



Office of the Director
Bureau of Consumer Protection

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

COMMISSION AUTHORIZED

January 14, 1994

Dawn P. Scardino
Executive Director
Board of Embalmers and Funeral Directors
Box 8757
Metairie, Louisiana 70011-8757

Dear Ms. Scardino:

The staff of the Federal Trade Commission¹ offers this comment on the proposal by the Board of Embalmers and Funeral Directors to amend its rules governing the removal of bodies from the state of Louisiana. The proposed new rule would require that, with some exceptions, a body could not be removed from the state unless it was first embalmed (or cremated). This requirement could force consumers to purchase services they neither need nor want, increase the costs borne by residents of other states arranging funerals for their relatives who die in Louisiana, and dampen competition between funeral providers in Louisiana and those in other states. Especially in view of the fact that virtually no other jurisdiction imposes a restriction like the one the Board has proposed, we urge the Board to consider carefully whether the public health benefits from the requirement outweigh these likely adverse consequences.

I. Interest and Experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.² Pursuant to this statutory mandate, the Commission encourages competition in the licensed professions, including those in the funeral and cemetery

¹ These comments are the views of the staff of the Bureau of Consumer Protection of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

² 15 U.S.C. § 41 et seq.

industry, to the maximum extent compatible with other state and federal goals. The staff of the FTC 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 Trade Regulation Rule that is intended to promote increased competition and consumer choice in the funeral industry by facilitating informed purchase decisions.³ In addition, the Commission has taken law enforcement actions against anticompetitive acquisitions in the funeral industry.⁴ The staff has previously commented on other states' proposed legislation involving the funeral industry.⁵

II. Description of the Proposed Regulation.

The Louisiana State Board of Embalmers and Funeral Directors has proposed a rule that would require that any dead body be embalmed (or cremated) before being transported out of state.⁶ In the original announcement, the proposal granted an exception to permit transfer of an unembalmed body for the purpose of

³ 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. The Commission has recently approved amendments to this rule, to be effective July 18, 1994, as part of a mandatory review procedure. 59 Fed. Reg. 1592 (January 11, 1994).

⁴ See Service Corporation International, Dkts. C-3372 (consent order, February 25, 1992), C-3440 (consent order, June 15, 1993).

⁵ See comments to the Wisconsin State Assembly, September 13, 1993; 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. Commission staff has also testified generally on regulatory issues in this industry; see Statement to California Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development, October 17, 1991.

⁶ Proposed Louisiana Administrative Code, Title 46, Part XXXVII, Ch. 13, §1303.B.

advancing medical science or as a source of transplant organs. In the amended announcement, another exception was added, providing that the rule was not to be construed to require embalming if special practices and beliefs of religious groups prohibited it.⁷

In the "impact statement" that accompanies the proposed rule, the Board refers to public health concerns about the spread of infections and contagious diseases. According to the statement, an effect of the rule will be a "slight" decrease in revenues for out-of-state firms, and a corresponding "slight" increase for those in-state; however, the statement says that there would be "no known impact on competition and employment within the state of Louisiana." The statement says that "many" local funeral homes already make it a practice to embalm before transfer, and points out that those homes may already provide a number of other services in connection with interstate transport of bodies.

III. Effects of the Proposed Regulation.

The requirement may force out-of-state clients to obtain, and pay for, services they neither need nor want. Neither Louisiana nor the bordering states of Texas, Arkansas and Mississippi impose a general embalming requirement by statute or regulation.⁸ A family in a nearby state who wanted to arrange

⁷ Because the exception deals only with embalming, the rule as drafted might still be construed to require cremation, regardless of religious beliefs or practices.

