

**Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson Respecting the Commission's Decision Not to Petition for Certiorari in *California Dental Association v. F.T.C.***

On July 9, 1993, the Federal Trade Commission issued an administrative complaint against the Respondent California Dental Association ("CDA"), alleging that the Respondent had restrained competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1995), by placing unreasonable restrictions on its members' truthful and nondeceptive advertising of the price, quality, and availability of their services.<sup>(1)</sup> After extensive proceedings, the Administrative Law Judge, Lewis F. Parker, concluded that CDA had violated Section 5 of the FTC Act, and issued an Initial Decision finding liability and issuing an order.<sup>(2)</sup> CDA appealed, and the Commission affirmed the Initial Decision, with some modifications. In particular, the Commission found that CDA had in fact effectively banned various types of price and quality claims of value to consumers - for example, claims of across-the-board discounts off the dentist's regular prices for certain groups of patients, such as senior citizens. Although CDA stated that these restrictions were intended to prevent false or misleading advertisements, the Commission found that it restricted broad categories of claims, without distinguishing between the deceptive and the nondeceptive. For these and other reasons, the Commission determined that CDA had violated Section 5 of the FTC Act, and issued a Final Order which permitted CDA "to regulate false and misleading forms of marketing and advertising by its members, but [did] not allow it to impose broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services."<sup>(3)</sup>

The appellate proceedings subsequent to the Commission's decision settled, once and for all, an important jurisdictional issue. The Ninth Circuit rejected CDA's challenge to the Commission's jurisdiction over it, as a professional association organized as a nonprofit entity, and the Supreme Court unanimously confirmed the Commission's authority over such organizations.

On the merits of the antitrust issues, the Supreme Court, by a 5-4 vote, held that the Ninth Circuit, in affirming the Commission's Order, had not engaged in an adequately searching analysis, and remanded to that court.<sup>(4)</sup> The Court ruled that a quick look was insufficient in this context, but found that neither a full rule of reason analysis nor proof of actual market effects was required.

We have serious concerns about several aspects of the Ninth Circuit's subsequent ruling.<sup>(5)</sup> For example, the court appears to have engaged in *de novo* re-weighing of the evidence in a complex trial record, contrary to the established "substantial evidence" standard of review.<sup>(6)</sup> The court also credited CDA's arguments that its restrictions benefitted consumers by preventing advertisements that would mislead consumers, and by inducing dentists to provide more complete pricing information<sup>(7)</sup> - notwithstanding that court's prior conclusion, on the same record, that there was "no evidence" that CDA's restrictions resulted in increased transparency of price information.<sup>(8)</sup> Finally, the court took the extraordinary step of directing dismissal of the case, rather than affording the Commission the opportunity to address any gaps in the evidentiary record in further administrative proceedings.<sup>(9)</sup>

The Commission has unanimously decided not to seek further review by the United States Supreme Court, but instead to return the matter to adjudication and dismiss the complaint. We believe that it is appropriate to provide a brief explanation of our reasons for voting for this action.

While various conclusions of the Court of Appeals could well form the basis for seeking further review in the Supreme Court, we also recognize certain practical difficulties in proceeding in this manner. The Commission's decision was made on the basis of a factual record that closed in 1995. CDA has been subject to the Commission's Order (except for limited provisions that were stayed pending appeal) since 1996 and, as far as we are aware, has complied with that order by refraining from enforcing the advertising restrictions that were the focus of the Commission's proceedings. Consequently, any further proceedings before the Commission would have to be based on stale evidence.

Our decision to support bringing an end to this case should not be taken as an indication of any lessening of our keen interest in the activities of trade or professional associations that harm competition. Where, for example, an association enforces advertising restrictions in a manner that systematically deprives consumers of valuable price and quality information, and that yields no corresponding benefits to competition or consumers, we continue to believe that grave antitrust concerns are raised. We do not read either the Supreme Court majority opinion, or the Ninth Circuit's opinion on remand, as holding to the contrary. Accordingly, we will continue to monitor such activities and, where it can be proven that an association is enforcing restrictions that are likely to cause anticompetitive effects, we will take appropriate enforcement action. In the meantime, we encourage trade and professional associations to continue to work informally with Commission staff to develop self-regulatory programs that will achieve the substantial benefits of such regulation while avoiding restrictions that may dampen the vigor of competition.

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1. *In re California Dental Ass'n*, 121 F.T.C. 190, 284 (1996).

2. *Id.* at 284-85.

3. *Id.* at 284.

4. 526 U.S. 756 (1999).

5. 224 F.3d 942 (9<sup>th</sup> Cir. 2000).

6. *Id.* at 950-58.

7. *Id.* at 957.

8. 128 F.3d at 728.

9. 224 F.3d at 958-59.