

BY DAVID R. PENEPEP, PH.D.

# REGULATIONS That Can Hurt CONSUMERS



**EXPOSING THE POTENTIAL DISRUPTION  
OF CREMATORY SERVICES AND A LATENT  
INCREASE IN COST TO CONSUMERS  
CREATED BY NEW YORK'S REGRESSIVE  
ANTI-COMBINATION CREMATION LAW.**

Laws in society are designed to protect both consumers and business owners. Especially in the funeral industry, laws govern proper conduct among professionals to protect not only the consumer but also employees, employers and society as a whole.

During the early part of the Industrial Revolution, business tycoons figured out ways to monopolize markets to their advantage. As they capitalized on their techniques, consumers bore the brunt of the expense because only the very few controlled marketplace competition. At the turn of the 20th century, the federal government realized that restraining trade in the marketplace had a direct impact on the cost of goods sold. Consequently, agencies such as the Federal Trade Commission were created to regulate unscrupulous practices, monopolies and price fixing in the marketplace.

One debate surrounding monopolies centered on whether certain monopolies, such as “Ma Bell” or AT&T, were *good* monopolies. Eventually, in the 1980s, the government determined that the “good” monopolies also restrained free trade, and it gave consumers the right to choose their own phone carrier. Competition in the marketplace provides consumers with choices and keeps prices reasonable.

Regulatory laws in New York state that govern the practice of funeral directing are, for the most part, consumer friendly. However, some have shortcomings and may even encourage a funeral professional to take part of his or her business

out of state, which can potentially increase the cost of services and affect consumers. Furthermore, some regulations could disrupt cremation services in the very near future due their strict enforcement and the inability of governmental agencies to do something constructive about a regulation designed to shut down funeral home/crematory operations in the state.

In this article, I will provide a history of the funeral home/cemetery/crematory anti-combination law enacted in the late 1990s to prohibit funeral home owners from operating both a funeral home and a cemetery/crematory. In addition, I will expose the problem and potential disruption of crematory services created by this regressive law.

In the state of New York, funeral businesses are governed by the Bureau of Funeral Directing, a division of the Department of Health. Cemeteries and crematories, on the other hand, are regulated by the Division of Cemeteries, part of the Department of State. Both agencies have their own administrative laws to regulate.

Most cemeteries and all crematories in New York are not-for-profit and are governed under Not-for-Profit Corporate Law 1502(a). Five types of cemeteries are present in the state:

not-for-profit, municipal, federal or veteran cemeteries, religious and private. For the most part, the Division of Cemeteries governs and regulates not-for-profit cemeteries and crematories. There are no funeral home/cemetery combination ownerships in New York.

However, prior to 1997, savvy funeral home owners who saw the growing demand for cremation in their communities petitioned the Division of Cemeteries for and were granted a license to operate crematories as part of their funeral home operations. When the state of New York realized that there could be a potential conflict of interest or opportunity for a funeral home to form a monopoly, it created the anti-combination law. After 1997, no funeral home owners, family members or licensed funeral directors could build and operate crematories or cemeteries in the state. In fact, within the last five years, a moratorium has been in existence on future crematories; there have only been a few new crematory operations built in New York in the past 15 years due to that moratorium.

There's a quandary on what to do with the 17 funeral home/crematory combinations that currently exist. When the anti-combination law was created, it was, in part, designed so that large, corporate funeral homes could not obtain a monopoly on the state funeral industry. The funeral homes/crematories that were already in existence could maintain their operations if they owned their businesses. This grandfather clause would expire the moment the owners changed their operations, retired, died or sold the business.

Recently, a funeral home/crematory owner wanted to upgrade his retorts to be more energy efficient and was denied permission by the state. In fact, the matter went to the courts for a decision. The state's argument was that the configuration of the operation was changing, thus voiding the grandfather clause, which could lead to the firm's closure.

In another funeral home/crematory combo operation, a western New York crematory was forced to temporarily cease operations due to unfounded complaints by neighbors regarding pollutants, even though the operator went to great lengths to comply with EPA and other governmental compliance requests.

In short, it appears that the only concern of the Division of Cemeteries is to dissolve funeral home/crematory combination operations.

One solution that has been proposed to these funeral home/crematory owners is to give the crematory operation over to a local cemetery already under Not-for-Profit Corporate Law 1502(a), but this is not a well-thought-out solution to the problem. As previously stated, most New York cemeteries are not-for-profit and are currently managed and operated by volunteers. A very large number of these cemeteries are experiencing an aging group of volunteers – an attrition cliff dilemma. Moreover, cemeteries are also experiencing decreased revenues because of the increase in cremation, a decrease in traditional burial and the high cost of maintenance, resulting in a lack of committal services. Consequently, every year, more and more of these types of cemeteries are being turned over to local municipalities, which leads to even more reductions in services provided to the consumer.

I predict that within the next 15 years, two-thirds of current not-for-profit cemeteries in New York state will be owned and operated by local municipalities.

