

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

1. KIM POWERS, 2. DENNIS BRIDGES, and)
3. MEMORIAL CONCEPTS ONLINE, INC.,)

Plaintiffs,)

v.)
)

1. JOE HARRIS, in his official capacity as President of)
the Oklahoma State Board of Embalmers and Funeral)
Directors; 2. JOHN SHONKWILER, in his official capacity)
as Secretary of the Oklahoma State Board of Embalmers)
and Funeral Directors; 3. CHARLES BROWN, in his official)
capacity as a Member of the Oklahoma State Board of)
Embalmers and Funeral Directors; 4. TERRY CLARK, in his)
official capacity as a Member of the Oklahoma State Board)
of Embalmers and Funeral Directors; 5. CHRIS)
CRADDOCK, his official capacity as a Member of the)
Oklahoma State Board of Embalmers and Funeral)
Directors; 6. KEITH STUMPPFF, in his official capacity as a)
Member of the Oklahoma State Board of Embalmers and)
Funeral Directors; and 7. SCOTT SMITH, in his official)
capacity as a Member of the Oklahoma State Board of)
Embalmers and Funeral Directors,)

Defendants.)

Case No. CIV-01-445-F

**MEMORANDUM OF LAW OF AMICUS CURIAE
THE FEDERAL TRADE COMMISSION**

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SUMMARY

Plaintiffs Kim Powers, Dennis Bridges, and Memorial Concepts On-Line, Inc. – sellers of caskets over the Internet – filed suit against the Oklahoma State Board of Embalmers and Funeral Directors (“Board”) alleging that Oklahoma’s Funeral Services Licensing Act (“FSLA”), which requires sellers of funeral goods to be licensed funeral directors, violates the Commerce Clause. The Board, which is represented by the Assistant Attorney General of Oklahoma, defends, *inter alia*, on the ground that the FSLA has a rational basis, which is consumer protection. In particular, the Board asserts that the FTC’s Funeral Industry Practices Rule (“Funeral Rule”),¹ which was expressly adopted to “lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice,”² could rationally have been extended by the Oklahoma legislature to cover sellers of funeral goods (hereinafter “casket retailers” or “third-party sellers”) and to require that such sellers be licensed funeral directors.

The FTC’s experience with the funeral industry through its Funeral Rule and through numerous antitrust investigations of funeral markets gives it unique expertise that may be relevant to the court in this proceeding. While the Commission does not take a position on whether the FSLA ultimately violates the Commerce Clause, it is filing this *amicus* brief because defendant’s characterization of the Funeral Rule conflicts with the actual purpose of the Rule and has the unfortunate effect of turning the Rule against its objective of enhanced competition and consumer welfare.

The fundamental purpose of the Rule is to protect consumers by giving them full information in order to promote greater competition. In adopting the Rule, the Commission determined that, without adequate information, consumers could find themselves at the mercy of individual funeral directors, who, in turn, would be insulated from meaningful competition. The Rule sought to remedy that problem by helping to ensure that funeral directors faced genuine competition, to the ultimate benefit of consumers.

The purpose and effect of the challenged portion of the FSLA is precisely the opposite. Rather than promote competition, the FSLA prohibits it. Rather than protect consumers by exposing funeral directors to meaningful competition, the FSLA protects funeral directors from facing any competition from third-party casket sellers. Rather than promote consumer choice, the FSLA forces consumers to purchase caskets from funeral directors. Whatever ends the FSLA can be said to be advancing, it is not advancing the ends of the FTC’s Funeral Rule.

The Funeral Rule operates by requiring funeral providers to give consumers important information – primarily itemized price information – as well as various other disclosures. This information helps consumers to make informed purchasing decisions so that they can select only the goods and services that they actually want and so they can comparison shop for them. The Rule expressly prohibits a funeral provider from charging casket-handling fees if the consumer purchases a casket from a third-party seller. The Rule thus protects consumers by informing them of their rights and

¹ 16 C.F.R. §§ 453.1 - 453.9 (2002).

² 47 Fed. Reg. 42,260 (1982).

by facilitating their ability to choose not only among goods and services offered but also among providers – including non-funeral providers – of those goods and services.

