

## **GIVING UP THE GHOST: HOW THE FUNERAL RULE AND STATE LICENSING BOARDS ARE FAILING TO PROTECT CONSUMERS FROM UNDERHANDED UNDERTAKERS**

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*When loved ones pass away, grieving families are left in a vulnerable position when transacting with the funeral service industry. While most funeral providers provide families a fair process, the information gap present in this business arrangement allows some providers to use unfair practices to deceive reliant and unsuspecting families. This Note details why and how funeral providers continue to use unfair and deceptive practices despite strong protective language in federal and state law and will recommend solutions to solve this dire problem. Background will be provided on federal and state regulation regarding funeral providers, introduce the key players in the funeral service industry, and examine the history of the current regulations and their enforcing bodies. Next, enforcement efforts by the FTC and State Boards will be examined to show that their efforts are being undermined through lobbying efforts, composition of State Boards, and inadequate resources. Finally, three major changes are recommended to help protect consumers: updating the Funeral Rule, increasing sanctions for funeral providers, and changing the composition of State Boards.*

### **I. Introduction**

A loved one's death is difficult; this difficulty is amplified when that death is sudden and no arrangements for "death care" have been made. Planning ahead for death, whether a loved one's or our own, makes us uncomfortable. According to a 2007 AARP survey, only 34% of Americans above the age of fifty have engaged in some preplanning

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for funerals and burial.<sup>1</sup> Like other major life events, death is not cheap—funeral costs often exceed \$6000.<sup>2</sup> Further, custom and necessity demand funeral services be rendered within days.<sup>3</sup> Bereaved companions, many of whom are elderly, face a major and immediate expense for which they have done little planning, if any.<sup>4</sup>

In these circumstances, companions become consumers all but forced to rely on funeral providers.<sup>5</sup> While most funeral providers render their services fairly, the information asymmetry in these exchanges enable some providers to use unfair practices to deceive reliant and unwitting consumers.<sup>6</sup>

This opportunity for consumer fraud or manipulation has caught the attention of both federal and state governments.<sup>7</sup> To address this concern, the Federal Trade Commission (“FTC”) and states rely on periodic investigations and consumer complaints.<sup>8</sup> Yet, due to the nature of the death care industry and the current regulations and their enforcement, changes are necessary to ensure consumers are adequately protected.

This Note examines why funeral providers continue to use unfair and deceptive practices despite clear prohibitions in federal and state law. Part II of this Note will provide background on federal and state regulation regarding funeral providers; this section will introduce industry influencers and briefly cover the history of the current regula-

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1. Lona Choi-Allum, *2007 Funeral and Burial Planners Survey*, AARP at 1 (2007), [https://assets.aarp.org/rgcenter/consume/funeral\\_survey.pdf](https://assets.aarp.org/rgcenter/consume/funeral_survey.pdf) [hereinafter Choi-Allum].

2. *Statistics*, NAT’L FUNERAL DIRS. ASS’N, <http://www.nfda.org/news/statistics> (last visited Sept. 16, 2019) [hereinafter *Statistics*].

3. Karen Laing, *How Long Do I Have to Make Funeral Arrangements?* LADY ANNE FUNERALS (Feb. 25, 2016), <https://www.ladyannefunerals.com.au/blog/funeral-arrangements-how-long-do-i-have>.

4. See Choi-Allum, *supra* note 1; *Statistics*, *supra* note 2.

5. Claire Brandon, *The Funeral Industry is Preying on Grieving People. This Must Stop*, THE GUARDIAN (Mar. 29, 2019, 10:16 PM), <https://www.theguardian.com/commentisfree/2019/mar/29/funeral-industry-grieving-people-investigation>.

6. *Avoid These 10 Common Funeral Scams*, US URNS ONLINE (Jan. 2, 2018), <https://www.usurnsonline.com/funeral-resources/avoid-these-10-common-funeral-scams/>.

7. *Filing a Complaint*, FUNERAL CONSUMER ALL., <https://funerals.org/?consumers=filing-a-complaint> (last visited Sept. 16, 2019) [hereinafter *Filing a Complaint*].

8. See, e.g., *FTC Undercover Inspections of Funeral Homes in 11 States Test Prompt Compliance with Funeral Rule Disclosure Requirements*, FTC (Apr. 18, 2018), <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-undercover-inspections-funeral-homes-11-states-test-prompt> [hereinafter *11 States Test Prompt Compliance*].

tions and their enforcing bodies. Part III will analyze the causes for current regulations' shortcomings; this section will address how well-intentioned efforts to protect consumers are being undermined by both bad faith actors and inadequate resources. Part IV of this Note will present specific and implementable recommendations to address the persistent chicanery in the death care industry ("the Industry").

## II. Background

### A. The Book

In the 1960s, an investigative journalist, Jessica Mitford, first unearthed the Industry's less-than-honest practices; Mitford's work captured the Nation's attention and heralded most of the Industry regulations we have today. Mitford's *The American Way of Death*, published in 1963, exposed millions of readers to the unscrupulous profiteering employed by funeral providers.<sup>9</sup> By the 1960s, funerals had become one of the most expensive purchases the average American would make in their lifetime.<sup>10</sup> Forty years earlier, in 1921, the average funeral cost was \$235<sup>11</sup> (adjusted to 1963 dollars<sup>12</sup>); by the time *The American Way of Death* was published, the cost of the average funeral was greater than \$700<sup>13</sup>—a figure that represented approximately 12.5% of the average American's income.<sup>14</sup> Mitford's investigations revealed instances of funeral providers lying to customers—for instance, claiming that state laws required coffin purchases for cremated remains or manipulating customers into purchasing unnecessary and extravagant services and products—claiming that these were traditional and necessary to cope

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9. Bess Lovejoy, *Fond Farewells*, LAPHAM'S QUARTERLY, <https://www.laphamsquarterly.org/death/fond-farewells> (last visited Sept. 16, 2019) [hereinafter Lovejoy].

10. Judith Newman, *Books*, N.Y. TIMES (Oct. 4, 1998), <http://movies2.nytimes.com/books/98/10/04/bib/981004.rv115616.html> (last visited Sept. 16, 2019).

11. Quincy L. Dowd, *Funeral Management and Costs: A World Survey*, UNIV. OF CHI. PRESS 3 (1921), [https://archive.org/stream/funeralmanagemen00dowdrich/funeralmanagemen00dowdrich\\_djvu.txt](https://archive.org/stream/funeralmanagemen00dowdrich/funeralmanagemen00dowdrich_djvu.txt) ("On the basis of an average expense of \$150 for individual funeral and burial, exclusive of graves, tombs, monuments, last-sickness costs, the total undertaking bill yearly for America would be \$136,000,000.")

12. *Calculate the Value of \$150 in 1921*, DOLLAR TIMES, <https://www.dollartimes.com/inflation/inflation.php?amount=150&year=1921%20> (last visited Sept. 16, 2019).

13. Lovejoy, *supra* note 9.

14. *Id.*

with grief.<sup>15</sup> Mitford's work struck a chord; *The American Way of Death* became a bestseller, and funeral providers claimed they experienced a decrease in sales.<sup>16</sup> Mitford's book also sparked legislative action and the creation of consumer protection regulations that empowered consumers to comparison shop and reject unwanted goods and services.<sup>17</sup> The enforcement and potential expansion of these consumer protection regulations continue to incite vigorous pushback from the Industry.

## B. The Industry Group

The National Funeral Directors Association ("NFDA" or "the Group") is a significant presence in the death care industry.<sup>18</sup> This industry group was founded in the 1880s and has had two main objectives: to professionalize the funeral director profession and to maintain high prices for funeral goods and services.<sup>19</sup> The NFDA is the "oldest, largest, and most influential" death care industry group and serves its legions of members, including its affiliated state groups, "through bulletins, keeping watch on legislative developments, lobbying activities, advising member firms on methods of cost accounting, and other business procedures."<sup>20</sup> Membership merely requires state licensure and dues; in contrast to other professional organizations, the Group sets no professional or ethical standards that its members must satisfy.<sup>21</sup> The NFDA also fails to disclaim or punish members who engage in serious misconduct—such as overcharging customers—further setting the NFDA apart from most professional organizations.<sup>22</sup>

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15. *Id.*

16. *Id.*

17. *Id.*

18. *About NFDA*, NAT'L FUNERAL DIRS.' ASS'N, <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-undercover-inspections-funeral-homes-11-states-test-prompt> (last visited Sept. 16, 2019).

19. Jessica Mitford, *The American Way of Death Revisited*, YOU-BOOKS.COM, <http://www.you-books.com/book/J-Mitford/The-American-Way-of-Death-Revisited> (last visited Sept. 16, 2019) ("[A] corollary objective of the organization—that of keeping prices pegged as high as possible—was expressed in a resolution passed in the previous year [1883]: 'Resolved, that we, funeral directors, condemn the manufacture of covered caskets at a price less than fifteen dollars for an adult size.'").

