



Teladoc Antitrust Litigation Reaches the End of the Road

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Remote care or “telemedicine” has grown rapidly in recent years, but not without controversy. One of the most high-profile battles over telemedicine has raged for years in the State of Texas—a federal antitrust lawsuit filed by Teladoc, Inc., one of the nation’s largest telehealth services, against the Texas Medical Board. The lawsuit claimed that certain Texas Medical Board rules, which required physicians to see patients face-to-face before treatment, were anti-competitive and violated federal antitrust laws. In late November, after years of litigation, the battle came to an end when Teladoc dropped its lawsuit after the Texas legislature passed new laws greatly expanding access to telemedicine in the State.

The Antitrust Backdrop: FTC v. North Carolina State Dental Board

It was a February 2015 United States Supreme Court decision that paved the way for Teladoc’s lawsuit. When the Supreme Court issued its ruling in *Federal Trade Commission v. North Carolina State Dental Board*, it was clear the decision would be a game-changer. The case involved a challenge brought by the Federal Trade Commission against North Carolina’s dental licensing board, alleging that the board’s efforts to prevent non-dentists from performing teeth-whitening services in the state were anti-competitive and violated federal antitrust laws.

At the time the FTC’s lawsuit against the North Carolina board was filed in the summer of 2010, most observers believed that, as an arm of the state, regulatory boards were not subject to federal antitrust laws under a long-recognized doctrine known as “state-action” immunity. In fact, this immunity doctrine was the centerpiece of the North Carolina board’s defense against the FTC lawsuit. But the FTC fought back, taking the position that the board must be treated as a *private* actor because it was a regulatory body “that is controlled by participants in the very industry it purports to regulate.”

Under longstanding antitrust law, if the North Carolina board was, indeed, deemed a private actor, it would have to demonstrate that it was “actively supervised” by the State before it could benefit

from immunity. And if it could not demonstrate active supervision, it risked a finding that its actions to drive out non-dentist teeth whitening services violated the antitrust laws.

The case wound its way through the courts over many years, grabbing the attention of state regulators, consumer rights advocates, and many others. It finally reached the Supreme Court, which ultimately sided with the FTC. In a 6 to 3 decision, the Justices concluded that because a “controlling number” of the North Carolina State Dental Board’s decision makers were “active market participants in the occupation the Board regulates,” the board must be treated as a private actor and, thus, was required to show active State supervision to be immune. The Court explained that this supervision required more than a review of decision-making procedures, but oversight of the actual substance of board decisions. The mere *potential* for state supervision was not enough, and the State supervisor could not be an active market participant in the regulated profession at issue. In the case of the North Carolina board, the Court agreed with the FTC that the active supervision requirement had not been met.

It’s fair to say that the decision sent shockwaves through the regulatory community. State attorneys general, governors, and legislatures struggled to determine how best to react to the changed landscape. If licensed professionals remained on boards, immunity was in jeopardy—unless the State could design a mechanism for “active supervision” that would satisfy the Supreme Court’s somewhat unclear new standards.

It came as no real surprise that the Supreme Court’s decision also ushered in a new wave of private antitrust litigation filed across the country by licensees, companies, and individuals dissatisfied with the actions of regulatory boards. Antitrust claims against a state board, previously presumed a dead end, became a growing trend.

The *Teladoc* Litigation

One such antitrust lawsuit was *Teladoc, Inc. v. Texas Medical Board*, No. 1:15-CV-00343, in the United States District Court for the Western District of Texas. The lawsuit, filed in April 2015, within months of the Supreme Court ruling, sought to block certain Texas Medical Board rules that required physicians to conduct an in-person physical exam of a patient before diagnosis and treatment would be permitted. Teladoc contended that the new rules were pretextual and were adopted only after Teladoc began to be a competitive threat to traditional medical practices in Texas.

Not ready to give up on state-action immunity, the Texas Medical Board moved to dismiss the case on immunity grounds. But because the vast majority of the board’s members were practicing physicians, it fell squarely within the crosshairs of the Supreme Court’s requirement for “active State supervision.” The board argued that it was adequately supervised because its decisions were subject to judicial review by the state courts and a state office of administrative hearings, as well as the legislature. But in December 2015 a Texas federal judge rejected those arguments, concluding that these oversight mechanisms were simply too limited.

The Texas board appealed that decision to a federal appellate court, but faced swift arguments from Teladoc (joined by the FTC and U.S. Department of Justice) that its appeal was procedurally premature. The board dropped its appeal. Over the months that followed, the two sides put the case on hold to negotiate a resolution.

The End of the Road

By May 2017, the landscape in Texas had changed significantly. New legislation made changes designed to expand the delivery of care via telemedicine in the State. Notably, the legislation removed the requirement of a face-to-face meeting prior to treatment via telemedicine. The Texas Medical Board promulgated revised rules as well, which took effect in November 2017.

Satisfied by these changes, Teladoc dropped its antitrust lawsuit on November 29, 2017, bringing to an end a long battle that shined a spotlight on telemedicine in Texas and further tested the limitations of antitrust immunity for state regulatory boards.



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