

CALIFORNIA DENTAL ASSOCIATION v FEDERAL TRADE COMMISSION: THE REVENGE OF FOOTNOTE 17

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I. INTRODUCTION

In *Goldfarb v Virginia State Bar*,¹ the Supreme Court unanimously ruled that a County Bar Association's adoption of minimum fee schedules, enforced through the prospect of disciplinary action, violated the Sherman Act.² Thus, the "learned professions" were not exempt from the antitrust laws. Following the aphorism that "footnotes are for losers," the Court did announce that perhaps antitrust law would apply differently to professions:

The fact that a restraint operates upon a profession 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 apply to the professions antitrust concepts 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.³

Despite footnote 17, the Court has aggressively applied antitrust law to the professions, without special treatment.⁴ The antitrust enforcement agencies, particularly the Federal Trade Commission, pursued dozens of cases against professionals and professional associations. By 1998 when the Supreme Court granted certiorari in one such case, *California Dental Association v Federal Trade Commission* ("CDA"),⁵ footnote 17 had receded into the antitrust background. In *CDA*, the FTC alleged that the association, through its Code of Ethics and implementing guidelines, had unreasonably restricted advertising of price and the quality of dental services.⁶ After a short

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¹ 421 US 773 (1975).

² Id at 793 (applying 15 USC 1). The Court had applied antitrust to the American Medical Association in 1943, but had not expressly decided whether a physician's medical practice was "trade" under the Sherman Act. See *American Medical Association of the United States*, 317 US 519 (1943).

³ *Goldfarb*, 421 US at 788-89, n17.

⁴ See Part III below.

⁵ 119 S Ct 1604 (1999).

⁶ *California Dental Advertising*, 121 FTC 190 (1996).

trial, an Administrative Law Judge found that the restraints violated antitrust law.⁷ The Commission agreed, finding the restraints on price advertising to be *per se* illegal and those on quality advertising to be illegal under an abbreviated Rule of Reason analysis.⁸ The Court of Appeals for the 9th Circuit rejected the Commission's *per se* holding, but found that both restraints were illegal under an abbreviated analysis.

By one vote, the Court disagreed, holding that when “any anti-competitive effects of given restraints are far from intuitively obvious, the Rule of Reason demands a more thorough inquiry into the consequences of those restraints than the Court of Appeals performed.”⁹ Although the four dissenters would have had no difficulty affirming, the majority stressed that the “professional” aspect of the case supported a different result. Citing footnote 17, the Court noted that this market was characterized by “striking disparities between the information available to the professional and the patient.”¹⁰ Professional price and quality advertising might not be sufficiently verifiable by consumers, making the advertising restrictions on net pro competitive, or at least having no competitive effect at all. Indeed, using the word professional nearly 30 times, the majority reasoned that even advertising of across-the-board discounts might mislead consumers and lead to a “lemons” market in which “dishonest dealings tend to drive honest dealings out of the market.”¹¹ The Court remanded because “a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions.”¹²

The decision surprised some lawyers. Government lawyers were naturally disappointed, both because of the remand and because they had thought that the courts had settled the anti-competitive nature of restraints on advertising.¹³ Some private attorneys expressed concern that the case further clouded the appropriate form of antitrust scrutiny,¹⁴ an issue that has been much debated throughout antitrust history, particularly in recent years.¹⁵ As with any one-vote decision, there was understandable uncertainty about the future.

What explains the majority's seeming departure from prior antitrust law? An answer is that this case involves both professions and advertising. The Court had held that numerous restraints among professionals violated antitrust laws and in CDA it agreed with the 9th Circuit

⁷ Id.

⁸ Id.

⁹ *California Dental*, 119 S Ct at 1607.

¹⁰ Id at 1613.

¹¹ George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q J Econ 495 (1970) (“Akerlof, *Market for Lemons*”).

¹² *California Dental*, 119 S Ct at 1618.

¹³ After all, they had successfully pursued many cases against such restraints.

¹⁴ David Segal, *High Court Lets FTC Police Nonprofits*, *The Washington Post*, May 25 1999, at E3, available in 1999 WL 17004890).

¹⁵ See Part V below.

that restraints on advertising should be viewed with suspicion as having potential to harm consumers. It had, however, never considered an antitrust case involving a restraint on professional advertising. Many restraints on advertising are imposed by state action and therefore are shielded from antitrust attack.¹⁶

Although footnote 17 had disappeared from the antitrust scene, concerns over maintaining professionalism had remained alive in the closely related body of jurisprudence analyzing restraints on advertising under the First Amendment's Commercial Speech Doctrine. Despite the First Amendment, the Court has permitted some restrictions on professional advertising, most recently in *Florida Bar v Went For It, Inc.* ("WFI")¹⁷ There, in another one-vote decision, the Court upheld rules that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days of an accident. The Court's composition was identical to that in *CDA*. Four of the Justices who voted to remand in *CDA* were in the *Florida Bar* majority, while three of the *CDA* dissenters also dissented in *Florida Bar*. The fourth *Florida Bar* dissenter, Justice Souter, wrote the majority opinion in *CDA*, while the fifth member of the *Florida Bar* majority, Justice Breyer, wrote the *CDA* dissent. The *Florida Bar* majority, written by Justice O'Connor, who has long sought to allow professionals to restrict advertising, noted the need to protect the privacy and tranquility of personal injury victims and the fact that the solicitations in question reflected poorly on the legal profession, causing users of legal services to view lawyers less favorably.

Such concerns over the difference between professional advertising and that by "merely" commercial enterprises are crucial to understanding the Court's *CDA* decision. To develop this point, Part II considers the various *California Dental* opinions, both those in the commission and in the federal courts. Part III of this article discusses previous Supreme Court cases, including the treatment of *Goldfarb*'s footnote 17, the Court's prior professional antitrust cases, and the Court's analysis of restrictions on professional advertising under the First Amendment. Part IV then addresses the numerous theoretical and empirical economic issues that the Court's analysis of professional advertising restrictions raises, both explicitly and implicitly. We will see that a large body of evidence addresses the issues the Court raised. Contrary to the Court's fears, professional advertising does not lead to a lemons market or otherwise reduce quality. In fact, advertising reduces prices without harming consumers.

Part V of this article addresses the more general issue of what *CDA* says about the appropriate form of antitrust scrutiny of restraints among competitors. For the first time, the Court explicitly blessed what has come to be known as "truncated" or "quick look" analysis, in which restraints among competitors can be condemned without full analysis of the effect of the particular restraint at issue and of whether the competitors possess market power. However, the dentists prevailed in this case because they raised plausible efficiency justifications that required further examination. Ironically, as Part IV details, ample empirical evidence already exists to show that, however plausible the justifications are in theory, in fact restraints on professional advertising harm consumers.

II. CDA IN THE COMMISSION AND THE COURTS

¹⁶ For a discussion of state action, see note 97.

¹⁷ 515 US 618 (1995).

A. The Commission

The case was tried before an Administrative Law Judge (ALJ) in 1995. The trial lasted two weeks and focused on the factual nature of CDA's practices rather on their economic impact. The ALJ found numerous facts, almost all of which the Commission adopted in its opinion.¹⁸

The CDA is a voluntary association of local dental societies, with membership of 19,300, about three-quarters of all California dentists. Members agree to abide by a code of ethics, including Section 10 that prohibits advertising or solicitation "false or misleading in any material respect . . ."¹⁹ CDA's advisory opinions and separate advertising guidelines formed the basis of the Commission's challenge. The Commission found that certain forms of price advertising and all forms of quality advertising were effectively banned under these pronouncements. CDA's opinion on quality advertising was clear: "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 a material respect."²⁰ Regarding price advertising, CDA permitted advertising discounts only with extensive disclosures, including the dollar amount of the non-discounted fee, the length of time that the discount would be offered, verifiable fees, and which groups qualify for the discount.²¹ The CDA banned advertising that characterized fees as being "low" or "affordable," as well as advertising of across-the-board discounts.²²

The Commission based these findings on both a textual reading of CDA's pronouncements and their impact on individual dentists. CDA and its affiliated organizations had challenged hundreds of "advertising representations which on their face are not false or deceptive."²³ Examples of price advertising CDA prohibited included use of "reasonable",²⁴ "20% off for new patients,"²⁵ "10% senior citizen discount,"²⁶ "Grand Opening Special . . . 40% off dental treatment,"²⁷ and "call our office before December 31, 1992 and our gift to you and your family - - Complete Consultation Exam and x-rays (if needed) ... [for only] a \$1.00 charged to you and your

¹⁸ Under FTC rules, the Commission can engage in *de novo* review of the ALJ's opinion. See Decisions on Appeal or Review, 16 CFR 3.54(a) (2000).

¹⁹ *California Dental*, 121 FTC at 219, 220.

²⁰ Id at 229 (internal quotations omitted).

²¹ Id at 227.

²² Id at 226-27.

²³ Id at 252. Commissioner Azquenaga questioned whether the evidence in fact supported the Commission's conclusions regarding the nature of CDA activities. She would have remanded for further factual findings.

²⁴ Id at 245-46.

²⁵ Id at 302.

²⁶ Id.

²⁷ Id at 310.

entire family with this coupon.”²⁸ Numerous quality representations were prohibited, including “quality care for less,”²⁹ “newest,” “latest” or “progressive,”³⁰ “guarantee,”³¹ and representations concerning the reduction of consumer anxiety, such as “special treatment for nervous patients” or general phrases like “gentle”.³² CDA also banned an important form of solicitation -- no-fee screening of school children. Like the other prohibitions, CDA made no inquiry into whether this practice was deceptive, unsubstantiated, or otherwise misleading.

Both the ALJ and Commission found evidence that CDA’s prohibition had competitive impact. Thus, the ALJ and the Commission credited testimony to the effect that quality advertising, such as regarding the comfort of services, attracts patients and that individual dentists had suffered adverse effects to their business when forced to discontinue such advertising.³³

Neither the record nor the ALJ, however, discussed the considerable economic literature concluding that restraints on advertising harm consumers.³⁴ Indeed, the complaint counsel did not even bother to have an economist testify. The ALJ nevertheless found an antitrust violation under *In Re Massachusetts Board of Registration in Optometry*,³⁵ a previous FTC case that adopted a structure for applying the Rule of Reason, discussed in more detail below.³⁶ The ALJ concluded that there had been no proof that CDA possessed and used market power, but found such proof unnecessary.

On appeal to the full Commission, in an opinion by Chairman Robert Pitofsky, a respected antitrust academic and practitioner for four decades, the Commission adopted the ALJ’s factual findings, except for the conclusion regarding market power, with which the Commission explicitly disagreed. The majority rejected the *Massachusetts Board* analysis, finding instead that the restrictions on discount advertising were illegal *per se*.³⁷ Alternatively, the Commission held that both price and non-price restraints violated antitrust law under an abbreviated Rule of Reason analysis.³⁸

²⁸ Id at 320, n25.

²⁹ Id at 230.

³⁰ Id at 232.

³¹ Id at 234.

³² Id at 235.

³³ See id at 310-311.

³⁴ This literature is discussed below in Part IV.B.

³⁵ 110 FTC 549 (1988).

³⁶ See Part V below.

³⁷ *California Dental*, 121 FTC at 284.

³⁸ Commissioner Starek concurred, arguing that the Commission should have applied *Massachusetts Board*, while Commissioner Azquenaga dissented because she believed that the record lacked sufficient evidence regarding anti-competitive effects and market power.

