

**BEFORE THE
FEDERAL TRADE COMMISSION**

COMMENTS REGARDING COMPETITION

**COMMENTS OF THE
NATIONAL FUNERAL DIRECTORS ASSOCIATION
ON THE POSSIBLE ANTITRUST EFFORTS
TO RESTRICT COMPETITION ON THE INTERNET**

NATIONAL FUNERAL DIRECTORS ASSOCIATION
13625 BISHOP'S DRIVE
BROOKFIELD, WISCONSIN 53005-6607
CONTACT: CHRISTINE PEPPER,
CHIEF EXECUTIVE OFFICER
(800) 228-6332

STATMAN, HARRIS, SIEGEL & EYRICH
255 EAST FIFTH STREET, SUITE 2900
CINCINNATI, OHIO 45202
CONTACT: T. SCOTT GILLIGAN
NFDA GENERAL COUNSEL
(513) 587-4440

AND

400 C STREET, N.E.
WASHINGTON, DC 20002
CONTACT: JOHN H. FITCH, JR.
DIRECTOR OF GOVT. RELATIONS
(202) 547-0441

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I. INTRODUCTION

The National Funeral Directors Association (“NFDA”) submits the following comments to the Federal Trade Commission (“FTC”) as part of its public workshop to explore possible anti-competitive efforts to restrict competition on the Internet. These comments are being submitted in accordance with the July 17, 2002 Request for Comments published by the Federal Trade Commission.

NFDA is the nation’s largest funeral service organization. In its role as the national representative of the funeral professional, NFDA has been involved in all facets of federal regulation of the funeral profession. It has over 13,000 members ranging in size from small family-owned funeral homes to large publicly-held corporations.

Another important component of NFDA’s membership are the funeral director associations for each of the fifty states and the District of Columbia (the “State Associations”). NFDA will often assist State Associations by serving as a clearinghouse for information on state laws and regulations, and by providing model guidelines and statutes for states seeking to enact or amend laws impacting the funeral industry and the funeral consumer.

The FTC has requested NFDA to participate in its public workshop that is exploring whether states have enacted laws and regulations which restrict competition on the Internet. Specifically, NFDA is being asked whether state laws and regulations limit on-line casket sales and, if so, whether there are any pro-consumer rationales for such restrictions. The FTC is also requesting NFDA to examine whether there are less restrictive means for achieving the pro-

consumer goals and to discuss the status of any current litigation concerning state laws and regulations.

II. INTERNET CASKET SALES

A) **No Restrictions on Internet Casket Sales.**

NFDA is unaware of any state that currently restricts in any manner online sales of caskets via the Internet. While a handful of states have laws that require an individual to hold a funeral director's license in order to sell caskets in the state, NFDA has no knowledge of any state action against an out-of-state casket retailer offering to sell caskets via the Internet. Therefore, online casket retailers are currently able to freely sell caskets throughout the United States.

The unfettered ability of casket retailers to use the Internet as a means of selling caskets to residents of all fifty states and the District of Columbia is readily apparent by a brief visit to the Internet. Placing the word "casket" in a search engine generates a list of over a hundred sellers of caskets online. We have attached as Exhibit A a small sample of the results we located in an online search of casket retailers. None of the websites we visited referenced any state law restrictions. Nor do any of the online sellers limit their sales to any particular states. Therefore, state laws and regulations impose no restrictions whatsoever on casket sales via the Internet.

B) **The Regulatory Gaps in Internet Sales.**

1) The Funeral Rule. Although the ability of consumers to purchase funeral goods over the Internet promotes competition and consumer choice, the void of government regulation also invites consumer abuse and fraud. The

reluctance of the FTC to strengthen the Funeral Rule by requiring every seller of funeral goods to comply with its price disclosures and prohibitions against misrepresentations deprives online funeral consumers of the basic protections that every consumer dealing with a funeral home receives.

It is ironic that the funeral profession has become the leading advocate of strengthening the Funeral Rule to protect all funeral consumers while the federal agency charged with protecting consumers continues to drag its feet on this critical issue. Over the past year, FTC staff members have publicly expressed concerns regarding whether the Commission has enough evidence to justify expanding the Rule over third party sellers. This recent bout of regulatory restraint is a stunning contrast to past proclamations by the same Staff who declared in 1990 that regardless of the lack of evidence in the rulemaking record, if the Funeral Rule's only benefit was to increase consumer choice and access to price information, this benefit by itself would be sufficient to justify the Funeral Rule.¹

There is no doubt that the Funeral Rule provides consumers with greater access to price information and more choice. By requiring all sellers of funeral goods or funeral services to abide by the Funeral Rule, the FTC would further expand consumer access to price information and choice. Whether consumers are purchasing funeral goods in person from a licensed funeral provider or via the Internet from an unlicensed casket retailer, they should be entitled to the protections of the Funeral Rule.

