

TELEMEDICINE & THE COURTS: *Teladoc v. Texas Medical Board* as a Case Study
BY
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ABSTRACT

The American Telemedicine Association defines telemedicine as the “use of medical information exchanged from one site to another via electronic communications to improve a patient’s clinical health status.” [1] Through telemedicine, physicians can employ an array of applications and services, including two-way video, email, smart phones, wireless tools and other forms of telecommunications technology, to interact with patients.

Using varied technology platforms to leverage healthcare accessibility has become a principal goal for the venture capitalists that fund tech startups. [2] Today, health insurance companies such as Aetna and United Healthcare have partnered with telemedicine companies in order to provide the service for its members. Teladoc, Inc., which markets itself as the first and largest telehealth provider in the United States, is one such company. [3] Of all of business generated by Teladoc’s 11.5 million members, one quarter comes from Texas. [4]

Over the course of the past year, however, Teladoc’s ability to continue its services in the state has been on legally tenuous ground due to repeated steps taken by the Texas Medical Board to oust the company from its state. The *Teladoc, Inc. v. Texas Medical Board* case exemplifies the collision between emerging technology and healthcare law, and serves as a useful study of the treatment such a dispute receives from the court system.

I. STATUTORY DEVELOPMENT

In June 2011, the Texas Medical Board (“TMB”), the administrative agency that licenses and regulates physicians in the state of Texas, sent Teladoc a letter attacking the company for advertising its ability to administer services over the telephone without any prior establishment of a physician/patient relationship via a face-to-face examination. In its letter, the TMB asserted that this practice was in violation of Board Rule 190.8(1)(L). [5]

Title 22 of the Texas Administrative Code governs the violation guidelines and disciplinary actions of the Texas Medical Board. Since November 2003, section 190.8(1)(L), paragraph (i) of the Code has defined requirements for a proper professional relationship as follows: [6]

- (i) A proper relationship, at a minimum requires:
 - (I) establishing that the person requesting the medication is in fact who the person claims to be;
 - (II) establishing a diagnosis through the use of acceptable medical practices such as patient history, mental status examination, physical examination, and appropriate diagnostic and laboratory testing. An online or telephonic evaluation by questionnaire is inadequate;
 - (III) discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and
 - (IV) ensuring the availability of the licensee or coverage of the patient for appropriate follow-up care. [7]

In 2010, Texas passed a separate set of guidelines concerning the regulation of telemedicine; medical services provided over the Internet or other “advanced communication technology” enabling an off-site physician to see and hear the patient in real time. *See* Teladoc, 453 S.W. 3d at 609. These telemedicine guidelines include a provision that specifically dictates

what constitutes the creation of the physician-patient relationship in a manner similar to Rule 190.8(1)(L)(i): [8]

(a) Evaluation of the Patient. Distant site providers who utilize telemedicine medical services must ensure that a proper physician-patient relationship is established which at a minimum includes:

- (1) establishing that the person requesting the treatment is in fact whom he/she claims to be;
- (2) establishing a diagnosis through the use of acceptable medical practices, including patient history, mental status examination, physical examination (unless not warranted by the patient's mental condition), and appropriate diagnostic and laboratory testing to establish diagnoses, as well as identify underlying conditions or contra-indications, or both, to treatment recommended or provided;
- (3) discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and
- (4) ensuring the availability of the distant site provider or coverage of the patient for appropriate follow-up care. [9]

Despite the discrepancy between the two provisions, TMB, in its letter to Teladoc, asserted that the more general provision, 190.8(1)(L), had always only accepted “face-to-face” consults as the only appropriate manner in which to establish a physician/patient relationship. Relying on this connection between 190.8(1)(L)(I)(ii) and 174.8, TMB accused Teledoc of unconscionable misrepresentation for advertising that its process could be conducted over the telephone without prior establishment of a physician/patient relationship via a ‘face-to-face’ examination. The letter made clear that the physicians choosing to participate in Teladoc’s network were jeopardizing their medical licenses. [10]

II. PROCEDURAL BACKGROUND

A. TRIAL COURT

Under the Texas Administrative Procedure Act, a rule is a generally applicable statement that affects private rights, implements, interprets, or prescribes law or policy, amends a prior rule, and does not deal only with the agency's internal management. [11] Failing to meet certain requirements can invalidate a rule. [12] These requirements include giving public notice of the proposed rule, allowing a reasonable opportunity for interested parties to comment, and addressing such comments with a reasoned justification for the rule's adoption. [13]

Teladoc argued before the District Court of Travis County, Texas, that the pronouncements contained in TMB's June 2011 letter were tantamount to statements of general applicability because they could "apply not only to [Teladoc] but to all other [companies and doctors] engaging in [telehealth] business across the state." [14] Therefore, argued Teladoc, the June 2011 letter was operating as a rule, and, because the TMB had not adhered to any of the requirements necessary to implement a rule, the letter was void. [15]

