



FEDERAL TRADE COMMISSION
Chicago Regional Office

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**COMMISSION
APPROVED**

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November 5, 1985

Gary L. Clayton
Director
State of Illinois
Department of Registration and Education
320 West Washington - 3rd Floor
Springfield, IL 62786

Dear Mr. Clayton:

The Federal Trade Commission's Chicago Regional Office and the Bureaus of Consumer Protection, Economics and Competition¹ are pleased to have the opportunity to comment on the definition of the practice of funeral directing and the issue of the regulation of pre-need solicitation and sales of funeral goods and services.

On May 31, 1985, the Bureaus of Consumer Protection, Economics and Competition commented on Illinois Senate Bill 293, which was then pending before the Illinois legislature. In those comments, the Bureaus addressed two issues: 1) restrictions on the ownership of funeral homes by unlicensed persons; and 2) restrictions on the pre-need solicitation of funeral goods and services. In its comments the Commission Staff stated that prohibitions on the ownership of funeral establishments by unlicensed persons could reduce competition by preventing the introduction and development of innovative forms of funeral practice, such as chain or franchise funeral homes. Such ownership prohibitions, the comments pointed out, might also prevent owners of cemeteries, for example, from owning funeral establishments and combining the business aspects of the two operations in a manner that may result in efficiencies, and hence, lower prices to consumers.

¹ These comments represent the views of the Chicago Regional Office and the Bureaus of Consumer Protection, Economics, and Competition 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 submission of these comments.

In addition, the comments on pre-need solicitation emphasize the value of effective communication of truthful commercial information to the functioning of competitive markets. The comments noted that pre-need solicitation and the competitive process it encourages may be especially important in the funeral industry because many consumers are not aware of the wide array of pre-need options available from marketers of funeral goods and services. Pre-need arrangements can enable consumers to make funeral purchasing decisions without the time or emotional pressures associated with at-need (time of death) purchases.

Because the issues discussed in those prior comments appear to be virtually identical to the issues on which the Illinois Department of Registration and Education is currently soliciting our views, we are resubmitting the May 31, 1985, comment letter and thereby reaffirming the views expressed in that letter.

We will also be happy to have attorney Michael Sirota attend your November 6th meeting at which these issues will be discussed.

We thank you for your willingness to consider our comments. Please let us know if we can be of further assistance.

Sincerely,



William C. MacLeod
Director
CHICAGO REGIONAL OFFICE

WCM:kw



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

May 31, 1985

Senator Judy Baar Topinka
Illinois State Senate
1060 Stratton Building
Springfield, Illinois 62706

Dear Senator Topinka:

The Federal Trade Commission's Bureaus of Competition, Consumer Protection, and Economics¹ are pleased to respond to your invitation to comment on Senate Bill 293, currently pending before the Illinois legislature. In these comments, we discuss the following two issues: (1) restrictions on the ownership of funeral homes by unlicensed persons and (2) restrictions on the solicitation of funerals in a pre-need context.

The Federal Trade Commission seeks to promote competition among members of licensed 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, physicians and others. Our goal is to identify and seek the removal of such restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits. In offering these comments, we acknowledge that we are not in a position to offer advice on what minimum level of quality of service the states should require.

As you may be aware, the Commission recently completed extensive rulemaking proceedings with respect to the funeral industry which led to the adoption of the "Funeral Industry Trade Practices Rule," 16 C.F.R. Part 453, which became effective in 1984. The purpose of the Rule is to permit increased competition and consumer choice in the funeral industry by facilitating informed purchasing decisions by consumers. The Rule requires the disclosure of detailed information about prices and legal requirements to purchasers of funerals.

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 submission of these comments.

Senate Bill 293 would amend the Illinois Funeral Directors and Embalmers Licensing Act² by deleting the provision in the Act that permits unlicensed persons to own funeral establishments³ and substituting in its place a provision that would allow unlicensed persons to own only the real estate upon which funeral directing is being practiced. The bill also would impose restrictions on the solicitation of pre-need funerals, including a requirement that only licensed funeral directors may engage in such solicitation, and a blanket prohibition on all telephone and door-to-door solicitation.

