

**ANALYSIS OF AGREEMENT CONTAINING
PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT**
In The Matter of Missouri Board of Embalmers and Funeral Directors, File No. 061-0026

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Missouri Board of Embalmers and Funeral Directors (“the Board” or “Respondent”). The agreement settles charges that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices described below. The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Order final.

The purpose of this analysis is to facilitate comment on the proposed consent Order. This analysis does not constitute an official interpretation of the agreement and proposed Order, and does not modify the terms in any way. Further, the proposed consent Order has been entered into for settlement purposes only, and does not constitute an admission by the proposed Respondent that it violated the law or that the facts alleged in the Complaint against the Respondent (other than jurisdictional facts) are true.

I. The Respondent

Respondent is the sole licensing authority for the practices of funeral directing and embalming in the State of Missouri. It is authorized to promulgate, adopt and enforce rules and regulations governing and defining those practices. Respondent is able to seek a court order to enjoin any person from engaging or offering to engage in any act that requires a license from the Board. The unlicensed practice of funeral directing or embalming in Missouri may be prosecuted as a class A misdemeanor.

At the time it adopted the regulation at issue in the proposed complaint, the Board was composed of five (5) licensed funeral directors, all of whom competed in the sale of at-need funeral caskets to consumers in Missouri.

II. The Conduct Addressed by the Proposed Consent Order

The proposed Complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by unlawfully restraining competition in the retail funeral casket market in the State of Missouri by promulgating a regulation that defined the practice of funeral directing to include selling at-need funeral merchandise.

The at-issue regulation stated: “No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: . . . (C) sale or rental to the public of funeral merchandise,

services or paraphernalia.”¹ Under the laws of the State of Missouri, however, licensing qualifications and conditions for persons practicing or offering to practice funeral directing and embalming do not apply to anyone engaged simply in the furnishing of at-need burial receptacles to the public.²

The proposed Complaint alleges that the Board’s regulation had anticompetitive effects by discouraging non-licensed persons from selling funeral caskets to the public in Missouri, depriving consumers of the benefits of price competition, and reducing consumer choices concerning the purchase of funeral caskets.

The Commission has previously found that funeral director conduct that limits entry by non-licensed casket sellers harms competition. In its 1994 review of the Funeral Rule,³ the Commission found that funeral-director-imposed “casket handling fees” excluded competition from third-party casket sellers, and the record evidence indicated that the fees “prevent[ed] potential price competition and reduce[d] consumer choice.”⁴ The Commission further found that “the long-term effect of [banning these fees] will be increased competition in the casket market such that prices will eventually go down and all consumers will pay less.”⁵

The courts have likewise found that state laws prohibiting the sale of caskets by non-licensed persons harm competition. The Sixth Circuit concluded that a Tennessee state law forbidding anyone but state licensed funeral directors from selling caskets imposed “a significant barrier to competition in the casket market” and “harm[ed] consumers in their pocketbooks.”⁶ A district court in Oklahoma found that “[a]s long as independent sellers stay in the market, casket sales from independent sources ... place downward pressure on casket prices as a result of increased competition.”⁷ A district court reviewing a similar statute in Mississippi also

¹ 4 CSR 120-2.060(18).

² See Mo. Rev. Stat. § 333.251 (2005). The at-issue regulation was revised during the course of the investigation and published in 20 CSR 2120-2.060 (18)(C) effective September 2006.

³ The FTC’s Funeral Rule, which was promulgated by the Commission in 1982 and revised in 1994, requires providers of funeral goods and services to give consumers itemized lists of funeral goods and services that not only provide price and descriptions, but also contain specific disclosures. The Funeral Rule removed the primary industry restraint on consumer choice (package-only funeral goods and service pricing) and makes clear that consumers may select and purchase only the goods and services they want. See 59 Fed. Reg. 1592 (1994).

⁴ 59 Fed. Reg. at 1603-04.

⁵ *Pa. Funeral Directors Ass’n, Inc. v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994). See also Memorandum of Law of Amicus Curiae The Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D. Okla. Aug. 29, 2002).

⁶ *Craigmiles v. Giles*, 312 F.3d 220, 222, 228 (6th Cir. 2002).

⁷ *Powers v. Harris*, 2002 WL 32026155 at *6 (W.D. Okla. Dec. 12, 2002).

