

Healthcare Policies: New Developments



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Learning Collaborative Summit

Wednesday, May 15, 2019

Notice

Sarah Freymann Fontenot, J.D., the Regional Healthcare Partnerships 9, 10 and 18 present this seminar with the express understanding that:

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- 2.neither Ms. Fontenot nor the RHPs are engaged in providing legal advice, and
- 3.that the information is of a general character.

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Agenda

- **Health Care in Texas Today**
- **Why is Texas Different? Is it?**
- **What if Health Care was Beyond Austin's Control?**
- **Looking Towards a New Future**
- **Questions, Answers, Discussion**

Health Care Today



Picture by GoaShape/unsplash.com

Health Care is Disrupted
in *All* sectors

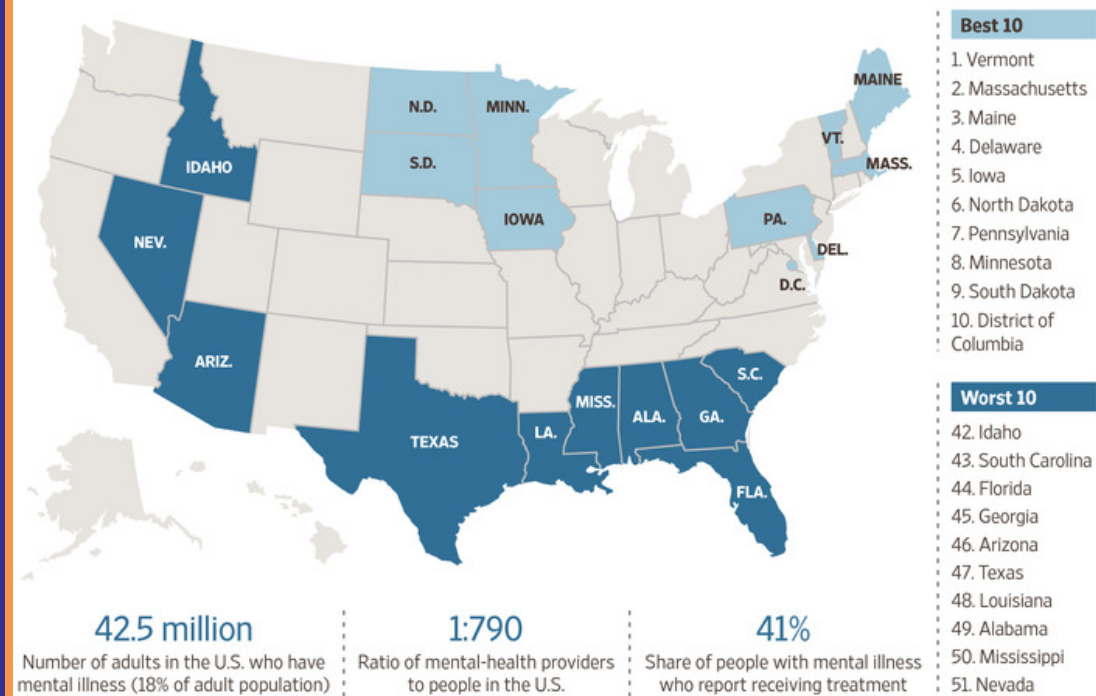


But for *YOUR*
Communities

Mental & Behavioral Health Care

Taking Care

How Mental Health America, a patient advocacy group, ranks the states on access to care, from best to worst. The ranking reflects measures including access to insurance, access to treatment, quality and cost of insurance and access to special education.