B. The 9th Circuit Opinion³⁹

The Court of Appeals disagreed with Chairman Pitofsky's per se/rule-of-reason categorization, instead applying an abbreviated Rule of Reason. Under that approach, the court rejected CDA's purported efficiency justification that its rules were merely designed to prevent deception. Moreover, the Court evaluated the market power evidence, finding that the evidence supported the agency, given CDA's large market share and influence.⁴⁰ One judge dissented, finding that full Rule of Reason analysis was required.⁴¹

C. Supreme Court

The Court's brief antitrust analysis in part III of its opinion acknowledged for the first time that its prior cases used an "abbreviated" or "quick-look" analysis under the Rule of Reason by which "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."⁴² To the Court, "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained."⁴³ In this case, however, "the very issue at the threshold . . . is whether professional price and quality advertising is sufficiently verifiable in theory and in fact" to make the effect of the restrictions as obvious as in previous cases. Because the CDA's restrictions were designed on their face to avoid false or deceptive advertising, they "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."⁴⁴ Crucial to the Court's conclusion were the "striking disparities between the information available to the professional and the patient,"⁴⁵ a passage accompanied by a citation to *Goldfarb* note 17.⁴⁶ Continuing its skepticism about whether normal market forces apply to professional advertising, the Court noted the difficulty customers have in monitoring quality claims and obtaining and verifying information about price. Moreover, "[p]atients' attachment to particular professionals, the rationality of which is difficult to assess, complicate the picture even further."⁴⁷ The Court observed:

³⁹ *California Dental Ass'n v FTC*, 128 F3d 720 (9th Cir 1997).

⁴⁰ *Id* at 729-30.

⁴¹ *Id* at 731. The majority was unclear whether market power was necessary to find a violation, even under its truncated analysis. For a more detailed discussion of this opinion, see Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of Massachusetts Board*, 66 Antitrust L J 773 (1998) ("Muris, *Massachusetts Board*").

⁴² *California Dental*, 119 S Ct at 1612.

⁴³ *Id* at 1613.

⁴⁴ *Id*.

⁴⁵ *Id* at 1618.

⁴⁶ The Court also provided a "cf" citation to the 1970 article by George Akerlof, *Market for Lemons* (cited in note 11).

⁴⁷ *California Dental*, 119 S Ct at 1614.

[T]he 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.⁴⁸

Turning specifically to CDA's price restraints, the Court noted that the 9th Circuit began with the "unexceptional statements that 'price advertising is fundamental to price competition' 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."⁴⁹ The Court, however, faulted the lower court for failing to consider "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."⁵⁰ The Court noted that the Court of Appeals found it enough that CDA's disclosure requirements in effect prohibited across-the-board discounts because of the infeasibility of disclosing all of the information required and that there was no evidence that the ban had led to more transparent dental pricing.⁵¹ Because price advertising is so fundamental to price competition, the 9th Circuit in effect argued that restricting it was impermissible unless the CDA showed that the restrictions provided compensating benefits. The Supreme Court rejected this logic, because the 9th Circuit "brush[ed] over the professional context and describ[ed] no anticompetitive effects."⁵² Assuming that CDA did in effect ban across-the-board discounts, "it does not obviously follow that such a ban would have a net anticompetitive effect here."⁵³

The Court observed that, although it might be better to disclose the original and discounted prices for various procedures, whether an advertisement was preferable to one offering an across-the-board discount "seems to us a question susceptible to empirical but not *a priori* analysis."⁵⁴ This conclusion follows because "[i]n a suspicious world, the discipline of specific examples may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping."⁵⁵ Moreover, even if advertising an across-the-board discount was more effective in drawing customers in the short run, "the recurrence of some measure of intentional or accidental misstatement due to the breadth of their claims might leak out over time to make potential patients skeptical of any such across-the-board advertising," thereby undercutting

⁴⁸ Id.

⁴⁹ Id (quoting *Bates*, 433 US at 364; 128 F3d at 727).

⁵⁰ Id at 1614.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id at 1615.

⁵⁵ Id.

the advertising's effectiveness.⁵⁶ The Court here added a "cf" cite to an economics article, noting that it explained how "dishonest dealings tend to drive honest dealings out of the market."⁵⁷ The Court feared that across-the-board discount advertisements "might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive."⁵⁸ The Court then added this crucial conclusion, summarizing its view of the market:

[T]he CDA's rule appears to contain 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 Commission may initially dismiss it as presumptively wrong.⁵⁹

In the footnote accompanying this passage, and in the next paragraph of text, the Court disagreed with Justice Breyer's dissent, discussed below, because, like the Court of Appeals, Justice Breyer did not provide empirical evidence to answer the question, but merely avoided it by "implicit burden-shifting."⁶⁰ Because "the circumstances of the restriction are somewhat complex, assumption alone will not do."⁶¹

Turning to the restraints on quality advertising, the Court again criticized the 9th Circuit's economic reasoning. The lower court had cited approvingly a passage from the leading antitrust treatise that "[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentist's services."⁶² The Court found this passage puzzling because "[t]he question is not whether the universe of possible advertisements has been limited . . . but whether the limitation on advertisements obviously tends to limit the total delivery of dental services."⁶³ As the Court noted, the lower court did state that "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."⁶⁴ The Court again faulted this economic analysis, arguing that even if the statement were true, "then restricting such advertising would

⁵⁶ Id.

⁵⁷ Akerlof, *Market for Lemons* at 495 (cited in note 11).

⁵⁸ *California Dental*, 119 S Ct at 1615.

⁵⁹ Id.

⁶⁰ Id at 1604 n12.

⁶¹ Id.

⁶² Id at 1615 (quoting P. Areeda & H. Hovencamp, *Antitrust Law* ¶1505, at 693-94 (Supp 1997)).

⁶³ Id at 1615.

⁶⁴ Id at 1616 (quoting 128 F3d at 728).

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 an anticompetitive effect of artificially raising prices."⁶⁵

Regarding quality, the Court also raised the professional context of the restraint, faulting the 9th Circuit for giving 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."⁶⁶ Perhaps the CDA's restrictions on unverifiable quality and comfort advertisement were nothing more than a "procompetitive ban on puffery."⁶⁷ Moreover, "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."⁶⁸ Although the restrictions might be anti-competitive, "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown."⁶⁹

Finally, in its penultimate paragraph, the Court responded to what it called "Justice Breyer's thorough-going, *de novo* antitrust analysis," calling it no quick look, but "[l]ingering."⁷⁰ The Court concluded that "[h]ad the Court of Appeals engaged in a painstaking discussion in a league with Justice Breyer's . . . and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion."⁷¹

Justice Breyer's forceful dissent began by describing the practices at issue as restraints on forms of price and quality advertising, a point the majority was willing to concede.⁷² He noted the "obvious" anti-competitive impact of restraining truthful advertising about lower prices and about such an important dimension of competition as quality. He also dismissed the pro-competitive justification because the record failed to support the assertion, and the defendant had the burden of establishing the pro-competitive justification. Turning to the majority's analysis, Justice Breyer argued that the 9th Circuit adequately addressed the issues the majority raised, including considering and rejecting CDA's justification. Moreover, Breyer noted that "petitioner's brief in this Court offers nothing concrete to counter the Commission's conclusion that the record does not

⁶⁵ Id at 1616.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id at 1617.

⁷⁰ Id.

⁷¹ Id. The opinion's last paragraph discussed its conclusion in the context of the appropriate antitrust analysis. That paragraph is discussed in Part V below.

⁷² Id at 1618. The majority had not addressed the question of whether there was substantial evidence, focusing instead on the appropriate antitrust analysis. Accordingly, it accepted the categorization of the restraints that the lower court had found and that Justice Breyer used. Id at 1612.

support the claim of justification.”⁷³

Justice Breyer concluded by stating that this case could not be reconciled with *Federal Trade Commission v Indiana Federation of Dentists*,⁷⁴ in which the Court had held that an agreement by dentists not to submit dental x-rays to insurance companies violated antitrust law. He argued that advertising of price discounts and service quality is much more important to consumers than willingness to submit x-rays. Moreover, the redeeming virtue the Indiana’s dentists raised was the “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 here.”⁷⁵

Justice Breyer raised several telling points. The long history of Supreme Court antitrust jurisprudence had placed price on a pedestal. As the Court had said in 1940, price competition is “the central nervous system of the economy.”⁷⁶ Consumers need to know of low price sellers for price competition to be the most effective. Moreover, Justice Breyer’s argument about *IFD* was persuasive on its face. Justice Breyer, however, never confronted the majority’s assertions that the market involving professional services was so different from the market for other products and services that CDA’s restraints might be pro-competitive. The Commission had never addressed these issues either, despite the considerable empirical evidence that restraints on price advertising, even short of a total ban, raise price and that advertising does not produce the dire consequences regarding quality that the Court feared.⁷⁷ Although Justice Breyer, a long-standing and respected student of regulation, undoubtedly was aware of this evidence, he may not have used it because it was not in the record and the majority could easily have responded that it was inappropriate to introduce such evidence before the Court.

With this background regarding the various opinions in *CDA*, the following sections discuss three questions. First, do previous cases justify, or at least explain, the Court’s suspicions toward professional advertising? Second, does the relevant economic analysis support such suspicions? Third, and more generally, what does this case tell us about the appropriate form of antitrust analysis for restraints among competitors?

III. PROFESSIONAL RESTRAINTS IN THE SUPREME COURT

Since *Goldfarb*, professions occasionally have been parties in antitrust cases, although none before *CDA* involved professional advertising. Part A considers those cases, while Part B considers the Court’s analysis of professional advertising under the First Amendment’s Commercial Speech doctrine.

A. Antitrust

At issue in *Goldfarb* was a published minimum-fee schedule. Attorneys who charged less

⁷³ Id at 1623 (Breyer, concurring in part and dissenting in part).

⁷⁴ 476 US 447 (1986).

⁷⁵ *California Dental*, 119 S Ct at 1623-24 (Breyer, concurring in part and dissenting in part).

⁷⁶ Id at 1619 (quoting *U.S. v. Socany - Vacuum Oil Co.*, 310 U.S. 150, 226 n59 (1940)).

⁷⁷ See Part IV.B below.

than the published prices were threatened with misconduct charges. Once the Court decided that the antitrust laws applied to this activity because there was no learned profession exemption and the state action doctrine did not shield the fee schedules, it was easy to conclude that the schedules fixed prices and were thus an antitrust violation.⁷⁸ Despite its footnote 17, the Court unanimously held that professionalism did not shield the price fixing.⁷⁹

Although footnote 17 suggested to professionals that some restraints on competition might be tolerated, the antitrust cases that followed *Goldfarb* suggested otherwise. In the first case after *Goldfarb*, *National Society of Professional Engineers v United States*,⁸⁰ the Court found that an ethical canon promulgated by a professional society to prohibit its members from competitive bidding violated the Sherman Act. The Court rejected the defendant's contention that its ethical standard protected both public safety and the ethics of its profession, calling this argument "nothing less than a frontal assault on the basic policy of the Sherman Act."⁸¹ The Court cited footnote 17, stating that, "certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context."⁸² Although the Court found the facts of the case inappropriate for such treatment, Justice Blackman's concurrence, joined by Justice Rehnquist, argued against closing the door left open by footnote 17:

In my view the decision in *Goldfarb* . . . properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly this case does not require us to decide whether the "Rule of Reason" as applied to the professions ever could take account of benefits other than increased competition.⁸³

In 1982, the Court cited *Goldfarb's* footnote 17 in two antitrust cases, although in neither did the respondents' professional nature allow them to escape condemnation. In *American Association of Mechanical Engineers v Hydrolevel*,⁸⁴ involving standard-setting by an engineers' association, the Court noted that "although non-profit organizations are subject to the antitrust laws . . . the antitrust laws need not be applied to professional organizations in precisely the same manner that they are applied to commercial enterprises."⁸⁵ Nevertheless, because of a fraudulent

⁷⁸ *Goldfarb*, 421 US at 793.

⁷⁹ *Id* at 793.

⁸⁰ 435 US 679 (1978).

⁸¹ *Id* at 695.

⁸² *Id* at 686.

⁸³ *Id* at 699. In a subsequent professional case, *FTC v Indiana Federation of Dentists*, 476 US 447 (1986), the Court clarified what it had meant in rejecting the engineer's defense. See note 91 below.

⁸⁴ 457 US 556 (1982).

