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

In the Matter of

CALIFORNIA DENTAL ASSOCIATION
Docket No. 9259

I concur in the Commission's determination that respondent California Dental Association ("respondent" or "CDA") has violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by promulgating and enforcing restrictions on truthful, nondeceptive advertising by its members. I concur as well in the Commission's findings that (1) CDA is subject to FTC jurisdiction; (2) CDA's adoption and enforcement of its policies restricting advertising by its members constitutes an agreement among competitors; (3) CDA's "state law" defense must be rejected; and (4) the Order appended to the majority opinion provides an appropriate remedy for respondent's unlawful acts. Despite my conclusion that CDA's restrictions on both price and non-price advertising unreasonably restrain trade, I cannot join in the majority's startling decision to extend *per se* treatment to all agreements among competitors to restrain truthful, nondeceptive price advertising. Finally, what the majority styles as its "quick look" rule of reason approach to CDA's restraints on both price and non-price advertising[1] contains unnecessary and potentially confusing departures from the analytical structure set forth in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("*Mass. Board*").

Instead of applying the framework established in *Mass. Board* for the systematic review of all horizontal restraints, the majority applies to CDA's price advertising restrictions a *per se* analysis, somewhat euphemistically labeling it "traditional."[2] Although the Supreme Court and the Commission have generally moved away from summary *per se* condemnation of horizontal restraints without some consideration of potentially relevant rule of reason factors,[3] my colleagues today breathe new life

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[1] Slip op. at 32.

[2] *Id.* at 39 (citing *Mass. Board*, 110 F.T.C. at 604 n.12).

[3] *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA*"); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) ("*BMI*"); *cf.*

into the rigid and often overinclusive application of the *per se* rule. *Mass. Board* analysis, which faithfully synthesizes and applies the Court's post-*BMI* horizontal restraints jurisprudence, has been bypassed and marginalized so that even the most truncated consideration of relevant market conditions and potential competitive benefits of agreements restricting price advertising need never trouble the Commission again.

As the majority acknowledges, had it followed a horizontal restraints analysis based on *Mass. Board*, the *result* in the present case would have been the same: CDA's advertising restrictions would have been condemned as unreasonable restraints of trade without an elaborate "full" rule of reason inquiry.[4] That result, however, would not have entailed the diminution in the relative clarity and coherence of FTC horizontal restraints analysis that we may surely expect to follow from the majority's reasoning in this case.

I.

The majority's decision not to rely on *Mass. Board* analysis in this case is puzzling. In *Mass. Board*, the Commission condemned a state optometry board's regulations restricting several types of truthful, nondeceptive advertising, including the advertising of price discounts.[5] The factual and legal

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Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) ("*GTE Sylvania*") (establishing the primacy of economic effects in the analysis of non-price vertical restraints).

[4] It is well established that the rule of reason may be expeditiously applied in appropriate cases. *See generally NCAA*, 468 U.S. at 109-10 n.39 ("the rule of reason can sometimes be applied in the twinkling of an eye" (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981))).

[5] 110 F.T.C. at 604-07. Although the horizontal restraints at issue in *Mass. Board* were promulgated by a state board, the Commission found the state action doctrine inapplicable because the Commonwealth of Massachusetts had not clearly articulated a policy to displace competition with state regulation. *Id.* at 614. The Commission condemned the challenged advertising restrictions under Section 5 of the FTC Act because they met Sherman Act Section 1's definition of a "contract, combination . . . , or conspiracy, in restraint of trade . . ." *Id.* at 606-08, 610-11.

issues analyzed in that matter are therefore similar to those now before the Commission. Moreover, in *Mass. Board* the Commission set out a "structure for evaluating horizontal restraints" that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, "more useful than the traditional use of the *per se* or rule of reason labels."[6] Nevertheless, the majority sidesteps *Mass. Board* analysis in favor of the *per se* and rule of reason "labels" it found wanting not that many years ago.

