

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1809

TITLE FEDERAL TRADE COMMISSION, Petitioner V. INDIANA
FEDERATION OF DENTISTS

PLACE Washington, D. C.

DATE March 25, 1986

PAGES 1 thru 45



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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL TRADE COMMISSION, :

Petitioner, :

V. : No. 84-1809

INDIANA FEDERATION OF :

DENTISTS :

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Washington, D.C.

Tuesday, March 25, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 2:02 o'clock p.m.

APPEARANCES:

MARCY J.K. TIFFANY, ESQ., Acting General Counsel,
Federal Trade Commission, Washington, D.C.; on
behalf of the petitioner.

BRUCE W. GRAHAM, ESQ., Lafayette, Indiana; on behalf of
the respondent.

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C C N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
MARCY J.K. TIFFANY, ESQ.,	
on behalf of the petitioner	3
BRUCE W. GRAHAM, ESQ.,	
on behalf of the respondent	24

1 PROCEEDINGS

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in the Federal Trade Commission against Indiana
4 Federation of Dentists.

5 Ms. Tiffany, I think you may proceed whenever
6 you are ready.

7 ORAL ARGUMENT OF MARCY J.K. TIFFANY, ESQ.,

8 ON BEHALF OF THE PETITIONER

9 MS. TIFFANY: Mr. Chief Justice, and may it
10 please the Court, this case involves a conspiracy by
11 Indiana dentists to refuse ex-rays requested by group
12 dental health care insurers. The insurers needed the
13 ex-rays to detect instances of fraudulent claims and
14 overtreatment of dental patients.

15 Their goal was to contain the cost of the
16 insurance programs they were administering, a goal that
17 was shared, indeed, insisted upon by those who were
18 footing the bill for the programs, the employers, and
19 unions who had negotiated the dental benefits.

20 The attitude of the dentists toward this cost
21 containment effort was best summed up in the words of
22 Dr. David McClure, one of the chief organizers of the
23 conspiracy here. Dr. McClure characterized the
24 situation as, and I quote, "economics war where the name
25 of the game is money."

1 And like all wars, this one had its victims.
2 Here they were the patients, the consumers, who were
3 deprived of the benefits of the cost containment efforts
4 of the insurance companies.

5 The dentists' response to the insurance
6 companies' cost containment efforts should not be
7 surprising, since from their perspective cost
8 containment essentially means fewer dollars for the
9 dentists. To again quote Dr. McClure, "Management,
10 government, labor, and the insurance industry are
11 determined to reduce the cost of the dental health
12 dollar at the expense of the dentist."

13 Now, a third party payer faces a difficult
14 problem with respect to cost containment. In the normal
15 purchase transaction the individual consumer has an
16 interest in making sure that he is not paying for more
17 than he needs. However, when an insurer is picking up
18 the tab, consumer self-interest tends to coincide with
19 that of the seller, which is to say, get as much as
20 possible out of the insurance company.

21 Thus, the responsibility is left to the plan
22 administrator for finding some way of making sure that
23 it is paying only for services that are covered under
24 the contract.

25 In this case the dentists were well aware that

1 the ex-rays were needed for this purpose. To quote Dr.
2 McClure yet again, "The fight for ex-rays will continue,
3 because this is the only way insurance companies can
4 control their costs."

5 The fight began with the Indiana Dental
6 Association, which is composed of 85 percent of all
7 licensed dentists in the state of Indiana. This group
8 organized the boycott, and did so very effectively.
9 They adopted a set of principles of acceptability which
10 specified that insurance plans requiring ex-rays to be
11 submitted would not be acceptable. They distributed a
12 form letter to their members to give to the patients
13 saying that they would not provide the ex-rays. They
14 also initiated a pledge --

15 QUESTION: That was the extent of their
16 boycott, wasn't it, just not providing the ex-rays?

17 MS. TIFFANY: That was the extent of the
18 boycott. They refused to provide the ex-rays.

19 They initiated a pledge campaign for dentists
20 to agree in writing that they would abide by the IDA's
21 principles of acceptability.

22 QUESTION: They didn't refuse to serve
23 patients that were covered by these health plans?

24 MS. TIFFANY: No, they would continue to serve
25 patients. They just wouldn't give the ex-rays to the

1 insurance companies so they could determine whether the
2 claim should be paid.

3 The efforts were very successful, and the
4 Administrative Law Judge found that eventually most
5 Indiana dentists were refusing to provide the ex-rays to
6 the insurers.

7 Now, about that time this Court decided the
8 Goldfarb case, which of course held that professions do
9 not enjoy any special immunity from the antitrust laws.
10 The leaders of the IDA boycott were understandably
11 nervous about their possible antitrust liability. The
12 response was to form the Indiana Federation of Dentists
13 under the mistaken belief that if they styled themselves
14 as a union they would be immune from the antitrust laws.

15 To once more quote the irrepressible Dr.
16 McClure, who was the first president of the Indiana
17 Federation of Dentists, "They would no longer have the
18 antitrust albatross around their necks."

19 The mandate of IFD was clear, to continue and
20 intensify the boycott that was begun by IDA. Equally
21 clear was the economic motivation for the formation of
22 IFD, as evidenced by, among other things, the
23 constitution and bylaws. They explicitly stated that
24 IFD was organized to represent the socioeconomic and
25 political interests of the dentists.

1 The constitution and bylaws authorized
2 strikes, job actions, or other forms of economic
3 pressure, and they provided for discipline of
4 non-conforming members. Based on a record developed
5 after six weeks of trial, the Commission concluded that
6 this conduct reduced or eliminated competition among
7 dentists as to their policy in dealing with third party
8 insurers.

9 QUESTION: Ms. Tiffany, the Commission refused
10 to find that it had the result of diminishing
11 competition among insurers, did it not?

