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Amalia Rodriguez-Mendoza
District Clerk
Travis District

D-1-GN-09-003379

CASE NO. _____

CARRIAGE CEMETERY SERVICES, INC.,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
V.	§	
	§	
TEXAS DEPARTMENT OF BANKING, AND CHARLES G. COOPER, in his official capacity as Commissioner of the Texas Department of Banking,	§	TRAVIS COUNTY, T E X A S
	§	
	§	
	§	
	§	
Defendants.	§	53rd JUDICIAL DISTRICT

PLAINTIFF'S (1) ORIGINAL PETITION;
(2) APPLICATION FOR TEMPORARY INJUNCTION AND PERMANENT INJUNCTION; AND
(3) REQUEST FOR LIMITED EXPEDITED DISCOVERY

Plaintiff Carriage Cemetery Services, Inc. ("Carriage") files this (1) Original Petition; (2) Application for Temporary Injunction and Permanent Injunction; and (3) Request for Temporary Injunction. Carriage respectfully shows the Court as follows:

I.

Nature of the Case

1. This case involves Carriage's challenge of a rule of the Department of Banking that exceeds the Department's statutory authority, that conflicts with the governing statutes, and that the Department failed to promulgate pursuant to the notice-and-comment provisions of the Texas Administrative Procedures Act. The Department's rule would allow purchasers of preneed funeral service contracts to default on their contracts and receive a no-risk, full-money-back guarantee that would become an exception that would swallow a regulatory framework that

the Legislature has crafted over many years to give the public the opportunity to arrange and pay for funerals in advance of need.

2. No factual disputes exist in this challenge. As the Department acknowledges in the letter to Carriage that gave rise to this lawsuit, "[t]he [disagreement between the Department and Carriage] does not dispute any facts but rather is a disagreement on the intent or spirit of the law." *See* Letter from Commissioner Cooper to Carriage's counsel, 9/15/09, Ex. A, at 2 (hereinafter, "Cooper Letter").

3. Preneed funeral contracts allow families to establish and fund, in advance, funeral services and products at prices prevailing at the time of the contract, instead of at the time of death. These contracts help families avoid the financial strain of paying for a funeral on the often short notice of the beneficiary's death.

4. Chapter 154 of the Texas Finance Code contains the Texas Legislature's regulatory framework for the preneed funeral contract business. Over the years, the Legislature has added to and revised the statutory scheme in keeping with its general purpose of giving the public an opportunity to arrange and pay for funerals in advance of need, as well as providing safeguards to protect the prepaid funds and to assure that the funds will be available to pay for prearranged funeral services. *See generally* Tex. Fin. Code § 154.001.

5. From time to time, purchasers of preneed contracts default on their obligations. Carriage works to avoid defaults by sending reminders, follow-up letters, past-due notices, demands for payment, final notices, and the like. But some purchasers fail or refuse to pay despite Carriage's best efforts. When that happens, Carriage has no choice but to cancel the defaulting purchaser's contract. For many years, Carriage has had a policy of making refunds to defaulting purchasers, keeping a retention (essentially to defray expenses) under the formula in

Finance Code § 154.155(d). Now, however, the Department has ordered Carriage to abandon that long-standing refund policy, despite the Department's awareness of that policy from years of audits and examinations. Now, the Department mandates that when Carriage cancels contracts for default, Carriage must: (1) refund all money plus interest; (2) obtain "Certificates of Cancellation" from defaulting purchasers; or (3) treat defaulting purchasers as having abandoned their contracts and let the funds escheat to the state.

6. The Department's rule creates at least three absurdities when purchasers default: first, defaulting purchasers will be entitled to a potential windfall ("100% of principal paid-in, plus interest," per Ex. B, at 3) if Carriage fails to obtain purchaser signatures on Department-mandated cancellation forms; second, Department's rule makes the Department's Certificates of Cancellation a nullity; no purchaser should ever execute such a form, because doing so will deprive the purchaser of the windfall receives (under the Department's rule) if the purchaser defaults; and third, the Department's recommendation that defaulting purchasers be deemed "abandoned" would encourage total forfeitures from defaulting purchasers who would otherwise receive the refunds Carriage pays them. These absurdities doom the Department's rule.

7. Indeed, the Department's rule (which appears nowhere in the Finance Code or the Texas Register) swallows the carefully crafted regulatory framework developed by the Legislature over many decades, replacing it with an amorphous policy that allows purchasers to obtain windfalls for defaulting that the Legislature never envisioned, imposes disproportionate costs on sellers, and undermines the Legislature's intent "to give the public the opportunity to arrange and pay for funerals in advance of need." Tex. Fin. Code § 154.001.

