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Antitrust Litigation in Post-Microsoft Era

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CALIFORNIA DENTAL ASSN. v. FTC (97-1625)
128 F.3d 720, vacated and remanded.

Opinion of the Court

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SUPREME COURT OF THE UNITED STATES

No. 97—1625

CALIFORNIA DENTAL ASSOCIATION, PETITIONER v.
FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 24, 1999] Justice Souter delivered the opinion of the Court.

There are two issues in this case: whether the jurisdiction of the Federal Trade Commission extends to the California Dental Association (CDA), a nonprofit professional association, and whether a "quick look" sufficed to justify finding that certain advertising restrictions adopted by the CDA violated the antitrust laws. We hold that the Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members, but that where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the Court of Appeals performed.

I

The CDA is a voluntary nonprofit association of local dental societies to which some 19,000 dentists belong, including about three-quarters of those practicing in the State. In re California Dental Assn., 121 F.T.C. 190, 196—197 (1996). The CDA is exempt from federal income tax under 26 U.S.C. § 501(c)(6), covering "[b]usiness leagues, chambers of commerce, real-estate boards, [and] boards of trade," although it has for-profit subsidiaries that give its members advantageous access to various sorts of insurance, including liability coverage, and to financing for their real estate, equipment, cars, and patients' bills. The CDA lobbies and litigates in its members' interests, and conducts marketing and public relations campaigns for their benefit. 128 F.3d 720, 723 (CA9 1997).

The dentists who belong to the CDA through these associations agree to abide by a Code of Ethics (Code) including the following §10:

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"Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect." App. 33.

The CDA has issued a number of advisory opinions interpreting this section,1 and through separate advertising guidelines intended to help members comply with the Code and with state law the CDA has advised its dentists of disclosures they must make under state law when engaging in discount advertising.2

Responsibility for enforcing the Code rests in the first instance with the local dental societies, to which applicants for CDA membership must submit copies of their own advertisements and those of their employers or referral services to assure compliance with the Code. The local societies also actively seek information about potential Code violations by applicants or CDA members. Applicants who refuse to withdraw or revise objectionable advertisements may be denied membership; and members who, after a hearing, remain similarly recalcitrant are subject to censure, suspension, or expulsion from the CDA. 128 F.3d, at 724.

The Commission brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated §5 of the FTC Act, 38 Stat. 717, 15 U.S.C. § 45.3 The complaint alleged that the CDA had unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. Complaint ¶7. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA, which, the ALJ noted, had itself "stated that a selection of its programs and services has a potential value to members of between $22,739 and $65,127," 121 F.T.C., at 207. He found that, although there had been no proof that the CDA exerted market power, no such proof was required to establish an antitrust violation under In re Mass. Bd. of Registration in Optometry, 110 F. T. C. 549 (1988), since the CDA had unreasonably prevented members and potential members from using truthful, nondeceptive advertising, all to the detriment of both dentists and consumers of dental services. He accordingly found a violation of §5 of the FTC Act. 121 F.T.C., at 272—273.

The Commission adopted the factual findings of the ALJ except for his conclusion that the CDA lacked market power, with which the Commission disagreed. The Commission treated the CDA's restrictions on discount advertising as illegal per se. 128 F.3d, at 725. In the alternative, the Commission held the price advertising (as well as the nonprice) restrictions to be violations of the Sherman and FTC Acts under an abbreviated rule-of-reason analysis. One Commissioner concurred separately, arguing that the Commission should have applied the Mass Bd. standard, not the per se analysis, to the limitations on price advertising. Another Commissioner dissented, finding the evidence insufficient to show either that the restrictions had an anticompetitive effect under the rule of reason, or that the CDA had market power. 128 F.3d, at 725.

The Court of Appeals for the Ninth Circuit affirmed, sustaining the Commission's assertion of jurisdiction over the CDA and its ultimate conclusion on the merits. Id., at 730.

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The court thought it error for the Commission to have applied per se analysis to the price advertising restrictions, finding analysis under the rule of reason required for all the restrictions. But the Court of Appeals went on to explain that the Commission had properly

"applied an abbreviated, or 'quick look,' rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. See [National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109-110, and n. 39 (1984)] ('The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.' [Ibid. (citing P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37—38 (Federal Judicial Center, June 1981) (parenthetical omitted)).] It allows the condemnation of a 'naked restraint' on price or output without an 'elaborate industry analysis.' Id. at 109." Id., at 727.

The Court of Appeals thought truncated rule-of-reason analysis to be in order for several reasons. As for the restrictions on discount advertising, they "amounted in practice to a fairly 'naked' restraint on price competition itself," ibid. The CDA's procompetitive justification, that the restrictions encouraged disclosure and prevented false and misleading advertising, carried little weight because "it is simply infeasible to disclose all of the information that is required," id., at 728, and "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," ibid. As to non-price advertising restrictions, the court said that

"[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services. See Areeda & Hovenkamp, Antitrust Law ¶1505 at 693—694 (Supp. 1997)… . The restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so… . Under these circumstances, we think that the restriction is a sufficiently naked restraint on output to justify quick look analysis." Ibid.

The Court of Appeals went on to hold that the Commission's findings with respect to the CDA's agreement and intent to restrain trade, as well as on the effect of the restrictions and the existence of market power, were all supported by substantial evidence. Id., at 728—730. In dissent, Judge Real took the position that the Commission's jurisdiction did not cover the CDA as a nonprofit professional association engaging in no commercial operations. Id., at 730. But even assuming jurisdiction, he argued, full-bore rule-of-reason analysis was called for, since the disclosure requirements were not naked restraints and neither fixed prices nor banned nondeceptive advertising. Id., at 730—731.

We granted certiorari to resolve conflicts among the Circuits on the Commission's jurisdiction over a nonprofit professional association4 and the occasions for abbreviated rule-of-reason analysis.5 524 U.S. ___ (1998). We now vacate the judgment of the Court of Appeals and remand.

II

The FTC Act gives the Commission authority over "persons, partnerships, or corporations," 15 U.S.C. § 45(a)(2), and defines "corporation" to include "any company … or association, incorporated or unincorporated, without shares of capital or capital stock or

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certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members," §44. Although the Circuits have not agreed on the precise extent of this definition, see n. 4, supra, the Commission has long held that some circumstances give it jurisdiction over an entity that seeks no profit for itself. While the Commission has claimed to have jurisdiction over a nonprofit entity if a substantial part of its total activities provide pecuniary benefits to its members, see In re American Medical Assn., 94 F. T. C. 701, 983—984 (1980), respondent now advances the slightly different formulation that the Commission has jurisdiction "over anticompetitive practices by nonprofit associations whose activities provid[e] substantial economic benefits to their for-profit members' businesses." Brief for Respondent 20.

Respondent urges deference to this interpretation of the Commission's jurisdiction as reasonable. Brief for Respondent 25—26 (citing Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 380—382 (1988) (Scalia, J. concurring) (Chevron deference applies to agency's interpretation of its own statutory jurisdiction)). But we have no occasion to review the call for deference here, the interpretation urged in respondent's brief being clearly the better reading of the statute under ordinary principles of construction.

The FTC Act is at pains to include not only an entity "organized to carry on business for its own profit," 15 U.S.C. § 44 but also one that carries on business for the profit "of its members," ibid. While such a supportive organization may be devoted to helping its members in ways beyond immediate enhancement of profit, no one here has claimed that such an entity must devote itself single-mindedly to the profit of others. It could, indeed, hardly be supposed that Congress intended such a restricted notion of covered supporting organizations, with the opportunity this would bring with it for avoiding jurisdiction where the purposes of the FTC Act would obviously call for asserting it.

Just as the FTC Act does not require that a supporting organization must devote itself entirely to its members' profits, neither does the Act say anything about how much of the entity's activities must go to raising the members' bottom lines. There is accordingly no apparent reason to let the statute's application turn on meeting some threshold percentage of activity for this purpose, or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. To be sure, proximate relation to lucre must appear; the FTC Act does not cover all membership organizations of profit-making corporations without more, and an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach, even though the quality of professional services ultimately affects the profits of those who deliver them.

There is no line drawing exercise in this case, however, where the CDA's contributions to the profits of its individual members are proximate and apparent. Through for-profit subsidiaries, the CDA provides advantageous insurance and preferential financing arrangements for its members, and it engages in lobbying, litigation, marketing, and public relations for the benefit of its members' interests. This congeries of activities confers far more than de minimis or merely presumed economic benefits on CDA members; the economic benefits conferred upon the CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit,"6 which the FTC Act makes the jurisdictional

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touchstone. There is no difficulty in concluding that the Commission has jurisdiction over the CDA.

The logic and purpose of the FTC Act comport with this result. The FTC Act directs the Commission to "prevent" the broad set of entities under its jurisdiction "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). Nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts. It may even be possible that a nonprofit entity up to no good would have certain advantages, not only over a for-profit member but over a for-profit membership organization as well; it would enjoy the screen of superficial disinterest while devoting itself to serving the interests of its members without concern for doing more than breaking even.

Nor, contrary to petitioner's argument, is the legislative history inconsistent with this interpretation of the Commission's jurisdiction. Although the versions of the FTC Act first passed by the House and the Senate defined "corporation" to refer only to incorporated, joint stock, and share-capital companies organized to carry on business for profit, see H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 11, 14 (1914), the Conference Committee subsequently revised the definition to its present form, an alteration that indicates an intention to include nonprofit entities.7 And the legislative history, like the text of the FTC Act, is devoid of any hint at an exemption for professional associations as such.

