

**Prepared Statement of the Federal Trade Commission**  
**For the Committee on Energy and Commerce**  
**Subcommittee on Commerce, Trade, and Consumer Protection**  
**United States House of Representatives**  
**July 27, 2009**

Mr. Chairman and members of the Subcommittee, I am Charles Harwood, Deputy Director in the Federal Trade Commission's ("FTC" or "Commission") Bureau of Consumer Protection. On behalf of the Commission, I appreciate this opportunity to provide information to the Subcommittee about the Commission's activities and authority with regard to the funeral industry, including cemeteries.<sup>1</sup>

The Commission welcomes the opportunity to work with the Subcommittee in identifying ways in which the Commission can usefully deploy its law enforcement authority, rulemaking authority, and outreach experience in connection with the recent grievous events at the historic Burr Oak Cemetery in Alsip, Illinois.

First, however, the Commission commends the thorough and rapid response of law enforcement authorities in Illinois to the desecrations at Burr Oak Cemetery. We understand that there is an ongoing criminal investigation being conducted by a number of law enforcement agencies and we also understand that the Illinois Attorney General's Office and the Illinois Comptroller's Office have recently initiated litigation to enforce the Illinois consumer protection law with regard to cemeteries. The Commission is prepared to cooperate and coordinate with these agencies; and to the extent additional available relief is called for, the FTC is prepared to investigate and bring an action if warranted.

#### The FTC's Consumer Protection Authority

As this Subcommittee well knows, Congress has charged the Federal Trade Commission with protecting American consumers – including consumers who find themselves in need of funeral goods and services – from fraud, deceit, and other injurious practices. The cornerstone

---

<sup>1</sup> The views expressed in this statement represent the views of the Commission. My oral statement and responses to any questions are my own and do not necessarily reflect the views of the Commission or any individual Commissioner.

of the Commission's statutory authority in fulfilling this mandate is the Federal Trade Commission Act (“FTC Act”).<sup>2</sup> Using its “unfair or deceptive acts or practices” authority under the FTC Act, the Commission is active in a wide range of efforts to protect the public from unfair, deceptive, and fraudulent practices in the marketplace through law enforcement targeting those who harm consumers, through rules that address prevalent and widespread unfair or deceptive practices, through studies, public hearings, and consultations with other government entities, and through education of consumers and businesses about the laws enforced by the FTC.

Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce.<sup>3</sup> An unfair act is one which causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.<sup>4</sup> The Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. Deceptive acts are those that

---

<sup>2</sup> 15 U.S.C. § 45(a). The Commission also has enforcement responsibilities under more than 50 additional statutes, *e.g.*, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which governs the privacy, fairness, and accuracy of certain sensitive consumer information; the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, which mandates disclosures of credit terms; and the Fair Credit Billing Act, 15 U.S.C. §§1666 *et. seq.*, which provides for the correction of billing errors on credit accounts. The Commission also enforces more than 30 rules governing specific industries and practices, *e.g.*, the Franchise Rule, 16 C.F.R. Part 436, which requires the provision of information to prospective franchisees; and the Telemarketing Sales Rule, 16 C.F.R. Part 310, which defines and prohibits deceptive telemarketing practices and other abusive telemarketing practices.

<sup>3</sup> “Commerce” as used here refers to interstate or foreign commerce.

<sup>4</sup> 15 U.S.C § 45(n). In determining whether an act or practice is unfair, the Commission may also consider established public policies, but these may not serve as a primary basis for such determination.

involve representations or omissions that are material to reasonable consumers.<sup>5</sup> The Commission may enforce Section 5 by means of administrative litigation, with the ultimate goal of issuing a cease and desist order, or it may seek and obtain preliminary and permanent injunctive relief (including the full range of equitable remedies, such as disgorgement of ill-gotten gains) in federal district court.<sup>6</sup> This authority extends to cemeteries, funeral homes, and other entities in this industry.<sup>7</sup> Note, however, that nonprofit firms are excluded from coverage by the FTC Act.<sup>8</sup>

#### FTC Efforts in Curbing Abuses in this Industry

Since the 1980s, the Funeral Industry Practices Trade Regulation Rule<sup>9</sup> (“Funeral Rule”), has been the centerpiece of the Commission’s consumer protection law enforcement efforts in the industry. Based on the facts as currently reported, however, the Funeral Rule is unlikely to apply to the events at Burr Oak. The Funeral Rule is primarily a cost disclosure rule that requires funeral providers to furnish consumers with three basic types of information, which, taken together, enable consumers to select the goods and services they want and to comparison

---

<sup>5</sup> FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

<sup>6</sup> 15 U.S.C. § 53(b).

<sup>7</sup> See *In Re Robert Lewis Wilkes d/b/a Barber Funeral Home*, 112 FTC 526 (1989) (administrative consent order in which a funeral director was alleged to have misrepresented burial services, including care of bodies and graves). The order in *Wilkes* included a ban on the funeral director providing further funeral services.

<sup>8</sup> Section 5 of the FTC Act, 15 U.S.C. § 45, empowers the agency to reach “persons, partnerships, or corporations;” “corporation” is limited by Section 4, 15 U.S.C. § 44, to companies, associations, and the like that are “organized to carry on business for their own profit or that of their members.”

