No. 16-0549

In the Supreme Court of Texas

DR. BEHZAD NAZARI, D.D.S., ET AL.,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent,

v.

XEROX CORPORATION ET AL.,
Respondents.

On Petition for Review from the
Third Court of Appeals, Austin, Texas
Cause No. 03-15-00252-CV

BRIEF ON THE MERITS FOR THE STATE OF TEXAS

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Table of Contents

Index of Authorities

Page(s)

Cases:

Statutes and rules:

Miscellaneous:

References

"CR.*p*" cites the clerk's record.

"Op.*p*" cites the court of appeals' slip opinion (attached as App. 1-26).

"TMFPA" cites chapter 36 of the Texas Human Resources Code.

"Xerox" refers collectively to the third-party defendants.

Statement of Jurisdiction

Defendants' brief on the merits prays for a ruling on two legal issues. For different reasons, this Court lacks jurisdiction to review either of them.

1. Defendants dispute whether the State has sovereign immunity from damages counterclaims when it sues to impose civil sanctions for a public wrong. The trial court so held, and thus granted the State's jurisdictional plea to the counterclaims. That jurisdictional ruling is appealable in an interlocutory posture. Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). But this Court lacks conflict jurisdiction to review the court of appeals' resolution of that issue. Defendants do not cite any decision of this Court or a court of appeals denying sovereign immunity from damages counterclaims asserted when the State sues in its sovereign capacity over a public wrong. *See* Pet. Br. xi (relying on Tex. Gov't Code §§ 22.001(a)(2) and 22.225(c)).

2. The trial court dismissed not only defendants' counterclaims against the State, but also defendants' claims against third-party Xerox. Defendants now assert that their "third-party claims can proceed." Pet. Br. 43 (prayer for relief).[1] Both the court of appeals and this Court lack appellate jurisdiction over that issue.

The order dismissing defendants' third-party claims against Xerox is interlocutory because it did not dispose of all pending claims and parties. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001); *see* CR.383-84 (defendants and State remain parties on State's pending claims). "A party may not appeal an interlocutory order

[1] In a separate case (this Court's No. 16-0671), Xerox seeks an exercise of this Court's mandamus jurisdiction to review whether the fault-allocation system under chapter 33 of the Civil Practice and Remedies Code applies in TMFPA actions. That is not the sovereign-immunity question presented by defendants in this appeal. *See* Pet. Br. xi.

unless authorized by statute." *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001).

No statute authorizes interlocutory appeal of the ruling dismissing the third-party claims against Xerox. In the court below, defendants cited Texas Civil Practice and Remedies Code § 51.014(a)(8), which allows interlocutory appeal of an order granting or denying a *plea to the jurisdiction*. Pet. C.A. Br. xi. But the dismissal of defendants' claims against third-party Xerox (unlike the dismissal of the counterclaims against the State) was not on jurisdictional grounds of sovereign immunity. Op.22-23. Instead, the dismissal was based on statutory interpretation. Op.22-23.

Accordingly, that non-jurisdictional ruling dismissing *the third-party claims* is not appealable in this interlocutory posture under § 51.014(a)(8), even though it was issued in the same order as the jurisdictional ruling on the counterclaims. Op.22-23 (so holding); *e.g.*, *Bobbitt v. Cantu*, 992 S.W.2d 709, 713 (Tex. App.—Austin 1999, no pet.) (dismissing appeal from a non-appealable ruling in an order also having an appealable ruling: "the district court's grant of partial summary judgment is non-appealable, although it comes along with the interlocutory order of temporary injunction") (quotation marks omitted); *Dickson v. Dickson*, 516 S.W.2d 28, 30 (Tex. Civ. App.—Austin 1974, no writ) ("Further, the fact that an interlocutory order contains elements which are, under the law, appealable, does not authorize review of elements of the order which are not made specifically appealable.").

Defendants do not challenge (or even acknowledge) the court of appeals' holding that Texas law does not allow interlocutory appeal from the non-jurisdictional dismissal of the third-party claims against Xerox. Op.22-25. Indeed, defendants' sole

"issue presented" concerns only the State's "immunity from counterclaims," not the dismissal of defendants' third-party claims against Xerox. Pet. Br. xii. Thus, despite their cursory merits arguments on the issue, Pet. Br. 38-39, defendants seem to appreciate at some level that appellate jurisdiction to review this issue is lacking. In any event, by failing to dispute the court of appeals' holding on appellate jurisdiction, in either their petition for review or their brief, defendants have waived any argument to the contrary. Pet. viii; Pet. Br. xi; *Guitar Holding Co. v. Hudspeth Cty. Underground Water Conservation. Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) ("[I]ssues not presented in the petition for review and brief on the merits are waived.").

Issue Presented

The sole issue presented by the petition for review (Pet. ix) is whether the court of appeals correctly affirmed the trial court's dismissal of defendants' three counter-claims as barred by the State's sovereign immunity.

To the Honorable Supreme Court of Texas:

Statement of Facts

The court of appeals correctly stated the nature of the case. Op.1-8.

A. Medicaid program overview

Texas Medicaid, funded by the federal and state governments, is a program for providing medical assistance to needy individuals. Tex. Hum. Res. Code § 32.001. Among other things, Texas Medicaid provides certain persons under age 21 with periodic dental exams and "medically necessary" follow-up dental treatment. *See* 42 U.S.C. § 1396a(a)(43); 25 Tex. Admin. Code §§ 33.2(2), 33.40(b).

Medicaid does not cover orthodontic services for cosmetic reasons, such as to straighten a rotated tooth. *See* 25 Tex. Admin. Code §§ 33.2(8), 33.71(a). Orthodontic services are covered only if needed due to severe medical conditions affecting a person's adult teeth, namely: "severe handicapping malocclusion and other related conditions." *Id.* § 33.71(a). That high standard reserves scarce public funds for only those who qualify. *Id.* § 33.2(8)(A).

To ensure that Medicaid funding is being used to treat only patients with qualifying conditions, Medicaid reimbursement for orthodontic services must be "prior authorized." *Id.* § 33.71(a). Prior authorization requires a healthcare provider to send diagnostic materials and patient information to the Medicaid program, for evaluation of the provider's claim that a proposed treatment meets the criteria for reimbursement. *E.g.*, 2008 Texas Medicaid Provider Procedures Manual §§ 19.19-.20 (2007).[2]

[2] All versions in effect during the period of time charged here are in accord.

Healthcare providers who enroll to treat Medicaid patients accept a duty to follow Medicaid policies and ensure that the information they submit to Medicaid is complete and accurate. *E.g.*, *id.* §§ 1.2.7, 1.3. With accurate information submitted, a request for prior authorization can be approved or denied. *Id.* Here, that duty was assigned to a Xerox, a company contracted by Texas Medicaid for claims administration. CR.45-46.

