



BEFORE THE IOWA INSURANCE COMMISSIONER

IN THE MATTER OF)	
)	Division Case No. 98002
)	
FORETHOUGHT LIFE)	DECISION AND
INSURANCE COMPANY,)	DECLARATORY ORDER
)	
Petitioner)	

DECISION

Petitioner, Forethought Life Insurance Company (“Forethought”) filed on April 17, 2018 a Petition for Declaratory Order on Iowa Code Chapter 523A (Iowa Code §§ 523A.102(26), 523A.303, 523A.401) (“Petition”) presenting four questions seeking interpretation of various provisions of Iowa statutes. The Commissioner issued a notice of hearing on October 8, 2018 as provided by law, briefs have been submitted, and an evidentiary hearing was held on January 24, 2019 before Commissioner Ommen at the offices of the Iowa Insurance Division, Two Ruan Center, 601 Locust St., 4th Floor, Des Moines, Iowa.

Forethought appeared by the firm FAEGRE BAKER DANIELS, LLP. The Division appeared by Compliance Attorney Lanny Zieman. No other parties appeared.

PARTIES AND JURISDICTION

1. Commissioner Douglas M. Ommen, directly and through his designees, administers and enforces Iowa Code Chapter 523A—the Iowa Cemetery and Funeral Merchandise and Funeral Services Act (“the Iowa Cemetery and Funeral Act”). The Commissioner also directly and through his designees administers and enforces a comprehensive regulatory framework over the business of life insurance, including insurers such as Forethought. The applicable statutory framework includes, but is not limited to Iowa Code Chapters 505,

505A, 505B, 506, 507, 507A, 507B, 507C, 507E, 508, 508A, 508B, 508C, 508D, 508E, 509, 511, 512A, and 512B.

2. Forethought is an Iowa domestic insurance company, subject to all the requirements of Iowa insurance laws and regulations.

3. The Commissioner has jurisdiction over this matter pursuant to Iowa Code §17A.9 and Iowa Admin. Code rule 191-2.

4. We take official notice of related litigation and all records of the District Court for Polk County in the case of *Iowa Department of Human Services v. Joseph R. Cataldo and Global Atlantic Financial Company dba Forethought*, LAW No. CVCV055022.

5. We did provide notice of this proceeding to the Iowa Department of Human Services (“IDHS”) pursuant to Iowa Admin. Code rule 191-2.2. On October 29, 2018, we received an email from the attorney general advising us that IDHS had elected to not intervene in this proceeding.

QUESTIONS PRESENTED

6. Specifically, Forethought presented the following four questions in its Petition:
- I. Are preneed insurers “sellers” within the meaning of Iowa Code Chapter 523A (as defined in Iowa Code § 523A.102(26))?
 - II. Are preneed insurers subject to the notice and remittance requirements in Iowa Code § 523A.303?
 - III. Do Iowa Code §§ 523A.303(1)(b) and 523A.303(2)(d)(4) pertain to excess funds from the proceeds of a preneed insurance policy or do they apply only to burial trusts?
 - IV. Does Iowa Code § 523A.401(5) require Forethought and other preneed insurers to disburse to sellers only that portion of preneed policy proceeds that is necessary to pay for the cemetery and funeral merchandise and services provided by the seller pursuant to the purchase agreement?

7. We conclude that the issuance of this declaratory order is in the public interest and in compliance with Iowa law and regulation.

QUESTION I

8. The first question presented by Forethought is whether preneed insurers, such as Forethought, are “sellers” within the meaning of Iowa Code Chapter 523A (as defined in Iowa Code §523A.102(26))?

9. While the underlying issue to this first question seems to primarily relate to the second question presented herein, namely the applicability of Iowa Code § 523A.303 to Forethought, an affirmative answer to the first question would impose on Forethought all of the regulations applicable to “sellers” in the Iowa Cemetery and Funeral Act, including licensure, establishing a preneed trust, and submitting annual reports.

