



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
CLEVELAND REGIONAL OFFICE

520-A Atrium Office Plaza  
668 Euclid Avenue  
Cleveland, Ohio 44114-3006  
(216) 522-4210  
Facsimile: 522-7239

MARK D. KINDT  
Regional Director

**COMMISSION AUTHORIZED**

December 16, 1991

The Honorable John D. Pridnia  
Michigan State Senate  
State Capitol  
Lansing, Michigan 48913

Dear Senator Pridnia:

The staff of the Federal Trade Commission is pleased to respond to your letter requesting comments on Senate Bill Nos. 301 and 302.<sup>1</sup> The bills would amend the Cemetery Regulation Act and Occupational Code, which regulate the licensing and operation of funeral establishments and cemeteries in Michigan. Our response is limited to those portions of the bills that address joint ownership or operation of a funeral establishment and a cemetery. We conclude that removing Michigan's prohibition of joint ownership or operation could make possible new business formats and improvements in efficiency, which might in turn lead to lower prices and better service to consumers. However, some aspects of the bills' regulation of funeral establishment-cemetery combinations prohibit the offer of bundled goods and services at a discount; if this prohibition is broader than necessary to prevent harm to competition, it could prevent the achievement of some of these efficiencies.

---

<sup>1</sup> These comments are the views of the staff of the Cleveland Regional Office and the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or those of any individual Commissioner.

## I. INTEREST AND EXPERIENCE OF THE STAFF OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission is empowered by statute to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>2</sup> Pursuant to this mandate, the Commission encourages competition in the licensed and regulated professions, including those in the funeral and cemetery industry, to the maximum extent compatible with other state and federal goals. The staff of the Commission works to identify restrictions that hinder competition and increase costs without providing countervailing benefits to consumers.

The Commission staff has become familiar with the funeral industry through its work on a consumer protection rule that is intended to promote increased competition and consumer choice in the funeral industry by facilitating informed purchase decisions.<sup>3</sup> In addition, the staff has previously commented on other states' proposed legislation involving the funeral industry.<sup>4</sup> One of these was a comment to the Illinois State Senate on proposed legislation that was the converse of the legislation being considered here. The Illinois State Senate had proposed restricting ownership of funeral homes by unlicensed persons, a category that could include cemetery owners.<sup>5</sup> Staff was concerned that such a prohibition, which is similar to

---

<sup>2</sup> Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

<sup>3</sup> The FTC rule governing Funeral Industry Practices, 16 C.F.R. § 453, became effective April 30, 1984. Among other things, the rule requires funeral providers to disclose to consumers detailed information about prices.

<sup>4</sup> See comments to: Pennsylvania House of Representatives Committee on Business and Commerce, August 29, 1989; Virginia Delegate Franklin P. Hall, February 9, 1989; Oregon State Representative Chuck Sides, April 6, 1987; Illinois Department of Registration and Education, May 9, 1986; Kansas State Representative Ginger Barr, February 14, 1986; Alabama Representative Arthur Payne, January 16, 1986; Illinois State Senator Judy Baar Topinka, May 31, 1985. Commission staff has also testified generally on regulatory issues in these industries; see Statement to California Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development, October 17, 1991.

<sup>5</sup> Comment from Timothy J. Muris, Director of the Bureau of Competition, to Illinois State Senator Judy Baar Topinka (May 31, 1985).

Michigan's current law, might injure consumers by preventing potential efficiencies of combination ownership.

## **II. BACKGROUND: REGULATING THE RELATIONSHIPS BETWEEN CEMETERIES AND FUNERAL ESTABLISHMENTS**

Many states regulate or license the ownership or operation of funeral establishments and cemeteries. Reasons that may be advanced for this regulation and licensing include concerns about public health and consumer protection. Our comments take no position on the public health issues, but instead address the possible consequences of regulations that might unnecessarily impair efficient business arrangements that otherwise might benefit consumers.

Most states permit combinations between funeral establishments and cemeteries.<sup>6</sup> States that restrict combinations do so in several ways. Operation of a funeral home at or adjacent to cemetery premises may be prohibited.<sup>7</sup> Another approach is to bar licensed funeral directors from employment by a cemetery or by a funeral establishment that is controlled by a cemetery.<sup>8</sup> Location or one-way employment restrictions might still allow some kinds of investments or combinations, at least in theory, although perhaps not in practice. An approach similar to one often taken for other licensed professions is to require that owners of funeral establishments

---

<sup>6</sup> Michigan Cemetery Industry, Cemetery Regulation in Michigan 53 (July 1990) (unpublished report).

<sup>7</sup> *See, e.g.*, Del. Code Ann. tit. 24. § 3111 (1987 & Supp. 1990) (no person with a license to practice funeral service may operate a funeral establishment within the confines of or connected with any cemetery); Wis. Stat. Ann. § 445.12(6) (1988). *See* Mich. Comp. Laws § 339.1812(2).

