Antitrust Law: An Analysis of Antitrust Principles and Their Application - Areeda and Hovenkamp, ¶2023. Agreements Pertaining to Advertising and Related Dissemination of Product Information

Antitrust Law: An Analysis of Antitrust Principles and Their Application - Areeda and Hovenkamp
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2023a. Introduction..—Horizontal agreements relating to advertising fall into two broad classifications. *First* are agreements limiting the amount or nature of advertising (¶b). *Second* are agreements for producing joint advertising, which we discuss briefly in ¶c. Many agreements in the latter class do not qualify as naked restraints at all unless they also involve price fixing. [1] The few discussed here deal with situations where the advertising in issue seems not to have been ancillary to any coordination of production or distribution. Finally, ¶d considers agreements to suppress truthful information.

2023b. Agreements restricting advertising..—

1. *Generally..*—Agreements restricting advertising are a form of output restriction in the production of information useful to consumers. [2] Possible harmful effects fall into two categories. First, under appropriate structural conditions they can facilitate collusion by eliminating various conditions under which competition can occur. For example, once cartel members or participants in an oligopoly have fixed a price, individual members have an incentive to compete on various nonprice terms, such as offering free delivery, stocking, extended warranties, or other collateral services. By restricting advertising the cartel or oligopoly can make it significantly more difficult for individual firms to communicate these additional services to consumers, thus stabilizing the cartel or oligopoly.

Second, as in the case of bans on competitive bidding, [3] advertising restrictions increase consumer search costs by hindering consumers in obtaining important information about the various alternatives available from sellers. [4] Even in a competitively structured market, increased consumer search costs can yield higher pricing. For example, if dentists are forbidden by agreement from advertising their prices, then patients must visit each dentist individually to compare prices—something that a patient with a bad toothache will be disinclined to do. The result insulates dentists from price competition even if the dentists' market is competitively structured in that numerous dentists serve the community and are within the patient's reasonable transportation range. In extreme cases of high search costs, a dentist could charge the monopoly price and receive a random distribution of local customers, because for each one the cost of seeking price comparisons is greater than the cost of simply paying what the first dentist charges. [5] In *CDA* [6] the Supreme Court majority seemed quite unconcerned about these factors, accepting at face value the defendant's argument that the dangers of consumer confusion from price or quality advertising were so severe that patients would be better off if there were no such advertising at all. [7] The restrictions effectively eliminated all quality advertising and most price advertising.

When markets are so complex that consumers lack good information about price and quality, the consumers generally benefit from the competitive amount of information, provided that individual instances of false or misleading claims are effectively disciplined by public authorities, by the market, or by the sellers themselves. [8] The dental association's restraints on price advertising had been interpreted to forbid dentists from advertising "reasonable" or "affordable" prices unless they provided complete documentation of the fees themselves for all procedures and the amount of any discount offered to various groups. [9] The Association even disciplined a dentist for advertising "reasonable fees quoted in advance" without listing those fees in the advertisement itself. [10] When the Association disciplined a dentist for using such a statement in his advertising, it apparently made no attempt to determine whether the statement was false but merely whether it violated guidelines requiring all advertising of fees as "reasonable" to spell out in detail what all the fees were. [11] As a result, dentists were effectively prohibited from making such claims altogether. [12]

To be sure, the dentists may believe that price competition will be bad for the dental services market because it will induce dentists to cut corners and serve patients inadequately, but the Supreme Court dispensed with these arguments in the *Engineers* case, [13] and they apply equally here.

On the other hand, restrictions on advertising may be beneficial to competition when they eliminate only false or deceptive advertising, which does not produce useful information for consumers and may cause rivals at least short-run injury.

2023b2. *Policy concerns..*—Truthful advertising is an important part of the output of any firm, and in many markets it is essential to effective distribution. [14] For example, the distribution of Ford automobiles requires not only transportation, dealerships, and warranty service, but also advertising that communicates information about the comparative qualities, pricing, and availability of Fords. As a result, an agreement among rivals restricting advertising is an output restriction agreement just as certainly as an agreement restricting the number of automobiles produced, the number of dealerships, the length of a warranty, the quality of the automobile itself, or any of the other attributes of automobile manufacturing and selling. As such, an agreement among competitors that they will not advertise at all, that they will not advertise in each other's territories, [15] or that they will restrict the content of their advertising even if it is truthful is ordinarily illegal per se. [16]

Although misleading or deceptive advertising is socially harmful, its regulation should lie primarily with public enforcers in the various levels and departments of government, not with the regulated firms themselves. For example, false and misleading advertising is within the jurisdiction of the Federal Trade Commission as well as numerous state and even some local consumer protection agencies. As a result, firms who are injured by the false and misleading advertising of a rival may ordinarily report violations and in some cases even seek redress themselves through public agencies or the judicial process. The same thing generally applies to consumers victimized by a seller's false advertising claims.