8. The Department concedes that nothing in the Finance Code "explicitly" imposes the requirements contained in its rule. *See* Letter from Commissioner Cooper to Carriage's

Counsel, 9/15/09, at 1 (Ex. A) (hereinafter, "Cooper Letter"). The Department acknowledges that its rule is based on the Department's "interpret[ation]" of the law in light of this gap in the Finance Code, and, again, no factual disputes exist.

9. In light of the Department's new rule, and the lack of any factual disputes regarding it, Carriage seeks this Court's declaration that the Department's rule is invalid under the Texas Administrative Procedure Act ("Texas APA"). The Department's new rule conflicts with the existing statutory regime that addresses a limited subset of defaults; nothing in the Texas Finance Code gives the Department authority to promulgate the rule; and the Department failed to promulgate rule in accordance with the Texas APA. The Department's rule interferes with and impairs Carriage's rights and privileges without complying with the statutory rulemaking procedures under the Texas APA. Pending the Court's determination of the merits, Carriage asks this Court to temporarily enjoin the Department from enforcing this rule.

II.

Jurisdiction and Venue

10. This Court has subject-matter jurisdiction over this matter under Section 2001.038 of the Texas Administrative Procedures Act for four reasons.

11. First, the Department's directive to Carriage (and, on information and belief, all other sellers of preneed contracts) is a rule under the Texas APA, Tex. Gov't Code § 2001.003(6) (defining "rule"). The Department's directive (contained in Exs. A and B and described in detail below) contains state agency statements of general applicability that implement, interpret, and prescribe law or policy and do not include a statement regarding only the internal management or organization of a state agency not affecting private rights or procedures. *See* Tex. Gov't Code § 2001.003(6).

12. Second, this Court has subject-matter jurisdiction. The rule that the Commissioner seeks to enforce constitutes an invalid rule of an administrative agency; the rule seeks to implement a new law or policy, and the agency's new law or policy appears nowhere in any legislative enactment or duly-promulgated rule under the notice-and-comment requirements of Texas APA § 2001.035(a) ("A rule is voidable unless a state agency adopts it in substantial compliance [with the notice-and-comment provisions of] Sections 2001.0225 through 2001.034.").

13. Third, this dispute is ripe for the Court's determination. The Department requires an immediate change in conduct with penalties attached for noncompliance. *See* Letter from Counsel for Department to counsel for Carriage, 9/16/09, at 1 (Ex. C) (hereinafter, "Giddings Letter"). Carriage must either comply or take the even more costly alternative of risking serious penalties. Carriage need not wait for the ax to fall to challenge the Department's rule. *See, e.g., Isbrandtsen v. United States*, 211 F.2d 51, 56 (D.C. Cir. 1954), cited in Bernard Schwartz, Administrative Law § 9.1, at 524 (2d ed. 1984).

14. Fourth, APA § 2001.038 gives this Court jurisdiction to hear this declaratory judgment action challenging the validity of the Department's rule because the Department's rule (or its threatened application) interferes with and impairs (or threatens to impair) Carriage's legal rights and privileges, and Carriage has made the Department a party to the action. This Court also has jurisdiction under Tex. Civ. Prac. & Rem. Code § 65.011.

III.

Parties

15. Plaintiff Carriage Cemetery Services, Inc. is a Texas corporation. It may be served through its counsel of record.

16. Defendant Texas Department of Banking may be served at 2601 N. Lamar Blvd., Austin, TX 78705.

17. Defendant Charles G. Cooper, sued only in his official capacity as Commissioner of the Texas Department of Banking, may be served at the Texas Department of Banking, 2601 N. Lamar Blvd., Austin, TX 78705.

IV.

Background and Undisputed Facts

A.

How Does the Texas Department of Banking Regulate Carriage?

18. Subchapter B of Chapter 154 gives the Finance Commission of Texas (the oversight body for the Texas Department of Banking) a limited scope for adopting "reasonable rules" relating to the enforcement and administration of Chapter 154. Tex. Fin. Code § 154.051. The Department of Banking regulates Carriage and other members of the preneed contracts industry through the Department's Special Audits Division.