We therefore conclude that the Commission had jurisdiction to pursue the claim here, and turn to the question whether the Court of Appeals devoted sufficient analysis to sustain the claim that the advertising restrictions promulgated by the CDA violated the FTC Act.

III

The Court of Appeals treated as distinct questions the sufficiency of the analysis of anticompetitive effects and the substantiality of the evidence supporting the Commission's conclusions. Because we decide that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable), we do not reach the question of the substantiality of the evidence supporting the Commission's conclusion.8

In National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984), we held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." Id., at 110. Elsewhere, we held that "no elaborate industry analysis is required to demonstrate
the anticompetitive character of " horizontal agreements among competitors to refuse to discuss prices, National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692 (1978), or to withhold a particular desired service, FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986) (quoting National Soc. of Professional Engineers, supra, at 692). In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. In National

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Collegiate Athletic Assn., the league's television plan expressly limited output (the number of games that could be televised) and fixed a minimum price. 468 U.S., at 99—100. In National Soc. of Professional Engineers, the restraint was "an absolute ban on competitive bidding." 435 U.S., at 692. In Indiana Federation of Dentists, the restraint was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." 476 U.S., at 459. As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. See Law v. National Collegiate Athletic Assn., 134 F.3d 1010, 1020 (CA10 1998) (explaining that quick-look analysis applies "where a practice has obvious anticompetitive effects"); Chicago Professional Sports Limited Partnership v. National Basketball Assn., 961 F.2d 667, 674—676 (CA7 1992) (finding quick-look analysis adequate after assessing and rejecting logic of proffered procompetitive justifications); cf. United States v. Brown University, 5 F.3d 658, 677—678 (CA3 1993) (finding full rule-of-reason analysis required where universities sought to provide financial aid to needy students and noting by way of contrast that the agreements in National Soc. of Professional Engineers and Indiana Federation of Dentists "embodied a strong economic self-interest of the parties to them").

The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious. Even on Justice Breyer's view that bars on truthful and verifiable price and quality advertising are prima facie anticompetitive, see post, at 4—5 (opinion concurring in part and dissenting in part), and place the burden of procompetitive justification on those who agree to adopt them, the very issue at the threshold of this case is whether professional price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule. Ultimately our disagreement with Justice Breyer turns on our different responses to this issue. Whereas he accepts, as the Ninth Circuit seems to have done, that the restrictions here were like restrictions on advertisement of price and quality generally, see, e.g., post, at 5, 7, 10, it seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition. The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising9 in a market characterized by striking disparities between the information available to the professional and the patient.10 Cf. Carr & Mathewson, The Economics of Law Firms: A Study in the Legal Organization of the Firm, 33 J. Law & Econ. 307, 309 (1990) (explaining that in a market for complex professional services, "inherent asymmetry of knowledge about the product" arises because "professionals supplying the good are knowledgeable [whereas] consumers demanding the good are uninformed"); Akerlof, The Market for 'Lemons': Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488 (1970) (pointing out quality problems in market characterized by asymmetrical information). In a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising. What is more, the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth-filling) or to something else (like a very tough walnut). See Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328, 1330 (1979); 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law §3—1, p. 86 (1995)

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(describing the common view that "the lay public is incapable of adequately evaluating the quality of medical services"). Patients' attachments to particular professionals, the rationality of which is difficult to assess, complicate the picture even further. Cf. Evans, Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?, in Occupational Licensure and Regulation 235—236 (S. Rottenberg ed. 1980) (describing long-term relationship between professional and client not as "a series of spot contracts" but rather as "a long-term agreement, often implicit, to deal with each other in a set of future unspecified or incompletely specified circumstances according to certain rules," and adding that "[i]t is not clear how or if these [implicit contracts] can be reconciled with the promotion of effective price competition in individual spot markets for particular services"). The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.

The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the CDA's restrictions on discount advertising began with the unexceptionable statements that "price advertising is fundamental to price competition," 128 F.3d, at 727, and that "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price," ibid. (citing Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388 (1992)). The court then acknowledged that, according to the CDA, the restrictions nonetheless furthered the "legitimate, indeed procompetitive, goal of preventing false and misleading price advertising." 128 F.3d, at 728. The Court of Appeals might, at this juncture, have recognized that the restrictions at issue here are very far from a total ban on price or discount advertising, and might have considered the possibility that the particular restrictions on professional advertising could have different effects from those "normally" found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board discount advertising.11 Instead, the Court of Appeals confined itself to the brief assertion that the "CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required," ibid., followed by the observation that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," ibid.

But these observations brush over the professional context and describe no anticompetitive effects. Assuming that the record in fact supports the conclusion that the CDA disclosure rules essentially bar advertisement of across-the-board discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here. Whether advertisements that announced discounts for, say, first-time customers, would be less effective at conveying information relevant to competition if they listed the original and discounted prices for checkups, X-rays, and fillings, than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to empirical but not a priori analysis. In a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping. It is also possible in principle that, even if across-the-board discount advertisements were more effective in drawing customers in the short run, the recurrence of some measure of intentional or accidental misstatement due to the

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breadth of their claims might leak out over time to make potential patients skeptical of any such across-the-board advertising, so undercutting the method's effectiveness. Cf. Akerlof, 84 Q. J. Econ., at 495 (explaining that "dishonest dealings tend to drive honest dealings out of the market"). It might be, too, that across-the-board discount advertisements would continue to attract business indefinitely, but might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive. Put another way, the CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong.12

In theory, it is true, the Court of Appeals neither ruled out the plausibility of some procompetitive support for the CDA's requirements nor foreclosed the utility of an evidentiary discussion on the point. The court indirectly acknowledged the plausibility of procompetitive justifications for the CDA's position when it stated that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," 128 F.3d, at 728. But because petitioner alone would have had the incentive to introduce such evidence, the statement sounds as though the Court of Appeals may have thought it was justified without further analysis to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy; the court's adversion to empirical evidence at the moment of this implicit burden-shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects.

The Court of Appeals was comparably tolerant in accepting the sufficiency of abbreviated rule-of-reason analysis as to the nonprice advertising restrictions. The court began with the argument that "[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." Ibid. (citing P. Areeda & H. Hovenkamp, Antitrust Law ¶1505, pp. 693—694 (1997 Supp.)). Although this sentence does indeed appear as cited, it is puzzling, given that the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services. The court came closest to addressing this latter question when it went on to assert that limiting advertisements regarding quality and safety "prevents dentists from fully describing the package of services they offer," 128 F.3d, at 728, adding that "[t]he restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so," ibid. This suggestion about output is also puzzling. If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices,13 see General Leaseways, Inc. v. National Truck Leasing Assn., 744 F.2d 588, 594—595 (CA7 1984) ("An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too–in other words, output will be

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restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects").

Although the Court of Appeals acknowledged the CDA's view that "claims about quality are inherently unverifiable and therefore misleading," 128 F.3d, at 728, it responded that this concern "does not justify banning all quality claims without regard to whether they are, in fact, false or misleading," ibid. As a result, the court said, "the restriction is a sufficiently naked restraint on output to justify quick look analysis." Ibid. The court assumed, in these words, that some dental quality claims may escape justifiable censure, because they are both verifiable and true. But its implicit assumption fails to explain why it gave no weight to the countervailing, and at least equally plausible, suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market. It is, indeed, entirely possible to understand the CDA's restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery, cf. Bates, 433 U.S., at 366 (claims relating to the quality of legal services "probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false"); id., at 383—384 ("[A]dvertising claims as to the quality of services ... are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction"), notwithstanding Justice Breyer's citation (to a Commission discussion that never faces the issue of the unverifiability of professional quality claims, raised in Bates), post, at 5.14

The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness if, for example, many dentists made very much the same sort of claims. And it is also of course possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

In light of our focus on the adequacy of the Court of Appeals's analysis, Justice Breyer's thorough-going, de novo antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals's review. The obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance. Had the Court of Appeals engaged in a painstaking discussion in a league with Justice Breyer's (compare his 14 pages with the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly Justice Breyer's treatment of the antitrust issues here is no "quick look." Lingering is more like it, and indeed Justice Breyer, not surprisingly, stops short of endorsing the Court of Appeals's discussion as adequate to the task at hand.

Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed

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market analysis" in order to "requir[e] some competitive justification," National Collegiate Athletic Assn., 468 U.S., at 110, it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating per se from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "per se" condemnation is justified. Id., at 104, n. 26. "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same–whether or not the challenged restraint enhances competition." Id., at 104. Indeed, the scholar who enriched antitrust law with the metaphor of "the twinkling of an eye" for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a 'spectrum' of adequate reasonableness analysis for passing upon antitrust claims: "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for… . Nevertheless, the quality of proof required should vary with the circumstances." P. Areeda, Antitrust Law ¶1507, p. 402 (1986).15 At the same time, Professor Areeda also emphasized the necessity, particularly great in the quasi-common law realm of antitrust, that courts explain the logic of their conclusions. "By exposing their reasoning, judges … are subjected to others' critical analyses, which in turn can lead to better understanding for the future." Id., ¶1500, at 364. As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.
It is so ordered.