Presented with a challenge to a trade association's promulgation and enforcement of restrictions on price advertising among the association's members, the majority first selects a serviceable *per se* category: "[I]t is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws."[7] The majority finds that CDA's restrictions amount to the prohibition of truthful and nondeceptive price advertising[8] and equates that behavior with "a naked attempt to eliminate price competition."[9] The opinion's classification of the restraints imposed by CDA effectively brings the horizontal restraints analysis to an end. Rather than inquire into the actual competitive effect of CDA's advertising restrictions, the core of the majority's *per se* analysis reviews in general the evils associated with restraints on price advertising[10] and leads to the authoritative conclusion that "CDA's restraints on price advertising are thus illegal *per se*."[11] Thus is born a new category of *per se* unlawful restraints.

The opinion then proceeds to demonstrate that the same price advertising restrictions would have been condemned under the rule of reason.[12] Although I presume that this demonstration is for

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[6] *Id.* at 603-04.

[7] Slip op. at 16.

[8] *Id.* at 17-19.

[9] *Id.* at 19.

[10] *Id.* at 19-23.

[11] *Id.* at 24.

[12] *Id.* at 24-38.

the benefit of benighted adherents of the *Mass. Board* approach,[13] the exercise in fact tends to vindicate the use of *Mass. Board* in the first place.

II.

The majority should have applied *Mass. Board* analysis in the present case not simply because it is apposite, but also because it -- and not the reinvigoration of the *per se* rule -- is consistent with the broad outlines of the past two decades of Supreme Court antitrust jurisprudence. The Commission's opinion in *Mass. Board* developed from a line of cases in which the Supreme Court sent the clear message that the analysis of a particular restraint of trade should be based on an understanding of the restraint's effect on competition. In cases including *BMI*, *NCAA*, and *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*"), the Court signaled its dissatisfaction with the use of rigid, outcome-determinative categories.[14]

As the majority correctly notes, for purposes of determining the legality of a restraint under Section 1 of the Sherman Act, "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on

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[13] Whatever support a literal reading of one isolated sentence in *Mass. Board*, 110 F.T.C. at 607, lends to the majority's statement that the Commission "summarily condemned the price advertising restraints" at issue in that case, slip op. at 23, I cannot agree with my colleagues' conclusion that CDA's price advertising restrictions can therefore be declared *per se* illegal. The Commission did not reach its conclusion in *Mass. Board* by mechanically applying a *per se* rule to the Board's restrictions; rather, it proceeded through the truncated rule of reason approach set out earlier in that opinion. *Mass. Board*'s "summary" condemnation thus included an assessment of whether the restrictions were inherently suspect and an examination of efficiency justifications. 110 F.T.C. at 606-07.

[14] Just as *BMI*, *NCAA*, and *IFD* indicated the need for economic depth in the treatment of horizontal restraints of trade, so the earlier decision in *GTE Sylvania*, *supra*, announced the Supreme Court's abandonment of its rigid *per se* treatment of non-price vertical restraints. *GTE Sylvania*, *BMI*, and succeeding cases demonstrate the evolution of the Court's approach away from bright-line categories and toward the application of sophisticated economic inquiry.

competition."[15] The rule of reason is the "prevailing standard" for assessing the effect on competition of most restraints.[16] Moreover, the Supreme Court has stated in the clearest possible terms that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[17] The rule of reason approach prevails because whenever antitrust analysis is too far removed from an inquiry into actual effects upon actual markets, the risks of overdeterrence rise dramatically. For this reason, *per se* rules are to be applied with the utmost circumspection.

As noted earlier, over the past two decades the Supreme Court has steadily diminished the scope of *per se* analysis in antitrust jurisprudence.[18] This evolution reflects the Court's increasing disposition to ground determinations of antitrust "harm" on actual effects on competition. The Commission's truncated rule of reason analysis in *Mass. Board* is quite consistent with that trend. Whatever the restraint, under *Mass. Board* there is at least some inquiry into its likely economic effect and into whether a plausible efficiency might merit a fuller weighing of the restraint's procompetitive benefits against its anticompetitive consequences.[19]

There is no basis for concluding that the Supreme Court has swerved from the path charted in *BMI* and *NCAA* of requiring analysis -- even the "truncated" variety -- rather than the use

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[15] Slip op. at 14 (citing *NCAA*, 468 U.S. at 104; *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1982)).