The Rule does not purport to protect consumers by limiting their choices and limiting competition but rather by increasing their choices and increasing competition. Through this amicus brief, the Commission seeks to inform the Court more fully about the operation and purpose of the Commission’s Funeral Rule and to rectify any misinterpretations of it.

STATEMENT OF INTEREST

The FTC’s statutory mission is to protect consumers. The FTC is charged by statute with enforcing those laws that prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.³ Pursuant to this statutory mandate, the Commission encourages competition to the maximum extent compatible with other state and federal goals. The Commission has extensive experience assessing the impact of regulation and business practices on competition in many regulated professions.⁴

The Commission also has significant expertise concerning the funeral industry in particular and has been active in this area for three decades. In 1972, the FTC began an investigation of funeral practices throughout the United States. As a result of the investigation, the Commission initiated a rulemaking proceeding to regulate the funeral industry. The Commission promulgated the Funeral Rule on September 24, 1982, and it became effective on April 30, 1984.⁵ The Rule has the force and effect of law and may be enforced through civil penalty actions in the federal courts.

In enforcing the Funeral Rule, the Commission has adopted an industry “sweeps” approach of simultaneous law enforcement actions targeting numerous industry members in a particular region or city. Funeral Rule sweeps cases are typically investigated and prosecuted cooperatively by the Commission staff and state Attorneys General.

The Commission is also concerned about activities in the funeral industry that may lessen competition and result in noncompetitive prices or lower quality of services for consumers. In recent years, the principal antitrust enforcement efforts in the funeral industry have involved potentially anticompetitive mergers and acquisitions. These cases generally are resolved through consent orders that require the acquiring firm to divest one or more acquired properties in order to prevent a reduction

³ Federal Trade Commission Act, 15 U.S.C. § 45.

⁴ See, e.g., *Alaska Healthcare Network, Inc.*, Docket No. C-4007 (Apr. 25, 2001); *Colegio de Cirujanos Dentistas de Puerto Rico*, Docket No. C-3953 (June 12, 2000); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

⁵ 47 Fed. Reg. 42,260 (1982). The Rule was challenged by funeral providers on various grounds and was upheld in *Harry and Bryant Co. v. FTC*, 726 F.2d 993 (4th Cir. 1984).

of competition.⁶ The Commission remains vigilant for transactions that may raise serious competitive concerns.

As part of its mission to protect consumers and competition, the Commission works to ensure that consumers have the fullest possible range of choices and options in their purchasing decisions, unencumbered by unnecessary anticompetitive restrictions. Internet commerce, in particular, can expand consumers' choices in numerous ways, and the dramatic growth of the online market reflects strong consumer demand for such new options. Encouraging greater competition to fulfill this consumer demand is an important policy goal for the Commission.⁷

BACKGROUND

A. The FTC's Funeral Rule

The FTC's Funeral Rule requires funeral providers to furnish consumers with a variety of information, which helps consumers to select the goods and services they want and to comparison shop for them. The Rule's price disclosure requirements ensure that consumers receive written, itemized price and billing information for the goods and services that comprise a funeral. Funeral providers are also required to include certain specific disclosures on their price lists, including disclosures that: (1) a consumer may choose only the items he or she desires; (2) embalming is not required by law, except in certain cases; and (3) alternative containers may be used for direct cremation. The Rule further protects consumers by prohibiting specific practices such as embalming for a fee without permission; misrepresenting certain legal, crematory, and cemetery requirements; and requiring a consumer to purchase any funeral good or service as a condition of purchasing any other good or service.

In the Funeral Rule's 1982 Statement of Basis and Purpose, the Commission declared that the essential purpose of the Rule is to lower barriers to price competition in the funeral market and to facilitate informed consumer choice.⁸ Accordingly, the Rule strives to ensure that consumers have access to sufficient information to permit informed purchase decisions, that consumers are not required to purchase items they do not want and are not required by law to purchase, and that misrepresentations are not used to influence consumer purchase decisions.

⁶ In 1999, for example, the Commission secured a consent decree with Service Corporation International, the largest owner of funeral homes and cemeteries in the world, to divest funeral service and cemetery properties in fourteen geographic markets in connection with its acquisition of Equity Corporation International, which was the fourth largest funeral home and cemetery company in the United States. *Service Corporation International*, FTC Docket No. C-3869 (Consent Order, May 4, 1999).