⁸⁵ *Id* at 580.

answer given by a sub-committee chairman to a public inquiry concerning the interpretation of a code section, the entire organization was exposed to liability. In the second case, *Arizona v Maricopa County Medical Society*,⁸⁶ a medical society was found to have illegally fixed prices. In rejecting the respondent's argument, the Court cited footnote 17 but noted that "[t]he respondents do not argue, as did the defendants in Goldfarb and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint."⁸⁷ The dissenters stated that "[We] would give greater weight than the Court to the uniqueness of medical services, and certainly would not invalidate on a *per se* basis a plan that may in fact perform a uniquely useful service."⁸⁸ Moreover, they argued that the majority lost "sight of the basic purpose of the Sherman Act. . . . the antitrust laws are a 'consumer welfare prescription.'"⁸⁹

Two other pre-CDA cases raised significant issues involving professionals' collaborative activities. *Indiana Federation of Dentists*, discussed above,⁹⁰ holding that an agreement by dentists to withhold x-rays from dental insurers violated the Sherman Act, did not consider whether the fact that the defendants were dentists affected the application of the antitrust laws.⁹¹ In the second case, *FTC v Superior Court Trial Lawyers Ass'n*,⁹² a group of private attorneys who specialized in handling court-appointed criminal cases refused to take more cases unless the local government raised their compensation. Without discussing footnote 17 or issues of professionalism, the court held that this was a naked restraint of trade.

B. First Amendment

In 1976, the Court struck down a state ban on advertising of drug prices.⁹³ Reversing a

⁸⁶ 457 US 332 (1982).

⁸⁷ Id at 349.

⁸⁸ Id at 366 n13.

⁸⁹ Id at 367 (quoting *Reiter v Sonotone Corp.*, 442 US 330, 343 (1979)). The Court decided another professions case, *Jefferson Parrish Hospital District No 2 v Hyde*, 466 US 2 (1984). This case, however, did not involve collaborative activity among professionals, as did the others discussed here, but instead involved an alleged tying arrangement. Questions of professionalism or special treatment under footnote 17 did not arise.

⁹⁰ See notes 74-75 and accompanying text.

⁹¹ The Court clarified its previous statement in *Professional Engineers* regarding quality justifications. In both cases, the defendants argued that the restraint was necessary to enhance quality. Although the earlier decision had seemed to suggest that the Court was unconcerned whether quality would in fact be reduced, in *IFD* the court stated "there is no more reason to suspect dental insurance companies to sacrifice quality in return for cost savings than to believe this of consumers in, say, the market for engineering services." Id at 463. Thus, the court concluded that the restrictions on competition at issue were not necessary to prevent quality deterioration.

⁹² 493 US 411 (1990).

⁹³ *Virginia St Bd Pharm v Virginia Consumer Council, Inc.*, 425 US 748 (1976).

prior case,⁹⁴ the Court thus granted limited First Amendment protection to commercial speech. Concerns over professionalism were raised in the initial First Amendment cases holding that bans on professional advertising were unconstitutional and have remained throughout the history of the Court's commercial speech cases involving professional advertising.

In *Bates v State Bar of Arizona*,⁹⁵ the Court considered its first lawyer advertising case, involving two attorneys whom the Arizona Supreme Court had disciplined for advertising the services of their legal clinic. Justices Powell and Stewart relied on the difference between the trades and the professions to disagree with the portion of the majority opinion weakening "the authority of the respective states to oversee the regulations of the profession[s]."⁹⁶ The opinion revealed considerable economic sophistication, causing commentators to note that the analysis was similar to a Rule of Reason evaluation under the antitrust laws.⁹⁷ The Court concluded that bans on advertising reduced consumer information and price competition as well as making it harder for new entrants to compete. Thus, without advertising "an attorney must rely on his contacts with the community to generate a flow of business. . . . [T]he ban in fact serves to perpetuate the market position of established attorneys."⁹⁸ Moreover, the Court cited to the then recent empirical literature, discussed below, to support its argument.⁹⁹ *Bates* also rejected the argument that "professionalism" justified banning truthful speech, finding that "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising."¹⁰⁰

Following *Bates*, the Court has issued numerous professional advertising decisions that, to say the least, are difficult to reconcile. In 1978 and 1979 the Court upheld bans on in-person solicitation by lawyers and optometrists' use of trade names.¹⁰¹ In both cases, it was enough that

⁹⁴ *Valentine v Christenson*, 316 US 52 (1942).

⁹⁵ 433 US 350 (1977).

⁹⁶ *Id* at 389.

⁹⁷ See, eg, William C. Canby, Jr & Ernest Gellhorn, *Physician Advertising: The First Amendment and the Sherman Act*, 1978 Duke LJ 543. *Bates* itself was an antitrust case, holding that because the action complained of was that of the state, in this case the State Supreme Court, it was exempt from the antitrust laws. For this reason, the Supreme Court's attitude toward much of professional advertising, in particular that of lawyers, is revealed in commercial speech rather than antitrust cases.

⁹⁸ *Bates*, 433 US at 378. The commercial speech doctrine, including its professional advertising case, is analyzed in an excellent article, Fred S. McChesney, *De-Bates and Re-Bates: The Supreme Court's Latest Commercial Speech Cases*, 5 S Ct Econ Rev 81 (1997) ("McChesney, *De-Bates and Re-Bates*"). See also Kathleen Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquor Mart*, 1996 S Ct Rev 123 (1997).

⁹⁹ 433 US at 377 n34. See Part IV.B.

¹⁰⁰ 433 US at 378. Thus, the Court rejected the contention that advertising was too commercial and would undermine the attorney's "sense of dignity and self-worth." *Id* at 378.

¹⁰¹ *Ohralik v Ohio State Bar Association*, 436 US 447 (1978); *Friedman v Rogers*, 440 US 1 (1979).

the activity was *potentially* deceptive; proof of actual deception, or even that the activity was likely to be deceptive, was unnecessary.¹⁰²

In 1982, however, the Court held unconstitutional a ban limiting the groups to whom lawyers could send professional announcements.¹⁰³ The Court held that the remedy was too broad to achieve any legitimate end,¹⁰⁴ a rationale that it followed in 1985 when it prohibited a ban on illustrations in lawyer advertising.¹⁰⁵ Moreover, the Court explicitly rejected the argument that professional services are harder than other services for consumers to evaluate.¹⁰⁶ Because the Court's view here directly contradicts its conclusions in *CDA*, it is worth quoting at length:

The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisement containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services. This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under §5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in . . . commerce," reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics. In short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be.¹⁰⁷

Four more recent cases reveal both the inconsistency in the Court's approach and the hostility toward professional advertising evidenced by the majority in *CDA*. In 1988, a split Court in *Shapiro v Kentucky Bar Association*¹⁰⁸ struck down a bar association rule that prevented

¹⁰² See McChesney, *De-Bates* and *Re-Bates*, at 95-98 (cited in note 98).

¹⁰³ *In re RMJ*, 445 US 191 (1982).

¹⁰⁴ *Id* at 653.

¹⁰⁵ *Zauderer v Office of Disciplinary Counsel*, 471 US 626 (1985).

¹⁰⁶ *Id* at 645-46 (footnotes and citations omitted). The Court cited, *inter alia*, the FTC report on lawyer advertising discussed in Part IV.B.1 below.

¹⁰⁷ *Id* at 644-46. The Court did uphold a restriction on contingent fees for failure to include disclosures the Court felt necessary to prevent deception -- that is, that clients would be liable for costs if the action was unsuccessful. *Id* at 652-53.

¹⁰⁸ 486 US 466 (1988).

lawyers “from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to clients known to face particular legal problems.”¹⁰⁹ The majority rejected the argument that potential deception justified banning the speech at hand, given that the state could regulate solicitation to avoid deception, for example by requiring the lawyer to file letters with the state agency.¹¹⁰ Joined by Chief Justice Rehnquist and Justice Scalia, Justice O’Connor issued a revealing dissent. The restrictions on speech were justified because of the “potentially misleading effects of targeted, direct-mail advertising, as well as the corrosive effects that such advertising can have on appropriate professional standards.”¹¹¹ The dissent emphasized professionalism. Thus, membership in the bar “entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct.”¹¹² The restrictions at issue “act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other.”¹¹³ The dissenters found professionalism important despite the restrictions’ “inevitable anti-competitive effects.”¹¹⁴ The dissent also appeared ignorant of the empirical evidence regarding professional advertising when it noted, concerning whether speech bans would raise prices, that “[a]lthough one could probably not test this hypothesis empirically, it is inherently plausible.”¹¹⁵

The split on the *Shapero* court continued two years later in *Peel v Attorney Registration and Disciplinary Commission*.¹¹⁶ There, an attorney had advertised on his stationary that the National Board of Trial Advocacy certified him in civil trial advocacy. He was censored for violating Illinois’s rule against advertising oneself as a specialist. In a 5-4 opinion, which lacked a majority rationale, the Court disagreed with the Illinois Supreme Court that the advertisement was inherently likely to deceive and thus should be denied First Amendment protection. The plurality opinion joined by Justices Stevens and Kennedy - - two of the *CDA* dissenters - - noted that the letter’s claims were accurate and that the state had no evidence that anyone was actually misled.¹¹⁷ Justice O’Connor again dissented, joined by the Chief Justice and Justice Scalia --

¹⁰⁹ Id at 469-470.

¹¹⁰ Id at 476.

¹¹¹ Id at 476.

¹¹² Id at 488.

¹¹³ Id at 490.

¹¹⁴ Id at 490-491. Thus, “[r]estrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers . . . to maintain a price-quality ratio in some of their services that is higher than would otherwise prevail.” Id at 488.

¹¹⁵ Id at 488. Because previous cases had discussed such evidence, this conclusion is surprising. See *Bates*, 433 US at 377 (citing Benham and Cady research discussed in Part IV.B below).

¹¹⁶ 496 US 91 (1990).

¹¹⁷ Id at 100-101.

three members of the *CDA* majority.¹¹⁸ The dissenters rejected the argument that the government must show more than potential deception.¹¹⁹ Moreover, the dissenters again cited their concerns with professionalism, noting that the restrictions were “designed to ensure reliable and ethical professions.”¹²⁰

In 1993, the Court spoke with more certainty, striking a Florida ban on a certified public accountant from soliciting business with letters to potential clients.¹²¹ The ban was invalid because the government did not show that this speech restriction directly advanced the interest asserted. The Court found that the State presented “no studies that suggest personal solicitation of prospective business clients by CPA’s creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear.”¹²² Moreover, the relevant literature, to which the Court cited, found no empirical link between solicitation and the quality or independence of accountants’ performance.¹²³ Only Justice O’Connor dissented:

I continue to believe that this Court took a wrong turn with *Bates v State Bar Association of Arizona*. . . . States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker’s membership in a learned profession and therefore damaging to the profession and society at large Commercialism has an incremental, indirect, yet profound effect on professional culture, as lawyers know all too well.¹²⁴

Even Chief Justice Rehnquist, who had dissented from the initial Supreme Court protection

¹¹⁸ Justice White also dissented, albeit on narrower grounds. Justice Marshall, joined by Justice Brennan, concurred in the judgment only, arguing that Illinois’ ban was unconstitutional as applied to this advertisement because the term “national board of trial advocacy” was only potentially misleading. *Id.* at 111-112.

¹¹⁹ *Id.* at 120-21.

¹²⁰ *Id.* at 119. *Ibanez v Florida Dept of Bus and Professional Reg*, 512 US 136 (1994) raises issues similar to *Peel*. *Ibanez*, an attorney-accountant, was reprimanded for referring in advertisements and other communications with the public to her credentials as a Certified Public Accountant (CPA) and Certified Financial Planner (CFP). In an opinion by Justice Ginsberg, the Court unanimously disagreed that *Ibanez*’s use of the CPA designation on her commercial communications were misleading, as long as she truthfully represented her status as a currently active CPA. By 7-2, the Court found that the effort to discipline *Ibanez* for the use of the CFP designation was equally unpersuasive. Justice O’Connor and Chief Justice Rehnquist dissented in part, arguing that the CFP designation was “both inherently and potentially misleading.” 512 US at 149.

