

**ANALYSIS OF AGREEMENT CONTAINING
PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT**
In The Matter of Missouri Board of Embalmers and Funeral Directors, File No. 061-0026

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Missouri Board of Embalmers and Funeral Directors (“the Board” or “Respondent”). The agreement settles charges that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices described below. The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Order final.

The purpose of this analysis is to facilitate comment on the proposed consent Order. This analysis does not constitute an official interpretation of the agreement and proposed Order, and does not modify the terms in any way. Further, the proposed consent Order has been entered into for settlement purposes only, and does not constitute an admission by the proposed Respondent that it violated the law or that the facts alleged in the Complaint against the Respondent (other than jurisdictional facts) are true.

I. The Respondent

Respondent is the sole licensing authority for the practices of funeral directing and embalming in the State of Missouri. It is authorized to promulgate, adopt and enforce rules and regulations governing and defining those practices. Respondent is able to seek a court order to enjoin any person from engaging or offering to engage in any act that requires a license from the Board. The unlicensed practice of funeral directing or embalming in Missouri may be prosecuted as a class A misdemeanor.

At the time it adopted the regulation at issue in the proposed complaint, the Board was composed of five (5) licensed funeral directors, all of whom competed in the sale of at-need funeral caskets to consumers in Missouri.

II. The Conduct Addressed by the Proposed Consent Order

The proposed Complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by unlawfully restraining competition in the retail funeral casket market in the State of Missouri by promulgating a regulation that defined the practice of funeral directing to include selling at-need funeral merchandise.

The at-issue regulation stated: “No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: . . . (C) sale or rental to the public of funeral merchandise,

services or paraphernalia.”¹ Under the laws of the State of Missouri, however, licensing qualifications and conditions for persons practicing or offering to practice funeral directing and embalming do not apply to anyone engaged simply in the furnishing of at-need burial receptacles to the public.²

The proposed Complaint alleges that the Board’s regulation had anticompetitive effects by discouraging non-licensed persons from selling funeral caskets to the public in Missouri, depriving consumers of the benefits of price competition, and reducing consumer choices concerning the purchase of funeral caskets.

The Commission has previously found that funeral director conduct that limits entry by non-licensed casket sellers harms competition. In its 1994 review of the Funeral Rule,³ the Commission found that funeral-director-imposed “casket handling fees” excluded competition from third-party casket sellers, and the record evidence indicated that the fees “prevent[ed] potential price competition and reduce[d] consumer choice.”⁴ The Commission further found that “the long-term effect of [banning these fees] will be increased competition in the casket market such that prices will eventually go down and all consumers will pay less.”⁵

The courts have likewise found that state laws prohibiting the sale of caskets by non-licensed persons harm competition. The Sixth Circuit concluded that a Tennessee state law forbidding anyone but state licensed funeral directors from selling caskets imposed “a significant barrier to competition in the casket market” and “harm[ed] consumers in their pocketbooks.”⁶ A district court in Oklahoma found that “[a]s long as independent sellers stay in the market, casket sales from independent sources ... place downward pressure on casket prices as a result of increased competition.”⁷ A district court reviewing a similar statute in Mississippi also

¹ 4 CSR 120-2.060(18).

² See Mo. Rev. Stat. § 333.251 (2005). The at-issue regulation was revised during the course of the investigation and published in 20 CSR 2120-2.060 (18)(C) effective September 2006.

³ The FTC’s Funeral Rule, which was promulgated by the Commission in 1982 and revised in 1994, requires providers of funeral goods and services to give consumers itemized lists of funeral goods and services that not only provide price and descriptions, but also contain specific disclosures. The Funeral Rule removed the primary industry restraint on consumer choice (package-only funeral goods and service pricing) and makes clear that consumers may select and purchase only the goods and services they want. See 59 Fed. Reg. 1592 (1994).

⁴ 59 Fed. Reg. at 1603-04.

⁵ *Pa. Funeral Directors Ass’n, Inc. v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994). See also Memorandum of Law of Amicus Curiae The Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D. Okla. Aug. 29, 2002).

⁶ *Craigmiles v. Giles*, 312 F.3d 220, 222, 228 (6th Cir. 2002).

⁷ *Powers v. Harris*, 2002 WL 32026155 at *6 (W.D. Okla. Dec. 12, 2002).

concluded that such requirements result in less price competition and consumer choice in selecting a casket.⁸

The Missouri statute that created the Board and grants it the authority to act was not intended to displace competition in the sale of funeral merchandise with regulation. Indeed, it appears that Missouri intended to preserve price competition with respect to the retail sale of funeral caskets by excepting from application of the at-need funeral statute “*any person engaged simply in the furnishing of burial receptacles for the dead.*”⁹

III. Terms of the Proposed Consent Order

The Board has signed a consent agreement containing the proposed consent Order. The proposed Order would prevent the Board from prohibiting, restricting, impeding or discouraging any person from engaging in the sale or rental to the public of funeral merchandise or burial receptacles for the dead, directly or indirectly, or through any rule, regulation, policy, or conduct.

The proposed Order requires the Board to publish in the Newsletter of the Board of Embalmers and Funeral Directors, the full text of Mo. Rev. Stat. § 333.251 (2005), the Order, and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri.”

The proposed Order also requires the Board to display an advisory on its public website stating that it has settled FTC allegations regarding restrictions and prohibitions on the sale of funeral merchandise or caskets, and to provide a link to the Board’s website that contains the full text of Mo. Rev. Stat. § 333.251 (2005), a link to Mo. Code Regs. Ann. tit. 20, § 2120-2.060 (2006), and a link to this Order. The proposed Order further requires the Board to publish notice of the Order and settlement in three consecutive issues of Missouri Funeral Directors’ Association Magazine and in the Missouri State Board of Embalmers and Funeral Directors Rules and Regulations, Chapters 333, 436, 193, 194, which shall be provided to all licensees within one (1) year from the date the Order becomes final.

The proposed Order includes requirements that the Board notify the Commission at least thirty (30) days prior to any filing with the Missouri Secretary of State of any Proposed Order of Rulemaking concerning the Board’s rules or regulations, or prior to proposing any change in Respondent that may affect compliance obligations. The proposed Order contains standard provisions requiring the filing of regular written reports of the Board’s compliance with the terms of the Order for each of the next five years. The Order will expire in ten (10) years.

⁸ *Casket Royale, Inc. v. Mississippi*, 124 F.Supp. 2d 434, 440 (S.D. Miss. 2000).

⁹ Mo. Rev. Stat. § 333.251 (2005).