The Medicaid program relies on the voluntary participation of healthcare providers. Contrary to defendants' inventive depiction, Pet. Br. 36-37, prior authorization for a given service does not require a healthcare provider to deliver that service and bill the Medicaid reimbursement rate. Providers are free to require every patient to pay privately set rates, if they can, to receive medical care. *See* 2008 Texas Medicaid Provider Procedures Manual § 1.2.7 (a provider agrees to accept the Medicaid reimbursement only if the provider files a claim with Medicaid). Prior authorization is simply a condition precedent to payment by Medicaid for a qualifying service. It does not conscript doctors into state servitude.

B. Trial court proceedings

1. The State's allegations

Defendants are six dental groups and affiliated individuals. CR.117-19 (State's live petition). The dental groups enrolled as Medicaid providers and agreed to abide by Medicaid laws, regulations, and Medicaid provider-manual policies. CR.117-19.

This law-enforcement action under the Texas Medicaid Fraud Prevention Act ("TMFPA"), Tex. Hum. Res. Code ch. 36, alleges that defendants committed the unlawful acts defined in § 36.002(1), (2), (4), (5), (6), (9), and (13) of the TMFPA.

CR.120-27. Specifically, the State alleges that all six of the dental groups misrepresented patients' dental conditions in order to receive prior authorization and payment by Medicaid. CR.120-27. Additionally, certain dental groups are accused of other unlawful acts, including (1) making claims for services and products never provided or more costly than those provided; (2) falsifying the credentials of persons who performed claimed work; and (3) soliciting kickbacks for referrals of patients to third parties. CR.120-27.

The State alleges that defendants are therefore liable as provided by TMFPA § 36.052, *see* CR.127-28, which provides:

> § 36.052. Civil Remedies
>
> (a) Except as provided by Subsection (c) [a mitigated-fault provision], a person who commits an unlawful act is liable to the state for:
>
> (1) the amount of any payment or the value of any monetary or in-kind benefit provided under the Medicaid program, directly or indirectly, as a result of the unlawful act, including any payment made to a third party;
>
> (2) interest on the amount of the payment or the value of the benefit described by Subdivision (1) at the prejudgment interest rate . . . ;
>
> (3) a civil penalty of [$5,500 to $11,000][3] for each unlawful act [as relevant here]; and
>
> (4) two times the amount of the payment or the value of the benefit described by Subdivision (1).

The State's petition notes that the TMFPA "is a statute of absolute liability" and there are "no statutory, equitable, or common law defenses for any violation of its

[3] Earlier versions, in effect for some of the charged period, had a lower range. CR.128.

provisions." CR.128 (citing *State v. Durham*, 860 S.W.2d 63, 67 (Tex. 1993)). The State also seeks an injunction against further TMFPA unlawful acts. CR.128.

2. Defendants' counterclaims

Defendants filed a general denial. CR.30. They also filed three self-described counterclaims. CR.30-33 ("II. Counterclaims"). The counterclaims begin by asserting that the State "has waived sovereign immunity" by filing this law-enforcement action under the TMFPA. CR.30. Defendants then allege the following:

1. Conspiracy/Joint Enterprise

Defendants' first counterclaim is captioned "Conspiracy/Joint Enterprise." CR.30. It alleges that the State "conspired" with Xerox to "allow" Xerox to wrongly approve requests for prior authorization. CR.30-31. Specifically, defendants allege that the State schemed for Xerox to "violate the law," to "rubber stamp" and conduct "no legitimate review" of requests for prior authorization, and to "withhold information from defendants"—as to induce defendants to continue in making the false and misleading statements alleged by the State in this lawsuit. CR.31. Defendants allege that this "conspiracy" caused defendants to succeed in—and to continue—obtaining Medicaid reimbursement through the conduct charged by the State here, which in turn exposed defendants to the "injury" of being "blame[d]" and subject to enforcement proceedings for their acts. CR.31.

2. Breach of Contract

Defendants' second counterclaim is captioned "Breach of Contract." CR.32. It alleges that the State breached its contract with Xerox "by failing to supervise Xerox and/or reviewing the work product of Xerox." CR.32. Defendants seem to allege

that the State violated a contract duty to ensure that Xerox caught the false and misleading statements submitted by defendants. Defendants allege that the supposed breach injured them because the State has "affirmatively sued defendants for repayment in this lawsuit and in past administrative actions." CR.32.

3. Conversion

Defendants' third and final counterclaim is captioned "Conversion." CR.32. It alleges conversion by the State in instituting, based on the allegations at issue in this lawsuit, administrative holds on Medicaid payments to defendants. CR.32-33. Defendants allege that the payment holds infringed a supposed unconditional right to payment that arose from the mere issuance, no matter how fraudulently obtained, of prior authorization for claimed services. CR.32-33. *But see Pers. Care Prods., Inc. v. Hawkins*, 635 F.3d 155, 159 (5th Cir. 2011) (no property right in Medicaid payments under investigation).

* * *

As remedies on each of these counterclaims, defendants pray that "judgment be entered" "against the State of Texas" awarding defendants actual damages, punitive damages, interest, court costs, and attorney fees. CR.40 (prayer); *accord* CR.31-33 (same prayer in individual counterclaims). Across all counterclaims, defendants "seek monetary relief over $1,000,000." CR.33.

3. Defendants' third-party claims

Along with their answer and counterclaims, defendants filed an "Original Third Party Petition Against Xerox." CR.33. This third-party petition makes allegations against Xerox under seven different headings. CR.33-40 (common-law fraud; breach

of contract; promissory estoppel; negligent hiring/supervision; negligence; negligent misrepresentation; and gross negligence and misapplication of fiduciary property). Defendants appear to count some of these third-party claims against Xerox as counterclaims against the State, stating in one place that there are "[t]welve categories of counterclaims," Pet. Br. 33 n.52, and elsewhere listing seven "[c]ounterclaims in this case," Pet. Br. 9. That is incorrect. Defendants have alleged only three counterclaims against the State. CR.30-33.

Defendants' third-party claims against Xerox seek damages or contribution that would satisfy defendants' liability to the State in this TMFPA action. CR.39.

4. Dismissal of the counterclaims and third-party claims

The State filed a plea to the jurisdiction asserting its sovereign immunity from defendants' counterclaims. CR.46-50. The State also moved to dismiss defendants' claims against third-party Xerox because, as a statutory matter, defendants in TMFPA enforcement actions may not reduce or eliminate their liability by claiming against a third party. CR.55; *see* CR.91-108.

After receiving defendants' responses and the State's reply, CR.141-56, 265-75, 323-40, the trial court dismissed the counterclaims as barred by the State's sovereign immunity, CR.384, and dismissed the third-party claims based on the court's "prior rulings interpreting the TMFPA" as not allowing such claims, CR.382.