19. Chapter 154 of the Texas Finance Code addresses cancellations in two circumstances, both of which appear in § 154.155: when the purchaser seeks to cancel a contract, and when a seller solicits the cancellation of a contract (most commonly, to sell a new contract). The statute provides:

> §154.155. Cancellation of Contract.
>
> (a) A *purchaser* of a prepaid funeral benefits contract *may cancel* the contract before maturity by giving written notice of cancellation to the seller on forms prescribed by the department. The seller shall maintain copies of the cancellation forms for examination by the department.
>
> (b) Not later than the 30th day after the date of the cancellation notice, the seller of a trust-funded contract shall withdraw and pay to the purchaser money in the depository being held for the purchaser's use and benefit.

> (c) The purchaser or seller may not make a partial cancellation or withdrawal.
>
> (d) The purchaser of a trust-funded contract is entitled to receive the actual amount paid by the purchaser and half of all earnings attributable to that money, less the amount permitted to be retained as provided by Section 154.252, except as provided by Subsection (e) and by Sections 154.1511, 154.1551, and 154.254.
>
> (e) A purchaser who cancels a contract *on the solicitation of the seller* is entitled to withdraw all money paid to the seller and *all earnings attributable to that money*. If the money is used to purchase a new prepaid funeral benefits contract under a solicitation by the seller, the new contract must protect the purchaser to an extent equal to or greater than that provided by the original contract, as determined by the department. Under the new contract, the cost to the purchaser of the same or substantially the same services or merchandise may not be greater than that provided by the canceled contract.
>
> (f) The cancellation of an insurance-funded contract by the purchaser is subject to Section 154.205.

Tex. Fin. Code § 154.155 (emphasis added).

20. As the Department acknowledges, nothing in §154.155 addresses purchaser defaults. However, another provision of the Finance Code does. Section 154.265, recently amended by the Texas Legislature, provides that a purchaser "*may not be considered in default* under the contract "if . . . the purchaser has paid at least 85 percent of the contract price" and "was unable to pay due to extenuating financial circumstances." (Emphasis added.) In other words, the Legislature has considered and addressed defaulting purchasers, giving them a remedy against loss of their prepaid benefits if they have paid more than 85 percent of their contracts' price but cannot pay further because of financial problems. By implication, the Legislature has excluded the broader remedy that the Department has mandated in its new rule, i.e., that sellers must obtain signed Certificates of Cancellation from defaulting purchasers or else pay them "100% of principal paid-in, plus accrued interest," per Ex. B, at 3.

21. Section 154.265 reflects one of three major amendments to the Finance Code with respect to cancellations and defaults. Before 1987, the Texas Legislature had said nothing about cancellations or defaults. Three major changes in the legislative scheme have occurred since then:

- 1987: **100% Paid-in Principal, Plus Interest, for "Solicited Cancellations."** In 1987, the Texas Legislature passed H.B. 744, imposing the "solicited cancellation" provision that later became codified in the Finance Code as § 154.155(e).

- 1993: **Certificates of Cancellation**. In 1993, the Texas Legislature passed H.B. 2499, changing the method for purchaser-initiated cancellations. Under the new law, purchasers may cancel by signing Department-promulgated forms and giving the forms to sellers, who keep them on file for inspection by the Department. Under prior law, sellers would complete the forms the purchasers' behalf and transmit the forms to the Department. This provision was codified in Finance Code § 154.155(a)-(d) and includes the formula for partial refunds (including a retention by the seller to defray expenses).

- 2009: **No Defaults for 85% Payments in Extenuating Financial Circumstances.** As noted above, in 2009, the Texas Legislature enacted H.B. 1468, prohibiting the treatment of a preneed contract as being in default if the purchaser has paid at least 85 percent of the contract price and failed to pay the remaining balance due to extenuating financial circumstances. Again, this provision was codified in Finance Code § 154.265.

The existing chapter 154 of the Texas Finance Code is attached as Ex. D; critical excerpts of the legislative history of the 1987, 1987, and 2009 amendments are attached as Ex. E (1987 amendments); Ex. F (1993 amendments); Ex. G (2009 amendments).

22. Until 2009, neither the Texas Legislature nor the Texas Department of Banking appear ever to have addressed the issue of the handling of purchaser defaults. In fact, the Department's new rule requiring "100% principal paid-in, plus accrued interest" (Report of Examination, 3/26/09, Ex. B, at 3) (hereinafter, "ROE") is derived from the "solicited cancellation" provision of § 154.155(e), enacted in 1987. Yet for more than two decades the

Department never contended that § 154.155(e) applied to defaulting purchasers. Instead, the Department recognized that § 154.155(e)'s purpose of punishing unscrupulous sellers of preneed contracts who induced (that is, "solicited") purchasers to cancel one contract only to sell another one (and thereby churn commissions).