Source: Mental Health America

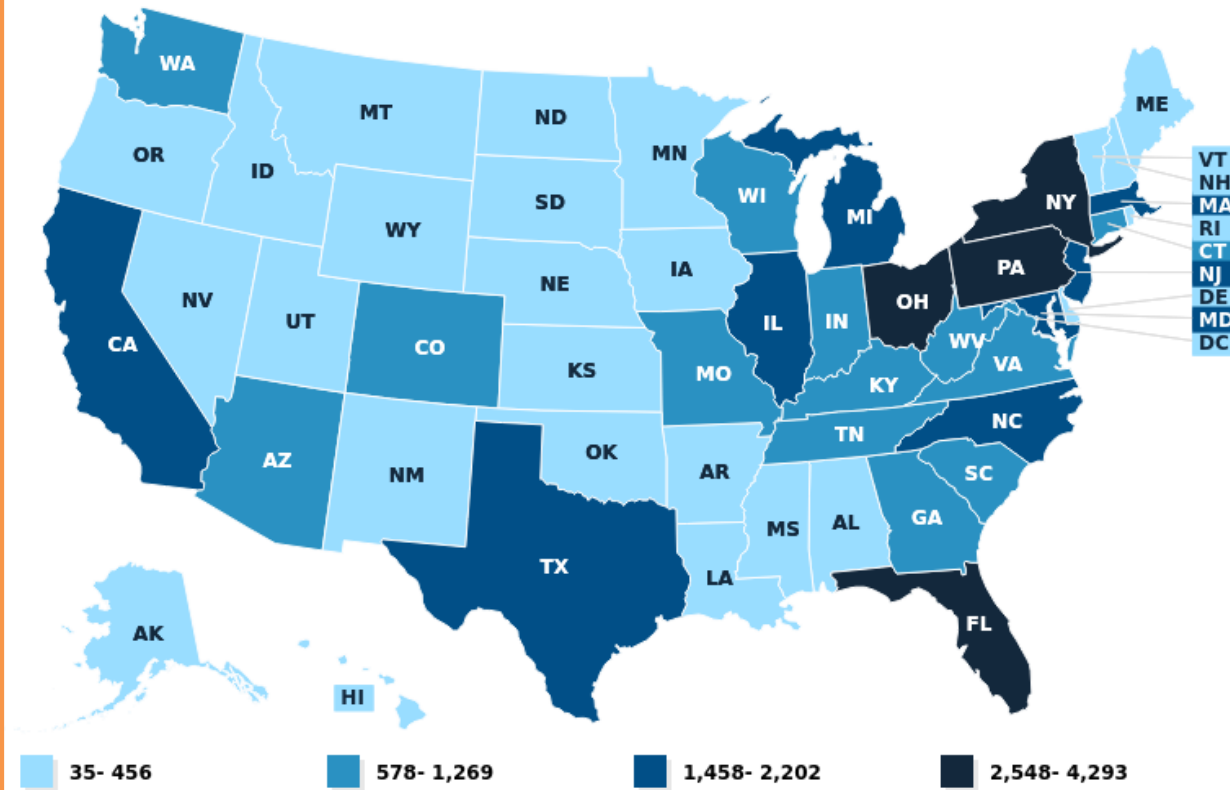
THE WALL STREET JOURNAL

We can't move the needle on Mental & Behavioral Health without **Access** to excellent services for the entire community

And the Opioid Crisis?