Notes

1. The advisory opinions, which substantially mirror parts of the California Business and Professions Code, see Cal. Bus. & Prof. Code Ann. §§651, 1680 (West 1999), include the following propositions: "A statement or claim is false or misleading in any material respect when it: "a. contains a misrepresentation of fact; "b. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts; "c. is intended or is likely to create false or unjustified expectations of favorable results and/or costs; "d. relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors; "e. contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived. "Any communication or advertisement which refers to the cost of dental services shall be exact,

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without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import. "Any advertisement which refers to the cost of dental services and uses words of comparison or relativity–for example, 'low fees'–must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity." "Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect." 128 F.3d 720, 723—724 (CA9 1997) (some internal quotation marks omitted).

2. The disclosures include: "1. The dollar amount of the nondiscounted fee for the service[.] "2. Either the dollar amount of the discount fee or the percentage of the discount for the specific service[.] "3. The length of time that the discount will be offered[.] "4. Verifiable fees[.] "5. [The identity of] [s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." Id., at 724.

3. The FTC Act's prohibition of unfair competition and deceptive acts or practices, 15 U.S.C. § 45(a)(1), overlaps the scope of §1 of the Sherman Act, 15 U.S.C. § 1 aimed at prohibiting restraint of trade, FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454—455 (1986), and the Commission relied upon Sherman Act law in adjudicating this case, In re California Dental Assn., 121 F.T.C. 190, 292, n. 5 (1996).

4. Compare In re American Medical Assn., 94 F. T. C. 701, 983—984, aff'd, 638 F.2d 443 (CA2 1980), aff'd by an equally divided Court, 455 U.S. 676 (per curiam) (1982), FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485, 487—488 (CA7 1975), with Community Blood Bank v. FTC, 405 F.2d 1011, 1017 (CA8 1969).

5. Cf. Bogan v. Hodgkins, 166 F.3d 509, 514 & n.6 (CA2 1999); United States v. Brown University, 5 F.3d 658, 669 (CA3 1993); Chicago Professional Sports Limited Partnership v. National Basketball Assn., 961 F.2d 667, 674—676 (CA7 1992); Law v. National Collegiate Athletic Assn., 134 F.3d 1010, 1020 (CA10 1998); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 594—595 (CA1 1993).

6. This conclusion is consistent with holdings by a number of Courts of Appeals. In FTC v. National Comm'n on Egg Nutrition, supra, the Court of Appeals held that a nonprofit association "organized for the profit of the egg industry," id., at 488, fell within the Commission's jurisdiction. In American Medical Assn. v. FTC, supra, the Court of Appeals held that the "business aspects," id., at 448, of the AMA's activities brought it within the Commission's reach. These cases are consistent with our conclusion that an entity organized to carry on activities that will confer greater than de minimis or presumed economic benefits on profit-seeking members certainly falls within the Commission's jurisdiction. In Community Blood Bank v. FTC, supra, the Court of Appeals addressed the question whether the Commission had jurisdiction over a blood bank and an association of hospitals. It held that "the question of the jurisdiction over the corporations or other associations involved should be determined on an ad hoc basis," id., at 1018, and that the Commission's jurisdiction extended to "any legal entity without shares of capital which engages in business for profit within the traditional meaning of that language," ibid. (emphasis deleted). The Court of Appeals also said that "[a]ccording to a generally accepted definition 'profit' means gain from business or investment over and above

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expenditures, or gain made on business or investment where both receipts or payments are taken into account," id., at 1017, although in the same breath it noted that the term's "meaning must be derived from the context in which it is used," id., at 1016. Our decision here is fully consistent with Community Blood Bank, because the CDA contributes to the profits of at least some of its members, even on a restrictive definition of profit as gain above expenditures. (It should go without saying that the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit.) Nonetheless, we do not, and indeed, on the facts here, could not, decide today whether the Commission has jurisdiction over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players. We therefore do not foreclose the possibility that various paradigms of profit might fall within the ambit of the FTC Act. Nor do we decide whether a purpose of contributing to profit only in a presumed sense, as by enhancing professional educational efforts, would implicate the Commission's jurisdiction.

7. A letter from Bureau of Corporations Commissioner Joseph E. Davies to Senator Francis G. Newlands, the bill's sponsor and a member of the Conference Committee, written August 8, 1914, before the Conference Committee revisions, included a memorandum dated August 7, 1914, that expressed concern that the versions of the bill passed by the House and the Senate would not extend jurisdiction to purportedly nonprofit organizations, which might "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to law." Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H. R. 15613) to Create a Federal Trade Commission, 63d Cong., 2d Sess., 3 (1914).

8. We leave to the Court of Appeals the question whether on remand it can effectively assess the Commission's decision for substantial evidence on the record, or whether it must remand to the Commission for a more extensive rule-of-reason analysis on the basis of an enhanced record.

9. That false or misleading advertising has an anticompetitive effect, as that term is customarily used, has been long established. Cf. FTC v. Algoma Lumber Co., 291 U.S. 67, 79—80 (1934) (finding a false advertisement to be unfair competition).

10. "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." Goldfarb v. Virginia State Bar, 421 U.S. 773, 788—789, n. 17 (1975).

11. Justice Breyer claims that "the Court of Appeals did consider the relevant differences." Post, at 10. But the language he cites says nothing more than that per se analysis is inappropriate here and that "some caution" was appropriate where restrictions purported to restrict false advertising, see 128 F.3d, at 726—727. Caution was of course appropriate,

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but this statement by the Court of Appeals does not constitute a consideration of the possible differences between these and other advertising restrictions.

12. Justice Breyer suggests that our analysis is "of limited relevance," post, at 12, because "the basic question is whether this … theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case," ibid. He thinks that the Commission and the Court of Appeals "adequately answered that question," ibid., but the absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden-shifting of the kind accepted by Justice Breyer. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

13. Justice Breyer wonders if we "mea[n] this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality." Post, at 11. But as the preceding sentence shows, we intend simply to question the logic of the Court of Appeals's suggestion that the restrictions are anticompetitive because they somehow "affect output," 128 F.3d, at 728, presumably with the intent to raise prices by limiting supply while demand remains constant. We do not mean to deny that an agreement not to advertise service quality might have anticompetitive effects. We merely mean that, absent further analysis of the kind Justice Breyer undertakes, it is not possible to conclude that the net effect of this particular restriction is anticompetitive.

14. The Commission said only that " 'mere puffing' deceives no one and has never been subject to regulation.' " 121 F.T.C., at 318. The question here, of course, is not whether puffery may be subject to governmental regulation, but whether a professional organization may ban it.

15. Other commentators have expressed similar views. See, e.g., Kolasky, Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements, Antitrust 41, 43 (Spring 1998) ("[I]n applying the rule of reason, the courts, as with any balancing test, use a sliding scale to determine how much proof to require"); Piraino, Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act, 47 Vand. L. Rev. 1753, 1771 (1994) ("[C]ourts will have to undertake varying degrees of inquiry depending upon the type of restraint at issue. The legality of certain restraints will be easy to determine because their competitive effects are obvious. Other restrictions will require a more detailed analysis because their competitive impact is more ambiguous"). But see Klein, A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review, Antitrust 41, 42 (Spring 1990) (examination of procompetitive justifications "is by no means a full scrutiny of the proffered efficiency justification. It is, rather, a hard look at the justification to determine if it meets the defendant's burden of coming forward with–but not establishing–a valid efficiency justification").

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CALIFORNIA DENTAL ASSN. v. FTC (97-1625)
128 F.3d 720, vacated and remanded.

Opinion of Breyer, J.

SUPREME COURT OF THE UNITED STATES

No. 97—1625

CALIFORNIA DENTAL ASSOCIATION, PETITIONER v.
FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 24, 1999]

Justice Breyer, with whom Justice Stevens, Justice Kennedy, and Justice Ginsburg join, concurring in part and dissenting in part.

I agree with the Court that the Federal Trade Commission has jurisdiction over petitioner, and I join Parts I and II of its opinion. I also agree that in a "rule of reason" antitrust case "the quality of proof required should vary with the circumstances," that "[w]hat is required … is an enquiry meet for the case," and that the object is a "confident conclusion about the principal tendency of a restriction." Ante, at 23—24 (internal quotation marks omitted). But I do not agree that the Court has properly applied those unobjectionable principles here. In my view, a traditional application of the rule of reason to the facts as found by the Commission requires affirming the Commission–just as the Court of Appeals did below.

I

The Commission's conclusion is lawful if its "factual findings," insofar as they are supported by "substantial evidence," "make out a violation of Sherman Act §1." FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454—455 (1986). To determine whether that is so, I would not simply ask whether the restraints at issue are anticompetitive overall. Rather, like the Court of Appeals (and the Commission), I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?

A

The most important question is the first: What are the specific restraints at issue? See, e.g., National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 98—100 (1984) (NCAA); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,

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441 U.S. 1, 21—23 (1979). Those restraints do not include merely the agreement to which the California Dental Association's (Dental Association or Association) ethical rule literally refers, namely, a promise to refrain from advertising that is " 'false or misleading in any material respect.' " Ante, at 2 (quoting California Dental Code of Ethics §10 (1993), App. 33). Instead, the Commission found a set of restraints arising out of the way the Dental Association implemented this innocent-sounding ethical rule in practice, through advisory opinions, guidelines, enforcement policies, and review of membership applications. In re California Dental Assn., 121 F. T. C. 190 (1996). As implemented, the ethical rule reached beyond its nominal target, to prevent truthful and nondeceptive advertising. In particular, the Commission determined that the rule, in practice:

(1) "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable," Id., at 301.

(2) "precluded advertising … of across the board discounts," ibid.; and

(3) "prohibit[ed] all quality claims," id., at 308.

