



Bureau of Competition
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

COMMISSION
APPROVED

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February 14, 1986

The Honorable Ginger Barr
Kansas State Representative
51st District
Shawnee County, P.O. Box 58
Auburn, Kansas 66402-0058

Dear Representative Barr:

The Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics¹ are pleased to respond to your invitation to comment on Senate Bill 499 and House Bill 2715, two measures that would modify existing laws regulating the funeral industry in Kansas. Both are currently pending before the Kansas legislature. In these comments, we discuss three issues: (1) the application of different regulatory standards to different sellers of the same funeral-related merchandise; (2) certain types of pre-need funeral trust requirements; and (3) restrictions on the solicitation of funerals in a pre-need (in advance of death) context.

The Federal Trade Commission ("Commission") seeks to promote competition among members of the professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the effects of restrictions on the business practices of professionals, including optometrists, dentists, lawyers, funeral directors, physicians, and others. Our goal is to identify and seek the removal of such restrictions when they impede competition, increase costs, and harm consumers without providing countervailing benefits.

The Commission has pursued this goal actively in the funeral industry. As you may be aware, the Commission on September 24, 1982, completed extensive rulemaking proceedings with respect to the funeral industry that led to the adoption of the Trade Regulation Rule Concerning Funeral Industry Practices ("Funeral Rule"), 16 C.F.R. Part 453, which became effective in full on

¹ These comments represent the views of the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the Bureaus to submit these comments.

April 30, 1984. (A copy of the Funeral Rule is attached to this letter.) The purpose of the Funeral Rule is to promote increased competition and consumer choice in the funeral industry by facilitating informed purchasing decisions by consumers. Among other things, the Funeral Rule requires the disclosure of detailed information about prices and legal requirements to purchasers of funeral goods and services.

As we understand it, the Kansas Cemetery Merchandise Act² ("Merchandise Act") permits cemeteries to sell certain items of merchandise on a pre-need basis if certain trust requirements are observed. Senate Bill 499 ("S.B. 499") would amend the Merchandise Act to remove caskets from the items that cemeteries can sell under that law. House Bill 2715 ("H.B. 2715"), introduced by a different sponsor, would amend Kansas' other pre-need statute, the Pre-Need Funeral Law³ ("Pre-Need Law"). The Pre-Need Law allows both cemeteries and funeral homes to sell services and certain items of merchandise, including caskets, if a second type of trust requirement is satisfied. H.B. 2715 would amend the Pre-Need Law to permit funeral homes to elect to sell certain merchandise under either the Pre-Need Law or the Merchandise Act. H.B. 2715 would thus grant to funeral homes the same option currently available to cemeteries.

House Bill 2715 would also amend the trust requirements of the Pre-Need Law. These currently require that all contract payments, including interest and earnings, remain in trust until death. As we understand it, the amendment would allow contract sellers who guarantee that the merchandise or services designated in the contract will be provided at death for a fixed contract price to withdraw interest and earnings annually from the trust. In addition, H.B. 2715 would amend the Pre-Need Law to permit the solicitation of pre-need contracts. This conduct is presently restricted by another Kansas law.⁴

These comments discuss in general the provisions of the two bills. We hope they will assist you in evaluating the bills' possible effects upon competition and consumers.

² Kan. Stat. Ann. §16-320 et seq.

³ Kan. Stat. Ann. §16-301 et seq.

⁴ Kan. Stat. Ann. §16-1722.

I. The Application of Different Regulatory Standards
To Different Sellers of the Same Good

Only cemeteries may sell certain items of merchandise, including caskets and vaults, on a pre-need basis under the terms of the existing Merchandise Act. Cemeteries selling under this Act must deposit 110 percent of such merchandise's wholesale cost (determined annually) into trust.⁵ To the extent that the contract payments and trust earnings exceed the 110 percent cost requirement, the seller can retain that excess to pay its selling and administrative expenses and for profit. Both cemeteries and funeral homes can sell services and certain items of merchandise, including caskets and vaults, under the different limitations contained in the Pre-Need Law. The Pre-Need Law mandates that 100 percent of the contract payments, including interest and earnings, remain in trust until the contract beneficiary dies or cancels the contract. Thus, under the statutory framework now in place, cemeteries, but not funeral homes, have the option of selling certain merchandise (such as caskets and vaults) on a pre-need basis under the trust requirements imposed by the Merchandise Act or those mandated by the Pre-Need Law. Funeral homes may sell such merchandise only under the Pre-Need Law.