¹²¹ *Edenfield v Fane*, 507 US 761 (1993).

¹²² *Id.* at 771.

¹²³ *Id.* at 772-73.

¹²⁴ *Id.* at 778.

of commercial speech, did not join Justice O'Connor. But Justice Rehnquist had expressed similar sentiments in his *Bates* dissent:

I continue to believe that the First Amendment speech provision, long regarded by the Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to product advertisements of goods and services.¹²⁵

Justice O'Connor finally prevailed in sustaining restrictions on professional speech in *Florida Bar v Went For It, Inc.*¹²⁶ Because the Court's membership in this 1995 decision was the same as in *CDA*, and because seven of the nine Justices voted to produce the same results concerning advertising restrictions in both cases, this case is highly revealing. Florida prohibited a lawyer from contacting or writing for thirty days to anyone who had been injured, to relatives of the injured person, or to relatives of those who had died in accidents. (The Kentucky rule in *Shapero* did not have this time limitation.) The District Court and Eleventh Circuit had declared the restrictions unconstitutional.¹²⁷ The Court of Appeals, however, on holding that *Bates* and its progeny required the decision, noted that the commercial speech doctrine had altered the practice of law, and "the resulting changes have not necessarily been for the better."¹²⁸ By one vote, the Court reversed. Justice O'Connor, writing for the majority, argued that the regulation was "an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, is universally regarded as deplorable and beneath common decency . . ."¹²⁹ The majority was concerned about the reputation of the legal profession, and with the "demonstrable detrimental effect that . . . [the solicitation here] has on the profession . . ."¹³⁰

To distinguish *Shapero*, the majority relied on protection of privacy, and a report that Florida had used to buttress the privacy justification. As Fred McChesney has persuasively argued,¹³¹ however, the report does not justify the Court's conclusion. In fact, the record contained only a short summary of the full report, and the summary itself contained scant information regarding direct mail. The Court emphasized that the survey showed that "27% of direct mail recipients reported that their regard for the legal profession and the judicial processes as a whole was lower as a result of receiving the direct mail."¹³² The Court could just as easily have argued that almost three quarters of direct mail recipients did not report that their regard for the legal profession was lower.¹³³ Moreover, as the dissent noted, the record revealed nothing

¹²⁵ 433 US at 404.

¹²⁶ 515 US 618 (1995).

¹²⁷ 808 F Supp 1543 (MD Fla 1993), aff'd 21 F3d 1038 (1994).

¹²⁸ 21 F3d at 1045.

¹²⁹ 515 US at 625.

¹³⁰ Id at 631.

¹³¹ McChesney, *De-Bates* and *Re-Bates* at 129-31 (cited in note 98).

¹³² 515 US at 627.

¹³³ McChesney, *De-Bates* and *Re-Bates* at 130 (cited in note 98).

about the actual surveys, sample selection, methodology, and excluded results.¹³⁴ Indeed, the record did not contain findings adverse to the Bar’s position, including that nearly sixty percent “strongly agree that direct mail advertising helps new, unknown lawyers, by putting them in touch with potential clients.”¹³⁵

Justice Kennedy’s dissent concluded that the majority opinion was inconsistent with prior decisions “at the expense of those victims most in need of legal assistance.”¹³⁶ The dissenters argued that *Shapero* could not be distinguished, and that the Court had previously decided that the possibility that some members of the population might find speech offensive did not justify its ban. The dissenters also noted that because “[p]otential clients will not hire lawyers who offend them,”¹³⁷ the market would cure any problem. The dissenters concluded that the Bar was engaged in censorship, and that the majority retreated from prior cases to “shield its own profession from public criticism.”¹³⁸

C. The Prelude to *CDA*: Two views on Professionalism

Thus, by the time *CDA* arrived at the Court, there were *two* lines of relevant cases that are difficult to reconcile. In antitrust cases involving professional restraints, the Court’s track record, despite footnote 17, was one of applying antitrust analysis to professionals in a manner similar to other industries. Restraints among professional competitors were treated harshly; not one had escaped Court condemnation. The Court had never considered, however, an antitrust case involving restraints on professional advertising. It had considered several professional advertising cases, but under the guise of the First Amendment’s Commercial Speech doctrine. Those cases revealed a deep split in the Court. Three of its members -- O’Connor, Rehnquist, and Scalia -- had a long a history of voting to sustain restrictions on professional speech, while Justices Kennedy and Stevens opposed such restrictions. The other four Justices, more recent members of the Court, had not participated in most of this history. In *WFI*, two of the newer members, Justices Breyer and Thomas, joined the critics of professional advertising to sustain the Florida Bar rule, while Justices Ginsburg and Souter joined the proponents’ of professional advertising. In *CDA* the anti-advertising forces again prevailed by one vote, although Justices Breyer and Souter reversed their positions from *WFI*, with both writing opinions.¹³⁹

Although *CDA* and *WFI* involved different doctrinal foundations, the two doctrines have considered precisely the same issues. The seminal commercial speech cases -- *Virginia State*

¹³⁴ 515 US at 640.

¹³⁵ McChesney, *De-Bates* and *Re-Bates* at 132 (cited in note 98).

¹³⁶ 515 US at 635.

¹³⁷ *Id* at 643.

¹³⁸ *Id* at 644.

¹³⁹ Because he is a student of the economics of regulation, Justice Breyer’s vote in *CDA* is easier to understand than his vote in *WFI*. The empirical evidence discussed below in Part IV.B reveals that restraints on advertising impose significant costs without counterbalancing benefits. Justice Souter, as the member of the *CDA* majority the least critical of professional advertising, was the most likely to write the majority opinion.

Board of Pharmacy v Virginia Citizens Consumer Council, Inc.,¹⁴⁰ and *Bates* -- turned on an analysis of the impact on consumers of banning advertising, just as would an antitrust analysis of an advertising ban. Indeed, commentators noted the identity of antitrust and First Amendment analysis.¹⁴¹ Under either antitrust law or the First Amendment, a restraint based on protection of the economic interests of any group, including professionals, would not stand. Moreover, many of the issues regarding deception raised in *CDA* had been considered in previous commercial speech cases, even to the extent that the Court concluded that consumers did not face more difficulty in evaluating professional than other services.¹⁴² It is true that some commercial speech cases have strayed from their economic origins and their current doctrinal basis is unclear.¹⁴³ Neither professionalism nor privacy, by themselves, would justify restraints among competitors in an antitrust case just as, in the earliest commercial speech cases, neither concern would have justified a restraint on professional advertising that, on balance, harmed consumers. As revealed in Justice O'Connor's opinions, however, the critics of professional advertising appear to believe that what is good for the professions should also be good for consumers. Justice Souter's skepticism about the Ninth Circuit's condemnation of *CDA*'s restraints transfers this hostility toward professional advertising into an antitrust context. Unlike *WFI*, the restraint in *CDA* was facially aimed at deceptive advertising, which enjoys no First Amendment protection, just as a restraint that reasonably furthers the goal of preventing deception would not violate antitrust law.¹⁴⁴

As in the commercial speech cases, the majority opinion in *CDA* therefore rests on what the Court correctly characterized as an empirical question: Is there evidence that advertising of the type *CDA* prescribed could in fact cause the anti-competitive consequences the majority postulated, in particular a "lemons" market in which low quality forces out higher quality? Moreover, is there evidence that the restraints would lead to the consequences that the dissenters feared, in particular higher prices? Although the *CDA* record did not discuss these issues, we will see next that ample justification exists, both theoretical and empirical, for condemning *CDA*'s restraints on advertising.

IV. ECONOMIC ISSUES

A. Theory

The *CDA* majority emphasized the difficulty consumers have in evaluating professional services and hence professional advertising. This problem of "asymmetric information" has been used, most notably in the Akerlof article that the Court twice cited,¹⁴⁵ to demonstrate how, in

¹⁴⁰ 425 US 748 (1976).

¹⁴¹ See the discussion and citations in note 97.

¹⁴² See the quotation and accompanying note 107.

¹⁴³ Again, Fred McChesney has chronicled this evolution in his excellent article. See McChesney, *De-Bates* and *Re-Bates* (cited in note 98).

¹⁴⁴ *CDA* involves private restraints, while most of the First Amendment cases involve restraints that the state enforces. Whether this difference justifies a different approach in antitrust cases is discussed below in Part IV.B.2.

¹⁴⁵ See *California Dental*, 119 S Ct at 1613, 1615 (citing Akerlof, *Market for Lemons* (cited in note 11)).

theory, dishonest dealers can drive honest dealers from the market. For example, if used car buyers cannot distinguish good used cars, which rarely need repairs, from "lemons," which frequently need repairs, then the cars must sell for the same price, all else equal. In such a market, the bad will drive out the good. Although owners, who know the true facts, will gladly sell lemons for more the cars are worth to them, owners will keep their good cars rather than sell them for less than they are worth to them. Because only bad cars are sold, buyers know they are getting lemons and will only pay the value of such cars. Although consumers do not overpay, they are harmed in the sense that there is no market for high-quality used cars. In another article that the Court cites, Hayne Leland argues that Akerlof's concept can apply to professional services, making quality levels too low.¹⁴⁶

Although the Court does not discuss the point, consumer knowledge of some aspects of professional services may be even worse than of used cars. With used cars, consumers can evaluate the quality of the cars after purchase, while with some professional services, they may not be able to evaluate quality at all.¹⁴⁷ For example, your dentist may eliminate your pain, but may also treat you for non-existent problems or do a poor job, causing future problems. When those problems occur, you may not know whether to ascribe them problems to bad luck, poor previous dental work, or some other intervening event.

What are we to make of the "lemons" argument as applied in *CDA*? Even in theory, the majority has exaggerated the impact of adverse information. To begin with, although such potential problems are pervasive in our economy, they usually do not justify restraints on advertising, even in the used car or car repair markets. Like professional services, car repairs are hard to evaluate, even after purchase. For example, most consumers are too ignorant to determine if the mechanic charged for more repairs than necessary, performed the repairs competently, or subtly sabotaged the car to induce further repairs. Yet, one doubts that the Court would have difficulty in condemning agreements among mechanics to limit price and quality advertising. But then mechanics are not "professionals."

As economists have argued, moreover, the lemons argument ignores the presence of numerous market and governmental institutions that protect consumers.¹⁴⁸ For example, sellers can offer guarantees or warranties to certify high quality. Indeed, from this standpoint advertising itself is part of the solution to the problem rather than the problem itself.¹⁴⁹ Reputation is also extremely important. Sellers who rely on repeat purchasers have a particularly strong incentive not to provide defective products. Experts such as Consumers Reports and local consumer TV and

¹⁴⁶ Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J Pol Econ 1328 (1979) ("Leland, *Quacks, Lemons*").

¹⁴⁷ In this sense, professional services are a kind of "credence" good that consumers must take on trust. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 JL & Econ 67, 68-69 (1973).

¹⁴⁸ See, e.g., Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization* 561-65 (2d ed 1994); Benjamin Klein and Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J Pol Econ 615 (1981) ("Klein & Leffler, *Role of Market Forces*").

¹⁴⁹ Advertising not only informs consumers of attributes such as guarantees, but its existence serves as a bond to assure consumers of higher quality. See Klein & Leffler, *Role of Market Forces* (cited in note 148).

newspapers, including some that rate professional services,¹⁵⁰ exist in many markets. Malpractice lawsuits and state licensing encourage high quality.¹⁵¹ Many of us possess quality information, albeit imperfect, for example from past experience or from friends.¹⁵² Regarding dental services, for example, many of us (unfortunately) have considerable experience. Although we may not possess technical expertise, we do have some knowledge of the success of the procedures, the level of pain, and the deportment of the professionals. Moreover, in our increasingly mobile society, many will have experience with multiple dentists.