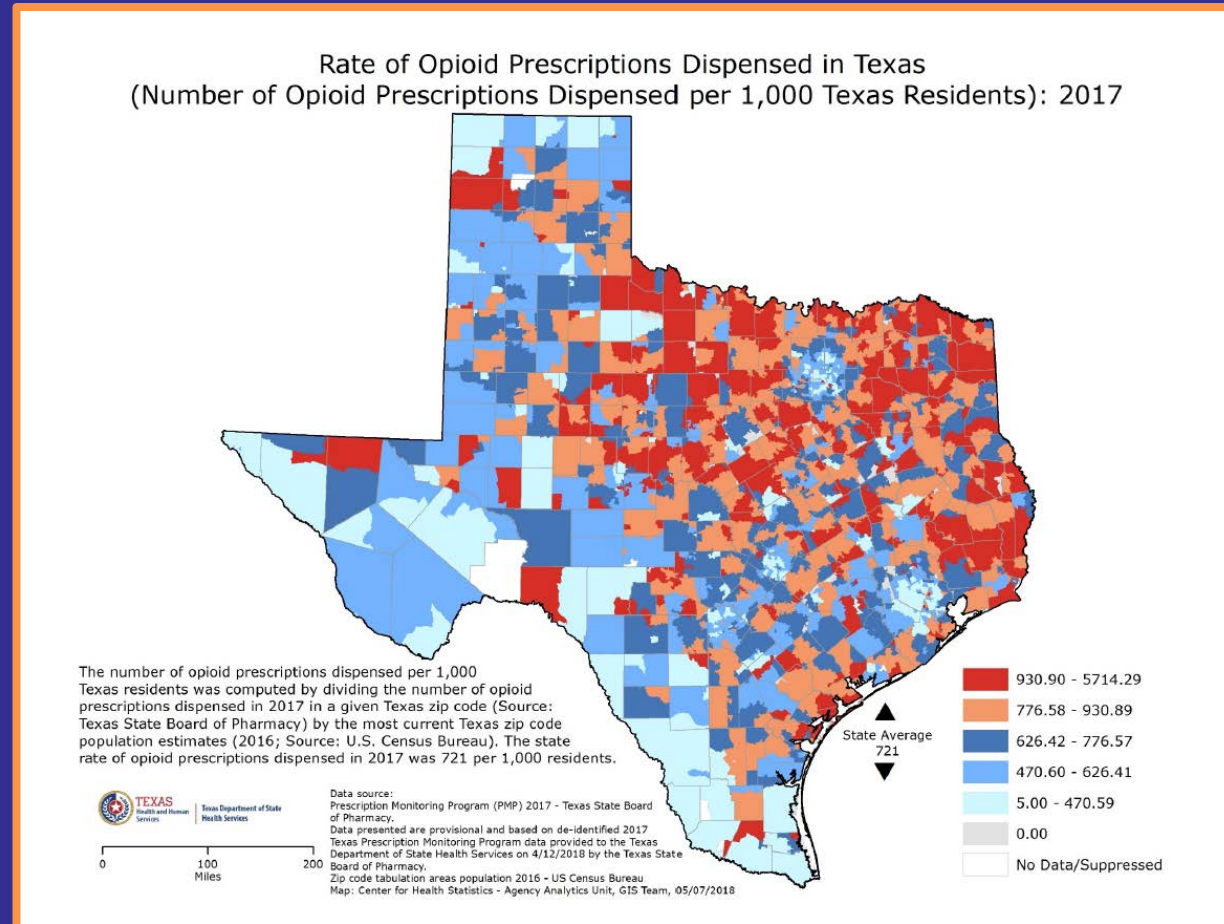
<https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-raceethnicity/?dataView=0&activeTab=map¤tTimeframe=0&selectedDistributions=total&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>

Opioid Overdose Deaths by Race/Ethnicity: Total, 2017



SOURCE: Kaiser Family Foundation's State Health Facts.

The Opioid Crisis is a Home Town Matter



Maternal Health

“According to vital statistics records, **Texas’ maternal mortality rate** – defined as deaths per 100,000 live births – **has jumped 87%**, from **18.3** for the five years from 2006 to 2010, to **34.2** for 2011 to 2015.

Maternal deaths are increasing in Texas, but probably not as much as officials thought

THA [1/4/19]

<https://www.texastribune.org/2018/01/04/maternal-deaths-are-increasing-texas-probably-not-much-officials-thoug/>