<sup>9</sup> 16 C.F.R. Part 453.

shop for them. First, if a consumer visits a funeral home in person, the Rule requires that the funeral director provide the consumer with a general price list that itemizes prices of each of the funeral goods and services offered by the funeral home.<sup>10</sup> Second, the Rule requires a specific disclosure on the general price list that a consumer may choose only the items he or she desires. Third, the Rule requires disclosures of certain legal requirements and options available to the consumer, such as the fact that one may use alternative containers for direct cremations, rather than incurring the much greater expense of purchasing a casket.

In addition to ensuring that consumers receive these three basic types of information, the Rule protects consumers by prohibiting specific practices, such as: (1) misrepresenting that embalming is legally required or necessary (when it is not); (2) misrepresenting that a casket is required for direct cremation; (3) misrepresenting that any funeral goods or services have protective or preservative abilities (when this is not the case); (4) embalming without consent; or (5) requiring a consumer to purchase any funeral good or service as a condition of purchasing any other good or service. In sum, the information required by the Rule seeks to enable consumers to make informed purchasing decisions at a time of extraordinary stress. Under the Commission's enforcement approach, which entails an extensive industry self-regulatory system with Commission oversight, there appears to be a good level of compliance with the Rule.

#### The FTC's Authority to Address Issues Raised by the Burr Oak Cemetery Incident

The FTC has three main tools in its arsenal that could address issues such as those raised by the Burr Oak Cemetery incident: law enforcement, rulemaking, and outreach.

---

<sup>10</sup> At the beginning of any discussion of funeral arrangements, funeral directors must provide a copy of the general price list for the consumer to keep, and must show the casket price list and outer burial container price list before showing the consumer those items. These requirements apply to both at-need and pre-need situations when funeral arrangements are being made.

First, the Commission stands ready to investigate the Burr Oak Cemetery incident as an unfair or deceptive practice under the FTC Act should that prove warranted in light of the Illinois criminal and civil enforcement actions.

Second, the Commission could address consumer protection problems in this area by rulemaking.<sup>11</sup> However, under the cumbersome FTC Act rulemaking procedures, this is likely to be a time consuming effort; many cemeteries would fall outside any such rule because they are non-profits; and promulgation of a rule would require a finding that the practices addressed are “prevalent.”<sup>12</sup>

Third, in preparation for this hearing, the Commission has also considered means, in addition to law enforcement and rulemaking, in which it might, in cooperation with the Subcommittee and others, assist consumers who have the deep misfortune to experience such tragic events, and consumers who are concerned about their choices with respect to selecting funeral services.

In many instances, the Commission has used studies, public hearings, and workshops to advance its consumer protection mandate. We believe some of these strategies may be appropriate here and would like to consult further with the Subcommittee and others about these options.

---

<sup>11</sup> Section 18 of the FTC Act, 15 U.S.C. § 57a, empowers the FTC to “prescribe rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce . . .”

<sup>12</sup> In rulemaking under Section 18, the Commission may not issue a notice of proposed rulemaking unless it has “reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.” 15 U.S.C. § 57a(b)(3). The Commission may find prevalence where available information “indicates a widespread pattern of unfair or deceptive acts or practices.” 15 U.S.C. § 57a(b)(3)(B).

For instance, it may be appropriate for the FTC to initiate a process to explore on a national level the scope of problems in this area, what steps state and local authorities are taking to address them, and perhaps help formulate successful strategies to address the problems.<sup>13</sup> FTC staff could seek out experts in the field to solicit their views.

Staff could also meet with relevant stakeholders – industry members and consumer groups, as well as state and federal regulators who play key roles in the industry – to identify core problems and best practices. As part of this effort, staff may host a public workshop or other event to obtain a full range of relevant information.<sup>14</sup> A task force with appropriate state officials might serve as a vehicle for assessing record-keeping at cemeteries.

Finally, an important part of the Commission’s consumer protection mission is education of consumers and businesses. With respect to the Funeral Rule, the agency has published materials in both English and Spanish to help consumers understand their rights and help businesses understand their legal obligations. Similarly, it might be helpful, with respect to educating consumer about cemeteries, burial options, and their rights, to start a new consumer and business education campaign, perhaps in partnership with other government entities and industry associations.

---

<sup>13</sup> In connection with any such initiative, the Subcommittee may want to consider requesting that the General Accountability Office update its 2003 study of cemetery regulatory practices. It might also be appropriate to approach The National Conference of Commissioners on Uniform State Law (NCCUSL) about a uniform state consumer protection law for cemeteries.

<sup>14</sup> Of course, a vital source of information is consumer complaints, which help define the scope of problems to be addressed. The FTC receives a relatively low number of complaints regarding this industry. For example, during calendar year 2008, it received 241 complaints. In comparison, the FTC received 104,642 complaints about debt collection in 2008.

Thank you again for this opportunity to describe for the Subcommittee the Commission's law enforcement efforts to promote competition and protect consumers in the funeral industry. The Commission will continue to work with the Subcommittee and its staff to explore ways in which FTC can utilize its authority and consumer outreach expertise directly or in support of the Subcommittee's efforts to address the problems highlighted by the terrible events at Burr Oak.