Thus, one must be wary of purely private agreements restraining advertising on the theory that rivals or consumers need additional protection from false or misleading claims. This is particularly so when the substantive restraint goes beyond that which a government agency would enforce, and even more so when the rule is coupled with the power to discipline a member or remove the member from the association for engaging in advertising that crosses the line. Such an agreement is a limitation on output and could be just as anticompetitive as an agreement among firms policing pricing practices and disciplining members whose prices are too low. While many producer associations may have good intentions, they also have interests that do not always coincide with the public interest or the interests of consumers, and they may not stand to benefit from aggressive competition. Further, the relationship between price advertising and low prices seems relatively well established. [17]

The remaining discussion is divided into three parts: horizontal restrictions on truthful price advertising (¶b3), restrictions on truthful advertising about things other than price (¶b4), and "overbroad" restrictions purporting to limit only untruthful or deceptive advertising (¶b5).

2023b3. *Restrictions on price advertising, even if truthful..*—A naked or nearly naked agreement prohibiting rivals from advertising truthful and nonmisleading information about their prices is unlawful per se. [18] The same thing applies to an agreement not to engage in truthful price advertising in one another's geographic territories, [19] agreements not to engage in truthful advertising comparing prices, promising the "lowest" price, offering to meet the lowest price of any rival, and the like. [20] In many markets price is the most important avenue down which competition moves, and in nearly every market it is at least very important.

The courts have generally agreed. Although historically there may have been an exception or at least a softening of the per se rule for the learned professions, [21] today it seems clear that no professional immunity as such exists. [22] Rather, the Supreme Court has adopted a rule of reason analysis for restraints in complex markets showing an extreme imbalance of information as between suppliers and customers. [23]

2023b4. *Restrictions on nonprice advertising, even if truthful; vertical restraints distinguished..*—While courts and the FTC have readily condemned naked restraints on truthful price advertising, they have had somewhat more difficulty with advertising about topics other than price, such as quality, nonprice terms of sale, and the like. The source of the difficulty is not obvious. Agreements about nonprice terms refer to the output of a firm and can facilitate collusion just as much as price terms. Indeed, in oligopoly markets, agreements about price terms are often unnecessary because the structure of the market ensures that the firms will lead and follow on matters of price. But the agreement on nonprice terms is essential for eliminating the alternative avenues of competition that are most likely to occur in relatively concentrated markets. As a result, agreements eliminating advertising of such things as product quality, length or comprehensiveness of warranty, free delivery, or collateral services can harm competition just as much as agreements restraining advertising about price.

A few courts appear to have been confused about the difference between horizontal and vertical agreements. Purely vertical agreements about “price” terms were once said to be unlawful per se, [24] while agreements about nonprice terms receive rule of reason treatment. [25] But no such difference has ever governed agreements among rivals. Today the distinction between vertical and horizontal agreements is even more important, for nearly all vertical price agreements are governed by the rule of reason while horizontal agreements are much more frequently unlawful per se.

The distinction between vertical and horizontal restraints on advertising is critical. Purely vertical restraints on dealer advertising are common, including among other things geographic limitations and restrictions prohibiting dealers from making invidious comparisons with other dealers of the same manufacturer. [26] As a general proposition a manufacturer or upstream firm does not impose vertical restraints on its dealers if it believes those restraints will reduce aggregate output or facilitate the exercise of dealer power. [27] As a result, a single manufacturer’s purely vertical restrictions on where or how its individual dealers advertise should be governed by a rule of reason. One way to analyze the problem is to consider how a single firm would manage the advertising of its own, wholly owned branches. Generally, it would not profit by expensive overlaps in geographic advertising designed to transfer customers from one branch to the next, and it would almost certainly not profit from advertising by one branch criticizing the services offered by a sibling branch. As a general matter, the franchisor or other upstream firm has the same incentives vis-à-vis independent franchisees or other downstream dealers as does the single firm.