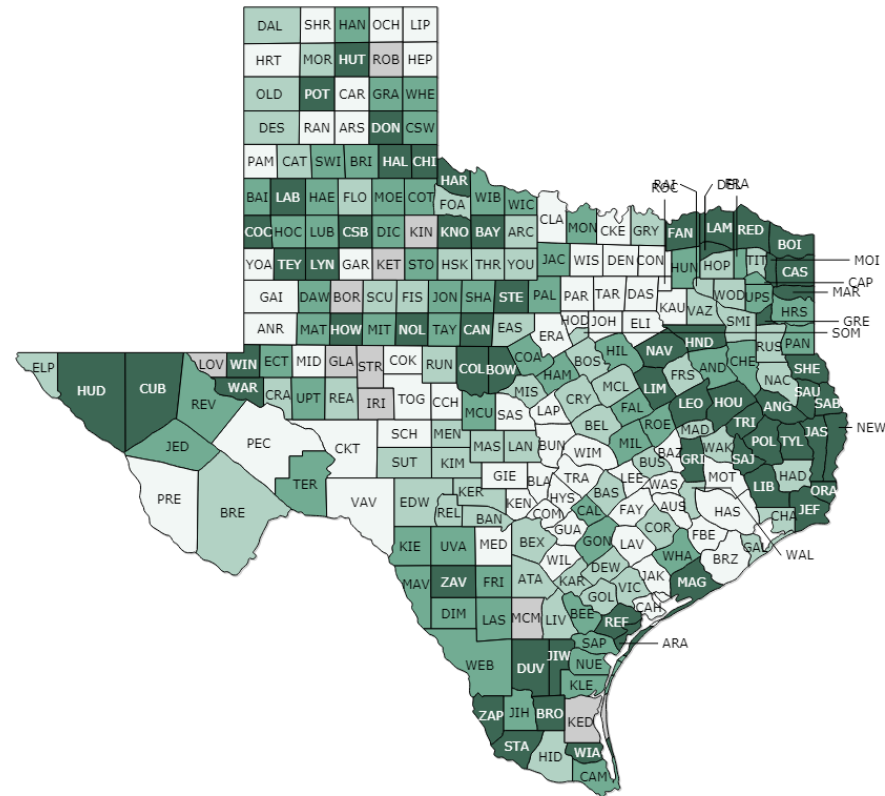
●
**DEADLY
DELIVERY**
THE MATERNAL HEALTH
CARE CRISIS IN THE USA

**health care is
a human right**

●
Amnesty International
March 2010

Health Outcome Comparisons

<http://www.countyhealthrankings.org/sites/default/files/state/downloads/2019%20Health%20Outcomes%20-%20Texas.png>



Rank 1-61 Rank 62-122 Rank 123-183 Rank 184-244 Not Ranked

Is There Life After DSRIP?

- Texas Legislative Session ending **May 27th**
- Five-year extension of the 1115 Waiver (Dec. 2017) expires **September 30, 2022.**
- DSRIP Transition Plan due to CMS by **October 1, 2019**



A Look Above the Tree Tops

- It can be very hard to see the **Forest** when you are constantly running into **Trees!**
-