Whether the Dental Association's basic rule as implemented actually restrained the truthful and nondeceptive advertising of low prices, across-the-board discounts, and quality service are questions of fact. The Administrative Law Judge (ALJ) and the Commission may have found those questions difficult ones. But both the ALJ and the Commission ultimately found against the Dental Association in respect to these facts. And the question for us–whether those agency findings are supported by substantial evidence, see Indiana Federation, supra, at 454—455–is not difficult.

The Court of Appeals referred explicitly to some of the evidence that it found adequate to support the Commission's conclusions. It pointed out, for example, that the Dental Association's "advisory opinions and guidelines indicate that … descriptions of prices as 'reasonable' or 'low' do not comply" with the Association's rule; that in "numerous cases" the Association "advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard to their truth"; and that one advisory opinion "expressly states that claims as to the quality of services are inherently likely to be false or misleading," all "without any particular consideration of whether" such statements were "true or false." 128 F.3d 720, 729 (CA9 1997).

The Commission itself had before it far more evidence. It referred to instances in which the Association, without regard for the truthfulness of the statements at issue, recommended denial of membership to dentists wishing to advertise, for example, "reasonable fees quoted in advance," "major savings," or "making teeth cleaning . . . inexpensive." 121 F. T. C., at 301. It referred to testimony that "across-the-board discount advertising in literal compliance with the requirements 'would probably take two pages in the telephone book' and '[n]obody is going to really advertise in that fashion.' " Id., at 302. And it pointed to many instances in which the Dental Association suppressed such advertising claims as "we guarantee all dental work for 1 year," "latest in cosmetic dentistry," and "gentle dentistry in a caring environment." Id., at 308—310.

I need not review the evidence further, for this Court has said that "substantial evidence" is a matter for the courts of appeals, and that it "will intervene only in what ought

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to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." Universal Camera Corp. v. NLRB, 340 U.S. 474, 490—491 (1951). I have said enough to make clear that this is not
a case warranting our intervention. Consequently, we must decide only the basic legal question whether the three restraints described above unreasonably restrict competition.

B

Do each of the three restrictions mentioned have "the potential for genuine adverse effects on competition"? Indiana Federation, 476 U.S., at 460; 7 P. Areeda, Antitrust Law ¶1503a, pp. 372—377 (1986) (hereinafter Areeda). I should have thought that the anticompetitive tendencies of the three restrictions were obvious. An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices. But why should I have to spell out the obvious? To restrain truthful advertising about lower prices is likely to restrict competition in respect to price–"the central nervous system of the economy." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n. 59 (1940); cf., e.g., Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (price advertising plays an "indispensable role in the allocation of resources in a free enterprise system"); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). The Commission thought this fact sufficient to hold (in the alternative) that the price advertising restrictions were unlawful per se. See 121 F. T. C., at 307; cf. Socony-Vacuum, supra, at 222—228 (finding agreement among competitors to buy "spot-market oil" unlawful per se because of its tendency to restrict price competition). For present purposes, I need not decide whether the Commission was right in applying a per se rule. I need only assume a rule of reason applies, and note the serious anticompetitive tendencies of the price advertising restraints.

The restrictions on the advertising of service quality also have serious anticompetitive tendencies. This is not a case of "mere puffing," as the FTC recognized. See 121 F. T. C., at 317—318; cf. ante, at 21. The days of my youth, when the billboards near Emeryville, California, home of AAA baseball's Oakland Oaks, displayed the name of "Painless" Parker, Dentist, are long gone–along with the Oakland Oaks. But some parents may still want to know that a particular dentist makes a point of "gentle care." Others may want to know about 1-year dental work guarantees. To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services. That, at any rate, is the theory of the Sherman Act. And it is rather late in the day for anyone to deny the significant anticompetitive tendencies of an agreement that restricts competition in any legitimate respect, see, e.g., Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930); United States v. First Nat. Pictures, Inc., 282 U.S. 44, 54—55 (1930), let alone one that inhibits customers from learning about the quality of a dentist's service.

Nor did the Commission rely solely on the unobjectionable proposition that a restriction on the ability of dentists to advertise on quality is likely to limit their incentive to compete on quality. Rather, the Commission pointed to record evidence affirmatively

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establishing that quality-based competition is important to dental consumers in California. 121 F. T. C., at 309—311. Unsurprisingly, these consumers choose dental services based at least in part on "information about the type and quality of service." Id., at 249. Similarly, as the Commission noted, the ALJ credited testimony to the effect that "advertising the comfort of services will 'absolutely' bring in more patients," and, conversely, that restraining the ability to advertise based on quality would decrease the number of patients that a dentist could attract. Id., at 310. Finally, the Commission looked to the testimony of dentists who themselves had suffered adverse effects on their business when forced by petitioner to discontinue advertising quality of care. See id., at 310—311.

The FTC found that the price advertising restrictions amounted to a "naked attempt to eliminate price competition." Id., at 300. It found that the service quality advertising restrictions "deprive consumers of information they value and of healthy competition for their patronage." Id., at 311. It added that the "anticompetitive nature of these restrictions" was "plain." Ibid. The Court of Appeals agreed. I do not believe it possible to deny the anticompetitive tendencies I have mentioned.

C

We must also ask whether, despite their anticompetitive tendencies, these restrictions might be justified by other procompetitive tendencies or redeeming virtues. See 7 Areeda, ¶1504, at 377—383. This is a closer question–at least in theory. The Dental Association argues that the three relevant restrictions are inextricably tied to a legitimate Association effort to restrict false or misleading advertising. The Association, the argument goes, had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order effectively to stop dentists from making unverifiable claims about price or service quality, which claims would mislead the consumer.

The problem with this or any similar argument is an empirical one. Notwithstanding its theoretical plausibility, the record does not bear out such a claim. The Commission, which is expert in the area of false and misleading advertising, was uncertain whether petitioner had even made the claim. It characterized petitioner's efficiencies argument as rooted in the (unproved) factual assertion that its ethical rule "challenges only advertising that is false or misleading." 121 F. T. C., at 316 (emphasis added). Regardless, the Court of Appeals wrote, in respect to the price restrictions, that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." 128 F.3d, at 728. With respect to quality advertising, the Commission stressed that the Association "offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts." 121 F. T. C., at 319. Nor did the Court of Appeals think that the Association's unsubstantiated contention that "claims about quality are inherently unverifiable and therefore misleading" could "justify banning all quality claims without regard to whether they are, in fact, false or misleading." 128 F.3d, at 728.

With one exception, my own review of the record reveals no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful claims. The one exception is the obvious fact that one can stop untruthful advertising if one prohibits all advertising. But since the Association made virtually no effort to sift the false from the true, see 121 F. T. C., at

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316—317, that fact does not make out a valid antitrust defense. See NCAA, 468 U.S., at 119; 7 Areeda, ¶1505, at 383—384.

In the usual Sherman Act §1 case, the defendant bears the burden of establishing a procompetitive justification. See National Soc. of Professional Engineers v. United States, 435 U.S. 679, 695 (1978); 7 Areeda, ¶1507b, at 397; 11 H. Hovenkamp, Antitrust Law ¶1914c, pp. 313—315 (1998); see also Law v. National Collegiate Athletic Assn., 134 F.3d 1010, 1019 (CA10), cert. denied, 525 U.S. ___ (1998); United States v. Brown Univ., 5 F.3d 658, 669 (CA3 1993); Capital Imaging Associates v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 543 (CA2), cert. denied, 510 U.S. 947 (1993); Kreuzer v. American Academy of Periodontology, 735 F.2d 1479, 1492—1495 (CADC 1984). And the Court of Appeals was correct when it concluded that no such justification had been established here.

D

I shall assume that the Commission must prove one additional circumstance, namely, that the Association's restraints would likely have made a real difference in the marketplace. See 7 Areeda, ¶1503, at 376—377. The Commission, disagreeing with the ALJ on this single point, found that the Association did possess enough market power to make a difference. In at least one region of California, the mid-Peninsula, its members accounted for more than 90% of the marketplace; on average they accounted for 75%. See 121 F. T. C., at 314. In addition, entry by new dentists into the market place is fairly difficult. Dental education is expensive (leaving graduates of dental school with $50,000—$100,000 of debt), as is opening a new dentistry office (which costs $75,000—$100,000). Id., at 315—316. And Dental Association members believe membership in the Association is important, valuable, and recognized as such by the public. Id., at 312—313, 315—316.

These facts, in the Court of Appeals' view, were sufficient to show "enough market power to harm competition through [the Association's] standard setting in the area of advertising." 128 F.3d, at 730. And that conclusion is correct. Restrictions on advertising price discounts in Palo Alto may make a difference because potential patients may not respond readily to discount advertising by the handful (10%) of dentists who are not members of the Association. And that fact, in turn, means that the remaining 90% will prove less likely to engage in price competition. Facts such as these have previously led this Court to find market power–unless the defendant has overcome the showing with strong contrary evidence. See, e.g., Indiana Federation, 476 U.S., at 456—457; cf. United States v. Loew's Inc., 371 U.S. 38, 45 (1962); Brown Shoe Co. v. United States, 370 U.S. 294, 341—344 (1962); accord, United States v. Aluminum Co. of America, 148 F.2d 416, 424 (CA2 1945). I can find no reason for departing from that precedent here.

II

In the Court's view, the legal analysis conducted by the Court of Appeals was insufficient, and the Court remands the case for a more thorough application of the rule of reason. But in what way did the Court of Appeals fail? I find the Court's answers to this question unsatisfactory–when one divides the overall Sherman Act question into its traditional component parts and adheres to traditional judicial practice for allocating the burdens of persuasion in an antitrust case.

