

OPINION OF COMMISSIONER ROSCOE B. STAREK, III,
CONCURRING IN PART AND DISSENTING IN PART

In the Matter of

INTERNATIONAL ASSOCIATION OF CONFERENCE INTERPRETERS, ET AL.
Docket No. 9270

In an opinion issued just about a year ago, the Commission held that respondent California Dental Association ("CDA") committed a *per se* violation of the antitrust laws by promulgating and enforcing restrictions on members' advertising of prices for dental services in California.¹ Although I agreed with my colleagues that CDA's restraints on both price and non-price advertising merited antitrust condemnation, I disagreed with their *per se* approach, which in my view applied -- by its language and its logic -- not only to CDA's particular price advertising restraints but also to "all agreements among competitors to restrain truthful, nondeceptive price advertising."² I pointed out in *CDA* that *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("*Mass. Board*") -- frequently and fruitfully relied on until *CDA*, then cast aside (if not explicitly overruled) by the *CDA* majority for reasons never clearly spelled out -- still provides a dependable framework for the analysis of horizontal restraints.³

¹ *California Dental Ass'n*, Docket No. 9259, 5 Trade Reg. Rep. (CCH) ¶ 24,007 (Mar. 25, 1996) ("*CDA*"), *appeal pending*, No. 96-70409 (9th Cir., filed May 20, 1996). The Commission also concluded that CDA's restrictions on both price and non-price forms of advertising were unlawful under the antitrust rule of reason. *CDA*, slip op. at 37-39 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,796-97].

² *CDA*, Opinion of Commissioner Roscoe B. Starek, III, Concurring in Part and Dissenting in Part, at 1 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,815].

³ "[I]f the majority considers *Mass. Board* beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in *Mass. Board* analysis that might be remedied, why not apply *Mass. Board* in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?" *Id.* at 9 [5 Trade Reg. Rep. (CCH) ¶ 24,007 at 23,818].

Once again I agree with the result reached by my colleagues but disagree with elements of their analytical methodology. I concur in the Commission's determinations that (1) the Commission has personal jurisdiction over respondent International Association of Conference Interpreters; (2) the Federal Trade Commission Act's not-for-profit exemption is unavailable to respondents; and (3) neither the statutory nor the nonstatutory labor exemption immunizes respondents' conduct. I also have no objection to the Order appended to the majority's opinion, because in my view the majority reached the correct determination as to which restraints should be declared unlawful. I simply do not share the majority's eagerness to replace *Mass. Board's* prudent approach to horizontal restraints with a system in which reference to categories of conduct -- some condemned *per se*, others judged under the rule of reason -- supplants discerning analysis.⁴

In one footnote in its opinion, the majority makes passing reference to a point that I emphasized in *CDA* -- that the Supreme Court's horizontal restraints jurisprudence of the late 1970s and early 1980s established the foundation for an analytical methodology like that laid down in *Mass. Board*.⁵ Nevertheless, judging from the juxtaposition of that footnote with the majority's observation (in the accompanying text) that "[r]ecent Supreme Court decisions continue the distinction between *per se* and rule of reason analyses,"⁶ my colleagues apparently believe

⁴ The fact that my colleagues and I agree here -- as we did in *CDA* -- on which restraints are illegal does not mean that our disagreement over analytical methodology lacks practical significance. Some future cases will likely involve alleged restraints whose competitive ramifications are more ambiguous than those at issue in the present case. Whether the Commission applies a *Mass. Board* analysis or adheres to the more mechanical approach established in *CDA* (and followed today) could obviously make a difference to the outcome.

⁵ "We note that some earlier Supreme Court cases had suggested the merging of the *per se* and rule of reason analyses. See, e.g., *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ('*BMI*'); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461 ('*IFD*'). Areeda also has suggested that there may have been some convergence of the *per se* category (see, e.g., the willingness to look beyond a horizontal price agreement in *BMI*) and a full blown rule of reason (see, e.g., the 'quick look' approach of *IFD*) so that at times the two antitrust approaches do not differ significantly. See 7 Phillip E. Areeda, *Antitrust Law* ¶ 1508c, at 408 (1986)." Slip op. at 14 n.11.

⁶ *Id.* at 14.

that the Supreme Court decided for reasons unexplained to forsake the approach of *IFD* and *BMI* and has instead endorsed the use of categories whose legality falls on one side or the other of a supposedly bright *per se*/rule of reason line.

Obviously, I do not assert that the Supreme Court and the lower courts have never found a practice to be *per se* illegal. Naked price-fixing, bid-rigging, market or customer allocation, and certain types of boycotts are condemned *per se* upon proof of the existence of an agreement -- that is, they are conclusively presumed to restrain trade unreasonably. But over the last 20 years, Supreme Court jurisprudence pertaining to restraints of trade -- both horizontal and vertical -- has steadily evolved into a heightened sensitivity to the economic implications of the conduct at issue and a reluctance to base condemnation of a particular practice on a superficial resemblance to price-fixing.

The Supreme Court decisions on which the majority relies (*Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), and *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) ("*SCTLA*")) do not undermine my point that the consistent thrust of the Court's decisions since the late 1970s has been to eschew antitrust decisionmaking on the basis of labels, categories, and mechanical line-drawing. It is hardly surprising that the Court found *per se* violations in *Palmer* and *SCTLA*, both of which involved conduct long viewed as plainly anticompetitive; nor is there any doubt that such cases will continue to arise as long as there is antitrust enforcement. But the Supreme Court has not signaled a retreat from the "presumption in favor of a rule-of-reason standard"⁷ for analyzing restraints. *BMI*, *IFD*, and *NCAA*⁸ still represent the general direction of the Court's thinking in this area; *Palmer* and *SCTLA* simply illustrate, against the backdrop of this overall trend, that anticompetitive conduct can occasionally be condemned *per se*.

⁷ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

⁸ *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

The approach of the majority does nothing to mitigate -- and in fact perpetuates -- the principal weakness of *CDA*: that oversimplistic analogizing to traditional *per se* categories is not a satisfactory substitute for the cautious analysis mandated by the Supreme Court.⁹ By contrast, *Mass. Board*, with whatever imperfections it had, distilled the essential elements of the Supreme Court's teaching: that seeming restraints of trade may not be what they first appear to be; that it is necessary to devote adequate scrutiny to an alleged restraint's competitive effects unless one can say, with a very high degree of confidence, that it is unmistakably anticompetitive; and that this whole exercise should not be conducted through the use of labels and categories. As I observed above, if the *Mass. Board* analysis needs improvement, the instant case presents (as did *CDA*) an opportunity to accomplish that. What I cannot accept is the majority's unwarranted abandonment of the *Mass. Board* precedent.

⁹ *NCAA*, *supra* n.8; *BMI*, *supra* n.5.