
TEXAS PUBLIC POLICY FOUNDATION
PolicyPerspective

December 2015
Center for Health Care Policy

Telemedicine in Texas

by Kate Murphy
Mental Health Policy Fellow

Key Points

- Texas has one of the strictest regulatory environments in the country surrounding telemedicine.
- The new telemedicine regulations hurt Texas' health care market by limiting competition.
- The unchecked authority licensing boards have to make rules and regulations, like the new telemedicine rules, leave Texas vulnerable to federal antitrust lawsuits that undermine state sovereignty.

PP33-2015

Introduction

Section 531.001(8) of the Texas Government Code defines telemedicine as a remote health care service in which a physician may assess, diagnose, consult, treat, or transfer medical data using technology. It is a convenient, affordable way to get health care services, and recent advances in audio-visual communications technology are enlarging the potential of telemedicine to reach more people and address a growing number of health care needs. More importantly, this service could increase access to health care in the more than 90 percent of Texas counties that are designated health professional shortage areas (U.S. Dept. of Health & Human Servs. 2015a) or medically underserved areas (U.S. Dept. of Health & Human Services. 2015b), where some care would be better than no care at all.

That is, if state regulators do not hamper telemedicine firms in Texas with regulations designed to suppress competition by strictly limiting the uses of telemedicine. Unfortunately, this appears to be happening, and state lawmakers should to intervene to stop it.

Competition, Regulation, and State Action Immunity

The heart of the United States' economy is competition (*National Soc. of Prof. Eng. v. U.S.*, 695). Federal antitrust laws have a long, complicated history. First devised in the late 19th century to allegedly protect competition, many of its doctrines over the years have "tended to protect businesses from competitive forces, rather than the other way around" (Peacock, 3). In addition, antitrust laws have failed to address perhaps the biggest threat to competition in recent years—federal and state government regulation. The state action immunity doctrine is the legal mechanism that protects state government from being subject to antitrust laws. This doctrine allows states to restrict markets and limit market participants through state licensure requirements, among other things, and deprive consumers of the benefits of competition despite federal policy favoring competition (*Parker v. Brown*, 352).

In April 2015, the Texas Medical Board (TMB) voted to implement stricter regulations governing telemedicine that would have been effective in June but for a lawsuit brought by Texas' largest telemedicine company, Teladoc (Texas Register, 1016). This action took place while HB 3444 was pending before the 84th Texas Legislature. The bill would have had the opposite effect of the new TMB regulations. Unfortunately, this bill did not pass, and the new regulations have made Texas the most heavily regulated state in the country for telemedicine and one of only three states that require an in-person or face-to-face examination before engaging in telemedicine services (Thomas & Capistrant, 3). These rules would prevent many telemedicine companies from operating in Texas using their current mode of operation. Fortunately, while the litigation between Teladoc and the TMB is pending, the United States District Court for the Western District of Texas has enjoined the new regulations, allowing telemedicine to continue to operate freely in Texas (Order, 1).

The TMB is the state agency authorized to regulate the practice of medicine in Texas under Section 152.001 of the Texas Occupations Code; one of their responsibilities includes physician licensure. Licensing, for better or worse, is an example of anticompetitive behavior that all states engage in. Licensing limits entry into a particular occupation like medicine. It is usually not the public that pressures the state legislature to impose

continued

occupational licensing standards, but rather the members of the occupation itself (Friedman, 140). Licensure typically provides a regulatory framework for the occupation, which regulators argue is designed to protect the health and safety of the public by assuring quality service (Kleiner & Wheelan, 30). However, the benefit of this scheme is questionable, and the restriction on competition is certain (Kleiner, 39–40). The restrictions stemming from state licensure persist in the actions of the regulatory boards that govern licensed occupations (Humphris, Kleiner & Koumenta, 9). These actions can be especially harmful when the regulatory board is made up of members of the occupation itself, as is most often the case, and therefore incentives are present for members to squelch competition at the expense of the public interest (Kleiner, 25). And that is exactly what we are seeing from the TMB's regulation of telemedicine.

The North Carolina Example

This anticompetitive behavior from the TMB might violate antitrust law according to the new precedent set in a case decided by the Supreme Court in February 2015, *North Carolina State Board of Dental Examiners v. F.T.C.* In more than 70 years of evolving precedent in this area, there has been a shift from favoring federalism, or state powers, to favoring the free market. In *Parker v. Brown*, the Supreme Court emphasized federalism when it held that federal antitrust laws do not apply to certain state conduct, which created the state action immunity doctrine (351). Under this doctrine, the law has evolved to mean that antitrust laws do not apply to actions of a state acting as a sovereign but do apply to actions flowing from some other basis. States, in other words, have wide latitude to regulate industries and professions as they see fit.