The American culture has shifted its view on cremation over the past 30 years. Currently, about 45% of Americans choose cremation as the means of final disposition. The cremation trend follows the church attendance trend; currently, 70% of Americans don't attend church regularly. Within the next 15 years, as the baby boomers approach death, I predict that the cremation rate will equal the church attendance rate, with 70% of society choosing cremation as a means of final disposition for their loved ones.

A crucial aspect of these potential statistics is that in 15 years, 3.4 million U.S. deaths are predicted. Based on my calculation of future cremations, 2.4 million people will eventually be cremated. In view of the moratorium on future crematories being built in New York, a shortage of services will potentially be created. Coupled with the grandfather clause expiring for 80% of the funeral home/crematory combinations, a disruption – or, at best, a backlog – could transpire in normal cremation operations in some parts of the state.

Knowledgeable funeral home owners who perceive the growing demand for cremation in the near future do not allow the anti-combination law to dictate their ability to control the future of their operations. New York borders six states and Canada. The current trend developing over the past 15 years is funeral home owners crossing over state lines and building or acquiring crematories in neighboring states. Within the next 15 years, it is extremely possible that this trend will not only continue but also play a significant part in where funeral homes bring human remains to be cremated. The regressive anti-combination cremation law is driving (in some parts of the state) the cremation business out of New York.

Some funeral home/crematory owners will challenge the law in court, but that will waste money, time and resources. The complexity of the anti-combination law is extremely difficult to overcome. If the courts decide that this law is unconstitutional and rule in favor of funeral home/crematory owners, then a Pandora's box will open to future lawsuits from corporately owned funeral homes that wish to own combination cemetery, crematory and funeral home operations.

The answer to this dilemma is as complex as the anti-combination law itself. All of the statistical data gathered by NFDA and other funeral-related organizations support the notion that cremation is on the increase. Still, the powers that be in New York have created a moratorium on building new crematories. The grandfather clause will quickly come to a co-

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**The regressive state laws will eventually inflate the cost of cremations.**

lossal end, which will lead to a significant shortage of crematories in the state while more and more local, not-for-profit cemeteries will be surrendered to local municipalities. The Division of Cemeteries is being destroyed from within. Not-for-profit cemeteries in New York are going to

have to change soon to for-profit cemeteries or risk being surrendered to local municipalities. But cemeteries for profit are highly unlikely; thus, the latter will become the trend in local communities. The cost for a municipality to own and operate one or two cemeteries in an area could be prohibitive. Accordingly, local governments will be looking for a revenue stream to fund abandoned cemetery operations.

Two years ago, Foxwood Memorial Park in Oswegatchie, New York, surrendered its operation to the town. This little rural community just outside of Ogdensburg did not want to be in the cemetery business but was forced to under state law. Realizing the financial liability that a cemetery operation places on the town's finances, the town petitioned and was granted a license by the Division of Cemeteries to operate a crematory: "The crematorium's construction solves a town dilemma regarding how to pay for maintaining a once

private facility that elected officials in the community never intended to own."

Foxwood Memorial Park may be the first example of what is a future trend for New York crematories. Over time, the Foxwood Crematory will fill a long overdue crematory demand in St. Lawrence County. The closest crematory prior to Foxwood Crematorium was 100 to 150 miles (round trip) away, and that crematory in Teresa is one of the 17 funeral home/crematory combinations in the state. By granting Foxwood a crematorium license, eventually the customer base upon which the operation in Teresa relied will greatly diminish, which could result in a financial crisis for this crematory. While a crematory was desperately needed in St. Lawrence County, it appears that the moratorium is designed to ensure that future crematories be owned by cemetery operators.

Cemetery/crematory operations may currently be the answer to the funeral home/crematory dilemma. However, in its haste to eliminate the funeral director from being involved in cremations, the Division of Cemeteries is overlooking its shortcomings. Millennials have little to no desire to donate their time or energy to not-for-profit cemeteries. As previously stated, the Division of Cemeteries governs these types of cemeteries and crematories. If my predictions and calculations are correct and two-thirds of cemeteries are surrendered to local municipalities in the next 15 years, what will be the fate of the Division of Cemeteries? While it regulates not-for-profit crematories in New York, it does not regulate municipal cemeteries. With few not-for-profit cemeteries needing to be monitored, the Division of Cemeteries could easily be dissolved and the Comptroller's Office could assume the annual inspections of crematories and not-for-profit cemeteries.

The regressive laws regulating crematories and cemeteries will eventually inflate the cost of cremations, especially if municipality-owned combinations become the norm. The level of maintenance needed in cemeteries is extremely costly, and with the decrease in revenues from traditional burials, local governments are going to rely on their "cash cow" (i.e., crematories) to fund dying burial practices. Funeral home owners who are in a 50-mile radius of a bordering state without regressive funeral home/crematory combination laws will be expanding their operations to include crematoriums. Thus, they will continue to funnel even more money out of New York, leading to consumers eventually being hit with rising cremation fees.

The anti-combination law has put off the problem of funeral home/crematory operations until now, but due to New York state's shortsightedness in understanding supply and demand, the consumer will eventually bear the price tag of this regressive law with higher cremation costs. ☰

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