

**BEFORE THE FEDERAL TRADE COMMISSION**  
**The International Cemetery and Funeral Association**  
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Preliminary Comments Regarding the FTC Public Workshop:  
Possible Anticompetitive Efforts to Restrict Competition on the Internet

October 8-10, 2002

The International Cemetery and Funeral Association (ICFA) was founded in 1887 and represents approximately 6,000 industry members including nonprofit, for-profit, religious and municipal cemeteries, funeral homes, crematories, monument retailers, and related professionals including architects, attorneys and accountants. The ICFA has adopted as its motto and ideology, “Promoting Consumer Choices, Prearrangement and Open Competition,” and has published a series of twenty eight *Model Guidelines for State Laws and Regulations* toward these goals. This material has previously been provided to the Commission and has also been distributed to state agencies and trade associations, AARP and other consumer advocates. We appreciate this opportunity to participate as a panelist in the Federal Trade Commission Public Workshop concerning “Possible Anticompetitive Efforts to Restrict Competition on the Internet,” on October 8-10, 2002, as it relates to state laws and industry practices that restrict or prohibit the retail sales of caskets by members of the allied funeral, interment and memorialization industries, and by third parties.

**I. Origins of Open Competition in the Funeral Services Industries**

Historically, sales of funeral-related goods and services have been subject to restrictive practices that limited who may sell what, but also limited how items

may be sold even by those permitted to sell them. The FTC Funeral Rule, 16 CFR Part 453, was developed during the 1970s in part to address the practice of funeral homes offering only “packaged plans” to consumers. While customers were free to select from among the plans, selecting only certain items within a particular plan was generally not permitted. A key purpose of the Funeral Rule was to require the “unbundling” of package plans so that consumers were allowed to select only those goods and services they wanted. In order to promote consumer choice, the Funeral Rule required that funeral goods and services offered by funeral homes must be itemized and separately priced on a price list given to customers prior to a purchasing decision being made. Thus, the general price list, the casket price list, and the outer burial container price list became requirements under the Funeral Rule, not because funeral directors refused to give these prices, but because they refused to unbundle their packaged plans and sell these items separately. This distinction is important because FTC staff had found that the practice of bundling such items was “not apparent” in other allied businesses, “at least in the same magnitude as it is in the funeral home industry.”<sup>1</sup> Hence, calls to expand the Funeral Rule to cover other sellers such as cemeteries and third parties were found to be unjustified by the lack of a record indicating consumer injury in the areas addressed by the Rule.

Today, much of the Funeral Rule seems anachronistic in that it addresses problems that consumers do not seem to have, e.g., the lack of price disclosures, while not addressing emerging consumer concerns such as selling restrictions. In order to test this theory, the ICFA made two separate FOIA (Freedom of Information Act) requests of the FTC asking for consumer complaints against cemeteries in order to determine whether the Funeral Rule would have prevented

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<sup>1</sup> Final FTC Staff Recommendations, May 28, 1991, at 17.

or remedied complaints had cemeteries been included under the Rule. The results from the FTC database produced nearly one hundred consumer complaints over a four-year period, from September 1997 through August 2001, or an average of two complaints per month on a national basis. Of these complaints, only four (an average of one complaint per year on a national basis) had potential to be addressed under the Funeral Rule, although more information was needed to make a specific determination. Similar to the results of our FOIA requests, the General Accounting Office also noted a low volume of consumer complaints against all funeral-related sellers in its 1999 report.<sup>2</sup>

However, the Funeral Rule protects consumers in two relevant areas that are exclusively in the realm of funeral homes: 1.) The requirement to obtain authorization prior to embalming; and 2.) The prohibition against imposing a casket handling fee when customers purchase a casket from a source other than the funeral home. This second safeguard was enacted in 1994 and is generally credited with creating an entirely new group of funeral-related retailers, the third-party casket seller (a term that ironically includes cemeteries), in less than a decade.

### **Consumer Protection and the Advent of Online Casket Retailing**

Despite the favorable climate for competition that the Funeral Rule's casket handling fee prohibition established, a significant number of states, approximately twenty-five percent, restrict the sale of caskets exclusively to licensed funeral directors.<sup>3</sup> Third party retailers have challenged these laws in some states, and it is

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<sup>2</sup> United States General Accounting Office, "Funeral-Related Industries," September 1999. GAO/GGD-99-156.