10. “Seller” or “preneed seller” is defined in Iowa Code § 523A.102(26):

As a person doing business within this state, including a person doing business within this state who sells insurance, who advertises, sells, promotes, or offers to furnish cemetery merchandise, funeral merchandise, funeral services, or a combination thereof when performance or delivery may be more than one hundred twenty days following the initial payment on the account whether the transaction is completed or offered in person, through the mail, over the telephone, by the internet, or through any other means of commerce. “*Seller*” or “*preneed seller*” includes any person performing any term of a purchase agreement executed within this state, and any person identified under a burial account as the provider of cemetery merchandise, funeral merchandise, funeral services, or a combination thereof. . .

11. We have the following statutory construction guidance by the Iowa Supreme Court:

We do not search for legislative intent beyond the express language of a statute when that language is plain and the meaning is clear (O)ur starting point in statutory interpretation is to determine if the language has a plain and clear

meaning within the context of the circumstances presented by the dispute. We only apply the rules of statutory construction when the statutory terms are ambiguous.

McGill v. Fish, 790 N.W.2d 113, 118 (Iowa 2010).

12. We conclude the language used by the legislature to define “seller” or “preneed seller” is clearly limited to persons who advertise, sell, promote, or offer to furnish cemetery merchandise, funeral merchandise, or funeral services if performance or delivery of such may occur more than 120 days from initial payment. Forethought has not advertised, sold, promoted, or offered to furnish cemetery merchandise, funeral merchandise, or funeral services.

13. Beyond the plain language of the Iowa Cemetery and Funeral Act, the Iowa Legislature is presumed to be aware of the Commissioner’s comprehensive regulatory authority over insurance companies, and the regulatory redundancy that would result by rewriting the definition of seller to include the insurance companies.

14. Insurance companies do not advertise, sell, promote or offer to furnish cemetery merchandise, caskets or viewings. Most of the licensure, trust, annual reporting and examination provisions and requirements of the Iowa Cemetery and Funeral Act applicable to “sellers” relate to preneed purchase agreements for cemetery and funeral merchandise and services. Iowa Code § 523A.401 does place some requirements specifically on insurance companies when preneed purchase agreements are funded by proceeds from insurance, including the annual reporting requirement in Iowa Code § 523A.401(8).

15. Rather than selling funeral merchandise or services, life insurance companies sell insurance policies that have been reviewed and approved by the Commissioner.

16. Insurance companies are required by contract law and various statutes to fulfill the terms of the insurance policy by paying monetary benefits to the designated beneficiaries

upon the met contingency of an appropriately documented claim of death. An assignment of proceeds may provide for the payment of a portion of the benefits to the funeral home pursuant to a purchase agreement. However, failure to make timely payments to beneficiaries as designated by contract would constitute an unfair practice in violation of Iowa Code Chapter 507B.

17. Insurance regulatory and contractual obligations apply to insurance companies that sell preneed insurance policies that are designed to cover the costs of funeral and cemetery expenses. Forethought insurance policies may permit the policyholder to assign benefits to the funeral home to cover the funeral home's contracted preneed merchandise and services. In the related preneed contract, a funeral home may agree to provide funeral and cemetery merchandise and services, but these two related contracts do not erase the distinct statutory treatment of insurance companies and preneed sellers.

18. We conclude that a preneed insurer selling preneed insurance policies that are designed to cover the costs of funeral and cemetery expenses, such as Forethought, is not a "seller" or "preneed seller" under Iowa Code Chapter 523A.

QUESTION II

19. The second question presented by Forethought is whether preneed insurers are subject to the notice and remittance requirements in Iowa Code § 523A.303?

20. This question appears to be entirely dependent on the answer to the first question presented concerning the definition of "seller."

