

No. 16-50017

**United States Court of Appeals
for the Fifth Circuit**

TELADOC, INC., TELADOC PHYSICIANS, Professional Association, KYON
HOOD, and EMMETTE A. CLARK,
Plaintiffs-Appellees,

v.

TEXAS MEDICAL BOARD, MICHAEL ARAMBULA, JULIE K.
ATTERBURY, MANUEL G. GUAJARDO, JOHN R. GUERRA, J. SCOTT
HOLLIDAY, MARAGERT C. MCNEESE, ALLAN N. SHULKIN, ROBERT B.
SIMONSON, WYNNE M. SNOOTS, PAULETTE B. SOUTHARD, KARL W.
SWANN, SURENDA K. VARMA, STANLEY S. WANG, and GEORGE
WILLEFORD III, individually and in their capacities
as members of the Texas Medical Board,
Defendants-Appellants

On Appeal from the United States District Court for the Western
District of Texas, Austin Division

**BRIEF OF *AMICUS CURIAE*
NEW BENEFITS, LTD.
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

In accordance with 5th Cir. R. 29.2, undersigned counsel of record certifies that, in addition to the persons and entities described in the certificates of interested parties of the parties and other *amici curiae*, the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae:
New Benefits, Ltd.

Counsel for Amicus Curiae:
Randy Howry

/s/ Randy Howry
Counsel of Record
New Benefits, Ltd.

RULE 26.1 DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 29(c)(1), *amicus* New Benefits, Ltd. is a privately held limited partnership formed and operating under the laws of Texas. It has one general partner, Neubene Management, LLC, a limited liability company formed and operating under the laws of Texas that has no parent corporation and does not issue stock.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE¹

New Benefits, Ltd. (“New Benefits”) is a provider of non-insured health, wellness, personal security, financial and leisure benefit solutions and services. In the healthcare industry, New Benefits’ mission is to deliver American consumers access to essential healthcare products and services at significant cost savings as compared to traditional business models. It accomplishes this mission in its capacity as a Discount Medical Plan Organization, offering discounts on healthcare services such as Teladoc. New Benefits’ customers include trade associations, insurance companies, banks, credit unions, brokerage/consulting firms, insurance agencies, and employer groups throughout the United States, including Texas.

New Benefits’ interest in the outcome of this appeal, while financial in nature due to its ongoing business relationship with Teladoc, stems directly from its concern that the physician-controlled Texas Medical Board’s (“TMB”) adoption of anticompetitive rules, if permitted to withstand legal scrutiny, will deprive Texas residents, many of whom are uninsured or underinsured, of access to the affordable, high-quality form of healthcare that Teladoc provides. While New Benefits acknowledges the necessity of protecting public safety through reasonable

1. All parties have consented to the filing of this brief and the source of authority for its filing is in Fed. R. App. P. 29(a) and 5th Cir. R. 29.1. No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

regulations of the practice of medicine in Texas, the Defendants-Appellants' regulatory actions run afoul of their proffered objective (patient safety) and, in fact, risk significant harms to public safety, particularly to low-income consumers who are uninsured or underinsured and live in regions of the State where there are few, if any, practicing physicians.

INTRODUCTION

Teladoc, Inc.’s (“Teladoc”) Answering Brief contains detailed analyses of why this Court lacks appellate jurisdiction, and, alternatively, why the district court’s order denying the TMB’s motion to dismiss should be affirmed on appeal. *Amicus Curiae* New Benefits fully concurs with these arguments but writes separately to address the significant public harms that would result should the TMB’s unlawful regulatory actions be permitted to avoid antitrust liability under the state-action doctrine.

Texas does not just suffer from a shortage of physicians – a problem remediated by Teladoc’s unique ability to provide consumers with low-cost, high-quality access to board-certified physicians 24 hours per day, 365 days per year; the State is also grappling with a large number of uninsured and underinsured individuals. For this reason, New Benefits respectfully asks that the Court consider the impact of the TMB’s anticompetitive conduct on the public’s ability to access quality, affordable healthcare in Texas, an issue germane to the TMB’s antitrust liability in this case.