20. *Id.*

21. *Id.*

22. *Id.*

The NFDA has long fought for funeral directors' professional recognition.<sup>23</sup> By advancing the professional conception of funeral directors, the NFDA has been able to boost educational requirements for Industry professionals.<sup>24</sup> This push toward professionalism serves the other major goal of the NFDA: to keep the price of funeral goods and services high.<sup>25</sup> Through professional licensing boards, the NFDA was able to suppress licensees from advertising their prices.<sup>26</sup> This suppression maintained the Industry's lack of transparency and served to safeguard death care providers' prices from competition.<sup>27</sup> While professional recognition may at first appear to be one of the NFDA's *two* core missions, largely through the Group's public relations efforts,<sup>28</sup> a second look reveals that the professionalism component of the NFDA's mission serves to advance what is clearly the Group's primary guiding mission: maintaining high prices for funeral goods and services.

One practice revealing the NFDA's true motives—a practice that is facially neutral but almost certainly affects prices—is the NFDA's publication of “average prices” for funeral goods and services. The publication of this information has been criticized as a means of establishing uniform price minimums, which violates antitrust laws.<sup>29</sup> However, to make everything “above board,” the NFDA includes a disclaimer clarifying that these prices are merely for comparative purposes.<sup>30</sup> The NFDA's publications provide further evidence for the

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23. *Id.*

24. *Id.* There is significant variation in education requirements between the states. While in some states, there are no education requirements for funeral directors, in others there may be degree and apprenticeship requirements. Institutions, colleges, and universities offer certificate programs from embalmers and funeral directors; these programs may take months or years; typically, embalming programs take longer. Embalming programs have also become, in general, significantly more demanding. A century ago, achieving a certificate in mortuary science took six weeks, now it may take two years.

25. *See id.* (“There was more behind this yearning [for professional classification] than just the desire for gentility and recognition.” The NFDA has argued that there is no demand for advertising and transparency regarding prices for funeral goods, reporting as the Group's official position that “[M]ost funeral directors do not consider it ethical to advertise prices . . . and [that] this view is shared by a majority of the public.”).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* Gottlieb likens the NFDA's attempt to cover its tracks via disclaimer as similar to disclaimers that were placed on wine bricks during Prohibition: “Do not under any circumstances place this brick in one gallon of water and let it stand at

main guiding mission: the Group has been critical of clergymen because it is resentful that religious leaders often encourage moderation in funeral arrangements.<sup>31</sup> And, as will be discussed *infra*, the NFDA is heavily involved in lobbying. It is hard to overstate the influence the NFDA has on the Industry.

### C. The Federal Response

The FTC's Funeral Rule ("Rule"), which was promulgated in 1982 and became effective in 1984,<sup>32</sup> was a resultant piece of consumer protection legislation. The Rule was "premised on evidence that consumers are uniquely disadvantaged when they purchase funeral services after the death of a loved one, due to grief, time constraints, and inexperience."<sup>33</sup> The FTC recognized a loved one's death presents major decisions for their grieving survivors that could render them particularly vulnerable, so the Agency sought to create certain rights for these consumers.<sup>34</sup> The Rule gives consumers the right to choose the goods and services they actually want and the right to receive general price lists from funeral providers when inquiring about funeral arrangements.<sup>35</sup> If state or local laws require particular purchases, these required purchases and their corresponding state or local laws must be disclosed on the provided general price lists.<sup>36</sup> In 1994, in response to funeral providers who began charging customers "handling fees," which ranged between \$300 to \$1000, for having purchased caskets elsewhere, the Rule was amended;<sup>37</sup> today, funeral providers cannot refuse to handle or charge fees to handle—caskets purchased elsewhere.<sup>38</sup> Party caskets required no additional labor or service from funeral providers, and handling fees were used solely to combat competition and to make up

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room temperature for one week, since this will cause it to turn into wine, an alcoholic beverage, the manufacture or possession of which is illegal."

31. *Id.* In the April 1961 edition of the *National Funeral Service Journal*, the Group expressed its opinion that the three reasons why the death care industry was under fire from the public were "religion, avarice, and a burning desire for social reform."

32. *Pa. Funeral Dirs. Ass'n v. FTC*, 41 F.3d 81, 83 (3d Cir. 1994).

33. *Id.*

34. *Funeral Rule*, FTC, <https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule> (last visited Sept. 16, 2019) [hereinafter *Funeral Rule*].

35. *Id.*

36. *Id.*

37. *Pa. Funeral Dirs. Ass'n*, 41 F.3d at 84.

38. *Funeral Rule*, *supra* note 34.

for the loss in funeral providers' sales.<sup>39</sup> The prohibition against handling fees, like the unfair and deceptive practices the Rule first sought to eliminate, was unsuccessfully challenged by the NFDA and other industry groups.<sup>40</sup> The Rule protects consumers' ability to compare prices and choose the products and services they actually want.<sup>41</sup> Bundling, charging non-declinable mandatory fees apart from the one for the funeral directors' professional services, and failure to disclose prices are all unfair and deceptive acts and practices contrary to the Rule's intent.

The Rule's intent and purpose were clarified shortly before the Rule became effective.<sup>42</sup> In 1983, U.S. Senator Bob Kasten of Wisconsin announced his support for the FTC's revised Funeral Rule before the Senate.<sup>43</sup> Senator Kasten highlighted two major components of the Funeral Rule: its requirement that funeral service providers disclose individual prices for goods and services offered and its provision that providers shall not offer "package pricing" deals, which often required customers to purchase additional goods and services they did not actually want in order to get those they did.<sup>44</sup> Senator Kasten recognized the FTC's Rule's appropriateness given that states' regulations of the death care industry left a substantial gap; states oversaw licensing requirements for funeral directors and public health standards for funeral homes but often failed to ensure that consumers retained the autonomy to choose the goods and services they wanted.<sup>45</sup> Senator Kasten acknowledged that the Rule would likely have an effect on the ever-increasing costs of funerals, but felt it would address a "real consumer need" and provide consumers with an adequate opportunity to comparison shop for funeral goods and services and decline those they did not want.<sup>46</sup> According to Senator Kasten, the FTC's Rule balanced the competing interests and would present minimal disruption and burden on the death care industry while also empowering consumers.<sup>47</sup>

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39. *Pa. Funeral Dirs. Ass'n*, 41 F.3d at 84.

40. *See generally id.* at 81.

41. 16 C.F.R. § 453.2(b)(4)(iii)(C) (2018).

42. 98 CONG. REC. S3153-54 (daily ed. Feb. 28, 1983) (statement of Sen. Kasten) available at <https://advance.lexis.com/r/documentprovider/7311k/attachment/data?attachmentid=V1,215,58122,CR-1983-0228From1To138,1&attachmenttype=PDF&attachmentname=3153&origination=&sequencenumber=&ishotdoc=false&docTitle=&#page=71> (last visited Sept. 16, 2019).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

The Senator recognized that consumers lacked (and needed) the ability to choose services and comparison shop—his address also suggested that the prices of funerals reflected a lack of consumer choice.<sup>48</sup> When evaluating the Rule today, it is important to consider how well it achieves its original purpose while also presenting a minimal burden on funeral providers, a balance the Senator acknowledged in his 1983 address.<sup>49</sup>

#### D. The State Response

Alongside the FTC, states protect consumers through their own funeral provider regulations, which are enforced through occupational licensing boards.<sup>50</sup> Funeral boards, like other state regulatory boards such as massage therapy and auctioneering, regulate licensure and adjudicate complaints.<sup>51</sup> Illinois's funeral board has seven members, all of whom are appointed by the Secretary of the Illinois Department of Financial and Professional Regulation ("IDFPR").<sup>52</sup> The IDFPR has dual objectives for the regulatory environment: to create an environment that "allows economic growth to flourish" and "effectively optimizes consumer choice."<sup>53</sup> All seven members on Illinois's funeral board are licensed funeral providers.<sup>54</sup> Illinois's board's composition is not unusual; states have had funeral licensing boards for the better part of a century and many of these boards largely consist of members who are licensed in the profession they serve.<sup>55</sup>

While each state has its own specific licensing requirements, licensed funeral service providers are typically required to have some level of higher education (often an associate degree), pass state or na-

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48. *Id.*

49. *Id.*

50. See generally *Licensing Boards & Requirements*, NAT'L FUNERAL DIRS. ASS'N, <http://www.nfda.org/careers/licensing-requirements> (last visited Sept. 16, 2019) (providing links to the licensing regulations of each state and the District of Columbia).