23. As described in detail below, the Department suggests that Carriage's cancellation for default amounts to an "inherent" solicitation of cancellation, but given Carriage's incentives to avoid cancellations and undisputed efforts to encourage purchasers to cure delinquencies, the Department's position contradicts the meaning of the term "solicitation" and therefore contradicts the text of the statute that defines the Department's authority.

B.

How Does the Department's Rule Attempt to Change the Law?

24. The dispute between Carriage and the Department relates to how Carriage – and all other sellers of preneed funeral contracts – refunds money to purchasers who default on their contracts. The Finance Code is silent as to how much money Carriage or other sellers must refund to defaulting purchasers. The Department admits this silence exists, as discussed in detail below. The Department states its rule as follows:

> "Section 154.155 of the Texas Finance Code ***is interpreted by the Department*** to require a purchaser of a preneed funeral contract to execute a cancellation form before funds may be withdrawn from the trust prior to the company cancelling the contract due to default.
>
> "The law ***does not explicitly provide for a seller to cancel*** a prepaid funeral benefit contract; however, the statute does provide a mechanism for handling an abandoned contract.
>
> "While ***Chapter 154 does not provide for the cancellation of a contract by a seller***, Section 303 [relating to abandoned contracts] addresses the conditions under which a withdrawal may be made from the fund. . . .
>
> "The [disagreement between the Department and Carriage] does not dispute any facts but rather is a disagreement on the intent or spirit of the law."

See Cooper Letter at 1-2 (Ex. A) (emphasis added).

25. Thus, even without addressing the merits, the Department makes clear three things:

- The Department's directive to Carriage (and, on information and belief, all other similarly situated sellers of preneed contracts) is based on the Department's "interpret[ation]" of the Finance Code;
- Nothing in the Finance Code contains this directive, because "the law does not explicitly provide for a seller to cancel a prepaid funeral benefit contract . . . . [and] Chapter 154 does not provide for the cancellation of a contract by a seller"); and
- The disagreement between Carriage and the Department "does not dispute any facts but rather is a disagreement on the intent or spirit of the law."

26. In short, the Department's directive to sellers such as Carriage is a rule; the Department's directive imposes certain procedures "before funds may be withdrawn from the trust prior to the company cancelling the contract due to default." *Id.* at 1. The Department concedes that nothing in the Finance Code "explicitly" addresses the procedures for withdrawing funds from the trust prior to the seller's cancellation of the contract due to default. *Id.* at 1, 2. The Department also acknowledges that its interpretation fills that gap in the Finance Code. *See id.* at 1. The Commissioner further concedes that no factual disputes are involved in its dispute with Carriage about this rule. *Id.* at 2.

C.

How Does the Department's Rule Exceed the Finance Code?

27. The Department grafts other procedures from chapter 154 – none of which have anything to do with defaults – into a new rule. The Department's rule mandates that sellers like Carriage must follow one of three procedures when cancelling contracts for default: (1) refund all money plus interest; (2) obtain "Certificates of Cancellation" from defaulting purchasers; or

(3) treat defaulting purchasers as having abandoned their contracts and let the funds escheat to the state. The Department contends that it may "interpret" the requirements it chooses; Carriage contends that to do so the Department must ask the Legislature to amend chapter 154.[1]

1. The Department's New Rule, Part 1 of 3: Total Refund Plus Interest

28. The Department contends that Carriage must refund "100% of principal paid in, plus all accrued interest, to the affected purchasers" (unless Carriage obtains a Certificate of Cancellation or treats the contracts as "abandoned," discussed in detail in Parts 2 and 3, below). *See* Report of Examination ("ROE"), 3/26/09, at 3 (Ex. B).

29. The Department bases this interpretation on the "solicited cancellation" rule of Finance Code §154.155(e), which the Legislature enacted in 1987. Until the Department's new rule, the Department, to Carriage's knowledge, never interpreted the "solicited cancellation" rule in this fashion despite conducting many audits and examinations of Carriage's (and other sellers') records.

30. In any event, § 154.155(e) provides that "[a] purchaser who cancels a contract ***on the solicitation of the seller*** is entitled to withdraw all money paid to the seller and all earnings attributable to that money." (Emphasis added.) This provision awards a windfall – "100% of principal paid-in, plus accrued interest", per ROE, Ex. B, at 3) – to purchasers who fall victim to unscrupulous sellers who "churn" or "twist" additional commissions or sales compensation from purchasers by soliciting purchasers to cancel an old preneed contract to replace a new one.