C. Court of appeals proceedings

Defendants appealed from both rulings. CR.385-86. The Third Court affirmed the dismissal of the counterclaims as barred by the State's sovereign immunity. Op.8-21. The court held that the State does not fall within an exception to sovereign

immunity when it brings a TMFPA enforcement action, as the State is not "acting as an ordinary litigant" seeking "damages" but, rather, is "acting in its sovereign capacity" to impose punishment for a public wrong. Op.15, 19 (emphasis omitted).

The Third Court then dismissed, for want of appellate jurisdiction, defendants' interlocutory appeal from the dismissal of their claims against third-party Xerox. Op.25. The court noted that the dismissal was on non-jurisdictional grounds, such that interlocutory appeal from the dismissal is not available, and that defendants did not request mandamus review. Op.23-26 & n.14.

Summary of the Argument

The trial court correctly dismissed the counterclaims alleged against the State. Defendants argue that their counterclaims fall within the sovereign-immunity exception recognized by this Court in *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006), for claims in offset that are germane, connected, and properly defensive to the government's claim. That is the equitable-recoupment exception recognized by federal and state courts. It does not apply here for three reasons.

1. First, that exception applies only to "properly defensive" counterclaims—those that do not seek relief different in nature to the State's claim, or against the State in a different capacity than that in which the State sues. But a defendant's claim for damages for an alleged private wrong by the State does not seek relief of the same nature as the State seeks in a TMFPA enforcement action. TMFPA enforcement actions are sovereign-capacity suits by the State against a public wrong, implicating the public's interests in the same way as a prosecution of a criminal offense. Just as defendants cannot assert a damages counterclaim to reduce a criminal fine, they can-

not bring a counterclaim to reduce the civil sanctions in a TMFPA enforcement action. Defendants try to avoid this conclusion by ignoring the contours of the TMFPA civil remedies and calling them damages. But those remedies do not turn on any measure of loss to the State and are based on monetary penalties and assessments that are distinguished from the damages available under the federal False Claims Act. Hence, damages counterclaims in a TMFPA enforcement action are not within the recoupment exception to the State's sovereign immunity from suit.

2. Second, even if the recoupment exception could apply in this context, it allows only a narrow class of counterclaims: those germane and connected to the transaction on which the governmental plaintiff sues. That is a strict test. Mere overlap in the parties and state program at issue is insufficient. The counterclaims here fail that strict test because they do not involve the same operative facts as the State's claims. Nothing in the State's claims turns on whether the State or its agent should have detected unlawful acts and denied prior-authorization requests, much less on the existence of eventual administrative payment holds. Those matters, which defendants wish to place in dispute, are wholly separate and do not arise from the same transaction placed at issue by this action—defendants' own statements and acts.

3. Third, defendants have not limited their counterclaims to only diminishing the State's recovery. Their pleading states counterclaims for affirmative relief, and defendants never asked the trial court to redesignate their pleading before the court ruled on the State's plea to the jurisdiction. For this reason as well, the recoupment exception to sovereign immunity does not embrace the counterclaims.

ARGUMENT

I. Defendants' Counterclaims Are Barred by the State's Sovereign Immunity from Suit.

The State's sovereign immunity from suit applies to both claims and counterclaims against it, and this Court has recognized only a limited exception for claims sounding in equitable recoupment. That narrow exception has three important limits. And the Court should not be confused by defendants' extensive discussion of a federal False Claims Act doctrine that has nothing to do with sovereign immunity. The counterclaims here do not meet any of three requirements for the recoupment exception to sovereign immunity and were correctly dismissed.

A. Overview of sovereign-immunity principles

1. Sovereign immunity applies to claims and counterclaims.

A sovereign's immunity from unconsented suit has a long pedigree and applies whether the sovereign is sued in an action or in a cross-action.

a. Sovereign immunity is "an established principle of jurisprudence" at common law, *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857), and was specifically emphasized by the framers of the Constitution, *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694-95 (Tex. 2003). Just as the federal government and tribes have sovereign immunity from unconsented suit, *United States v. Navajo Nation*, 556 U.S. 287, 289 (2009); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), this Court has long acknowledged the State's immunity from suit in its own courts except to the extent, and only to the extent, that the State consents to be sued. *Hosner v. De Young*, 1 Tex. 764, 769-70 (1847); *Bd. of Land Comm'rs v. Walling*, Dallam 524, 525-

26 (Tex. 1843) ("That it is one of the essential attributes of sovereignty not to be amenable to the suit of a private person without its own consent has grown into a maxim, sanctioned as well by the laws of nations as the general sense and practice of mankind.").[4]

b. Sovereign immunity from suit applies whether the State is sued in an action or in a cross-action. In other words, the State's appearance in its own courts as a plaintiff does not waive or negate its sovereign immunity from counterclaims.

This point is universally true of sovereign immunity. For example, in *United States v. Shaw*, 309 U.S. 495 (1940), the Supreme Court refused to treat the federal government's institution of a lawsuit as waiving its sovereign immunity from counterclaims. There, the defendant sought to counterclaim against the United States further than allowed by a statutory waiver of immunity, arguing that a sovereign gives up its immunity from suit when it "voluntarily seeks the aid of the courts." *Id.* at 501-02. The Supreme Court unanimously rejected this waiver-by-conduct argument: "The objection to a suit against the United States is fundamental, whether it be in the form of an original action, or a set-off, or a counter-claim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it." *Id.* at 503 (quoting *Nassau Smelting & Ref. Works v. United States*, 266 U.S. 101, 106

[4] Eleventh Amendment immunity—that of a State in federal court—is different in kind from sovereign immunity. *Lapides v. Bd. of Regents of Univ. of Ga.*, 545 U.S. 613, 623 (2002) (explaining difference between immunity cases in which the "sovereign . . . seek[s] the protection of its own courts" and Eleventh Amendment cases that involve state rights "vis-à-vis" federal sovereignty). States' sovereign immunity in their own courts is not comparable to Eleventh Amendment immunity but, rather, to the federal government's sovereign immunity when it appears as a plaintiff in federal courts.

(1924)); *accord, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Petitioner . . . argues that, to the extent that the Commission's counterclaims were 'compulsory' under Federal Rule of Civil Procedure 13(a), the District Court did not need any independent jurisdictional basis to hear those claims. We rejected an identical contention over a half-century ago."); *United States v. Longo*, 464 F.2d 913, 916 (8th Cir. 1972) ("The fact that the counterclaims are authorized by the Federal Rules of Civil Procedure does not establish the right of the court to entertain a counterclaim violative of the sovereign immunity doctrine.").