But this is not generally the case with respect to firms whose only market relationship is horizontal and who are not engaged in other significant integration of output or distribution. In such cases agreements not to advertise in overlapping territories or not to make invidious comparisons with competitors are simply a way of limiting competition by forcing customers to incur the higher costs of making suitable comparisons on their own.

Presumptively, agreements to which the manufacturer, franchisor, or other upstream firm is a party should be characterized as vertical and subjected to rule of reason treatment. By contrast, agreements *among* the dealers or franchisees of a single manufacturer or other supplier and to which the upstream firm is not a party are clearly horizontal.

2023b5. *Overbroad restrictions limiting untruthful or deceptive advertising..*—While consumers have a strong interest in advertising, they certainly do not benefit from false or misleading advertising. Further, while numerous federal and state statutes condemn false and misleading advertising, these statutes may not be sufficiently broad or aggressive to reach the manifold varieties of misleading advertising. Still further, since the statutes are usually of general application, they may not reach certain individual markets with sufficient specificity. As a result, there may be some value in more market-specific, specialized advertising rules that apply only to a given industry or profession. Further, those best equipped to distinguish the truthful from the false or misleading may be participants in the market in question.

These considerations may justify sellers operating in relatively specialized areas to make rules governing false and misleading advertising, normally enforced through trade or professional associations. At the same time, however, market participants have a dual set of incentives that may distort their judgment about what constitutes false or misleading advertising. On the one hand, as market participants they profit when consumer confidence in their market is increased, and insistence on truthful advertising serves to increase such confidence. Thus, it can be said that sellers in a market profit from strict rules prohibiting false and misleading advertising that serves to undermine consumer confidence. But sellers can also profit from restraints limiting competition among them, and limits on aggressive advertising of price or product or comparative advertising of competitive offerings can greatly hinder consumers in making competitive judgments.

Thus, while the sellers in a market can be expected to be enthusiastic about limiting “deceptive” advertising, they are often inclined to be overly enthusiastic and to brand as deceptive that which is merely aggressive. [28] So if professional associations are to have rules limiting false or misleading advertising, these rules and their enforcement must be scrutinized under the antitrust laws to ensure that the line is properly maintained between what is actually false or misleading, thus undermining consumer confidence, and what properly informs consumers about competitive offerings, enabling consumers to seek out alternatives with confidence.

While we believe the Supreme Court in *CDA* was too sanguine about permitting competitors to limit their own advertising, the decision in any event applies only in markets that display an unusual imbalance between the information held by suppliers and that held by customers. [29] If the country’s manufacturers of ordinary products, such as furniture or appliances, should agree to refrain from making any quality claims in their advertising, their agreement would be adjudged unlawful per se. [30] Such an agreement would be a naked restriction on the output of information that consumers deem useful. Although such information can sometimes be misleading, [31] we would not leave to the firms themselves such unbridled discretion to deal with potentially misleading advertising by eliminating all quality claims whatsoever.

2023b6. *Relevance of state legislation or its absence..*—The learned professions are heavily regulated by state law, which ordinarily establishes licensing requirements and, in many cases, rules of professional conduct. At the same time, antitrust analysis generally proceeds on the assumptions that markets are sufficiently similar to one another that its more generalized rules apply to all. If a market is subject to significant “market failure” requiring price regulation or government-supervised output restrictions, that task befalls Congress, state legislatures, or local government. Congress always has the power to “repeal” the federal antitrust laws selectively, [32] and state and local government can achieve essentially the same result by qualifying their legislation under antitrust’s “state action” immunity. [33] Thus, for example, the Supreme Court held in *Bates* [34] that restrictions on lawyer advertising promulgated by a state bar association were lawful under the Sherman Act when compelled by the state’s supreme court.

