

## healthcare industry lawflash

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## Supreme Court Ruling's Implications for Healthcare Professions

*The U.S. Supreme Court ruled that a state professional board controlled by active market participants must be supervised by a state to enjoy protection from federal antitrust laws.*

On February 25, the U.S. Supreme Court issued an opinion in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, ruling that a state professional board controlled by active market participants must be actively supervised by a state to enjoy protection from federal antitrust scrutiny. The Court ruled that attempts by the North Carolina Board of Dental Examiners (the Board) to prevent nondentists from engaging in the practice of teeth whitening were unlawfully anticompetitive. The Board, which consisted of a statutorily mandated majority of practicing dentists elected by fellow dentists, was, according to the Court, a “nonsovereign actor controlled by active market participants.” Because the Board was not “actively supervised” by the State of North Carolina, the Court concluded that the State Action Doctrine did not immunize the Board from the antitrust challenge.

So, what does this mean for healthcare providers that seek to blaze new trails and offer consumers new choices in the evolving healthcare marketplace? Will this Supreme Court decision mean less challenge by state licensing boards that, according to the Federal Trade Commission (FTC), have often acted with anticompetitive effect? Given that licensing bodies serve to protect the health and welfare of state citizens, undoubtedly professional licensing boards will remain wary of practices that push the envelope of a professional licensing oversight scheme. But those states that operate licensing boards with little state oversight and significant active market participant control may have a more difficult time when those licensing boards' actions are challenged.

The Court did not comment on any specific sanctioned scheme of state supervision because the Board did not argue that it was, in fact, supervised by the state in the first instance. Instead, the Court commented only generally on this point, describing the question about the adequate level of supervision to be a mostly “flexible and context-dependent” inquiry into whether the state’s review mechanisms provide “realistic assurance” that a nonsovereign actor’s anticompetitive conduct promotes state policy and not just individual interests. The Court suggests that this broad inquiry may be informed by the presence of a few specific characteristics of oversight, including the necessity of a state supervisor’s veto power and its lack of active market participation.

For states with limited budgets and limited attorney general office resources to advise and oversee professional licensing boards, it may take some time to adopt more stringent state oversight of professional licensing boards composed largely of active market participants (i.e., competitors). For healthcare providers with active participation with state societies or the boards of professional licensure, awareness of this Supreme Court ruling may help avoid antitrust scrutiny of future actions by ensuring that adequate state oversight is either in place or sought before taking action that could limit competition, even if a health and safety basis exists among the many possible justifications.

Depending on the level of supervision that states impose on board action, we expect that the FTC—which has been active in this area before receiving the Supreme Court’s imprimatur—will actively monitor board activity and rulemaking to ensure that there is (1) active state supervision and (2) effective adoption of the board action as the relevant state’s policy. Where those elements are not present, we expect that the FTC will take an active role in investigating and, where it deems appropriate, challenging board actions that impede competition and innovation in the marketplace. Healthcare professionals and businesses affected by state licensing board actions that they

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do not regard as evidencing genuine state action should consider advising the FTC (and state attorneys general, in appropriate circumstances) of their concerns as means of either staving off implementation of board action that will impede competition and/or innovation or enabling the FTC to pursue remedial or enforcement action.

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