<sup>8</sup> *See, e.g.*, Me. Rev. Stat. Ann. tit. 32, § 1451 (1988 & Supp. 1990).

be licensed to practice funeral directing.<sup>9</sup> Such a requirement prevents others from even investing in funeral establishments.

Michigan's current law is among the most restrictive. It not only limits locations and requires licensing in the funeral and cemetery industries, but also absolutely prohibits joint ownership, operation, or management, whether direct or indirect.<sup>10</sup>

In other licensed and regulated businesses, such as health care, laws and regulations limiting "commercial practice" have been supported as necessary to maintain quality of service and protect the professional's independent judgment. Among other restrictions, these laws commonly prevent licensed professionals from entering commercial relationships, including employment, with non-licensed persons or firms. But our experience with these restrictions, admittedly in licensed businesses and professions other than the funeral and cemetery industries, suggests that their effect is usually to increase prices. That effect on prices should be weighed carefully against effects, if any, on quality of care or service that the restrictions are thought to promote.<sup>11</sup>

---

<sup>9</sup> See, e.g., Pa. Stat. Ann. tit. 63, § 479 (Purdon 1968 & Supp. 1991) (except for professional corporations comprised of licensed shareholders with at least one licensed principal corporate officer, no unlicensed person shall have any interest in the practice of funeral directing); 49 Pa. Code § 13 (1990) (funeral directors may form professional corporations but shares of such corporations may only be issued to licensed funeral directors).

<sup>10</sup> See Mich. Comp. Laws § 339.1812 (Supp. 1991).

<sup>11</sup> See C. Cox and S. Foster, *The Costs and Benefits of Occupational Regulation*, October 1990 (FTC Bureau of Economics staff report). This report, a review of economic studies of licensing, finds that licensing frequently increases prices and imposes substantial costs, but that many licensing restrictions do not appear to increase the quality of service. The report recommends careful weighing of likely costs against prospective benefits. *Id.*, p. v.

### III. EFFECT OF REMOVING THE PROHIBITION ON JOINT OWNERSHIP OR OPERATION

Michigan Senate Bill No. 302 would remove restrictions on joint ownership or operation. Michigan law now states that a cemetery owner or operator "shall not" own or maintain a funeral establishment<sup>12</sup> and prevents a funeral establishment from locating on cemetery property.<sup>13</sup> Senate Bill No. 302 would change the words "shall not" to "may" and would repeal the location prohibition.

Restrictions on the business practices of professionals can reduce competition by preventing the introduction and development of innovative forms of professional practice that may be more efficient, provide comparable quality, and offer competitive alternatives to traditional providers. For example, in a case challenging various ethical code provisions that the American Medical Association (AMA) enforced, the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institution and from entering into partnerships or similar business relationships with non-physicians unreasonably restrained competition, and, as a result, violated federal antitrust laws.<sup>14</sup> The Commission concluded that the AMA's prohibitions kept physicians from adopting business formats that might have been more efficient, and that, in particular, these restrictions precluded competition with organizations not directly and completely under the control of physicians. The

---

<sup>11</sup>(...continued)

Where consumers are in a relatively poor position to evaluate the product or service, regulation of some kind can be necessary. The Commission's Funeral Rule addresses the consumer's relative lack of knowledge, and potentially vulnerable state of mind when these decisions are often made, by requiring disclosures, rather than by regulating the service directly or controlling who can practice. *See* Funeral Industry Practices, 16 C.F.R. § 453.

<sup>12</sup> Mich. Comp. Laws § 339.1812(1) (Supp. 1991).

<sup>13</sup> *Id.* § 339.1812(2).

<sup>14</sup> American Medical Association, 94 F.T.C. 701 (1979), *affd*, 638 F.2d 443 (2d Cir. 1980), *affd mem. by an equally divided Court*, 455 U.S. 676 (1982).

Commission also found that there were no countervailing procompetitive justifications for these restrictions.<sup>15</sup>

The principle might well apply to the funeral and cemetery businesses. Prohibiting joint ownership could prevent some efficient combinations of business aspects of the two operations that might result in lower prices to consumers. For example, cemetery and funeral entities might be able to realize administrative and overhead economies through joint facilities. Further savings might be possible in the areas of transportation and transaction costs. Buyers could make decisions about the burial and funeral service in one location, saving expense and perhaps easing personal concerns during a particularly stressful period. Admitting into the funeral and cemetery industries new business formats that Michigan's law now prohibits could have a generally positive effect on competition. These innovations might afford consumers a wider selection of services and costs.