Courts use the two-pronged *Midcal* test to determine whether the state action immunity doctrine will apply. The first prong is whether the challenged restraint or regulation is "clearly articulated and affirmatively expressed as state policy" (*Cal. Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 105). The second is whether the state "actively supervised" the policy (*Cal. Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 105). To satisfy the first prong, states only have to prove that the state "clearly intend[ed] to displace competition in a particular field with a regulatory structure" (*S. Motor Carriers Rate Conference, Inc. v. U.S.*, 64). The second prong is a higher burden. It requires that state officials have the power to review and disapprove of regulations that are discordant with state policy, and that state officials actually exercise that power (*Patrick v. Burget*, 101).

Because it is so easy to fulfill the first prong of the *Midcal* test, and the second prong does not apply to public entities, the question of whether an entity is public or private is very important (*S. Motor Carriers Rate Conference, Inc. v. U.S.*, 64). In *Goldfarb v. Virginia State Bar,* the Court held that state agencies, such as a state medical board, are not necessarily sovereign actors for the purposes of state immunity, so it was an open question whether state regulatory boards like the TMB were public or private for purposes of the *Midcal* test (791).

But *North Carolina State Board of Dental Examiners v. F.T.C.* has settled that question. In that case, the court held that a non-sovereign actor, such as a state regulatory board, controlled by active market participants, enjoys state immunity only if it satisfies both prongs of the *Midcal* test (*N.C. State Bd. of Dental Examiners v. F.T.C.*, 1110). The "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants," because these market participants are likely to be driven by anticompetitive motives—sometimes without recognizing it (*N.C. State Bd. of Dental Examiners v. F.T.C.*, 1111). This is why such boards must be held accountable for antitrust violations (*N.C. State Bd. of Dental Examiners v. F.T.C.*, 1111).

The Texas Medical Board and Teledoc

Because of this new precedent, the TMB is not raising a sovereign immunity defense in the lawsuit against Teladoc, but is instead arguing there was no antitrust violation in the first place (Order, 6). The United State District Court for the Western District of Texas disagreed, and issued an injunction against TMB's new anticompetitive rules (Order, 1).

Teladoc asserted that the new regulations would result in, "increased prices, reduced choice, reduced access, reduced innovation, and a reduced overall supply of physician services," which are exactly "the kind of injuries antitrust laws were enacted to prevent" (Order, 7). Given Texas' shortage of doctors, it is clear that this service could negatively impact competitors while improving the market, which the court stated was a "classic antitrust injury" (Order, 7).

TMB claimed their new regulation will improve the quality of medical care (Order, 8). But all licensed physicians in Texas, including those at telemedicine companies, are bound to the same standard of care and ethical rules. A physician's professional judgment about whether a patient could be diagnosed reasonably and safely via telemedicine does not disappear simply because the physician is providing remote care, and physicians providing telemedicine services still refer cases they cannot safely diagnose to in-person care. Therefore, allegations that telemedicine diagnoses are often deficient are likely unfounded—especially considering the failures of many in-person encounters. Moreover, the Texas Occupations Code vested TMB with the authority to, investigate complaints against physicians who fail to meet the standards of care for practicing in Texas, which it regularly does. Given the existing restrictions on poor quality care, TMB's assertion that the new regulation will improve quality of care is suspect, as TMB already has the power to ensure that doctors are providing safe care, whether remotely or in-person. This seem especially true in light of the fact that telemedicine is providing safe, quality health care in the 47 states without such stringent requirements.

A New Frontier in State Regulatory Schemes

As we are seeing in the case Teladoc brought against TMB, licensing boards that seek to expand their monopoly will likely face increasingly more and heightened antitrust scrutiny. Licensure is a government-sanctioned monopoly over a particular occupation (Humphris, Kleiner & Koumenta, 13). The more a licensed profession can limit competition, the more its members financially benefit, to the detriment of consumers (Havighurst, 596). Licensing boards are usually made up of members of the regulated occupation because they have the most knowledge and expertise about how to regulate it, as is the case with TMB (Havighurst, 596). The obvious problem with such a scheme is that most of the regulators have incentives to expand the scope of their jurisdiction and eliminate competition even if this is against the public interest (Havighurst, 598–99). This is precisely what is happening with telemedicine in Texas.

Because of *North Carolina State Board of Dental Examiners v. F.T.C.*, we know that licensing boards will be treated like private entities and subject to both prongs of the *Midcal* test. Although this is good for the free market, it is a new avenue through which the federal government will have increasing opportunities to interfere with state governance. So what should Texas legislators do, both to preserve state sovereignty and to ensure the vitality of the free market?