12 MS. TIFFANY: The Commission declined to find
13 that it diminished competition among insurers.

14 QUESTION: The Commission seems to have
15 conducted a sort of abbreviated rule of reason analysis
16 here, not really doing a full-blown inquiry into the
17 economic effects of the boycott, as I understand it.

18 MS. TIFFANY: That's correct. The rule of
19 reason analysis was applied here, although the
20 Administrative Law Judge had found that a per se
21 analysis would have been appropriate to this conduct.
22 The line, however, between per se and rule of reason is
23 not always a clear one, as this Court noted in the ICAA
24 case, and --

25 QUESTION: Do you think an abbreviated rule of

1 reason analysis is justified?

2 MS. TIFFANY: I don't believe we would refer
3 to it as an abbreviated rule of reason. The analysis
4 was conducted -- a rule of reason analysis was
5 conducted, and it was extensive enough, given the facts
6 in this case, to reach the conclusions that the
7 Commission reached.

8 This restraint was very much like this Court
9 has held -- restraints this Court has held to be illegal
10 without an elaborate market analysis. Paramount Famous
11 Lasky is a case in point. That case, like this one,
12 involved horizontal competitors who were refusing to
13 deal with third parties except on terms and conditions
14 that they had agreed to, that they had specified between
15 themselves.

16 It is also very much like the Professional
17 Engineers case. Here, the dentists were restricting the
18 flow of price-related information. If this information
19 had been provided, it would have enabled insurers to
20 determine whether the dentists are overtreating, which
21 is the economic functional equivalent of overcharging.

22 This in turn would have enabled the insurers
23 to make purchasing determinations that would have
24 lowered their costs. Thus, as was the case in
25 Professional Engineers, while this is not a naked price

1 restraint, it is a restraint that directly impacts
2 price.

3 Without this type of restraint, decisions as
4 to the types of services purchased would have been made
5 as a function of the interplay of the market forces.

6 Now, the Seventh Circuit did reject the
7 Commission's findings on an evidentiary basis, finding
8 that there was insubstantial evidence to show that the
9 boycott restrained trade. This holding of the Seventh
10 Circuit means that there is really a very narrow issue
11 facing this Court, and that is whether the Court of
12 Appeals misapplied the standard review when it reversed
13 the Commission's decision.

14 The importance of this case, however, goes far
15 beyond the narrow legal issue to be resolved here. The
16 problem of cost containment in the context of third
17 party insurers is a large one. It has dimensions that
18 really dwarf the facts in this particular case.

19 As amicus briefs point out, the serious
20 problem of rapidly rising health costs is one that is
21 here to stay. Indeed, problems similar to those
22 encountered by the insurance companies in Indiana are
23 being faced throughout the country.

24 QUESTION: Well, is there something in this
25 record that indicates that furnishing these ex-rays

1 would be a step to contain costs?

2 MS. TIFFANY: The cost containment --

3 QUESTION: Did the Commission make any
4 findings about that?

5 MS. TIFFANY: The Administrative Law Judge
6 made a finding that the cost containment efforts were
7 generally -- in general experience were effective ones.
8 With respect to Indiana, it was difficult --

9 QUESTION: Well, with respect to the ex-rays.

10 MS. TIFFANY: The ex-rays were needed to do
11 the cost containment. The ex-rays were needed to do the
12 alternate benefit determination, and the Administrative
13 Law Judge did find that in general experience alternate
14 benefit determinations have been effective in containing
15 costs.

16 QUESTION: Did the Commission uphold that
17 finding?

18 MS. TIFFANY: The Commission basically took
19 the position that it really wasn't necessary to
20 establish one way or the other that the cost containment
21 efforts were in fact effective in this particular case,
22 rather, that the insurance companies were entitled to
23 give an innovative cost containment effort a chance to
24 operate, which they did not have here, and in fact that
25 was one of the difficulties of getting evidence in

1 Indiana, because right about the same time the insurance
2 companies started the alternate benefit programs, the
3 boycott began. So with respect to Indiana itself the
4 evidence is not complete.

5 However, there certainly was evidence of
6 similar restraints being used in other parts of the
7 country. In fact, the Commission had entered a consent
8 agreement in Texas involving dentists who had been
9 involved in the very same conduct. In fact, there was
10 some evidence that the Indiana dentists were attempting
11 to export their boycott to other states.

12 QUESTION: How widespread is this practice?

13 MS. TIFFANY: You mean throughout the country
14 or in Indiana? The references to the concerns
15 throughout the country are fairly oblique in the
16 record. It is enough to give the indication that these
17 were nationwide insurance programs, and that they faced
18 problems in other states.

19 I do not know from the record how extensive
20 the boycotts are, although there clearly was one in
21 Texas.

22 In this case, this Court has the opportunity
23 to send a clear message to professionals that they will
24 not be permitted to act in concert to obstruct the
25 innovative cost containment initiatives, and that lower

1 courts may not accept unsubstantiated assertions of
2 professional judgment by refusing to apply appropriate
3 standards of review to the determinations of government
4 agencies regarding --

5 QUESTION: Well, that may be a desirable goal
6 or policy, but you were going to get around to saying
7 how that restrains competition.

8 MS. TIFFANY: Yes.

9 QUESTION: I mean, how their conduct restrains
10 competition, even if it maybe isn't in the public
11 interest in terms of cost containment.

12 MS. TIFFANY: Well, there were several effects
13 on competition, several ways that competition was
14 restrained. First of all, it did interfere with -- the
15 boycott interfered with the ability of the insurers to
16 make these determinations as to whether they were being
17 overcharged.

18 QUESTION: I know, but --

19 QUESTION: How would that affect the
20 competition among dentists?

21 MS. TIFFANY: The competition among the
22 dentists was certainly both for dollars and for
23 patients. Patients were deprived of the ability to pick
24 a dentist who would cooperate with their insurance
25 company's cost containment programs, and as a result

1 were deprived of the benefits of the cost containment
2 efforts that their insurance companies were attempting
3 to undertake.

