[Like all other professional trade associations, the California Dental Association (CDA) has a Code of Ethics by which member dentists agree to abide. Section 10 of that Code provides: “Although any dentist may advertise, no dentist shall advertise or solicit patients in any manner that is false or misleading in any material respect . . .”]

The Federal Trade Commission (FTC) sued the CDA, alleging that it applied guidelines and advisory opinions issued in connection with this section so as to restrict truthful, non-deceptive advertising, in violation of Section 5 of the FTC Act which proscribes, among other things, “unfair methods of competition.” Following an administrative hearing and subsequent review by the commission as a whole, the commission found that the CDA had in practice effectively precluded advertising that characterized a dentist’s fees as being low, reasonable, or affordable; precluded advertising of across-the-board discounts; and prohibited all quality claims.

Over the jurisdictional and substantive objections of the CDA, alleging that it applied guidelines and advisory opinions issued in connection with this section so as to restrict truthful, non-deceptive advertising, in violation of Section 5 of the FTC Act which proscribes, among other things, “unfair methods of competition.” Following an administrative hearing and subsequent review by the commission as a whole, the commission found that the CDA had in practice effectively precluded advertising that characterized a dentist’s fees as being low, reasonable, or affordable; precluded advertising of across-the-board discounts; and prohibited all quality claims.

In the Supreme Court, the case involved two issues: first, whether the jurisdiction of the FTC extends to nonprofit professional associations serving the interests of its for-profit professional members; and second, whether the “quick look” analysis was appropriate for examining the issues raised in the case, or whether—as the CDA argued—a more fact-intensive should have been undertaken into the Association’s asserted justifications for its policy.

The Court decided the first issue unanimously, setting a split among the circuits. The jurisdictional question turned on the meaning of the term “corporation” as defined by the FTC legislation, which gives the commission authority over “persons, partnerships, or corporations.” The statute defines that term to include “any company organized to carry on business for its own profit or that of its members.” The FTC, whose interpretation of its statutory mandate is entitled to judicial deference under well-settled principles of administrative law, claimed jurisdiction over anticompetitive practices by nonprofit associations whose activities “provide[e] substantial economic benefits to their for-profit members’ businesses.” The Supreme Court not only agreed with the FTC’s view but adopted an even more expansive interpretation, holding that if the nonprofit association makes even a “proximate” contribution to the profits of its individual members, the FTC has jurisdiction over it, a test broad enough to cover almost all nonprofit associations that work in the
health care field, and thus to subject their anticompetitive activities to oversight by the FTC.

The second issue was more complicated. Prior to this case, many had thought that there were three mutually exclusive forms of antitrust analysis for claims brought under Section One of the Sherman Act, or similar claims under Section 5 of the FTC Act: per se, “quick look”, and full-blown “rule of reason.” The Ninth Circuit used the “quick look” approach to affirm the FTC’s conclusions. Historically, this type of analysis had been reserved under prior Supreme Court precedent for cases in which there was no per se violation but where courts could properly conclude that no elaborate or extended factual analysis was necessary to demonstrate the anti-competitive nature of the conduct in issue. The Ninth Circuit had concluded that this was such a case, but the Supreme Court disagreed, ruling that the case was not appropriate for “quick look” analysis, primarily because of the unusual characteristics of professional advertising. What follows is the majority’s discussion of professional advertising.]
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.

. . . .

The point is not that the CDA’s restrictions necessarily have the pro-competitive 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 anti-competitive. The point, rather, is that the plausibility of competing claims about the effects of professional advertising restrictions rules out the indulgently abbreviated review to which the Commission’s order was treated. The obvious anti-competitive effect that triggers abbreviated review has not been shown.

. . . . Because the Court of Appeals did not scrutinize the assumption of relative anti-competitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.

. . .

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

. . . Whether the Dental Association’s basic rule as implemented actually restrained the truthful and non-deceptive 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 those facts. And the question for us—whether those agency findings are supported by substantial evidence—is not difficult.

[A discussion of the evidence follows.]

. . . 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 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 anti-competitive tendency of that agreement was to reduce competition among dentists in respect to their willingness to submit x-rays to insurers, . . . a matter in respect to which consumers are relatively indifferent, as compared to advertising of price discounts and services quality, the matters at issue here. . . .

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