



Suite 1437
55 East Monroe Street
Chicago, Illinois 60603
(312) 353-8156

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
CHICAGO REGIONAL OFFICE

COMMISSION AUTHORIZED

September 13, 1993

The Honorable Marlin D. Schneider
Wisconsin State Assembly
State Capitol
P.O. Box 8953
Madison, Wisconsin 53708

Dear Mr. Schneider:

The staff of the Federal Trade Commission¹ is pleased to respond to your request for comment on proposals to amend the Wisconsin statutes regulating the licensing and operation of funeral establishments and cemeteries in Wisconsin. Our response is limited to those portions of the bills that address joint ownership or operation of a funeral establishment and a cemetery. We conclude that permitting joint ownership or operation could make possible new business formats and improvements in efficiency, which might in turn lead to lower prices and better service to consumers.

I. Interest and experience of the Federal Trade Commission.

The Federal Trade Commission is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.² Pursuant to this statutory mandate, the FTC encourages competition in the licensed professions, including those in the funeral and cemetery industry, to the maximum extent compatible with other state and federal goals. The staff of the FTC works to identify restrictions that hinder competition and increase costs without providing countervailing benefits to consumers.

¹ These comments are the views of the staff of the Chicago Regional Office and the Bureau of Competition of the Federal Trade Commission, and do not necessarily represent the views of the Commission or any individual Commissioner.

² 15 U.S.C. §41 *et seq.*

The Commission staff has become familiar with the funeral industry through its work on a consumer protection rule that is intended to promote increased competition and consumer choice in the funeral industry by facilitating informed purchase decisions.³ In addition, the Commission has taken law enforcement actions against anticompetitive acquisitions in the funeral industry.⁴ The staff has previously commented on other states' proposed legislation involving the funeral industry.⁵ One of these was a comment to the Michigan State Senate on proposed legislation that would remove restrictions on joint ownership or operation of funeral establishments and cemeteries.⁶ Staff was concerned that such a prohibition might injure consumers by preventing potential efficiencies of combination ownership.

II. Wisconsin's Current Law and the Two Proposed Amendments.

Wisconsin now prohibits a funeral director from operating a mortuary or funeral establishment located within the confines of, or connected with, any cemetery.⁷ Wisconsin also prohibits a funeral director or employee from directly or indirectly receiving or accepting any commission, fee, remuneration or benefit from a cemetery in connection with the sale or

³ The FTC rule governing Funeral Industry Practices, 16 C.F.R. §453, became effective April 30, 1984. Among other things, the rule requires funeral providers to disclose to consumers detailed information about prices.

⁴ See Service Corporation International, Dkts. C-3372 (consent order, February 25, 1992), C-3440 (consent order, June 15, 1993).

⁵ See comments to the Pennsylvania House of Representatives Committee on Business and Commerce, August 29, 1989; Virginia Delegate Franklin P. Hall, February 9, 1989; Oregon State Representative Chuck Sides, April 6, 1987; Illinois Department of Registration and Education, May 9, 1986; Kansas State Representative Ginger Barr, February 14, 1986; Alabama Representative Arthur Payne, January 16, 1986. Commission staff has also testified generally on regulatory issues in these industries; see Statement to California Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development, October 17, 1991.

⁶ See Comment from Mark D. Kindt, Director, Cleveland Regional Office, to Michigan State Senator John D. Pridnia, December 16, 1991; see also comment from Timothy J. Muris, Director, Bureau of Competition, to Illinois State Senator Judy Baar Topinka, May 31, 1985.

⁷ Wis. Stat. Ann. §445.12(6). Here "connected with" apparently can include corporate affiliation; see Op. Atty. Gen. 2-89, January 10, 1989, calling for review of facts about legal separateness of parent and subsidiary corporations in determining whether one of them, as operator of a funeral establishment, was impermissibly "connected with" a cemetery.

transfer of any cemetery lot, or from acting, directly or indirectly, as a broker or jobber of any cemetery property or interest.⁸

S.B. 354 would add further prohibitions. A funeral director would be prohibited from operating a funeral establishment that is connected financially with a cemetery, either through an ownership interest or an operating arrangement. The location prohibition would be rephrased, to bar operating a funeral establishment "that is located in or contiguous to a cemetery." In addition, the prohibitions would be included in the statute governing cemetery authorities, as well in as the statute governing funeral establishments.⁹