In the absence of such legislation, the inference must be that the professional association at issue has not succeeded in convincing state legislators that the challenged restrictions should be a part of the state’s legislative program. At that point, it is inappropriate to try to convince a federal antitrust tribunal that a market is sufficiently idiosyncratic to justify “self-regulation” of a sort that would be impermissible in other markets. As a result, we would not treat horizontal restrictions on advertising in the learned professions in a significantly different manner than such restrictions are treated in the general run of markets. [35]

2023c. Joint advertising without other integration of production or output..—

1. *Generally..*—By contrast to agreements limiting advertising, agreements to advertise jointly are a form of joint production, and joint production generally enjoys a presumption of efficiency gains sufficient to evoke rule of reason treatment, particularly when the joint advertising is part of a larger joint venture organizing the defendants' production or distribution. [36]

Nonetheless, in many markets advertising is the principal way that statements about price and product quality are communicated, and the concerns for collusion are significant, particularly if the only significant aspect of the firms' production that is subject to coordination is the advertising itself. The concerns run from very high when the advertising in question sets a price or output term, to very low when the advertising appears to provide no opportunity whatsoever for setting price or reducing output.

To begin with an easy example, suppose that the only three sellers of RAM memory chips agree to run joint advertisements stating that they are offering chips for $100 per unit. The firms are not producing jointly or integrating any other part of their distribution. The ad is nothing more than naked price fixing and should be condemned as illegal per se. [37] By contrast, an advertisement that did no more than inform potential consumers about the merits of putting more memory in their computers, without any mention of a price term, would ordinarily be legal; it does not obviously restrain price or output at all, or it has only positive output effects. [38] We would be suspicious of agreements calling for joint advertising and also forbidding the participants from advertising independently.

The FTC was correct to condemn automobile dealers' running of joint advertisements stating that car dealership showrooms would all be closing at 6 P.M. The advertising was nothing more than a mechanism for communicating the results of a cartel agreement restricting showroom hours and had the additional effect of deterring patrons from leaving their homes to shop for cars in the evening, even though some dealers were not participating in the cartel. [39]

Also illegal per se as a general proposition is joint advertisers' agreements that they will not advertise elsewhere. For example, suppose a group of builders agree that they will run a joint advertisement in a weekly newspaper promoting their services but also that they will not advertise anywhere else. To be sure, certain joint ventures require exclusivity in order to work, particularly if the venture produces intellectual property and individual participants have an incentive to free-ride by copying the learning of the intellectual property in nonventure applications. [40] And indeed, joint ventures developing creative advertisements might lawfully insist that individual participants not copy the advertisements in other publications. For example, if X, Y, and Z pay an advertising firm to develop a clever advertisement for their joint ads, they might insist that the firms individually not use the same advertisement attached to only one of them. [41]

But an agreement not to advertise at all outside the venture rests on entirely different grounds and would appear to have no other rationale than a reduction in the overall amount of advertising. In *Polygram*, the D.C. Circuit agreed with the FTC that an agreement between two record production companies that they would not advertise their previously made individual recordings of three well-known tenors was unlawful. [42] In this case, that agreement was part of a larger joint production venture in which the parties were developing a joint recording of the same performers. As a result, a strict per se approach was inappropriate. Rather, the tribunal must engage in at least a cursory examination to determine whether the agreement not to advertise was justified in light of the joint production agreement.

2023c2. *Joint advertising: summary..*—Joint advertising agreements are best analyzed under the following classification scheme:

I. Joint advertising that is reasonably ancillary to other joint production or distribution activity is ordinarily analyzed under the rule of reason. [43] An example would be advertising of the automobiles produced by the GM/Toyota joint venture. If the automobiles are jointly owned, they must be jointly sold. In such circumstances even an advertisement stating the price would qualify for rule of reason treatment. By contrast, if the joint venture simply provides an input into the firms' separate production, then joint advertising of the price of the final production would ordinarily be unlawful. For example, firms jointly developing computer operating system software bundled with their computers could not jointly advertise the price of the computers, although they could jointly advertise the fact that their computers employed the same operating system.

II. Agreements to advertise jointly that do not accompany other significant integration of production or distribution are dealt with as follows:

A. Advertisements that state the price or a price term, or that create other opportunities for fixing the price or reducing output should generally be regarded as illegal per se or subjected to somewhat more elaborate review as described in ¶1911 if there are plausible defenses.

B. Advertisements that make no reference to price and provide no opportunity for increasing price or reducing output are generally lawful. An example would be the advertisement of the three hypothetical manufacturers of RAM chips stating simply that "new software requires more memory and now is a good time to buy it." To the extent such advertising has any impact at all, it serves to increase demand and thus output.

III. Whether or not an agreement to advertise jointly should be regarded as lawful, collateral agreements that the parties will not advertise elsewhere are not justified, except to the extent that the separate advertising violates jointly held intellectual property rights.