This Court too has long recognized the State's sovereign immunity from suit, whether the State is sued in an action or in a cross-action. Thus, *Borden v. Houston*, 2 Tex. 594 (1847), recognized the State's sovereign immunity from counterclaims:

> The government . . . can be sued only with its own consent, and in the manner and for the causes which it may by law prescribe. But it would be of no avail to the government that it cannot be coerced by a direct suit, if the same thing may be done indirectly in another manner. . . . Whether it be directly by suit, *or indirectly by set-off, which is in the nature of a cross-action*, is immaterial.

Borden, 2 Tex. at 611 (emphasis added); *accord State v. Snyder*, 18 S.W. 106, 109 (Tex. 1886) (rejecting defendants' counterclaims for monetary relief "in the absence of a statute authorizing suit against the state"); *Bates v. Republic*, 2 Tex. 616, 618 (1847) ("A set-off, though not denominated a suit, *is in the nature of a cross action*, and . . . is, then, but another name for an action, and therefore cannot be instituted or set up against the government without its consent.") (emphasis added).

The core principle is that declaring the conditions and tribunals for suit against the State is a job for the Legislature, not the courts. *See Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 808 (Tex. 2016), *reh'g denied* (Oct. 21, 2016) ("sovereign immunity is universally recognized and fundamental to the nature and functioning of government, and that we leave it to the Legislature to make changes to that doctrine, as it has done in the Tort Claims Act"); *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002) ("We have consistently deferred to the Legislature to waive sovereign immunity from suit, because this allows the Legislature to protect its policymaking function."); *see also* Tex. Gov't Code § 311.034 (expressing Legislature's desire to control sovereign immunity "[i]n order to preserve [its] interest in managing state fiscal matters through the appropriations process").

Defendants cite a passage from a concurring opinion in *Reata* expressing the view that government officials are exercising authority to waive sovereign immunity "when they file suit on an affirmative claim" because "they must be doing so with legislative authorization." Pet. Br. 24 (quoting *Reata*, 197 S.W.3d at 384 (Brister, J., concurring)). *Reata* soundly declined to endorse that reasoning, which the Supreme Court has squarely rejected. *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940) ("If [that view] were true, it would subject the government to suit in any court in the discretion of its responsible officers. This is not permissible."). "[C]ourts have firmly rejected" the waiver-by-suit theory that when a sovereign "commences an action it assumes the position of a private litigant and submits itself to the court's full jurisdiction as to any counterclaim that defendant might interpose." Charles A.

Wright et al., 6 Federal Practice & Procedure § 1427 (3d ed.); *see U.S. Fid. & Guar. Co.*, 309 U.S. at 513 (rejecting waiver-by-suit theory); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) ("The commencement of a lawsuit by itself does not, however, operate as a waiver of immunity with respect to compulsory counter-claims.").

Defendants also claim that "more than 100 years of case law" hold that "[w]hen the State files a lawsuit, it waives immunity from suit." Pet. Br. 10. That is wrong. Defendants cite (Pet. Br. 13) two 1898 cases holding merely that the State's rights on a claim *in litigation* are determined by the same law that applies to other litigants. *Fristoe v. Blum*, 45 S.W. 998, 999 (Tex. 1898) (same contract law); *State v. Zanco's Heirs*, 44 S.W. 527, 529 (Tex. Civ. App. 1898, writ denied) (same rights to new trial). The other cases they cite are in accord. *Sec. Trust Co. v. Lipscomb Cty.*, 180 S.W.2d 151, 159 (Tex. 1944) (same res judicata limits); *Wortham v. Walker*, 128 S.W.2d 1138, 1145-46 (Tex. 1939) (same res judicata limits). Those holdings do not address sovereign immunity *from suit*—and thus do not support defendants' historical claim. Indeed, defendants' overbroad reading of the 1898 *Fristoe* decision has already been rejected by this Court. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 406-07 (Tex. 1997). As this Court explained there, how rights are determined when claims are in litigation is a relatively "unremarkable" issue that "has nothing to do with immunity from suit." *Id.* ("To state what happens *if* the State consents to be sued says nothing about whether the State consents to be sued.").

2. Texas has joined several sovereigns that recognize a narrow immunity exception for counterclaims falling within the defensive doctrine of equitable recoupment.

Although a State "does not waive its sovereign immunity for counterclaims seeking monetary damages simply by initiating litigation against a private party," federal courts and "the majority of [state] courts to have considered this issue have recognized an exception to sovereign immunity for recoupment counterclaims." *Chief Info. Officer v. Computs. Plus Ctr., Inc.*, 74 A.3d 1242, 1254 n.21 (Conn. 2013) (citing, inter alia, this Court's decision in *Reata*). This defensive doctrine of equitable recoupment is limited in its availability, distinguishing it from the counterclaims allowable under the rules of civil procedure.

In 1840, Texas adopted the common law of England, to "continue in force until altered or repealed by the Legislature." *Grigsby v. Reib*, 153 S.W. 1124, 1125 (Tex. 1913) (citing statute). "Being a part of the common law of England in 1840, [the doctrine of equitable recoupment] was expressly adopted by the State of Texas . . . , and has existed since in unimpaired form in that state." *Pa. R. Co. v. Miller*, 124 F.2d 160, 162 (5th Cir. 1941) (discussing recoupment in statute-of-limitations context); *accord S. Pac. Co. v. Porter*, 331 S.W.2d 42, 45 (Tex. 1960) ("The question of common law recoupment . . . comes to us by adoption . . . .").

Under English common law, "the term 'recoupment' described a claim that defendant could assert against plaintiff only if it arose from the same transaction as plaintiff's claim. It was purely defensive in character and could be used only to defeat or diminish plaintiff's recovery; recoupment could not be the basis for affirmative relief." Federal Practice & Procedure, *supra*, § 1401. "'Setoff,' on the other hand,

referred to a claim by defendant that was unrelated to plaintiff's claim. Moreover, unlike recoupment, setoff permitted defendant to assert an affirmative claim for relief. But the utility of setoff was limited by the requirement that the claim either be for a liquidated amount or arise out of a contract or judgment." *Id.*

Reata notes this distinction between "set-offs," which are "unrelated to the governmental entities' claims," and the related claims within the rule *Reata* adopts. 197 S.W.3d at 376 n.2; *accord Seidner v. Citibank (S. Dak.) N.A.*, 201 S.W.3d 332, 337 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("The defense of recoupment allows a defendant to deduct any amounts accruing to him as a result of the same transaction that forms the basis of the action against him. . . . The defense of set-off also serves to reduce the amount of a plaintiff's claim, but it differs from recoupment in that the amount claimed as a reduction arises out of a transaction unrelated to the plaintiff's claim.").[5]

These two common-law doctrines are the predecessors of the counterclaims currently allowed under the rules of civil procedure, although the modern rules are "more liberal than the common-law practice or the early codes" that expanded on those common-law doctrines. Federal Practice & Procedure, *supra*, at § 1401. For example, modern rules allow a trial court to enter judgment on a counterclaim before judgment on the plaintiff's claim, or when the plaintiff's claim is dismissed. Fed. R.

