



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Harvey L. Lapin, Esq.
P.O. Box 1327
Northbrook, IL 60065-1327

RE: Request for staff advisory opinion

Dear Mr. Lapin:

This letter is in response to your request for an informal staff advisory opinion concerning the applicability of the "cash advance" provisions of the FTC Funeral Rule to certain practices. Your request states that the Comptroller of the State of Illinois introduced legislation to amend several provisions of the funeral and cemetery laws he enforces. One of the key provisions in the proposed law is an amendment to the Illinois Unfair and Deceptive Practices Act that would require funeral providers making at-need arrangements that include the purchase of cemetery spaces to provide consumers with a contract with the cemetery provider.¹

Your concern is that some funeral providers are using the "cash advance" provision of the Funeral Rule to disclose the estimated cost for cemetery merchandise and services in a way that sometimes results in consumer harm when the funeral provider does not have a contractual agreement with the cemetery for the services at issue. You contend that it is implicit in the "cash advance" requirements of the Funeral Rule that because a funeral provider is required to provide an accurate price or a good faith estimate of a cash advance item, the funeral provider must have a contract with whoever furnishes the service or merchandise before advising the purchaser of the actual or estimated amount of the cash advance item.

¹ You note in your letter that the Illinois General Assembly did not enact the proposed legislation in 2005, but that you expect it will be reintroduced in another session. You also note in your letter that similar requirements were proposed, but not adopted, for the Illinois Funeral and Burial Funds Act, 225 ILCS 45/1a. Recently you confirmed that the issue is still pending in Illinois.

In support of this view, you describe three scenarios, all involving situations in which the funeral provider does not have a contract with the cemetery provider:

- An at-need arrangement in which a consumer asks the funeral provider to make arrangements with the cemetery provider. The funeral provider selects a current price schedule from a cemetery that either may not be the consumer's family cemetery or may result in an interment location not to the family's liking, and uses that price as the "good faith" estimate of the price of the cemetery plot.
- A pre-need scenario in which a funeral provider has implied that he has reserved an interment and interment right at a cemetery and collects payment for this as a cash advance item. Several years pass and the cemetery no longer offers what the purchaser thought would be provided. As a result, either the consumer will have to pay more, or the interment will occur in a location other than that desired by the deceased.
- A second pre-need scenario in which the consumer already owns a grave in a particular cemetery and pays the funeral provider in advance for the opening and closing costs listed on the cemetery price list at the time. By the time of burial, years later, the cost for these services is higher, resulting in the deceased being diverted to a less costly and, perhaps, less desired alternative.

Before addressing your specific issues, it is useful to note that an essential purpose of the Funeral Rule is to "ensure that consumers have access to sufficient information to permit informed purchase decisions, that consumers are not required to purchase items they do not want and are not required by law to purchase and that misrepresentations are not used to influence consumer purchase decisions." Statement of Basis and Purpose, Funeral Industry Practices Trade Regulation Rule, 59 Fed. Reg. at 1593 (January 11, 1994) (reprinted from the 1982 Statement of Basis and Purpose). To a large extent, our conclusion must be driven by this fundamental purpose of the Rule.

Section 453.2(b)(5)(i)(B) of the Funeral Rule requires that funeral providers give an itemized written statement to each person who arranges a funeral that includes, *inter alia*, specifically itemized cash advance items. The Rule requires that the cost of any cash advance items:

be given to the extent then known or reasonably ascertainable. If the prices are not known or reasonably ascertainable, a **good faith estimate** shall be given and a written statement of the actual charges shall be provided before the final bill is paid. (Emphasis added.)

Section 453.1(b) of the Funeral Rule defines “cash advance item” to mean “any item of service or merchandise described to a purchaser as a ‘cash advance,’ ‘accommodation,’ ‘cash disbursement,’ or similar term. A cash advance item is also any item obtained from a third party and paid for by the funeral provider on the purchaser’s behalf. Cash advance items may include, **but are not limited to:** cemetery or crematory services. . . .” (Emphasis added.) Thus, cemetery interment rights and merchandise, and cemetery plots would be included in the definition of “cash advance items,” if they are obtained from a third party and paid for by the funeral provider on the purchaser’s behalf.²

Section 453.2(b)(5)(i)(B) specifies what disclosures must be given for cash advance items, dependent on whether the actual cost is known or reasonably ascertainable at the time the disclosures are made. If the actual cost is not known or reasonably ascertainable, the funeral provider must provide a “good faith estimate” of the cost.³ A “good faith estimate” requires more than a guess or reliance on out-dated information. It requires the funeral provider to make a reasonable effort to determine the cost of the item. Thus, in all three of the scenarios posited in your letter, the funeral provider must provide cemetery and interment costs based on a current price schedule. A “good faith estimate” does not necessarily require that the funeral provider have a contract with the third-party before providing the “estimate.”

We assume from the facts presented in your letter, however, that consumers making pre-need decisions are pre-paying for their funeral goods and services, rather than merely pre-planning. Section 453.2(b)(5)(i)(B) of the Funeral Rule requires that a written statement of the **actual** charges be provided **before the final bill is paid.** (Emphasis added.) In a pre-need situation where the consumer wishes to fully pay for the funeral goods and services in advance, the funeral provider is required to state the actual, final costs of such goods and services. In those instances, if the cost of the cemetery merchandise or services offered is not ascertainable unless the funeral provider has a contract with the cemetery provider, then such a contract would be required by the Rule before the final bill is paid by the purchaser. Furthermore, funeral providers who make written promises to consumers but do not fulfill them may be liable under Illinois law for breaching their contractual obligations with consumers.

Finally, if the funeral provider charges a mark-up on any cash advance item, it should be noted that Section 453.3(f)(2) of the Funeral Rule requires that the itemized statement of funeral goods and services selected include the following disclosure: “We charge you for our services in obtaining: (specify cash advance items).”

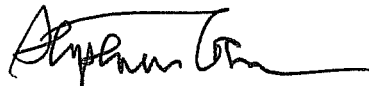
² For a further explanation of the definition of cash advance item, we have attached a letter issued by the Federal Trade Commission in July 2005 that addresses the subject more fully.

³ It would be prudent to label any disclosures based on a good faith estimate as such.

Harvey L. Lapin, Esq.
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Please be advised that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the opinions of those staff members charged with enforcement of the Funeral Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen L. Cohen", with a long horizontal flourish extending to the right.

Stephen L. Cohen
Senior Staff Attorney
Funeral Rule Enforcement