

The Economics of Preneed Theft

Competition is good, but theft by deceit and unfair business practices is anti-competitive.

Sadly, the words “preneed” and “theft” can go hand in hand. I’ve seen people steal preneed deposits, falsify insurance claims and fail to make deposits into various trusts. These people, of course, are crooks. The thing is, they themselves would tell you they are crooks and knew they were breaking the law.

There are others, however, who could be stealing preneed funds, but these individuals don’t think they’re doing anything wrong. They even commit their misdeed in the open, and if caught, will not be prosecuted.

Who commits these nefarious acts, you ask? Some employees, when they leave a place of employment, choose to co-opt confidential business property and goodwill, then use it to try to convince consumers to move their established preneed arrangements to another funeral home. Depending on the opinion of a court, generally, these people won’t go to jail since this is a civil matter, not a criminal one.

I have acted as an expert witness in some 150 cases during my career, many of them dealing with this subject, but I am not an attorney. As an expert witness, however, while I don’t try the case, I study the facts of the matter and present my findings to the judge or jury.

THE ACTIONS CAUSING THE PROBLEM

Here is a typical scenario. Employee A is employed by Funeral Home A. Employee A, in the routine course of his or her employment, has access to Funeral Home A’s preneed and at-need records. At some point, Funeral Home B offers employment to Employee A, who sees the chance to enrich himself or herself by bringing preneed contracts from Funeral Home A to Funeral Home B. So, Employee A makes overtures to these preneed consumers directly and encourages them to change to Funeral Home B.

What’s wrong with this? I interpret it as a breach of several legal obligations. First, it is a breach of the confidentiality inherent in any professional employment agreement. Those relationships with consumers are part of the assets of Funeral Home A.

Consider all the matters any employee, licensed or not, is exposed to at your firm. You expect all of them to keep such matters confidential. You don’t want an employee exposing the cause of death of someone in your care, telling people how much someone paid for a funeral your firm arranged or telling anyone about a payment problem you have with a family. Similarly, to the people who have prearranged services in place, funded or not, this is a confidential matter, and you expect everyone in your employ to treat it as such.

Second, I believe Employee A’s actions would fall under “unfair business practices,” a body of law that has matured over the past generation. These practices encompass a wide arena of actions, including fraud, misrepresentation by a business or employee, and burdensome or unconscionable acts or practices by a business against either consumers or other businesses. This could also include the actions of a person against a business.

This body of law exists because some actions by some parties could be considered anti-competitive. Imagine you’re in the water supply business, for example, and your competitor employs someone to follow your truck as it travels its delivery route to record the address of each customer and how many bottles of water each receives.

Suppose a salesperson then reaches out to each household and offers “special pricing,” knowing that the package pricing is specific to each user. That ap-

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proach is far more efficient than going through a full marketing effort. Competition is good, but theft by deceit or other means is anti-competitive.

In one case, a manager left to start his own business and immediately mailed out 91 letters to consumers, asking each to switch their preneed arrangements to his new firm. All 91 just happened to be preneed contract holders at the firm he'd left. When the judge asked him, "Do you know what we call that, sir?" the defendant answered, "A coincidence, your honor?"

THE ECONOMICS OF PRENEED THEFT

In a criminal case, the consequence for a perpetrator's actions is prison time and/or limitation of rights. In a civil case, the usual consequence for a perpetrator, to make the victim "whole," is a financial settlement.

To understand the economics of preneed theft, you must understand why someone would participate in this anti-competitive act. First, if a director can steer patronage, whether through theft or their own goodwill, it results in more profit for the new employer, which has a profit incentive to service these contracts.

But what about lost profit to the funeral home that had its contracts co-opted? The profit margins of funeral homes can be studied, and in most cases, a funeral home receives the highest profit on the last calls in a given year. For instance, if a 100-call firm receives an 10 calls above its annual average, those calls generate a profit of 70% or more, based on my studies.

On the other hand, if a firm loses 10 calls, assuming an average revenue of \$7,000 per call, that firm loses \$70,000 in revenue, which translates to roughly \$49,000 in lost profit since funeral service is pretty much a fixed-cost business. The additional 30% of overhead really comprises the variable costs, such as the cost of goods, a little labor, funeral-prep costs, etc.

The second reason to steer traffic to a new firm concerns future business. Suppose mom and dad have preneed arrangements with a funeral home, and a director can solicit them away. Well, upon fulfilling dad's arrangements after he dies, the new firm will almost certainly be the firm of choice for mom as well.

And it goes even further. The soliciting director will have become the funeral director to that family, meaning future cases will come.

This "expectation of patronage" is almost linear. I have done studies in this area, and you can create a "patronage tree" that can link many of the calls you get from a single call. I assert that if you could convince 100 people to move their arrangements, it could be worth 300 calls (or more) within a decade.

The third reason is equity. As a business owner, you possess something of value. Assume a firm typically sells for five times its earnings. If I can co-opt 10 preneeds a year, which results in \$50,000 in earnings, what does that do to my firm's value? At five times earnings, it would increase the value by \$250,000!

On the flip side, it would mean a loss of the same

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amount for the firm whose arrangements were taken.

Clearly, there's a lot at stake when confidential information like your preneed client list, including your firm's current income, future income and economic value, is co-opted.

WHAT TO DO IF YOU ARE A VICTIM

Because this is a civil wrongdoing, a victim's only redress will be the civil courts. If you act quickly, you may get a restraining order against the party to prevent them from converting your property to theirs.

Another option is to sue for damages. Is it expensive? Yes. However, you have much to lose. Any form of notice should go to the funeral home employee attempting to steal, or who has stolen, your customers and to the firm employing and servicing the contracts.

If you have to go to court to protect your assets, remember, you are protecting your equity. The problem with the courts is that not all understand business issues, nor do all lawyers understand finance and business. There is risk to the world of justice.

In one case, a business was sold to a key person, who paid the price the seller asked, used the lawyer and banker the seller stated and signed the contract

presented. A few years later, though, the seller wanted more money. Because there was no Non-Competition Agreement between seller and buyer, as we'd usually see, the seller began to solicit preneed contract holders to another firm that was paying him for his efforts. To me, that smacks of fraud, bad faith and malpractice.

HOW TO PREVENT BECOMING A VICTIM

Most people enter into an employment agreement, verbal or written, and honor it without tumult. But there will always be some who look for shortcuts.

Consider a requirement that a new employee enter into a Non-Solicitation and Confidentiality Agreement as a condition of employment. This will specify that all information concerning funeral home preneed clients is confidential and the employee agrees that upon termination, the employee will not solicit existing preneed clients. [Editor's note: NFDA offers a free sample Non-Solicitation and Confidentiality Agreement in its Legal Forms Library (nfda.org).

Also hold regular training sessions and restate the various matters you consider confidential information. Have employees sign an acknowledgment as to these matters.

Dan Isard, MSFS, is founder of The Foresight Companies, which provides financial and management consulting to funeral homes, cemeteries and vendors within the space. He can be reached at 800-426-0165 or danisard@theforesightcompanies.com.

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20 years, but it seems like yesterday. After the initial shock & pain, first responders raised flags over smoking ruins, Americans gave blood in record numbers, gathered with neighbors, and proudly placed our flag on buildings, homes, & cars. Hundreds of millions of Americans turned this tragedy into a moment of unity. One family, united in grief & purpose. Personally, I will always remember this as a time when I was most proud to say, "I am an American."
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