4 QUESTION: Well, is that an injury to
5 competition?

6 MS. TIFFANY: When the cost of insurance --

7 QUESTION: When the patient can't find a
8 dentist who will send his ex-rays in? Does that
9 restrain competition?

10 MS. TIFFANY: The competition was -- yes, in
11 fact I believe it would be a restraint on competition.
12 The competition was with respect to the policy of
13 dealing with third party payers.

14 QUESTION: Ms. Tiffany, Judge Fairchild's
15 concurring opinion, he didn't join Judge Coffey's
16 opinion, he says pretty clearly that no evidence was
17 developed on the validity of an assumption that a
18 dentist's policy of refusal of cooperation has any
19 significance in competition among dentists, and the FTC
20 decision fails to analyze the proposition.

21 I take it you disagree with his opinion.

22 MS. TIFFANY: Yes, we do disagree with his
23 opinion, Justice Rehnquist.

24 QUESTION: It seems to me that the two --
25 talks about, you know, this is the battle for cost

1 containment and this is the big picture. We have to
2 figure out what evidence was developed right here in
3 this case, and not go to generalizations.

4 MS. TIFFANY: In the Professional Engineers
5 case there was a restraint that dealt with bidding.
6 Because of this restraint, the purchasers of the
7 information -- of the services were not able to get
8 information that would allow them to cost compare.

9 Here, the purchasers have to be understood in
10 the context both of the patients who are purchasing and
11 the third party insurer who is paying for it. The
12 effect is essentially to have a bifurcated purchaser.
13 You have one person who is going in and getting the
14 service and the other who is making the decision as to
15 whether they are going to buy that service and pay for
16 it.

17 Insofar as this restraint made it impossible
18 for the insurance companies to do their part, to be able
19 to make the determinations that they were willing to
20 purchase this service, yes, it affected competition.

21 QUESTION: But how about the failure of the
22 FTC to make a finding that it affected competition among
23 insurers?

24 MS. TIFFANY: The --

25 QUESTION: Aren't you just trying to come in

1 the back door with something the FTC refused to let in
2 the front door?

3 MS. TIFFANY: That really would be a very
4 secondary finding. Just as in the Professional
5 Engineers case, I mean, arguably the people who were
6 purchasing the services from the engineers were going to
7 be selling their buildings. The Commission by parallel
8 didn't find that it would interfere in their ability to
9 sell buildings. Similarly the Commission didn't find
10 that it would interfere in the insurance company's
11 ability to sell insurance overall. It nevertheless did
12 interfere with their ability to buy the services.

13 QUESTION: Now, what the FTC declined to find
14 was that the dentists' concerted action reduced
15 competition among insurers. Now, it seems to me when
16 you say that the insurer is really another buyer and he
17 was competing as a buyer, you are insisting there was a
18 finding that the FTC refused to make.

19 MS. TIFFANY: Oh, no, Justice Rehnquist. What
20 the Commission was really referring to there was the
21 fact that lower prices for selling the insurance would
22 make insurers more competitive between each other. That
23 is the restraint between insurers that the Commission
24 was referring to.

25 QUESTION: Who is the buyer here? Is it the

1 ultimate patient who wants dental services?

2 MS. TIFFANY: The buyer is really a bifurcated
3 one. It is the patient who is getting the services and
4 it is the insurer who is paying for them.

5 QUESTION: What is the product here? Is it
6 the advice necessary in order to monitor dental
7 services?

8 MS. TIFFANY: No.

9 QUESTION: Is that the product?

10 MS. TIFFANY: No, Justice O'Connor.

11 QUESTION: No?

12 MS. TIFFANY: The product is dental services.
13 And a decision has to be made as to whether those dental
14 services will be purchased. That decision is being made
15 both by the insurance company and the consumer. The
16 patient goes in and has a problem. They want to
17 purchase the service. The insurance company has to make
18 a determination as to whether they are willing to pay
19 for the service, whether they indeed are willing to
20 purchase the service.

21 When those two coincide, there is a
22 transaction.

23 QUESTION: I would have thought perhaps the
24 product was the advice or evaluation services that
25 insurers provide in competition with dentists.

1 MS. TIFFANY: There certainly is an element of
2 the insurer providing a second opinion, if you will, to
3 the patient, and that was a loss to the patient, not
4 having the benefit of this second opinion.

5 However, that was only one of the many
6 effects, and certainly the --

7 QUESTION: Well, maybe it is just a product
8 effect, not a price effect.

9 MS. TIFFANY: I think that's right. The price
10 effect had to do with not giving the insurers the
11 information they needed to purchase the product.

12 The Commission had substantial evidence of the
13 anti-competitive effects in this case to support their
14 conclusions.

15 QUESTION: Among dentists? Competition
16 between dentists, among dentists? Is that it?

17 MS. TIFFANY: The --

18 QUESTION: That is all they really find, is,
19 it resulted in reducing or eliminating competition among
20 dentists as to their policy of dealing with third party
21 payers.

22 MS. TIFFANY: Yes, the --

23 QUESTION: That is what they really focused
24 on, isn't it?

25 MS. TIFFANY: That is correct, Justice White,

1 and they had substantial evidence to reach that
2 conclusion. The market power here was substantial both
3 for the Indiana Dental Association and the Indiana
4 Federation of Dentists.

5 With respect to the Indiana Dental
6 Association, 85 percent of all dentists in Indiana
7 belonged, and the Administrative Law Judge Teeter found
8 that virtually all of them participated in the boycott.

9 QUESTION: Well, spell that out a little. How
10 did eliminating competition with respect to their policy
11 dealing with third party payers, how did that reduce
12 competition among dentists? Is it that if some dentists
13 furnished ex-rays and some didn't, the ones that
14 furnished them might get more patients?

