

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE NEW YORK STATE ASSOCIATION)	
OF CEMETERIES, INC., and MOUNT)	AMICUS
CALVARY CEMETERY, INC.,)	CURIAE
)	
Plaintiffs,)	
)	
- against -)	
)	CIVIL ACTION NO.:
)	99-CV-0664
)	
RICHARD FISHMAN, Individually and as Director,)	
New York State Division of Cemeteries: ALEXANDER)	
I. TREADWELL, Individually and as Secretary of)	
State of the State of New York; ELLIOT SPITZER,)	
Individually and as Attorney General of the State of)	FJS-RWS
New York; ANTONIA C. NOVELLO, Individually and)	
As Commissioner of Health of the State of New York,)	
And THE NEW YORK STATE CEMETERY BOARD,)	
)	
Defendants,)	

AMICUS CURIAE BRIEF OF THE
INTERNATIONAL CEMETERY AND FUNERAL ASSOCIATION
IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT PURSUANT TO FRCP 56

The International Cemetery and Funeral Association (“ICFA”), by its undersigned counsel, respectfully submits this amicus curiae brief in support of plaintiffs’ motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The ICFA was founded in 1887 and is a voluntary trade association of nearly 6,000 members including nonprofit, for-profit, religious and municipal cemeteries, funeral homes, crematories, and memorial retailers. The ICFA’s activities include

educational conferences and workshops on all phases of the funeral, interment, and memorialization industries. The ICFA also takes an active role in advancing the public interest involving industry issues and encourages its members to meet the needs of consumers. To that end, the ICFA promotes consumer choices, prearrangement and open competition.

Public Policy Concerns

The present litigation has attracted considerable attention and concern among the ICFA's membership because the adjudication of the claims asserted here may potentially have a far-reaching effect on long-standing cemetery practices throughout the United States. Specifically, Chapter 560 of the Laws of 1998 of the State of New York prohibits, among other things, nonprofit cemeteries from engaging in the retail sale of markers, memorials, and monuments, excepting flush bronze markers. Chapter 560 also prohibits certain nonprofit cemeteries in New York State, those having 30 acres or more, from entering into any business or contractual relationships with for-profit funeral home establishments, and even prohibits management contracts with anything other than a nonprofit cemetery corporation.

In ICFA's view, the prohibitions in this statute appear to have no rational basis but are anti-competitive and anti-consumer in effect. The only logical purpose served by the prohibitions in Chapter 560 is to maintain the status quo market shares of existing industry segments and to insulate those entities from competition. We provide

corroboration of our views based on rulings and opinions from federal agencies such as the Federal Trade Commission and the Internal Revenue Service, and from the federal courts, as discussed below, that have found that prohibitions similar in nature to Chapter 560 will undermine the ability of cemeteries to function in the best interests of their lot owners and families, bar new entrants into the market place, and retard price competition - all to the detriment of consumers whom Chapter 560 purportedly seeks to “protect.”

Nonprofit Cemeteries May Sell Monuments and Memorials

Chapter 560 prohibits nonprofit cemeteries from engaging in one of the most commonly accepted, and legally sanctioned, activities that a cemetery can perform: selling grave markers, memorials, and monuments for placement within the cemetery. The Internal Revenue Service (IRS) determined years ago that a nonprofit cemetery’s tax status would not be jeopardized if it sells various memorials to its customers, similar to the memorial options offered by monument retail establishments and funeral homes.

In 1972, the IRS published a key revenue ruling stating, “The exempt status of a cemetery company is not adversely affected if it sells monuments, markers, vaults, and flowers solely for use in the cemetery and uses the sales proceeds for the maintenance of the cemetery.” Nonprofit cemeteries that are exempt from federal income tax under section 501(c)(13) of the Internal Revenue Code must be “owned and operated exclusively for the benefit of their members or ... not operated for profit.” (Rev. Rul. 72-17, attached as Exhibit A). Thus, the IRS ruling confirms that a nonprofit cemetery’s sale

of all types of memorials is a function within its exempt purpose and ensures that net income from marker sales will benefit the lot owners and family members of the decedents interred within the cemetery.

It is also important to note that the amount of net income derived from cemetery sales activities is irrelevant to maintaining the cemetery's tax-exempt status. As long ago as 1941, the U.S. Board of Tax Appeals explained that the amount of net income was of concern only to the extent that it advanced the tax exempt purpose, "the emphasis being placed upon the destination of the income rather than its source." (*Forest Lawn Memorial Park Assn. v Commissioner*, (1941) 45 B.T.A. 1091 at 1100, attached as Exhibit B).

