The State of South Carolina

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The Honorable John W. Tucker, Jr.
Member, House of Representatives
333C Blatt Building
Columbia, South Carolina 29211

Dear Representative Tucker:

By your letter of January 14, 1987, you have asked that this Office opine on whether a cemetery can have a rule which prohibits individual monument dealers from installing monuments in cemeteries for consumers. While this question has not been decided in the federal or state courts in South Carolina, other jurisdictions have struck down similar rules of groups of cemeteries as violative of several federal laws. This opinion will summarize applicable state and federal laws on the issue but will not draw any conclusions as to a particular cemetery's rules.

Because this Office cannot investigate facts, see Op. Atty. Gen. dated November 15, 1985, we must accept as true the facts presented, for purposes of this opinion. No rules or regulations of a particular cemetery have been examined by this Office, and thus our comments are confined to general principles of law. It must also be noted that applicability of many legal principles to be discussed herein is highly dependent upon establishment of relevant facts; not all legal principles discussed herein may therefore apply to a given cemetery's rules.

The facts, as provided by one of your constituents, are that the South Carolina State Cemetery Board permits perpetual care cemeteries to charge a fee of 38 cents per square inch (psi) for installation and perpetual care of a monument. Of this fee, eight cents psi is earmarked for the cemetery's Care

and Maintenance Trust Fund; the remaining 30 cents psi goes to the cemetery for installation and other needs. The cost to install a 44-inch by 13-inch bronze marker with a 48-inch by 17-inch granite base would be $310.08; of this, $65.28 is earmarked for the trust fund and $244.80 goes to the cemetery for installation and other needs.

Your constituent also states that when a consumer purchases a plot in a perpetual care cemetery, he pays a one-time perpetual care cost. Allegedly, the consumer is not told that if a memorial (monument or marker) is to be placed on the plot, an additional installation and perpetual care fee will be charged for the marker. Your constituent has also alleged that cemetery representatives are advising consumers that monuments must be purchased from the cemetery; further, the price being quoted is not itemized as to cost of the marker, cost of installation, and so forth.

Finally, independent monument dealers are allegedly not being permitted to install monuments or markers in perpetual care cemeteries. The consumer may apparently purchase a monument from an independent dealer, but he must still pay the high installation costs charged by the cemetery.

Your constituent is concerned that the 38 cents psi is too high, that the actual cost of installation is much lower and that the cost of perpetual maintenance is excessive since one perpetual care fee has already been paid; that itemized costs are not being presented to the consumer; that some cemeteries are requiring perpetual care consumers to also purchase monuments from the cemetery; and that independent monument dealers are not being permitted to install monuments, which could result in cost savings to consumers. The law applicable to these concerns will be discussed, though ultimate resolution of the questions will be up to an appropriate adjudicatory body (state or federal court or the State Cemetery Board).

State Statutes

A search of state statutes and regulations promulgated by the Cemetery Board revealed none which established a 38 cents psi approved fee for installation and perpetual care of monuments in a perpetual care cemetery. Thus, it is assumed for purposes of this opinion that such regulation may have been adopted by a particular cemetery and approved by the Cemetery

Board pursuant to Section 39-55-125, Code of Laws of South Carolina (1976, as revised), which provides in part:

> (2) The owner of every cemetery shall have the further right to establish reasonable regulations regarding the type material, design, composition, finish, and specifications of any and all merchandise to be used or installed in the cemetery. Reasonable regulations may further be adopted regarding the installing by the cemetery or others of all merchandise to be installed in the cemetery. These regulations must be posted conspicuously and maintained, subject to inspection, at the usual place for transacting the regular business of the cemetery. No cemetery owner may prevent the use of any merchandise purchased by a lot owner, his representative, agent, or heirs or assigns from any source, if the merchandise meets all cemetery regulations.
>
> (3) All regulations established by a cemetery pursuant to this subsection must be submitted to the [Cemetery] board for its approval. [Emphasis added.]

Several factors are clear from this statute: merchandise (such as a monument) purchased from other than the cemetery may be used in the cemetery as long as the merchandise conforms to cemetery regulations; reasonable regulations are permitted to be adopted concerning installation of merchandise, by the cemetery or by others (which could include independent monument dealers); and the Cemetery Board must approve the regulations of all cemeteries, presumably thus judging whether such regulations or rules are reasonable.

