The Application of Unclaimed Property Laws to Pre-need Trusts

A New Alternative

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UNCLAIMED PROPERTY LAWS can be of great benefit to individuals and businesses. These laws help reunite people with funds they own that they have unintentionally abandoned or have not acknowledged for a specified period of time. Given the positive outcomes that result from these laws, legislatures around the country have recently sought to apply unclaimed property laws to pre-need contracts that may have gone unused by their beneficiaries. While that goal seems, at first blush, a good one; the matter is not as simple as it may initially appear.

Insurance vs. Trust

Let's start by studying the only two ways to fund a pre-need contract in most states. As you may know, the consumer can either (1) purchase an insurance policy and assign it to the funeral home that will receive the death benefit at the time of the insured's death, or (2) the funeral home can receive payment from the consumer and then deposit all or some portion of the payment into a state-regulated trust.

The first of those methods, insurance funding, is exempt from the reach of most unclaimed property laws. In many states, life insurers are not required to apply the tests for abandonment to the insurance policies that fund pre-need contracts. These tests determine if funds have been abandoned, possibly deeming them "unclaimed."

The second method, trust funding, is where several have sought to apply unclaimed property laws to trust accounts that fund pre-need contracts. This would mean trust funds fall under the same definition as general bank accounts when applying tests for abandonment.

Of course, a pre-need trust is very different from an individual's personal checking account, and this is why both funding methods should be exempt from unclaimed property laws. Most bank accounts require one contract between the financial institution and the account owner. But a pre-need transaction requires two contracts:

1. the pre-need contract between the consumer and the funeral home; and

2. either:
- an insurance contract between the consumer and the insurance company; or
- the trust agreement between the consumer or funeral home and the trustee (bank).

This two-contract scenario complicates the simple application of unclaimed property laws, as the trustee, known as the "holder" of the funds, is not a party in the contract between the consumer and funeral home, which often involves the funds that are arguably "abandoned."

If funds are deemed unclaimed in this scenario, funds in the pre-need trust must be sent to the treasury of the state in which the pre-need contract was written. This would expose a contradiction between deathcare laws and unclaimed property laws, as deathcare laws state that trustees are prohibited from releasing trust funds under any circumstance other than fulfillment, cancellation, or default.

A Legislative Proposal

One approach to solve these issues was recently considered during the legislative session of a state with significant pre-need contract beneficiaries. While the legislation failed for reasons unrelated to the proposal, it was received favorably and made several professionals optimistic that the industry would soon agree to proper reform for abandoned funds.

The proposal suggested that the deathcare law of the state, rather than the general unclaimed property law, be utilized to require proactive steps by a pre-need licensee to resolve issues of abandonment. It was proposed that the licensee seek out consumers who may be entitled to funds related to a pre-need contract and reunite such consumers either with funds or merchandise and services.

Consumers who cancel pre-need contracts pursuant to the above proposal would receive more money than if the monies in trust were remitted to the state's unclaimed property division and are then retrieved by consumers by operation of the unclaimed property laws.

The proposal suggests the following process:

1. The pre-need seller would perform an analysis to determine which of the beneficiaries in its active contract database meet one of two criteria:

- **a.** the pre-need contract would have been in existence for more than 50 years; or
- **b.** the beneficiary of the contract would have been at least 105 years of age.

2. If either criterion is met, then the pre-need seller is obligated to send a notice to the pre-need contract purchaser and beneficiary detailing the status of the funds.

3. The pre-need seller will receive some responses to the notices and for others it is obligated to conduct a diligent search for the parties.

4. Based on the outcome of the diligent search, the pre-need seller must follow up by sending additional notices.

5. If the pre-need seller has received no response to the notices sent regarding a contract within 120 days, the pre-need seller marks the contract "abandoned" and the trustee distributes the funds in trust related to the pre-need contract to all other active contracts in trust for the pre-need seller as income.

6. The pre-need seller must provide the names of the purchaser and beneficiary of such contract to the state unclaimed property division within 30 days.

7. If either the purchaser or beneficiary contacts the pre-need seller regarding the pre-need contract, the pre-need seller must perform pursuant to the pre-need contract or permit the benefits under the contract to be assigned to another beneficiary.

The approach is different and more effective in the deathcare industry, as it benefits the pre-need contract purchaser and beneficiary, or the families of either or both. Other approaches, such as general unclaimed property laws, do not.

Under this approach, a pre-need contract purchaser or beneficiary can either receive the benefits of the guaranteed prices of the pre-need contract or the family of either can pass them along to another party.

Whereas, under a traditional unclaimed property law approach, the purchaser and beneficiary would receive only the monies originally paid by the purchaser and perhaps only a portion of those monies (after fees related to unclaimed property claimed are withdrawn), not the benefit of the original pre-need contract. This proposal permits the benefit of guaranteed prices to be passed along to others.

This approach, though quite different from that advocated by many states' unclaimed property divisions, is the only one that actually keeps the benefits of a guaranteed price pre-need contract with the purchaser or beneficiary of the pre-need contract.

As a result, deathcare firms and families across the country do not lose all or a portion of funds just because a contract hasn't been fulfilled within a specific period of time. If eventually enacted, this approach will maintain and enhance the deathcare industry's reputation and help accomplish its ultimate goal: serving families with the utmost care, attention, and trust. M

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