Regulating Telemedicine (Or Trying To)

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By Ron Hedges

Telemedicine is, to say the least, "exploding"—both as a source of electronic health information and a business model. As of December 2015, "29 states and Washington D.C. have enacted legislation ensuring that private insurers offer reimbursement for telemedicine at equivalent levels with in-person services, provided the care is deemed medically necessary. Many of the laws enacted in 2015 will take effect in January 2016," according to Nathaniel M. Lacktman in an article published to *Health Care Law Today*. Telemedicine's expansion across the nation should also be furthered by the Interstate Medical Licensure Compact in 2015. This Compact was introduced by the Federation of State Medical Boards. The Compact "creates an expedited process for eligible physicians to apply for licensure in states" which adopt it, according to Ellen Janos and Carrie Roll in *Health Law & Policy Matters*. For those who want to explore a broad discussion of telemedicine, the white paper "Telehealth Policy Trends and Considerations," from the National Conference of State Legislatures.

Nevertheless, the road to adoption of telemedicine might be bumpy in one or more States. Take, for example, Texas. The Texas Medical Board (Texas Board) is statutorily empowered to regulate the practice of medicine in Texas. In 2015, after litigation in state court, the Texas Board adopted a rule which apparently requires a "face-to-face" visit before a physician can issue a prescription to a patient. Teladoc, Inc. and Teledoc Physicians, P.A., and two physicians (plaintiffs) challenged the rule in the United States District Court for the Western District of Texas, arguing that the rule violated federal antitrust law and the Commerce Clause of the United States Constitution because it restrained the ability of telemedicine practitioners to compete with "traditional" physicians and reduced patient access to affordable medical treatment. The Texas Board and its members were named as defendants.

Not surprisingly, the defendants moved for dismissal at the outset which would end litigation before discovery and a ruling on the merits of the claims asserted in a complaint. The defendants advanced two reasons to dismiss. First, that the complaint was barred by the applicable statute of limitations. The court rejected that reason. And then the court turned to the second reason, that the defendants were immune from suit under the state immunity doctrine.

States are generally free to regulate their economies as they wish. The United States Supreme Court affirmed this only last year in *North Carolina State Bd. of Dental Examiners v. FTC,* 135 S. Ct. 1101 (2015). However, there are two requirements for immunity. First, the regulation under challenge must be "clearly articulated and affirmatively expressed as state policy." Second, the regulation must be "actively supervised by the state." The Texas Board failed to meet either.

The Texas Board was largely composed of "market participants." This triggered the Texas Board's obligation to meet the two requirements for immunity. The court found no authority that would allow the State to veto or modify the rule under challenge. Hence, there was no "active supervision." As to the "clear articulation" requirement, the court chose not to address it because the Texas Board had failed to demonstrate active supervision. The court also declined to dismiss the plaintiffs' Commerce Clause claim because, among other things, the claim was fact-sensitive."

What does all this mean? At first blush, the decision demonstrates that motion to dismiss can be made in any civil action but might not be successful. On another level, however, the decision stands for the proposition that healthcare providers which offer services through new technologies might face challenges by jurisdictions such as Texas which regulate the services through "traditional" means and attempt to apply traditional practices to new technologies. Time will tell how the challenge to the Texas rule is resolved. Time—and the healthcare market—will surely see the emergence of new providers which will be subject to regulation by the States.

***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

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