In its defense, the TMB asserted that the June 2011 letter was merely a restatement of § 190. Citing Texas case law, TMB likened the June 2011 letter to "an informal agency statement that does no more than restate its own formally promulgated rules [and] would not in itself be a 'rule.'" [16] The court concluded that the letter TMB sent to Teladoc in June 2011 was not a rule within the meaning of the Administrative Procedure Act. [17] The court also denied Teladoc's motion for summary judgment and granted TMB's cross-motion for summary judgment and jurisdictional challenge, which alleged that Teladoc had brought the case in the court erroneously. [18]

B. COURT OF APPEALS

The question before the Court of Appeals of Texas, Austin, was whether TMB's June 2011 letter qualified as a "rule" under the Administrative Procedure Act. The Administrative Procedure Act in Texas defines a rule as follows:

(6) "Rule":

- (A) means a state agency statement of general applicability that:
 - (i) implements, interprets, or prescribes law or policy; or
 - (ii) describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures. [19]

The court assessed the differences between the 2004 rule, § 190.8, and § 174.8, which had been passed in 2010. The earlier provision stated that, in order to establish a physician/patient relationship, physicians could make a diagnosis "through the use of acceptable medical practices such as patient history, mental status examination...". Section 174.8, by contrast, substituted the word "including" for "such as" in the earlier statute ("establishing a diagnosis through the use of acceptable medical practices, including patient history") (note: emphasis added).

The court concluded that the Medical Board had, in its pronouncements in the June 2011 letter, effectively attempted to conform the earlier law with the more recent telemedicine guidelines. By making these amendments to the existing rule 190.8(1)(L), the June 2011 letter, was, therefore, deemed a procedurally invalid rule. [20]

In response to the Court of Appeals' decision, which had been delivered on December 31, 2014, the TMB issued an emergency rule on January 16, 2015. The emergency rule mandated a face-to-face visit or in-person evaluation before a physician can issue a prescription. [21]

While Teladoc obtained a temporary preliminary injunction of the emergency rule in Texas State Court, the TMB proceeded to engage in formal rule-making procedure. On April 10, 2015, the TMB voted to adopt the New Rule 190.8. [22]

C. FEDERAL DISTRICT COURT

On April 29, 2015, Teladoc filed suit in United States District Court for the Western District of Texas, seeking to enjoin the enforcement of “New Rule 190.8”. Teladoc alleged TMB was violating antitrust law, and sought to enjoin the New Rule from going into effect, as it was scheduled to do on June 3, 2015. [23]

A party seeking a preliminary injunction carries the burden of persuasion on all four of the following requirements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the injunction will result in irreparable injury; (3) that the threatened injury out-weighs any damage that the injunction may cause the opposing party; and (4) that the injunction will not disserve the public interest. [24]

1. Likelihood of Success

The court found that Teladoc satisfied the first requirement by demonstrating it was substantially likely to succeed on the merits of their antitrust claim. [25] In order to establish a violation of Section 1 of the Sherman Act, plaintiffs must show that the defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market. [26] TMB did not contest the existence of a conspiracy, so Teladoc needed only to demonstrate elements 2 and 3. [27]

In determining that Teladoc met its burden in demonstrating the anti-competitive effect of New Rule 190.8, the court was largely persuaded by the ample evidence Teladoc put forth. [28] The court specifically compared the average costs of visits to a physician or emergency room, \$145 and \$1957, respectively, to the cost for a Teladoc consultation, which is typically \$40. The court also considered the research Teladoc presented, stating that companies using their services achieved reduced monthly employee healthcare costs. [29] Taking all of this information into consideration, the court concluded that the effect of New Rule 190.8 would be increased prices, reduced choice, reduced access, reduced innovation, and reduced overall supply of physician services, thus constituting an anti-competitive effect. [30]

The court then analyzed the second part of the anti-trust analysis, balancing the anti-competitive effect of the challenged regulation with the pro-competitive justification offered in support. [31] The only pro-competitive justification TMB offered to implement the New Rule 190.8 was that it would lead to improved quality of medical care. The court deemed the affidavit testimony TMB used to support this claim anecdotal. Conversely, the court found that Teledoc's evidence more persuasively proved that allowing the company to remain operating in Texas would lead to improved quality of medical care in the state. [32] The compelling support from Teladoc included testimony from patients detailing positive experiences with the company's services. It also included a research study of Home Depot employees using Teladoc's services. The study's results showed significantly lower rates of follow-up office visits, ER visits, and hospitalizations at both 7 and 30 days. This proof countered any negative claims made by TMB.

After reviewing the copious evidence presented, the court disagreed with TMB and its claim that the quality of medical care would improve if New Rule 190.8 were implemented. [33]

2. Substantial Threat of Irreparable Injury

The court found that Teladoc satisfied the requirement of showing substantial threat of irreparable injury based on several factors. First, Teladoc maintained it would no longer be in business in Texas, or otherwise, if New Rule 190.8 were to go into effect. [34] The court found this point particularly persuasive when it considered that the defendant state agency has the ability to assert immunity from monetary damages. [35] Second, Teladoc was about to have its initial public offering, and the company had been advised that it would not be able to go through with the offering if the company had to cease operations in Texas pursuant to New Rule 190.8. Finally, the court also conveyed that because the telehealth industry as a whole is in such an early stage of growth, it would be difficult to quantify the amount of loss the company would suffer as a result of New Rule 190.8. [36]