Another statute adopted by the General Assembly is relevant: Section 39-55-185(H) of the Code provides:

> All cemetery owners shall have a full and complete schedule of all charges for services provided by the cemetery plainly printed or typewritten, posted conspicuously, and maintained, subject to inspection

> and copying at the usual place for transacting the regular business of the cemetery.

While this section does not require that a consumer be given an itemized accounting, that information must be available to the consumer by being posted conspicuously at the "usual place for transacting the regular business of the cemetery." Presumably such a "full and complete schedule of all charges for services provided by the cemetery" would differentiate between perpetual care costs for the plot as well as for the marker or monument, installation costs, and a breakdown of other costs to be paid by the consumer.

The South Carolina Unfair Trade Practices Act, in Section 39-5-20 of the Code, provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." South Carolina also has statutes prohibiting monopolies and agreements in restraint of trade or to limit competition, Section 39-3-10 et seq. The applicability of these statutes to the activities as described above cannot be determined without making factual determinations; if the constituent believes that such laws may have been violated, he should approach the appropriate enforcement authority, such as the circuit solicitor. See Section 39-3-190, for example. Because the state laws are similar to the federal laws to be discussed below, and case law is available on the federal laws, no duplicate discussion is presented herein.

Federal Statutes

There are federal statutes, similar to the state statutes, which prohibit antitrust and other activities which restrain trade. These statutes will be discussed along with applicable court decisions. As noted above, the ultimate question of applicability can be decided only in conjunction with necessary facts; thus, this Office is not commenting upon applicability. These acts permit private causes of action to be pursued by individuals who believe they are aggrieved by the actions of others. Because such is not in the purview of this Office, any individuals so aggrieved may wish to consult a private attorney.

The Sherman Antitrust Act, 15 U.S.C. § 1 et seq., provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. ...

In 15 U.S.C. § 2, the Act continues:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ... .

Another potentially applicable federal law is the Clayton Act, the relevant portion of which is found at 15 U.S.C. § 14 [§ 3 of the Act]:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States ... or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

To summarize the foregoing in simpler language, Sullivan in the treatise Antitrust (West Publishing Co. 1977) has stated that

> Section 1 [of the Sherman Act] declares contracts, combinations and conspiracies in

> restraint of trade to be unlawful. The gravamen is concerted conduct by two or more actors having the forbidden effect on interstate trade. Section 2 forbids monopolization, combinations or conspiracies to monopolize and attempts to monopolize. The Clayton Act is a longer statute which specifies offense more precisely. ... Section 3 [of the Clayton Act] forbids certain tying arrangements, requirements contracts, and other exclusive arrangements ... .

Id., § 3, p. 13. With this brief background in mind, the cases involving cemetery regulations and the above cited statues will be examined.

One series of cases is Rosebrough Monument Company v. Memorial Park Cemetery Association, 666 F.2d 1130 (8th Cir. 1981), cert. den. 457 U.S. 1111 (1982), after remand 736 F.2d 441 (8th Cir. 1984). In Rosebrough, several cemeteries and a cemetery trade association conspired to adopt an exclusive foundation preparation policy under which independent monument dealers could sell monuments or markers to the public but only cemeteries could prepare the foundations for the monuments. Such an arrangement was found to violate both the Sherman and Clayton Acts, under the theories of conspiracy, restraint of trade, and tying arrangements.

According to the decision reported in 666 F.2d 1130 (called Rosebrough II in later decisions), to successfully prove a conspiracy to unreasonably restrain trade under the "rule of reason," the following must be established:

> (1) an agreement among two or more persons or distinct business entities, (2) which is intended to harm or unreasonably restrain competition, and (3) which actually causes injury to competition. ... The primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects. ...

> Simply stated the inquiry mandated by the rule is whether, on balance, the challenged agreement is one that "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." ... To arrive at a conclusion, the factfinder must weigh all of the circumstances surrounding the agreement (i.e., the market impact, public benefits, economic justification and competitive effect) before deciding whether the practice should be prohibited as imposing an unreasonable restraint on competition. [Emphasis added.]

666 F.2d at 1138. The Eighth Circuit Court of Appeals held that "the exclusive foundation preparation policy stunts rather than develops trade within the cemetery industry and limits consumer choice and the free flow of commerce." Id. The rule of reason was violated because the policy adopted by members of the trade association amounted to "an agreement among competitors to reduce or restrain competition." Id. at 1139. Consumers were deprived of the opportunity to compare prices for services. Benefits to the public were outweighed by the anticompetitive effect of the policy, and an unreasonable restraint on trade was the foreseeable consequence.