⁷ In October, the Commission will host a public workshop to explore how certain state regulations and private business practices may be having significantly anticompetitive effects on e-commerce. One of the workshop's panels will address the topic of online casket sales. See <<http://www.ftc.gov/os/2002/07/ecomfrn.htm>>, 67 Fed. Reg. 48,472 (2002).

⁸ Statement of Basis and Purpose, 47 Fed. Reg. at 42,260-42,304.

According to the rulemaking’s record evidence, several practices engaged in by funeral providers impeded consumers from making informed, independent choices. These practices included requiring consumers to purchase pre-packaged funerals by bundling items together (thereby prohibiting consumers from selecting items separately) and misrepresenting that certain goods and services, such as embalming, or a casket for a direct cremation, were required purchases.⁹ The Rule was based on “evidence that showed that funeral service providers often sold only preselected packages of goods and services such that consumers were forced to purchase goods and services they did not want.”¹⁰

The Funeral Rule addresses these practices by articulating that in “selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies”¹¹ Funeral goods are goods “sold or offered for sale directly to the public for use in connection with funeral services,”¹² and funeral services are services which may be used to “[c]are for and prepare deceased human bodies for burial, cremation or other final disposition” and “arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.”¹³ A funeral provider is “any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public.”¹⁴

Pursuant to the Rule, funeral providers must furnish to those who inquire about the funeral provider’s offerings a general price list (“GPL”) that contains itemized prices for 16 specified goods and services, such as forwarding and receiving remains, embalming, and use of facilities and staff for a viewing, memorial service, or funeral ceremony.¹⁵ The Rule on its face contemplates that caskets will be sold by parties other than funeral directors, in that it expressly stipulates that the GPL must also contain the price range for the immediate burials offered by the funeral provider, including “[a] separate price for an immediate burial *where the purchaser provides the casket*”¹⁶

In addition, the GPL must also include either (1) the “price for the basic services of funeral director and staff, together with a list of the principal basic services provided for any quoted price” and whether the fee can be declined or (2) the statement “please note that a fee of [specify dollar amount] for the use of our basic services is included in the price of our caskets. This same fee shall be added to

⁹ *Id.*

¹⁰ *Pennsylvania Funeral Directors Ass’n v. FTC*, 41 F.3d 81, 83 (3d Cir. 1994).

¹¹ 16 C.F.R. § 453.2.

¹² 16 C.F.R. § 453.1(h).

¹³ 16 C.F.R. § 453.1(j).

¹⁴ 16 C.F.R. § 453.1(i) (emphasis added).

¹⁵ 16 C.F.R. § 453.2(b)(4).

¹⁶ 16 C.F.R. § 453.2(b)(4)(D)(1) (emphasis added).

the total cost of your funeral arrangements *if you provide the casket.*¹⁷ Again, this provision would be unnecessary if only funeral providers were to sell caskets.

Detailed price lists for the caskets and outer burial containers offered by the funeral provider also must be supplied to consumers. If funeral providers prefer, they can include these itemized prices on the GPL. If not, the GPL must include the price range for caskets and outer burial containers, and a statement that informs consumers that itemized prices for those items are available.¹⁸

The original Funeral Rule included a mandate that a rulemaking amendment proceeding be initiated within four years after the effective date of the Rule.¹⁹ The purpose of the review was to determine early on whether the Rule was operating as expected in reducing barriers to price competition and increasing informed consumer choice or whether some modification was necessary to facilitate those benefits. In addition, the Commission would consider termination if increased competition had largely corrected the problems addressed by the Rule.²⁰

In 1988, the Commission initiated the rulemaking amendment proceeding by publishing in the Federal Register a Notice of Proposed Rulemaking (“NPR”).²¹ The resulting 1994 amendments changed several provisions relating to the GPL and also changed a provision relating to the non-declinable fee. The original Rule mandated a specifically-worded disclosure informing the consumer that “[y]ou may choose only the items you desire.”²² The general purpose of this provision was to make it possible for consumers freely to select funeral goods and services. Funeral providers were thus required to “unbundle” their offerings to allow for consumers’ unfettered selection of individual funeral goods and services. When the Rule was amended in 1994, this section was augmented by an additional section prohibiting casket-handling fees. This section specifies that it is an unfair or deceptive practice for funeral providers to:

Charge any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral, other than the fees for: (1) services of funeral director and staff, permitted by § 453.2 (b)(4)(iii)(C); (2) other funeral services and funeral goods selected by the purchaser; and (3) other funeral goods or services required to be

¹⁷ 16 C.F.R. § 453.2(b)(C)(1)-(2) (emphasis added).