[16] *GTE Sylvania*, 433 U.S. at 49.

[17] *Id.* at 58-59.

[18] *See, e.g.*, *Northwest Wholesale Stationers* (rule of reason inquiry appropriate for some group boycott claims); *NCAA* (rule of reason analysis applied to agreement among competing college football teams to fix prices for all television broadcasts of their games); *BMI* (rule of reason analysis for agreement among thousands of competing songwriters to contract with a single entity to fix prices for performance rights to their songs); *GTE Sylvania* (rule of reason analysis to be applied to all vertical non-price restraints in the absence of market power).

[19] *Mass. Board*, 110 F.T.C. at 604.

of categories.[20]

III.

The majority opinion asserts that "[a] *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances."[21] Then, quoting from *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), the majority states that "'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable'"[22] -- *i.e.*, it

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[20] My reluctance to apply a *per se* approach to respondent's restrictions on price advertising is only heightened by the Supreme Court's "general reluctance" -- recognized by the majority, slip op. at 24 -- to apply a *per se* approach to codes of conduct of professional associations. *See*, *e.g.*, *IFD*, 476 U.S. at 458; *United States v. Brown Univ.*, 5 F.3d 658, 671 (3d Cir. 1993).

[21] Slip op. at 15.

[22] *Id.* *Maricopa* is a textbook example of why structured case-by-case analysis is usually preferable to a *per se* rule. As one distinguished commentator put it:

> The courts have repeatedly invoked the per se label without the faintest comprehension of the commercial functionality of the practice they were condemning. One need only go back as far as the *Maricopa County* case . . . . As this case demonstrates, if per se condemnation is made before understanding is achieved, understanding may never be achieved; the legal classification precludes the development of a trial record that would elucidate the challenged practice.

William F. Baxter, *The Viability of Vertical Restraints Doctrine,* 75 Calif. L. Rev. 933, 936 (1987) (citation omitted).

Although *Maricopa* involved unreasonable restraints of trade, its broad application of the *per se* rule to physician agreements regarding price has frustrated an informed reexamination of provider combinations in an era of burgeoning managed care. It has been persuasively suggested that *Maricopa*'s unnecessarily broad *per se* rhetoric has contributed to the current overdeterrence of many potentially efficient combinations of

has declared the restraint *per se* unlawful.

But on what foundation rests the majority's conviction that CDA's restrictions on price advertising belong in the narrow group of practices that can be declared illegal without at least an initial inquiry into their reasonableness? If "*[p]er se* categories of unlawful economic activities . . . consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues,"[23] how can the majority be confident that it has properly placed CDA's restraints on price advertising in such a category? Doesn't *per se* condemnation of CDA's price advertising restrictions sidestep the need to answer "the ultimate question" raised by each restraint of trade, *viz.*, "whether the challenged restraint hinders, enhances, or has no significant effect on competition"?[24]

If a determination of *per se* illegality means that a restraint has "almost invariably untoward effects . . . across economic actors and circumstances,"[25] then presumably one consequence of today's ruling is that the Commission will feel no obligation to perform an analysis of particular market circumstances before condemning other restrictions on truthful, nondeceptive price advertising in a wide array of future cases. One court of appeals has observed that the Supreme Court has been more hesitant to apply a *per se* rejection to competitive restraints imposed in contexts where the economic impact of such practices is neither immediately apparent nor one with which the Court has dealt previously.[26] Thus, I question whether the Commission should establish a rule in future cases that restraints on truthful, nondeceptive price advertising -- even in markets to which the Commission has had no prior exposure -- are "beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be

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health care providers. *See, e.g.*, Clark C. Havighurst, *Are the Antitrust Agencies Overregulating Physician Networks?*, 8 Loy. Consumer L. Rep. (forthcoming 1996).

[23] Slip op. at 15.

[24] *Id.* at 14.

[25] *Id.* at 15.