The court defined a tying arrangement as "the sale or lease of one item (the tying product) on the condition that the buyer or lessee purchase a second item (the tied product) from the same source." Id. at 1140. The court elaborated:

> Tying arrangements deny competitors and consumers free access to the tied product market, not because the seller of the tying product has a superior product in the tied market, but because of the leverage exerted by the seller using the tying product.
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> * * *
>
> Tying arrangements are presumptively illegal if three elements exist, and once those are demonstrated no specific showing of unreasonable anticompetitive effect is needed.

Id.

The three elements which must be proved are the following: (1) two distinct products or services; (2) "sufficient economic power in the tying market to impose significant restrictions in the tied product market;" and (3) "the amount of interstate commerce in the tied product market must not be insubstantial." Id. at 1140, 1141. As to the first element, the court held that a cemetery lot and foundation preparation for a monument were two separate and distinct products, that a separate market existed for each product.

In considering the element of sufficient economic power, the court looked at the following factors:

> (1) the unique characteristics of the tying product or its desirability to consumers, (2) the noncompetitive nature of the price sought for the tied product, (3) the volume of sales of the tied product or service (foundation preparation), and (4) the size of the companies owning and operating the tying product (cemetery lots). ...
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> * * *
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> ... Sufficient economic power exists if the supplier of the tying product has sufficient leverage in the market to increase prices or to force a significant number of buyers to accept burdensome terms. ... Where the sellers are of sufficient size to exert some power, control or dominance over the tying product, the threshold standard of economic power has been met.

Id. at 1142. In finding that the cemeteries possessed sufficient economic power, the court noted such factors as the volume of sales by the cemeteries and the size of the business enterprises involved.

The third factor, a substantial effect on interstate commerce, is established by examining "(1) whether a 'substantial' volume of interstate commerce is involved in the overall ... operation [of cemeteries], and (2) whether the challenged activity is an essential, integral part of the transaction and inseparable from its interstate aspects." Id. at 1144. The court

aggregated sales figures for the time period during which the cemeteries had engaged in the allegedly illegal practices, as well as the amount of purchases of markers or monuments made outside the state where the cemeteries were located, to conclude that the amount of interstate commerce was not insubstantial.

Since the three elements necessary to prove a tying arrangement were shown, the court then looked for any possible justification, since "[t]ying arrangements are valid if they can be shown to protect a legitimate antitrust interest." Id. at 1145. Factors to be considered include the following:

> (1) there are other public interests that are served by the practice in question; (2) those interests cannot be served by a less restrictive alternative; and (3) the contribution made by the restrictive practice is not outweighed by the harm to competition. ...
>
> Tying arrangements have been justified when a defendant proves that a substitute for the tied product must comply with such precise and detailed specifications that other manufacturers may not be able to market a product functionally compatible with the tying product.

Id. The cemeteries argued that they had a duty to maintain the quality of their lots, and their ability to perform exclusive services which would affect their ownership interest. The court disagreed and offered guidance on less restrictive alternatives to accomplish the same objectives.

As a result of Rosebrough II, cemeteries were permitted to adopt rules and regulations which would permit independent monument dealers to prepare foundations and install monuments; the regulations could include any or all of the following:

> (1) the cemetery may establish specifications for the foundation of each type memorial which it permits in the cemetery. These specifications shall be the same as the cemetery itself utilizes in preparing foundations for particular type memorials;

(2) the cemetery may schedule, upon reasonable notice, all installations, taking into account weather and ground conditions, cemetery burial services, availability of personnel, etc.;

(3) the cemetery may require that the foundation site be laid out by the cemetery personnel; [later deleted; see below]

(4) the cemetery may supervise the foundation and installation process and require the installation meet specifications after inspection and prior to placement of a memorial; [later deleted; see below]

(5) the cemetery may require removal of excavated dirt and cleanup of the installation site;

(6) the cemetery may require

(a) evidence that the installer's employees are covered by workman's compensation insurance and that the installer carries adequate public liability insurance in which the cemetery is a named insured, and

(b) a bond to insure compliance with the rules and regulations;

(7) the cemetery may charge a fee based on its actual labor costs in connection with the third party memorial foundation services;

(8) if the cemetery contributes separately to a fund for the care of memorials, it may require the third party installer to contribute to such fund the same percentage of the charge by said installer as is contributed by the cemetery from its own installation charge; [later deleted; see below]

> (9) the cemetery may require that the installer expeditiously correct any deviations from the specifications. If, after notice, any deviation is not corrected the cemetery may make such corrections at the installer's expense. All such rules and regulations which the cemetery may hereinafter adopt are to be reasonable in nature and application.