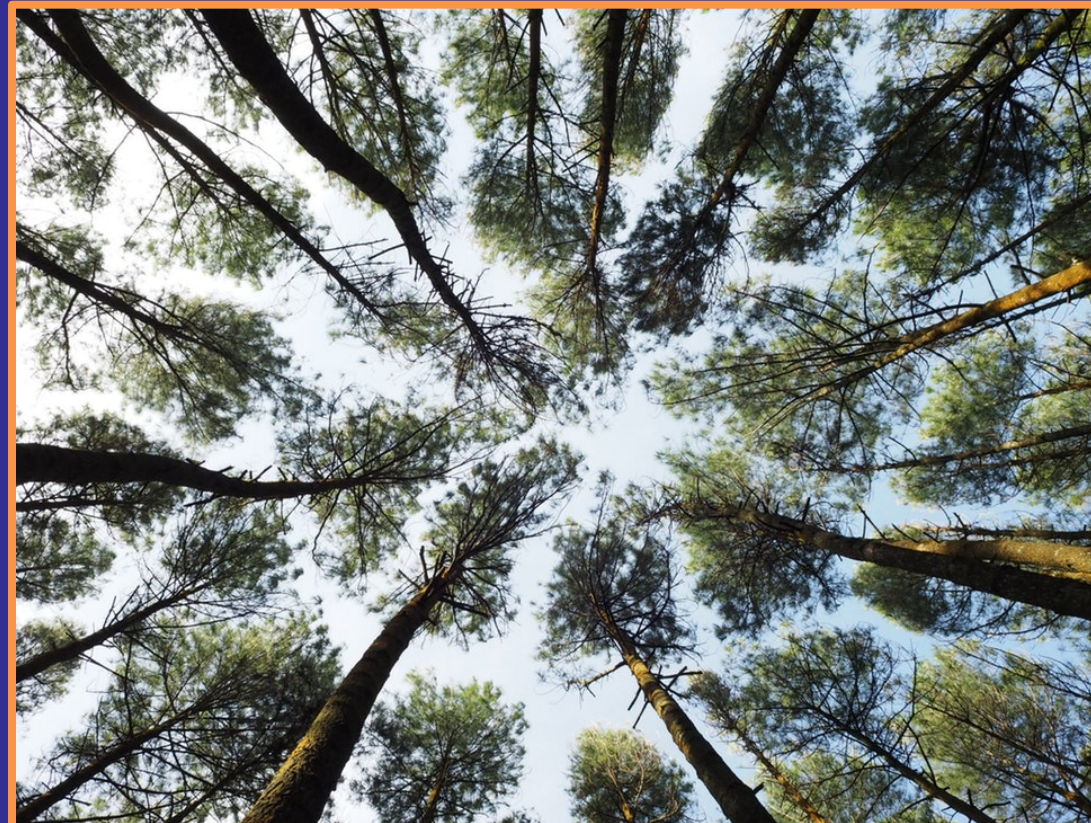


Photo by Aldino Hartan Putra/Unsplash.com

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“Texas Is Different”

“We just can’t do [fill in the blank] here”



“That dog don’t hunt in Texas”



“Texas just has it’s own way”



“That will never make it through Austin”

Really?

Arkansas

“Private Option” created 4/23/13

Louisiana

Expansion effective 6/1/16

Nebraska

Passed on Ballot Initiative 11/6/18

Virginia

Expansion effective 1/1/19

Kansas

Senate Dismisses Medicaid Expansion With Single Vote 5/2/19

Keep in Mind...

●
Medicaid was passed in **1965** but not fully implemented until the last holdout state (Arizona) got on board in **1982!**
●

The Shifting Demographics of Texas



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But What If...



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What if the future of Health Care in Texas was not (entirely**) in the hands of the Texas Legislature?**

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But What If...

Story Time!

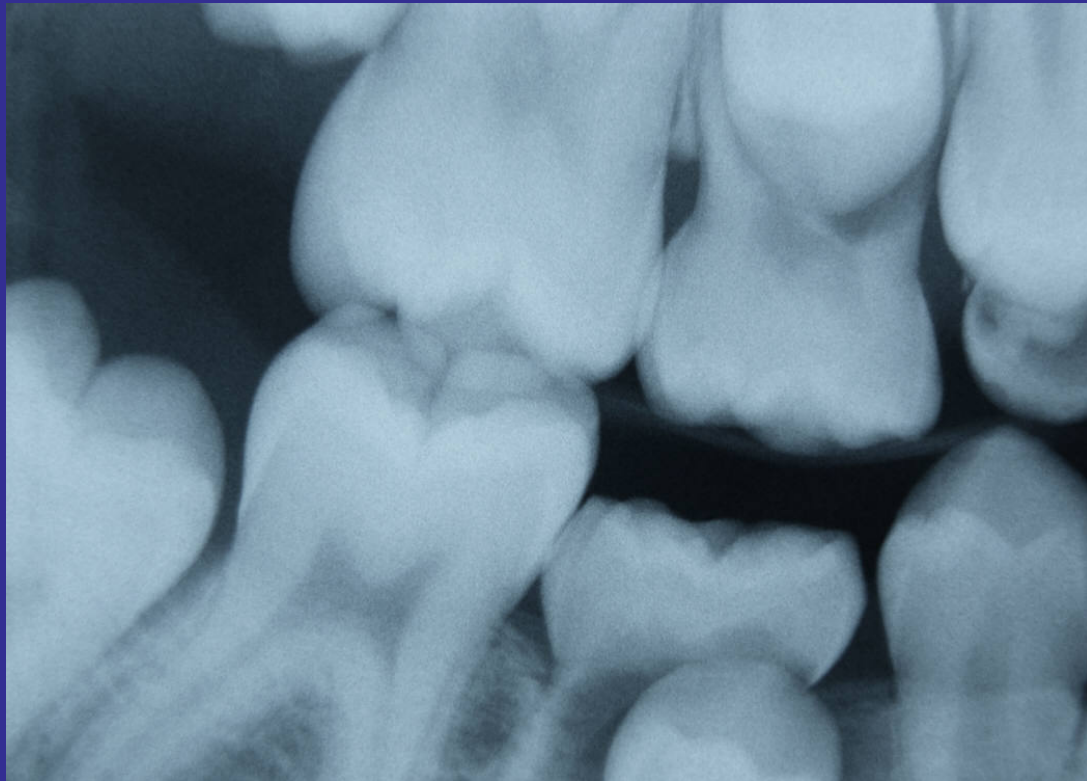


Impact #1



Impact #2

North Carolina State Board of Dental Examiners v. Federal Trade Commission



●

Do the actions of the Dental Board fall under the “state action exemption” or was it anticompetitive activity subject to antitrust liability?