It appears that H.B. 2715 would attempt to address this disparity in regulatory treatment by permitting funeral homes to sell merchandise under the Merchandise Act, thus allowing both groups the freedom to sell under either regulatory scheme. S.B. 499 appears to address this same issue. It would seek "parity" between the two industries by specifically excluding caskets, an item sold heavily by both cemeteries and funeral homes, from the merchandise that cemeteries may sell under the Merchandise Act. S.B. 499 would limit both groups to selling caskets only under the regulatory framework of the Pre-Need Law.

Regardless of the consumer protection approach taken, we recommend that cemeteries and funeral homes be subjected to the same regulatory standards with respect to sales of pre-need merchandise, including caskets and vaults. We are not aware of any evidence that supports subjecting cemeteries and funeral homes to different regulatory standards. For example, we know of no evidence that suggests that there may be a higher degree of fiscal responsibility among members of one industry group than

⁵ Kan. Stat. Ann. §16-321.

the other.⁶ We are also unaware of any studies indicating that the potential for consumer fraud and other abuses differs between the two groups with respect to pre-need sales. To the extent that a pre-need seller's familiarity with the goods it sells might be a factor in determining the appropriate level of consumer protection, both groups appear to have equal knowledge of the relative attributes and characteristics of different types of caskets and vaults.

Applying differing regulatory standards to competing sellers of the same goods or services can, in some circumstances, have anticompetitive consequences. When different regulatory standards impose different costs on separate categories of competing sellers, one group may suffer a competitive disadvantage. Depending upon the disparity in regulatory costs, the ultimate effect of such differential treatment may be to deny consumers the benefits of otherwise active competition between the affected groups, such as lower prices and more purchasing options.

Because differing regulatory treatment in this area appears to accord no significant protection for consumers, we urge the legislature to avoid the anticompetitive risks that differential regulatory costs might pose.

II. Effects of Certain Types of Pre-Need Trust Requirements on Competition and Consumers

Purchasers of pre-need funeral goods and services frequently pay for the items they have selected well in advance of death. Some states have determined that trust requirements are an appropriate regulatory mechanism for protecting the pre-need consumer's investment, and for preventing fraud and other abuses. At the same time, however, certain types of trust requirements -- such as 100 percent trust requirements -- may have unintended anticompetitive consequences that can themselves injure consumers.

One hundred percent trust fund laws, such as the present Kansas Pre-Need Funeral Law, require all pre-need sales proceeds, including interest and earnings, to remain in a trust fund until death. Based on our current knowledge of the pre-need sales industry, it appears that such laws may restrict competition in the sale of pre-need goods and services, without necessarily

⁶ Differences in trust requirements may not be the only differing regulatory standards between the two statutes. We would recommend that any other differences, such as differences in auditing and reporting requirements, be eliminated along with differences in trust requirements.

providing countervailing consumer benefits. Under 100 percent trust fund laws, the contract seller cannot recover its financial outlay for overhead, selling, and administrative expenses, nor a competitive rate of return, until a distant future date, when death occurs and the merchandise is delivered or the services are provided. It is likely that many potential sellers may be unwilling or unable to subsidize pre-need sales for a lengthy, indefinite period of time. These laws may therefore discourage competitors from entering the pre-need market. Fewer sellers and reduced competition in the pre-need market can cause injury to consumers by depriving them of the lowest prices for the goods and services they wish to purchase and of the full array of pre-need alternatives and pricing options that would otherwise be available.

House Bill 2715 would amend the 100 percent trust requirement of the Pre-Need Law to authorize sellers who guarantee to provide the selected items at a fixed contract price to withdraw interest and earnings annually from the trust. (The amendment would require that funds equal to the contract price always be retained in the trust.) Such an amendment might reduce the level of assurance to pre-need purchasers that adequate funds will be available at the time of death to pay for the goods and services selected, particularly when inflation is taken into account. At the same time, permitting sellers to withdraw interest and earnings from the trust might facilitate competition in the pre-need market by encouraging more sellers to offer pre-need services.

Legislators may wish to consider alternatives apart from trust fund percentage requirements that do not pose the same anticompetitive risks and that may provide adequate protections to pre-need purchasers. For example, in analogous types of sales where delivery is deferred or occurs over an extended period of time, performance bonds have been recognized as an effective means of protecting the consumer's investment. In three recent Commission cases,⁷ three health spa businesses were charged with, among other things, failing to fulfill contracts with customers and retaining customers' money without offering or making refunds. The consent judgments in those cases prohibit the spa operators from accepting any payment for a spa membership in advance of actually providing promised services unless performance bonds have been obtained. The consent judgments specify that the bond amount must be for at least \$50,000 or enough to provide refunds to all health spa members in the event

⁷ FTC v. Lady Venus Centers, Inc., No. 3-84-0158 (M.D. Tenn. Feb. 16, 1984); FTC v. Tyler-Radcliffe Co., Inc., No. 3-84-0159 (M.D. Tenn. Feb. 16, 1984); FTC v. Thor Enterprises, Inc., No. 84-2121-MA (W.D. Tenn. Feb. 16, 1984).

that a spa fails to open or closes down before all the services are provided. Thus, a requirement that all pre-need sellers obtain performance bonds to guarantee the delivery of prepaid funeral goods and services may be a viable alternative that the legislature may wish to consider.