ARGUMENT

I. TEXAS FACES CHALLENGES NOT JUST FROM A SHORTAGE OF PHYSICIANS, BUT FROM A LARGE NUMBER OF UNINSURED AND UNDERINSURED.

According to the Texas Medical Association (“TMA”), “Texas is the uninsured capital of the United States,” with “[m]ore than 5.04 million Texans –

including 784,000 children – lack[ing] health insurance” based on 2014 statistics, or about 1.5 to 2 times the national average.² While the Affordable Care Act (“ACA”) has reduced these numbers, Texas remains the state with the highest percentage of uninsured and, for the first time, the largest raw number of uninsured.³

The uninsured population includes not only the unemployed, but Texans who work in small businesses that do not offer health insurance and many who earn low to moderate incomes. Indeed, according to TMA, “Texas workers are less likely to have employment-based health insurance coverage than those in other states,” and “[p]eople making moderate and low wages are much less likely to have job-based health insurance coverage.”⁴

Texans who do not have adequate access to healthcare providers are at increased risk from health-related problems and “are much less likely to receive needed medical care, even for symptoms that can have serious health consequences if not treated.”⁵ As discussed below, these risks are compounded by New Rule 190.8, which effectively extinguishes one of the few remaining low-cost options for accessing a physician.

2. See http://www.texmed.org/uninsured_in_texas/.

3. *Id.*

4. *Id.*

5. *Id.*

II. THOUSANDS OF WORKING TEXAS FAMILIES WITH MODERATE AND LOW INCOMES WHO HAVE NO OR LIMITED HEALTH INSURANCE WILL BE HARMED IF THE TMB’S ANTICOMPETITIVE RULES ARE UPHELD.

Many moderate and low income workers who lack adequate access to healthcare services find some relief in discount healthcare programs. Discount healthcare programs are non-insurance membership programs that, for a modest monthly fee (often paid by the employers as a benefit for employees), provide members with access to various healthcare services at discounted prices. ROA.905, ¶ 4. Originally, these programs were conceived as a means of defraying the cost of dental, vision and pharmacy products and services. (*Id.*) But discount programs eventually grew to include many other healthcare services, including chiropractic, hearing and telemedicine. (*Id.*) Today, although the ACA has increased the number of insured Americans, discount programs continue to play a vital role in the healthcare marketplace as there continue to be large numbers of uninsured or underinsured, as well as gaps in coverage.

New Benefits is one of the largest providers of discount healthcare programs in the country. (*Id.*, ¶ 5.) More than 35,000 Texas families (totaling approximately 87,500 individuals) are currently enrolled in a New Benefits program that includes a telehealth benefit administered by Plaintiff-Appellee Teladoc, Inc. (*Id.*) Nationally, more than 200,000 families are enrolled in a New Benefits program that includes telehealth. (*Id.*) Most of these members access the program through an employer-

sponsored benefit. ROA.906, ¶ 6. Participating Texas employers include organizations such as Cracker Barrel, Comer Bakery, Red Lobster, Olive Garden, Hutto ISD, Homeaway, First United Bank and Keller Williams. (*Id.*) They also include hundreds of small businesses with less than 50 employees. (*Id.*)

Telehealth has been one of the most popular features of New Benefits' programs. Utilization across all groups averages 15-20% annually, making it one of the most widely used benefits. (*Id.*, ¶ 7.) Telehealth is also one of the most appreciated benefits. (*Id.*)

In New Benefits' experience, this high utilization and success results from two factors. One is the convenience that telehealth provides to program members. *Id.* ¶ 8. As detailed in the record, New Benefits members – like other telehealth customers – enjoy the convenience of speaking directly with board-certified physicians on the telephone, without the expense and effort associated with an in-office visit. ROA.148, Mot. For Prelim. Inj., p. 9. And as Plaintiffs-Appellees correctly point out, this convenience is critical for program members who do not have the flexibility to take time off from work or to arrange childcare in order to visit a doctor. ROA.149, Mot. For Prelim. Inj., p. 10.

The second factor is cost. A Teladoc consultation costs \$40, far less than the cost of the average costs of an in-person visit to a doctor or the emergency room, which cost approximately \$150 and \$2,000, respectively. ROA.1896, ¶ 47(d).

However, the overwhelming majority of New Benefits members do not pay *any* out-of-pocket money to access the telehealth service. ROA.906, ¶ 8. Rather, the Teladoc consultation is paid fully by their employer. This again is particularly significant for program members who live in one of the 35 Texas counties that have no physicians at all, or who are either uninsured or do not have the resources to pay for physician office visits. Plaintiffs-Appellees’ Br., p. 9, fn. 5 (internal citation omitted).