21. Iowa Code § 523A.303(1) provides:

If funds remain in a nonguaranteed irrevocable burial trust fund or from the proceeds of an insurance policy or annuity made payable or assigned to the seller

or a provider after the payment of funeral and burial expenses in accordance with the conditions and terms of the purchase agreement for cemetery merchandise, funeral merchandise, or funeral services, the seller shall comply with all of the following:

- a. The seller shall provide written notice by mail to the director under subsection 2.
- b. At least sixty days after mailing notice to the director, the seller shall disburse any remaining funds from the burial trust fund as follows. . .

(Emphasis added.)

22. Iowa Code § 523.303(1) must be analyzed in light of the entire framework of the Iowa Cemetery and Funeral Act, including the Commissioner’s administrative and enforcement authority. The Commissioner and his designees pursuant to Iowa Code §§ 523A.801 through 523A.814 are the appropriate enforcement agency for any violation of Iowa Code § 523.303(1). If IDHS had concluded that Iowa Code § 523.303(1) was ambiguous, but should be applied to insurance companies – and since a bill that sought to apply Iowa Code § 523.303(1) to insurance companies was introduced in the Iowa Legislature in 2013, but did not pass – we would have preferred a request by IDHS for us to engage in rulemaking to clarify the statute. Our preference rests on the fact that we are also responsible for properly supervising the solvency, risks and market activity of all domestic insurance companies. Had we been asked and been persuaded the questioned conduct was unlawful, we would have taken action long ago.

23. Notwithstanding that observation, we conclude that the requirements of Iowa Code § 523A.303(1) are only imposed upon “sellers” and the meaning of “sellers” is unambiguous. See *McGill, supra*. We do not possess the authority to expand the plain meaning of the Iowa Cemetery and Funeral Act by rulemaking. Only the Iowa Legislature can add a statutory requirement that life insurance policies – which now assign proceeds to the seller’s interest in a purchase agreement – shall also assign benefits to IDHS. Under the terms of

existing insurance policies made in compliance with the Iowa Cemetery and Funeral Act, beyond the assignment of proceeds to the seller under the terms of the purchase agreement, the benefits are owed to named beneficiaries.

24. Any amendment to Iowa Code § 523A.303(1) that would require an assignment of benefits to IDHS and make all related requirements of notice applicable to insurance companies, must be decided by passage of an act in the Iowa Legislature that must be signed into law by the Governor.

25. Since the narrow question before us is whether preneed insurers are subject to the notice and remittance requirements, we conclude that preneed insurers are not “sellers” and therefore, not subject to the notice and remittance requirements of the duty of Iowa Code § 523A.303(1).

QUESTION III

26. The third question presented by Forethought is whether Iowa Code §§ 523A.303(1)(b) and 523A.303(2)(d)(4) pertain to excess funds from the proceeds of a preneed insurance policy or do they apply only to burial trusts?

27. Iowa Code § 523A.303(1) provides:

If funds remain in a nonguaranteed irrevocable burial trust fund or from the proceeds of an insurance policy or annuity made payable or assigned to the seller or a provider after the payment of funeral and burial expenses in accordance with the conditions and terms of the purchase agreement for cemetery merchandise, funeral merchandise, or funeral services, the seller shall comply with all of the following:

- a. The seller shall provide written notice by mail to the director under subsection 2.
- b. At least sixty days after mailing notice to the director, the seller shall disburse any remaining funds from the burial trust fund as follows. . .

(Emphasis added.)

28. Iowa Code § 523A.303(2), in pertinent parts, provides:

The notice mailed to the director shall meet all the following requirements and is subject to all of the following conditions:

* * *

d. The notice shall provide all of the following information:

* * *

(4) Amount of funds remaining in the burial trust fund.

29. This question appears to be entirely dependent on the answer to the first question presented concerning the definition of “seller.”

30. Iowa Code § 523A.102(4) defines “Burial trust fund” as:

An irrevocable burial trust fund established by a person with a financial institution for the purpose of funding the future purchase of cemetery merchandise, funeral merchandise, funeral services, or a combination thereof upon the death of the person named in the burial trust fund’s records or a related purchase agreement. “Burial trust fund” does not include or imply the existence of any oral or written purchase agreement for cemetery merchandise, funeral merchandise, funeral services, or a combination thereof between the person and a seller.