51. See generally *Filing a Complaint*, *supra* note 7.

52. *Funeral Directors and Embalmers Licensing and Disciplinary Board*, ILL. DEP'T OF FIN. & PROF'L REG., <https://www.idfpr.com/profs/boards/fundir.asp> (last visited Sept. 16, 2019) [hereinafter *Funeral Dirs. and Embalmers Licensing and Disciplinary Board*].

53. *About IDFPR*, ILL. DEP'T OF FIN. & PROF'L REG., <https://www.idfpr.com/About/About.asp> (last visited Sept. 16, 2019).

54. *Funeral Dirs. and Embalmers Licensing and Disciplinary Board*, *supra* note 52.

55. *Id.*



tional tests, complete an internship or apprenticeship, and fulfill continuing education requirements to keep abreast of industry standards.<sup>56</sup> It is understandable why funeral providers should meet such requirements—providers are entrusted with securing and filing legal documents and claims, arranging and directing funeral ceremonies, and transporting and preparing bodies.<sup>57</sup> Also, a significant amount of money changes hands. Today, funeral providers are part of an industry that accounts for roughly \$20 billion in annual economic activity.<sup>58</sup> While large publicly traded corporations have a hold on items such as caskets and headstones, funeral homes that provide services are often independently owned.<sup>59</sup> With nearly 20,000 independently owned funeral homes in the country, regulation and oversight presents a significant challenge for state boards<sup>60</sup> that highlights the necessity of meaningful oversight.

### III. Analysis

#### A. FTC Enforcement of the Funeral Rule

The FTC's Funeral Rule was a legislative attempt to regulate an industry whose practitioners had spent decades operating below the radar; although the Industry initially fought the Rule, they later changed their tactics and became "supporters" of the Rule. The stated goal of the Rule is "to lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice."<sup>61</sup> The FTC believed that the Rule would accomplish this goal by providing consumers with sufficient information to make informed choices, preventing consumers from being required to purchase goods and services that

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56. *Careers in Funeral Service*, NAT'L FUNERAL DIRS. ASS'N, <http://www.nfda.org/careers/overview> (last visited Sept. 16, 2019).

57. *Id.*

58. Perianne Boring, *Death of the Death Care Industry and Eternal Life Online*, FORBES (Apr. 25, 2014, 8:00 AM), <https://www.forbes.com/sites/perianneboring/2014/04/25/the-death-of-the-death-care-industry-and-eternal-life-online/#26a93d201c1a>.

59. Michael B. Sauter et al., *The Ten Companies That Control The Death Industry*, 24/7 WALL ST. (Jan. 13, 2011, 6:39 AM), <https://247wallst.com/investing/2011/01/13/the-ten-companies-that-control-the-death-industry/>.

60. *See id.*

61. Funeral Industry Practices, 16 C.F.R. § 453 (2008).

were unwanted or not required by law, and preventing funeral providers from using misrepresentations to undermine consumers' desires.<sup>62</sup> The Rule's objectives mirror those of Mitford's investigative work, which first fixed the Nation's attention on the fittingly shrouded death care industry twenty years earlier.<sup>63</sup>

To enforce the Rule, the FTC conducts undercover investigations.<sup>64</sup> Roughly one in four funeral homes investigated is found to have violated the Rule in varying degrees of severity.<sup>65</sup> Funeral homes with minor Rule compliance violations are ordered by the FTC to provide evidence that such deficiencies have been corrected.<sup>66</sup> Funeral homes that commit major Rule violations, the most common being failure to disclose price lists, may commit to a three-year training program to increase Rule compliance, called the Funeral Rule Offenders Program (referred to by the FTC as "the FROP program").<sup>67</sup> Funeral homes that choose not to participate in the FROP program will be subject to FTC suits with penalties of up to \$41,484 per violation.<sup>68</sup> Most funeral homes choose the FROP program.<sup>69</sup> The FROP program option insulates funeral homes from any severe repercussions because the names of the funeral homes are not even released to the public.<sup>70</sup> In lieu of civil penalties, funeral homes in the FROP program make voluntary payments to the U.S. Treasury and also pay annual administrative fees to the NFDA, which is responsible for running the FROP program.<sup>71</sup>

The option to enroll in the FROP program appears to have defanged the FTC's civil penalty sanction.<sup>72</sup> Increases in civil penalty

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62. *Id.*

63. 16 C.F.R. § 453 (2019); see Lovejoy, *supra* note 9.

64. *Funeral Rule*, *supra* note 34.

65. Sid Kirchheimer, *Beware of Funeral Frauds*, AARP, <https://www.aarp.org/money/scams-fraud/info-2014/beware-of-funeral-fraud.html> (last visited Sept. 16, 2019).

66. FED. TRADE COMM'N, *FTC Undercover Inspections of Funeral Homes in Nine States Test Compliance with Funeral Rule Disclosure Requirements* (Mar. 11, 2014), <https://www.ftc.gov/news-events/press-releases/2014/03/ftc-undercover-inspections-funeral-homes-nine-states-test> [hereinafter FED. TRADE COMM'N].

67. *Id.*

68. *Id.*; *Complying with the Funeral Rule*, FTC, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-funeral-rule#telephone-price-disclosures> (last visited Sept. 16, 2019) [hereinafter *Complying with the Funeral Rule*].

69. FED. TRADE COMM'N, *supra* note 66.

70. *Id.*

71. *Id.*

72. FED. TRADE COMM'N, *FTC AND MASSACHUSETTS [SIC] AG ANNOUNCE TEN FUNERAL HOME [SIC] IN MASSACHUSETTS ARE IN VIOLATION OF FEDERAL RULE* (Sept.

sanctions have had little to no effect on funeral provider compliance with the Rule; based on the FTC's press releases, which present the results of the FTC's undercover sweeps, compliance with the Rule has *declined* from 1996 to 2018, despite gradual increases to the amount of civil penalties the Agency can pursue for "unfair or deceptive acts or practices" from \$10,000 to \$40,654.<sup>73</sup> While it is possible that a decrease in Rule compliance could occur without the option of the FROP program, the FROP program presents an opt-out that enables funeral providers to dodge the increasing sanctions.<sup>74</sup> The increasing sanctions, combined with the continuous availability of the FROP program, are likely responsible for reducing litigation. According to the FTC, none of the funeral providers found to have been in violation of the Rule opted to litigate during 2015 and 2016.<sup>75</sup> It seems evident from the FTC's press releases that, after several years with funeral providers choosing to litigate claims, the significant hike in civil penalties, from \$16,000 to \$40,000, resulted in the decrease of litigation—from about two cases per year to none.<sup>76</sup> Though the exact amounts are not published, the voluntary payments made by funeral providers to the U.S. Treasury are significantly less than the cost of FTC sanctions.<sup>77</sup> For offending funeral

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16, 1996), <https://www.ftc.gov/news-events/press-releases/1996/09/ftc-massachusetts-ag-announce-ten-funeral-home-massachusetts-are> [hereinafter FTC AND MASSACHUSETTS].

73. Funeral Industry Practices, 16 C.F.R. § 453 (2008); FTC AND MASSACHUSETTS, *supra* note 72.

74. *Free Funeral Rule Compliance Guide*, NAT'L FUNERAL DIRS. ASS'N (July 21, 2017), <http://www.nfda.org/news/in-the-news/nfda-news/id/2526/free-funeral-rule-compliance-guide>.

75. See FED. TRADE COMM'N, FTC UNDERCOVER INSPECTIONS OF FUNERAL HOMES IN NINE STATES PROMPT COMPLIANCE WITH FUNERAL RULE DISCLOSURE REQUIREMENTS (Feb. 15, 2017), <https://www.ftc.gov/news-events/press-releases/2017/02/ftc-undercover-inspections-funeral-homes-nine-states-prompt> (reporting the FTC uncovered investigations of 133 funeral homes during 2015 and 2016, and of those, thirty-one were found to have violated the Funeral Rule. Moreover, all of these homes chose to enroll in the FROP program.) ("All the homes found in violation during the past two years [2015 & 2016] have chosen to enter the FROP rather than subject themselves to the possibility of an enforcement lawsuit seeking civil penalties of up to \$40,654 per violation."); see also *11 States Test Prompt Compliance*, *supra* note 8 (following the trend in 2015 and 2016, twenty-nine of the 134 homes visited during 2017 opted to enroll in the FROP program rather than risk litigation, which could result in penalties more than four times greater than those available to the FTC in 1996. Prior to 2015, although most funeral providers had opted for the FROP program, it seems there was greater potential that funeral providers would choose litigation.).

76. *11 States Test Prompt Compliance*, *supra* note 8.