15 MS. TIFFANY: Absolutely.

16 QUESTION: Because the word would get around
17 that here these hardnoses won't really cooperate with my
18 insurance company?

19 MS. TIFFANY: Absolutely, Justice White, and
20 there is evidence in the record to support that. There
21 was evidence of patients who, for example, crossed the
22 Ohio River and went into Kentucky to find a dentist who
23 would cooperate. The unions, who were very interested
24 in promoting these plans and making these plans work --

25 QUESTION: Well, the Commission could have

1 said a little more than it did, it seems to me.

2 MS. TIFFANY: Justice White, in hindsight, we
3 all perhaps could be more clear, and so, too, the
4 Commission, but the evidence is there, and it is there
5 in the record, and it is referenced in the Commission's
6 opinion.

7 QUESTION: One of the rules around in
8 agencies, and I take it the FTC is an agency --

9 MS. TIFFANY: Yes, sir.

10 QUESTION: One of the administrative rules is
11 that you explain what you do.

12 MS. TIFFANY: That is correct.

13 QUESTION: Adequately.

14 MS. TIFFANY: And the Commission --

15 QUESTION: Whether there is evidence in the
16 record or not.

17 MS. TIFFANY: The Commission did explain what
18 it did, perhaps not as crystal clearly as it could have,
19 but the explanation is there, and moreover the evidence
20 is there to support the conclusions that the Commission
21 reached.

22 Let me address for a moment the legal, moral,
23 and ethical justifications that have been raised in this
24 case. The Commission gave the dentists every
25 opportunity to come forward with a pro-competitive

1 quality justification for their no ex-ray policy. The
2 Commission concluded, however, that the respondents
3 failed to present any evidence of such quality
4 justifications.

5 Indeed, they did not even establish a logical
6 nexus between the no ex-ray policy and any possible
7 patient quality of care concerns that they might have.
8 This was not a case where the dentists were being asked
9 to do anything improper with respect to the patients.
10 The ex-rays they were being asked to submit had already
11 been taken as part of the diagnostic procedures.

12 With respect to the lay examiners who --

13 QUESTION: To whom do the ex-rays belong? To
14 the patient or the dentist? Do you know?

15 MS. TIFFANY: I believe under Indiana law they
16 are accessible -- Indiana law has been revised since
17 then. They are now accessible to the patient.

18 QUESTION: If the -- would the dentist have
19 broken some ethical rule if the patient had directed him
20 to send the ex-rays to the insurer and he had refused?

21 MS. TIFFANY: Only one that was constructed by
22 the Indiana Dental Association pursuant to this
23 boycott. They established it as some kind of ethical
24 rule. But certainly there was nothing in Indiana law
25 that would have prohibited them from sending the

1 ex-rays.

2 QUESTION: Well, I know, but if a patient
3 comes in and says, I want the ex-rays you took of me,
4 will the dentist give it to him?

5 MS. TIFFANY: Under Indiana law they now are
6 required to give them to the patients.

7 QUESTION: Now.

8 MS. TIFFANY: Yes.

9 QUESTION: Were they?

10 MS. TIFFANY: I think at that time the law did
11 not address it one way or the other. It didn't say they
12 could not.

13 QUESTION: Does not the dentist have a
14 professional interest in maintaining the ex-rays, at
15 least by copy, in case he is conceivably sued for
16 malpractice later, and he needs the ex-rays to defend
17 himself?

18 MS. TIFFANY: That is absolutely correct, Mr.
19 Chief Justice, and the record shows that the insurance
20 companies were sensitive to that, indeed, in some
21 instances, in trying to negotiate a plan that would be
22 more acceptable, had agreed to do a double pack ex-ray,
23 where the pack would take two ex-rays at the same time,
24 allowing the dentist to have one copy and sending the
25 other copy in to the insurer, and the insurer was

1 willing to pay for the extra cost of that type of ex-ray
2 rack, which was not really very substantial in any case.

3 As to the lay examiners that were reviewing
4 these claims, much has been made of lay examiners
5 looking at ex-rays, but the truth of the fact is that
6 the lay examiners could only approve claims. They could
7 not deny claims. It is difficult to imagine how having
8 an insurance company approve the claim submitted by the
9 treating dentist could in any way cause harm to a
10 patient.

11 As to the dental consultants who were
12 reviewing the more questionable ex-rays, these were
13 licensed dentists. Contrary to respondent's assertions
14 in its brief, the dentists did not rely on the ex-rays
15 alone when making determinations as to the alternate
16 benefits.

17 Rather, they could and did consult with
18 treating dentists before determining the alternate
19 benefit determinations, and moreover, these were
20 professionals. They used their own professional
21 judgment as to what additional information they needed,
22 and in fact were able to access the information.

23 There is nothing in the record that indicates
24 that there was any restraint that they could not look at
25 anything but ex-rays.

1 Indeed, there was no evidence here of any
2 alternate benefit determination that was even medically
3 erroneous. Moreover, nothing in Indiana law exists to
4 justify this boycott. There is no express prohibition
5 on lay persons screening the ex-rays, and even if so,
6 there was nothing in Indiana law that would authorize
7 this kind of vigilante group boycott to enforce the law.

8 If you strip away this legal, moral, and
9 ethical veneer that the Seventh Circuit applied to this
10 case, you really are left very much with a case like
11 Professional Engineers, where the professionals were
12 saying, we are the professionals, we know how to do
13 things better than the antitrust laws do, better than
14 the competitive market. We should not be subject to
15 those constraints.

16 Where legitimate pro-competitive
17 justifications exist, this Court has indicated every
18 willingness to countenance them. But professionals,
19 like other entrepreneurs, have a direct economic
20 incentive to keep the costs of their services high.
21 This Court accordingly must demand more of professionals
22 than a bare assertion that they know what is best.