31. Iowa Code § 523A.102(10) defines “Financial institution” as:

A state or federally insured bank, savings association, credit union, trust department thereof, or a trust company authorized to do business within this state and which has been granted trust powers under the laws of this state or the United States, which holds funds under a trust agreement. . .

32. Iowa Code § 523A 102(21) defines “Provider” as:

A person that provides funeral services, funeral merchandise, or cemetery merchandise purchased in a purchase agreement.

33. Iowa Code § 523A.303(1) specifically prescribes how excess funds should be disposed of, who disposes of such funds, and what notice is required to be provided. This section specifically identifies excess funds from “burial trust funds” and “proceeds of an insurance policy or annuity made payable or assigned to the *seller* or *provider* after the payment of funeral and burial expenses. . .” By the statutory definitions and directives there is no mention of benefits owed, but not yet paid by an insurance company.

34. Even more significantly, the duty of notice rests with the “seller.” Insurance companies are not defined as sellers under Iowa Code § 523A.102(26). Further, insurance companies are not included as financial institutions and therefore, not covered as a “burial trust fund.” This is also readily apparent in the overall structure of Iowa Code Chapter 523A, as insurance is an alternative to trusts under Iowa Code §§ 523A.401 to 523A.405.

35. We conclude that Iowa Code §§ 523A.303(1)(b) and 523A.303(2)(d)(4) only apply to burial trust funds. These two provisions have no application to any benefits that remain as unpaid by an insurance company after the purchase agreement has been funded.

QUESTION IV

36. The fourth question presented by Forethought is whether Iowa Code § 523A.401(5) requires Forethought and other preneed insurers to disburse to sellers only that portion of preneed policy proceeds that is necessary to pay for the cemetery and funeral merchandise and services provided by the seller pursuant to the purchase agreement?

37. Iowa Code § 523A.401(5)(a) states that:

Any new insurance policy must satisfy the following conditions:

- a. Except as necessary and appropriate to satisfy the requirements regarding burial trust funds under Tit. XIX of the federal Social

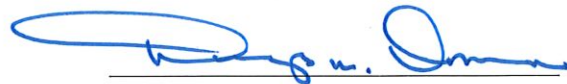
Security Act, the policy shall not be owned by the seller, the policy shall not be irrevocably assigned to the seller, and the assignment of proceeds from the insurance policy to the seller shall be limited to the seller's interests as they appear in the purchase agreement, and conditioned on the seller's delivery of cemetery merchandise, funeral merchandise, and funeral services pursuant to a purchase agreement.

38. The first clause of Iowa Code § 523A.401(5)(a) is a limiting reference to Title XIX of the federal Social Security Act, otherwise known as the "Medicaid Act" (42 U.S.C. § 1396 et seq.). However, Iowa Code § 523A.401(5)(a) otherwise states that an insurance policy itself shall not be owned by the seller, nor irrevocably assigned to the seller.

39. Iowa Code § 523A.401(5)(a) does permit the "assignment of proceeds," but limits the assignment to "the seller's interests as they appear in the purchase agreement" and must be "conditioned on the seller's delivery of cemetery merchandise, funeral merchandise, and funeral services."

40. We conclude that Iowa Code § 523A.401(5) requires Forethought and other preneed insurers to disburse to sellers only that portion of preneed policy proceeds that is necessary to pay for the cemetery and funeral merchandise and services provided by the seller pursuant to the purchase agreement.

SO ORDERED on the 29th day of March, 2019.



DOUGLAS M. OMMEN
Iowa Insurance Commissioner

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause, or their attorney, at their respective addresses disclosed on the pleadings on March 29, 2019.

By: () First Class Mail () Personal Service
() Restricted certified mail, return receipt (X) Email, by consent
() Certified mail, return receipt () _____

Signature: Tammi L Green
Tammi L. Green