77. FED. TRADE COMM'N, FTC ANNOUNCES RESULTS OF INSPECTION OF NEW JERSEY FUNERAL HOMES FOR COMPLIANCE WITH CONSUMER PROTECTION LAW (July

homes, the message is clear: choose the program. The FROP program insulates offending funeral providers from severe consequences by maintaining their anonymity, trading their large civil penalties for nominal voluntary payments, and presenting an out-of-court option. The program also enables the NFDA to reap an annual crop of paying members.<sup>78</sup>

The NFDA is the largest funeral service association in the world; it has nearly 20,000 individual members and represents more than 10,000 funeral homes.<sup>79</sup> Apart from running the FROP program, which is the de facto “next step” for funeral providers who violate the Funeral Rule, the NFDA maintains a “small but constant presence in federal affairs” through lobbying.<sup>80</sup> The NFDA was the primary opponent of the Funeral Rule and bears much of the blame for the lag time between national demand for more transparency and honesty from the Industry in the early 1960s, and the Funeral Rule’s passage in the mid-1980s.<sup>81</sup> Industry groups, foremost of which was the NFDA, spent between \$1.2 million and \$1.5 million—in 1970s and 1980s dollars—challenging the Rule’s passage within the FTC, in Congress, and through multiple lawsuits.<sup>82</sup> According to David Bohardt, the executive director of the NFDA

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17, 1997), <https://www.ftc.gov/news-events/press-releases/1997/07/ftc-announces-results-inspection-new-jersey-funeral-homes>.

78. Justin Crowe, *FTC Releases Results of Undercover Funeral Rule Investigation...4 Regions Bombed*, CONNECTING DIRS. (June 18, 2018), <https://connectingdirectors.com/52111-funeral-rule-investigation>.

79. *NFDA Consumer Survey: Funeral Planning Not a Priority for Americans*, NAT’L FUNERAL DIRS. ASS’N (June 22, 2017), <http://www.nfda.org/news/media-center/nfda-news-releases/id/2419/nfda-consumer-survey-funeral-planning-not-a-priority-for-americans>.

80. *National Funeral Directors Assn*, CTR. FOR RESPONSIVE POL., <https://www.opensecrets.org/lobby/clientsum.php?id=D000022133&year=2018> (last visited Sept. 16, 2019); Vanessa Rodriguez, *Funeral Services: Background*, CTR. FOR RESPONSIVE POLICY (July 2015), <https://www.opensecrets.org/industries/background.php?cycle=2018&ind=G5400>.

81. Margaret Engel, *FTC Implements Rules to Protect Consumers in Funeral Arrangements*, WASH. POST (May 1, 1984), [https://www.washingtonpost.com/archive/business/1984/05/01/ftc-implements-rules-to-protect-consumers-in-funeral-arrangements/49ffe8f0-f821-495d-9f3f-38e24e2c6d8d/?noredirect=on&utm\\_term=.c350301d1979](https://www.washingtonpost.com/archive/business/1984/05/01/ftc-implements-rules-to-protect-consumers-in-funeral-arrangements/49ffe8f0-f821-495d-9f3f-38e24e2c6d8d/?noredirect=on&utm_term=.c350301d1979) [hereinafter Engel] (“The FTC has prepared a television advertising campaign to alert the public to the new protections, which survived one of the longest challenges from an industry group in commission history, becoming effective twelve years after the FTC’s investigation of the deceptive funeral practices began.”).

82. *Id.*

when the Rule was passed, the Group's relentless battle against the consumer protection regulation was "simply on principle."<sup>83</sup> Although somewhat undermined by their vigorous opposition, Industry groups' leaders claimed that price transparency and the Rule's other mandates would either have no effect or would lead to an increase in the prices of goods and services.<sup>84</sup>

The NFDA—which "blacklisted" members who advertised their prices prior to the Rule's passage<sup>85</sup> and which vigorously opposed the Rule and made unsupported (and bad faith) claims that the Rule would either have no effect on or would negatively affect prices—is now, because of the FROP program, an essential "component" of the Rule's enforcement process.<sup>86</sup> While the Rule may have initially appeared to be a victory for consumer groups,<sup>87</sup> the NFDA's continued and growing involvement with the Rule's enforcement likely explains why so few gains in Rule compliance have been made, as shown by the FTC's annual undercover investigation reports.<sup>88</sup> Because the failure to provide price lists continues to be one of the most common Funeral Rule violations, requiring funeral providers to publish their prices online may seem like an obvious next step. Consequently, this common-sense solution is also opposed by the NFDA, which offers the disingenuous rebuttal that funeral providers will publish price information on their websites if consumers demand it.<sup>89</sup> Whenever there are cries for further reforms, such as strengthening the Rule, the response of industry

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83. *Id.*

84. *Id.* In 1984, Dale Rollings, executive director of the Order of the Golden Rule, which represented over 1200 funeral directors at the time of the Rule's passage, claimed to believe that few people would actually read the itemized price lists; Rollings also claimed that those states that had already required funeral providers to disclose itemized price lists had experienced rises in funeral prices.

85. *Id.*

86. FED. TRADE COMM'N, *supra* note 66 ("Funeral homes that violate the price list disclosure requirements for the first time can enter the Funeral Rule Offender's Program, a training program run by the National Funeral Directors Association designed to increase compliance with the Funeral Rule.").

87. Engel, *supra* note 81. (explaining that consumer groups hailed the rules. "This gives us a more equal bargaining position," said Kent Burnette, a spokesman for the 15 million member American Association for Retired Persons. "There has been misrepresentation, and people have been unable to get price information.").

88. FED. TRADE COMM'N, *supra* note 66.

89. Robert Benincasa, *Despite Decades-Old Law, Funeral Prices Are Still Unclear*, NPR (Feb. 8, 2017, 4:36 AM), <https://www.npr.org/2017/02/08/504031472/despite-decades-old-law-funeral-prices-are-still-unclear> [hereinafter Benincasa].

groups has been to further the impression that misrepresentations and violations of the Rule are “a matter of a few rotten apples.”<sup>90</sup>

While the Industry today may be quick to assert that unscrupulous practices are kept in check by the Funeral Rule, it is important to consider why the FTC created the Rule—to check funeral providers’ unfair and deceptive practices<sup>91</sup>—and why industry groups like the NFDA were formed—“to protect themselves from excessive and therefore harmful competition from within their own ranks.”<sup>92</sup> There is a fundamental discord between the Rule’s objectives and those of industry groups; consumer protection is antithetical to maintaining high prices and a lack of true competition.<sup>93</sup> And yet, despite the clear conflict of interests, the FTC has enabled the NFDA to be a crucial component of the Rule’s enforcement.<sup>94</sup>

The Rule was a *response* to death care industry groups’ domination over state licensing boards.<sup>95</sup> As stated by the Fifth Circuit in *St. Joseph Abbey v. Castille*,

The FTC determined that it could not rely on state funeral licensing boards to curb [unfair and deceptive practices] because the state boards were “dominated by funeral directors.” The funeral directors had organized themselves into industry groups, which lobbied state legislatures and made practices such as a refusal to disclose prices part of their professional “ethics” code.<sup>96</sup>

The lobbying strength of the death care industry, specifically the NFDA, can also be seen in the proliferation of licensure requirements for funeral directors and embalmers now enforced in all fifty states and the District of Columbia.<sup>97</sup> Naturally, licensure requirements beget licensure requirements—at least a dozen states now require licensure

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90. *Id.*

91. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 218 (5th Cir. 2013) (“Beginning in the early 1980s, the FTC promulgated regulations, known as the Funeral Rule, to mitigate unfair or deceptive practices of funeral providers.”).

92. Dick M. Carpenter II, *Bottleneckers: The Origins of Occupational Licensing and What Can Be Done about Its Excesses*, 18 FEDERALIST SOC’Y REV. 14, 15 (June 26, 2017) (quoting Rebecca A. von Cohen, *The FTC Assault on the Cost of Dying*, 27 BUS. & SOC’Y REV. 49–50 (1978)) [hereinafter *Bottleneckers*].

93. Benincasa, *supra* note 89.

94. FED. TRADE COMM’N. *supra* note 66.

95. *Castille*, 712 F.3d at 218.

96. *Id.*

97. Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, INST. FOR JUST., 31 (Nov. 2017), [https://ij.org/wp-content/themes/ijorg/images/ltw2/License\\_to\\_Work\\_2nd\\_Edition.pdf](https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf) [hereinafter *License to Work*].

just to *sell* caskets.<sup>98</sup> Industry groups' lobbying efforts to require licensure for funeral providers was not the result of a newfound desire to protect consumers, but rather another anti-competitive strategy to allow the groups' members to reap the profits of their "monopolistic activities."<sup>99</sup>

In essence, the FTC's Funeral Rule was a response to unfair and deceptive industry practices and groups' domination of state licensing boards. Initially, industry groups, chiefly the NFDA, fought the FTC's efforts for consumer protection. When the FTC finally prevailed and the Rule was enacted, the NFDA's response was two-fold: it became a "supporter" of the Rule and "partnered"<sup>100</sup> with the FTC to implement Rule enforcement via the FROP program and the NFDA, along with other powerful industry groups, and set its sights back on state licensing boards.