736 F.2d at 444.

As noted within the permitted regulations, several have been deleted. The Eighth Circuit, upon review of the lower court's order, felt that rules 3 and 4 would permit a cemetery to gain an unfair economic advantage over independent dealers and thus maintain the market control complained of. Rule 8 was also deleted for the following reason:

> In Missouri, an "endowed care cemetery" is required to set aside and deposit in a trust fund a minimum of ten percent of the gross sales price, or five dollars, whichever is greater, for each grave space sold. The income from said fund is to be used only for care and maintenance of the cemetery. ... A cemetery is not statutorily required to set aside any amount from the price of its installation service. Whether a cemetery chooses to do so should not obligate a third party installer to contribute to a fund to cover the costs of what remains the cemetery's responsibility, i.e., care and maintenance of the cemetery. We believe that the rules permitting the cemetery to require a bond to ensure compliance with the cemetery's installation specifications, to inspect, at a fee, the finished work product of third party installers, and to require correction of any deviations adequately protect a cemetery against incurring care and maintenance costs resulting from third party installations.

Id. at 445. While the factors present in the Rosebrough cases have not been presented to this Office for consideration,

the Rosebrough decisions may offer guidance as to how the courts have dealt with a particular tying arrangement.

A second series of cases involved lawsuits brought by a grave marker and installer under the same federal laws against a cemetery trade association and several cemeteries, Moore v. Jas. H. Matthews & Co. 550 F.2d 1207 (9th Cir. 1977), after remand 682 F.2d 830 (9th Cir. 1982). The facts are substantially the same as those in Rosebrough, with consumers being virtually coerced to purchase grave markers or monuments from the cemeteries in which the plots were located. Allegations were made as to monopolization, conspiracy, and tying arrangements, all as violative of the Sherman and Clayton Acts. The conclusion was reached by the Ninth Circuit Court of Appeals that a tying arrangement was indeed in effect. To avoid a repetition of the same legal principles recited above, I am enclosing copies of the two Ninth Circuit decisions, as well as the Rosebrough decisions, for your own perusal. Again, the facts are not exactly as those presented by your constituent, but the guidance offered by the Eighth and Ninth Circuits may be helpful to your constituent if the facts are developed in a similar fashion.

Conclusion

To summarize the foregoing, courts in other jurisdictions have found that when a group of cemeteries has entered into an agreement to prevent independent monument installers from preparing foundations or installing monuments and otherwise coerces consumers to purchase monuments from the cemetery by a tying arrangement, such agreements are violative of the Sherman Antitrust Act and the Clayton Act. Whether such a rule or regulation of a cemetery in South Carolina acting alone would fall within the ambit of either act could only be determined by a court, taking all relevant facts and circumstances into account as in the Moore and Rosebrough cases. (For example, a single cemetery, acting alone, might have a tying arrangement without participating in a conspiracy.)

Similarly, only a court or the Cemetery Board would have jurisdiction to examine the rules of a particular cemetery to determine whether such rules would be considered reasonable or perhaps violative of state laws pertaining to cemeteries. Whether the 38 cents psi is too high a charge for installation of a monument would likewise be within the purview of the Cemetery Board or the courts of this State to determine.

As has been pointed out repeatedly, we have not examined the rules or regulations of a particular cemetery, group of cemeteries, or a trade association. We have attempted to discuss the state and federal laws which may be relevant, depending upon the development of facts. While this opinion cannot therefore reach an absolutely definite conclusion to your question, we hope that we have sufficiently presented the legal aspects to give you and your constituent an idea of how federal courts have viewed the issued.

Finally, the attorney in this Office assigned to represent the Cemetery Board has advised that at least one lawsuit alleging a tying arrangement and unfair trade practices has been brought in this State. A copy of the judge's order in State ex rel. McLeod v. Hillcrest Memorial Gardens, Inc., 77-CP-42-574, dated August 14, 1978, is enclosed. While it is only a circuit court order, it was not appealed from and thus is the law of the case. The attorney was not aware of any similar complaints having been made to the Cemetery Board concerning cemeteries in Anderson County and further suggested that your constituent may wish to report such matters to the Board.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:

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