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Did the Court of Appeals misconceive the anticompetitive tendencies of the restrictions? After all, the object of the rule of reason is to separate those restraints that "may suppress or even destroy competition" from those that "merely regulat[e] and perhaps thereby promot[e] competition." Board of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918). The majority says that the Association's "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." Ante, at 14. It adds that

"advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition." Ante, at 15.

And it criticizes the Court of Appeals for failing to recognize that "the restrictions at issue here are very far from a total ban on price or discount advertising" and that "the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition … ." Ante, at 16.

The problem with these statements is that the Court of Appeals did consider the relevant differences. It rejected the legal "treatment" customarily applied "to classic horizontal agreements to limit output or price competition"–i.e., the FTC's (alternative) per se approach. See 128 F.3d, at 726—727. It did so because the Association's "policies do not, on their face, ban truthful nondeceptive ads"; instead, they "have been enforced in a way that restricts truthful advertising." Id., at 727. It added that "[t]he value of restricting false advertising … counsels some caution in attacking rules that purport to do so but merely sweep too broadly." Ibid.

Did the Court of Appeals misunderstand the nature of an anticompetitive effect? The Court says:

"If quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and . . . the producers' supply . . . is normally relevant in determining whether a . . . limitation has the anticompetitive effect of artificially raising prices." Ante, at 19.

But if the Court means this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality, I believe it is the majority, and not the Court of Appeals, that is mistaken. An agreement not to advertise, say, "gentle care" is anticompetitive because it imposes an artificial barrier against each dentist's independent decision to advertise gentle care. That barrier, in turn, tends to inhibit those dentists who want to supply gentle care from getting together with those customers who want to buy gentle care. See P. Areeda & H. Hovenkamp, Antitrust Law ¶1505´ ;, p. 404 (Supp. 1998). There is adequate reason to believe that tendency present in this case. See supra, at 5—6.

Did the Court of Appeals inadequately consider possible procompetitive justifications? The Court seems to think so, for it says:

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"[T]he [Association's] rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators)." Ante, at 17—18.

That may or may not be an accurate assessment of the Association's motives in adopting its rule, but it is of limited relevance. Cf. Chicago Board of Trade, supra, at 238. The basic question is whether this, or some other, theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case. Both court and Commission adequately answered that question.

The Commission found that the defendant did not make the necessary showing that a redeeming virtue existed in practice. See 121 F. T. C., at 319—320. The Court of Appeals, asking whether the rules, as enforced, "augment[ed] competition and increase[d] market efficiency," found the Commission's conclusion supported by substantial evidence. 128 F.3d, at 728. That is why the court said that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing"–which is to say that the record provides no evidence that the effects, though anticompetitive, are nonetheless redeemed or justified. Ibid.

The majority correctly points out that "petitioner alone would have had the incentive to introduce such evidence" of procompetitive justification. Ante, at 18. (Indeed, that is one of the reasons defendants normally bear the burden of persuasion about redeeming virtues. See supra, at 8.) But despite this incentive, petitioner's brief in this Court offers nothing concrete to counter the Commission's conclusion that the record does not support the claim of justification. Petitioner's failure to produce such evidence itself "explain[s] why [the lower court] gave no weight to the . . . suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market." Ante, at 20—21.

With respect to the restraint on advertising across-the-board discounts, the majority summarizes its concerns as follows: "Assuming that the record in fact supports the conclusion that the [Association's] disclosure rules essentially bar advertisement of [such] discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here." Ante, at 17. I accept, rather than assume, the premise: The FTC found that the disclosure rules did bar advertisement of across-the-board discounts, and that finding is supported by substantial evidence. See supra, at 3—4. And I accept as literally true the conclusion that the Court says follows from that premise, namely, that "net anticompetitive effects" do not "obviously" follow from that premise. But obviousness is not the point. With respect to any of the three restraints found by the Commission, whether "net anticompetitive effects" follow is a matter of how the Commission, and, here, the Court of Appeals, have answered the questions I laid out at the beginning. See supra, at 2. Has the Commission shown that the restriction has anticompetitive tendencies? It has. Has the Association nonetheless shown offsetting virtues? It has not. Has the Commission shown market power sufficient for it to believe that the restrictions will likely make a real world difference? It has.

The upshot, in my view, is that the Court of Appeals, applying ordinary antitrust principles, reached an unexceptional conclusion. It is the same legal conclusion that this

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Court itself reached in Indiana Federation–a much closer case than this one. There the Court found that an agreement by dentists not to submit dental X rays to insurers violated the rule of reason. The anticompetitive tendency of that agreement was to reduce competition among dentists in respect to their willingness to submit X rays to insurers, see 476 U.S., at 456–a matter in respect to which consumers are relatively indifferent, as compared to advertising of price discounts and service quality, the matters at issue here. The redeeming virtue in Indiana Federation was the alleged undesirability of having insurers consider a range of matters when deciding whether treatment was justified–a virtue no less plausible, and no less proved, than the virtue offered here. See id., at 462—464. The "power" of the dentists to enforce their agreement was no greater than that at issue here (control of 75% to 90% of the relevant markets). See id., at 460. It is difficult to see how the two cases can be reconciled.

* * *

I would note that the form of analysis I have followed is not rigid; it admits of some variation according to the circumstances. The important point, however, is that its allocation of the burdens of persuasion reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion, cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 266 (1960), and the latter called forth the criticism that the "Government always wins," United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). I hope that this case does not represent an abandonment of that basic, and important, form of analysis.

For these reasons, I respectfully dissent from Part III of the Court's opinion.

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CALIFORNIA DENTAL ASSN. v. FTC (97-1625)
128 F.3d 720, vacated and remanded.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued.
The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.
See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

CALIFORNIA DENTAL ASSOCIATION v. FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97—1625. Argued January 13, 1999–Decided May 24, 1999

Petitioner California Dental Association (CDA), a nonprofit association of local dental societies to which about three-quarters of the State's dentists belong, provides desirable insurance and preferential financing arrangements for its members, and engages in lobbying, litigation, marketing, and public relations for members' benefit. Members agree to abide by the CDA's Code of Ethics, which, inter alia, prohibits false or misleading advertising. The CDA has issued interpretive advisory opinions and guidelines relating to advertising. Respondent Federal Trade Commission brought a complaint, alleging that the CDA violated §5 of the Federal Trade Commission Act (Act), 15 U.S.C. § 45 in applying its guidelines so as to restrict two types of truthful, nondeceptive advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA and found a §5 violation. As relevant here, the Commission held that the advertising restrictions violated the Act under an abbreviated rule-of-reason analysis. In affirming, the Ninth Circuit sustained the Commission's jurisdiction and concluded that an abbreviated or "quick look" rule-of-reason analysis was proper in this case.

Held:

1. The Commission's jurisdiction extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members. The Act gives the Commission authority over a "corporatio[n]," 15 U.S. C. §45(a)(2), "organized to carry on business for its own profit or that of its members," §44. The Commission's claim that the Act gives it jurisdiction over nonprofit associations whose activities provide substantial economic benefits to their for-profit members is clearly the better reading of the Act, which does not require that a supporting organization must devote itself entirely to its members' profits or say anything about how much of the entity's activities must go to raising the members' bottom lines. There is thus no apparent reason to let the Act's application turn on meeting some threshold percentage of activity for this purpose or even a softer formulation calling for a substantial part of the entity's total activities to be

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aimed at its members' pecuniary benefit. The Act does not cover all membership organizations of profit-making corporations without more. However, the economic benefits conferred upon CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit," which is the Act's jurisdictional touchstone. The Act's logic and purpose comport with this result, and its legislative history is not inconsistent with this interpretation. Pp. 7—11.

2. Where any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the abbreviated analysis the Ninth Circuit performed in this case. Pp. 11—24.

(a) An abbreviated or "quick-look" analysis is appropriate when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets. See, e.g., National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85. This case fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious, for the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect or possibly no effect at all on competition. Pp. 11—14.

(b) The discount and nondiscount advertising restrictions are, on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient. The existence of significant challenges to informed decisionmaking by the customer for professional services suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment. In applying cursory review, the Ninth Circuit brushed over the professional context and described no anticompetitive effects from the discount advertising bar. The CDA's price advertising rule appears to reflect the prediction that any costs to competition associated with eliminating across-the-board advertising will be outweighed by gains to consumer information created by discount advertising that is exact, accurate, and more easily verifiable. This view may or may not be correct, but it is not implausible; and neither a court nor the Commission may initially dismiss it as presumptively wrong. The CDA's plausible explanation for its nonprice advertising restrictions, namely that restricting unverifiable quality claims would have a procompetitive effect by preventing misleading or false claims that distort the market, likewise rules out the Ninth Circuit's use of abbreviated rule-of-reason analysis for those restrictions. The obvious anticompetitive effect that triggers such analysis has not been shown. Pp. 14—21.

(c) Saying that the Ninth Circuit's conclusion required a more extended examination of the possible factual underpinnings than it received is not necessarily to call for the fullest market analysis. Not every case attacking a restraint not obviously anticompetitive is a candidate for plenary market examination. There is generally no categorical line between restraints giving rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required is an enquiry meet for the case, looking to a restraint's circumstances, details, and logic. Here, a less quick look was required for the initial assessment of the CDA's advertising restrictions. Pp. 21—24.

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128 F.3d 720, vacated and remanded.