[5] *Reata* uses a third term—"offset"—to note that claims within the immunity exception must serve only to diminish the government's recovery. 197 S.W.3d at 377. That term is linguistically similar to but not to be confused with "set-offs," which *Reata* distinguishes from claims within the immunity exception. *Id.* at 376 n.2.

Civ. P. 13(i), 54(b); *accord* Tex. R. Civ. P. 97(c), (h), 174. This is not allowed under equitable recoupment, which is purely defensive. 20 Am. Jur. 2d *Counterclaim, Recoupment, Etc.* § 5 (noting that "recoupment is a doctrine of an intrinsically defensive nature," and "[t]he defense of recoupment is not a counterclaim or setoff"); *see Reata*, 197 S.W.3d at 377 ("[T]he City continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the City's claims.").

As explained below, federal and Texas courts recognize the same fundamental limits on the recoupment doctrine. Under federal case law, "to constitute a claim in recoupment (1) the claim must arise from the same transaction or occurrence as the plaintiff's suit; (2) the claim must seek relief of the same kind or nature; and (3) the claim must seek an amount not in excess of the plaintiff's claim." *FDIC v. Hulsey*, 22 F.3d 1472, 1487 (10th Cir. 1994) (citing *Frederick v. United States*, 386 F.2d 481,488 (5th Cir. 1967)). Although using slightly different language, this Court recognized the same limits in *Reata*, 197 S.W.3d at 376-77.

a. *Claims in equitable recoupment must arise from the same transaction as the plaintiff's claim.*

First, *Reata* held that a defendant's claim, to be heard despite sovereign immunity, must be "germane" and "connected" to the government's claim. *Id.* at 377. To explain this limit, this Court cited (*id.*) its earlier language requiring a claim arising out of the same "transaction." *State v. Humble Oil & Ref. Co.*, 169 S.W.2d 707, 709 (Tex. 1943). This transaction test is strict. It was not met in *Humble Oil*, even where

the claim and counterclaim both involved the same parties and same "gross production taxes on oil," because the State's claim alleged underpaid taxes for January 1936 whereas the counterclaim alleged overpaid taxes "for other months." *Id.* at 707, 710.

Reata approved *Humble Oil*'s strict approach to the requisite nexus between claim and counterclaim. *Reata*, 197 S.W.3d at 376 (agreeing that "the defendant's claim [in *Humble Oil*] was not connected with the State's claim as the two involved taxes for different months and years"). Federal courts likewise hold that "[t]he fact that the same two parties are involved, and that a similar subject matter gave rise to both claims, however, does not mean that the two arose from the 'same transaction'" for recoupment purposes. *Lee v. Schweiker*, 739 F.2d 870, 875 (3d Cir. 1984). And this Court has previously noted "[t]he narrow scope of recoupment in Texas." *Porter*, 331 S.W.2d at 45; *accord, e.g.*, James E. Tierney, *Equitable Recoupment Revisited: The Scope of the Doctrine in Federal Tax Cases After* United States v. Dalm, 80 Ky. L.J. 95, 118 (1991) (noting that "courts have construed that [same-transaction] requirement narrowly" for recoupment purposes).

Part of the reason for this strict requirement is that third-party interests can be disparately affected by rules giving special treatment to claims in recoupment. For instance, in bankruptcy, recoupment of funds is not subject to the automatic stay, *In re Kosadnar*, 157 F.3d 1011, 1014 (5th Cir. 1998), and allows parties a preference in improving their position relative to the debtor's own claims against them, *Lee*, 739 F.2d at 875. Likewise with an exception to sovereign immunity: it would allow a party sued by the state government to improve its position based on a claim that would otherwise be limited or barred by sovereign immunity, whereas a party not sued, or

subject to state administrative or federal enforcement proceedings based on the same conduct, could not use the same claim to improve its position.

Thus, federal courts reflecting on the modern liberality in defining compulsory counterclaims have deemed that broad approach inappropriate for the recoupment doctrine. *Compare, e.g.*, *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 389-90 (3d Cir. 2002) (describing that circuit's "generous[]" view of the test for a compulsory counterclaim: "whether the counterclaim 'bears a logical relationship to an opposing party's claim,'" which turns on overlap in factual and legal issues, evidence, witnesses, and parties), *with In re Univ. Med. Ctr.*, 973 F.2d 1065, 1081 (3d Cir. 1992) ("[T]he open-ended standard, endorsed in the context of discerning compulsory counterclaims, is inadequate for determining whether two claims arise from the same transaction for the purpose of equitable recoupment.").

The seminal Fifth Circuit case outlining the recoupment exception to sovereign immunity does equate that exception's relatedness test with the "same transaction" test of the compulsory-counterclaim rule. *Frederick*, 386 F.2d at 487. But that fifty-year-old decision was not commenting on the more recent trend toward liberal construction of the compulsory-counterclaim rule. Indeed, the rationale behind the compulsory-counterclaim rule (promoting efficiency from grouping substantially related claims in a single litigation) is demonstrably not the rationale behind the recoupment exception to sovereign immunity (which will never allow that efficiency, because the defendant cannot receive a judgment for the excess of his counterclaim over the gov-

ernment's claim). *See U.S. Fid. & Guar. Co.*, 309 U.S. at 511, 513 (holding that, although "a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim," the "desirability for complete settlement of all issues between parties must . . . yield to the principle of immunity").

Rather, the rationale behind the recoupment doctrine is an equitable judgment that "obligations [that] arise out of a single integrated transaction" should be netted out before a plaintiff's liability on its claim is set. *In re Gasmark Ltd.*, 193 F.3d 371, 374-75 (5th Cir. 1999); *accord Distribution Servs., Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 811, 812 (5th Cir. 1990) ("Recoupment," rather, "is a defense that goes to the foundation of plaintiff's claim by deducting from plaintiff's recovery all just allowances or demands accruing to the defendant with respect to the same contract or transaction."); *Howard Johnson, Inc. of Fla. v. Tucker*, 157 F.2d 959, 961-62 (5th Cir. 1946) ("Recoupment exists at common law and in equity and rests on the justice of settling both sides of a transaction at once as a mutual matter."); *In re Harmon*, 188 B.R. 421, 425 (B.A.P. 9th Cir. 1995) ("Recoupment, on the other hand, involves a netting out of debt arising from a single transaction."); *Seidner*, 201 S.W.3d at 337 ("[R]ecoupment allows a defendant to deduct any amounts accruing to him as a result of the same transaction that forms the basis of the action against him."). That narrow rationale comports with this Court's controlling view in *Humble Oil*, which held that a counterclaim that would likely meet a broad view of the compulsory-counterclaim test (having a substantial overlap in legal theories, witnesses, etc.) was not sufficiently connected to the specific conduct alleged by the State (underpayment of one specific tax) as to be exempt from sovereign immunity. 169 S.W.2d at 710.

b. *Claims in equitable recoupment must seek relief of the same nature as the plaintiff's claim.*

To fall within the recoupment exception, a claim must not only arise from the same transaction as the government's claim, it must seek relief of the same kind or nature as the government's claim. If the defendant seeks relief of a different nature or against the plaintiff in a different capacity, the claim is not "properly defensive." *Reata*, 197 S.W.3d at 377.

