With kind regards, I am

Very truly yours,



T. Parkin Hunter  
Assistant Attorney General

REVIEWED AND APPROVED:



ROBERT D. COOK  
Assistant Deputy Attorney General