Souter, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which Rehnquist, C. J., and O'Connor, Scalia, and Thomas, JJ., joined. Breyer, J., filed an opinion concurring in part and dissenting in part, in which Stevens, Kennedy, and Ginsburg, JJ., joined.

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INVESTIGATIVE TEMPLATE
For
ANTI-TRUST/ANTI-COMPETITIVE FACTFINDING

Exclusive Dealing or Requirements Contracts

1. Has any competitor agreed to provide all, or a stated percentage, of the customer's requirements? If so, what is the length of the agreement?

2. Has a customer of any competitor agreed to buy all, or a stated percentage, of the competitor's production? If yes, what is the length of the agreement?

3. Is there any reason to believe that any competitors have minimum purchase agreements with any wholesalers or retailers?

Market Allocation Issues

1. Is there any indication that any competitors have agreed that one of them will not sell their product in a particular town, city, state or region?

2. Is there any indication that any competitors have agreed that one of them will not sell their product to a particular customer?

Preferential Treatment for Some Customers

1. Is there any indication that competitors sell the same products to customers at different prices?

2. Is there any indication that competitors offer promotional programs (in-store displays, street money or coupon circulars) to some, but not all, of their customers?

3. Is there any indication that competitors offers price discounts or reductions to some, but not all, of its customers?

4. Is there any indication that competitors has suggested that a particular customer will get preferred treatment or better treatment than anyone else?

5. Is there any indication that competitors has promised a particular customer that no other customer will be more favorably treated than the particular customer?

Product Advertising and Marketing

1. Is there any indication that agents or employees of any competition have made any statements (either orally or in writing) to other competitors, retailers, consumers or the general public that directly or indirectly cast the client or any products in a negative light?

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2. Is there any indication that agents or employees of any competition have made any oral or written statements about the client or any products that are partially or completely untrue?

3. Is there any indication that agents or employees for any competition have made comparisons between their company and the client or their product and any product?

4. Is there any indication that a competitor of the client has made false claims about the qualities or characteristics of its own product?

5. Do any competitors increase their advertising when new products are introduced into the market? If so, describe the types of advertising that are increased (national, regional, local, coupons, etc.) and the duration of the initiative.

Group Boycotts

1. Is there any indication that any competitors have agreed that neither company will do business with certain wholesalers or retailers?

2. Is there any indication that any competitors have agreed to do business with only certain wholesalers or retailers?

3. Is there any indication that any competitors have agreed to do business with wholesalers or retailers only on certain terms?

4. Is there any indication that any competitors have discussed their policies for negotiating or otherwise dealing with wholesalers or retailers?

Predatory Pricing

1. Has a competitor of the client recently reduced the price of their product to wholesalers and/or retailers? If yes, is there any indication as to what motivated the price reduction?

2. Has the retail price of any competitor's products recently decreased? If yes, is there any indication as to what motivated the price reduction?

3. Do any competitors periodically reduce the price of their product? If yes, is there any indication as to what motivates the price reduction?

4. Is there any indication that a competitor of the client is selling, or periodically sells, a product at below cost prices (that is, the marginal price is less than the marginal cost)?

5. Has any agent or employee of a competitor made any written or oral statements about his or her company's competitive power, which suggest a desire to harm a competitor?

6. Do any competitors lower prices, offer greater discounts or coupons or increase advertising when a new product is introduced into the market?

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7. Has any employee of a competitor made any written or oral statements suggesting that their company is able to project sales or profits without reference to marketplace competition?

8. Has any employee co petition, written or said anything that might be taken as an expression of intent to monopolize, to capture a dominant share of the market or to drive competitors out of business?

9. When competitors discuss their sales objectives, do they state the objectives in negative terms? That is, do they indicate that their goal is to reduce sales (or another company's) or market share rather than increasing their own sales?

10. Has any agent of any competition written or said anything suggesting that their company's size, scope or market share enhances its ability to "do things" or influence competitors?

Price Fixing

1. Other than in the supplier/customer relationship, is there any indication that competitors have discussed or agreed to the prices they will each charge to their individual customers?

2. Other than in the supplier/customer relationship, is there any indication that competitors have discussed their general price ranges or policies with each other?

3. Other than in the supplier/customer relationship, is there any indication that competitors have discussed or agreed to product discounts?

4. Other than in the supplier/customer relationship, is there any indication that competitors have discussed their discount strategies or policies with each other?

5. Other than in the supplier/customer relationship, is there any indication that competitors have discussed or agreed to product or sales warranties?

6. Other than in the supplier/customer relationship, is there any indication that competitors have discussed inventory strategy, marketing and product plans, market surveys or studies, production plans or capabilities or any other proprietary or secret information?

7. Other than in the supplier/customer relationship, is there any indication that competitors have discussed or agreed to offer specified terms of credit to their individual customers?

8. Other than in the supplier/customer relationship, is there any indication that competitors have discussed their credit offering policies with each other?

9. Other than in the supplier/customer relationship, is there any indication that competitors have discussed or agreed to offer any other sales term to their customers?

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10. Have any meetings taken place between competitors where prices, discounts, warranties, terms and conditions of sale (including credit), costs, cost coverage or profit margins were discussed?

11. Has one company obtained information about a competitor's business directly from the competitor (rather than from public sources or from customers of the competitor that were not necessary to consummate a legitimate supplier/customer relationship or to serve a particular customer jointly)?

12. More specifically, have any competitors directly given a price list to another company?

13. Have any competitors announced pricing actions far in advance of implementation (presumably to "test the waters" for a response by competitors)?

Refusals to Deal

1. Are there any potential buyers of any competitors that a competitor's refuse to sell to? If so, does the potential buyer carry another competitor's product?

Product Sales

1. Is there any indication that a competitor of the client has paid, or offered to pay, a wholesaler or retailer to refuse to carry any products or disfavor the client in any way? The payments may occur in a variety of forms, including payoffs, bribes, gifts, display purchasing or participating in coupon programs.

2. Is there any indication that a competitor of the client has discounted, or offered to discount, the price of its products to a wholesaler or retailer in exchange for the retailer's refusal to carry any products or disfavor the client in any way? The discount may appear in the form of a direct price discount on the product or indirectly by the competitor paying a "fee" or participating in coupon or marketing programs.

3. Is there any indication that a competitor of the client has provided, or offered to provide, services (shelf stocking, display set-ups, etc.) to a retailer in exchange for the retailer's refusal to carry any products or disfavor the client in any way?

4. Is there any indication that a competitor of the client has given, or offered to give, any other type of benefit to a retailer in exchange for the retailer's refusal to carry any products or disfavor the client in any way?

5. Is there any indication that a competitor of the client has paid or offered to pay ("under the table money," payoffs or bribes) a retailer for favorable treatment of their company or product?

6. Is there any indication that a competitor of the client has discounted or offered to discount the price of its products in exchange for favorable treatment of their company or product?

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7. Is there any indication that a competitor of the client has provided or offered to provide services on any kind to a retailer in exchange for the retailer's favorable treatment of the company or the company's product?

8. Is there any indication that a competitor of the client has given, or offered to give, any other type of benefit to a retailer in exchange for the retailer's favorable treatment of the company or the company's product?
9. Is there any reason to believe that a competitor of the client might attempt to skew the results of a new product's test market research (for example, buying all of the product in the test market to misrepresent market demand, flooding the test market with coupons for the competitor's goods or tampering with in-store displays, etc.)? If so, please explain.

10. Is there any indication that any competitors have or will attempt to skew the results of the client's market research?

11. Is there any indication that, on a personal level, employees of any competitors have provided, or offered to provide, wholesaler or retailer employees with money or gifts in exchange for refusing to carry client products or for disfavoring the client in any way?

12. Is there any indication that, on a personal level, employees for any competitors have provided, or offered to provide, wholesaler and retailer employees with money or gifts in exchange for favoring their company or products in any way?

Trade Associations

1. Have competitors of the client participated in any meetings, however informal, that discussed any of the above questions?

Reselling the Manufacturers Product

1. Is there any indication that any competitors are influencing the customer's resale prices? That is, is there any indication that any competitor influences a retailer's sales price in any way?

2. Is there any indication that the purchasing and sales departments of any competitors are sharing information regarding a particular customer?

3. Is there any indication that different departments of any competitors collaborate in any manner in an effort to increase the company's market?

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RECENT DEVELOPMENTS IN ANTITRUST LAW

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I. SUPREME COURT

A. *California Dental Association v. Federal Trade Commission*, 119 S. Ct. 1604 (1999).

The CDA, a nonprofit professional association of dentists, challenged an FTC order requiring it to refrain from enforcing its advertising restrictions. The CDA is comprised of approximately 75 percent of the state's dentists. It provides advantageous insurance; functions as a lobbying group for the profession; requires compliance with the Code of Ethics, including a prohibition on false and misleading advertising; and had interpreted the pertinent false advertising regulation as barring any price or quality advertising.

The FTC challenged the interpretations under Section 5 of the FTC Act. The ALJ held that the FTC had jurisdiction over the CDA because the organization provided its members with financial benefits. It also found a Section 5 violation, observing that, under *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988), proof of market power is not required.

The Commission affirmed, but treated the CDA's restrictions as illegal *per se*. Alternatively, the Commission held that the restrictions constituted violations under truncated rule-of-reason analysis. The Ninth Circuit affirmed on the alternative, "quick-look" rule-of-reason holding.