¹ June, 1990 Final Staff Report at pages 106-107.

2) Preneed Trusting Requirements. Another potential regulatory gap that exists with regard to Internet casket sales concerns the area of preneed purchases. In a preneed purchase, the consumer prepays the seller for funeral goods and services that will be provided at a later date when the death occurs.

Obviously, the pre-payment of hundreds of millions of dollars by consumers in exchange for the promise by sellers to deliver funeral goods and services in the future creates significant risk of monetary loss due to seller insolvency and fraud. In response to those risks, all fifty states have enacted preneed trusting laws. Under those statutes, funeral homes that sell funeral goods and services on a preneed basis are required to place all or a significant portion of those prepaid funds received from the consumer into trust.² These trusting laws help to ensure that funds will be available to provide the prepaid funeral goods and services in the future either by the original contracting funeral provider or its successor.

As is evident from the sample of Internet casket sellers contained in Exhibit A, some of them engage in preneed sales over the Internet. Rather than complying with the preneed trusting laws in the state where the consumer resides, the Internet sellers in our sample appear to comply with the trusting laws in the states where they are located. For example, the website for Trappist Caskets recites that prepaid funds will be controlled by a preneed contract approved by the State of Iowa, its situs state. Likewise, Casket Plus, a Texas

² Slightly less than half of the states require one hundred percent of funds to be trusted. The other states typically allow the seller to retain a small portion of the prepaid funds as an administrative fee. Those amounts typically range from 5-20% of the prepaid funds. As an alternative to trusting, most states allow

based Internet retailer, states on its website that its preneed payment plan is approved by the Texas Banking Commission and overseen by the State Board of Insurance.

The significant regulatory gap in preneed casket sales via the Internet arises because not all states require third-party sellers (as opposed to funeral homes) to trust prepaid funds. In California, Section 7735 of the Business and Professional Code requires that 100% of all preneed funds paid to funeral homes be placed into trust until the funeral contract is performed. However, if a consumer purchases funeral goods from a third-party seller in California, none of the prepaid funds paid to the seller are required to be placed in trust.

While California has elected not to protect its residents when they deal with third-party sellers, that lack of protection crosses beyond California's borders with Internet casket sales. Several years ago, the North Carolina Board of Mortuary Science contacted an Internet casket seller operating out of California who sold a casket on a preneed basis to a North Carolina resident. When the retailer was asked whether it complied with North Carolina's 90% trusting statute, it replied that its sales contracts were governed by California law which required no trusting. The North Carolina Board of Mortuary Science could not undertake any formal enforcement to protect its citizens since the retailer was based in California and the contract provided that all sales took place in California and were governed by California law.

prepaid funerals to be funded by the purchase of an insurance policy on the life of the contract beneficiary. When the beneficiary dies, the proceeds of the life insurance policy are used to fund the preneed contract.

With states like California declining to subject third-party sellers to preneed trusting laws, a significant regulatory gap exists in the protection of preneed consumers. Consumers prepaying for caskets from Internet sellers in California will be completely without recourse if those retailers either go out of business or abscond with the prepaid funds. While this regulatory gap is not caused by the Internet, the Internet allows it to spread beyond California borders to the entire nation.

III. STATE LAWS RESTRICTING IN-STATE CASKET SALES

While no state laws or regulations currently restrict the Internet sale of caskets, there are a handful of states that have laws or regulations which prohibit anyone other than a licensed funeral director from selling caskets. States having such laws and regulations on the books include Alabama, Delaware, Georgia, Idaho, Louisiana, Maine, Massachusetts, Mississippi, Minnesota, Oklahoma, South Carolina, Tennessee, Vermont and Virginia. However, only Alabama, Oklahoma, Louisiana and Virginia currently enforce those statutes.³

Although opponents of these laws often allege that they were enacted to restrict third-party sellers, the truth is that all the laws were enacted well before the emergence of third-party sellers in the mid-1990's. Most of these laws resulted simply because the state legislature used expansive definitions in funeral licensing laws and incorporated the sale of funeral merchandise as an act which required a funeral director's license. These expansive definitions were not

³ Courts in Georgia, Mississippi, South Carolina and Tennessee have either invalidated state laws restricting casket sales to licensed funeral directors or enjoined state agencies from enforcing those laws. As discussed later in these Comments, the federal district court overturning the Tennessee law is under appeal.

viewed as unduly restrictive when they were adopted since, at that time, nearly all funeral merchandise was sold by funeral directors only. Therefore, only in the past seven years with the emergence of third-party sellers have the statutes been branded as anti-competitive attempts by the licensed funeral industry to restrict competition.