## B. State Enforcement Through Boards

Despite purporting to complement the Rule and its aim to protect consumers, boards' inability to adequately oversee the conduct of licensees makes them unreliable and ineffective guardians. Generally, a

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98. *Id.*

99. *Bottleneckers*, *supra* note 92. Occupational licensing schemes, like the death industries for funeral providers, are "bottlenecks" that limit free movement and progress (competition). Once bottlenecks were put in place, i.e. once competition was limited to only those who had satisfied the licensing requirements that an industry group had supported, prices could be raised. Before the Funeral Rule was passed, some funeral providers were raising the prices of goods and services by as much as 600% through bundling—requiring the purchase of certain goods or services in order to obtain the goods and services consumers actually desired. Because the Funeral Rule requires funeral providers to sell items piece-by-piece, eliminating bundling, industry groups have been lobbying for state laws allowing only licensed funeral providers to sell certain funeral merchandise, including caskets. These licensure requirements serve the same purpose that licensing requirements have always been created to serve: to thwart competition. Where one door closes, another opens.

100. *See id.* Characteristic of "bottleneckers" and their desire to impede the free flow of workers is the process by which bottleneckers do this; bottleneckers "co-opt" the government for their own ends. The now long-running relationship between the FTC and the NFDA, the very industry group that fought the Agency's Rule for over a decade, is probably also an example of a bottleneck, although of a different sort than the clearer example of state licensing boards. Because the NFDA has partnered with the FTC to enforce the Rule, the Agency is collecting less money in penalties from violators and is sending "business" to the already-powerful industry group, which can now use that money for continued lobbying. The FTC has probably accepted that its current role does little more than offer outsiders the naïve impression that the Agency's investigations—and subsequent funneling of violators to the FROP program—constitute actual enforcement of the Rule.

board will not investigate a funeral provider unless it receives consumer complaints, however, a board *may* initiate an investigation if the body receives information that it believes warrants investigating.<sup>101</sup> But, this is uncommon.<sup>102</sup> Though boards primarily rely on complaints to “get the ball rolling,” filing a complaint does not ensure that an investigation will ensue,<sup>103</sup> complaints may go uninvestigated or they may even go completely ignored.<sup>104</sup>

When a board falls short of its purported mission to protect consumers, little can be done unless the public becomes engaged.<sup>105</sup> Local investigative journalism in Wisconsin revealed that most complaints filed against funeral homes in that state are not even investigated.<sup>106</sup> Wisconsin consumers filed complaints with the state’s licensing board alleging that funeral providers had violated basic tenets of the Rule, such as the Rule’s prohibition against mandatory embalming.<sup>107</sup> According to the journalist-investigators, allegations made in dozens of ignored complaints also included clear violations of professional standards.<sup>108</sup>

Complaints alleged that remains were lost, caskets were reused, funeral providers were intoxicated, and bodies were cremated without permission.<sup>109</sup> Despite the complaints, the licensing board neither investigated nor disciplined funeral providers.<sup>110</sup> The journalists’ investigation found that half of the complaints filed between 2013 and 2016

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101. *Professional Licensing Board Disciplinary Proceedings: Myths and Realities*, HAMEL MARCIN DUNN REARDON & SHEA, PC, <https://www.hmdrlaw.com/news-to-bys-article.html> (last visited Sept. 16, 2019) [hereinafter *Myths and Realities*].

102. *Id.*

103. See Meghan Dwyer & Stephen Davis, “It’s Too Late to Fix It”: State Often Buries Funeral Home Complaints Instead of Investigating Misconduct, FOX6NOW (Nov. 10, 2016, 9:05 PM), <http://fox6now.com/2016/11/10/its-too-late-to-fix-it-state-often-buries-funeral-home-complaints-instead-of-investigating-misconduct/> [hereinafter Dwyer & Davis].

104. *Id.*

105. See generally Katherine Barrett & Richard Greene, *America’s 1,800 Licensing Boards and Their Countless Problems*, GOVERNING (Mar. 2018), <http://www.governing.com/commentary/gov-state-licensing-boards-failing.html> [hereinafter Barrett & Greene].

106. Dwyer & Davis, *supra* note 103.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*



were closed without investigation; only 12% of the investigations conducted resulted in discipline.<sup>111</sup> This investigation illustrates the ineffectiveness of a state licensing board to process the valid complaints that it receives. How can a board that probably meets once or twice a month, with only a handful of members—most of whom are themselves practicing funeral directors—possibly ensure that the hundreds, possibly thousands, of funeral homes in their state are meeting professional standards?

Boards' abilities to regulate the Industry are complemented by their ability to control who is licensed, yet in this aspect boards may also fall short of ensuring that consumers are protected. The same Wisconsin investigation also discovered that the Board had granted licenses to funeral providers accused of sexually abusing children and convicted of theft, though the Board claims that it "thoroughly reviews all applications for licensure and a criminal conviction that is substantially related to the profession may be considered, as the public's protection is [the Board's] utmost concern."<sup>112</sup> At the time the results of the investigation's discoveries were publicized, Wisconsin's Funeral Directors Examining Board had allegedly conducted just six funeral home investigations that year.<sup>113</sup> The story was reported in mid-November.<sup>114</sup> The Board's failure to scrutinize potential licensees exacerbates the problem and further overwhelms the Board's members and their ability to protect consumers. Failure to even investigate claims as egregious as those alleged in Wisconsin runs counter to the default narrative that licensing boards are created for consumer protection.<sup>115</sup>

Complaints are not always ignored by boards. It is possible that consumer complaints *will* spark action; however, that action may not be timely. In 2017, Maryland conducted legislative reviews of its Board of Professional Counselors and Therapists.<sup>116</sup> The reviews revealed issues common to many professional boards.<sup>117</sup> Maryland found that its Board failed to act in a timely manner and complaints submitted by the

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111. *Id.*

112. *Id.*

113. *Id.* ("Six funeral homes have been inspected this year due to complaints, but the state won't tell us which ones.")

114. *Id.*

115. See *Myths and Realities*, *supra* note 101.

116. Barrett & Greene, *supra* note 105.

117. *Id.*

Board to the State's Office of the Attorney General for administrative action remained unacted on, possibly due to a lack of tracking.<sup>118</sup>

Boards struggle with other issues as well. Additional issues raised are that boards are often thinly staffed and their members are often poorly paid, members' interests may vary from the public's, and board members may lack essential managerial skills.<sup>119</sup> A lack of board oversight and organization, including poor documentation, can thwart even the best-intentioned board.<sup>120</sup> In Nevada, a lack of organization is credited with complaint resolution taking, on average, 400 days.<sup>121</sup>

Industry groups' claims that state licensing boards will provide effective consumer protection from the "few bad apples" seem, at least, disingenuous. There is a common thread amongst state licensing boards that there simply is no route for these bodies to effectively regulate all of the licensed practitioners in their state. For example, this inability can be seen in a case from Illinois involving Andrew Appleby, formerly a funeral director at the Joines-Appleby Funeral Home in Newman.<sup>122</sup> Despite the suspension of Appleby's license in Spring 2013, he continued to provide funeral services until at least Spring 2015.<sup>123</sup> Appleby's criminal activity included forging signatures on death certificates—a felony—and was only discovered after the Illinois Comptroller's Office investigated Appleby for failing to file required reports for pre-need funeral sales for *six years*.<sup>124</sup> In the course of the investigation, the Office discovered that Appleby was operating without a valid license.<sup>125</sup> Appleby's license had been suspended for failure to complete continuing education requirements and for making material misrepresentations on his license renewal application.<sup>126</sup> Despite having a suspended license, Appleby was able to continue practicing as a funeral provider for years without detection at a funeral home with his name

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Mary Schenk, *Ex-Funeral Director Charged with Forging Death Certificate Signatures*, THE NEWS-GAZETTE (Jan. 1, 2016), <http://www.news-gazette.com/news/local/2016-01-01/ex-funeral-director-charged-forging-death-certificate-signatures.html>.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

on it.<sup>127</sup> In this instance, an unlicensed funeral provider committed dozens of felonious acts that are considered an even greater threat to the public than failure to abide by the Rule, yet the Board did nothing for years until another investigation tipped it off. When boards are already thinly staffed and lacking in resources, how can they perform any basic investigatory oversight? Boards are essentially reliant on complaints being filed as they are unable to prompt their own investigations to ensure compliance.

