Fear of antitrust damages could stymie med boards

By David Pittman

05/23/2016 05:00 AM EDT

A Supreme Court ruling that could hold individual medical board members liable for antitrust violations has sent shock waves through the boards, whose doctor-officers fear getting socked with immense legal charges.

At least five antitrust lawsuits have been filed against health licensing boards since the North Carolina Dental Board v. Federal Trade Commission decision, which held that licensing boards like those that regulate physicians, nurses and pharmacists are open to antitrust suits if they try to block competitors like telemedicine companies or pain clinics.

The high court ruling left open the question of whether individual board members could be sued, and in some cases they have been.

In the high-profile battle between Teladoc and the Texas Medical board, plaintiffs sued not only the state boards but 14 members of the board, which is trying to prevent the Dallas-based telemedicine company from operating in the state.

Medical groups are alarmed by such actions, saying the risk of liability will undercut state medical authorities by creating fear of repercussions.

"This is something that's certainly going to have a chilling effect on people's willing to serve on professional licensing boards because they're basically volunteers," said Lisa Robin, the Federation of State Medical Board's chief advocacy officer.

"It's a little early to see if any board would be willing to take a stand in the interest of patient safety," Henry Allen, an antitrust attorney for the American Medical Association, said at an American Bar Association event earlier this month. "Our sense is that they're fearful."

Individual board members have been sued in states other than Texas.

A hearing aid supplier's suit against the Tennessee Department of Health - over the process required to become licensed to sell hearing aids in the state - lists board members individually. So does a case brought against the Nevada pharmacy board by veterinarians who want to sell animal drugs directly to individuals.

A case against the Mississippi medical board over ownership of pain clinics does not list individual board members.

Teladoc has cited the North Carolina case in its years-long litigation against the Texas Medical Board. The company declined to answer questions for this story citing the ongoing litigation. But
attorneys who have represented telemedicine companies defend the practice of suing individual board members.

"People who conspire under the antitrust law are potentially individually liable, so there's nothing that's radical about that," said Stuart Gerson, an attorney with Epstein Becker & Green in Washington. If the board members don't want to get sued, they shouldn't break antitrust law, Gerson said.

State policies on how to protect individual members varies. Some insure members and offer to cover any legal damages. The AMA and Federation of State Medical Boards are trying to get other states to extend that same coverage.

"The question is, Where does the money for the damages come from?" Ed Tellechea, counsel for the Florida Board of Medicine, asked in comments to the board this year. Florida would not coverage damages, which would be substantial, for its board members in such a situation, Tellechea said.

The Federation of State Medical Boards passed a resolution this month to develop policies and guidance in response to the Supreme Court decision. It wants Congress to clarify that health licensing boards enjoy immunity.

The AMA wants states to give their medical board members legal protections from antitrust suits. Few states have acted, but Alabama lawmakers passed a bill saying it was their intent to immunize medical board members from such actions.

The FTC has offered guidance on ways state licensing boards can avoid antitrust action. It didn't address the threats of individual liability.

The FTC is in a listening and deliberation mode when states approach it for specific advice on how to dodge antitrust accusations, Melissa Westman-Cherry, from the commission's competition bureau, told the ABA meeting his month.