Currently, several licensing and regulatory boards are under Sunset Review in Texas, including the TMB. This review provides a unique opportunity for the Legislature to make significant changes to these regulatory bodies. Based on the *Midcal* test, there are two things the Legislature should closely examine. The first is the scope of the licensing boards' authority as found in each board's enabling statute. Texas should limit the ability of licensing boards to expand their monopoly or restrict competition by clearly stating so in their enabling statute. One way licensing boards do this is by broadening the scope of how the occupation they regulate is defined. Such a power should lie solely with the Legislature, and boards who have incentives to expand their monopoly should be specifically prevented from engaging in this type of action.

The second way is by implementing a supervision plan for each board to ensure the regulations accord with state policy, thereby protecting federalism and the free market. Such a plan might involve a standing committee that reviews and approves rules or allowing the entire legislature to approve. If the Legislature were to take an active supervisory role over licensing boards, it would prevent those boards from overreaching and enacting rules and regulations that stifle competition. This would preclude an antitrust challenge like the current lawsuit against TMB, and also would likely prevent federal intervention by the Federal Trade Commission, as in the North Carolina case.

Conclusion

Although public entities have long engaged in anticompetitive conduct, most are protected from antitrust scrutiny by the state action immunity doctrine. State licensing boards like TMB are public entities controlled by private actors, who are also market participants and, as such, face the same conflicts of interest and incentives that drive private actors to minimize competition wherever they can.

Earlier this year, the Supreme Court recognized these obvious problems and held that state licensing boards controlled by market participants should face antitrust scrutiny when they pass new regulations. This is happening right now in Texas. TMB passed regulations that would squeeze telemedicine providers out of their market, leaving Texans with fewer options for health care access and limiting opportunities for innovation in the state's health care market. Now TMB is facing a federal lawsuit that may have broad implications for health care policy in Texas and beyond. State policy, however, should not be decided by federal courts. Instead, the Texas Legislature should take active steps to guard against the anticompetitive conduct of its licensing boards that also leave the state vulnerable to federal lawsuits. First, the Legislature should rein in the TMB, and then it should alter state policy to prevent similar lawsuits against other licensing boards.

Texas cannot afford to ignore the anticompetitive behavior of licensing boards to the detriment of its sovereignty—especially when it comes to telemedicine.

References

40 Texas Register 993. 2015.

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

Friedman, Milton. 1962. *Capitalism And Freedom*.

Goldfarb V. Virginia State Bar, 421 U.S. 773 (2004).

Havighurst, Clark C. 2006. Contesting Anticompetitive Actions Taken In The Name Of The State: State Action Immunity And Health Care Markets. 31 Journal of Health Politics, Policy and Law. 587.

Humphris, Amy, Morris M. Kleiner & Mara Koumenta. 2010. How Does Government Regulate Occupations In The UK And US? Issues And Policy Implications.

Kleiner, Morris M. 2006. *Licensing Occupations: Ensuring Quality Or Restricting Competition?*

Kleiner, Morris M. & Charles Wheelan. 2010. Occupational Licensing Matters: Wages, Quality, And Social Costs. Cesifo Dice Report.

National Socity of Professional Engineers v. U.S., 473 U.S. 679 (1978).

North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015).

Order, *Teladoc, Inc. v. Texas Medical Board*, Case No. 1:15-Cv-00343-Rp (W.D. Tex. May 29, 2015).

Parker v. Brown, 317 U.S. 341 (1943).

Patrick v. Burget, 486 U.S. 94 (1988).

Peacock, Bill, Mario Loyola, and Josiah Neeley. 2013. Protecting Innovation: The Role Of State Attorneys General In Antitrust Enforcement, Texas Public Policy Foundation.

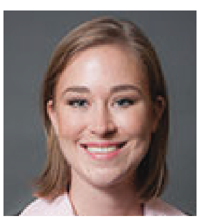
S. Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48 (1985).

Thomas, Latoya & Gary Capistrant. 2015. State Telemedicine Gaps Analysis: Physician Practice Standards & Licensure. American Telemedicine Association.

U.S. Department of Health & Human Services. 2015A. HPSA Find Results. Search "Texas" "All Counties" "Primary Care" "Dental Health" & "Mental Health."

U.S. Department of Health & Human Services. 2015B. MUA Find Results. Search "Texas" "All Counties."

About the Author



Kate Murphy is a mental health policy fellow contributing to the centers for Effective Justice and Health Care Policy at the Texas Public Policy Foundation.

Murphy interned for Justice Johnson at the Texas Supreme Court, and was also a Judge K.K. Legett Fellow. Murphy interned at the Washington Legal Foundation where she drafted arguments that were included in amicus briefs submitted to the U.S. Supreme Court. Before joining the Foundation, Kate worked as an attorney in Houston. Her practice focused primarily on oil and gas law and condemnation proceedings.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Texas Public Policy FOUNDATION