2023d. Agreements to suppress truthful product information..—While we ordinarily think of the "output" of a product as the physical units of production, whether cars or toothpaste, it is in fact much more. Output also includes information that enables consumers to make informed judgments about a product's uses or risks. [44] Suppose that researchers in an industry containing numerous manufacturers discover that the product is dangerous or defective. The result of disclosure would be significantly reduced demand, and thus lower prices. However, the firms agree with each other to suppress this information with the result that demand does not fall.

On the one hand, this restraint seems to increase rather than decrease output. Without information about the defect, consumers actually purchase more rather than less. But to focus on the number of units sold is to misconceive the output question—"output" consists of everything in the product package, including the information that a competitive market would ordinarily provide and that is necessary for a consumer to determine willingness to pay. The number of units sold is sometimes a measure of output, but often it is not. For example, suppose the petroleum industry discovered a gasoline additive that doubled a vehicle's mileage, but the refiners agreed with each other not to use it. This agreement would actually increase "output," in the sense that cars would burn twice as much gasoline without the additive as with it. But a court would readily conclude that such an agreement restrains trade—not because it results in the production of less gasoline per se, but because it results in the production of less of the product package that a competitive market would provide.

Courts are occasionally tripped up by this. For example, the district court in a case involving a labor union health fund concluded that an agreement to suppress information about the unhealthy effects of smoking cigarettes was not in restraint of trade because the result of the information suppression was that more cigarettes would be sold, and "creating increased demand for a product is not an anticompetitive activity." [45] While such agreements might lead to more cigarette consumption, they also "restrain trade" by leading to lower output of the production/information mix that a competitive market might have produced. By contrast, the FTC and the Seventh Circuit reached the correct result in the *National Macaroni* decision. [46] The defendants responded to a dramatic price increase in durum semolina wheat by agreeing with each other to make their products using 50 percent such wheat rather than 100 percent. The result was, of course, to reduce production costs and thus to increase the number of units of macaroni that were sold. The agreement was correctly condemned nonetheless, notwithstanding the likely output increase. The consumer injury resulted not from the higher output, but from the agreement to produce a cheaper product and to eliminate the more expensive one. Under competition, some manufacturer might have chosen to make the cheaper mixture while others stayed with the premium product, but that choice rightfully belongs to the competitive marketplace.

Footnotes

1 Advertising agreements that are ancillary to other productive activity are discussed in ¶2137.

2 In *California Dental Ass'n v. FTC (CDA)*, 526 U.S. 756, 776 (1999), the Supreme Court doubted this proposition with respect to the facts of that case but did not question the general proposition that agreements restraining advertising limit a firm's useful output. See ¶2008.

3 See ¶2022e.

4 *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 377–78 (1977) (noting that limits on price advertising increase consumer search costs).

5 See ¶2021c.

6 *California Dental Ass'n v. FTC (CDA)*, 526 U.S. 756, 776 (1999).

7 For further discussion, see ¶2008.

8 *See* George J. Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213 (1961); Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice §5.3 (5th ed. 2015); Richard A. Posner, Antitrust Law 30 (2d ed. 2001).

9 *Cf. Morales v. TWA, Inc.*, 504 U.S. 374, 388 (1992) ("[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive"; holding that state statutes providing aggressive restraints on airline advertising were preempted by federal legislation).

10 *See* 128 F.3d 720, 724 (9th Cir. 1997). However, a dissenter in the FTC vigorously disputed these fact findings and concluded that most instances of overly aggressive enforcement of advertising claims either (a) dated from the early 1980s, or (b) were the product of overzealous local societies rather than the CDA itself. Of course, in the latter case the CDA might, depending on the circumstances, be liable for failing to clarify its position or rein in the excesses of its local chapters.

11 Thus, dentists were disciplined for offering discounts if they did not specify the undiscounted price of every service to which the discount might apply. *See* 526 U.S. at 783, *and see* 121 F.T.C. 190, 302 (1996) (dentist disciplined for offering "20% off to new patients with this ad").

12 "… [T]he record bears out the conclusion that dentists do not advertise across-the-board discounts that include a complete itemization of the regular fee for each discounted service." *Cf. Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 606–08 (1988) (striking down restrictions on discount advertising by optometrists).

13 See ¶2022e, discussing *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

14 *See, e.g., Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (truthful advertising informs consumers about "who is producing and selling what product, for what reason, and at what price"). *See also Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977).

