

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 12-06

Prearranged Funeral Contracts

QUESTION

Do the provisions of Tenn. Code Ann. § 62-5-409(c) prohibiting a business from offering a discount to consumers on merchandise and services related to prearranged funeral contracts constitute an improper restraint on trade and competition or violate any state or federal law or regulations, including but not limited to the Commerce Clause of the United States Constitution or the federal Sherman Antitrust Act.

OPINION

No. The State of Tennessee's prohibition against the discounting of prearranged funeral contracts is a permissible exercise of state authority, is exempt from federal antitrust laws under the state action immunity doctrine and does not violate any other applicable federal or Tennessee law.

ANALYSIS

Since 1959, Tennessee has prohibited persons, firms and corporations from offering discounted pre-need funeral merchandise and services. *See* 1959 Tenn. Pub. Acts 293. Tennessee, like many states, regulates pre-need burial contracts because they present opportunities for fraud and frequently cater to vulnerable populations. *See State ex rel. Long v. Mynatt*, 207 Tenn. 319, 324-325, 339 S.W.2d 26, 28-29 (1960); *E.S. Stephens, Annotation, Validity of Statutes Regulating Pre-need Contracts for the Sale of Furnishing of Burial Services and Merchandise*, 68 A.L.R.2d 1251 (1959 & Supp.).

Tennessee, by the enactment of the Tennessee Prepaid Funeral Benefit Act ("TPFB"), has developed a comprehensive regulatory process designed to ensure that, when pre-need burial contracts are sold to consumers, sufficient funds are reserved so that any benefits provided under these contracts can be paid for when they come due. *See* Tenn. Code Ann. §§ 62-5-101 to 417. The TPFB establishes "the qualifications and procedures for registration and general regulatory requirements for the sale of prepaid funeral benefits in this state." Tenn. Code Ann. § 62-5-402.

The TPFB expressly prohibits a person, firm or corporation from offering a discount to consumers on prearranged funeral contracts for merchandise and services, stating as follows:

It is unlawful for any person, firm or corporation to enter into any contract, conditioned to take effect on the death of any person, wherein the person, or the personal representative, heirs or next of kin of the person, is promised any rebate, discount or reduction in price for or on account of funeral merchandise, expenses or services by virtue of the person being issued the policy or certificate, or being designated as beneficiary in the policy, or by the virtue of the person entering into the contract or being designated in the policy as the recipient of any such rebate, discount or reduction in price.

Tenn. Code Ann. § 62-5-409(c).

However, as recognized by the Tennessee Court of Appeals and this Office, this provision does not absolutely ban the sale of funeral services on a pre-need basis, but must be read in *pari materia* with other sections of the TPFB which allow funeral services to be purchased in advance so long as certain conditions designed to protect the public are met. *Garrett v. Forest Lawn Memorial Gardens, Inc.*, 588 S.W.2d 309, 313-14 (Tenn. Ct. App. 1979); Op. Tenn. Att’y Gen. 96-017 (February 15, 1996); Op. Tenn. Att’y Gen. 86-52 (March 6, 1986). Thus the TPFB expressly allows funeral services to be purchased in advance so long as consumers purchasing such services are protected by requiring the money paid to be deposited in a trust account. Tenn. Code Ann. §§ 62-5-406 to 408.

In enacting such statutes, the General Assembly is exercising its inherent power to protect the health, safety and welfare of Tennessee’s citizens. *See Brundage v. Cumberland County*, No. E2010-00089-SC-R11-CV, 2011 WL 6326094, at *5 (Tenn. December 19, 2011). The General Assembly has unlimited power to enact such laws, except as expressly or impliedly restrained by the Tennessee or United States Constitutions. *Dennis v. Sears, Roebuck & Co.*, 223 Tenn. 415, 426, 446 S.W.2d 260, 265-66 (1969). When evaluating the constitutionality of a statute such as the TPFB, there exists a strong presumption that acts passed by the General Assembly are constitutional. *McCarver v. Ins. Co. of State of Pennsylvania*, 208 S.W.3d 380, 384 (Tenn. 2006).

Our review reveals no constitutional or legal impediment with the operation of the TPFB. Initially, the TPFB as a legislative act regulating prearranged funeral contracts is exempt from antitrust review under the Sherman Antitrust Act, codified at 15 U.S.C.A. §§ 1-40. The United States Supreme Court has recognized that the antitrust laws are not applicable to States acting in their sovereign capacity:

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 350-51 (1943). Thus the adoption of legislation by a State constitutes state action which is ipso facto exempt from the operation of the federal antitrust laws, commonly referred to as the “state action immunity doctrine.” *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984); *Forrest City Grocery Co. v. Tennessee Department of Revenue*, 917 S.W.2d 247, 248-49 (Tenn. Ct. App. 1995).

Nor does the TPFB violate the Commerce Clause of the United States Constitution. The Commerce Clause provides that “Congress shall have the power to regulate commerce among the several states.” U.S. Const. art. I, § 8. The United States Supreme Court also has recognized a negative command in the Commerce Clause, referenced as “the dormant Commerce Clause.” *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005) (citing *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 541 U.S. 175, 179 (1995)). In essence the dormant Commerce Clause prohibits state “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988).

However the Commerce Clause does not preclude states from addressing matters of legitimate local concern even though interstate commerce may be affected. State legislation that regulates evenhandedly to effectuate a legitimate state purpose does not run afoul of the Commerce Clause, so long as any burden imposed on interstate commerce is not clearly excessive in relation to the local benefits. *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 346 (2007); *Northville Downs v Grandholm*, 622 F.3d 579, 588 (6th Cir. 2010); *Bean v. McWherter*, 24 S.W.3d 325, 331 (Tenn. Ct. App. 1999).

Here the TPFB evenhandedly applies the regulatory requirements for the sale of prearranged funeral contracts and provides no benefit to in-state economic interests by burdening out-of-state competitors. The Commerce Clause accordingly imposes no bar to the General Assembly’s enactment of the TPFB to protect consumers purchasing prearranged funeral contracts.

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