¹⁸ 16 C.F.R. § 453.2(b)(2) and (3).

¹⁹ 16 C.F.R. § 453.10.

²⁰ Statement of Basis and Purpose, 47 Fed. Reg. at 42,261, 42,299.

²¹ 53 Fed. Reg. 19,864 (1988). The Commission had on Dec. 9, 1987, issued an Advance Notice of Proposed Rulemaking (“ANPR”) describing the planned review of the Funeral Rule. 52 Fed. Reg. 46,706 (1987). In drafting the NPR, Commission staff utilized information extracted from the more than 350 comments that were received in response to the ANPR.

²² 16 C.F.R. § 453.4(b)(2)(i)(A).

purchased, as explained on the itemized statement in accordance with § 453.3 (d)(2).²³

Thus, funeral providers cannot charge a fee that is not for the services of the funeral director and staff or for the items the consumer specifically selected. This limitation on permissible fees was designed to prohibit a funeral provider from charging consumers a casket-handling fee for using a casket purchased from some source other than that funeral provider. In amending the Rule in this manner, the Commission recognized that funeral providers that added substantial casket-handling fees were stifling potential competition. The Commission determined that “substantial ‘casket-handling fees’ are imposed on consumers by a significant proportion of providers wherever third-party casket sellers exist, and, as a result, frustrate the Rule’s ‘unbundling’ requirements and result in the reduction of potential competition.”²⁴ The record evidence indicated that some providers implemented casket-handling fees as a “direct response to third-party competition,” while others used handling fees “because of their competitive reluctance to shift overhead costs and profit from the casket mark-up to professional services fees.”²⁵

The amendment was challenged by an association of funeral directors and upheld.²⁶ The court noted that, prior to enactment of the Funeral Rule, funeral service providers were virtually the only entities selling caskets, and that by unbundling funeral goods and services, the Rule paved the way for others sellers to enter the market and offer caskets “usually at a substantially lower price than did the funeral homes.”²⁷ In reaction to this competition, funeral service providers began to charge a casket-handling fee to consumers who purchased a casket elsewhere but wanted to have the funeral conducted at the funeral home. The court stated that “funeral service providers admit that there is absolutely no additional labor or service or handling involved when a customer provides a casket from a third-party to justify such a fee.”²⁸ Accordingly, the court held that a casket-handling fee “can only be described as a penalty for exercising choice in purchasing a good and as a method of forcing consumers to purchase a casket from a funeral home, or at least pay the funeral home mark-up on a casket” and that this “constitutes substantial consumer injury.”²⁹

Another important issue that the Commission has considered is whether the Funeral Rule should be expanded to encompass other types of “death care-related” businesses, as opposed to applying only

²³ 16 C.F.R. § 453.4(b)(1)(ii).

²⁴ 59 Fed. Reg. 1,592 at 1,604 (1994).

²⁵ *Id.* Thus, a provider must recoup its overhead costs in ways other than imposing fees upon consumers who elect to purchase a casket from another seller.

²⁶ *Pennsylvania Funeral Directors Ass’n v. FTC*, 41 F.3d 81 (3d Cir. 1994).

²⁷ *Id.* at 84.

²⁸ *Id.*

²⁹ *Id.* at 90.

to “funeral providers.”³⁰ Because the Rule defines a funeral provider as “any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public,³¹ persons that sell or offer to sell *only* funeral goods or *only* funeral services are not considered “funeral providers.” In other words, the non-traditional members of the funeral industry, such as casket and urn retailers, or independent cemeteries, do not meet the definition of “funeral provider” and are thus not subject to the Rule’s provisions. The Commission considered expanding the definition of funeral provider in the earlier Rule review. In the late 1980’s and early 1990’s, however, these non-traditional sellers were few in number. At that time, the public comments lacked sufficient evidence of non-traditional sellers’ practices to warrant Commission action. Therefore, the 1994 amendments did not expand the Rule to include these non-traditional sellers. In hopes of increasing competition, however, the amendments did encourage entry into the market by non-traditional sellers by including the prohibition on casket-handling fees.