Justice Souter, writing for the Supreme Court held that:

- The FTC had jurisdiction over the CDA. It found that the FTC has jurisdiction over "anticompetitive practices by nonprofit associations whose activities provid[e] substantial economic benefits to their for-profit members' businesses." Although the Court noted that the relation between profit and association membership must be proximate before jurisdiction will lie, it found that "the CDA's contributions to the profits of its individual members [to be] proximate and apparent." *Id*. at 1611.

- Quick-look analysis is inappropriate where the likelihood of anticompetitive effects is not obvious. The Court emphasized that the context of the market must be considered before a professional practice is condemned under the antitrust laws. It noted that the CDA's restrictions, on their face, were meant to avoid misleading advertising. Noting that, within the dentistry profession, where advertising is rare, comparability of service is difficult to ascertain and patients attach irrationally to particular dentists, the Court held that a more detailed examination of the market is required.

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- The Court found that, since it was not implausible that procompetitive effects could outweigh the anticompetitive effects of the restrictions, the Commission was not justified in dismissing the CDA's defense. Only an obvious anticompetitive effect will trigger the abbreviated analysis.

- Although the Court rejected the appropriateness of the more-truncated analysis, it stated that a "full blown market analysis" was not required, either. *Id*. at 1617. The question remained whether the restraint enhances competition. The Court offered guidance for this inquiry: "What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of the restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least a quicker) look, in place of a more sedulous one." *Id*.

Justices Breyer, Stevens, Kennedy and Ginsburg concurred in part and dissented in part. They would have affirmed, rather than remanding, under the traditional, four-prong antitrust inquiry.

II. IMMUNITIES

A. Parker Immunity

In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that Congress did not intend for states to be subject to the federal antitrust laws. Furthermore, in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court held that a state may cloak its municipalities with immunity if it does so expressly. Thus, a local entity seeking protection from the federal antitrust laws must prove "a state policy to displace competition." *Id*. at 39.

1. *Neo Gen Screening v. New England Newborn Screening Program*,1999 WL 486383 (1st Cir. 1999)

The Court found that the *Parker* doctrine includes actions of the state executive branch. Under *Parker*, the First Circuit found that University of Massachusetts' newborn screening program was immune from the antitrust laws.

2. *Surgical Care Center of Hammond v. Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999)

A privately owned hospital filed claims under Sections 1 and 2 of the Sherman Act against a Louisiana District's public hospital. A Louisiana statute authorized the hospital service district to engage in joint ventures "notwithstanding any other laws to the contrary." *Id*. at 235. The Fifth Circuit refused to extend *Parker* immunity to the hospital district. The Court distinguished between statutes that establish a state policy of displacing competition and statutes that merely allow a municipality to do what other businesses may do. Although the Court refused to

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identify any particular "formula or expression" that a state must use to confer immunity to a municipality, it held that Louisiana's statute served only to "level the playing field" between its hospital districts and other private hospitals, not to confer antitrust immunity. *Id*. at 234-35.

3. *Beer & Pop Warehouse v. John. E. Jones*, 41 F. Supp. 2d 552 (M.D. Penn. 1999)

Manufacturers, distributors and retailers of malt liquor sued the state, alleging that the Pennsylvania Liquor Code, which regulates the pricing of their products, violated Section 1 of the Sherman Act. The Code provides that malt liquor price reductions must be maintained for at least 120 days, unless the price reduction was made for "good cause." Any "good cause" reduction would be reviewed by the Pennsylvania Liquor Control Board. The Code also provided that any price reduction must be offered to all other distributors or retailers in a defined geographic area.

The court determined that, because this case involved a "hybrid restraint of trade" that allowed private entities to set prices, *Parker* immunity did not apply. The court determined that the Liquor Code's restraints were *per se* violations of the Sherman Act and thus held the statute unconstitutional under *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

B. Noerr-Pennington

In *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court held that a party who petitions the government for redress is generally immune from antitrust liability when the resulting government action creates a retraint on trade. This immunity does not apply, however, to petitions or lawsuits that are a "mere sham" to cover what is actually an attempt to interfere directly with the business relationships of a competitor.

1. *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999)

The United States Court of Appeals for the Third Circuit considered whether the "sham" exception to *Noerr-Pennington* immunity applies if the defendant made misrepresentations in its petition to the government. The court noted that the Supreme Court had expressly declined to decide this question in *Prof. Real Estate Investors v. Columbia*, 508 U.S. 49, 61 (1993).

Here, the Third Circuit refused to carve out a new exception to *Noerr-Pennington* immunity but instead decided that, even if the defendant made misrepresentations in its government petition, they were not material to the question of whether its petition had an objective basis. Stated differently, the defendant's alleged misrepresentations did not "affect the very core" of its petition. *Cheminor*, 168 F.3d at 124. The court arrived at this conclusion because of evidence that the governmental entity involved did not rely on the defendant's misrepresentations in making its ultimate determination. The court noted that requiring misrepresentation to be

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material to bar *Noerr-Pennington* immunity is consistent with the approaches taken by the Ninth Circuit and the D.C. Circuit. *Id.* [FN12].

2. *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp.*, __ F.3d __, 1999 WL 541268 (3d Cir. 1999)

A few months later, the Third Circuit again considered arguments that misrepresentations in a government petition would trigger the "sham" exception to *Noerr-Pennington* immunity. Again noting that the Supreme Court had never decided the precise issue under consideration, the court cited *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), for the propositions that *Parker* state immunity is not lost because of governmental corruption and that a court should not "look behind the actions of state sovereigns" in these situations. The court imported this rule to the current case, applying it in the *Noerr-Pennington* context. 1999 WL at *8-9. The court concluded that liability for injuries caused by state action are precluded, "even where it is alleged that a private party urging the action did so by bribery, deceit, or other wrongful conduct." *Id.* at *9. In a footnote, the court attempted to distinguish *Cheminor* on its facts. *Id.* [FN2]. The dissent argued that the majority opinion conflicted with *Cheminor* and cases in other circuits. *Id.* at *25.

III. MERGERS AND ACQUISITIONS

A. *Midwest Machinery, Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439 (8th Cir. 1999)

Customer brought suit under Section 7 of the Clayton Act after Northwest had completed its merger with Republic Airlines. Northwest argued that the cause of action under Section 7 was extinguished when the merger was completed and only one corporation was left in existence. The district court accepted Northwest's argument and dismissed the complaint. On appeal, the Court of Appeals held that, even though Section 7 is aimed primarily at arresting anticompetitive acquisitions in their incipiency, the statute also extends to completed transactions. Thus, the court reversed the judgment of the district court and remanded the case for further proceedings.

B. *Federal Trade Commission v. Tenet Health Care Corp.*, __F.3d __, 1999 WL 512108 (8th Cir. 1999)

The Court of Appeals for the Eighth Circuit reversed the district court's temporary restraining order prohibiting the merger of two Missouri hospitals. The appellate court concluded that the FTC had not met its burden of proving that the merger would substantially lessen competition in the relevant geographic market. The court held that the FTC had produced insufficient evidence of a well-defined relevant geographic market. The court found that the district court erroneously ignored practicable alternatives to the merged hospital, the enhanced efficiency of the merged hospital, and the commercial realities that both hospitals faced prior to the merger. The Court of Appeals concluded that the FTC had failed to meet the high standard of "likelihood of success on the merits of the section 7 claim" to justify an award of injunctive relief. *Id*. at *7.

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IV. MONOPOLIZATION - *Stearns Airport Equipment v. FMC*, 170 F.3d 518 (5th Cir. 1999)

Plaintiff and defendant were competing manufacturers of airplane boarding bridges. Plaintiff alleged that the defendant was a monopolist and that its marketing strategy amounted to exclusionary conduct in violation of Section 2 of the Sherman Act. Defendant had lobbied municipalities to avoid competitive bidding and to induce them to buy directly from defendant. It had also lobbied municipalities to adopt purchasing specifications that mirrored its product and excluded the plaintiff's product.

The court found that, unlike in *Aspen Skiing Co. v. Aspen Highlands*, 472 U.S. 585 (1985), the defendant in the case at bar had a business justification for its conduct independent from the alleged motivation to harm its competitor. Observing that the marketing of the product was part of the competition and that the ultimate purchasing decision rested with the municipality, the court concluded that the antitrust laws were not offended.

V. VERTICAL RESTRAINTS - *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.*, __F.3d __, 1999 WL 515825 (2d Cir. 1999).

A manufacturer of blood analysis machines brought antitrust claims against a competitor who had entered into exclusive dealing arrangements with its distributors. The court affirmed dismissal of the claims for the defendant. The court found that the distributors involved with the exclusive dealing contracts were only marginally important to plaintiff's distribution opportunities. It held that because the plaintiff had other avenues of distribution that were not affected by the exclusive dealing arrangements, and its products could still reach the ultimate consumer, the arrangement did not offend the antitrust laws. The court also noted that the arrangement was for a short time period (1 year) and was easily terminated (on 60 days' notice).

VI. HORIZONTAL RESTRAINTS

A. *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, __F.3d__, 1999 WL 701645 (7th Cir. 1999)

JTC, a road contractor ("applicator"), sued other applicators and asphalt producers under Sections 1 and 2 of the Sherman Act. After JTC settled with the asphalt producers and certain applicator-defendants, the remaining applicator-defendants moved for summary judgment. These defendants argued that, if they had conspired to allocate the market and to raise price, JTC could only have benefited by the umbrella of the conspiracy. Thus, they argued, JTC could not show antitrust injury on its remaining claims against the applicator-defendants. Accepting this argument, the district court granted summary judgment dismissing the remaining claims.

