

# Memorial Business Journal

The weekly resource for progressive funeral directors, cemeterians and cremationists

A Publication of **NFDA**

July 21, 2011 • Vol. 2 No. 29

This Issue:

From Defendant to Plaintiff.....	P. 1
Pennsylvania Funeral Director Makes Good On Former Ownership's Preneed Shortfalls .....	P. 2
NFDA Elects Patton, Cozine and Childs to Executive Board.....	P. 5
The Notebook .....	P. 6
From the Editor's Desk .....	P. 7



Photo by Becca Wilusz

## From Defendant to Plaintiff Judge Grants Illinois FDA Motion to Seek Damages Against Former Legal Counsel in Master Trust Debacle

CHICAGO – A twist in the legal wrangling resulting from the collapse of the Illinois Funeral Directors Association's Preneed Master Trust has resulted in the association's role in one of the lawsuits being realigned from nominal defendants to plaintiffs, which means that IFDA is now seeking damages from its former legal advisors.

According to Dawn Goulet, an attorney with the firm Wexler Wallace LLP, Chicago, which is representing the plaintiff funeral homes, IFDA and IFDA Services, acting at the direction of an independent litigation committee, filed a motion to realign the parties, in which it sought to take the case over on its own behalf. On May 25, the Circuit Court of Cook County granted IFDA's motion.

As there was no reason to have more than one party pursue the litigation going forward, the funeral home plaintiffs recently sought and were granted leave to withdraw from the case, Goulet said. The case continues now as a lawsuit by IFDA and IFDA Services against certain of its former officers and directors and its former legal advisors, Mark Cullen and the firm of Sorling, Northrup, Hanna, Cullen & Cochran Ltd.

Judge Mary L. Mikva ruled that the plaintiff funeral directors make no claim against nor seek relief from IFDA or IFDA

Services but rather seek relief from Cullen and the Sorling firm, and various former directors and officers of IFDA.

"IFDA and IFDA Services are the real parties in interest and were only named as defendants in the complaint to ensure their presence before the court," the order said. "IFDA and IFDA Services are the real parties in interest as both entities allegedly suffered damages as a result of the deficit in the Preneed Trust Tax-Exempt Fund. There is no antagonism between IFDA, IFDA Services and the plaintiffs and thus no reason not to realign IFDA and IFDA Services as plaintiffs. A current majority of the IFDA Board of Directors has not been named as defendants and is in favor of this suit as evidenced by the board resolution adopted in favor of it."

The case has now moved into the discovery phase.

David Nixon, Nixon Consulting, Chatham, Ill., said the action is a "really smart move" on the part of IFDA.

"It is definitely a step forward, and a welcome step forward," he said. "Basically, they have not been an effective organization because they have been mired in this issue for so long, and if they can take this leap and distance themselves from it as a plaintiff, then the true rebuilding will begin."

William Stalter, Overland, Kansas-based attorney and founder of Stalter Legal Services and Preened Resource Company, agrees. "With its motion for realignment of parties, IFDA took a crucial step toward restoring the confidence the association lost with members and consumers," observed Stalter, who publishes the "Death Care Compliance Law" blog on his website ([www.deathcarelaw.com](http://www.deathcarelaw.com)). He said credit is due to the funeral director plaintiffs and their attorneys with how the litigation was originally brought.

"Those lawsuits focused on the breaches of fiduciary duty committed by board members and their advisors," Stalter said. "With the board members refusing to acknowledge any breaches, individual funeral homes had to pursue litigation in their capacities as members of the association and contingent beneficiaries of the master trust.

"IFDA members have also stepped up by pursuing appointment to the IFDA board, and then redefining the association's leadership," he added. "That new leadership has agreed that the association should assume the burden of continuing the lawsuits against the former board members and their advisors."

This lawsuit was originally filed in early 2009 by six Illinois funeral directors against the directors and officers of IFDA and IFDA's legal advisors, Cullen and his law firm, Sorling, Northrup, Hanna, Cullen & Cochran Ltd., to recover damages on behalf of IFDA for injuries it has sustained as a result of those defendants' unlawful misconduct.

According to a summary of the case on the Wexler-Wallace website, in an amended complaint, the plaintiffs alleged, among other things, that the director and officer defendants breached their fiduciary duties and acted negligently in approving, participating in and carrying out a scheme by which the great majority of preneed trust funds entrusted to it by its members were inappropriately invested in speculative life insurance policies.

The complaint further alleged that Cullen and the Sorling firm aided and abetted the officer and director defendants in breaches of duties and, as the long-time corporate counsel for IFDA, are liable for malpractice for their failure to properly advise IFDA with respect to its duties under Illinois law.

### Other Activity

According to Goulet, there has also been some activity in a class action case pending in federal court in the Southern District of Illinois. Two recent decisions in that case have denied the former trustee of the state's master trust, an easy exit from litigation relating to the mishandling of preneed funeral funds in Illinois.

On June 21, U.S. District Judge G. Patrick Murphy denied a motion to dismiss made by Merrill Lynch Bank & Trust Co., the one-time trustee of the preneed trust. Murphy determined that the funeral home plaintiffs have standing to pursue their claims and, significantly, recognized that they properly allege they were unfairly forced into signing a trust agreement with Merrill Lynch that purports to relieve the company not only of any liability but of any responsibility as a trustee to pursue claims against those who harmed the Trust.

More recently, on July 1, Murphy also denied a motion to dismiss made by the financial advisors to the trust, Edward L. Schainker and Merrill Lynch, in a related case brought by preneed consumers.

Said Stalter: "With Southern District U.S. Court having denied motions to dismiss claims against the master trust advisors, IFDA may have the momentum needed to force new settlement proposals from Merrill Lynch and the association's former law firm. For an association that was pronounced DOA last year, IFDA seems to be on the long road to recovery."

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## The Promise: Pennsylvania Funeral Director Makes Good On Former Ownership's Preened Shortfalls

MECHANICSBURG, PA – Funeral director Bob Buhrig thought he'd hit upon the perfect storm. For sale was a funeral home he wanted to purchase. It had long been his dream to buy a funeral home in his hometown. So there it was. Not only was this funeral home in his hometown, it was the funeral home he wanted – one that for him held a special connection since it was the funeral home where he started his career.

Buhrig saw everything falling into place. Then he started doing his homework and found out some serious shortfalls in