The issues with state licensing boards go beyond a lack of resources. Because board members are unlikely to rule against their peers, individuals rarely lose their licenses.<sup>128</sup> Board members may be lenient on their fellow practitioners because of pre-existing relationships or a desire to curry favor with fellow licensees should they themselves ever be accused of misconduct. It is also possible that board members, justifiably, fear repercussions from industry groups, whose guiding principles are to protect their licensee-members; blacklisting from industry groups is not unheard of.<sup>129</sup>

Boards may be lenient on their fellow practitioners while concurrently engaging in economic protectionism that runs afoul of antitrust laws. This was the case in *North Carolina State Board of Dental Examiners v. FTC*, in which the Dental Examiners Board sought to bar non-dentists from performing teeth whitening services.<sup>130</sup> Here was an example of a board directly using its limited resources to protect a source of its members' income and thwarting competition by enlarging the scope of services that could be offered only by licensees, which would have the additional effect of keeping prices for whitening services higher, despite the absence of any significant risk to consumers from receiving teeth-whitening from non-dentists.<sup>131</sup>

For many professions, there are no clear health and safety benefits to licensing; professions that require licensure vary significantly from

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127. *See id.*

128. Barrett & Greene, *supra* note 105.

129. Engel, *supra* note 81.

130. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S.Ct. 1101, 1104 (2015)

(holding that for a State to rely on active market participants as regulators, such as a licensing board composed of licensed members, the State must provide active supervision if state-action immunity is to be invoked to permit anti-competitive regulation).

131. *Id.* at 1116.

state to state,<sup>132</sup> which indicates arbitrariness. Why would it be the case that consumers in some states need to purchase funeral merchandise through licensed funeral providers while in other states consumers can order these products online?

Until recently, Alabama was one of about a dozen states that required a funeral director's license to sell funeral merchandise. In Alabama, "funeral merchandise" even includes urns.<sup>133</sup> The absurdity of this requirement can best be illustrated by a suit that raised state-wide attention to the state law and led to its end—a recent case involving The Good Earth Burial Ground.<sup>134</sup>

In 2015, Shelia Champion opened The Good Earth Burial Ground ("Good Earth") in Hazel Green, Alabama.<sup>135</sup> Good Earth offered consumers affordable and environmentally friendly burials in untended woodland and meadows.<sup>136</sup> In fitting with the Good Earth's guiding principles, bodies were to be buried in biodegradable shrouds and caskets, including basic cardboard box caskets, which Champion offered.<sup>137</sup> Yet, Champion had not attended mortuary college, had not served as an apprentice, and had not obtained a license to be a funeral director.<sup>138</sup> Therefore, each time Champion sold a cardboard casket, she was committing a crime that exposed her to penalties that included significant fines and up to a year in jail.<sup>139</sup> Alabaman consumers were not protected by the State's restriction on who could sell them caskets; instead, this restrictive regulation was "designed to ensure the dominance of the traditional, full-service funeral model, as well as ensure

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132. See Mark Flatten, *Protection Racket: Occupational Licensing Laws and the Right to Earn a Living*, GOLDWATER INST. (Dec. 6, 2017), <https://goldwaterinstitute.org/article/protection-racket-occupational-licensing-laws-and/> ("Fewer than 30 occupations are licensed in all 50 states . . . some of the jobs licensed in all or nearly all states have neither the obvious health concerns of doctors and nurses, nor the specialized training and expertise of architects and engineers. [. . .] Landscape architects, the people who use plants and other materials to design outdoor spaces, are licensed in every state.") (emphasis added).

133. See 2016 Ala. Legis. Serv. 265.

134. See *Alabama Caskets*, INST. FOR JUSTICE, [https://ij.org/case/alabama-caskets/#citation\\_5](https://ij.org/case/alabama-caskets/#citation_5) (last visited Sept. 16, 2019).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

that the state-licensed funeral directors have a monopoly on the money Alabamans spend on funerals.”<sup>140</sup>

Fortunately for consumers and the environment, Champion and The Good Earth Burial Grounds prevailed.<sup>141</sup> Shortly after Champion brought a suit against the Alabama Board of Funeral Service contending that the State’s law was an unconstitutional restriction on competition, the Alabama Legislature amended the law to permit funeral merchandise sales by unlicensed citizens.<sup>142</sup> The Good Earth was still running at the time this Note was written; on her company’s website, Champion even publishes The Good Earth’s itemized price list, including cardboard caskets, which are an affordable \$70.<sup>143</sup> By making its prices available online, Good Earth is in the minority of funeral providers.<sup>144</sup>

Because boards often lack the resources to fully process complaints, oversee licensees, and initiate investigations, and because boards are too lenient on violators and appropriate their limited resources to litigation with no decipherable purpose other than to keep out non-licensed competitors, boards fail to protect consumers.<sup>145</sup> Consumers, it seems, are on their own.

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140. *See id.* (“In particular, funeral directors want a monopoly on casket sales because the casket is typically the single largest expense for a funeral. There is no legitimate reason why only funeral directors should be allowed to sell caskets or shrouds. A casket is just a box, which is why it can be made of anything, including cardboard. A shroud is just a piece of fabric, and could literally be just a bed sheet from the department store.”).

141. *See Victory for Alabama “Green” Cemetery*, INST. FOR JUST. (May 5, 2016), <https://ij.org/press-release/victory-alabama-green-cemetery/>. At the time of this press release, the Institute for Justice had litigated five cases in federal courts based on states’ laws prohibiting those without funeral director licenses from selling caskets. The Institute was successful in four of those cases.

142. *Id.*

143. *See generally The Good Earth*, <http://www.thegoodearthllc.com/general-price-list-gpl-.html> (last visited Sept. 16, 2019).

144. Benincasa, *supra* note 89.

145. *Filing a Complaint*, *supra* note 7.

#### IV. Recommendation

Compliance violations are discovered in roughly 20% of the funeral homes the FTC investigates annually.<sup>146</sup> Given the many complaints and issues discovered regarding funeral homes and funeral providers by state licensing boards, it is apparent that several changes are necessary to further both the Rule's and state licensing boards' purported objective of protecting consumers. This Note recommends three primary solutions. First, the Rule should be updated. Second, sanctions should be increased for Rule violations. Finally, state licensing boards should undergo radical transformations so that they can more sincerely advance their fundamental objective. Beyond the specific changes advanced below it will also be necessary to curb the influence industry groups are able to exert on federal and state agencies and agents for long-term success.

##### A. Update the Rule by Publishing General Price Lists Online

The Funeral Rule needs to be modernized in order to be effective. The failure to provide inquirers with a general price list ("GPL") is one of the most common major Rule violations committed by funeral providers.<sup>147</sup> The GPL requirement is intended to enable consumers to select only the individual goods and services they want and to allow consumers to comparison shop.<sup>148</sup> Currently, funeral providers are required to give GPLs to anyone who asks about funeral goods or services, or the prices of those goods or services in person.<sup>149</sup> It does not matter if the inquirer is a potential customer or a competitor. If someone asks, in person, the funeral provider must proffer a physical GPL.<sup>150</sup> The physical GPL must even be offered when consumers are discussing triggering topics with funeral providers outside the funeral home—for

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146. *FTC Conducts Undercover Inspections of Funeral Homes in Eight States to Press Funeral Homes to Comply with Consumer Protection Law*, FTC (July 24, 2013), <https://www.ftc.gov/news-events/press-releases/2013/07/ftc-conducts-undercover-inspections-funeral-homes-eight-states-0> [hereinafter *FTC Conducts Undercover Inspections*] ("Since the FROP program began in 1996, the FTC has inspected nearly 2,700 funeral homes, 427 of which have agreed to enter the compliance program."). In this same report, an additional forty-three funeral homes investigated in 2012 were found to have minor compliance deficiencies, which did not merit formal action.

147. *Id.*

148. *Id.*

149. *Complying with the Funeral Rule*, *supra* note 68.

150. *Id.*

instance, at a hospital or on a home visit.<sup>151</sup> Funeral providers are also required to provide accurate price disclosures from the GPL over the telephone if triggering topics arise.<sup>152</sup>

The GPL component of the Funeral Rule is very broad; price disclosure is required when certain funeral services or goods are discussed over the phone or in person, regardless of the purpose of the inquiry or the location of the exchange.<sup>153</sup> Yet this clear and important Rule component is often violated.<sup>154</sup> A measure that could increase compliance with this Rule component is a requirement that funeral providers publish their GPLs on their websites. Alternatively, a common site administered by the FTC that keeps a file and has links to all funeral providers' current GPLs would also accomplish this same end: to allow consumers to select those goods or services they want and to enable comparison shopping.