On appeal, the plaintiff argued that one element of the alleged conspiracy was to punish and

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control those competitors who refused to join the conspiracy, such as the plaintiff, by inducing their supplier of asphalt (one of the settling defendants) to cut off the asphalt supply to such maverick applicators. The applicator-defendants allegedly did this by "paying" the asphalt supplier for conspiracy-policing services in the form of higher-than-market prices for the asphalt they purchased. The Court of Appeals found that this theory sufficiently alleged an antitrust injury, especially given the industry's history of cartelization, to warrant a trial on the merits. Thus, the court reversed the summary judgment entered below.

B. *Full Draw Productions v. Easton Sports*, 182 F.3d 745 (10th Cir. 1999)

Full Draw, a promoter of an archery trade shows, brought claims under Sections 1 and 2 of the Sherman Act against archery supplies manufacturers and AMMO, their trade association, for boycotting a Full Draw trade show in retaliation for Full Draw's refusal to sell the show to AMMO. The district court granted summary judgment for AMMO and its members on the ground that, as displaying manufacturers at trade shows, they were consumers of Full Draw's services and the antitrust laws do not protect companies from consumer boycotts.

The Court of Appeals reversed, holding that, "A group boycott such as this, by large customers to destroy one producer of trade show services in favor of another over which it had influence and could obtain advantage at the expense of other consumers, states a violation of the Sherman Act." *Id*. at 753. The court also observed that Full Draw could be seen as either a competitor of AMMO or as a consumer of AMMO's services, in that AMMO's members could be considered "[i]n one regard . . . as the suppliers and Full Draw as a customer. That is, defendant manufacturers and distributors were the suppliers of exhibitors, a commodity essential to the successful operation of a trade show . . . [for which] the manufacturers and exhibitors were paid in the currency of a forum for access to retail dealers who might purchase their archery products." *Id*.

C. *Re/Max Int'l, Inc. v. Realty One, Inc*., 173 F.3d 995 (6th Cir. 1999)

Plaintiff, a nationally based real estate broker, sued two real estate brokerage firms in northeast Ohio under Sections 1 and 2 of the Sherman Act. The defendants' combined market share exceeded 50 percent in most locations in the region. The evidence established that real estate agents who list a house for sale typically split their commission 50/50 with an agent working for another broker if that agent brings a purchaser to the deal. It was undisputed that, at around the same time, both defendants notified plaintiff that they would only do a 70/30 or 75/25 split whenever a Re/Max agent was on the other side of the table. It was also undisputed that the policy was intended to deter defections of defendants' sales agents to the plaintiff. The Court of Appeals interpreted this practice to most closely resemble a refusal to deal. *Id.* at 1014.

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The Court of Appeals reversed the district court's decision granting summary judgment to the defendants. While the district court had held the plaintiff had not produced sufficient evidence of the conspiracy to resist summary judgment, the Court of Appeals cited two pieces of evidence:

- that the "adverse-split" policy would not have been in either defendant's independent economic self- interest if applied unilaterally, and

- evidence that the CEO of the one of the defendants had talked to the principal shareholder of the other defendant about the adverse-split policy. *Id.* at 1009-1011.

In assessing the illegality of the conspiracy, the court apparently applied a rule of reason analysis, finding that the plaintiff had produced sufficient evidence to allow a reasonable jury to determine that the likely effect of the defendants' conduct was anticompetitive.

The court also questioned the district court's analysis of the Section 2 claims. Even though the plaintiff failed to introduce specific evidence of localized markets, the court found sufficient evidence to permit a jury to conclude that the region's real estate markets were relatively localized. It also found that the district court had erred in rejecting plaintiff's evidence that the defendants' ability to impose adverse splits demonstrated their monopoly power, even without a showing of relevant markets. *Id.* at 1019-1020. Nevertheless, the court found plaintiff's Section 2 claims were barred by the statute of limitations.

VII. PROCEDURAL DEVELOPMENTS

A. Summary Judgment

1. *AD/SAT v. Associated Press*, 181 F.3d 216 (2d Cir. 1999).

AD/SAT electronically transmitted advertisements to newspapers. Approximately 20 percent of all newspaper advertisements in the relevant market were delivered electronically. When AP entered the same market, AD/SAT alleged that AP had violated Section 2 by attempting to monopolize the market for electronic transmission of advertisements, by engaging in monopoly leveraging, and by monopolizing the wire services news and photo-transmission markets. It also alleged that AP had violated Section 1 by conspiring to monopolize and conspiring to boycott AD/SAT. On a motion for summary judgment for the defendant on all grounds, the court held for the defendants, making some key findings of fact on the pleadings:

- Since the relevant market was advertisement delivery by any means, rather than advertisement delivery by electronic means, there was not a dangerous probability that AP would achieve monopoly power.

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- Since the relevant market was advertisement delivery by any means, competition was not harmed by AD/SAT's exit from the market, and the leveraging claim failed, as well.

- Under *Monsanto Co. v. Spray-Rite Serve Corp.,* 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), AD/SAT's conspiracy claims failed because the plaintiff had not produced evidence that excluded the possibility that each of the defendants independently terminated its contract with AD/SAT. As the court stated, "at best [AD/SAT demonstrated] parallel conduct following an invitation to conspire." Since termination was at least as consistent with a legitimate business purpose as with unlawful conspiracy, to survive summary judgment AD/SAT had to present more direct evidence in support of its claims, which it had failed to do. *Id*. at 240.

2. *Mitchael v. Intracorp*, 179 F.3d 847 (10th Cir. 1999)

Defendant insurance companies had hired Intracorp to review their insureds' chiropractic claims. Intracorp's own internal policy regarding chiropractic claims was to deny coverage for fees exceeding the eightieth percentile of fees charged by all chiropractors.

Plaintiff chiropractors sued, alleging Section 1 conspiracy in restraint of trade. The court held that, under *Matsushita*, the plaintiffs had failed to present evidence excluding the possibility that the insurance companies had acted independently, with the legitimate business concern of controlling chiropractic fees. At most, the evidence showed that "the Insurers shared a common concern about chiropractic cost containment, and that, at times, some of them shared information about how each one individually handled chiropractic claims and, at times, the Insurers used Intracorp to review chiropractic claims." *Id*. at 860.

3. *In Re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d Cir. 1999)

Direct purchasers of baby food products brought suit under Section 1 of the Sherman Act, alleging a price-fixing conspiracy among three baby food manufacturers that accounted for 98 percent of the baby food market. Plaintiffs presented (a) evidence of parallel price increases among the defendants, (b) evidence that sales representatives at some of the defendant companies were instructed to report to their superiors any information about upcoming price changes that they may have learned from their counterparts at the other companies, and (c) evidence of internal company memos of one of the defendants referring to a "truce," which the plaintiffs argued referred to a price agreement between the companies. In addition, plaintiffs pointed to numerous internal memos from each of the companies indicating that, on various occasions, one of the defendants knew about an upcoming price increase from another of the defendants.

Nevertheless, the court concluded that the plaintiffs did not present sufficient evidence to sustain an inference of a price-fixing conspiracy but, rather, that the evidence indicated only a exchange of information among the defendants. Because the evidence indicated only an information exchange,

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the court applied a rule of reason analysis, rather than a *per se* analysis. Citing *Matsushita*, the court granted summary judgment for the defendants.

B. Other Issues

1. Standing: *Angelico v. Lehigh Valley Hospital, Inc*., 184 F.3d 268 (3d Cir. 1999)

A cardiothoracic surgeon alleged that the three hospitals in his geographic area conspired to boycott his services. The district court held that the plaintiff did not have standing to pursue the antitrust charges because he had not proven an antitrust injury.

The Court of Appeals for the Third Circuit reversed, distinguishing between an antitrust injury that confers standing and the anticompetitive market effect needed to prevail on a Section 1 claim ("antitrust injury"). The court applied five factors in determining that the plaintiff had standing:

(1) There was a causal connection between the alleged violation and the alleged harm to the plaintiff.

(2) The injury was the type the antitrust laws were intended to redress.

(3) The injury was direct.

(4) There were no more-direct victims.

(5) There was no real risk of a duplicative recovery

The court emphasized that it was not giving relief to a competitor who was losing to competition, but rather that was conferring standing on a plaintiff who alleged a "harm caused by a conspiracy with an illegal anticompetitive intent." *Id*. at 275.

2. Statute of Limitations: *Grand Rapids Plastics, Inc. v. Lakian*, __F.3d __, 1999 WL 604199 (6th Cir. 1999)

The court considered the continuing-violation exception to the antitrust statute of limitations. The case involved payments made from 1990 through 1995 under an allegedly anticompetitive agreement made in 1990. The plaintiff filed suit in 1995 under the Robinson-Patman Act, which has a four-year statute of limitations. The court rejected plaintiff's argument that each payment constituted a separate overt act that reset the statute of limitations. Instead, the court held that each payment was merely an effect of the 1990 agreement (the only overt act), and thus that the claim was barred by the statute of limitations.

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3. Joinder: *Lowell v. American Cyanamid Co.*, 177 F.3d 1228 (11th Cir. 1999)

Farmers sued manufacturers (but not retailers) for conspiring with the retailers to set a minimum resale price on crop protection products. The district court dismissed the claims, relying on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that indirect purchasers may not sue distant manufacturer without joining the direct retailer. The Court of Appeals reversed, holding that *Illinois Brick* did not apply because its purpose of protecting the manufacturer from double liability (to both the retailer and the ultimate consumer) was not implicated where the manufacturer and retailer had allegedly conspired tto set prices.

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