B. The Oklahoma Funeral Services Licensing Act

The Oklahoma FSLA permits casket sales only by licensed funeral directors. It defines a funeral director as someone who, among other things “sells funeral service merchandise to the public,”³² and a funeral establishment as “a place of business used in the care and preparation for burial or transportation of dead human remains, or any place where any person or persons shall hold forth and be engaged in the profession of undertaking or funeral directing.”³³ It defines funeral service merchandise or funeral services as “products and services normally provided by funeral establishments and required to be listed on the General Price List of the Federal Trade Commission, . . . including, but not limited to, the sale of burial supplies and equipment”³⁴ The Act further specifies that any person engaged in “the sale of any funeral service merchandise” shall be required to be licensed pursuant to the FSLA.³⁵ The FSLA provides that the “Oklahoma State Board of Embalmers and Funeral Directors shall determine the qualifications necessary to enable any person to practice as a funeral director or embalmer, and prescribe the requirements for a funeral establishment or commercial embalming establishment.”³⁶

³⁰ 16 C.F.R. § 453.1(i).

³¹ *Id.* (emphasis added). Funeral goods are “the goods which are sold or offered for sale directly to the public for use in connection with funeral services.” Funeral services are “any services which may be used to: (1) care for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.” 16 C.F.R. § 453.1(h) & (j).

³² OKLA. STAT. tit. 59, § 396.2(2)(d).

³³ OKLA. STAT. tit. 59, § 396.2(3).

³⁴ OKLA. STAT. tit. 59, § 396.2(10).

³⁵ OKLA. STAT. tit. 59, § 396.3a(1)(c).

³⁶ OKLA. STAT. tit. 59, § 396.3(A).

C. Regulations of the Oklahoma State Board of Embalmers and Funeral Directors

The Board's regulations carry out the statute's requirement in the following manner. First, a regulation defines a funeral service establishment as "a fixed place of business used and equipped for funeral services, or for the retail sale or display of funeral service merchandise, or used to embalm, transport, or ship dead human remains, and to provide for the care and disposal of dead human remains."³⁷ Next, it defines funeral service merchandise as "products and services normally provided by funeral establishments, including but not limited to burial supplies and equipment" and "any items of service or merchandise offered by the funeral service establishment as required to be listed on the General Price List mandated by the Federal Trade Commission with the exception of outer burial containers."³⁸ Finally, it defines the practice of funeral directing as the preparation of dead bodies or "being in the general control, supervision or management of the operations of funeral service establishment."³⁹ To be a licensed funeral director in Oklahoma, an individual must, among other things, be a graduate of an accredited program of mortuary science, complete 60 college semester hours at an accredited institution of higher education, pass both the National Board Examination of the International Conference of Funeral Service Examining Boards and an Oklahoma Law examination, and complete an embalmer or funeral director apprenticeship.⁴⁰ There are also numerous requirements for licensing a funeral service establishment, such as having a specific street address, a room for preparing dead bodies, a room for selecting caskets, viewing rooms, and having a full-time licensed funeral director.⁴¹ The Board's regulations do not apply, however, when "an individual related to the deceased by blood or marriage provides a burial receptacle and buries the related deceased without embalming or conducting a funeral."⁴²

ARGUMENT

I. The Funeral Rule protects consumers by facilitating their ability to choose among goods offered and among providers.

A. The defendants' characterization of the Funeral Rule is inaccurate

Defendants maintain that consumers who are buying caskets may be vulnerable to fraud. They

³⁷ OKLA. ADMIN. CODE § 235:10-1-2. Thus, a place of business used for the retail sale or display of funeral merchandise, such as caskets, is deemed a funeral service establishment and must meet the regulations' requirements for such establishments.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ OKLA. ADMIN. CODE § 235:10-3-1.

⁴¹ OKLA. ADMIN. CODE § 235:10-3-2. These requirements appear to prohibit Internet or catalog stores, or stand-alone showrooms, even if run by a licensed Oklahoma funeral director.