We believe that the following comments, which discuss in general the two categories of restrictions contained in the bill, may be of some assistance to you in evaluating the bill's possible effect upon competition.

I. Prohibitions on the Ownership of Funeral Establishments by Unlicensed Persons

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 enforced by the American Medical Association (AMA), 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 thereby violated the antitrust laws.⁴ The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats and that, in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The

² Ill. Ann. Stat. ch. III, §2800 et. seq.

³ Ill. Ann. Stat. ch. III, §2802(b).

⁴ 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).

Commission also found that there were no countervailing procompetitive justifications for these restrictions.⁵

Prohibitions on the ownership of funeral homes by unlicensed persons prevent owners of cemeteries, for example, from owning funeral establishments and combining the business aspects of the two operations in a manner that may result in efficiencies, and hence, lower prices to consumers. Cemetery and funeral combinations may be able to realize substantial economies through the use of joint facilities and through savings in transportation and transactional costs. Cemeteries typically sell burial plots on a pre-need basis, and at the same time could increase the availability of pre-need funerals to persons who are interested in purchasing them.⁶

Prohibitions on the ownership of funeral establishments by unlicensed persons may also deter the formation and operation of other innovative business forms of funeral practice, such as chain funeral homes or franchise operations that may be more cost-efficient than traditional providers. Restrictions on the ownership of funeral homes by lay persons may deter all corporate practice of funeral directing except by professional service corporations, all of whose shareholders are licensed funeral directors. Such restrictions, which limit the availability of equity capital for professional practices, may well increase the cost of capital to professional firms and hinder the development of high-volume practices that may be able to reduce costs through

⁵ The Commission recently issued a notice of proposed rulemaking for a trade regulation rule that would preempt state laws and regulations which ban, among other things, employment or other relationships between optometrists and non-optometrists. In its notice, the Commission stated that public restraints on forms of ophthalmic practice appear to increase prices without providing offsetting public health or safety benefits. 50 Fed. Reg. 598, 599-600 (1985).

⁶ Our recognition that it may be procompetitive to permit ownership of funeral establishments by unlicensed persons is premised, of course, on the assumption that the involvement of unlicensed owners in the business aspects of the funeral home operation will not affect the obligation of licensed persons to comply with applicable professional standards. Similarly, regardless of whether a funeral establishment is owned by a licensed or unlicensed person, state public health requirements governing the operation of funeral establishments should be equally applicable.

economies of scale and consequently offer lower prices to consumers.

Proponents of restrictions on relationships between licensed professionals and non-licensees have often justified these restrictions as necessary to maintain a high level of quality in the professional services market. For example, they claim that employee-employer or other business relationships between professionals and non-professionals will result in lay interference in the professional judgment of licensees, thus causing a decline in quality. Supporters of restrictions are particularly opposed to the employment of professionals by business corporations such as "chain" retailers. They believe that chain retailers would be concerned only with profits, not with the quality of professional care. They also believe that such firms might offer lower prices, but would insist that their professional employees cut corners to maintain profits. The public would suffer doubly, according to those who favor restrictions, because professionals who practice in traditional, non-commercial settings would be forced to lower the price and quality of their services in order to compete.

The Federal Trade Commission's Bureau of Economics and Consumer Protection have issued two studies that provide evidence that restrictions on business relationships between licensed professionals and non-professionals are, in fact, harmful to consumers. The first study, conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses across cities with a variety of legal environments. Cities were classified as markets where advertising was present if there was advertising of eyeglasses or eye exams in local newspapers or "Yellow Pages." Cities were classified as markets with commercial practice if eye examinations were available at large interstate optical firms. Since restraints on corporate practice of optometry appear inherently likely to restrict the operations of chain optical firms offering optometric services, the study provides important information on the likely effects of such restrictions.

The study found that prices charged in 1977 for eye examinations and eyeglasses were significantly higher in cities

7 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). A copy of this study is enclosed with our comments.

without chains and advertising than in cities where advertising and chain firms were present. The average adjusted price charged by optometrists in the cities without chains and advertising was 33.6 percent higher than in the cities with advertising and chains (\$94.46 versus \$70.72). Prices were approximately 17.9 percent higher as a function of the absence of chains; the remaining price difference was attributed to the absence of advertising.

