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This Issue:

Illinois DOI's Amended Consent Order Sets Up Round 2 in Circuit Court	P. 1
TSA Seeking Technologically Advanced Protocols For Screening of Human Remains	P. 2
Advocacy Summit to Boast Enhanced Lobbying Alliance Between NFDA, NFD&MA and CANA	P. 3
The Notebook	P. 5
From the Editor's Desk	P. 6



Illinois DOI's Amended Consent Order Sets Up Round 2 in Circuit Court Order Provides for 'Immediate Distribution' of Funds But the \$18 Million Question Remains Unanswered

CHICAGO – Following last week's Circuit Court ruling that the Illinois Department of Insurance (DOI) and the Office of the Comptroller had no authority to draft a settlement agreement with Merrill Lynch in the wake of the state's preneed trust fund debacle, came word that the DOI had quietly reached an agreement with Merrill Lynch on an amended consent order. The DOI pointed out that the new order would provide for the immediate distribution of \$18 million from an escrow account to funeral directors without releasing Merrill Lynch from any liability — a major issue of contention in the order the court ruled upon on Feb. 24. (See *Memorial Business Journal*, Feb. 25 edition)

According to documents obtained by the Memorial Business Journal, Michael T. McRaith, director of insurance, signed off on the amended consent order on Feb. 17. Lori M. Salvo, senior vice president and secretary for Merrill Lynch Life Agency, signed off on the document of Feb. 22, two days before Judge Mary Ann Mason issued her summary judgment on the original consent order.

"Although presented to the Court, and for procedural reasons, it does not appear that the Court had the opportunity to consider the current Department Order," said Anjali Julka, com-

munications manager for the Illinois Department of Insurance. "Through its counsel, the department looks forward to revisiting these issues with the Court as soon as the legal process allows."

According to the Circuit Court of Cook County Clerk's office, the plaintiffs, six Illinois funeral directors, must file an amended complaint by March 24. Then, the defendants are granted until April 21 to file responses. A status hearing on the matter has been tentatively scheduled for May 5.

Edward Wallace, lawyer for the six funeral directors, said that in his opinion the amended consent order would be viewed in similar fashion by the court. "I think once you read [Judge Mason's] opinion, I don't see what they did, or are trying to do, will go anywhere," Wallace said.

He added that he is hopeful that the revised position by the DOI may make it easier to resolve the case. "The bottom line is I think the judge believes that the funeral directors need to be involved in the settlement," Wallace said. "The funeral directors stand ready to work with the state agencies involved, including the DOI, to find a global solution to the problems concerning the Preneed Trust."

“DOI cannot comment further at this time due to pending litigation,” Julka said.

The \$18 Million Question

While a provision in the original consent order that would have released Merrill Lynch Life Agency from liability in order to collect money from the fund has been deleted from the amended version, there remains the matter of the \$18 million figure. Funeral directors have said that withdrawing a “proportional share” would cause such a shortfall that many funeral homes would not be able to recover.

In her opinion, Judge Mason wrote DOI had the option to fine Merrill Lynch or refuse to renew its license. The \$18 million, she said, “is an apparently arbitrary sum determined by Merrill Lynch Life Agency to be ‘reasonable’ (in some unspecified context) and that Merrill Lynch Life Agency and the Director together want to use as a part of a quasi-judicial common fund to resolve the claims of funeral directors and preneed customers.”

In the June 4 edition of the Springfield Journal-Register, McRaith was reported saying that negotiators arrived at \$18 million as a settlement figure based on revenue and commissions the fund generated for Merrill Lynch.

MBJ

TSA Seeking Technologically Advanced Protocols For Screening Of Human Remains

WASHINGTON, D.C. – The Transportation Security Administration (TSA) has clarified its comments with regard to the implementation of its Certified Cargo Screening Program (CCSP), which will require the screening of 100 percent of air cargo that is shipped on passenger aircraft as of Aug. 1.

The bottom line is that shipments of human remains will not be exempt from mandatory screening on Aug. 1. A spokesman for TSA said that a statement issued last weekend referred to the protocol of inspecting human remains, or the manner in which human remains are screened, and not to the timetable for implementation of the 100 percent cargo screening requirement.

Screening protocols that are currently in place will remain in effect on Aug. 1. TSA noted that new advanced protocols to screen human remains would not be ready by Aug. 1. However, the agency is currently developing these protocols, using new technology, that will be put in place after Aug. 1.