By contrast, under the other proposal, which does not have a bill number, restrictions would be eliminated. It would allow a funeral establishment to be located in a cemetery and would allow a cemetery authority to own or operate a funeral establishment.¹⁰

III. Effects of Prohibiting Jointly Owned or Operated Facilities.

In other licensed and regulated businesses, such as health care, laws and regulations limiting "commercial practice" have been promoted on the grounds that they are necessary to maintain quality of service and protect the professional's independent judgment. Among other restrictions, these laws commonly prevent licensed professionals, such as dentists, optometrists, or veterinarians, among others, from entering commercial relationships, including employment, with non-licensed persons or firms. But our experience with such restrictions, principally in licensed businesses and professions other than the funeral and cemetery industries, suggests that their effect is usually to reduce competition and increase

⁸ Wis. Stat. Ann. §445.12(6). This prohibition may not bar all financial relationships between cemeteries and funeral operators, though; see 35 Op. Atty. Gen. 186 (1946), permitting a licensed funeral director to be the salaried secretary of a cemetery association.

⁹ S.B. 354, 1993-94 Legis., §1, 157.067(2) and §3, 445.12(6).

¹⁰ Proposed legislation, §3, 445.12(6)(b). The proposal would remove the cemetery's property tax exemption for that portion of its property used for the funeral establishment.

prices. That effect should be weighed carefully against effects, if any, on quality of care or service that the restrictions are thought to promote.¹¹

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 that the American Medical Association (AMA) enforced, 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, as a result violated federal antitrust laws.¹² The Commission concluded that the AMA's prohibition kept physicians from adopting business formats that might have been more efficient, and that, in particular, these restrictions precluded competition from organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.¹³

The principle might well apply to the funeral and cemetery businesses. Prohibiting jointly owned or operated facilities, as S.B. 354 would do even more completely than Wisconsin's law now appears to do, could prevent some efficient combinations of business practices of the two operations that might result in lower prices to consumers. For example, cemetery and funeral entities might be able to realize administrative and overhead economies

¹¹ See C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation, October 1990 (FTC Bureau of Economics Staff Report). This report, a review of economic studies of licensing, finds that licensing frequently increases prices and imposes substantial costs, but that many licensing restrictions do not appear to increase the quality of service. The report recommends careful weighing of likely costs against prospective benefits. *Id.* at v. Where consumers are in a relatively poor position to evaluate the product or service, regulation of some kind can provide benefits to consumers. The Commission's Funeral Rule addresses the consumer's relative lack of knowledge, and potentially vulnerable state of mind when purchase decisions are often made, by requiring disclosures, rather than by regulating the service directly or controlling who can practice. See Funeral Industry Practices, 16 C.F.R. § 453.

¹² See 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).

¹³ See also comment of the staff of the Federal Trade Commission on the American Bar Association's Model Rules of Professional Conduct, March 26, 1991, addressing issues raised by proposals to allow law firms to provide ancillary, non-legal services. In that comment, the staff pointed out that law firm diversification could benefit consumers by allowing firms to provide an efficient mix of services that consumers seek, and that rules restricting such services could harm consumers by restricting consumer choice. The comment also analyzed how different proposals would meet concerns about professional standards and ethical obligations.

The Honorable Marlin D. Schneider


Page 5

through joint facilities. Further savings might be possible in the areas of transportation and transaction costs. Buyers could make decisions about the burial and funeral service in one location, saving expense and perhaps easing personal concerns during a particularly stressful period. Admitting into the funeral and cemetery industries new business formats that Wisconsin's law now prohibits could have a positive effect on competition. These innovations might afford consumers a wider selection of services and costs.

IV. Conclusion.

S.B. 354 would tend to restrict competition in the funeral and cemetery industries; by contrast, the alternative proposal would tend to promote it. By allowing joint ownership or operation, the alternative proposal would remove barriers to new business formats and may promote efficiencies that ultimately could result in lower prices to consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Steven Baker". The signature is stylized with a large initial "C" and a long horizontal stroke at the end.

C. Steven Baker
Director

CHICAGO REGIONAL OFFICE