The GPL requirement has been a part of the Funeral Rule since it went into effect in the early 1980s.<sup>155</sup> The Rule has remained essentially unchanged since 1994, when it was amended to include the prohibition on "handling fees."<sup>156</sup> It is time to tailor the Rule to our times. The Internet can further assist the Rule's purpose by providing consumers with GPLs, which consumers are already entitled to receive over the phone or in person.<sup>157</sup> Publishing GPLs will reduce the potential harm to consumers that results from funeral providers' failure to disclose the statutorily required information because consumers can simply find the information on funeral providers' websites or on an FTC-managed platform.

Further, providing this information online augments consumers' ability to comparison shop and presents no significant burden to funeral providers—except the obvious burden of freer competition and the diminished opportunity to violate the Rule for personal financial gain (both of which are not legitimate). In fact, a burden addressed in the Rule was the "burden" funeral providers would face having to take time to discuss prices with consumers over the telephone,<sup>158</sup> but this

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151. *Id.*

152. *Id.*

153. *Id.*

154. *FTC Conducts Undercover Inspections*, *supra* note 146.

155. *Complying with the Funeral Rule*, *supra* note 68.

156. 16 C.F.R. § 453 (2008).

157. *Complying with the Funeral Rule*, *supra* note 68.

158. *Id.*

“burden” would be alleviated if funeral providers could refer consumers to a link or tab on the provider’s website. Amending the Rule to require funeral homes to publish their prices online would likely face significant pushback from the NFDA, which has always fought transparency—it even prohibited its members from advertising in newspapers in the 19th century.<sup>159</sup>

There has been some success in getting funeral providers to publish general price lists online at the state level, further undercutting industry groups’ arguments and demonstrating online price publication’s feasibility. In 2013, a California law made it a criminal offense for a funeral home with a website to fail to provide information regarding that home’s GPL.<sup>160</sup> Section 7685 requires that a funeral home include on its website either (1) its GPL or (2) a list of all goods and services that are on its general price list, along with a statement that price lists are available on request.<sup>161</sup> Like the Rule, this law was opposed by industry groups; in this case, it was the California Funeral Directors Association.<sup>162</sup> While this law improves transparency, it is still a compromise<sup>163</sup> that deprives many consumers from being able to easily access basic price information regarding expensive and nearly essential goods and services. Contrary to industry groups’ contentions, however, California’s disclosure law did not result in any noticeable harm to the California funeral industry.<sup>164</sup>

Requiring online publication of the GPLs would diminish the resultant harm of the frequently violated Rule requirement, further the Rule’s goals, and present no significant (or even minor) burden on funeral providers. Thus, the Rule should be amended to require online publication of the GPLs to further its purpose. Ed Howard, the attorney and consumer advocate who successfully lobbied for California’s law requiring funeral providers to at least acknowledge FTC-mandated price lists on their websites, said “[t]he FTC really, really, really, needs

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159. Benincasa, *supra* note 89.

160. CAL. BUS. & PROF. CODE § 7685 (Deering 2018) (“Each licensed funeral establishment that maintains an Internet Web site shall post on its Internet Web site the list of funeral goods and services that are required to be included in the establishment’s general price list, pursuant to federal rule, and a statement that the general price list is available upon request.”).

161. *Id.*

162. Benincasa, *supra* note 89.

163. *Id.*

164. Ashlea Ebeling, *Should Funeral Homes Have to Post Prices Online?*, FORBES (Oct. 20, 2015, 8:40 AM), <https://www.forbes.com/sites/ashleaebeling/2015/10/20/should-funeral-homes-have-to-post-prices-online/#1a051b887957>.



to get off its south pole and bring itself into the 20th and 21st centuries, and make this modest requirement a national requirement.”<sup>165</sup> What legitimate purpose could possibly be served by refusing to publish prices? Do funeral providers have delicate Victorian sensibilities that would be offended by the vulgarity of prices?

### B. Increase Sanctions for Major Rule Violations

Currently, major violators of the Funeral Rule have the option to go into the FROP program, where their names are not released, even if they are under investigation by the FTC.<sup>166</sup> Even though the Funeral Rule’s tenets are clear, simple, and have remained unchanged for a quarter of a century, a significant number of funeral providers continue to fail to adhere to them, as made evident by the annual FTC investigations.<sup>167</sup> This is especially disconcerting when one considers that providers must have had to undergo training, examinations, and continuing education courses in order to obtain licensure.<sup>168</sup> Because funeral providers receive substantial training, their continued failure to adhere to the Rule seems to stem from something other than well-meaning ignorance of the Rule, and more education is all that is offered by the FROP program.<sup>169</sup>

Evidence suggests that tougher sanctions would be more effective to increase Rule compliance. In an FTC press release from 1997, the first year of the FROP program coupled with the voluntary payments to the U.S. Treasury, the agency noted that Rule compliance had increased significantly from the low levels for the years immediately preceding the new sanctions: 60–80% of funeral providers complied with the Rule

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165. Benincasa, *supra* note 89.

166. *FTC Conducts Undercover Inspections*, *supra* note 146.

167. *Id.*

168. See *Regulations In Funeral Service Licensing, Continuing Education and Pre-need*, INT’L CONFERENCE FUNERAL SERV. EXAMINING BDS., (June 2017), <https://theconferenceonline.org/wp-content/uploads/2017/07/Regulations-in-Licensing-2017.pdf>.

169. FED. TRADE COMM’N, *supra* note 66. (“[The FROP program] is run by the National Funeral Directors Association and provides participants with a legal review of the price disclosures required by the Funeral Rule, and on-going training, testing and monitoring for compliance with the Rule.”).

in 1994 and 1995.<sup>170</sup> Additionally, nearly 90% of funeral providers investigated in 1996 were found to be in compliance with the Rule.<sup>171</sup> While compliance with the Rule was on an upward trajectory, in the last ten years, compliance has fallen—hovering around 80% again.<sup>172</sup> That compliance with the Rule has *declined*, even though the Rule remained unchanged and penalties for Rule violations significantly increased, suggests that the Rule is not being effectively enforced.

The FROP program is nothing more than a “slap on the wrist.” If the FROP program truly was comparable to the FTC’s civil penalties, violators would choose to either pay these penalties or litigate in roughly equal numbers. These alternatives are not comparable; virtually no providers choose litigation. The FROP program is essentially the next step after the FTC finds major violations. Whereas a *single* violation of the Funeral Rule could cost a funeral home more than \$40,000,

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170. *FTC Announces Results of the First Year of the Funeral Rule Offenders Program*, FTC (Jan. 22, 1997), <https://www.ftc.gov/news-events/press-releases/1997/01/ftc-announces-results-first-year-funeral-rule-offenders-program> [hereinafter *Funeral Rule Offenders Program Results*].

171. *FTC Announces Results of D.C. Inspection of Funeral Homes for Compliance with Consumer Protection Law*, FTC (Apr. 14, 1997), <https://www.ftc.gov/news-events/press-releases/1997/04/ftc-announces-results-dc-inspection-funeral-homes-compliance>; *Funeral Rule Offenders Program Results*, *supra* note 171.

172. See FED. TRADE COMM’N, *supra* note 66 (noting that 30 of 122—or roughly 25%—funeral homes failed to disclose pricing information at the homes investigated in 2013); *FTC Conducts Undercover Inspections of Funeral Homes in Nine States to Press Funeral Homes to Comply with Consumer Protection Law*, FTC (Apr. 18, 2012), <https://www.ftc.gov/news-events/press-releases/2012/04/ftc-conducts-undercover-inspections-funeral-homes-nine-states> (noting that 23 of 102—or roughly 23%—funeral homes investigated in 2011 were found to be significantly violating the Funeral Rule); *FTC Sues Two Funeral Homes for Failing to Provide Price Lists; Undercover Inspections in Eight States Find Violations of the FTC’s Funeral Rule*, FTC (July 21, 2011), <https://www.ftc.gov/news-events/press-releases/2011/07/ftc-sues-two-funeral-homes-failing-provide-price-lists-undercover> (noting that 35 of 126—or roughly 28%—of funeral homes investigated in 2010 were found to have significantly violated the Funeral Rule); *Undercover Inspections of Funeral Homes in Seven States Ensure that Consumers Receive Price Lists Required by Law*, FTC (Mar. 19, 2009), <https://www.ftc.gov/news-events/press-releases/2009/03/undercover-inspections-funeral-homes-seven-states-ensure> (noting that 26 of 104—or 25%—of funeral homes investigated by the FTC in 2008 were found to have significant violations of the Funeral Rule); *Undercover Funeral Home Inspections in Nine States Yield Mixed Results; FTC Reminds Providers They Must Give Price Lists to Consumers*, FTC (Dec. 19, 2007), <https://www.ftc.gov/news-events/press-releases/2007/12/undercover-funeral-home-inspections-nine-states-yield-mixed> (noting that of 174 funeral homes investigated in 2007, only 26 (15%) were found to have significantly violated the Funeral Rule; however, another 66 homes were found to have minor compliance deficiencies. In total, of 174 homes inspected in 2007, 92 of 174—more than half—had compliance deficiencies in some degree).