15 *See Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (agreement between lawyers that they would not advertise in one another's territories illegal per se).

16 *See, e.g., AMA*, 94 F.T.C. 701, 1005 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (general ban on advertising restraints, but Association may continue to penalize false and deceptive advertising); *Massachusetts Bd.*, 110 F.T.C. at 605 (striking down ban on all advertising, even if truthful). See also the following consent decrees: *American Inst. of Certified Pub. Accountants*, 113 F.T.C. 698 (1990) (prohibiting ban on truthful advertising); *Oklahoma Optometric Ass'n*, 106 F.T.C. 556 (1985) (similar); *Association of Indep. Dentists*, 100 F.T.C. 518 (1982) (similar).

See also International Ass'n of Conference Interpreters, 5 Trade Reg. Rep. ¶24,235 (F.T.C. 1997) (restrictions permitting members to advertise that they are interpreters but forbidding them from comparing themselves with others occasionally enforced so as to prohibit comparative price advertising; rule of reason applied and these charges dismissed for lack of finding of power or anticompetitive effects).

17 *Bates v. State Bar of Ariz.*, 433 U.S. 350, 377 (1977) (prices sometimes "dramatically lower" when price advertising is permitted).

18 In addition to previously cited cases, see *Federation of Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 484 F. Supp. 1195, 1207 (D.D.C. 1980), *aff'd in part and rev'd in part*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982) (condemning pharmacy association's efforts to limit mail order pharmaceutical companies by banning advertising); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961) (criminal case; per se unlawful for gasoline retailers to agree not to advertise their gasoline prices except by posting prices directly on the pump); *Massachusetts Board*, 110 F.T.C. at 605 (unlawful for optometrists' association to prohibit truthful advertising of pricing or discounts, quality claims, or association with a particular optical establishment); and *United States v. House of Seagram*, 1965 Trade Cas. ¶71,517, at 81,275 (S.D. Fla. Mar. 26, 1965). See also the following consent decrees: *Arizona Auto. Dealers Ass'n*, 5 Trade Reg. Rep. ¶23,560 (F.T.C. 1994) (consent decree; automobile dealers agree to refrain from advertising that they will meet or beat competitors' price or that their prices are lower than anyone else's); *Personal Protective Armor Ass'n*, 5 Trade Reg. Rep. ¶23,521 (F.T.C. 1994) (consent decree); *Commercial Ass'ns Inst.*, 5 Trade Reg. Rep. ¶23,561 (F.T.C. 1994) (consent decree); *United States v. Greater Des Moines Hosp. Ass'n*, 57 Fed. Reg. 45,401 (S.D. Iowa 1992) (consent decree banning restrictions on hospital advertising); *Association of Indep. Dentists*, 100 F.T.C. 518 (1982) (consent decree; dentists agree to ban all, even truthful, advertising); *United States v. American Pharm. Ass'n*, 1981 WL 2105, 1981-2 Trade Cas. ¶64,168 (W.D. Mich. June 18, 1981).

19 *Cf. Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (condemning agreement between two law firms that they would not advertise in one another's territories).

20 *Cf. Denny's Marina v. Renfro Prods., Inc.*, 8 F.3d 1217, 1219 (7th Cir. 1993) (marine dealers' exclusion of dealer from trade show because of its "meet or beat" any price advertising illegal per se).

21 *See AMA*, 94 F.T.C. 701, 1003–04 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) (refusing to apply per se rule because doubtful about its application to learned professions). *But see Goldfarb v. Virginia State Bar*, 421 U.S. 773, 779–80 (1975) (noting and rejecting historical tendency of courts to regard activities of the learned professions as not part of "trade or commerce," and thus as not reachable by the Sherman Act).

22 See ¶2008 ; *and see, e.g., Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 348–49 (1982) (applying per se rule to physicians; rejecting learned profession exception); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (applying per se rule to lawyer price fixing; no discussion of learned profession immunity).

23 See the ¶2008 discussion of the Supreme Court's decision in *California Dental Ass'n v. FTC (CDA)*, 526 U.S. 756, 776 (1999), as well as our critique.

24 See Ch. 16B (minimum resale price maintenance).

25 See Ch. 16D.

26 See ¶1609a.

27 See ¶1611.

28 This is our reading of the facts of the *CDA* case, 526 U.S. 756 (1999); however, the Supreme Court majority did not seem overly concerned about the dangers of leaving competitors in control of their profession's advertising. *See also* Richard A. Posner, Antitrust Law 30 (2d ed. 2001), which agrees with our position.