3. Balancing of Respective Interests

In the final stage of its preliminary injunction analysis, the court concluded that the preliminary injunction inquiry collapsed because the interests asserted by the TMB, protecting the public from injury, were rebutted by the copious evidence that Teladoc had put on the record. [37]

In response to the TMB's claim that Teladoc's harm was speculative, the court countered that the evidence detailing the financial harm the company would suffer, including the destruction of Teladoc's business model and ability to do business in Texas, as well as the company's doubtful ability to receive monetary damages, was sufficient to characterize the harm as non-speculative. [38]

III. OUTCOME:

The Federal District Court found for Teladoc and issued the preliminary injunction. The relentless efforts made by both parties in this litigation may be indicative of the particular kind of intensity associated territorial disputes. While this may serve as a sign of things to come, it does not appear as though Texas is finished with Teladoc.

While New Rule 190.8 did not go into effect this past summer, the Texas Attorney General filed a 41-page document in federal district court last month, defending the intended regulation. The Attorney General said that because “the Texas Medical Board’s rulemaking is subject to review by outside state authority,” it could not be found to be in violation of antitrust standards. [39]

ENDNOTES

- [1]. *What is Telemedicine*, AMERICAN TELEMEDICINE ASSOCIATION, <http://www.americantelemed.org/about-telemedicine/what-is-telemedicine#.VjNlfyBVikq> (last visited October 30, 2015)
- [2]. *What is Telemedicine*, AMERICAN TELEMEDICINE ASSOCIATION, <http://www.americantelemed.org/about-telemedicine/what-is-telemedicine#.VjNlfyBVikq> (last visited October 30, 2015)
- [3]. *What is Telemedicine*, AMERICAN TELEMEDICINE ASSOCIATION, <http://www.americantelemed.org/about-telemedicine/what-is-telemedicine#.VjNlfyBVikq> (last visited October 30, 2015)
- [4]. *See Teladoc, Inc. v. Texas Med. Bd.*, No. 1-15-CV-343 RP, 2015 WL4103658, at 11 (W.D. Tex. May 29, 2015); *Teladoc Announces Second Quarter 2015 Results*, TELADOC (August 12, 2015), <http://www.teladoc.com/news/2015/08/12/teladoc-announces-second-quarter-2015-results/>
- [5]. *See Teladoc, Inc. v. Texas Med. Bd.*, 453 S.W.3d 606, 608-09 (Tex. App. 2014)
- [6]. *Teladoc*, 453 S.W. 3d at 609.
- [7]. 22 TEX. ADMIN. CODE § 190.8.
- [8]. *Teladoc*, 453 S.W.3d at 610.
- [9] 22 TEX. ADMIN. CODE § 174.8.
- [10]. *Teladoc*, 453 S.W.3d at 610.
- [11]. Brief of Appellant Teladoc, Inc. at 8, *Teladoc, Inc., V. Texas Medical Board*, 2013 WL 3973959.
- [12]. *Id.*
- [13]. Brief of Appellant Teladoc, Inc. at 8; Tex. Gov't Code §§ 2001.024(a), 2001.029, 2001.033.
- [14]. Brief of Appellant Teladoc, Inc. at 11; *See Combs v. Entm't Publications, Inc.*, 292 S.W.3d 712, 721-22 (Tex. App. 2009).
- [15]. *See* 22 TEX. GOV'T CODE ANN. §§ 2001.035.
- [16]. *See Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 703 (Tex. App. 2011).
- [17]. *See Teladoc, Inc. v. Texas Medical Board*, 2013 WL 4662817, at *1 (Tex. Dist. March 2013).
- [18]. *Id.* at 613.
- [19]. Tex. Gov't Code Ann. § 2001.003 (West).
- [20]. *See Teladoc*, 453 S.W. 3d at 619-20.
- [21]. *See Teladoc*, 2015 WL 4103658, at 3.
- [22]. *See id.*
- [23]. *See Teladoc*, 2015 WL 4103658, at 3.
- [24]. *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985); *Teladoc*, 2015 WL 4103658, at 3.
- [25]. *See Teladoc*, 2015 WL 4103658, at 3.
- [26]. 15 USC § 1; *See Teladoc*, 2015 WL 4103658, at 4.
- [27]. *See Teladoc*, 2015 WL 4103658, at 4.
- [28]. *See id.* at 5.
- [29]. *See id.*
- [30]. *See id.*

[31]. *See id.* at 6.

[32]. *See id.*

[33]. *See id.* at 14.

[34]. *See id.* at 11.

[35]. *See id.*

[36]. *See id.*

[37]. *See id.* at 12.

[38]. *See id.*

[39]. David Pittman, Morning eHealth, POLITICO (SEPT. 28, 2015, 10:01 AM)

<http://www.politico.com/tipsheets/morning-ehealth/2015/09/politicos-morning-ehealth-cmss-icd-10-contingency-plan-where-is-that-stage-2-final-rule-cassidy-interopability-bill-coming-this-week-210414#ixzz3o6oJcISL>.