●

Round One

“Physicians are urging a U.S. appeals court to overturn a **FTC ruling** that doctors say **strips medical boards of their right to regulate medicine**. The appeal comes after a North Carolina dental board was found to have violated federal antitrust regulations by attempting to stop nondentists from operating teeth-whitening centers... **If the FTC decision stands, the ruling would significantly imperil state regulation of medicine**”

*FTC decision jeopardizes authority of medical boards, doctors say
AMA News [8/20/12]*

FTC UPHELD

“On May 31, the court ruled that a North Carolina dental board exceeded its authority when it attempted to stop nondentists from providing teeth-whitening services. In siding with the [FTC], judges said **the board is not shielded from antitrust scrutiny** because it is not actively supervised by the state and its members are private market participants. **Legal experts say the decision could discourage physicians from serving on state boards and inhibit board members from making difficult regulatory decisions for fear of federal scrutiny.** The opinion also could lead to legislative rules that impose more state oversight over licensing boards, doctors and attorneys say... **The FTC hailed the decision as a victory for healthy competition among health care professionals.**”

AMEDNEWS.COM [June 17, 2013]

March 3, 2014: *Supremes* Take the Case



Dentists



Physicians



Engineers



Lawyers

And the Answer...

and on February 25,
2015

(Slip Opinion)

OCTOBER TERM, 2014

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA STATE BOARD OF DENTAL
EXAMINERS *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 13–534. Argued October 14, 2014—Decided February 25, 2015

North Carolina’s Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” The Board’s principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board’s concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board’s motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in

Citing Antitrust Law, SCOTUS Backs FTC in NC Dental Board Suit

“The ruling could have broad implications for state regulatory boards overseeing professional activities, including those of physicians and hospitals... Writing for the **[6-3] majority**, Justice Anthony Kennedy said the Sherman Antitrust Act protects competition and respect federalism. “It **does not authorize the states to abandon markets to the unsupervised control of active market participants**, whether trade association or hybrid agencies. If a state wants to rely on active market participants as regulators, **it must provide active supervision** ... The high court's three most conservative judges sided with the dental board.”

HealthLeaders Media , February 27, 2015

Self-Dealing?

“Justice Anthony Kennedy, writing for the majority, said **state boards composed mostly of active market participants run the risk of self dealing**. “This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the state's policy goals,” he said. “If a state wants to rely on active market participants as regulators, it must provide active supervision.”

USA TODAY, February 25, 2015

“far reaching effects on the states' regulation of professions”

“Writing in dissent, Justice Samuel Alito noted that the majority’s ruling ‘will create practice problems and is likely to have far reaching effects on the states' regulation of professions.’”

HealthLeaders Media , February 27, 2015



FTC Guidance Released

Modern Healthcare [10/14/15]

-
-

**Change the make-up
of your Board**

-
-

**Provide “adequate
supervision”**

But What If...

Thanks for the Story



But What Does This Have To
Do With Us!



Photo by Mark Zamora/Unsplash.com

But What If...

Story Time!