31. But Carriage (and other sellers) who cancel contracts because of purchaser defaults do not "solicit" those cancellations. To the contrary, as the undisputed facts show,

[1] Subchapter B of chapter 154 of the Finance Code enumerates the powers and duties of the Department of Banking with respect to preneed funeral contracts. Nothing in Subchapter B gives the Department the power to impose new refund or cancellation policies against sellers of preneed contracts such as Carriage.

Carriage tries to avoid cancellations for default by sending "friendly reminders," follow-up letters, past-due notices, demands for payment, final notices, and the like. *See, e.g.,* Ex. H (documents previously produced to Department). Carriage cancels contracts only as a last resort. *See id.* Again, the Department does not dispute these facts. Cooper Letter, Ex. A, at 2.

32. Thus, this Court must decide, as a matter of law, whether Carriage's conduct constitutes "solicited cancellations" under Section 154.155(e). Because it is not a term of art, the Court must give the word "solicitation" its normal meaning. *See, e.g.,* Tex. Gov't Code § 312.002(a). Black's Law Dictionary defines "solicitation" to include "asking; enticing; urgent request. . . ." and "to solicit" to include "[t]o endeavor to obtain by asking or pleading; to entreat; implore, or importune . . . ." *See* Black's Law Dictionary 967 (Abridged 6th ed. 1991).

33. Nothing Carriage does falls within the plain (or any) meaning of "solicitation" of cancellations of defaulting purchasers' contracts. To the contrary, Carriage solicits purchasers *not* to cancel their contracts. Carriage asks, Carriage pleads, and Carriage implores its purchasers to *cure* defaults and *avoid* cancellations. But when purchasers refuse to respond to Carriage's pleading, Carriage has no other choice but to cancel.

34. Nevertheless, the Department contends in its Report of Examination that a seller that invokes the seller's right to cancel on the purchaser's default "is ***inherently soliciting*** the cancellation of the contract." *See* ROE, Ex. B, at 3. But an administrative interpretation contrary to the plain meaning of a statute is entitled to no deference. *See, e.g., Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989); *see also Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (observing that "the court, as well as the agency, must give effect to the unambiguously expressed intent of [the legislature]"); *see also McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003) (courts must give effect to plain meaning).

35. Here, to the extent the Department's term "inherent[] solicit[ation]" has any meaning different than that of the plain meaning of "solicitation" in § 154.155(e), this Court must give no deference to it. Again, Carriage avoids cancellations at all costs; again, the only solicitation in which Carriage engages is to *avoid* cancellations, not to encourage them. Carriage's cancellations (made, per the undisputed facts, as a last resort) in no way meet the definition of "solicitation" in the Finance Code. Nothing about the Department's notion of an "inherent" solicitation changes the facts or the plain meaning of the statute. The Court must therefore invalidate the Department's assertion that cancellations arising from default trigger the penalties for solicited cancellations under § 154.155(e).

2. The Department's New Rule, Part 2 of 3: Obtain "Certificates of Cancellation" from Defaulting Purchasers

36. The Department further contends that sellers like Carriage need not make total refunds plus interest to defaulting purchasers if sellers like Carriage "secure executed cancellation forms signed by the [defaulting] purchasers." ROE, Ex. B, at 3. The Department dictates the forms of these Certificates of Cancellation (Ex. I). But the Court must invalidate Department's rule for at least three reasons: (a) the plain meaning of § 154.155(e) *does not* require forms for defaulting purchasers; (b) nothing in the Departmental forms addresses cancellations arising out of purchaser defaults; and (c) forcing Carriage and other sellers to obtain the forms would lead to absurd outcomes that further show why the statute cannot possibly apply to defaulting purchasers.

a. The Plain Meaning of § 154.155 Does Not Require Forms for Defaulting Purchasers

37. First, the plain meaning of § 154.155(a)-(d) does not require forms for defaulting purchasers. Instead, those provisions apply only to purchasers who initiate cancellations

themselves. Section 154.155(a) states that "[a] *purchaser* of a prepaid funeral benefits contract *may cancel* the contract before maturity by giving written notice [on department-approved forms]." (Emphasis added.) The phrase "a *purchaser* . . . may cancel" in section 154.155(a) does not apply to cancellation by the seller arising out of the purchaser's default. (Emphasis added.)

38. Indeed, as explained in detail above, the structure of Chapter 154 reflects the Legislature's intent not to regulate cancellations for default except when the defaulting purchaser has paid at least 85% of the contract price. *See* Tex. Fin. Code § 154.265 (September 2009 amendment). The vast majority of defaults do not involve that small group of defaulting purchasers. Moreover, the Department admits that "chapter 154 *does not provide for the cancellation of a contract by a seller* . . . ." Cooper Letter, Ex. A, at 1 (emphasis added).