An additional problem with the majority's analysis is its failure to distinguish among advertising claims regarding consumers' ability to verify. For example, the extent and nature of a dentists' guarantee is verifiable. Moreover, specific prices, such as the \$1 special¹⁵³ and other claims included in advertisements the CDA condemned, were obviously verifiable. Even discounts reveal important information. When dental services involve repeat purchases in which consumers observe the actual fee, at least some can compare the ad with their previous experiences. Further, consumers can call the advertising dentist's office and inquire about specifics. In any event, pain is a constant feature of dental visits, making claims of "gentleness" easy for consumers to evaluate, particularly after repeat visits. Dentists who advertise that they have the latest techniques in general, or for avoiding pain in particular, provide useful and verifiable information to consumers about the evolving nature of dental practice.¹⁵⁴ Finally, the Court said in *CDA* that the dental market defied comparison-shopping.¹⁵⁵ Yet insurance companies standardize dental procedures along a variety of dimensions. This suggests that consumers can compare prices for such services as dental cleaning, x-rays, filling a cavity, pulling wisdom teeth, and root canals. CDA nevertheless forebode all of these ads regardless of consumers' difficulty in verifying them and without inquiring into whether they were true or substantiated.

It is significant that CDA's motivation, as found by the Commission, was a concern that advertising would increase competition. The dentists were afraid of the impact of price

¹⁵⁰ An example is *Washington Checkbook Magazine*, which provides consumer evaluations of sellers of goods and services in the Washington, D.C. area.

¹⁵¹ On licensure, see Leland, *Quacks, Lemons* (cited in note 146). Moreover, as my colleague Larry Ribstein recently argued, law firms' role as reputational intermediaries can supplement or substitute for ethical rules. See Larry E. Ribstein, *Ethical Rules, Agency Costs and Law Firm Structure*, 84 *Virginia Law Review* 1707 (1998).

¹⁵² Klein & Leffler, *Role of Market Forces* at 634 (cited in note 148).

¹⁵³ See accompanying text at note 28.

¹⁵⁴ Thus, a recent article in *FDA Consumer Magazine* discussed new devices for more gentle dental care, a particularly important fact for children as the article emphasized. See Paula Krutzweil, *New Devices Make For More Gentle Dental*, 82 *Consumers Research* 27 (June 1999) (reprinted from *FDA Consumer magazine*).

¹⁵⁵ *California Dental*, 119 S Ct at 1611-12.

competition on their businesses, as well as tarnishing their “shining image” as professionals.¹⁵⁶ Moreover, advertising was criticized as attracting relatively poor patients who thought prices were too high and merely wanted discounts.¹⁵⁷

The Court, moreover, ignored its own previous statements regarding advertising. While the *CDA* majority raised possible problems with terms such as “reasonable prices,” the *Bates* Court said there was no reason to ban such phrases because “advertising will permit the comparison of rates among competitors, thus revealing if the rates are reasonable.”¹⁵⁸ Although the *CDA* majority spoke favorably of the association’s requirement of detailed disclosure, the Court had previously warned, “requiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive.”¹⁵⁹ While the *CDA* majority emphasized consumers’ difficulty in evaluating professional services, the Court had previously explicitly rejected the argument that such services are harder for consumers to evaluate than other services.¹⁶⁰ Finally, the *CDA* majority expressed skepticism about the value of commercial speech and appeared unconcerned that *CDA* did not attempt to distinguish truthful from deceptive claims, yet the Court had previously observed that “[r]ecent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”¹⁶¹

The court seemed confused on some economics issues. The Court of Appeals had found that the restraints on quality advertising were a form of output limitation.¹⁶² But even if advertising induced customers to obtain non-emergency care that they might otherwise avoid, the Court was still not persuaded that the restraints decreased output because “restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producer’s supply of a good relative to the demand that is normally relevant to determining whether a producer-imposed output *limitation* has an anticompetitive effect of artificially raising prices.”¹⁶³ The Court is incorrect in implying that a restriction on advertising that reduced the amount of services consumers demanded would not have an anti-competitive effect identical to what the Court called “normally relevant”. When advertising is restricted, consumers are relatively ignorant and therefore may purchase fewer goods or services than they otherwise would. Thus, output may be lower than without the restriction. As with output restrictions caused by a cartel that raises prices, consumers may forego purchases of goods whose value exceeds the costs of producing them. Also,

¹⁵⁶ *California Dental*, 121 FTC at 220-21.

¹⁵⁷ *Id.*

¹⁵⁸ 433 US at 382.

¹⁵⁹ *Morales v Trans World Airlines, Inc.*, 504 US 374, 388 (1992).

¹⁶⁰ See note 107 and accompanying text above.

¹⁶¹ *Shapiro*, 486 US at 478 (quoting *Zauderer*, 471 US at 646).

¹⁶² 128 F3d at 728. See accompanying text at notes 62-65.

¹⁶³ *California Dental*, 119 S Ct at 1616 (emphasis added).

producers can raise price with less fear of losing customers to competitors if the customers are less aware of alternatives. Whether quantity is restricted because of producer decisions directly or because the advertising restriction raises search costs or (as the Court calls it) reduces consumer demand, the impact is identical.¹⁶⁴

A further problem is the Court's assertion that "banning quality claims might have no effect at all on competitiveness, if, for example, many dentists made very much the same claims."¹⁶⁵ If most dentists make the same claim, for example one of "gentleness," then it would appear that market forces, driven by consumer desires, produced this result. The relevant comparison is not among professionals who are permitted to make the claim, but rather between when dentists are allowed to advertise and when they are not. If dentists feel compelled to emphasize one or more aspects of their service when advertising is permitted, then this fact indicates that consumers desire those aspects to be emphasized.¹⁶⁶

B. Empirical Evidence

Whatever the flaws in the *CDA* majority's reasoning, the Court is surely correct about two issues. The first is that the hypothesis that these restraints on advertising may be pro-competitive in the professions must ultimately be tested empirically. The second is that the Court of Appeals

¹⁶⁴ The *CDA* majority makes three other peculiar statements regarding advertising and the professional market. First, the Court notes that some patients are attached to a particular professional, "the rationality of which is difficult to assess." *Id.* at 1614. To question the rationality of consumer decisions criticizes one of the primary foundations of antitrust law. Moreover, practitioners would have an incentive to encourage such attachment by avoiding deception. Professionals value long-term relationships, which are more difficult to form when deception occurs. In any event, there is no evidence or reason to believe that switching among providers does not occur optimally in professional services. Second, the court discusses a possible "pro competitive ban on puffery." *Id.* at 1616. Puffery, by definition, is a statement that no reasonable consumer would take literally and rely on when making purchase decisions. See *Black's Law Dictionary* 1233-24 (7th ed 1990). If no reasonable consumer would rely on the claims, then how can a ban on such claims be pro-competitive? This does not mean that puffery can serve no purpose. As Dean Grady and others have argued, even advertising devoid of specific informational content can be useful because it identifies the existence of a seller for a product whose use consumers already know or it can encourage consumers to seek additional information about a new product. Mark F. Grady, *Regulating Information: Advertising Overview*, in Kenneth W. Clarkson and Timothy J. Muris, *The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior* (Cambridge 1981). Third, the court mentions "irrelevant" advertising. 119 S Ct at 1614. It is not clear what this means, as the merits of truthful advertising are normally thought to be judged in the market place rather than by an organization of competitors.

¹⁶⁵ 119 S Ct at 1616.

¹⁶⁶ The Court might respond that the claims could be untrue. If so, then this assertion could be evaluated on its merits. If the concern is over a "lemons market," then the theoretical points of this section about the unlikelihood of such markets, as well as the empirical evidence developed in the next section, are relevant. Moreover, it is difficult to understand how a result that forced professionals to emphasize quality could be said to be a lemons market, in which bad quality drives out good quality.

did not discuss such testing. The FTC had explicitly addressed whether the professional setting should affect the antitrust analysis, even citing *Goldfarb's* footnote 17. Based on pronouncements in previous Court cases, including commercial speech cases dealing with professional advertising, the Commission concluded that special treatment was unjustified.¹⁶⁷ The FTC did not, however, discuss the considerable body of empirical evidence, some of which the Commission had itself previously developed, demonstrating that the Court's fears about the impact of professional advertising on consumers are unwarranted. This section considers that evidence, beginning first with price, then turning to quality, and finally considering surveys of both consumer and provider attitudes toward professional advertising.

1. Evidence on Price

To begin, many economists once thought that banning advertising would lower prices because the firms could forego advertising expenses.¹⁶⁸ The evidence has proven this view to be incorrect. A recent article surveyed the literature that tested whether professional advertising raised prices, citing 17 studies.¹⁶⁹ All but one rejected the hypothesis that prices increased. For example, in 1972 Lee Benham found that state prohibitions against advertising by optometrists raised prices by approximately 25 percent.¹⁷⁰ Other studies in a variety of industries produced the same results.¹⁷¹ One particularly striking result of these studies is that prices in restrictive states are highest for the least educated consumers. In 1980, the FTC's own Bureau of Economics published a detailed study on the effects of advertising restrictions in optometry. The results agreed with Benham, and also showed that advertising lowers the prices charged not just by those who advertise, but also by those who do not.¹⁷²

At this point, the *CDA* majority might answer that, however reliable and overwhelming such evidence is, it is irrelevant for *CDA* because that case did not involve a ban on all advertising, but only on advertising about quality or across the board discounts. Here, too, considerable empirical evidence exists, finding that less than total bans on advertising also raise price, even if not as much as total prohibitions. Thus, John Cady found that explicit prohibition of advertising had a greater effect on drug prices than the outlawing of "promotional schemes" like

¹⁶⁷ *California Dental*, 121 FTC at 306-306.

¹⁶⁸ See Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J L& Econ 337 (1972) ("Benham, *Effect of Advertising*").

¹⁶⁹ James H. Love and Jack H Stephen, *Advertising, Price and Quality, in Self-regulating Professions: A Survey*, 3 Intl J Econ Bus 227 (1996) ("Love & Stephen, *Advertising, Price and Quality*").

¹⁷⁰ *Id.*

¹⁷¹ See *id.* See also J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National Advertising* 8-9 (1993). One study found higher prices. See notes 179-81 and accompanying text.

¹⁷² R. S. Bond, J. J. Kwoka, J. J. Phelan, and I. T. Whitten, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980), FTC Bureau of Economics Staff Report ("1980 FTC Staff Report").

senior citizen discounts, but both restrictions increased prices.¹⁷³ Using data from England and Wales, James Love and his colleagues found that non-price, as well as price, advertising reduces the price for legal services.¹⁷⁴

Perhaps the most comprehensive study came from a 1984 FTC report that considered the effects of different commercial speech restrictions on lawyers.¹⁷⁵ Evaluating five legal services, the study found that relaxing restrictions on commercial speech reduced prices. Most important for present purposes, because different states imposed different restrictions, the Commission could test the incremental effects of adding restrictions. Thus, some states restricted the speech's content, such as the use of trade names, while others restricted the media in which advertising could be placed, such as electronic media. Using individual variables for the various restrictions, the study concluded that the fewer the restrictions, the lower the prices. The Report's two-paragraph conclusion to its empirical investigation well summarizes the benefits of removing as many restrictions on advertising as possible:

The study provides convincing support for the proposition that greater flexibility to engage in non-deceptive advertising will be associated with lower prices for consumers of legal services. For each of the five legal services studied, lower prices were found in cities where the fewest restrictions on advertising existed. We found that the removal of restrictions on the use of electronic media and the removal of restrictions on fee advertising may contribute to the most meaningful price reductions. However, there appears to be a continuous relationship between prices and regulations, with the lowest prices associated with the fewest restrictions on attorney marketing practices.