not including the cost of litigation, the FROP program costs a funeral home roughly \$1900 for all three years regardless of the number of violations caught by the FTC's investigators.<sup>173</sup> In addition to this fee, a funeral home also makes a one-time voluntary payment to the US Treasury for .08% of the home's average annual revenue for the past three years.<sup>174</sup> If a home's revenue was \$300,000, on average, that home would be on the hook for \$1900 to the NFDA and \$2400 (.08% of \$300,000) to the U.S. Treasury—a total bill of \$4300.<sup>175</sup> This amount represents roughly *a tenth* of the penalty that this home would have received had it faced a *single* penalty charge directly from the FTC; it represents an even smaller fraction if attorneys' fees and additional penalties are factored in.<sup>176</sup> Apart from the significant upfront savings, enrollment in the FROP program also ensures that the funeral home's confidentiality is maintained.<sup>177</sup> The Rule's purpose and enforcement are further defeated by the mandated FROP program fees; these fees, paid to the NFDA, support the very industry group fighting against industry transparency and free competition.<sup>178</sup>

Proponents of the FROP program argue that the FTC would be burdened with having to litigate dozens of funeral home violators annually, however, with the absence of the "get out of jail *nearly* free" option presented by the FROP program, it is likely funeral homes will quickly become more amenable to following the Rule's straightforward demands. The FROP program is a burden on funeral providers, but unlike potential \$40,000-per-Rule-violation penalties, it is a manageable burden. Violating the Rule may even be a justifiable risk given the manageability of the FROP program and the potential for reaping a profit in the Industry.

The Rule's tenets are clear. The educational requirements necessary to become a licensed funeral provider are more than sufficient to educate providers on the Rule. Thus, the reasons for the FROP program's existence are to save funeral homes money, to thwart the Rule, and to ease any burden the FTC might otherwise face having to actually

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173. Patti Poss, *FTC Funeral Rule: What's New at the FTC?*, FTC 1, 6–7 (Feb. 28, 2019) <https://theconferenceonline.org/wp-content/uploads/2019/02/Whats-New-at-the-FTC.pdf> [hereinafter Poss].

174. *Id.* at 7.

175. *See id.*

176. *See id.*

177. *Id.*

178. Poss, *supra* note 173 at 7; Benincasa, *supra* note 89.

litigate and enforce Rule compliance. Unless the FROP program is eliminated or is fundamentally altered, any further increases in civil penalties for Rule violations will not increase compliance with the Rule because the system already favors violators' participation in the FROP program. If civil penalties were increased, this would create the impression that adequate enforcement exists and that funeral providers have an incentive to abide by the Rule. This impression would be mistaken.

The FTC places its Rule and guides up for review every ten years; the Funeral Rule is up for review in 2019.<sup>179</sup> This review presents an opportunity for the public to comment on the Rule and any amendments.<sup>180</sup> This Note proposes that funeral homes publish GPLs on websites and remove (or fundamentally alter) the FROP program. Failure to make these changes will continue to prevent the Rule from accomplishing its objective of protecting consumers.

### C. Make Changes to State Boards

State boards will continue to fail to accomplish their purported purpose so long as they lack necessary resources and are composed largely, or solely, of members of the profession they seek to regulate. The existence of boards alone is not enough; boards require oversight and accountability.

After investigations uncovered the Wisconsin's Funeral Board's failure to pursue legitimate complaints and the rarity that the Board would discipline funeral providers, journalists interviewed the president of the Wisconsin Funeral Directors Association, a voluntary organization for funeral directors.<sup>181</sup> The President of the Association, Jeffrey Kleczka, recommended more oversight, including initiating surprise inspections.<sup>182</sup> Kleczka reported that his funeral home has not been investigated in *decades*.<sup>183</sup> According to Kleczka, the only oversight for funeral homes in the State comes from employees and competitors.<sup>184</sup>

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179. FED. TRADE COMM'N, FTC FUNERAL RULE: WHAT'S NEW AT THE FTC? \*1, \*8 (Feb. 28, 2019), <https://theconferenceonline.org/wp-content/uploads/2019/02/Whats-New-at-the-FTC.pdf>.

180. *Id.*

181. Dwyer & Davis, *supra* note 103.

182. *Id.*

183. *Id.*

184. *Id.*

Additional board oversight has also been recommended and instituted in other states to ensure that complaints are received, reports are completed on time, and that complaints are handled consistently.<sup>185</sup> Another potential means of increasing board accountability is the implementation of a tracking system for complaints, as is being developed by Maryland.<sup>186</sup>

Shortcomings common to many state boards are rooted in a lack of resources.<sup>187</sup> Whether it is more diligently pursuing claims of misconduct or tracking and responding to complaints in a timelier manner, boards will need more resources to achieve their stated goals of protecting consumers. Resources can be stretched to protect consumers if states examine all licensing boards with an eye toward disbanding professional boards that fail to contribute toward public health and safety in any meaningful way.

Further, states should evaluate professions that merit licensure and licensing boards. In doing so, states should eliminate regulations that do not serve these boards' justifying purpose. In the death care industry, a regulation that does not serve the public good is the regulation that prohibits the sale of caskets by those without funeral director licenses. Legislators who have been cowed into passing regulations that prohibit casket sales by non-licensed vendors, or who represent states where previous representatives succumbed to the strength of Industry lobbying assaults, should critically evaluate these monopolistic laws for their efficacy in protecting consumers.<sup>188</sup>

Finally, the composition of boards needs to be examined. Although members of a profession are likely the best suited to understand the profession's needs and requirements, their role would be better in an advisory capacity, with non-licensed persons serving sanctions. One option is to populate boards with investigators and deputy attorney generals from states' attorney general's offices' licensing enforcement and consumer protection divisions. This restructuring would cut against members' natural tendency toward leniency and self-protection.

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185. See Barrett & Greene, *supra* note 105.

186. *Id.*

187. *Id.*

188. See *Bottlenecks*, *supra* note 92 (“[W]hen an Oklahoma legislator proposed a bill to allow casket sales without a funeral director’s license, industry bottlenecks warned legislators that the bill would mean dead bodies would have to be propped in a corner while awaiting a casket purchased over the internet, completely ignoring the reality of next-day delivery.”).

By eliminating unnecessary boards and regulations, and by altering boards' compositions, states' limited resources would go further toward protecting resident consumers.

## V. Conclusion

At first blush, the existence of the FTC's Funeral Rule and state licensing boards creates the impression in consumers' minds that the death care industry is well-regulated and that bad actors are exceptional, if they exist at all. This appearance of sufficient regulation belies the truth: that the death care industry, through the efforts of industry groups, is largely self-regulated.<sup>189</sup> While self-regulation is not a bad thing *per se*, in the case of the death care industry, the guiding principles of such self-regulation are economic protectionism and non-transparency; if consumer protection is a concern, then it is likely only to the degree that more flagrant abuse might cast light on the Industry, revealing the extent to which current regulation is only superficially for consumer protection. Unfortunately, when many people are faced with the need to purchase goods and services from funeral providers, their awareness of the Industry and those regulations that actually are intended for consumer protection is minimal. The elderly are particularly vulnerable to financial abuse, who in the wake of a significant loss, must confront funeral providers and an industry seemingly unified on increasing their profits and obscuring their prices and practices.

There are many more ways to improve the death care industry to protect consumers than those mentioned above. Given the strength and persistence of industry groups, a multi-prong approach may be the only way to reign in groups' bad faith conduct and bring the death care industry into the light. The Funeral Rule is an example of how a consumer protection regulation can quickly become co-opted by its opponents at the Federal level while simultaneously become thwarted and subverted at the state level.

While this Note proposes three very basic solutions—update the Funeral Rule, increase sanctions for violators, and tailor state licensing boards to suit their purported purpose—none of these changes will come without public demand. Concentrated lobbying efforts from a

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189. See *License to Work*, *supra* note 97, at 29 (“Occupational practitioners, often through professional associations, use the power of concentrated interests to lobby state legislators for protection from competition through licensing laws.”).

particularly invested minority—funeral providers—are far more persuasive to politicians than a general, but unexpressed, desire from a diffuse majority. The Funeral Rule was first instigated by a “muckraking” journalist who caught the Nation’s attention and triggered an outcry by exposing a purposefully nontransparent and deceptive industry; that outcry for consumer protection was answered with the Funeral Rule. Now that the Rule has been co-opted and defanged, it is time to ring the bells and cry out for effective regulation again.