23 As I noted at the outset, this is a war, and
24 the stakes are high. The cost of health insurance in
25 general and dental health insurance in particular are

1 extremely high and rising. If these dentists can
2 successful engage in this kind of obstructionist conduct
3 in the face of the abundant record evidence to support
4 the Commission's conclusion of the existence of an
5 antitrust violation here, cost containment efforts in
6 the health care field may well suffer a serious
7 setback.

8 Accordingly, the Commission respectfully
9 requests this Court to reverse the decision of the
10 Seventh Circuit below and direct that court to affirm
11 and enforce the order of the Federal Trade Commission.

12 If there are no other questions, I will
13 reserve my time.

14 CHIEF JUSTICE BURGER: Very well.

15 Mr. Graham.

16 ORAL ARGUMENT OF BRUCE W. GRAHAM, ESQ.,

17 ON BEHALF OF THE RESPONDENT

18 MR. GRAHAM: Mr. Chief Justice, may it please
19 the Court, contrary to the theme of the Commission, this
20 case should not be viewed as a crusade to lower dental
21 costs. The Commission has not evidenced that these cost
22 containment provisions did contain costs, and
23 specifically refused to do so at the administrative
24 hearing.

25 The focus of this case should be the proper

1 application to a non-price restraint wherein there are .
2 involved valid health care concerns promulgated here by
3 a small group of Indiana dentists, the IFD, and
4 particularly the review that an appellate court should
5 apply in reviewing the application of a rule of reason
6 under these circumstances.

7 Now, as we know, the Seventh Circuit clearly
8 decided that the Commission had failed to evidence
9 anticompetitive effect in a relevant market. Thus,
10 absent the rare instance where the Court of appeals
11 grossly misapplied the substantial evidence standard,
12 the Commission should not prevail today, and the Seventh
13 Circuit's decision should stand.

14 I think it is important to kind of look at
15 this from the perspective of the Seventh Circuit as they
16 were analyzing this case initially. They saw 88
17 dentists which compromised the IFD who had allegedly
18 engaged in a restraint of trade. These 88 dentists were
19 scattered around three parts of Indiana, and
20 specifically in Fort Wayne there were 19 IFD dentists
21 out of 139 in the Fort Wayne area.

22 The Commission in their opinion stated that
23 they were applying a rule of reason analysis. The
24 Seventh Circuit expected them to demonstrate a relevant
25 market and anticompetitive effect in that market. They

1 didn't do that.

2 QUESTION: Well, the Commission at least said
3 that no elaborate analysis was necessary to define the
4 market, that this group spanned the state, and it was
5 the state that was the relevant market. I grant you it
6 was in a footnote, but they said it anyway.

7 MR. GRAHAM: Well, that's right, they spoke
8 briefly to market power, and attributed the market power
9 of Indiana Dental Association --

10 QUESTION: They spoke briefly to the
11 definition of the market, the geographical market,
12 anyway, and certainly there wasn't much question about
13 what the product market was, is there?

14 MR. GRAHAM: Well, I am not certain. I don't
15 think they ever defined exactly what the product market
16 was, and that is one of the problems in this case. I
17 believe that the Commission's core dispute actually at
18 this point in time is that the Seventh Circuit required
19 a full competitive rule of reason analysis, and that in
20 that analysis they considered IFD's quality of care
21 justifications.

22 QUESTION: Mr. Graham, can I ask a kind of
23 preliminary question? As I understand it, this was a
24 proceeding under Section 5 of the Federal Trade
25 Commission Act. And the conclusion of the Commission

1 was that there was -- an unfair method of competition
2 had been found.

3 There wasn't really a Sherman Act issue on its
4 own terms in the case, was there?

5 MR. GRAHAM: Well, I believe the Commission
6 stated that they were applying Sherman Act principles.

7 QUESTION: I notice they cited some Section 1
8 cases, but the section of the legal discussion is all
9 under the rubric of Section 5. Do you think that makes
10 any difference? I don't know whether it does or not.

11 MR. GRAHAM: Well, no, and I believe the
12 Seventh Circuit proceeded under the same theory I am,
13 that the Commission stated they were employing Sherman
14 Act principles, anticompetitive -- antitrust principles,
15 and that is how the case was analyzed by the Commission.

16 QUESTION: Do you think it is necessary to
17 find a Section 1 violation in order for there to have
18 been a Section 5 violation?

19 MR. GRAHAM: Yes, I do. That is what they
20 stated they were doing, so that is what I expected in
21 the Seventh Circuit also. Definitely in this particular
22 case a rule of reason analysis, a full competitive rule
23 of reason analysis was really required, and I think that
24 is evidenced by a number of things.

25 Initially we find in the initial decision by

1 the Commission a determination that IFD's actions were
2 per se restraint of trade. Although the initial
3 decision tests the idea that a rule of reason might be
4 applicable in this case, they said there were no factors
5 to outweigh the clearly anticompetitive effects that had
6 been evidenced.

7 Unfortunately, the initial decision never
8 indicated what those were, just continually referred to
9 clearly anticompetitive effects.

10 The final order of the Commission upon the
11 urging of the IFD agreed that a rule of reason analysis
12 should be applied, and they specifically stated a number
13 of reasons why that is so. The Commission stated
14 specifically the conduct involved in by IFD was not
15 aimed primarily at excluding competitors, it was not
16 wholly motivated by an anticompetitive purpose, and was
17 a very limited refusal with regard to insurance company
18 mandates. Only the x-ray was withheld. All other
19 aspects of the insurer-dentist transaction continued.

20 These are the Commission's findings. Now, as
21 to why they applied a rule of reason and rejected per se
22 there are other findings in the Commission's decision
23 which also support application of a rule of reason.
24 They found that -- they refused to make a finding that
25 there was any unfairness to consumers. They correctly

1 found that the insurers were neither a customer nor a
2 competitor of the dentist.

