

**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. SCOTT3d4MTH in his official )

Case No. CIV-01-445-F

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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”),<sup>1</sup> which was expressly adopted

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<sup>1</sup> 16 C.F.R. §§ 453.1 - 453.9 (2002).

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>3</sup> Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>4</sup> 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).

<sup>5</sup> 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 (4<sup>th</sup> Cir. 1984).

of competition.<sup>6</sup> 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.<sup>7</sup>

## **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.<sup>8</sup> 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.

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<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> 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.<sup>9</sup> 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.”<sup>10</sup>

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 . . . .”<sup>11</sup> Funeral goods are goods “sold or offered for sale directly to the public for use in connection with funeral services,”<sup>12</sup> 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.”<sup>13</sup> A funeral provider is “any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public.”<sup>14</sup>

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.<sup>15</sup> 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 . . . .*”<sup>16</sup>

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

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<sup>9</sup> *Id.*

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

<sup>11</sup> 16 C.F.R. § 453.2.

<sup>12</sup> 16 C.F.R. § 453.1(h).

<sup>13</sup> 16 C.F.R. § 453.1(j).

<sup>14</sup> 16 C.F.R. § 453.1(i) (emphasis added).

<sup>15</sup> 16 C.F.R. § 453.2(b)(4).

<sup>16</sup> 16 C.F.R. § 453.2(b)(4)(D)(1) (emphasis added).



the total cost of your funeral arrangements *if you provide the casket.*<sup>17</sup> 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.<sup>18</sup>

The original Funeral Rule included a mandate that a rulemaking amendment proceeding be initiated within four years after the effective date of the Rule.<sup>19</sup> The purpose of the review was to determine early on whether the Rule was operating as expected in reducing barriers to price

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

<sup>18</sup> 16 C.F.R. § 453.2(b)(2) and (3).

<sup>19</sup> 16 C.F.R. § 453.10.

<sup>20</sup> Statement of Basis and Purpose, 47 Fed. Reg. at 42,261, 42,299.

<sup>21</sup> 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.

<sup>22</sup> 16 C.F.R. § 453.4(b)(2)(i)(A).



to “funeral providers.”<sup>30</sup> 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,<sup>31</sup> 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,”<sup>32</sup> 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.”<sup>33</sup> 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 . . . .”<sup>34</sup>

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<sup>30</sup> 16 C.F.R. § 453.1(i).

<sup>31</sup> *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).

<sup>32</sup> OKLA. STAT. tit. 59, § 396.2(2)(d).

<sup>33</sup> OKLA. STAT. tit. 59, § 396.2(3).

<sup>34</sup> OKLA. STAT. tit. 59, § 396.2(10).

<sup>35</sup> OKLA. STAT. tit. 59, § 396.3a(1)(c).

<sup>36</sup> OKLA. STAT. tit. 59, § 396.3(A).

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<sup>37</sup> 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.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> OKLA. ADMIN. CODE § 235:10-3-1.

<sup>41</sup> OKLA. ADMIN. CODE § 235:10-3-2. These requirements appear to prohibit Internet or



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<sup>48</sup> 16 C.F.R. § 453.2(a) (emphasis added).

<sup>49</sup> 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

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<sup>50</sup> 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.