The data also showed that the quality of vision care was not lower in cities where chain optometric practice and advertising were present. The thoroughness of eye examinations, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in both types of cities.

The second study compared the cost and quality of cosmetic contact lens fitting by various types of eye care professionals.⁸ This study was designed and conducted with the assistance of the major national professional associations representing ophthalmologists, optometrists and opticians. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas.

The study found that there were few, if any, meaningful differences in the quality of cosmetic contact lens fitting provided by ophthalmologists, optometrists, and opticians. The study showed that, on average, "commercial" optometrists -- that is, optometrists who worked for a chain optical firm or advertised heavily -- fitted contact lenses at least as well as other fitters, but charged significantly lower prices.

These studies provide evidence that restrictions on employment, partnership, or other business relationships between professionals and non-professionals tend to raise prices above the levels that would otherwise prevail, but do not seem to improve the quality of professional care. Although these studies deal specifically with restrictions on the practice of optometry, the results may be applicable to analogous restrictions in other professions, such as funeral directing.

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Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983). A copy of this study is enclosed with our comments.

II. Restrictions on Pre-need Solicitation of Funerals

Effective communication of truthful commercial information by professionals to potential clients is critical to the functioning of competitive markets. Restrictions on solicitation may drastically reduce the 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. In certain circumstances, a particular form or method of solicitation may be so susceptible to overreaching or similar abuses that its prohibition is justified. For example, in its decision in American Medical Ass'n,⁹ 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 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 Similarly, in the context of lawyer marketing practices, the Federal Trade Commission's Cleveland Regional Office and Bureau of Economics recently proposed a staff Model Code of lawyer advertising which prohibits only false or deceptive communications, while providing additional safeguards against overreaching, undue influence, or

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).

¹⁰ Id. at 1005.

¹¹ Id. at 1029-30.

coercion in personal contacts with prospective clients. The FTC Model Code permits solicitation, in-person or through the mail, except when the lawyer knows or should know that the communication involves coercion or undue influence or when an apparent mental or physical condition would impair the judgment of the prospective client.¹²

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 overreaching 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 are not aware of the wide array of pre-need options available from funeral directors. Pre-need arrangements enable consumers to make choices without the time or emotional pressures associated with at-need purchases.

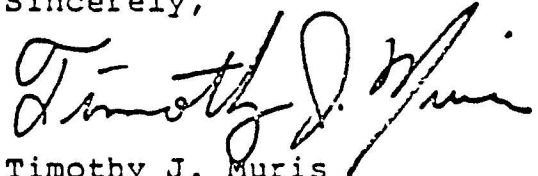
In some circumstances, of course, pre-need solicitation may also be susceptible to overreaching. This does not, however, justify restrictions on solicitation that are overly broad, and hence, more restrictive of legitimate forms of solicitation than necessary to prevent overreaching or similar abuses. Restrictions that prohibit all pre-need solicitation, including solicitation in situations where there is no overreaching or undue influence, may unnecessarily restrict the dissemination of information about and sales of pre-need funerals to willing and

¹² Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Staff Report on Improving Consumer Access to Legal Services: The Case For Removing Restrictions on Truthful Advertising (November 1984). The FTC Model Code was published in conjunction with a Commission study that provides convincing support for the proposition that removal of state regulations restricting non-deceptive marketing practices by lawyers leads to increased lawyer advertising and consequent lower prices to consumers of legal services.

competent purchasers.¹³ 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.

We hope that our comments concerning the possible anticompetitive effects of restrictions on funeral home ownership and pre-need solicitation will be of some assistance to you in your deliberations on Senate Bill 293. We sincerely appreciate the opportunity to present our views for your consideration.

Sincerely,



Timothy J. Muris
Director
Bureau of Competition

Enclosures

¹³ Because payment for pre-need arrangements is typically made well in advance of death, some states have adopted regulatory measures, e.g., trust requirements, to protect consumers from fraud and other abuses. All consumers who purchase pre-need funerals in their homes are protected by the Federal Trade Commission's Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. Part 429. In these comments, we do not address what additional consumer protection measures, if any, may be appropriate in the area of pre-need sales.