3 And they found that in essence there was no
4 impact on price, and the Commission failed to evidence
5 any impact on price in the dental industry.

6 QUESTION: Do you think that is a necessary
7 element of their case?

8 MR. GRAHAM: It is if they are trying to
9 analogize this to a price case. I think they should
10 demonstrate --

11 QUESTION: In a price case would it be
12 necessary to show that there was an impact on price?

13 MR. GRAHAM: Especially --

14 QUESTION: If you prove an agreement to fix
15 price, do you have to prove anything more?

16 MR. GRAHAM: If you demonstrate -- I think if
17 you demonstrate price-fixing, you are at least -- you
18 are either probably in a per se rule or, if it exists,
19 some kind of truncated rule of reason analysis, which
20 apparently they are touting now.

21 QUESTION: It is part of your submission that
22 they must prove an impact on price in this case?

23 MR. GRAHAM: If it is a price case, or as if
24 they are saying that we can apply somewhat of a
25 truncated rule of reason now. You know, they are

1 analogizing this case to Professional Engineers, is what
2 they are doing.

3 QUESTION: Did they prove an impact on price
4 in Professional Engineers?

5 MR. GRAHAM: I think Professional Engineers
6 was an absolute ban on competitive bidding. I think it
7 was facially, for all intents and purposes --

8 QUESTION: But did they prove an impact on
9 price?

10 MR. GRAHAM: Well, I don't think they
11 necessarily had to, because --

12 QUESTION: But you think they have to in this
13 case?

14 MR. GRAHAM: In a rule of reason case I think
15 they --

16 QUESTION: Well, whatever you call this case,
17 do you think it is an essential ingredient of the
18 Commission's case that they prove an impact on price in
19 this case?

20 MR. GRAHAM: Well, or other anticompetitive
21 effects. I think it is essential they prove something
22 like competitive effects.

23 QUESTION: Of course, they claim they did.

24 MR. GRAHAM: I know they claim that.

25 QUESTION: But what I am really trying to find

1 out is whether you think they had to prove an impact on
2 price.

3 MR. GRAHAM: No, I don't think it was -- had
4 anything to do with this case, because this case is not
5 a price case.

6 Clearly the Commission rejected per se
7 analysis and stated, we are applying a rule of reasons,
8 and cited to Chicago Board of Trade, which basically
9 delineates the typical considerations to be analyzed in
10 a rule of reason case.

11 Unfortunately, they failed to carry out a
12 proper rule of reason analysis, and the Seventh Circuit
13 pointed this out to them. Now, only after the Seventh
14 Circuit vacated the opinion, we see a new theory
15 evolving on appeal.

16 We see in the petition for rehearing in the
17 Seventh Circuit the Commission now stating that no
18 elaborate analysis was necessary, and that there are
19 certain types of anticompetitive conduct that can be
20 observed in the twinkling of an eye, and apparently ever
21 now in their reply brief apparently the Commission
22 applied some kind of truncated, slight in scale rule of
23 reason analysis.

24 These are inventions of appellate counsel,
25 because they are not in the Commission's final order,

1 and that is what the Seventh Circuit was reviewing.

2 I think it is clear that a complete
3 competitive rule of reason analysis was necessary here,
4 aside from the fact that the Commission themselves
5 indicated -- this is a novel case. The relationships in
6 this case are not traditional. There is at least a
7 three-party situation involving a patient, the dentist,
8 the insurer, and possibly the employer of the patient
9 who is paying for the dental services.

10 Aside from all this, IFD presented valid,
11 reasonably objective medical concerns about the
12 practices of the dental insurers, which basically were
13 that insurance companies were giving another opinion as
14 to the necessity and adequacy of the treatment being
15 provided by the dentist.

16 I think this is clear. They were diagnosing.
17 I think the initial decision admits this. The initial
18 decision further indicates --

19 QUESTION: Why shouldn't an insurance company
20 at least have a backup diagnosis of its own if it is
21 going to pay the bill?

22 MR. GRAHAM: Well, I don't think that our
23 clients have ever had any problem having an insurance
24 company do that, if they do it properly. The problem
25 was, the insurance companies were taking a single

1 diagnositc aid, the ex-ray, and dentists would look at
2 that and say, well, this treatment is unnecessary.

3 QUESTION: Well, now, your opposing counsel
4 said that these dentists assisting the insurance
5 companies didn't use just the ex-ray.

6 MR. GRAHAM: Well, I beg to differ. I will
7 point to -- defer to the initial decision finding that
8 -- on Page 241A of the appendix where the Administrative
9 Law Judge admits it is not known what supplementation
10 for diagnosis is being made by the insurance companies
11 in Indiana, and not only is he admitting that they are
12 diagnosing, but he is admitting, I don't know on what
13 basis.

14 QUESTION: Why can't an insurance company say,
15 all right, we don't have as much time as the dentist to
16 spend on these individual cases, we have got to process
17 them, we are going to make our backup judgment just on
18 the basis of ex-rays?

19 MR. GRAHAM: Because -- that would be fine if
20 they were just trying to decide what their limits were
21 on a particular case, if it is a \$50 case or a \$100
22 case. What they were doing was imposing less expensive
23 but supposedly adequate treatment, and then they would
24 inform the patient, we are only going to pay for the
25 treatment that is less expensive but adequate in our

1 opinion.

2 QUESTION: You can't say that is not cost
3 containment.

4 MR. GRAHAM: I don't think it contains costs.
5 What it does is reduces treatment, because a patient is
6 not going to opt to have treatment done when somebody
7 else has told him that it is not necessary, it is not
8 warranted.

9 QUESTION: He is probably not going to opt to
10 have treatment done if the insurance company won't pay
11 for it.

12 MR. GRAHAM: That is true. That is also
13 true. What it does is, it works -- it changes the
14 originally prescribed treatment plan based on an
15 improper diagnosis, without ever looking at the
16 patient.

