

BEFORE THE FEDERAL TRADE COMMISSION

The International Cemetery and Funeral Association
1895 Preston White Drive
Reston, Virginia 20191
703/391-8400/1-800-645-7700

Post-Hearing Comments to the FTC Public Workshop:
Possible Anticompetitive Efforts to Restrict Competition on the Internet
October 8-10, 2002

The International Cemetery and Funeral Association (ICFA) appreciates the opportunity provided by the Commission for our participation in the October 9th panel discussion concerning online casket retailing. In addition to the comments we filed prior to the public workshop, we submit the following post-hearing comments to supplement our previous remarks.

I. Potential Limited Market

During the panel discussion, our representative, Mark Krause, remarked that his casket store, which operates at a strip mall in the Milwaukee, Wisconsin area, would not be economically viable if not supplemented by the funeral services offered through Mr. Krause's funeral home nearby. Although the casket

store

offers cremation urns and outer burial containers in addition to a variety of caskets, Mr. Krause stated that the range of products offered for sale to the public is apparently too narrowly focused to independently sustain the cost of operations.

Subsequent to the public workshop, Mr. Krause contacted colleagues in two different market areas: St. Petersburg, Florida and Denver, Colorado. Similar to Mr. Krause, these two individuals in Florida and Colorado respectively, each operate a casket store at a local mall as an adjunct to their funeral home. Both individuals concurred with Mr. Krause's personal experience that their respective casket stores would be economically unprofitable without the additional services offered by their funeral homes.

The ICFA suggests that these collective experiences may be symptomatic of the problems encountered by casket retailers in general. Although testimony provided by the National Casket Retailers Association and individual casket retailers alleged unfair trade practices by funeral home competitors and by casket

manufacturers, the ICFA urges the Commission to explore the economic model upon which independent casket retailers operate. We believe that the limited types of funeral products offered by these retailers may play a significant factor in their economic profitability. Whether the market area for such limited inventory can be expanded to a national or even international basis through Internet retailing, thereby increasing net income of operations, has not yet been demonstrated.

II Cemetery Service Fees

During the October 9th panel discussion, a certain amount of time was devoted to a discussion of whether the FTC Funeral Rule should be expanded to Internet retailers of funeral goods or services. In addition, the Commission has received at least one comment suggesting that cemeteries should not be permitted to charge service fees for vaults, markers and other merchandise purchased from a retailer other than the cemetery. An analogy was drawn comparing the Funeral Rule's prohibition against a casket handling fee to cemetery service fees.

The ICFA strongly believes that the comparison is inappropriate for the simple reason that funeral homes are permitted to charge a non-declinable

professional service fee under the Funeral Rule to cover overhead expenses of operations. By contrast, cemeteries do not generally impose any basic service fee but instead itemize each service or merchandise used by their customers. In fact, cemeteries have itemized fees long before the Funeral Rule required such itemization in 1984.

In addition, federal case law specifically permits cemeteries to charge a handling fee when customers arrange for the purchase and installation of a monument or marker by an outside retailer. In *Rosebrough Monument Co. v. Memorial Park Cemetery Assn.*, 736 F.2d 441, (8th Circuit 1984), the Eighth Circuit Court of Appeals held that cemeteries could assess a handling fee, based on actual labor costs, to inspect the finished work product of the third party retailer. The Court also allowed cemeteries to require third party installers to post a performance bond and carry adequate liability insurance with the cemetery as a named insured. The *Rosebrough* decision is considered the leading federal case law on cemetery handling fees assessed on third party merchandise and should be considered during any discussion of this issue.

III State Regulations and Cremation Rates

The ICFA comments submitted in conjunction with the October 9th panel discussion specifically favored open competition and opposed state laws that limit casket retailing to licensed funeral directors. A similar concern has been expressed by panelist David E. Harrington, Claremont McKenna College in Claremont, CA. However, Prof. Harrington's comments discuss a survey he has conducted whereby he concludes that "unregulated states," that is, states that do not restrict casket sales solely to licensed funeral directors, have a higher cremation rate than "regulated states" that limit casket sales to funeral directors. While his findings may have some relevance to the issues under discussion, we believe that his survey methodology is flawed.

Specifically, Harrington states that his survey "does not control for differences...in the socioeconomic and religious characteristics of their populations." For this reason alone, the ICFA believes that his findings are skewed. Other surveys studying consumer preferences towards cremation have found that education, income, race and religious beliefs are important factors in determining such preferences. For example, the Wirthlin Study of American Attitudes Towards Ritualization and Memorialization conducted a benchmark survey of consumers in 1991 and tracking surveys in 1995 and again in 1999.

Consistent in all three Wirthlin surveys, consumers in higher income brackets and higher education levels were more likely to choose cremation for themselves and family members. Also, whites arranged more cremations than blacks (27% and 10% respectively); practicing Protestants (31%) and non-practicing respondents (34%) were more likely than practicing Baptists (10%) to arrange for cremation. These results and other findings suggest that focusing on state restrictions concerning who may sell caskets to the public may be too narrow in determining cremation rates. We encourage Prof. Harrington to undertake a new study whereby ethnic, financial, religious and educational characteristics are factored into the survey.

IV Advertising Claims

There was some discussion by panelists regarding advertising claims and we would like to reinforce our concerns. Like similar looking cars, two caskets may seem comparable in appearances but have a legitimate disparity in pricing, both wholesale and retail. Online casket retailers may offer substantial savings on an “oak casket” but the item may be considerably different than the “oak casket” sold elsewhere at a higher price. Exterior ornamentation, carvings, interior fabric and design can affect the cost. As a result, some sort of disclosure guideline may be

needed to accurately quantify claims made by online sellers of price savings. In the meantime, we believe that the FTC's regulation on deceptive pricing, 16 CFR Part 233, and section 5 of the FTC Act provide the Commission with the legal authority to take action against potential misconduct.

Conclusions

The ICFA congratulates the Federal Trade Commission on its leadership to initiate the study of possible anticompetitive effects impeding Internet commerce. We believe that the recent comments and testimony provide a good framework for the FTC to move forward in this area. "E-commerce" is such a new area of consumerism that we suspect that it will take some time before genuine anticompetitive factors that can be accurately identified and extraneous ones eliminated. The ICFA appreciates this opportunity to assist the Commission in this new field and we look forward to working together in the future. Thank you.

Respectfully submitted,

Robert M. Fells

November 4, 2002

External Chief Operating Officer
and General Counsel