“TSA has not provided any industry an exemption to the Aug. 1, 2010, deadline for screening 100 percent of air cargo,” said James Fontenos from TSA Office of Strategic Communications and Public Affairs.

Clarifying the earlier communication, Fontenos said, “The notification sent out to the industry refers to the respectful screening of human remains. The Aug. 1 deadline remains in place; however the protocols that dictate how screening must take place have not changed at this time.”

He added that TSA understands the sensitive nature of screening human remains and is working with the industry to ensure security while providing flexibility in the screening process.

Fontenos noted that many businesses handling human remains have already applied to the Certified Cargo Screening Program (CCSP). “TSA will continue to work with these companies to certify their facilities providing for the respectful handling of human remains,” Fontenos said. “TSA is dedicated to ensuring the highest level of air cargo security, and we are confident that CCSP is the most effective way to meet the 100 percent screening requirement without affecting the flow of commerce.”

The CCSP is a voluntary program designed to assist industry in achieving the 100 percent screening requirement. The program was designed to enable TSA vetted, validated and certified facilities to screen air cargo prior to delivering the cargo to the air carrier.

Any facility, including funeral homes, that successfully completes the TSA certification process to include an on site assessment of the facility, will be designated as a Certified Cargo Screening Facility (CCSF). CCSFs must adhere to TSA

Fact and Fiction

Aside from the city's sports teams, one of the first things I learned about the City of Chicago as a child turned out to be based purely on TV fiction. During an episode of *M*A*S*H**, Hawkeye Pierce had a craving for spare ribs that could only be had from "this place in Chicago near the Dearborn Street station." As the plot developed I learned the fictional place was called Adam's Ribs and they were able to fill Hawkeye's take out order and have his ribs shipped to South Korea for the staff to enjoy. As a kid, I really hoped that the place existed, and I was disappointed when I found out it didn't.

Lately we have been finding out quite a lot about what has been happening in and around Chicago in the great state of Illinois, particularly as it pertains to funeral service. And it is too bad that what has happened is real life, and not TV fiction. In just the last few weeks we've seen a recent election bring up death care related issues, the enactment of consumer protection initiative that are part of a new Cemetery Oversight Act, and last week's ruling in the Circuit Court of Cook County sharpened focus back on the state's preneed trust fund debacle.

In May 2009, when the Illinois Division of Insurance announced an \$18 million settlement agreement with Merrill Lynch, more questions were raised than answered. **For example, if losses in the preneed fund approached \$100 million,** who was going to make up the balance of that shortfall? (Sadly, we do know the answer to that one.) How can Merrill Lynch deny any wrongdoing when the Division of Insurance issued a \$100,000 fine to a Merrill Lynch investment adviser and insurance broker who sold about 120 insurance policies to the Illinois Funeral Directors Association (and collected significant commissions)? Why would funeral directors want a fraction of any settlement if it means they let Merrill Lynch off the hook from any future liability?

Merrill Lynch has had a tough go of it over the past few years. If it wasn't for Bank of America's government-backed purchase of Merrill Lynch on Jan. 1, 2009, who knows what would have happened to the financial giant. (Although Merrill Lynch was able to pay \$3.6 billion in bonuses to its "best people" in December 2008 as the company suffered \$21 billion in operating losses in the fourth quarter of 2008 alone.) To me, it seems that every effort is being made to cushion the blow to Merrill Lynch and not the funeral directors. The funeral directors, it seems, are being blamed for allowing past association executives to make bad decisions for them. A separate suit filed in federal court by the six funeral directors in January 2009 against the Illinois Funeral Directors Association and has yet to be heard.

Fortunately, last week's Circuit Court ruling eliminated a very bitter pill for the funeral directors — letting Merrill Lynch off the hook from future liability. But the new consent agreement worked out between the DOI and Merrill Lynch still had some odd points, such as the genesis of the magic \$18 million figure, which remains as a staple of the new agreement. Further, the appearance of an amended consent agreement suggests that the DOI knew it had a loser with the first agreement. **Meantime, the lawyer for the funeral directors who sued DOI and Merrill Lynch is waiting to be invited to talks that may help reach a fair settlement.**

But now, as far as this action is concerned, the dance starts over again with an amended complaint, an amended answer, status hearings, etc. The difference this time around is that there is at least some hope that the victims will be treated like victims and those found guilty of wrongdoing will be held accountable.

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