17 QUESTION: Well, but how can you say the
18 diagnosis is improper?

19 MR. GRAHAM: Because the work rule, the
20 evidence at trial was uncontradicted. In fact, the
21 Administrative Law Judge made a finding that the experts
22 which we presented and others all agreed that an ex-ray
23 or any single diagnostic aid is not enough to make a
24 proper diagnosis. That was the Commission's finding.

25 QUESTION: Yes, but that is a proper diagnosis

1 for prescribing treatment, isn't it? Is there something
2 unethical or improper about an insurance company writing
3 a policy saying that when there are two alternate
4 methods of treatment, we will reserve the right to
5 decide which one we will pay for?

6 MR. GRAHAM: No, but if you decided that there
7 is a treatment that is adequate based on a very poor and
8 medically unsound basis --

9 QUESTION: Well, adequate for determining what
10 they will pay for. Don't they have that right? I don't
11 understand this.

12 MR. GRAHAM: They have a right to determine
13 what they are going to pay for, but they don't have a
14 right to indicate that there are other treatments.

15 QUESTION: Can't they say, the reason we won't
16 pay for a gold filling is because we think a plastic
17 filling is cheaper and that that is adequate? Can't
18 they say that?

19 MR. GRAHAM: Not on the basis of an ex-ray,
20 they can't. That is the problem. An ex-ray won't
21 reveal what type of -- sort of material necessarily need
22 be utilized without --

23 QUESTION: Who should determine -- do you
24 think they must, there is some legal rule they have to
25 pay whatever the doctor -- for whatever the dentist

1 thinks is appropriate?

2 MR. GRAHAM: No. The Indiana Federation of
3 Dentists never opposed cost containment by the insurance
4 companies. What they opposed was their method of making
5 a --

6 QUESTION: They thought the insurance company
7 ought to send a dentist out and review the files on
8 every patient, and the insurance company said, that
9 would be much more expensive, and will run up the cost
10 of insurance. Isn't that what it is all about?

11 MR. GRAHAM: If the insurance company is going
12 to diagnose, I think they ought to do it properly.

13 QUESTION: Even though it is a more expensive
14 way and the cost of insurance would go up.

15 MR. GRAHAM: Well, that was never
16 established.

17 QUESTION: Well, I think there were findings
18 to the effect that the processing method of going to the
19 office by individual dentists would be a good deal more
20 expensive. I thought that was in the -- even Judge
21 Coffey acknowledge that, I thought.

22 MR. GRAHAM: There was evidence that it costs
23 \$10 a patient to do that. Aetna did that on a one-shot
24 basis. There was also evidence that the cost to the
25 dentist to comply with the insurance company forms and

1 -- costs them money, too.

2 QUESTION: And that's why they didn't want to
3 supply the ex-rays.

4 MR. GRAHAM: They supplied everything but the
5 ex-rays. They supplied claim forms, narratives. They
6 would speak to the insurance company on the phone.

7 QUESTION: Would you tell me again, just so I
8 have it, why did the -- what was the purpose of this
9 refusal to supply ex-rays, in a nutshell? Why didn't
10 the dentists want to do it?

11 MR. GRAHAM: Because the insurance companies
12 were making diagnoses.

13 QUESTION: They didn't want the insurance
14 companies to engage in unethical practice of dentistry.

15 MR. GRAHAM: It was a second opinion based on
16 an ex-ray.

17 QUESTION: Is that the basic reason, they
18 thought it was -- the insurance companies would be
19 unlawfully engaged in the practice of dentistry if they
20 cooperated?

21 MR. GRAHAM: That's right, and that concern is
22 evidenced additionally by the Indiana State Board of
23 Dental Examiners since at least 1974 --

24 QUESTION: Didn't the dentists submit a
25 narrative explanation of what work they were proposing

1 would be done?

2 MR. GRAHAM: The dentist would --

3 QUESTION: And isn't that available to the
4 insurance company to review?

5 MR. GRAHAM: Yes, they did that openly.

6 QUESTION: So they aren't relying just on the
7 ex-ray at all. They have the benefit of the narrative
8 explanation. Isn't that so?

9 MR. GRAHAM: Yes, but the narrative is not --
10 it goes much farther than that in making a diagnosis,
11 and I believe the Indiana Federation of Dentists work
12 rule delineates what all the experts indicated was
13 true. You can't just look at a single diagnostic aid or
14 summary in a claim form and decide that this treatment
15 is not necessary, this treatment is not warranted, as
16 the Commission refers to it themselves.

17 QUESTION: But from what you have said, there
18 was more supplied to the insurance company than just the
19 ex-ray. There was the proposed work, the outline of the
20 work to be done and the narrative description and the
21 opinion of the examining dentist, so the insurance
22 company has all that available plus the ex-ray if it is
23 furnished.

24 GRAHAM: And the evidence was that that was
25 not sufficient to effect another diagnosis.

1 QUESTION: Well, what else would they get by
2 going to the dentist's office?

3 MR. GRAHAM: There is --

4 QUESTION: Which was acceptable to the Indiana
5 group?

6 MR. GRAHAM: Well, they could have all the
7 diagnostic aids. There could be models, impressions.
8 There could be an oral exam, which Aetna conducted for
9 some while on 4,700 patients, I believe. You can't --
10 you are unable to observe the health conditions of the
11 patient and how well he takes care of his teeth. There
12 are a number of factors going into --

13 QUESTION: Well, you don't propose that the
14 insurance company has to physically examine the patient,
15 surely.

16 MR. GRAHAM: No, all I propose is that they
17 not diagnose unless they know what they are doing, and
18 that is what the Federation of Dentists have contended.

