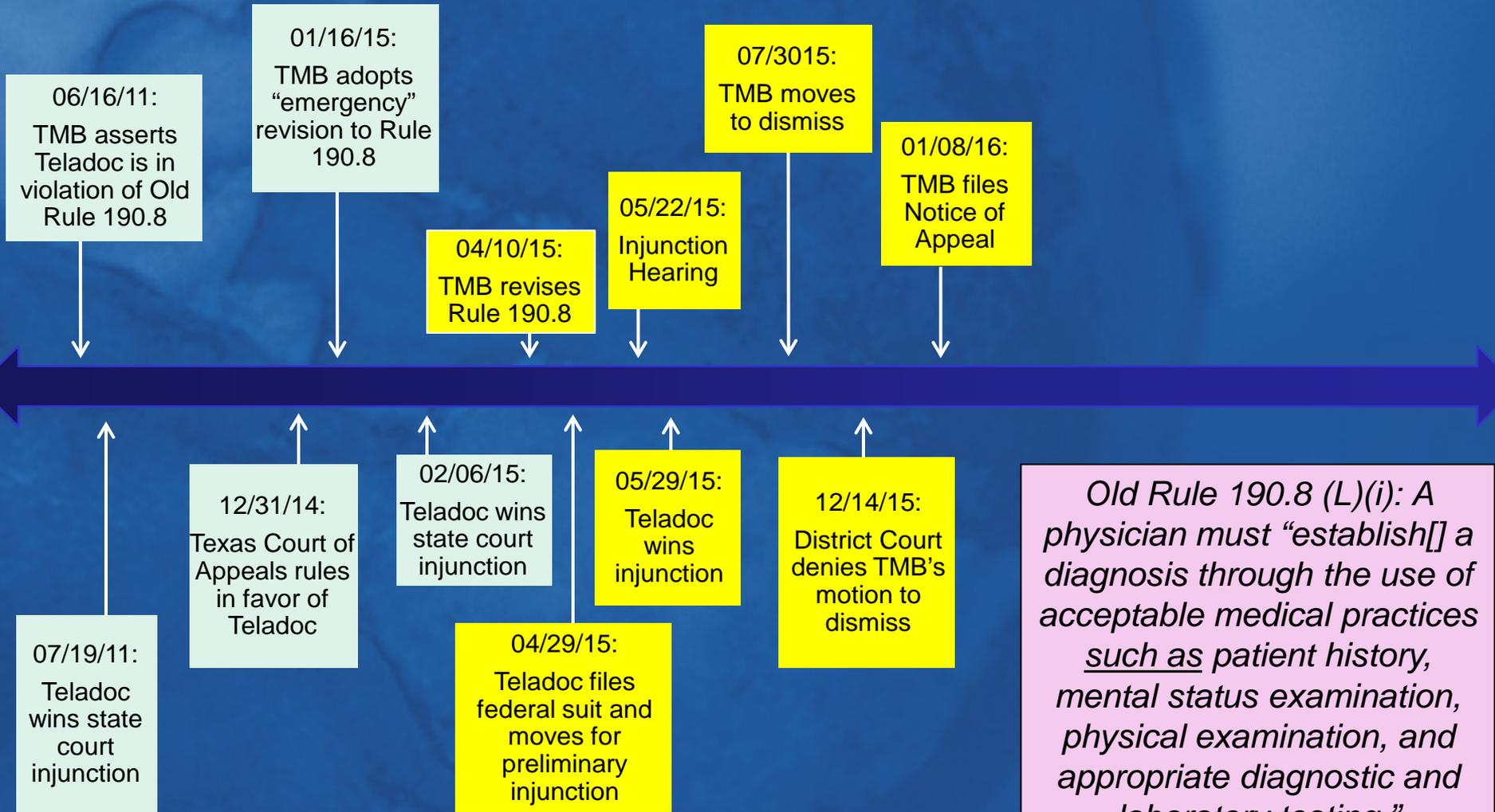


Teladoc v. Texas Medical Board

Such As –Section 190.8(1)(L)

- Establishing diagnosis through use of acceptable medical practices ***such as***
- patient history,
- mental status examination, ***physical examination***, and
- appropriate diagnostic and laboratory testing.

Litigation Timeline



Old Rule 190.8 (L)(i): A physician must "establish[] a diagnosis through the use of acceptable medical practices such as patient history, mental status examination, physical examination, and appropriate diagnostic and laboratory testing."

Teladoc's Complaint

- Alleges New Rule 190.8(1)(L), requiring an in-person physical exam regardless of medical need, violates federal antitrust law and the U.S. Constitution
- Notably, the TMB states that doctors with offices are permitted to continue treating patients by phone without a physical exam through “on-call” arrangements
- Alleges new rule (and an earlier rule limiting competition by providers who offer video consultations) would eliminate competition from an affordable, accessible, and high quality option for medical care

Plaintiffs Teladoc, Inc. and Teladoc Physicians, P.A. (collectively, “Teladoc”), Kyon Hood, M.D., and Emmette Clark, M.D. (together with Teladoc, “Plaintiffs”) bring this action for injunctive relief against Defendants the Texas Medical Board and certain of its members, in their official and individual capacities (collectively, the “TMB” or “Defendants”) for violations of the Sherman Act, 15 U.S.C. § 1 and the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Plaintiffs allege as follows:

I. INTRODUCTION

1. The Supreme Court recently reaffirmed that state licensing boards made up of active members of the licensed profession, like the TMB, are not immune from the antitrust laws when they take anticompetitive actions without the active supervision of the State. That is exactly what happened here. On April 10, 2015, Defendants agreed to adopt revisions to Texas Administrative Code § 190.8(1)(L) (“New Rule 190.8”) that would dramatically restrict competition from telehealth. If this new rule is permitted to take effect, it would raise prices and reduce access to physician services in Texas.