<sup>3</sup> To the best of our knowledge, these states are Alabama, Delaware, Georgia, Idaho, Louisiana, Maine, Massachusetts, Mississippi, Minnesota, Oklahoma, South Carolina, Tennessee, Vermont and Virginia.

significant that federal district courts in two states, Tennessee and Mississippi, have declared that such statutes are unconstitutional and, therefore, invalid.<sup>4</sup> The Tennessee decision is being appealed by the state funeral board, but we are pleased to note that the FTC's "Amicus Curiae" brief, submitted in the current Oklahoma litigation challenging that state's law, clarifies that the Funeral Rule was not meant to restrict competition solely to licensed funeral directors as the state board contends.<sup>5</sup>

It is unclear whether state laws permitting sales only by licensed funeral directors can be applied to out-of-state entities selling through the Internet. However, the existence of these state prohibitions can have a chilling effect on potential entrants to the casket retailing market and appear at the very least to prohibit such third party sellers from being based in those states. In the ICFA's view, such laws are anticompetitive and their proponents seek to exploit consumers' concerns regarding fraud and deception as the *raison d'etre* for maintaining these laws when less restrictive means to address such concerns are available.

Specifically, whether or not casket retailers should be registered sellers does not justify a requirement that such retailers must also graduate from mortuary science school, pass a licensing examination, and serve an apprenticeship at a funeral home, in order to sell a casket. These typical requirements for becoming a licensed funeral director in most states make no sense when applied solely to the sale of caskets. Columnist George Will succinctly stated the issue when he

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<sup>4</sup>The decisions are *Craigmiles v. Giles*, 110 F.Supp.2d 658 (E.D.Tenn. 2000) and *Casket Royale, Inc. v. Mississippi*, 124 F.Supp.2d 434 (S.D.Miss. 2000).

<sup>5</sup> *Powers, et al. v. Harris, et al.*, Case No CIV-01-445-F, U.S. District Court for the Western District of Oklahoma; FTC Memorandum of Law of Amicus Curiae, submitted August 29, 2002.

observed that requiring casket sellers to be licensed funeral directors was like saying only podiatrists can sell shoes.<sup>6</sup>

### III. **Assuring Delivery for Prepaid Casket Sales**

The growing popularity of prepaid or “preneed” funeral arrangements has raised a unique issue in consumer protection due to the fact that customers pay in full for merchandise and services that they will not receive until years or decades in the future, i.e., at the time of death. Safeguarding future delivery has led virtually all states to require that prepaid funds must be escrowed in trust accounts or secured through life insurance policies in order that sufficient amounts are available to meet the funeral provider’s wholesale cost. Unfortunately, some states have such high trust deposit requirements that potential preneed sellers are unable to enter the market. The Commission staff has issued a series of “intervention letters” that question the anticompetitive effects of high trust deposit requirements, 90 percent to 100 percent, that effectively prevent sellers from recovering the costs of the preneed sale, thereby barring them from the market.<sup>7</sup>

Regardless of the percentages, most state preneed trust deposit laws apply only to funeral homes and cemeteries. Third party casket sellers that are independent of either funeral homes or cemeteries are under no legal obligation to escrow prepaid funds to assure future delivery. The ICFA strongly recommends that reasonable trust deposit requirements in an amount sufficient to defray the casket provider’s costs should be mandatory for all casket retailers, whether

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<sup>6</sup> George F. Will, “Of Death and Rent Seeking,” *Newsweek*, May 15, 2000, quoting the Institute for Justice.

<sup>7</sup> See the Commission-authorized letter to Rep. David Wright, Pennsylvania House of Representatives, March 28, 1994; also, Commission-authorized Statement to Pennsylvania House Committee on Business and Commerce, August 29, 1989.

through online or “brick and mortar” retailing. In addition, alternative forms to assure delivery should also be considered such as storing caskets in a bonded and insured warehouse with the purchaser given custody of the receipt. It should be noted that none of these forms of consumer protection justify the requirement for a funeral director’s license in order to sell to the public.

Finally, we note that the Commission staff recently submitted comments to the Food and Drug Administration that we believe are relevant to this proceeding. Specifically, FTC staff was asked to provide guidance on whether consumer protection regulations might conflict with constitutional First Amendment rights of commercial free speech. Staff concluded, “The commercial speech doctrine recognizes the importance of consumer access to truthful and accurate information. On the other hand, inaccurate or misleading claims have no protection under the First Amendment and need to be purged from the marketplace...”<sup>8</sup> As applied to casket sales, the ICFA believes that advertising content including claims of quality, price comparisons and savings should be subject to this same standard.

In conclusion, these remarks provide a brief outline of our position on the relevant issues. The ICFA is looking forward to the panel discussion concerning online casket retailing during the public workshop on October 9<sup>th</sup> where the Association will be represented by Board member Mark Krause. Both Mr. Krause and myself will be happy to answer any questions regarding this emerging form of retailing. Thank you.

Respectfully submitted,

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<sup>8</sup> In the Matter of Request for Comment on First Amendment Issues, September 13, 2002.

Robert M. Fells  
External Chief Operating Officer  
and General Counsel

September 27, 2002