In Tennessee, which is one of the few states which opted to enforce its licensing law against third-party sellers, the legal challenges to its licensing law involve many of the same issues that are the subject of this Workshop. The legislative history to the Tennessee licensing law shows that in 1972, in response to abuses being committed by unlicensed door-to-door casket salesman, Tennessee amended its license law to require a funeral director's license in order to sell funeral merchandise.⁴ That 1972 licensing restriction was enforced against two casket stores that began operations in Tennessee in 1999 without using licensed funeral distributors.

The two Tennessee casket stores challenged the licensing restriction as a violation of the due process and equal protection clauses of the U.S. Constitution. In *Craigmiles v. Giles*, (District Court #99-00304), the U.S. District Court for the Eastern District of Tennessee up held the Constitutional challenge and found that the licensing restrictions were not rationally related to the legitimate state interests of protecting the vulnerable funeral consumer or furthering public health.

⁴ Tennessee Public Acts 1972, ch. 553, §1. See also the legislative history collected in Defendant's Exhibit 1, Apx Pgs. 00698, 00700, 00701-00702, and 00704 in *Craigmiles v. Giles* (No. 00-6281), United States Court of Appeals for the Sixth Circuit.

In its appeal of the trial court decision to the United States Court of Appeals for the Sixth Circuit, the State of Tennessee argued that the licensing law promotes consumer protection because it makes all sellers of funeral merchandise in Tennessee subject to the FTC Funeral Rule, requires them to have training in caskets and grief counseling, and makes them accountable to a licensing board which can discipline them for consumer abuses and unprofessional conduct. The trial court basically rejected these arguments finding that consumers had other laws to protect them and that the Tennessee licensing restrictions actually harmed consumers by limiting competition in the sale of caskets.

There is no doubt that the Tennessee law, in requiring a funeral director's license to sell funeral merchandise, restricts competition. However, in the opinion of the State of Tennessee, the anti-competitive effects of the law are outweighed by the consumer protection measures of making every seller subject to the Funeral Rule and accountable to a licensing board. Certainly, one could argue that Tennessee could create a less restrictive measure to license preneed third-party sellers and require their adherence to the Funeral Rule without requiring them to have a funeral director's license.

The underlying issues in *Craigmiles v. Giles* are similar to those presented in this Workshop. States are claiming that licensing restrictions are necessary to protect consumers while opponents believe they unduly restrain competition. Steps to adopt a middle ground, such as strengthening the Funeral Rule to make all sellers of funeral goods and services subject to its price disclosure

requirements, are rejected by federal agencies that advocate wide-open competition. At the same time, states struggle to protect their citizens from being abused by retailers operating out of states with little or no regulations.

In *Craigmiles v. Giles*, the Sixth Circuit Court of Appeals will soon decide whether the trial judge exceeded his authority by substituting his judgment as to the wisdom and benefits of the licensing law for that of the Tennessee legislature. Whether and to what extent the FTC should engage in the same exercise employed by the trial judge is an open question.⁵ Nevertheless, regardless of the FTC's involvement in challenging state licensing laws, it should realize that the two governmental interests of promoting competition and protecting the consumer are often at odds with each other. Where and how to strike the balance between these two competing interests requires a thorough understanding of how a particular market operates in a given area. Since the funeral industry consists of many markets throughout the country, the role of the state legislature in protecting the consumers in their respective states should not be undermined by federal agencies promoting competition.

Respectfully submitted

STATMAN, HARRIS, SIEGEL
& EYRICH

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By: _____
T. Scott Gilligan
Attorney for National Funeral
Directors Association
2900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202

⁵ In light of *California State Board of Optometry v. FTC*, 910 F2d 976 (D.C. Cir. 1990), it is questionable what action, if any, the FTC can undertake to preempt a state licensing law it deems to be anti-competitive.

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(513) 587-4440