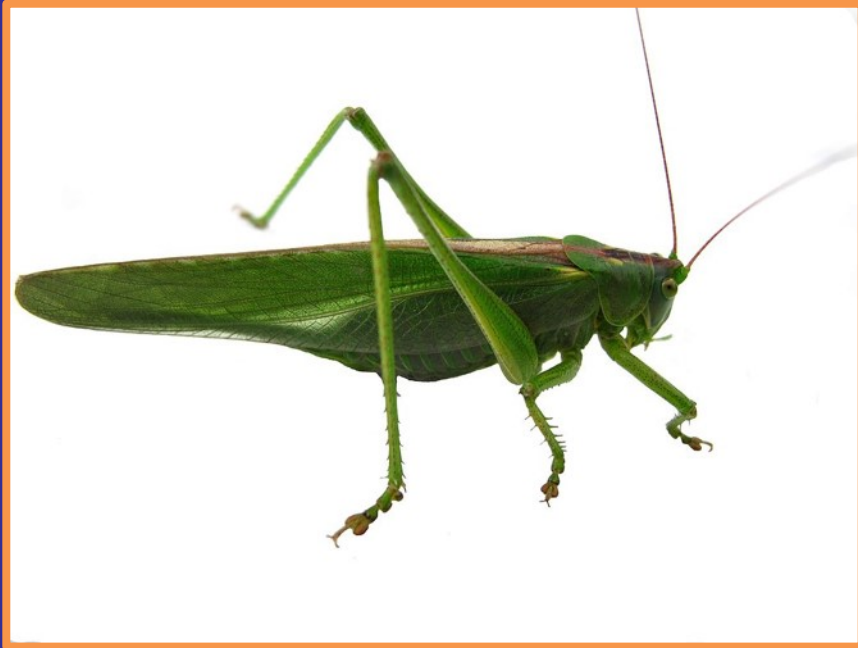


Impact #1



Impact #2

The Impact



*North Carolina State
Board of Dental
Examiners v. Federal
Trade Commission*

Feb 25, 2015

The US Supreme Court
Speaks

Along Comes Texas

“Telemedicine company Teladoc's recent lawsuit against the Texas Medical Board is one of the first cases that could be affected by a recent U.S. Supreme Court ruling about state regulatory boards' immunity- or lack thereof- from antitrust laws... **Teladoc, which uses technology to facilitate patient/doctor visits, alleges the rule violates antitrust laws because it would restrict the company's ability to compete** - and as a result raise prices and reduce access to physicians in the state.”

Modern Healthcare [10/22/15]

Federal Regulators Take Teladoc's Side in Medical Board Suit

“**Teladoc**, the Dallas-based company that sued Texas over its telemedicine regulations, **has a new ally in the Federal Trade Commission**. In a letter sent to the U.S. 5th Circuit Court late Friday, **the federal antitrust agency sided with Teladoc in the company's legal battle, criticizing the Texas Medical Board** for allegedly misinterpreting case law.”

Texas Tribune [9/10/16]

<https://www.texastribune.org/2016/09/10/federal-regulators-take-teladocs-side-medical-board/>

Citing Telemedicine Law, FTC Drops TMB Antitrust Probe

Senate Bill 1107 [which TMA helped craft] **provides a clear framework for proper telemedicine services in Texas and clarifies that the standard of care for a telemedicine visit is the same as one done in-person.** Gov. Greg Abbott signed SB 1107 on May 27.

●
Following the passage of TMA-supported legislation governing telemedicine in Texas, **the Federal Trade Commission (FTC) has closed an investigation into whether the Texas Medical Board (TMB) violated antitrust law,** FTC said in a release.

Texas Medical Association Action, July 5, 2017
<https://www.texmed.org/Template.aspx?id=45247>

Telemedicine Comes to Texas



●
Please raise your hand if you
are currently using
Telemedicine to reach your
populations
●

But More to My Point

- We have Telemedicine in Texas today despite the majority opinion of Austin, not because of it
-



But What If...

Story Time!

