



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

Division of Marketing Practices

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T. Scott Gilligan, Esq.
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Re: Requiring Consumer Inspection of Third-Party Caskets

Dear Mr. Gilligan:

You have requested clarification of a staff opinion on the FTC Funeral Rule ("Funeral Rule" or "Rule") issued on June 22, 2004, which noted that "it may be a violation of § 453.4(b)(1) for funeral providers to refuse to use third-party merchandise in conducting agreed-upon funeral arrangements until the consumer or his/her representative physically inspects and/or accepts such merchandise."

As you know, Section 453.4(b)(1) of the Rule prohibits a funeral provider from "tying" or conditioning the purchase of any funeral good or service offered by the provider on the purchase of any other funeral good or service from the provider. The purpose of this prohibition is to prevent funeral providers from requiring consumers to purchase goods or services from them that the consumer does not want. Thus, it has been the consistent position of FTC staff since 1988, as your request recognizes, that the refusal of a funeral provider to sign an acknowledgment of delivery of a third-party casket is tantamount to a refusal to accept delivery, thereby unreasonably burdening a consumer's right to use a third-party casket and effectively preventing its use in violation of § 453.4(b)(1) of the Rule. Staff Opinions of March 10, 1988, and May 12, 2004.

In a letter issued on June 22, 2004, FTC staff concluded that the use by funeral providers of a Receipt of Third Party Merchandise form to acknowledge delivery of third-party caskets would not violate the Funeral Rule. The form, which was prepared and disseminated by the National Funeral Directors Association ("NFDA"), states that the funeral provider acknowledges receipt of the merchandise, but that the acknowledgment does not constitute acceptance of the merchandise or its condition, which can only be given by the purchaser. The form also provides a space where the funeral provider can note any visible defects or conditions that were present at time of delivery.

At the same time, the staff opinion made it clear that we interpret Section 453.4(b)(1) as prohibiting funeral providers from "unreasonably" burdening a consumer's choice to purchase an

item from a third-party, such as by refusing to sign for the delivery of a casket or requiring the consumer to be present when it is delivered. Consequently, the staff's conclusion that the use of the NFDA Receipt would not "unreasonably burden" consumer choice was conditioned on the caveat that the Receipt not be "used as a justification for requiring the consumer to be present when the merchandise is delivered or for otherwise unreasonably requiring the consumer's physical presence to inspect or accept the merchandise."

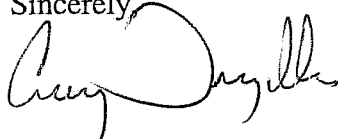
Your request for clarification of the staff opinion argues that funeral providers may be liable if the wrong casket is delivered and then used by the provider without first requiring an inspection by the purchaser. You state that funeral providers should be allowed to "require a consumer to inspect the casket prior to placing a body in it," because once a body is placed in a casket, it cannot be reused or resold.

In fact, Funeral providers can choose any number of other mechanisms to protect themselves from liability, but they cannot require consumers to inspect the casket. For example, they could ask the consumer to provide the make, model and a description of the casket and telephone the consumer if it appears that the wrong casket has been delivered, or if the casket appears damaged. Indeed, such a practice would appear to mesh neatly with the NFDA Guidelines for Handling Third Party Caskets, which advise funeral providers who receive a defective or damaged third-party casket to "immediately alert the family and indicate to them the defect or damage noted."¹

Absent clear evidence that funeral providers lack the means to avoid legal liability other than to require an inspection of third-party caskets or other merchandise by the purchaser, staff is not inclined to reverse its prior opinion, as your request for clarification would have us do. It remains staff's opinion that a funeral provider's refusal to use third party merchandise until the consumer has inspected it may place an unreasonable burden on consumer choice, in violation of Section 453.4(b)(1) of the Rule.

Please note that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding on the Commission or any individual Commissioner. However, they do reflect the views of FTC staff charged with enforcement of the Funeral Rule.

Sincerely,



Craig Tregillus
Funeral Rule Coordinator

¹ This letter does not express an opinion on any portion of the NFDA Guidelines submitted with your request except to the extent the Guidelines suggest that funeral providers may require consumers to inspect caskets purchased from third-party dealers, contrary to the views expressed in this opinion.