2. Telehealth services offer patients access to highly qualified, in-state-licensed physicians through telecommunications technologies. Telehealth providers are generally available 24 hours per day, 365 days per year, for a fraction of the cost of a visit to a physician’s office, urgent care center, or hospital emergency room.

Motion for a Preliminary Injunction

- Teladoc sought an injunction against new Rule 190.8(1)(L)
- Plaintiff must show:
 - Substantial likelihood of success on merits
 - Irreparable injury
 - Balancing of the equities
- Judge Pitman granted the preliminary injunction

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TELADOC, INC., ET AL.,

Plaintiffs,

V.

TEXAS MEDICAL BOARD, ET AL.,

Defendants.

1-15-CV-343 RP

ORDER

Before the Court are Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction Before June 3, 2015 and Brief in Support, filed April 29, 2015 (Clerk's Dkt. #10), the responsive pleadings thereto, as well as Amicus briefs filed both in support of, and opposition to, Plaintiffs' application. The Court conducted a hearing on the application on May 22, 2015. Having considered the application, response, record in the case, and the applicable law, the Court is of the opinion that Plaintiff's application for a preliminary injunction should be granted. See FED. R. CIV. P. 65(b).

Judge Pitman's Decision Granting the PI

- “[T]he TMB declined to assert any immunity defenses ... as to Plaintiffs’ application for a preliminary injunction.” (Op. at 6)
- Court found “the effect of New Rule 190.8 will be **increased prices, reduced choice, reduced access, reduced innovation, and a reduced overall supply of physician services.**” (Op. at 8)
- “The sole justification the TMB offers is that New Rule 190.8 will lead to improved quality of medical care.... **[T]he Court finds TMB’s assertion of additional improvement in the quality of care by the adoption of New Rule 190.8 suspect.**” (Op. at 9-10)
- The Court found the TMB’s mischaracterization of a key RAND study to be “troubling” and, after reviewing the full record, concluded that “Plaintiffs have presented significant evidence which undermines the TMB’s contention that the quality of medical care will be improved by New Rule 190.8.” (Op. at 12-13)

TMB Moves to Dismiss

- Following the grant of the preliminary injunction, the TMB moved to dismiss, arguing that it has “**state action immunity**” from the antitrust laws
- TMB conceded that, under Supreme Court’s decision in *FTC v. North Carolina Board of Dental Examiners*, **its conduct must be actively supervised** by the State, but argued it met this requirement
 - Potential judicial review under the Texas APA
 - Potential judicial review of disciplinary proceedings
 - Future legislative oversight through Sunset Review process
 - Legislative oversight through Congressional committees theoretically receiving courtesy copy of proposed rules
- TMB’s other arguments:
 - Claims against “telemedicine medical services” rules in Section 174 are time barred by the four-year statute of limitations
 - Dormant Commerce clause allegations fail to state a claim

Denial of the TMB's Motion to Dismiss

- Court denied the TMB's motion on all fronts
- TMB's claims regarding active supervision **do not "meet the Supreme Court's mandate** that 'the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.'"
- "[T]he **Supreme Court has made abundantly clear** that the 'mere presence of some state involvement or monitoring does not suffice.'"
- Court also rejected the TMB's statute of limitations and Dormant Commerce Clause arguments

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TELADOC, INC., ET AL.,

Plaintiffs,

V.

TEXAS MEDICAL BOARD, ET AL.,

Defendants.

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1-15-CV-343 RP

ORDER

Before the Court are Defendants' Amended Motion to Dismiss, filed July 30, 2015 (Clerk's Dkt. #64) and the responsive pleadings thereto. After reviewing the pleadings, relevant case law, as well as the entire case file, the Court issues the following order.

Issue on Appeal to CA5

- State-Action Defense Fails Because Anticompetitive Conduct Was Not Actively Supervised By State

No Active Supervision-Courts

- Scope Of Texas APA Review Too Limited To Constitute Active Supervision
- No Texas APA Review Occurred

No Active Supervision-Leg.

- Legislative Standing Committees Did Not Actively Supervise The Challenged Actions
- Sunset Review Commission Did Not Actively Supervise The Challenged Actions

Additional arguments

- State-Action Defense Also Fails Because Defendants' Anticompetitive Conduct Does Not Further A Clearly Articulated State Policy
- Principles Of Federalism Reinforce Conclusion That Defendants Failed To Satisfy The Requirements For A State-Action Defense

Amicus Briefs

- New Benefits
- TD Industries
- Texas Nurse Practitioners
- TPPF
- Texas Association of Business
- US and Federal Trade Commission
- The ERISA Industry Committee

Aftermath

- Appeal dismissed
10/17/16
- Case stayed until 4/19/17
- Interim ED