⁴² OKLA. ADMIN. CODE § 235:10-1-3.

suggest that if casket sales are not limited to funeral directors, no relief is available to injured consumers, “as there would be no regulatory oversight over them.”⁴³

The assertion that third-party sellers of funeral merchandise are subject to no oversight is incorrect because casket sellers, like sellers of any goods, are subject to the same general consumer protection laws as are any other businesses. Thus, casket sellers would be subject to the Oklahoma Consumer Protection Act,⁴⁴ and to full liability under Oklahoma tort and contract law. Likewise, the Federal Trade Commission has authority under Section 5 of the FTC Act to bring an enforcement action against a casket seller who makes false or misleading claims about the products or services it provides.⁴⁵ The Commission also has authority under its unfairness jurisdiction to stop marketing practices that cause or are likely to cause substantial consumer injury, which is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or to competition.⁴⁶

The key legal issue in this case is whether *additional* requirements imposed by the FSLA on third-party casket sellers provide sufficient “local benefits” to satisfy the applicable Commerce Clause standard. *See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In their attempt to justify these additional regulatory requirements and entry barriers, the defendants miscast the purpose of the FTC’s Funeral Rule. Defendants assert that, although the FTC’s Funeral Rule covers funeral providers and not other sellers of funeral goods, “[c]onsumers are no less vulnerable to potential abuses by unlicensed providers of funeral merchandise than by licensed funeral directors. If the intent of the FTC Rule is to protect the vulnerable consumers in their purchasing decisions, then common sense would dictate that all suppliers of funeral merchandise should be subject to the same regulation.”⁴⁷ The defendants thus offer the following argument:

- (1) The goal of the FTC’s Funeral Rule is consumer protection;
- (2) The Funeral Rule does not cover sellers of funeral merchandise who are not funeral directors; therefore
- (3) The FSLA furthers the consumer protection goals of the FTC’s Funeral Rule by preventing anyone other than licensed funeral directors from selling funeral merchandise.

Defendants’ argument inaccurately describes the purpose and effect of the FTC’s Funeral Rule, which is to facilitate consumer choice by promoting competition, ensuring that consumers have sufficient

⁴³ Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint and brief in Support at 18. *See also* Report of Frank B. Rosenacker at 5-6, 11-12.

⁴⁴ OKLA. STAT. tit. 20, § 751, et seq.

⁴⁵ 15 U.S.C. § 45.

⁴⁶ 15 U.S.C. § 45(n); *also see* Unfairness Policy Statement, appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

⁴⁷ Defendants’ Motion to Dismiss Plaintiffs’ First Amended Complaint and brief in Support at 19. *See also* Report of Frank Rosenacker at 5-6.

information to make informed decisions, and preventing them from being forced to buy products or services they do not want as a condition of obtaining the services of a funeral director. Unlike the FSLA, the Funeral Rule does not restrict consumer choice by limiting the sources from which consumers can purchase funeral goods; precisely the reverse – it instead promotes consumer choice and increases competition.

The Federal Trade Commission promulgated the Funeral Rule to stop unfair acts and practices by funeral providers. *See, e.g., Craigmiles v. Giles*, 110 F. Supp.2d 658, 663 (E.D. Tenn. 2000) (“The FTC issued the Rule to prevent funeral directors from selling preselected packages of goods to consumers so that consumers were forced to purchase goods and services they did not want.”); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440 (S.D. Miss. 2000) (“[I]t is clear that the FTC has found that there is a necessity in protecting consumers from the pricing practices of the funeral industry, especially in regard to casket sales.”) In fact, as the court emphasized in *Pennsylvania Funeral Directors Ass’n v. FTC*, 41 F.3d at 90, the purpose of the Rule, as amended, is to “encourage consumers to exercise choice in the marketplace, especially with the entrance of third party competitors, and to prevent funeral homes from effectively prohibiting that choice” (emphasis added). The court further noted, “[f]orcing consumers to purchase a casket from a funeral home, or at least pay the funeral home the mark-up on a casket . . . constitutes substantial consumer injury.” *Id.* at 90.

The defendants invoke the Funeral Rule in defense of restrictions on the very types of competition that the Funeral Rule was intended to permit. The FTC’s Funeral Rule protects consumers, not by limiting their ability to choose among casket sellers, but by ensuring that they have sufficient information to make an informed choice and are not constrained in their choice of casket provider.