III. Restrictions on Pre-Need Solicitation of Funerals

House Bill 2715 would amend the Pre-Need Law to authorize the solicitation of pre-need arrangements "by any lawful means, including the dissemination of prices and educational materials." Currently, another Kansas law imposes a flat ban on all pre-need solicitation.⁸ Although it is not clear to us whether the sponsors of H.B. 2715 seek to make all or only select methods of pre-need solicitation lawful, we believe that the following discussion will provide the legislature with a framework in which to consider the solicitation issue.

Effective communication of truthful commercial information by sellers to potential customers is critical to the functioning of competitive markets. Restrictions on solicitation may drastically reduce the truthful information that is available to consumers in making purchasing decisions. Such restrictions on the flow of information may make it more difficult for consumers to learn about the various prices, levels, and types of services that are available, as well as which firms are stressing the price factor. When consumers are unable to compare prices and other options, competitors are isolated from competition, and their incentive to keep prices down and to offer alternatives (in both the amount and quality of services) desired by consumers is reduced. Restrictions on solicitation may also prevent competitors, especially new market entrants or those offering innovative services, from obtaining clients. This is not to say that all forms or methods of solicitation are always procompetitive. The legislature may determine that in certain circumstances, a particular form or method of uninvited, in-person solicitation may be so susceptible to coercion, harassment, or similar abuses that its prohibition is justified.

In its decision in American Medical Ass'n⁹, the Federal Trade Commission held that an AMA code of ethics provision prohibiting virtually all advertising and solicitation by physicians violated Section 5 of the Federal Trade Commission Act. The Commission found that the "AMA's broad proscription of

⁸ Kan. Stat. Ann. §65-1722.

⁹ American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982).

advertising and solicitation [had], by its very essence, significant adverse effects on competition among AMA members."¹⁰ The Commission did provide in its order, however, that "in view of the potential overreaching that may occur in the absence of professional regulation," the AMA could proscribe "uninvited in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence."¹¹

In the funeral industry, restrictions on at-need solicitation (after death has occurred or where death is imminent) may be justified because of the substantial risk of coercion, harassment, or similar abuses in such instances. Pre-need solicitation and the competitive process it encourages, on the other hand, may be especially important in the funeral industry because many consumers may be unaware of the wide range of pre-need options available from pre-need sellers. Pre-need arrangements enable consumers to make choices without the time or emotional pressures associated with at-need purchases.

It is possible that the legislature might determine that in some circumstances, even pre-need solicitation might be susceptible of coercion, harassment, or similar abuses.¹² This does not, however, justify restrictions on pre-need solicitation that are overly broad, and hence, more restrictive of legitimate forms of solicitation than reasonably necessary to prevent such abuses. Restrictions that prohibit all pre-need solicitation, including solicitation in situations where there is little or no risk of coercion, harassment, or similar abuses, may unnecessarily restrict the dissemination of truthful information about and sales of pre-need funerals to willing and competent purchasers. Similarly, restrictions that permit only licensed funeral directors to engage in pre-need solicitation may unnecessarily limit the ability of legitimate businesses to disseminate information that is beneficial to consumers and for which the professional expertise of a funeral director is not required.

¹⁰ Id. at 1005.

¹¹ Id. at 1029-30 (emphasis added).

¹² The Federal Trade Commission's Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. Part 429, is a consumer protection measure that extends to all consumers who purchase pre-need funerals in their homes. The Rule requires that the seller give the consumer a notice of the consumer's right to rescind the door-to-door sale within three days.

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Accordingly, we urge the legislature to pursue whatever avenues it deems most appropriate to permit truthful pre-need solicitation of funeral goods and services. We further urge the legislature to tailor narrowly any safeguards it may deem necessary to protect pre-need consumers who, because of their particular circumstances, are vulnerable to abuses that have been identified by the legislature.

Conclusion

We hope that our comments concerning the competitive and consumer protection aspects of certain types of pre-need trust requirements, restrictions on solicitation, and the application of differential regulatory standards will assist you in your deliberations on S.B. 499 and H.B. 2715. We appreciate the opportunity to present our views.

Sincerely,


Walter T. Winslow
Acting Director
Bureau of Competition

Attachment