29 See ¶2008b, c.

30 *Cf. Detroit Auto Dealers Ass'n*, 111 F.T.C. 417, 494–99 (1989), *aff'd*, 955 F.2d 457, 471 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992), where the FTC applied the per se rule to an agreement among automobile dealers limiting showroom hours; while the Sixth Circuit applied the rule of reason, it also condemned the restraint.

31 For example, advertising "discounts" can be deceptive if the advertiser merely inflates the base price from which the discount is taken, and the FTC has condemned firms for that practice. *Encyclopedia Britannica*, 100 F.T.C. 500, 505 (1982) (order modifying consent order); *Diener's*, 81 F.T.C. 945, 976–78, 980–81 (1972), *modified*, 494 F.2d 1132 (D.C. Cir. 1974); *Paul Bruseloff*, 82 F.T.C. 1090, 1095–96 (1973) (consent order).

32 See Ch. 2C.

33 See Ch. 2B-3.

34 *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 377–78 (1977) (noting that limits on price advertising increase consumer search costs).

35 But see the qualifications in ¶2008.

36 On joint arrangements for distribution and sales generally, see ¶2137.

37 *See United States v. Serta Assocs.*, 296 F. Supp. 1121, 1125–26 (N.D. Ill. 1968), *aff'd per curiam*, 393 U.S. 534 (1969) (joint price advertising and agreement to limit comparative advertising among Serta mattress dealers unlawful per se). *Cf. United States v. Petty*, 1994 WL 730096, 1994-2 Trade Cas. ¶70,797 (C.D. Ill. Oct. 11, 1994) (consent decree governing defendants' agreements to engage in joint advertising for waste disposal services; under the decree no defendant could disclose its rate to a rival until after the rate had been disclosed to the public, and no joint advertising could state prices); *United States v. Pittsburgh Area Pontiac Dealers, Inc.*, 1978 WL 1398, 1978-2 Trade Cas. ¶62,233 (W.D. Pa. July 24, 1978) (consent decree prohibiting defendants from "adopting, participating in or adhering to any plan, practice or program, the purpose or effect of which is to advertise the sale price of a Pontiac automobile or fix the advertised price of a Pontiac automobile"; permitting joint advertising, including a "suggested" retail price provided that it is labeled as such, or to advertise "average" prices). *See also Pontiac Dealers Adver. Ass'n*, 1979 WL 3900, 1980-1 Trade Cas. ¶63,011 (Mass. Super. Ct. June 29, 1979) (similar to previous; state law). *Cf. Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962, 966 n.2 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976) (not a Sherman Act price-fixing violation for firms to agree with each other to misrepresent the flame-resistance qualities of their product, even though the impact of the agreement may have been to increase its price).

However, joint price advertising may be permissible in situations where joint production entails joint sales. *See* U.S. Dep't of Justice, Business Review Letter to Newspaper Ass'n of Am. (Dec. 10, 1993) (not challenging newspaper joint venture marketing advertising space at an announced price where joint provision and billing for such advertising was more efficient than requiring each newspaper to do so individually). See generally ¶2137.

38 *Cf. Greene Cnty. Mem'l Park v. Behm Funeral Homes, Inc.*, 797 F. Supp. 1276 (W.D. Pa. 1992) (refusing to apply per se rule to funeral homes' group advertising warning local public against out-of-town sellers of caskets; no violation). See ¶2102.

39 *Detroit Auto Dealers Ass'n*, 111 F.T.C. 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992).

40 Such rationales for exclusivity are discussed in Chapter 22.

41 *Cf. Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) (noting, and ultimately approving, agreement among moving firms jointly using Atlas name that they would not employ that name in advertising their separate operations).

42 *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

43 See ¶2137.

44 *See* George J. Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213 (1961).

45 *Laborers Local 17 Health & Benefit Fund v. Philip Morris*, 7 F. Supp. 2d 277, 290 n.9 (S.D.N.Y. 1998), *rev'd in part*, 191 F.3d 229 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000).

46 *National Macaroni Mfrs. Ass'n*, 65 F.T.C. 583 (1964), *enforced*, 345 F.2d 421 (7th Cir. 1965); see ¶2014a.