In *Reata*, both sides sought the same relief—damages for negligence. *Id.* at 373 (describing negligence claims); *id.* at 377 (city filed "suit for damages," allowing at most an opposing claim for "damages sufficient to offset" that claimed recovery). So there was no occasion in *Reata* to address relief of a different nature than that sought by the government. But *Reata* recognized that the sovereign-immunity exception is limited to claims that are "properly defensive," *id.* at 377, which courts have held means that a counterclaim is not allowed "to the extent of a judgment against the government which is affirmative in the sense of involving relief *different in kind or nature* to that sought by the government." *Frederick*, 386 F.2d at 488 (emphasis added). This also means that a counterclaim in offset must be against the plaintiff in the same capacity in which the plaintiff sues. *Cf. Capital Concepts Props. 85-1 v. Mut. First, Inc.*, 35 F.3d 170, 175 (5th Cir. 1994) (noting that setoff is unavailable when the plaintiff "was not acting in the same capacity" on the claim and counterclaim); *Brook Mays Organ Co. v. Sondock*, 551 S.W.2d 160, 166 (Tex. Civ. App.—Beaumont 1977,

writ ref'd n.r.e.) (noting that setoff is "proper only where the demands are mutual, between the same parties, and *in the same capacity or right*") (emphasis added).[6]

This explains why prosecutions seeking fines for criminal offenses, *e.g.*, Tex. Penal Code § 12.32(b) (fines for felony offenses), do not allow criminal defendants to bring damages counterclaims against the State. *See Nelson v. City of Roanoke*, 135 So. 312, 313 (Ala. Ct. App. 1931) ("We know of no law, and the appellant has cited us to none, which would authorize a plea of recoupment in this character of action, which is criminal so far as the penalty to be imposed on conviction is concerned."). Although fines and damages both award money from one party to another, those remedies are different in nature: the fine is a punitive award based on a public wrong, whereas damages are compensation for a loss or injury. *See Fine*, Black's Law Dictionary (10th ed. 2014) ("pecuniary criminal punishment or civil penalty"); *Damages*, *id.* ("[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury").

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[6] Defendants thus wrongly claim that the capacity in which the State sues is irrelevant. Pet. Br. 22. To support that incorrect claim, defendants cite *Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107 (Tex. Comm'n App. 1933, judgm't adopted). *Anderson* did not hold that sovereign immunity is abrogated when the State seeks penalties. It held that sovereign immunity never applies to a claim "to enjoin the enforcement of an invalid law." *Id.* at 110; *accord City of El Paso v. Heinrich*, 284 S.W.3d 366, 368-69 (Tex. 2009). Such an injunction can be sought as a claim or counterclaim. *Anderson* then addressed the venue in which such an injunctive claim could be brought. 62 S.W.2d at 109 (addressing a specific district court). *Anderson* held that a court's jurisdiction over specific state officers, as opposed to the State, exists when the State brings an enforcement suit in that court and then answers an injunctive counterclaim naming the officers. *Id.* at 110. But that holding is irrelevant here. The issue here is not jurisdiction to hear a claim against state officers to enjoin enforcement of a law, but rather a claim against the State for damages.

Likewise, the government's suit for "an equitable remedy of restitution" does not allow, under the recoupment exception, a claim against the government for "monetary damages under state tort law." *United States v. Green*, 33 F. Supp. 2d 203, 225 (W.D.N.Y. 1998). Again, although both remedies are monetary in nature, "[a] valid claim for recoupment must . . . seek relief of the same kind and nature as is sought by [the government]." *Id.* Otherwise, a defendant's claim is not properly *defensive* to the government's claim.

As another example, when the government sues to recover delinquent property taxes, *Reata*'s exception to sovereign immunity does not allow a damages counter-claim against the government for attorney's fees. *Waller Cty. v. Simmons*, No. 01-07-00180-CV, 2007 WL 3038420, at *3 (Tex. App.—Houston [1st Dist.] Oct. 18, 2007, no pet.) (mem. op.). Again, although both types of relief order money awarded from one party to another, recovery of property taxes "is, by its very nature, not a claim for monetary damages," as to allow a damages counterclaim under *Reata*. *Id.*

c. *Claims in equitable recoupment must seek an amount not in excess of the government's claim.*

Lastly, the recoupment exception to sovereign immunity is limited to claims that are defensive, not only in the nature of relief sought, but also in the amount sought. *Reata* thus allowed "adverse parties to assert*, as an offset,*" claims meeting the other requirements of the recoupment doctrine. 197 S.W.3d at 377 (emphasis added).

This means that claims within this immunity exception must be pleaded or at least recharacterized as defenses rather than counterclaims. This distinction matters under the rules of civil procedure. For instance, the distinction between affirmative

defenses and counterclaims can determine "whether certain statutes of limitation are applicable and in determining proof requirements on a motion for summary judgment." 67 Tex. Jur. 3d *Setoffs, Counterclaims, Etc.* § 5. A defendant's counterclaim seeking affirmative relief also negates the plaintiff's absolute right to nonsuit its claim. Tex. R. Civ. P. 162. And a counterclaim allows a judgment for the defendant even before judgment on the plaintiff's claim. Tex. R. Civ. P. 97(c), (h), 174(b); *accord* Fed. R. Civ. P. 13(c), (i), 54(b).

If the defendant makes "requests for affirmative relief," a court "cannot treat [such a] counterclaim" as merely a defensive matter. *Adams v. Tri-Cont'l Leasing Corp.*, 713 S.W.2d 152, 153 (Tex. App.—Dallas 1986, no writ) (noting for purposes of assessing summary-judgment standard that, although "fraud [is] an affirmative defense, fraud may also be an affirmative cause of action," and that the defendant pleaded a counterclaim when he "requested recovery of [payments], exemplary damages of $25,000, and attorney's fees"); *accord, e.g.*, *Hobbs Trailers v. J. T. Arnett Grain Co.*, 560 S.W.2d 85, 88 (Tex. 1977) (statute of limitations turns on how claim is presented: fraud or mutual mistake "is purely defensive" when "sought" only in reduction of the plaintiff's recovery, but not otherwise); *Garza v. Allied Fin. Co.*, 566 S.W.2d 57, 63 (Tex. Civ. App.—Corpus Christi 1978, no writ) (noting that "the general rule that a recoupment, *when pled* only to defeat plaintiff's claim, is not barred by the statute of limitations so long as the plaintiff's main action itself is timely") (emphasis added).