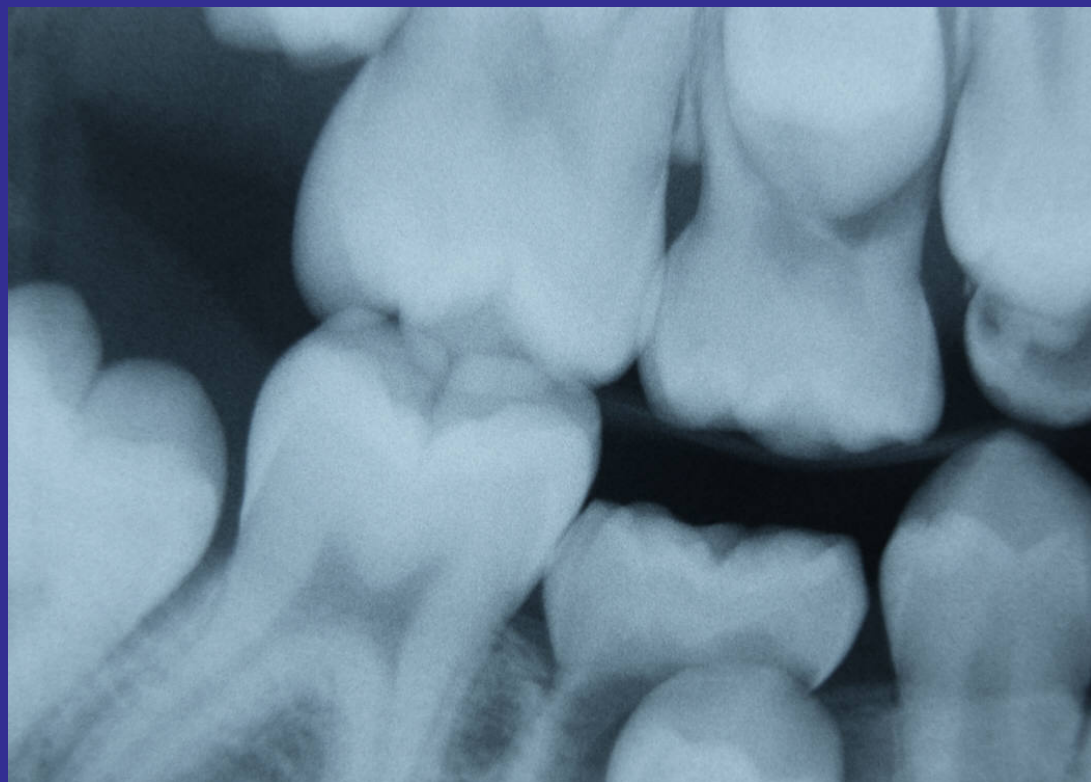


Impact #1



Impact #2

But What If...



-
- What else has been prevented in Texas that might now be difficult for Austin to control?
-

But What If...

Access

=

**Boots on the
Ground!**



Did You Know?

Twenty-two states and the District of Columbia allow NPs to function in a "full practice environment," which includes evaluating patients, ordering and interpreting diagnostic tests, managing treatments, and prescribing medications."

More States Pushing For Autonomy In Scope-of Practice Battle
Healthleaders 5/1/19

●
"But that won't
EVER
happen in Texas!"
●

Failed Bills: 2017

<http://scopeofpracticepolicy.org/states/tx/#>

TX H 3395

TX H 2807

TX H 2548

TX H 1804

TX H 1415

TX H 1846

TX S 1928



Will PAs be Next?

Optimal Team Practice

In May 2017, AAPA adopted new policy... which will make a profound difference in expanding access to care and aligning the PA profession to meet modern healthcare needs [and] emphasizes PAs' commitment to team-based care and includes recommended changes to state and federal laws and regulations:

<https://www.aapa.org/advocacy-central/optimal-team-practice/>

Who Else Is Watching?

Texas Bill Would Allow Pharmacists To Order Antibiotics For Patients

AHLA Health and Life Science Law Daily [3/7/17]



Texas Bill Would Allow Psychologists To Obtain Prescriptive Authority Certificates

AHLA Health and Life Science Law Daily [3/2/17]



Independent Practice in Texas



●
Please raise your hand if
having
More Primary Providers
would be good for your
populations
●

And Again...

If progress to meet your needs is slow and frustrating in Texas



Remember change is coming from multiple directions!



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Back to “The Good Old Days”?

- The danger of **unexpected abundance** is climbing over each other and returning to **fortress mentality!**
-



Is There Life After DSRIP?

- **DSRIP created new alliances and economies among you. Those connections will remain critical long after DSRIP is gone.**
-



Photo by Simone Acquaroli/Unsplash.com

Looking Forward

●
Practice the “Economy of Smart”
●

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Thank You!

**Thank You for Your
Attention**



**Thank You for The
Work You Do**

It has been my pleasure
-Sarah