⁸ The Commission's Funeral Rule declares it to be deceptive for a funeral provider to represent that the law requires embalming when that is not the case, or to fail to disclose that embalming is not required by law except in certain special cases. 16 C.F.R. §453.3(a)(1). Thus, the Rule prohibits funeral providers from representing that embalming is required for direct cremation, immediate burial, a funeral using a sealed casket, or if refrigeration is available and the funeral is without viewing or visitation and with a closed casket when state or local law does not require embalming. 16 C.F.R. §453.3(a)(2)(i). The Rule also requires funeral providers to make the following written disclosure on their general price lists:

Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming,
(continued...)

for immediate burial or a funeral without a viewing might well choose to save the cost of embalming. But if their family member had died across the state line, this proposal would require them to obtain and pay for that service. The proposal, by requiring that services be obtained from in-state providers, regardless of whether related or similar services would also be obtained from other, out-of-state providers, would also make it more likely that out-of-state clients would have to pay a basic professional services fee⁹ to two different funeral providers, in circumstances where it would have been feasible to pay only once.

The Board's impact statement describes how the requirement will affect competition among providers, especially in geographic markets that cross state lines. Funeral establishments in nearby states could not compete to provide embalming or cremation services, even when their customers wanted them, and would probably be unable to compete effectively to provide related services such as transportation. If a person from out of state died in Louisiana, the decedent's family and executor (or, more likely, their out-of-state funeral home) would have to arrange and pay for embalming (or cremation) by a Louisiana funeral establishment before the remains could be returned home for burial. This would be true even if the distance to the out-of-state location were shorter than a transfer entirely within Louisiana.¹⁰ In-state businesses would thus be insulated from some of the competition from businesses across the state line.

Most states do not require embalming before remains are shipped. Of the few state statutes that do require embalming,

⁸(...continued)

you usually have the right to choose an arrangement which does not require you to pay for it, such as direct cremation or immediate burial.

16 C.F.R. §453.3(a)(2)(ii).

⁹ The Funeral Rule permits funeral providers to establish a separate fee for professional services, which typically covers overhead costs as well as staff expenses, and include that fee in the charge for forwarding or receiving remains. 16 C.F.R. §453.2(b)(4)(iii)(C)(1).

¹⁰ An example illustrates the disparity: the proposed regulation would not require embalming or cremation to transfer a body the 300 miles from New Orleans to Shreveport, but would for the 40 mile transfer from New Orleans to Picayune, Mississippi.

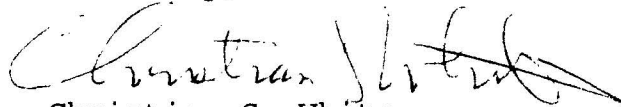
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all but one apply only to bodies shipped on common carriers.¹¹ Staff has found that major airlines and businesses actively engaged in handling shipment of remains for burial do not generally require embalming, so long as the remains are carried in suitable containers.

IV. Conclusion.

Because the proposed regulation would limit consumer choice and impair competition, we urge the board to consider less anticompetitive options. We express no opinion on the public health issues outlined in the statement accompanying the proposed rule; however, we suggest that the Board consider measures to protect public health without adversely affecting competition. In particular, a rule based on the method of handling, rather than on political boundaries, might both promote public health and preserve competition.

Sincerely,



Christian S. White
Acting Director

¹¹ Kansas prohibits common carriers from receiving bodies that have not been embalmed. Kans. Stat. Ann., Public Health Code §65-1703. Idaho and Wyoming appear to do the same, although the statutes do not explicitly require embalming. Id. Gen. L. §54-1120; Wyo. Stat. 1977 §33-16-106. California requires embalming before common carrier shipment, but provides an exception; if the condition of the body does not permit embalming, it may be shipped in an airtight container. Cal. Health & Safety Code §7355. These four statutes treat interstate and intrastate shipment alike. Arkansas requires embalming of bodies shipped by common carrier out of the state. Ark. Code Ann., Prof., Occup. & Bus. §17-26-311. The exception is Alabama, which requires embalming (or cremation) of any body to be transported out of the state, regardless of whether a common carrier is used. Ala. Code §22-19-2.