We also found that as restrictions are removed, more attorneys use advertising. This finding supports the proposition that restrictions on advertising increase the cost of communicating and discouraging advertising. Furthermore, the study provides evidence for the proposition that as advertising increases in the legal services market, prices will decline. We also found support for the theory

¹⁷³ J. F. Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (Washington, D.C.: American Enterprise Institute, 1976) ("Cady, *Restricted Advertising*"); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 *Econ Inq* 490, 504 (1976).

¹⁷⁴ See James H. Love, et al, *Spatial Aspects of Competition in the Market for Legal Services*, 26 *Reg Stud* 137 (1992). Another study by Stephen, one of the co-authors of the Love study, found that non-price, but not price, advertising had a statistically significant effect on prices for legal services for property conveyances in Scotland. See Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market*, 26 *Applied Econ* 1177 (1994). Lee Benham found that banning only price advertising raised prices by a lower amount than did banning all advertising. This result for price advertising, however, was not statistically significant. See Benham, *Effect of Advertising* at 349-50 (cited in note 168).

¹⁷⁵ William W. Jacobs, Brenda W. Doubrava, Robert P. Weaver, Douglas O. Stewart, and Eric L. Pahl, *Improving Customer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984), FTC Staff Report ("1984 FTC Staff Report"). Love & Stephen, *Advertising, Price and Quality* (cited in note 169), do not cite this study.

that advertising will exert a pro-competitive influence on the market. The data show that attorneys who advertise a specific service tend to provide that service at a lower price than attorneys who do not advertise that service. Furthermore, it appears that advertising attorneys are frequently the providers offering the lowest prices for their services. The empirical data, therefore, support the information theory of advertising and establish strong evidence for removing unnecessary restrictions on truthful, non-competitive advertising practices.¹⁷⁶

There is additional evidence in a non-professional setting that advertising lowers price even if it does not discuss price or is not fully informative. For example, advertising for toys, directed primarily to children, lowered prices.¹⁷⁷ Moreover, the broadcast ban on cigarette advertising raised prices, even though magazine and billboard advertising was still permitted and the banned advertising did not mention price.¹⁷⁸

As noted above,¹⁷⁹ only one study has concluded that advertising led to higher prices.¹⁸⁰ The authors claimed to test selection effects -- that is, the possibility that advertisers and non-advertisers systematically differed. In one sense their result is not surprising, since prices must cover advertising costs. More important for present purposes, the authors do not ask the appropriate question: what is the impact of advertising on the overall market? Other studies found that non-advertisers are forced to lower their fees as a result of competitors' advertising, lowering overall prices¹⁸¹

Although most of the evidence discussed in this section involves professions, it does not consider dentists. Nor does it consider the precise restrictions and geography at issue in *CDA*. The trial record, however, lacked contrary evidence and reasons to believe that the considerable empirical literature was irrelevant for *CDA*. One possible distinction, not discussed in *CDA*, is

¹⁷⁶ 1984 FTC Staff Report at 126-27 (cite in note 175). Of course, the *CDA* Court was concerned about deceptive advertising, particularly the impact on quality. I discuss quality in the next section.

¹⁷⁷ Robert L. Steiner, *Does Advertising Lower Consumer Prices?* 37 J Marketing 17 (1973).

¹⁷⁸ Robert H. Porter, "The Impact of Government Policy on the U.S. Cigarette Industry," in Pauline Ippolito and D. Scheffman, eds., *Empirical Approaches to Consumer Protection* (Washington, D.C.: Federal Trade Commission, March 1986).

¹⁷⁹ See text following note 169.

¹⁸⁰ See John A. Rizzo & Richard J. Zeckhauser, *Advertising and Entry: The Case of Physician Services*, 98 J Pol Econ 476 (1990) ("Rizzo & Zeckhauser, *Advertising and Entry*").

¹⁸¹ Love & Stephen, *Advertising, Price and Quality* at 232 (cited in note 169). Rizzo & Zeckhauser, *Advertising and Entry* (cited in note 180) also suffers from econometric problems. For example, when using price as a dependent variable, quality and quantity should have been independent variables. The same holds true when using quality and quantity as dependent variables. The authors acknowledge this problem, which they cannot directly address because of lack of "a sufficiently rich set of independent variables." *Id.* at 395 n20. Moreover, they hypothesize that the advertisers may be those with lower opportunity costs of time because of under utilized practices. Because their equations do not have a cost measure, they cannot know if the evidence supports this hypothesis.

that most of this evidence involved state rather than private restrictions on advertising. Although state restrictions may be more effective and longer lasting, private restrictions still harm consumers. Competitors can use associations to achieve market power through rules that raise marginal costs for members. Each competitor experiences higher costs, but each can profit from collective enforcement of an association rule that lowers output and consequently raises prices for the service that the association members as a group provide. New competition via entry into the association will not solve the problem if new entrants adhere to the cost-raising rules that incumbent competitors also follow. Such entry may reduce profits rather than prices.¹⁸² Many competitors may join the association because membership confers substantial benefits, such as quality certification through membership in a respected professional organization, peer approval, and other pecuniary benefits.¹⁸³ In fact, CDA concluded that the value of a membership, including all of the various benefits provided to members, exceeded the cost to members who used these benefits.¹⁸⁴ Thus, although some professionals may choose not to join, and some of them may advertise in ways that would violate the association's rules, an equilibrium can develop by which consumers are worse off than if the restrictions did not exist. The lesson of the FTC lawyers and other studies that removing advertising restrictions benefits consumers should apply equally to the dental market.

2. Quality

Numerous empirical studies of the relationship between professional advertising and quality, like the price evidence, do not support CDA's restrictions. After reviewing 10 studies in their 1996 survey article, Love and Stephens conclude that, "there is very little evidence that advertising lowers the quality of service offered to the public, or that restricting its use by professionals is likely to raise quality."¹⁸⁵ Indeed, some studies provide explicit evidence that advertising increases quality. In the first published study, John Cady considered various quality measures for pharmacists services, including the availability of waiting areas, credit arrangements, delivery, special provisions for emergencies, providing information on drugs, and maintaining family prescription records.¹⁸⁶ Assuming that the more services that pharmacists offered the higher the quality, Cady found no significant differences between the proportion of pharmacies in regulated states and the proportion of pharmacies in unregulated states that offered delivery service, waiting areas, and credit accounts. In other words, advertising restrictions did not raise the level of these services. In fact, more pharmacies in states in which advertising was unrestricted provided emergency services, contrary to the theory that advertising reduces quality.

¹⁸² See James Langenfeld and John Morris, *Analyzing Agreements Among Competitors: What Does the Future Hold?*, 36 *The Antitrust Bul* 651 (1991); James Langerfeld & Louis Silvie, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, 61 *Antit LJ* 653 (1997).

¹⁸³ This issue of whether the association lacked market power also raises the question of how the Rule of Reason should be applied, discussed in Part V below.

¹⁸⁴ *California Dental*, 121 *FTC* at 313-15.

¹⁸⁵ Love & Stephen, *Advertising, Price and Quality* at 237 (cited in note 169).

¹⁸⁶ Cady, *Restricted Advertising* at [pinpoint] (cited in note 173). Love & Stephen do not discuss this evidence.

Only on one variable, maintaining family records, did the regulated states perform better than the unregulated.

A few years later, Fred McChesney and I reported the results of a case study involving advertising and the quality of legal services.¹⁸⁷ This study compared the subjective and objective quality of services provided by a high-volume legal clinic with that of traditional law firms in the Los Angeles area. Using a mail survey with questions identical to those of a national survey, we asked clients of the two firm types to assess their level of satisfaction with their lawyers' performance on a range of cases, including divorces, wills, and real estate. There were seven measures of satisfaction, including promptness, honesty, keeping the client informed, and paying attention to what the client said.¹⁸⁸ The legal clinic scored higher on each measure, with a statistically significant overall difference. We also used objective criteria, namely the performance on child support awards, using public records from Los Angeles County courts. The legal clinic performed as well as or better than the traditional firms. In fact, when the clinic represented women who retained custody of their children, child support awards were statistically significantly higher than those obtained by traditional law firms. The study also concluded that firms that advertised could provide equal or higher quality at lower prices because advertising led to a larger, more reliable client base. Larger planned volume let firms take advantage of economies of scale and specialization, thereby lowering costs. Moreover, particularly because of specialization, on some measures quality was higher.

As part of a rulemaking involving restrictions on advertising and commercial practice in the professions, the FTC's Bureau of Economics examined the impact of advertising on the quality of optometric services.¹⁸⁹ In the first of two studies, conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, the economists compared the price and quality of eye examinations and eyeglasses across cities with a variety of restrictions. The quality of vision care was not lower when optometrists practiced in retail chains and where advertising was more prevalent. The thoroughness of eye examinations, the accuracy of eyeglass prescriptions, the accuracy in workmanship of eyeglasses, and the extent of unnecessary prescriptions were, on average, the same regardless of advertising.

The second study compared the cost and quality of cosmetic contact lens fitted by a variety of eye care professionals. This study was designed and conducted with the cooperation and help of major national professional associations representing ophthalmologists, optometrists, and opticians. More than 500 contact lens wearers in 18 urban areas were evaluated. There were few, if any meaningful differences in the quality of fitting across providers. "Commercial" optometrists who worked for chain optical firms that advertised or themselves advertised heavily fitted contact lens at least as well as others and charged significantly lower prices.

John Kwoka used part of the FTC data to analyze one frequently discussed measure of quality, the time that the professional spends with the patients.¹⁹⁰ Opponents of advertising argue

¹⁸⁷ Timothy J. Muris and Fred McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 Am Bar Found Research J 179.

¹⁸⁸ Id at 197-201.

¹⁸⁹ 1980 FTC Staff Report at (cited in note 172).

¹⁹⁰ John Kwoka, *Advertising the Price and Quality of Optometric Services*, 74 Am Econ Rev

that less time will be spent, necessarily causing a less thorough, and therefore lower quality, examination. Kwoka's analysis revealed that this quality dimension was actually higher in markets in which advertising prevailed.¹⁹¹

Although the FTC optometrist results were criticized,¹⁹² Professor Debra Haas-Wilson reproduced the results to address the major criticisms.¹⁹³ She compared the effects of advertising on prices and on two measures of quality, the thoroughness of the examination, using a scale devised by the optometric experts, and the accuracy of the prescription. Consistent with previous studies, Professor Haas-Wilson found that prices were dramatically lower (26-33 percent) in markets in which price or non-price media advertising existed. She also found that neither advertising nor other commercial practice restrictions produced a statically significant difference in quality.¹⁹⁴

Two studies analyze the relationship between "commercial" dentistry and quality. The first study found no relationship between professional attitudes toward commercialism and quality of care.¹⁹⁵ The second, unpublished, study involved the FTC's San Francisco Regional office and the Los Angeles dental market. Like the FTC's optometry study, the pilot study of dentistry used

211 (1984).

¹⁹¹ In such markets, non-advertising practitioners spent more time with patients than the average, but the overall market average where advertising was present was higher than the overall average in markets without advertising.

¹⁹² Ophthalmic Practice Rules, 54 F Reg 10,285, 10,292-293 (1989) (discussing James P. Greenan, Presiding Officer, *Report of the Presiding Officer on Proposed Trade Regulation Rule of Ophthalmic Practice Rules* (1986)).

¹⁹³ Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry*, 29 J L & Econ 165 (1986). While the FTC study had classified geographic areas according to the restrictiveness of their restraints on commercial practice, Haas-Wilson avoided any subjective judgment by not attempting to classify areas by restrictiveness. Instead, she estimated the effect of the presence of commercial practice restrictions individually, finding that a restriction is present if it is imposed by statute, Board of Optometry Regulation, court decision, or attorney general opinion.

¹⁹⁴ Id at 181-82. Regarding individual optometrists, Professor Haas-Wilson found that the price of an eye examination and a pair of eyeglasses increased with the thoroughness of the eye exam, but not with the accuracy of the prescription. She concluded that this result suggested that prices convey information on one aspect of product quality, thoroughness, but not on prescription accuracy, observing that "a possible explanation of this is that the consumers can assess thoroughness but not prescription accuracy." Id at 182. In another optometric study, Professor Haas-Wilson found that advertising had no systematic effect on quality. See Deborah Haas-Wilson & Elizabeth Savoca, *Quality and Provider Choice: A Multinomial Logit-Least Squares Model With Selectivity*, 24 Health Service Res 791 (1990).