Nonprofit Cemeteries May Affiliate with Funeral Homes

The IRS has provided clear guidance on the permissibility of nonprofit, tax-exempt cemeteries to engage in business and contractual relationships with for-profit funeral homes, also known as mortuaries. Initially, the U.S. Board of Tax Appeals held in a 1941 decision that a nonprofit cemetery could directly operate a mortuary without jeopardizing its tax exemption. The Board reasoned that the preparation of human remains by a funeral home operation for final disposition was necessarily incidental to the operation of a cemetery. (Ibid., *Forest Lawn Memorial Park Assn. v Commissioner*, Exhibit B).

However, the IRS did not acquiesce in that decision and later challenged the tax exemption of Forest Lawn, a nonprofit cemetery, due to its mortuary operation. In a 1964 revenue ruling, the IRS stated that a cemetery corporation exempt from federal income tax under section 501(c)(13) “will become subject to the loss of its exempt status if it establishes and operates a mortuary on the cemetery grounds, or elsewhere.” (Rev. Rul. 64-109, attached as Exhibit C)

Based on Rev. Rul. 64-109, the IRS proposed the revocation of Forest Lawn’s tax exempt status in 1964 and again in 1975. However, the IRS accepted a plan whereby the cemetery operated the funeral home through a taxable, wholly-owned subsidiary. (IRS Training Manual, Mortuaries, excerpted pages attached as Exhibit D). This plan became the model for subsequent arrangements by which nonprofit cemeteries could permissibly operate a funeral home without jeopardizing their tax exemption and the IRS has confirmed its approval on numerous occasions (for example, IRS Private Letter Ruling 9630014 attached as Exhibit E). Therefore, the prohibition in Chapter 560 against nonprofit cemeteries engaging in business relationships with funeral homes is unwarranted and without a rational basis.

Prohibitions on Management Contracts

The ICFA is unaware of any compelling legal authority or rule of law that prohibits nonprofit entities, including cemeteries, from entering into management contracts with for-profit organizations. Chapter 560 appears to be unique by prohibiting a

practice that is legally permissible in the forty-nine other states. We are aware of concerns regarding the efforts by large public companies to control cemeteries located in New York in order to allegedly obtain some type of monopolistic position with regard to selling burial lots. However, that question, regardless of whether or not it reflects a valid concern, should focus on antitrust issues involving market shares and market concentration.

Concern has also been expressed over a for-profit entity “siphoning off” the proceeds from a nonprofit cemetery. This argument is bogus because of well-established safeguards under IRC Sec. 501(c)(13) stating that “no part of the net earnings of which inures to the benefit of any private shareholder or individual” is permitted. Thus, the Internal Revenue Service prohibits the private inurement of cemetery earnings under penalty of the revocation of the cemetery’s tax exempt status. Since cemeteries are required to be organized as not-for-profit organizations in New York State, an IRS revocation of a cemetery’s tax exemption would effectively put it out of business. Thus, arguments attempting to justify prohibitions against nonprofit cemeteries affiliating with for-profit entities due to “siphoning” are unsound.

The Chapter 560 prohibition can be interpreted as restricting a cemetery from entering into a relationship with attorneys, accountants, general contractors, and others providing quasi-managerial services to assure the professional operation and maintenance of the cemetery through the use of sound business principles. Similar to the restrictions

discussed above, this prohibition has no legitimate purpose and seeks only to shelter existing funeral and memorial retailers from a source of potential competition.

Cemetery-Mortuary Prohibitions are Anti-Competitive

Combined cemetery-mortuary operations are commonplace throughout the United States and have existed since at least the 1930s. The number of “combos” is conservatively estimated at 1500 and their activities are not controversial in the many states where they exist. Ironically, controversy over combinations surface only in the few states where they are prohibited. The Federal Trade Commission (FTC) staff has published a series of “intervention letters” whereby it analyzes proposed legislative amendments to state laws and the effects such changes may have on competition. In two Commission-authorized letters, FTC staff have expressed serious concerns with restrictions on cemetery-funeral home combined operations.

In a 1991 letter, FTC staff responded to a request by a Michigan state senator to proposals that would remove Michigan’s longstanding prohibition against joint funeral home and cemetery combinations. The staff concluded “that removing Michigan’s prohibition of 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 customers.”