The rules of civil procedure allow a district court to treat a claim that was misdesignated as a counterclaim as an affirmative defense "if justice so requires." Tex.

R. Civ. P. 71; *accord* Fed. R. Civ. P. 8(c)(2). But if a defendant pleads what is a counterclaim in substance (a claim seeking affirmative relief) and fails to present a redesignation request after the government's invocation of sovereign immunity, the trial court does not err by relying on the substance of the claim as pleaded to define the government's rights. *See, e.g.*, *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (rejecting challenge to trial court's failure to redesignate claims: "Raising the argument that the cross-claims should have been redesignated as affirmative defenses in his motion for reconsideration was simply too little, too late."); *United States v. M/V Santa Clara I*, 819 F. Supp. 507, 514 (D.S.C. 1993) ("[T]his court agrees that counterclaimants have not complied with the third requirement for recoupment in that they have not limited their counterclaim to an offset against any amount that the government might recover."); *United States v. Failla*, 120 F. Supp. 797, 802 (D.N.J. 1954) ("It is well established that sovereign immunity extends not only to original claims but also to counterclaims *which demand* the entry of an affirmative judgment against the sovereign.") (emphasis added); *see also* Federal Practice & Procedure, *supra*, § 1426 ("a limitation to the effect that a counterclaim is available only to the extent that it diminishes or defeats plaintiff's claim would not make sense in a modern system").

In short, sovereign immunity applies if a claim is not "assert[ed] as an offset" to the government's claim. *Reata*, 197 S.W.3d at 377.

3. Defendants misapprehend the jurisdictional ruling they challenge by citing federal False Claims Act cases that are about not sovereign immunity at all, but rather a separate doctrine.

Defendants rely in large part on federal False Claims Act cases that do not deal with sovereign immunity at all. Pet. Br. 30-41.[7] Rather, these cases involve a substantive limit on defenses and rights under the False Claims Act and on skirting that limit by cross-actions having the same effect. That substantive doctrine applies in all False Claims Act suits, regardless of whether brought by the government or a private *qui tam* relator (as most of these cases were). Because that doctrine does not involve sovereign immunity, it has no bearing on the jurisdictional ruling on appeal here.

a. Defendants in False Claims Act suits often wish to accuse others of bearing responsibility for the defendants' own false statements to the government. Sometimes the allegedly culpable party is a whistleblower formerly employed by the defendant, named in a threatened counterclaim after initiating a False Claims Act suit as a *qui tam* relator. *E.g.*, *Miller*, 505 F. Supp. 2d at 25 ("the counterclaim was premised on the allegation that the *qui tam* relator himself was responsible for the

[7] Citing nine cases, not one of which mentions sovereign immunity: *Cell Therapeutics, Inc. v. Lash Grp., Inc.*, 586 F.3d 1204, 1213 (9th Cir. 2009), *as amended on denial of reh'g and reh'g en banc* (Jan. 6, 2010); *United States ex rel. Madden v. Gen. Dynamics Corp.*, 4 F.3d 827, 830-31 (9th Cir. 1993); *United States ex rel. Salvatore v. Fleming*, No. 2:11-cv-01157, 2015 WL 1326330, at *3 (W.D. Pa. Feb. 24, 2015), *report and recommendation adopted*, 2015 WL 1384487 (Mar. 25, 2015); *United States ex rel. Battiata v. Puchalski*, 906 F. Supp. 2d 451, 461 (D.S.C. 2012); *United States v. Campbell*, No. 2:08-cv-01951, 2011 WL 43013, at *11 (D.N.J. Jan. 4, 2011); *United States ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 505 F. Supp. 2d 20, 26-27 (D.D.C. 2007); *United States ex rel. Stephens v. Prabhu*, No. 1:92-cv-00653, 1994 WL 761237, at *1 (D. Nev. 1994); *Burch ex rel. United States v. Piqua Eng'g, Inc.*, 145 F.R.D. 452, 456-57 (S.D. Ohio 1992); *United States v. Nardone*, 782 F. Supp. 996, 999 (M.D. Pa. 1990).

fraud and had led the defendant astray, so it was in the nature of an action for indemnification"). Other times, the defendant may wish to shift blame to and seek contribution from a third-party. *E.g.*, *Campbell*, 2011 WL 43013, at *10. Or the defendant may seek to blame the government for the defendant's own misrepresentations. *E.g.*, *Nardone*, 782 F. Supp. at 999 (dismissing counterclaim against federal government).

Regardless of whom the defendant wishes to blame, "[t]he unavailability of contribution and indemnification for a defendant under the False Claims Act now seems beyond peradventure." *Miller*, 505 F. Supp. 2d at 26. That limit is not a sovereign-immunity doctrine. As just noted, the party whom the defendant wishes to blame is often not the government but rather a private party. *E.g.*, *id.* at 25.

Rather, that limit is a matter of statutory interpretation and public policy. The False Claims Act itself does not provide a right of indemnification or contribution. *Mortgs., Inc. v. U.S. Dist. Ct.*, 934 F.2d 209, 213 (9th Cir. 1991). And courts hold that those rights cannot be implied under the Act, given the policy of the *qui tam* provisions to reward even wrongdoers who bring violations to light violations. *Id.* ("The FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a qui tam plaintiff with 'unclean hands.'"). Similarly, the Act's comprehensive enforcement provisions, including adjustments to a *qui tam* relator's share of any recovery, foreclose judicial creation of contribution or indemnification rights by common law. *Id.* at 213-14 (observing that "nothing in the Act prevents the government from naming the qui tam plaintiff as a defendant," if sufficiently at fault).

b. To ensure that defendants do not skirt that limit, federal courts hold that False Claims Act defendants may not "assert state law counterclaims that, if prevailed on, would end in the same result" of indemnification or contribution. *Id.* at 214. "These courts have been alert to the likelihood that clever defendants will seek what federal law denies them under the guise of affirmative state law rights of action . . . ." *Miller*, 505 F. Supp. 2d at 26.