¹⁹⁵ Peter Milgrom, Peter Ratener, Douglas Conrad and Philip Weinstein, *Determinants of the Quality of Restorative Dental Care*, 18 Medical Care 400 (1980).

dental experts to define and measure quality.¹⁹⁶ Unlike the optometry study, the dentistry study did not consider evidence on price or compare markets with and without advertising restrictions.¹⁹⁷ The study focused on differences between commercial and non-commercial dentists, with commercial defined as practices that were large (for example with three or more offices), employed at least one dentist who was not an owner, and solicited business through advertising or other means. Comparing quality, commercial practices were more adept at more frequently provided services, but poorer on more complex services such as surgery. The study found evidence of a negative relationship between solicitation and service quality, just as in the FTC Optometry Study. In that study, in markets with advertising the quality of the non-advertising optometrists was higher. The crucial test for the hypothesis that advertising reduces quality, however, is to compare markets with and without advertising restrictions. The dental pilot study did not perform such a comparison. The optometry study did, finding that quality was not reduced in markets without advertising restrictions. Moreover, as discussed above, some studies find that advertising increases quality.

A study published in 1986 purports to find that, contrary to the other evidence discussed here, advertising reduced overall market quality.¹⁹⁸ However, the study used an imperfect proxy for quality -- subjective evaluations of time spent counseling clients. In addition, the results were mixed. The study found an inverse and statistically significant relationship between advertising and time spent counseling clients in uncontested divorce cases.¹⁹⁹ Total time spent counseling clients in uncontested bankruptcies was also inversely related to advertising, but not statistically significant at the .05 level.²⁰⁰ For simple wills, however, time spent was positively related to advertising.²⁰¹

Even if quality were lower with advertising, this fact would not, by itself, justify restraints on advertising. Quality variations among providers are common in most markets, including those in which quality is difficult to measure. High quality producers have various means to convince consumers of their superiority, including advertising and guarantees.²⁰² Some consumers may prefer lower quality at a lower price, while others may prefer the higher quality, higher price

¹⁹⁶ Ronald W. Phelon, John E. Kushman, James R. Freed, and Jay A. Gershen, *Dental Care Quality and Commercialism: A Pilot Study* (1988).

¹⁹⁷ Because the pilot study was of the Los Angeles area, most of the dentists, as CDA members, faced the restrictions imposed by the CDA.

¹⁹⁸ John Schroeter, Scott Smith, and Steven Cox, *Advertising and Competition in the Routine Legal Services Market: An Empirical Investigation*, 36 J. Industrial Economics 340 (1987).

¹⁹⁹ Id. at 349. For total time spent on divorce cases, however, the result was insignificant (t=1-20).

²⁰⁰ Id. The result was significant at .10.

²⁰¹ Id. The result was significant at .13.

²⁰² See notes 148-52 and accompanying text.

provider. Antitrust law normally allows consumers to make these decisions without allowing providers to restrict the information available to make informed choices. Thus, even a study that revealed that advertising lowered overall quality in a market may simply reflect consumer desires.

We cannot judge whether consumers are better off by looking at prices or quality in isolation. Even if restrictions on advertising increase quality, they may raise price so much that consumers would prefer lower quality and lower prices. This is precisely what has happened in the airline industry. Before deregulation, airlines, unable to compete on price, competed on quality. Thus, airlines provided better food, more room (particularly with most flights less than full), and other amenities. Price, however, was dramatically higher than today. Although quality has dropped for the average consumer, competition has revealed that consumers prefer the lower price/quality combination.²⁰³ Consumers who prefer higher quality, such as more room and better food, can always fly first-class. The one study of professional advertising that attempts most directly to make this comparison makes a similar argument that consumers do not value higher quality as much as lower price, even assuming that regulation encouraged relatively higher quality.²⁰⁴

As with the evidence on price, most of the evidence on quality involves state, not private, restrictions on advertising. This fact actually strengthens the case against CDA's restraints. The state's power makes restraints on advertising easier to enforce and thus likely to be more effective and longer lasting.²⁰⁵ If the restraints in fact improve quality, the evidence of state restraints is *more* likely to reveal that improvement. That the available evidence overwhelmingly fails to find increased quality, even with state restraints, is powerful proof that the possible justifications of CDA's private restraints that the CDA majority raised are empirically unsupportable.

To summarize, as with the impact on price, the impact of advertising on quality does not cause the problems the CDA Court feared. The overwhelming evidence is that market quality does not decrease when providers advertise. Moreover, evidence of a lemons market has not been found.²⁰⁶

²⁰³ See George W. Douglas & James C. Miller III, *Economic Regulation of Domestic Air Transportation: Theory and Policy* (1974); Clifford Winston, *U.S. Industry Adjustments to Economic Deregulation*, 12 J Econ Persp 89 (1998). As Winston details, one area of airline quality, service frequency, has increased. *Id.* at 101.

²⁰⁴ Roger Feldman & James Begun, *The Welfare Costs of Quality Charges Due to Professional Regulation*, 34 J Indus Econ 14 (1985).

²⁰⁵ As discussed at text accompanying notes 182-84, concern over private restraints is still warranted, even if they are less effective than those of the state.

²⁰⁶ Indeed, the evidence that there are lemons markets anywhere is quite limited, even in the area that Akerlof suggested, used vehicles. Studies of the market for used trucks, for example, have not found evidence for the theoretical implication that the trucks traded tend to need more repairs than those that are not. See E. Bond, *A Direct Tests of the Lemons Model: The Market for Used Pick-up Trucks*, 72 Am Econ Rev 836 (1982); E. Bond, *Test of the Lemons Model: Reply*, 74 Am Econ Rev 801 (1984); N. Pratt & G. Hoffer, *Test of the Lemons Model: Comment*, 74 Am Econ Rev 798 (1984). A study of used cars less than 8 years old also found no problems. For cars 8 years and older, however, average quality differed significantly by sellers. Purchasing cars through friends or relatives or new and used car dealers produced higher quality than cars

3. Surveys of Consumers and Providers

Several surveys cast additional doubt on the concerns that consumers cannot comprehend professional advertising and that advertising reduces quality. For example, one study found that, although professionals including dentists opposed advertising for their professions, practitioners in several professions agreed that there was no correlation between promotion and competence.²⁰⁷ Moreover, a survey when professional advertising was first allowed found that consumers overwhelmingly supported physician advertising.²⁰⁸ A 1985 report of a survey of state regulatory agencies undertaken for the FTC found that there was little or no problem with false advertising by doctors.²⁰⁹ In one controlled experiment, when researchers asked consumers to examine a hypothetical attorney advertisement and then to compare lawyers who advertise with the “average” lawyer, the respondents realistically viewed lawyers who advertised as younger, less experienced, and less established than the average, and agreed that the advertising lawyer would be less expensive, but not necessarily less competent.²¹⁰

Another controlled study tested the importance of detailed disclosures in aiding consumer comprehension. The test considered an issue similar to that of across-the-board discounts in *CDA*. Rather than allowing a simple statement that discounts were available from rental car companies, several state attorneys general wanted such offers to include detailed disclosures listing the length of the offer and other restrictions. The study compared the disclosure “contact an Avis representative for details” with another providing the detailed disclosures. The results revealed essentially no difference between the two alternatives in consumer understanding of the

purchased through advertisements. See James M. Lacko, *Product Quality and Information in the Used Car Market*, FTC Bureau of Economics Staff Report (1986).

²⁰⁷ Darling and Hackett, *The Advertising of Fees and Services: A Study in Contrast Between, and Similarities Among, Professional Groups*, *J Advertising* (Spring 1978).[?] **add citation information [Could not find]**

²⁰⁸ See Shapero and Bohmbach, *Much Ado About Nothing Much? What’s the Fuss, Consumers Ask*, *Advertising Age* S-4 (December 24, 1979).**add citation information [could not find]**

²⁰⁹ See Braun and Braun, *Advertising Healthcare Professionals: Problem Solution and Benefits*, in *Advertising by Health Care Professional in the 80s: Proceedings of the National Symposium sponsored by the Federal Trade Commission* at 87 (1985). [**Could not find**]

²¹⁰ See Patterson & Swerdlow **first names**, *Should Lawyers Advertise? A Study of Consumer Attitudes*, 10 *J Acad Marketing Sci* 314 (1982). [**could not find**] A recent study addressed the issue, raised by the *WFI* majority, whether advertising caused the public to think poorly of professionals. This Gallop study considered whether public opinions of the legal profession's standards were a function of the amount of television advertising by lawyers. Holding other factors constant, the study found that advertising's influence of advertising on the public perception of lawyers was actually positive: the more lawyers advertise, the better their ratings for honesty and ethics. See Richard J. Cedula, *The Impact of the Advertising of Legal Services on Television on the Public’s Imaging of the Law Profession: An Extended Empirical Analysis* (1996).

likelihood that the discounts had restrictions in general, or specific restrictions in particular. Equally important, in a test of the commercial without a disclosure at all, most of the subjects indicated that they thought it was likely that the offer was restricted, casting doubt on whether *any* disclosure was needed.²¹¹

V. CDA AND THE RULE OF REASON

Although the crucial determinant of *CDA* is that it involved professional advertising, it is also instructive about application of antitrust law's Rule of Reason. For the first time, the Court explicitly recognized what many call "abbreviated" or "quick-look" analysis, in which it is not necessary to use full market analysis to analyze restraints among competitors. The Court held that the Court of Appeals erred not because it failed to apply the fullest analysis, but because it "did not scrutinize the assumption of relative anti-competitive tendencies."²¹² The Court was vague about when to determine how much scrutiny was necessary, stating only that the answer will vary with the circumstances. According to the Court:

[T]here 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 inquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The objective 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.²¹³

Although quite general, in the context of the history of Rule of Reason analysis, this passage is nevertheless revealing. For much of antitrust history, particularly during the Warren Court era, there was a supposed dichotomy between the two basic forms of antitrust analysis of business arrangements -- *per se* and Rule of Reason. The former was inflexible, purportedly allowing no competitive scrutiny of challenged practices, while the latter required elaborate and often cumbersome application, with markets defined and market power analyzed. The Court's recent departure from strict categorization began with *Broadcast Music, Inc. v Columbia Broadcasting System*.²¹⁴ There, the Court described the challenged conduct as an agreement among competitors to fix prices. Under the categorization approach, the Court should then have condemned the agreement as illegal *per se* without inquiring into its purpose and effect. However, the Court rejected such a rigid analysis. Instead, to determine whether this particular price fix could properly be called *per se*, the Court stated:

²¹¹ John H. Murphy and Jeff I. Richards, *An Investigation of the Affects of Disclosure Statements in Rental Car Commercials*, 26 J Consumer Aff 351 (1992).

²¹² *California Dental*, 119 S Ct at 1617.

²¹³ *Id* at 1618.

²¹⁴ 441 US 1 (1979). For the genesis of *BMI*, see Judge Taft's famous opinion in *United States vs. Addyston Pipe & Steel Co.*, 85 F 271 (6th Cir), *aff'd as modified* 175 US 217 (1899), and Robert Bork's classic articles on the Rule of Reason. Robert H. Bork, *The Rule of Reason and the Per se Concept, Price Fixing and Market Division* [I], 74 Yale LJ 775 (1965); Robert H. Bork, *The Rule of Reason and the Per se Concept, Price Fixing and Market Division* [II], 75 Yale LJ 373 (1966).