A debate about whether and how to extend health insurance coverage to the uninsured is well beyond the scope of this case. What is not beyond the scope, however, is whether it is prudent for the TMB, without active supervision from the State, to deny low and moderate income families – including those who are uninsured, underinsured or who are enrolled in an employer-sponsored discount healthcare program – one of the only low-cost means available to access physicians.

New Rule 190.8 would require a physician to perform an in-person physical examination before treating a patient, regardless of medical necessity. And even when an in-person examination is conducted, the rule only allows a physician to utilize telehealth to treat a preexisting condition; other medical conditions occurring after the examination could not be treated through telehealth.

For the same reasons articulated in Plaintiffs-Appellee’s Answering Brief, New Benefits does not believe this rule can withstand legal scrutiny. With that said, if New Rule 190.8 were to be upheld notwithstanding its anticompetitive effects, the

impact on thousands of low to moderate income Texans would be significant. According to Plaintiffs-Appellees, this rule will “end Teladoc’s business in Texas.” ROA.159, Mot. For Prelim. Inj., p. 20. Given that Teladoc is one of the largest and most influential telehealth services in the United States, it is likely that the rule will likewise force other telehealth providers to cease offering services in Texas. Without access to a telehealth provider, New Benefits will have no choice but to remove this benefit from its discount healthcare programs offered in the State of Texas. ROA.906, ¶ 9.

For program members who have health insurance or a means to pay for office visits, this will increase their out-of-pocket costs by removing an efficient means of speaking to a physician on nights and weekends for minor but acute issues. Instead, program members will have only have the more expensive options of in-office, urgent care or emergency room visits.

For members who do not have health insurance or a means to pay for office visits, the impact will be more severe. These members will be left with two bad choices: access physicians through significantly more expensive emergency-room visits or forego necessary care altogether. It is not difficult to grasp the cascading effects of this scenario. The strain on Texas’ already inadequate supply of primary care physicians will increase as more patients seek office visits for relatively minor conditions. Patient outcomes will deteriorate as some who choose to forego care go

undiagnosed until their conditions become more severe. And the costs to the state will increase as more of our state's most vulnerable residents access emergency rooms or wait until their conditions worsen and require more costly care.

III. THE LEGISLATURE HAS EXPRESSED A POLICY TO PERMIT CONSUMERS TO ACCESS TELEHEALTH AND TELEMEDICINE SERVICES AND SEEK REIMBURSEMENT FROM THEIR INSURERS.

The new rule is inconsistent with state reimbursement conditions applicable to telehealth and telemedicine services. Texas Insurance Code section 1455.004 prohibits a health benefit plan from denying reimbursement for telehealth and/or telemedicine services "solely because the service is not provided through a face-to-face consultation." TEX. INS. CODE § 1455.004. By enacting section 1455.004, the Legislature has expressed that it is the policy of the state to allow consumers to access physicians via Teladoc and other telehealth or telemedicine providers and seek reimbursement from their health benefits plans. Thus, New Rule 190.8 is directly at odds with the Legislature's expression of state policy.

CONCLUSION

In short, the impacts of New Rule 190.8 reach far beyond the business interests of the litigants in this case (or of New Benefits). Thousands of low to moderate income Texans who lack adequate access to healthcare providers rely on telemedicine as a low-cost, efficient means of accessing physicians. These Texans will be forced into choosing unnecessary emergency-room visits or foregoing care

if the TMB's anticompetitive rules are upheld. New Benefits believes that this demonstrable public interest – combined with the significant interests of Plaintiffs-Appellees – weighs strongly in favor of subjecting the TMB to antitrust liability in the absence of active supervision and a clearly articulated policy by the state. We respectfully request that the Court affirm the district court's order denying Defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on September 9, 2016, the above amicus brief was served, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov/>, which will send notice of such filing to all registered CM/ECF users.

Counsel also certifies that on September 9, 2016, the foregoing instrument was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov/>.

Counsel further certifies that 1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; 2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and 3) the document has been scanned with Symantic Management Agent version 7.6 and is free of viruses.

s/ Randy Howry
Randy Howry

CERTIFICATE OF COMPLIANCE
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s/ Randy Howry
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Dated: September 9, 2016