The prohibitions in the Michigan law, as described in the FTC letter, seem very similar to the restrictions in Chapter 560: “Most states permit combinations between funeral establishments and cemeteries.... Michigan’s current law is among the most restrictive. It not only limits locations and requires licensing in the funeral and cemetery industries, but also absolutely prohibits joint ownership, operation, or management, whether direct or indirect.” FTC staff pointed out that similar restrictions imposed in other regulated industries were based on claims to maintain quality of service and to protect the professional’s independent judgment. “But our experience with these restrictions, admittedly in licensed businesses and professions other than the funeral and cemetery industries, suggests that their effect is usually to increase prices.”

The FTC letter observed, “Prohibiting joint ownership could prevent some efficient combinations of business aspects 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 through joint facilities. Further savings might be possible in the areas of transportation and transaction costs. Buyers could make decisions about 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 Michigan’s law now prohibits could have a generally positive effect on competition. These innovations might afford consumers a wider selection of services and costs.” (FTC Letter, dated December 16, 1991, attached as Exhibit F).

Another FTC staff letter was drafted in response to a 1993 inquiry by a Wisconsin State Assembly member concerning legislation involving prohibitions similar to Chapter 560. According to FTC staff, “Wisconsin now prohibits a funeral director from operating a mortuary or funeral establishment located within the confines of, or connected with, any cemetery. 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 transfer of any cemetery lot, or from acting, directly or indirectly, as a broker or jobber of any cemetery property or interest.”

At the time, additional restrictions on combined operations were being proposed in the Wisconsin legislature that would prohibit any financial or operating arrangement between a funeral home and a cemetery. The FTC staff cautioned against enactment of additional restrictions, warning that the proposal “would tend to restrict competition in the funeral and cemetery industries.... By allowing joint ownership or operation, the alternative proposal (to repeal existing prohibitions) would remove barriers to new business formats and may promote efficiencies that ultimately could result in lower prices to consumers.” (FTC Letter, dated September 13, 1993, attached as Exhibit G).

Another New Federal District Court Decision

Plaintiffs’ brief discussed the August 21, 2000 decision by the U.S. District Court for the Eastern District of Tennessee, *Craigmiles v. Giles*, 110 F. Supp. 658, that held the Tennessee state law restricting the retail sale of casket exclusively to licensed funeral

directors was unconstitutional. Subsequently, on October 31st of this year, the U.S. District Court for the Southern District of Mississippi made a similar finding in *Casket Royale, Inc. v. State of Mississippi, et al.*, Civil Action No. 3:99CV737BN (copy attached as Exhibit H).

In *Casket Royale*, the federal district court granted plaintiff's motion for summary judgment on the basis that the state law restricting casket sales to licensed funeral directors violated the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. The Court recognized the state's legitimate interest in consumer protection and in the prompt disposition of human remains. However, the Court ruled that "the regulation in question does not advance this interest as nothing inherent in the licensing requirement, at least in regard to a coffin, would offer a quicker burial or cremation."

Regarding consumer protection claims to justify the licensing requirement, the Court held that the requirement "not only fails to advance the interest of Mississippi in consumer protection, it actually diminishes it. As a result of this requirement, consumers in Mississippi are offered fewer choices when it comes to selecting a casket. Consequently, there is less price competition among the sellers of caskets. Ultimately, the consumer is harmed by this regulation as one is forced to pay higher prices in a far less competitive environment." Echoing the views of the FTC intervention letters discussed

above, we believe the *Craigmiles* and *Casket Royale* decisions provide persuasive authority for granting plaintiff's motion for summary judgment.

Conclusions

For the reasons stated above, the ICFA urges the Court to give due consideration to the analysis contained in the attached IRS rulings, FTC intervention letters, and case law, in determining plaintiffs' motion for summary judgment. The sale of markers, memorials, and monuments by nonprofit cemeteries is a well-established practice that is consistent with IRS policy. Likewise, the combined operations of cemeteries and funeral homes has met with approval from the Federal Trade Commission, and from the IRS for nonprofit cemeteries when the relationship is structured in an arms' length manner. Likewise, cemeteries should be permitted to contract with for-profit management firms when such relationships are in the best interests of the lot owners. Finally, two recent federal district court decisions involving restrictions similar to those in Chapter 560 found that they were not rationally related to protecting the public. Because there are no material facts in dispute, we urge this Court to grant plaintiffs' motion for summary judgment.

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Respectfully submitted,

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