California Dental Association v. FTC

526 U.S. 756 (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. [As a non-profit organization,] the CDA is exempt from federal income tax . . ., 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.

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

> "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."

[As interpreted by the CDA, under this standard, members were not allowed to advertise fees, especially discounted fees, and were not allowed to include in their advertising statements relating to the quality of dental services. Violators were subject to censure, suspension, or expulsion from the CDA].

The Commission brought a complaint against the CDA, alleging . . . [that the interpretations of the standard unreasonably restricted competition in violation of § 5 of the FTC Act]. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA, . . . [and] that, although there had been no proof that the CDA exerted market power, no such proof was required to establish an antitrust violation . . ., 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.

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*. 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. . . .

The Court of Appeals for the Ninth Circuit [ruled that the Commission erred by applying] *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.') It allows the condemnation of a 'naked restraint' on price or output without an 'elaborate industry analysis.' *Id.* at 109.

. . . We granted certiorari to resolve conflicts among the Circuits on the Commission's jurisdiction over a nonprofit professional association and the occasions for abbreviated rule-of-reason analysis. 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," and defines "corporation" to include "any company ... or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to *carry on business for its own profit or that of its members*." Although the Circuits have not agreed on the precise extent of this definition, the Commission has long held that some circumstances give it jurisdiction over an entity that seeks no profit for itself.

. . . [Here], 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. . . . There is no difficulty in concluding that the Commission has jurisdiction over the CDA. . . .

III

[We hold] that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate. . . .

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." 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). . . . In [cases that form] 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.

[For example, in] *National Collegiate Athletic Assn.*, the league's television plan expressly limited output (the number of games that could be televised) and fixed a minimum price. In *National Soc. of Professional Engineers*, the restraint was "an absolute ban on competitive bidding." 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." As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. . . .

The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious. . . . [I]t 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 non-discount advertising are, at least 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.[10] . . .

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. . . . The existence of such significant challenges to informed decision-making 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 point . . . 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.

. . . 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

[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).

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. . . . Indeed, [Philip Areeda] 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). . . .

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. . . .

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.

Justice BREYER, with whom Justice STEVENS, Justice KENNEDY, and Justice GINSBURG join, concurring in part and dissenting in part.