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**Case Law Updates**

**presented by**  
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# Administrative Case Law Update

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The University of Texas at Austin  
**13<sup>th</sup> Annual Advanced Texas Administrative Law Seminar**  
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*Of note and disclaimer: none of the summaries are or should be considered the opinion of the Texas Attorney General. The summaries are for informational purposes only.*

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## I. Introduction

This case law update includes many of the administrative law cases decided in Texas between August 2017 and April 2018. This is not an exhaustive review of all administrative law cases, nor do these synopses exhaustively cover all issues raised by these cases. We have attempted to choose cases representative of issues raised in Texas courts and to highlight the most salient points of each. Our views are not to be taken as the views of Texas Tech University School of Law and should not be interpreted as predictive of the result of future cases.

## II. Agency Authority

*Swate v. Tex. Med. Bd.*, No. 03-15-00815-CV, 2017 WL 3902621, 2017 Tex. App. LEXIS 8291 (Tex. App.—Austin Aug. 31, 2017, pet. filed). ☞

Dr. Tommy Ernest Swate (Dr. Swate) began his career by practicing gynecology and obstetrics in 1975. Dr. Swate was practicing treating addiction and chronic pain in the Houston-area from 2007 to 2010. The Texas Medical Board (Board) brought a complaint

against Dr. Swate in 2011, alleging he violated the Texas Medical Practice Act under Texas Occupations sections 151.001-169.005 and Texas Administrative Code title 22, sections 160.1-190.16, due to his failure to keep adequate medical records while treating patients with addiction and chronic pain. The allegations specifically stated that Dr. Swate did not meet the standard of care regarding treatment because he did not keep records to support prescriptions that he authorized.

After hearings before the State Office of Administrative Hearings, the administrative law judges issued findings that Dr. Swate did violate the Act. Consequently, the Board revoked his license to practice medicine, but allowed him to petition the Board in one year for the re-issuance of his license. Dr. Swate then sought review of the Board's decision from the district court. The district court reviewed the merits of the complaint and affirmed the Board's final order. On appeal, Dr. Swate argued the district court erred for seven different reasons.

Dr. Swate's first four challenges regarded the testimony of the Board's expert witness. He argued the expert's testimony had no evidence of reliability and could not be used

against him. After reviewing for an abuse of discretion on appeal, the court determined that the Board's expert witness was appropriate because his statements were not based on unreliable methods. In Dr. Swate's fifth issue, he challenged the validity of the Board's twelve exhibits that lack authentication of witnesses. He argued that it was "harmful error" and thus the exhibits should have been excluded. However, the court found that the judges did not abuse their discretion in admitting the exhibits because the Board met its burden of establishing good cause by stating Dr. Swate had copies of the exhibits ten months prior to the hearing. Dr. Swate's sixth issue involved whether enough evidence substantiated the Board's final order. The court presumes an order from an agency is valid under the substantial evidence standard. The party challenging the order must show that substantial evidence did not exist by pointing to unfair conclusions of fact or law. Dr. Swate failed to meet this high burden because no evidence on record proved that he performed initial exams on his patients that would support a rationale for providing prescriptions. The court found more evidence supporting the opposite proposition.

Finally, Dr. Swate's seventh and last issue accused the Board of issuing its final order in an arbitrary and capricious manner. The court looks to see whether fact-findings have support though evidence and whether there is a rational relationship between the findings of fact and the decision. Here, the court found that the Board adopted the judge's findings without any changes; therefore, the Board's final order was identical to the findings of fact. The judges found that Dr. Swate failed to treat ten patients under an acceptable standard of care, and therefore found that the Board acted with reasoned decision-making. The court of appeals affirmed the district court's order stating that the Board's order was proper in revoking Dr. Swate's medical license.

***Graphic Packaging Corp. v. Hegar***, 538 S.W.3d 89 (Tex. 2017).  $\beta$

Graphic Packaging Corporation (Graphic) is a packaging seller in Texas and throughout the United States. Graphic is subject to the franchise tax in Texas, and in order to calculate this tax the company must decide what

portion of its business is attributable to Texas. Section 171.106 of the Texas Tax Code states that a taxpayer must calculate its tax base by multiplying the total business margin of the company by the fraction of gross receipts that come from its business in Texas. From 2008–09, Graphic used the calculation provided by section 171.106. Later, Graphic amended its 2008 and 2009 reports, and calculated its tax for 2010 with the chapter 141 apportionment formula of the Texas Tax Code—which is Texas's version of the Multistate Tax Compact (Compact). Graphic argued that the franchise tax was an income tax so the company could elect to use chapter 141's apportionment scheme.

The Comptroller disagreed, denying the tax refunds and assessing a deficiency, and stated that the exclusive way to determine the franchise tax was section 171.106's gross-receipts fraction. Graphic then pursued administrative relief unsuccessfully and paid the taxes the company had been assessed for 2010. The company then filed suit in the district court, arguing it was entitled to apportion its margin using chapter 141's formula and seeking \$821,961 for the tax years from 2008–10. Both parties filed motions for partial summary judgment on the issue of apportionment. The court granted the summary judgment motion for the Comptroller, denied Graphic's motion, and rendered a final judgment for the Comptroller. Graphic then appealed. The appellate court affirmed, holding that chapter 141's apportionment formula does not apply to the franchise tax because it is not an income tax as required by this section of the code. This appeal followed.

The Supreme Court of Texas did not decide the issue of whether Graphic's franchise tax for 2008–10 amounted to the income tax considered by chapter 141's apportionment formula. Instead, the court claimed that Graphic still had the burden of establishing that the legislature did not, or in the alternative could not, make section 171.106's single-factor formula the only valid means to apportion the Texas franchise tax. The court's analysis focused on the two issues, which the court of appeals chose not to consider: (1) whether the single-factor apportionment formula of section 171.106 precludes a company from using the Compact's three-factor formula included in chapter 141 of

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