39. Under the maxim that the Legislature's expression of one thing means the exclusion of the other ("*expressio unius est exclusio alterius*"), the Legislature's repeated pronouncements about cancellations, and particularly the September 2009 amendment regarding defaults in § 154.265, shows that Legislature understands that purchasers default and that sellers cancel their contracts when purchasers default. The Legislature's decision not to address that one component of the highly-regulated preneed funeral industry shows that the Department's rule exceeds the boundaries of the carefully considered statutory scheme. *See generally Johnson v. Second Injury Fund*, 688 S.W.2d 107, 108-09 (Tex. 1985); *see also Rodriguez v. State*, 953 S.W.2d 342, 354 (Tex. App. – Austin 1997, pet. ref'd) (observing that if the Legislature had intended to change the law, it could have done so).

40. Despite this, the Department suggests that it may "interpret" a requirement for situations that a statute fails to address. Ex. A, at 1. That is incorrect. Again, courts give no

deference to agency interpretations contrary to the plain meaning of a statute, especially when it is clear that the Legislature has considered the subject of the interpretation without enacting the rule that the agency later seeks to enact. *Compare Betts*, 492 U.S. at 171 (no deference to interpretations contrary to statute) and *Johnson*, 688 S.W.2d at 108-09 (when legislature has expressed a view on a matter but not the other, the legislature excluded the other from legislation).

41. Furthermore, if a statute creates a liability unknown to the common law or deprives a person of a common law right, courts will strictly construe the statute to avoid expanding it beyond its plain meaning or will restrict the statute from applying to cases not clearly within its purview. *See, e.g., Smith v. Sewell*, 858 S.W.2d 350, 354 (Tex. 1993).

42. That is the case here. Under common law, no dispute exists that a seller has the right to terminate a purchaser who fails to pay and make whatever refund, if any, allowed under the contract. Without a specific legislative requirement to the contrary, the Department has no authority to demand a "Certificate for Cancellation" under these circumstances.

b. The Departmental Forms Are Drafted for Purchaser-Initiated Cancellations and Say Nothing About Default

43. Second, the forms that the Department requires sellers to obtain from defaulting purchasers do not apply to defaulting purchasers. The forms, like the statute (save the 85% rule of § 154.265), say nothing about whether or not the purchaser defaulted. The forms state the following:

> Your signature on this application for withdrawal indicates your *desire* to receive a cash refund on your prepaid funeral benefit contract and to *cancel the prearranged funeral*. You should receive your refund within 30 days of the seller receiving this written notice.

Ex. I (emphasis added).

44. Few, if any, defaulting purchasers "desire . . . to cancel the prearranged funeral." Most defaulting purchasers would keep their benefits, but for a variety of reasons have failed to make the payments they agreed to make. The forms, like the statute, say nothing about defaulting purchasers. As such, this Court should invalidate the Department's requirement that Carriage obtain signed Certificates of Cancellation for defaulting purchasers.

c. Requiring Forms from Defaulting Purchasers Would Lead to Absurd Results

45. In addition to defying the plain meaning of the statute and the forms, the Department's rule requiring signed Certificates of Cancellation would lead to absurd results. Again, it is black-letter law that courts must enforce the plain meaning of a statute, and as a corollary, the plain meaning must trump readings that lead to absurd results. *See generally City of San Antonio v. Second Court of Appeals*, 820 S.W.2d 762, 768 (Tex. 1991) (orig. proceeding) ("Absent a clear legislative directive, a statute should not be construed so as to produce an absurd or foolish result if it is reasonably susceptible of an alternative construction."); *City of Sherman v. Public Util. Comm'n*, 643 S.W.2d 681, 684 (Tex. 1983) ("Where adherence to the strict letter would lead to injustice, to absurdity, or to contrary positions, the duty devolves upon the court of ascertaining the true meaning.").[2]

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[2] As now-Chief Justice Jones of the Third Court of Appeals observed in a leading article on what he called the "absurd-results" principle of statutory interpretation in Texas:

> Where . . . the intention of the legislature is so inadequately or vague expressed that the court must resort to construction, it is proper to consider the results and consequences of any proposed construction, and the court will, if possible, place upon the statute a construction which will not result in injustice, oppression, hardship, or inconvenience, unreasonableness, prejudice to public interest, or absurd consequences.