Other provisions of Senate Bills Nos. 301 and 302 would regulate the practices of affiliated cemeteries and funeral establishments.<sup>16</sup> The provisions that would ensure that consumers are not required to deal with the affiliated entity—for example, to arrange services through the cemetery's affiliated funeral provider—are analogous to provisions of the Funeral Rule that ensure that consumers are not required to buy

---

<sup>15</sup> See also comment of the staff of the Federal Trade Commission on the American Bar Association's Model Rules of Professional Conduct, March 26, 1991, addressing issues raised by proposals to allow law firms to provide ancillary, non-legal services. In that comment, the staff pointed out that law firm diversification could benefit consumers by allowing firms most efficiently to provide a mix of services that consumers seek, and that rules restricting such services could harm consumers by restricting consumer choice. The comment also analyzed how different proposals would meet concerns about professional standards and ethical obligations.

<sup>16</sup> Under the proposed bills, a funeral provider or cemetery could not compel a consumer to purchase goods or services from its affiliated entity, nor charge a different price if the consumer did not do business with the affiliated entity; disclosures to that effect would be required. Also prohibited would be "manipulating the relative prices" of merchandise or services and providing preferences or discounts based on doing business with affiliated cemeteries and funeral establishments. S. 302, 86th Leg., 1991 Sess. (amending Michigan Compiled Laws Section 339.1812(3) and adding Sections 339.1812(4) and 339.1812(5)); S.301, 86th Leg., 1991 Sess. §§ 18A, 18C.

goods or services they do not want, along with those they do.<sup>17</sup> The proposed bills would, however, also require that prices be the same for all customers, regardless of whether they do business with an affiliated entity; moreover, when cemetery and funeral services or merchandise are sold in one transaction, "any benefit, discount, or other preferential price or treatment" based on dealing with both of the affiliated entities would be prohibited.<sup>18</sup> An effect of these further prohibitions might be to prevent a combined funeral establishment and cemetery from offering the consumer the benefit of a bundle of discounted funeral and cemetery goods and services.

The common practice of bundling goods and services for sale at a single price (usually lower than the total price of the bundle's components if bought separately) may reflect lower costs and other desirable efficiencies. The seller's savings may be passed on to some extent to the customer. And the consumer may also benefit from simplified, one-stop shopping. To prohibit all offerings of discounts for bundled purchases may result in increased costs and, as a result, harm consumers. Accordingly, the prohibition's possible costs should be compared to its anticipated benefits. It may be thought that prohibiting bundling will promote or protect competition. There are some economic theories that suggest bundling might harm competition if a seller has market power and also can effectively coerce the buyer to take the entire bundle in order to get any part of it. Federal antitrust laws, such as the prohibition against "tying", already provide remedies for situations in which harm from bundling is likely.<sup>19</sup> Applying these antitrust remedies calls for assessment of such factors as market (or economic) power and the nature and strength of the "tie". A blanket prohibition does not take into account such case-by-case factors, and, consequently, may discourage efficiencies in situations that present no competition problems.

---

<sup>17</sup> Compare S. 301, 86th Leg., 1991 Sess. § 18A and S. 302, 86th Leg., 1991 Sess. § 1812(2)-(3), which provide that a cemetery or funeral establishment "shall not condition" sales on the purchase of goods or services from an affiliated establishment, and § 453.4(b)(1) of the Commission's Funeral Rule, which provides that it is an unfair or deceptive act or practice for a funeral provider "to condition the furnishing of any funeral good or funeral service . . . upon the purchase of any other funeral good or funeral service."

<sup>18</sup> S. 301, 86th Leg., 1991 Sess. §§ 18A(2), 18C; S. 302, 86th Leg., 1991 Sess. § 1812(4). In addition, "manipulating" relative prices "to allocate a disproportionate share of the total price to any of the merchandise or services" would be prohibited. S. 301, § 18C(A).

<sup>19</sup> See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Michigan's antitrust law and remedies might also be applied in these situations. See Mich. Comp. Laws § 445.772, § 750.151.

The Honorable John D. Pridnia  
December 17, 1991  
Page 8

#### IV. CONCLUSION

Senate Bills Nos. 301 and 302 propose changes that would tend to increase competition in the funeral and cemetery industries. By allowing joint ownership or operation, they would remove barriers to new business formats and may promote efficiencies that ultimately could result in lower prices to consumers. The bills' general prohibition of bundling products and services at discounted prices may, in some cases, prevent the achievement of some of those efficiencies, if the prohibition is broader than necessary to prevent harm to competition.

We hope that our comments concerning the competition aspects of combination ownership or operation of funeral establishments and cemeteries will assist you in your deliberations on Senate Bills Nos. 301 and 302. We appreciate having had the opportunity to present our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Kindt", written in a cursive style.

Mark D. Kindt