It bears repeating that the Funeral Rule flows from the finding that “it is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate *price information* disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies”⁴⁸ Thus, even if the Funeral Rule were to extend to third parties who sell funeral goods, it would merely require them to provide consumers detailed price and other information about the goods.⁴⁹ Unlike the FSLA, it would not prohibit third-party sales and force consumers to buy funeral goods only from funeral directors.

⁴⁸ 16 C.F.R. § 453.2(a) (emphasis added).

⁴⁹ As the court observed in *Craigmiles*, 110 F. Supp. 2d at 663, “Independent [casket] retailers do not need to be compelled to disclose prices. Like any other retailers, if they fail to disclose their prices, they will do no business.” Commission staff conducted an Internet search from July 29 to August 2, 2002, and were able to locate web sites for less than 10% of Oklahoma funeral homes. Notably, only 2 of these sites provided casket price lists, while 2 other sites provided the price range of their caskets. Consequently, it appears that Oklahoma consumers have few options in attempting to use the Internet to search for price information on goods and services sold by state-licensed funeral establishments.

B. The Oklahoma statute does not further the Funeral Rule's consumer protection goals

A principal intention and effect of the Funeral Rule is to permit consumers to purchase caskets and other funeral merchandise from third parties who are not funeral directors. While the Rule, by itself, does not guarantee that consumers will never be misled or pressured into purchasing expensive or unneeded merchandise, it does help ensure that consumers have accurate price information and the ability to comparison shop for funeral merchandise if they so choose.

By contrast, the FSLA's requirements limit consumers' choice of funeral merchandise providers, thereby insulating the funeral service industry in Oklahoma from competition that could lower casket prices or provide other consumer benefits. The FSLA specifies that only state licensed funeral directors may sell caskets in Oklahoma, and it requires that caskets be sold only in state-licensed funeral establishments. The first requirement denies Oklahoma consumers the benefits of competition that consumers in many other states currently derive from alternative forms of casket retailing, including casket retail stores, Internet retailers of caskets, and sellers of highly personalized or individually-crafted caskets.⁵⁰ The second requirement affects the business practices of licensed funeral directors as well, as it prevents them from selling caskets through a facility that is not a licensed funeral establishment, such as a free-standing showroom or even over the Internet.

Caskets are typically the most expensive component of traditional funeral services sold by funeral homes.⁵¹ Evidence suggests that third-party casket sellers typically charge significantly lower prices than do funeral homes for comparable caskets.⁵² Moreover, third-party casket sellers can benefit consumers by expanding the range of casket choices available in a market along additional dimensions. For example, consumers desiring highly individualized caskets made by artists or craftsmen may be unable to find such caskets through funeral homes.⁵³

Other things being equal, lower prices and more choices benefit consumers; equivalently, higher prices and fewer choices harm consumers. Additionally, casket retailers can provide the stimulus for funeral homes to operate in a more efficient manner, thereby benefitting all funeral service consumers regardless of where they buy their caskets. Conversely, the exclusion of third-party sellers has the potential to harm all funeral merchandise consumers in a market.

⁵⁰ For example, Custom Caskets in Dorris, Oregon, has manufactured and sold caskets with western themes, Victorian themes, and non-standard linings (furs, leather hides, etc.); family members are encouraged to be part of the decorating process. Caskets by Design in Austin, Texas, has sold caskets with tropical sea designs and camouflage designs. *News Briefs*, MORTUARY MANAGEMENT, Mar. 2000, at 21-22.

⁵¹ See *Craigmiles*, 100 F. Supp. 2d at 664.

⁵² See Report of Daniel Sutter, Ph.D. at 4 (“[O]verall, licensed funeral homes prices average about 68% higher than prices charged by Memorial Concepts Online.”)

⁵³ See, e.g., examples cited *supra* note 50.

CONCLUSION

In sum, protection of consumer choice is the core function of the FTC's Funeral Rule. The Rule carries out this function through its disclosure requirements and its prohibition on casket-handling fees, thereby allowing consumers to make an informed choice among funeral goods and services and among providers of those goods and services. Thus, the Rule promotes consumer choice and promotes competition. Defendants' argument that the FSLA furthers the consumer protection goals of the Funeral Rule by restricting consumer choice and by prohibiting competition for licensed funeral directors is simply in error.

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