[26] *United States v. Brown Univ.*, 5 F.3d at 671.

considered."[27] If CDA's restrictions on price advertising are unlawful -- as they have appropriately been held to be -- it is not because some of them fit into a "category." Rather, it is because a properly framed competition analysis, however truncated, shows that they -- together with CDA's restraints on non-price advertising -- lessen competition.

IV.

The majority also treats CDA's restraints on price and non-price advertising under a dubious variant of the "truncated" rule of reason.[28] Instead of asking the structured series of questions posed by *Mass. Board*[29] -- a set of questions that lends itself flexibly to the appraisal of horizontal restraints -- the majority imports into its analysis issues that may or may not be relevant under a properly conducted *Mass. Board* approach.

The flexibility afforded by the *Mass. Board* framework serves, among other goals, the ends of judicial economy. In certain cases, evidence sufficient to support the condemnation of a horizontal restraint may fall short of what would have appeared in the record of a "full" rule of reason trial. For example, if the challenged restraint "appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'"[30] and if there is no plausible efficiency justification for the practice, then a finding of illegality is appropriate even if market power (and other elements of "the full balancing test of the rule of reason"[31]) have not been established. On the other hand, in cases in which the restraint's likely anticompetitive effect is not apparent, or in which a proffered efficiency

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[27] Slip op. at 15. Cases such as *BMI* and, for that matter, the case in which the Supreme Court set forth the classic articulation of the rule of reason -- *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) -- illustrate the Court's longstanding reluctance to condemn uncritically arrangements that on their face more closely resemble "naked" price-fixing than do CDA's price advertising restrictions. *See also* cases cited *supra* note 18.

[28] Slip op. at 24-39.

[29] 110 F.T.C. at 604.

[30] *Id.* (quoting *BMI*, 441 U.S. at 20).

[31] *Mass. Board*, 110 F.T.C. at 604.

justification deserves a detailed examination, the full rule of reason approach -- including scrutiny of market power in many cases -- is necessary.

Nevertheless -- and despite language to the contrary in the opinion[32] -- the approach that the majority uses in place of *Mass. Board* makes a fairly elaborate assessment of market power a key element of its "quick look" approach. Although the Administrative Law Judge's anomalous determination with respect to market power[33] may have impelled the majority to discuss the issue at length, I am concerned that the majority opinion may be read to imply that an assessment of market power is a necessary part of the truncated rule of reason approach.

Let me be clear that I am by no means saying that the issue of market power should never play a role in truncated rule of reason analysis of horizontal restraints. Frequently the answers to the initial questions in the *Mass. Board* sequence will show that evaluation of market power is required. But in some cases those answers -- that the challenged restraint is likely to restrict competition, and that it lacks a plausible efficiency rationale -- will indicate that a restraint can be fairly condemned without a potentially elaborate and expensive inquiry into market power.

V.

It is only fair to note that *Mass. Board* is not without its faults and its critics. But if the majority considers *Mass. Board* beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in *Mass. Board* analysis that might be remedied, why not apply *Mass. Board* in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?

As I stated at the outset, the problem with the majority's decision today is not the result. It is the reasoning that tends to determine the lasting significance of an opinion. The majority's reasoning, which amounts to a return to the conclusory

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[32] Slip op. at 25 ("The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion . . .").

[33] Initial Decision at 76.

labeling that the Commission sought to supplant in *Mass. Board*, is likely to cause confusion in future cases. How will the majority's analysis in *CDA* apply in the next price-related advertising case? Will the Commission summarily condemn any restraint hampering price-related advertising, or only those restraints that effectively *prohibit* price-related advertising? Without some type of rule of reason inquiry, how will we know whether restrictions on price advertising "effectively prohibit" price advertising in a given case? Will the Commission use today's newly-minted *per se* rule alone or in combination with the backup rule of reason analysis it employs in the present case? Or, since the majority has not seen fit to overrule or modify *Mass. Board* in any way, can we expect to see the Commission apply *Mass. Board* analysis in the future, notwithstanding today's opinion? Unfortunately, all of these are now open questions.