J. Woodfin Jones, *The Absurd-Results Principle of Statutory Construction in Texas*, 15 Rev. Litig. 81, 88-89 & n. 22 (1996), citing, among other cases, *National Surety Corp. v. Ladd*, 115 S.W.2d 600, 603 (Tex. 1938).

46. For example, the form Certificates of Cancellation tell purchasers that "[i]f you cancel this contract at the request of the Seller, then Seller is required to refund all money paid and the income earned." (Ex. I.) This language reflects the "100% refund" option of § 154.155(e) for "solicited cancellations." But Carriage does not solicit cancellations; again, Carriage asks, Carriage pleads, and Carriage implores its purchasers to *cure* defaults and *avoid* cancellations.

47. Furthermore, forcing sellers to obtain signed Certificates of Cancellation as to defaulting purchasers leads to another, related, absurdity. Under the Department's rule, defaulting purchasers receive more money upon cancellation than purchasers in good standing receive when they initiate cancellations under Section 154.55(a)-(d) and sign the Departmental forms. Indeed, under the Department's new rule, no purchaser who initiates a cancellation under § 154.155(a) should ever sign the form the Department drafted pursuant to that subsection. Instead, the purchaser (otherwise in good standing) should default, refuse to sign the Department form, and reap the windfall under the Department's new rule by getting "100% principal paid-in, plus accrued interest" per Ex. B, at 3. Conceivably, Carriage even could be sued under the DTPA for omitting from the forms a warning to purchasers to the effect that "signing this form could be hazardous to your financial health."

48. Of course, the Texas Legislature never intended chapter 154 to lead to such absurd results; to the contrary, nothing in the text, legislative history, or any other legal authority supports the Department's rule, which would swallow all the provisions in the Finance Code,

crafted over decades of legislative deliberation, regarding cancellation and default of preneed contracts.[3]

49. Accordingly, the Court must invalidate the Department's requirement that sellers like Carriage must obtain "Certificates of Cancellation" from defaulting purchasers or suffer the punitive remedy of § 154.155(e)'s refund of "100% of paid-in principal, plus accrued interest," per the Department's ROE, Ex. B., at 3.

3. The Department's New Rule Part 3 of 3: Abandonment and Forfeiture of Purchaser Funds

50. The Commissioner's third option for sellers with defaulting purchasers is to follow the "abandonment and escheat" provisions of the Finance Code. *See, e.g.*, Cooper Letter, at 1 ("The law does not explicitly provide for a seller to cancel a prepaid funeral benefit contract; however, the statute does provide a mechanism for handling an abandoned contract."). But the abandonment provisions do not apply because in many instances in which a purchaser defaults, Carriage knows the location and existence of the purchaser. Moreover, the abandonment provisions hurt purchasers because no money goes to them; instead, those funds escheat to the state.

51. Furthermore, those provisions should not apply on basic principles of fairness to purchasers and manageability to sellers like Carriage. It would be wasteful to force Carriage and other sellers to hold funds in escrow for three years, and unfair to escheat these funds to the state

[3] Moreover, obtaining these signed Certificates of Cancellation is impracticable, if not impossible, for sellers like Carriage to obtain from defaulting purchasers. Defaulting purchasers often refuse to respond to any correspondence from creditors. Forcing sellers to obtain forms from nonresponsive defaulting purchasers when the statute contains no such requirement is another "absurd or foolish" result the court should avoid per cases such as *City of San Antonio v. Second Court of Appeals*, 820 S.W.2d at 768. That is particularly the case here because purchasers in good standing who initiate a cancellation on their own (and sign the forms verifying that fact) suffer the statutory penalty that the Department's new rule prohibits Carriage from assessing against defaulting purchasers.

when instead of paying purchasers most of their money back. The Department's suggestion that the abandonment provisions apply to defaulting purchasers reflects yet another way in which the Department's rule eviscerates the detailed legislative framework governing cancellations, defaults, and abandonment of preneed contracts. Again, this Court must invalidate that rule.

V.

Causes of Action

A.

Declaratory Judgment Under Texas APA,
Tex. Gov't Gode § 2001.038

52. All prior paragraphs are incorporated herein as though repeated in full.

53. Pursuant to section 2001.038 of the Tex. Gov't Code (the Texas Administrative Procedures Act), Carriage seeks declaratory relief to establish Plaintiff's rights in light of defendants' rule interpreting chapter 154 of the Texas Finance Code with respect to the procedure and calculation of refunds to defaulting purchasers of preneed contracts. Carriage is a corporation with an interest under chapter 154 and defendants' rules and directives; Carriage's rights, status, and legal relations are affected by the defendants' rules and directives; and Carriage is entitled to have this Court determine its rights, status, and legal relations under defendants' rules and directives affecting Carriage.