[O]ur inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy -- that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output ... or instead one designed to “increase economic efficiency and render markets more, rather than less, competitive.”²¹⁵

Two important cases followed *BMI, NCAA v. Board of Regents*,²¹⁶ and *IFD*. Both developed this new approach, and *CDA* cited both as examples of “abbreviated” or “quick-look” analysis. In condemning the NCAA’s restrictions on televising football games, the Court in *NCAA* classified the conduct as outside the *per se* category, yet still condemned it without a full rule of reason analysis (i.e., defining the market and determining whether market power existed). Similarly, *IFD*, discussed above,²¹⁷ focused on whether there was an efficiency justification for practices that the Court concluded were inherently suspect.²¹⁸

With these cases, *per se* categorization lost its determinative role in antitrust. The length of a trial and level of proof required would no longer simply turn on the box in which the parties could place a challenged restraint. Whether the collaborators could justify restraints that clearly threaten consumer welfare had become the crucial issue.

In *CDA*, Chairman Pitofsky attempted to return to *per se*/rule of reason categorization. He argued that two cases decided in 1990, *Superior Court Trial Lawyers* and *Palmer v BRG*,²¹⁹ indicated that the Court itself had returned to that approach. But this view proved to be incorrect. The Court of Appeals rejected *per se* categorization with only a brief comment.²²⁰ The Supreme Court did not even bother to consider the possibility that *per se* categorization was appropriate. Instead, like Professor Areeda, it saw the rule of reason as a continuum,²²⁰ allowing for many levels of scrutiny.²²¹

CDA is also instructive regarding how truncated analysis is to be applied. Following the Court’s departure from *per se*/Rule of Reason categorization, the antitrust agencies, lower courts, and commentators have struggled with the appropriate form of analysis in cases when less than full

²¹⁵ *Broadcast Music*, 441 US at 19-20 (citations omitted) (quoting *United States v United States Gypsum Co.*, 438 US 422, 441 n16 (1978)).

²¹⁶ *NCAA v Board of Regents*, 468 US 85 (1984).

²¹⁷ See notes 74-75 and 90-91 and accompanying text.

²¹⁸ These issues are discussed in Timothy J. Muris, *The New Rule of Reason*, 57 Antitrust LJ 859 (1989) (“Muris, *New Rule of Reason*”).

²¹⁹ *California Dental*, 121 FTC at 299. I discuss the former in Part III.A and the latter in Muris, *Massachusetts Board* at 791-92 (cited in note 41).

²²⁰ *California Dental*, 128 F3d at 726-27.

²²¹ This does not mean, as we shall see shortly, that a restraint can never be *per se* illegal, or that categorization has no role in antitrust analysis. See text accompanying notes 230-32.

rule of reason analysis is appropriate. Some, most notably Judge Easterbrook,²²² have argued that restraints should not be condemned without an inquiry into market power, while others have argued that truncation should focus on efficiency justifications for practices that, absent justification, appear highly likely to harm consumers.²²³ Thus, one commissioner dissented from the majority decision in *CDA*,²²⁴ as did one member of the Ninth Circuit panel,²²⁵ in part because of the failure to prove market power.²²⁶ The Court did not conclude that the lower court failed because it did not properly find market power. Although *CDA* vigorously raised the market power issue at all levels, the Court instead focused on the too hasty condemnation of restraints that in fact may well have been justified. The Court's description of "quick-look" analysis belies any claim that market power is necessary. The Court says that "quick-look" analysis is that by which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers in markets."²²⁷ The Court said that, "quick-look analysis carries the day when the great likelihood of anti-competitive effects can easily be ascertained."²²⁸ Thus, the application of abbreviated analysis focuses on the restraint itself rather than on the market in which the restraint occurred.²²⁹

The Court is correct in not requiring a finding of market power. As Section IV above

²²² See Frank H. Easterbrook, *The Limits of Antitrust*, 63 *Tex L Rev* 1 (1993). See also C. Frederick Beckner, III and Stephen C. Salop, *Decision Theory and Antitrust Rules*, 67 *Antitrust L J* 419 (1999).

²²³ See Muris, *New Rule of Reason* at n14 (cited in note 218) and sources cited therein.

²²⁴ *California Dental*, 121 *FTC* at 333 (Azquenaga, dissenting).

²²⁵ *California Dental*, 128 *F3d* at 730 (Real, dissenting).

²²⁶ Because the case was tried under a theory that avoided defining markets and proving market power, the record was not extensive on this issue. See notes 34-36 and accompanying text.

²²⁷ *California Dental*, 119 *S Ct* at 1612.

²²⁸ *Id* at 1613.

²²⁹ Because the Commission and the Ninth Circuit found that such power existed, one might argue that *CDA* is consistent with the notion that market power is nonetheless required. Such an interpretation is strained. All three opinions below produced at least one jurist rejecting a finding of market power. Moreover, the record lacked extensive evidence of market power, given that the case was tried on an essentially *per se* theory. When the plaintiff can satisfy the Court on the "easily ascertained" nature of anti-competitive effects, *CDA* does not even suggest that an additional requirement, for example market power, is needed. Justice Breyer's dissent stated that the Commission had met its burden of showing that the parties had "sufficient market power to make a difference." *Id* at 1621. Obviously given the record evidence, he was not referring to what the *CDA* and dissenters below sought to establish, a detailed inquiry into defining markets and measuring the impact of the restraints in these markets. One doubts that his market power requirement will limit prosecution of advertising restraints by professional associations, at least those with substantial membership.

demonstrates, both economic theory *and* economic evidence reveal the anti-consumer, price-increasing effect of restraints on advertising. Moreover, there is no corresponding evidence that consumers benefit from increased quality. Under these circumstances, requiring market power is an unnecessary diversion that serves only to increase litigation costs and the probability that a restraint without consumer benefits escapes condemnation. Given this evidence, restraints on advertising among competitors are akin to price restraints. When price restraints are naked -- i.e., lack an efficiency justification -- our experience with them reveals that finding market power is unnecessary. Because we know that naked price fixing often harms consumers substantially and that it lacks countervailing benefits, condemnation without further inquiry is appropriate.²³⁰

Although the Court correctly concluded that market power need not be demonstrated, it nevertheless provided little guidance on how to apply abbreviated analysis. By contrast, the Commission, in its 1988 *Massachusetts Board* decision, provided such a framework:

First, we ask whether the restraint is “inherently suspect.” In other words, is the practice the kind that appears likely, absent an efficiency justification, to “restrict competition and reduce output.” . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry -- *a third inquiry* -- is needed to determine whether the justification is valid. If it is, it must be assessed under the full balancing test of the rule for reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry — there are no likely benefits to offset the threat to competition.²³¹

The Court’s *CDA* opinion fits easily within this framework. Restrictions on basic forms of competition such as advertising price and quality would appear to be inherently suspect. The Court conceded as much when it called the Ninth Circuit’s statement that price advertising was central to a competitive market place “unexceptional.” All three tribunals regarded *CDA*’s efficiency justification of preventing deception as plausible. The Commission’s failure arose at the point of validity. Although Section IV discusses why fuller analysis reveals that *CDA*’s justification is not valid, the opinions before the Court did not address the relevant economic

²³⁰ As discussed at text accompanying notes 182-84, the fact that most of this evidence involves state restraints does not justify refusing to apply the evidence to *CDA*’s private restraints.

²³¹ As discussed in *Muris*, *Massachusetts Board* (cited in note 41), I was one of those responsible for this approach. It is important to understand the limited nature of *Massachusetts Board*. As the *CDA* Court states, “quick-look” involves analyzing whether the practices under scrutiny are, in *Massachusetts Board*’s words, “inherently suspect.” To criticize *Massachusetts Board* because it does not explain how to apply the balancing test of full Rule of Reason analysis criticizes the test for something it does not even attempt to do. See Howard H. Chang, David S. Evans, and Richard Schmalensee, *Some Economic Principles for Guiding Antitrust Policies Toward Joint Ventures*, 2 Col Bus L Rev 223, 303 (1998).

evidence.

It is important to understand the nature of the validity inquiry. Because the Court's language emphasized *professions* rather than dentistry, it would be inappropriate to require that the Commission must develop specific evidence regarding dentistry in California. There is no reason why dentistry in general, or dentistry in California in particular, should produce different results than the studies discussed in Section IV(B). Presentation of the evidence cited above should at least satisfy the Commission's burden of persuasion. CDA would then need to demonstrate, presumably with empirical evidence of its own, why this empirical evidence does not apply to its case.²³² Had the Commission tried CDA like it tried *Massachusetts Board*, the problem that arose in the Court should have been avoided. In *Massachusetts Board*, the evidence regarding the impact of restraints on advertising was fully presented; in CDA, the complaint counsel did not even bother to have an economist testify. This lack of serious empirical scrutiny of the economic issues concerning restraints on advertising helps explain the CDA majority's reluctance. Faced with the full evidentiary history, as presented here, this reluctance should disappear.

Thus, CDA is consistent with the Court's recent pronouncements on the appropriate rule of reason analysis. Practices can still be *per se* illegal, as they were in the 1990 cases Chairman Pitofsky relied upon, but only when they are both inherently suspect *and* naked, i.e., lack efficiency justifications. Categorization retains importance, but it no longer determines the outcome. Even an inherently suspect practice can promote efficiency as in *BMI*. The synthesis of Court decisions that the Commission developed in *Massachusetts Board*, and that Chairman Pitofsky attempted to overturn, is still highly useful. Indeed, it provides a framework to address, and resolve, the issues that badly split the Court in CDA.

VI CONCLUSION

Many antitrust lawyers read CDA without proper focus on its professional advertising context. Although new as an antitrust issue, for over two decades the Court has struggled with the extent to which the First Amendment protects professional advertising. CDA, like *WFI* decided by the same Court four years before, is a victory for those who seek to restrict such advertising. The Court is closely divided, however, and resolution of this struggle is not in sight.

Thus, this article asserts that had some other group, such as car repairers, restrained advertising, the Court would have had little difficulty applying truncated analysis to condemn the restraint. Although defense lawyers would try to read CDA expansively, even a cautious judge should have little difficulty with the car repair case. CDA should be read to require all plaintiffs to have an empirical basis for why the restraint harms consumers, but not more. The literature discussed in part IV of this article provides such evidence regarding restraints on professional

²³² There may be some confusion regarding the burden of persuasion and the burden of producing evidence. The "burden of persuasion" falls upon the party who will lose the issue unless the evidence is sufficiently in his favor to meet a given "standard of proof," which in civil cases is usually "more likely than not." *McCormick on Evidence* § 336 & § 338 (West, 3d ed 1984). The Court has clearly placed this burden on the Commission for the validity issue. The Commission thus bears the ultimate burden of persuasion on whether CDA in fact aims its rules at deception. CDA, however, as the party possessing relevant evidence on how it enforces its rules, would bear the burden of producing that evidence.

advertising. The few studies of advertising restraints among non-professionals are consistent with the studies of professionals. At a minimum, the existing evidence should establish the plaintiffs' *prima facie* case and force the defendants to produce evidence of their own about the positive benefits of restraining advertising.

Many non-advertising restraints short of explicit price fixing should be treated similarly. Consider *Detroit Auto Dealers Ass'n v Federal Trade Commission*,²³³ one of the first FTC cases to apply the *Massachusetts Board* framework. There, auto retailers conspired to limit their hours of operation. Unlike in other large cities across America, consumers could not visit dealers most nights and weekends. By itself, this comparison reveals that consumers are harmed, again forcing the defendants to rebut the evidence.

If this is the long run impact of *CDA* -- to force plaintiffs to have an evidentiary basis for why competitor restraints harm consumers -- the case will have been worthwhile. Plaintiffs' lawyers and government prosecutors, whether under *per se* categorization, *Massachusetts Board*, or other approaches for truncation, have been too quick to reason from analogy, not evidence. *CDA* may be a useful reminder that, in antitrust as in so many other areas, the life of the law remains experience.

²³³ 111 FTC 417, aff'd in part and remanded, 955 F2d 457 (6th Cir), modified on remand, 119 FTC 891, remanded with direction for a hearing for further modification, 84 F3d 787 (6th Cir 1995).