19 QUESTION: May I follow up with just one
20 question on that, Mr. Graham? Mr. Graham, it is your
21 position if they supplied the ex-rays, that might lead
22 to the unethical practice of dentistry. What if they
23 supplied everything but the ex-rays, and then the
24 insurance companies did the best they could without the
25 ex-rays? Would that be the unethical practice of

1 dentistry by the insurance companies?

2 MR. GRAHAM: Well, I believe so.

3 QUESTION: But weren't they willing to do
4 that, supply everything else they wanted except the
5 ex-rays?

6 MR. GRAHAM: In the office, along with an oral
7 examination.

8 QUESTION: Was it the dentists who insisted on
9 having an insurance company person come to the office?
10 Weren't they willing to send in a partial file just
11 excluding the ex-ray?

12 MR. GRAHAM: They did that, yes.

13 QUESTION: Why didn't that raise exactly the
14 same ethical problem as sending in the ex-rays without
15 more material?

16 MR. GRAHAM: Because it was a narrative on a
17 claim form. It wasn't a diagnostic aid that was being
18 misused by the dentist at the insurance company.

19 QUESTION: In both instances the insurance
20 company was trying to decide whether to pay the claim,
21 wasn't it, whether it had the ex-ray or not?

22 MR. GRAHAM: No, they were trying to decide
23 what treatment was --

24 QUESTION: What treatment they would pay for.

25 MR. GRAHAM: The cheapest treatment that they

1 decided was adequate, is what they were doing.

2 In any event, these -- there were at least
3 valid medical concerns here by IFD that should have been
4 looked at by the Commission, and they weren't. The
5 entire case was short-shifted. It was, as we know now,
6 a truncated rule of analysis.

7 QUESTION: Has this sort of a boycott by
8 dentists spread to other states? Do you know?

9 MR. GRAHAM: There was similar concerns in the
10 state of Texas and, I believe, Pennsylvania. The record
11 doesn't really reflect this. It does seem evident that
12 right now the Commission is now asking in the reply
13 brief on Page 10 that no elaborate industry analysis is
14 required to demonstrate the anticompetitive effect of
15 IFD's actions, citing Professional Engineers.

16 This is a per se test that they are citing
17 here. It seems to me that in an attempt to avoid their
18 evidentiary requirements and prove anticompetitive
19 effect, they are now saying, well, I think we can
20 presume anticompetitive effect. It is apparently now a
21 per se case again, because they are citing a per se
22 test.

23 I think it is pretty evident what the
24 Commission did in this case was, they stated they were
25 going to apply a rule of reason, but they presumptively

1 concluded IFD had engaged in anticompetitive conduct and
2 then looked for proof of procompetitive effects. Well,
3 I don't think that's the way it works, especially in a
4 novel case involving health care concerns.

5 The rule of reason requires an analysis of the
6 reasons for the restraint, the history of it, the facts
7 peculiar to the business. That was not engaged in.

8 Why do all these things need to be done? To
9 determine the competitive significance. We need to find
10 out who is competing with who on what basis, in what
11 market, and for what reasons. Why? So that there can
12 be a demonstration of anticompetitive effect in a
13 relevant market, as this Court, I believe, has recently
14 indicated again in Jefferson Parish.

15 These are the same concerns the Seventh
16 Circuit had. Where is the evidence of anticompetitive
17 effect? What is the market that was affected? Well,
18 the Seventh Circuit observed that the Commission held
19 that competition was lessened amongst dentists in their
20 policy of dealing with third party payer insurers. That
21 was the gist of their holding.

22 The Seventh Circuit delineated a series of
23 factors that the Commission had failed to even address
24 in their series of conclusory assumptions about the
25 market and competition. They pointed out that the

1 Commission had failed to define the market and
2 competitive forces.

3 They pointed out that there was no real
4 analysis of the total number of dental patients within
5 the relevant market, or the percentage of those covered
6 by insurance in the relevant market, the availability
7 and proximity of other dentists, the fees charged
8 insured patients as opposed to uninsured patients, the
9 policy of non-FDI member dentists in dealing with
10 insurers, or the policy of insurers in evaluating dental
11 treatment plans.

12 There was no analysis of the additional cost
13 to dentists to process claim forms. There was no
14 analysis of potential disincentives posed to dentists
15 for submitting diagnostic aids in violation of fairly
16 well delineated state policies against it dating back to
17 1974.

18 No evidence of price alteration, price
19 stabilization.

20 Now, in short, I believe that the Seventh
21 Circuit found that competitive -- competition at issue
22 was not defined. They didn't know who competed with who
23 for what, for what reason. Very little attention has
24 been paid to the patient in this case, which is actually
25 the ultimate consumer of dental benefits.

1 They didn't demonstrate an effect on an
2 undefined market.

3 In conclusion, I believe that the Seventh
4 Circuit -- the Commission stated, we are applying a rule
5 of reason analysis. Under the circumstances, it needed
6 to be a rule of reason analysis. Thus they had a burden
7 to establish anticompetitive effect in the relevant
8 market. The Commission is stating something differently
9 now. They are asking for, I believe, a per se
10 application, or at least some kind of truncated rule of
11 reason application.

12 Well, the Seventh Circuit found their analysis
13 wholly deficient. They said rule of reason. They were
14 obligated to establish the effects. And there simply is
15 not a gross misapplication of the substantial evidence
16 test by the Seventh Circuit.

17 For those reasons, we believe that the
18 Commission should not prevail on their petition.

19 Thank you.

20 CHIEF JUSTICE BURGER: Very well.

21 Do you have anything further, Ms. Tiffany?

22 MS. TIFFANY: Unless there are further
23 questions from the bench, Mr. Chief Justice, I do not.

24 CHIEF JUSTICE BURGER: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 2:52 o'clock p.m., the case in
2 the above-entitled matter was submitted.)
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#84-1809 - FEDERAL TRADE COMMISSION, Petitioner V. INDIANA FEDERATION

OF DENTISTS

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BY Paul A. Richardson

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