B.

Declaratory Judgment Action
Under Chapter 37 of the Texas Civil Practice & Remedies Code

54. All prior paragraphs are incorporated herein as though repeated in full.

55. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, Carriage seeks declaratory relief to establish Plaintiff's rights under the new rule that Defendants have

threatened to enforce against Carriage. Carriage is a corporation with an interest under written contracts and Carriage's rights, status, and legal relations are affected by Defendants' rule and threatened enforcement of it. Carriage is entitled to have this Court determine its rights, status, and legal relations with respect to Defendants' rule and threatened enforcement action against Carriage.

C.

Application for Temporary Injunction
Under Tex. Civ. Prac. & Rem. Code § 65.011

56. All prior paragraphs are incorporated herein as though repeated in full.

57. Carriage requests that this Court set a hearing on its application for temporary injunction and issue an order directing defendants to appear at that hearing. At that hearing, defendants should show cause, if any, why this Court should not enter a temporary injunction to fully protect Carriage's rights during the pendency of this proceeding.

58. The Department of Banking has threatened an enforcement action against Carriage for alleged violations of the rule. *See* Cooper Letter, 9/15/09, at 2 (Ex. A); Giddings Letter, at 2 (Ex. C). Thus, Carriage faces an extraordinary situation in that it has no adequate remedy at law or otherwise to prevent the irreparable harm or damage that may occur unless this Court restrains defendants from pursuing an enforcement action against Carriage. In order to preserve the status quo and to prevent immediate and irreparable harm to Carriage's vested rights, the Court should grant a temporary injunction. Therefore, Carriage requests that this Court issue a temporary injunction barring the Texas Department of Banking from initiating any enforcement action against Carriage for alleged violations of the Department's new rule.

59. The requested temporary injunction will allow the maintenance of the status quo until the date of the resolution of this matter.

D.

Application for Permanent Injunction

60. All prior paragraphs are incorporated herein as though repeated in full.

61. Carriage requests that this Court enter a permanent injunction at the final trial of this lawsuit to fully protect Carriage's rights. Defendants should show cause, if any, why this Court should not enter a permanent injunction to fully protect Carriage's rights.

62. The Department of Banking has threatened an enforcement action against Carriage for alleged violations of the rule. *See* Cooper Letter, 9/15/09, at 2 (Ex. A); Giddings Letter, at 2 (Ex. C). Thus, Carriage faces an extraordinary situation in that it has no adequate remedy at law or otherwise to prevent the irreparable harm or damage that may occur unless this Court restrains defendants from pursuing an enforcement action against Carriage. In order to preserve the status quo and to prevent immediate and irreparable harm to Carriage's vested rights, the Court should grant a permanent injunction. Therefore, Carriage requests that this Court issue a permanent injunction barring the Texas Department of Banking from initiating any enforcement action against Carriage for alleged violations of the Department's new rule.

E.

Request for Expedited Discovery

63. Carriage requests that the Court permit Plaintiff to take expedited (and limited) discovery on the Department's documentation regarding its new rule in order to collect the evidence necessary to prepare fully for the hearing on Carriage's request for temporary injunction.

VI.

Prayer for Relief

WHEREFORE, Plaintiff Carriage Cemetery Services, Inc. prays that upon hearing and trial of this matter, it have and recover judgment against Defendants herein as follows:

(a) a temporary injunction;

(b) a permanent injunction;

(c) a declaration from this Court invalidating the Department's rule regarding refunds to defaulting purchasers;

(d) expedited discovery pending the Court's hearing on Carriage's request for temporary injunction; and

(e) all further relief, in law or in equity, that Carriage may be entitled to receive.

Dated this 1st day of October, 2009.

Respectfully submitted,

BROWN MCCARROLL LLP

By: Kurt Kuhn/wpd

Kurt Kuhn
State Bar No. 24002433
111 Congress Avenue, Suite 1400
Austin, Texas 78701
Telephone: (512) 472-5456
Facsimile: (512) 479-1101

SIEGMYER, OSHMAN & BISSINGER LLP

By: _____

David K. Bissinger
State Bar No. 00790311
Gerald S. Siegmyer
State Bar No. 18343300
2777 Allen Parkway, Tenth Floor
Houston, Texas 77019
Telephone: (713) 524-8811
Facsimile: (713) 524-4102

Attorneys for Plaintiff
Carriage Cemetery Services, Inc.