The end result "is the rule that an FCA defendant found liable of FCA violations may not pursue a counterclaim that will have the equivalent effect of contribution or indemnification." *Id.* This is often called a "dependent" claim. *See id.* Conversely, "a qui tam defendant may maintain a claim for independent damages; that is, a claim that is not dependent on a finding that the qui tam defendant is liable." *Id.* That doctrine prohibits, for example, a defendant's claims against third-party individuals for allegedly contributing to the submission false claims, since those claims could only succeed if the defendant is liable under the False Claims Act. *Stephens*, 1994 WL 761237, at *1. In contrast, "counterclaims against [private *qui tam* plaintiffs]" for libel and malicious prosecution are allowed because they do not provide for indemnification or contribution: those claims fail if the defendant is liable under the Act but could succeed if the defendant is not liable. *Id.*

c. In short, the independent-vs.-dependent-claim test is a substantive limit on a defendant's permissible pleadings under the False Claims Act—whether those pleadings are against a third party, a private *qui tam* relator, or the government. This test determines whether a counterclaim is barred as an end-run around the unavailability of contribution and indemnification rights under the Act. This doctrine has

nothing to do with sovereign immunity. It limits pleadings against private parties in the same way that it limits pleadings against the government. Unsurprisingly, then, none of the nine cases cited by defendants on this doctrine discuss sovereign immunity—or even use the word "immunity." *See supra* n.7.

Defendants discuss this body of law at length (Pet. Br. 30-41) but never explain its relevance to the sovereign-immunity issue on appeal here. The notion that this body of law "is exactly what this Court considered and adopted in *Reata*" (Pet. Br. 31) is unmoored from reality. *Reata* does not even cite this False Claims Act doctrine, much less consider and adopt it as governing sovereign immunity.

Of course, substantive limits on defenses and rights in a TMFPA action may independently bar both the counterclaims and third-party claims pleaded by defendants here, regardless of sovereign immunity.[8] But the ruling on appeal here is a grant of the State's plea to the jurisdiction on the counterclaims, not the grant of a motion to strike pleadings under Texas statutory law.

The substantive False Claims Act doctrine invoked by defendants is irrelevant in this appeal, and the distinctions drawn by that doctrine should not confuse the analysis here. Neither should the notion that this doctrine creates "due process concerns" (Pet. Br. 31) by barring compulsory counterclaims—a suggestion unfounded

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[8] *See* Brief on the Merits for the State of Texas, *In re Xerox Corp.*, No. 16-0671 (Apr. 21, 2017) (addressing limits on contribution rights); *see also Durham*, 860 S.W.2d at 67 ("[T]he State in its sovereign capacity, unlike ordinary litigants, is not subject to the defenses of limitations, laches, or estoppel."); *Flukinger v. Straughan*, 795 S.W.2d 779, 787 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (to the extent defendant could not have sued to enforce a claim before plaintiff sued, the claim is a putative defense).

on its own terms[9] but simply irrelevant here. Defendants do not even argue that respecting sovereign immunity from counterclaims offends due process. That is no more problematic than when sovereign immunity bars those claims in a freestanding action against the State. As the Supreme Court has held: "The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. . . . Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *U.S. Fid. & Guar. Co.*, 309 U.S. at 513-14.[10]

B. Defendants' counterclaims do not meet any of the three recoupment requirements of *Reata*'s exception to sovereign immunity.

Defendants' counterclaims do not meet any of the three requirements for the recoupment exception to sovereign immunity. Indeed, that limited exception does not allow any counterclaims to TMFPA enforcement actions, due to the nature of those actions and the specifically defined unlawful acts upon which they are founded.

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[9] Neither case cited by defendants held that applying this doctrine within its contours violates due process. One case simply noted that *extending* the doctrine to bar independent counterclaims against "qui tam plaintiffs" would present due-process concerns. *Madden*, 4 F.3d at 830-31. The other case discussed barring counterclaims to a plaintiff's claim of employment discrimination, not a False Claims Act claim. *Burch*, 145 F.R.D. at 456.

[10] To be clear, the recoupment exception to sovereign immunity, although recognized in Texas and several other jurisdictions, is not required by due process or uniformly recognized. *Chief Info. Officer*, 74 A.3d at 1254 n.21 (noting that Alabama, Illinois, and Tennessee do not recognize this exception and prohibit all counterclaims against the state). The State reserves the right to urge this Court to reconsider *Reata* and reject the recoupment exception. *See* Amicus Curiae Br. of the State of Texas in Supp. of Mot. for Reh'g 22-30, *Reata*, *supra* (giving reasons why the Court should not adopt the recoupment exception to sovereign immunity). But overruling *Reata* is not necessary for the Court to affirm here.

First, the counterclaims here are not properly defensive because they seek relief of a different nature than the State does. Under TMFPA § 36.052, the State sues in its sovereign capacity seeking a civil sanction for a public wrong; private defendants cannot bring counterclaims seeking the same kind of relief against the State. Second, TMFPA enforcement actions arise from precisely defined unlawful acts, such that counterclaims regarding a defendant's broader course of dealing with the Medicaid program cannot be germane and connected to the specific transaction sued on by the State. Third, defendants did not plead for relief limited to an offset of the State's recovery, or ask the trial court to so limit their counterclaims. Instead, those counterclaims pray for affirmative relief against the State and are outside the recoupment exception for that reason as well.

1. Medicaid-program statutory background

The TMFPA's civil-remedy provision is analogous to (1) the federal Social Security Act's civil-penalties provision, (2) the Texas Penal Code's grading of the severity of criminal Medicaid fraud, and (3) the Texas administrative penalties for Medicaid-program violations. All of these afford relief different from the damages remedy under the False Claims Act, to which defendants attempt comparison.

The Medicaid program, part of the Social Security Act, *see* 42 U.S.C. § 1305, provides matching federal funds to States that enact and fund medical-assistance programs meeting federal standards. *Id.* § 1396 *et seq*. The Texas Health and Human Services Commission ("HHSC") administers Texas's medical-assistance program and uses public funds to provide assistance to a range of beneficiaries. *See* Tex. Hum. Res. Code § 32.024(a)-(b).

Anyone seeking Medicaid payment faces "the most demanding standards in its quest for public funds" and must "act with scrupulous regard for the requirements of law." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63 (1984). This is because "proper government reimbursement is essential given the escalation of health care costs in our nation and the need for the proper distribution of limited public funds." Health Care Programs: Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting from Public Law 100-93, 57 Fed. Reg. 3298-01, 3311-01 (Jan. 29, 1992). Both federal and state law impose exacting sanctions on those who violate the integrity of the Medicaid program.

a. *Federal-law protections*

"Because the Department of Justice often lacks the resources to pursue cases of fraud against the Medicaid and Medicare programs, the [Social Security Act] allows the Secretary of Health and Human Services to seek civil remedies as an alternative to criminal prosecution." *Chapman v. HHS*, 821 F.2d 523, 525 (10th Cir. 1987). The "Civil Monetary Penalties Law (CMPL) in the Social Security Act," 42 U.S.C. § 1320a-7a, "provides for the imposition of civil monetary penalties and assessments through administrative proceedings upon anyone making false or improper claims for Medicare or Medicaid payments." *Chapman*, 821 F.2d at 525-26. Violations creating civil liability include, for example:

- knowingly presenting to a state agency (like Texas's HHSC) a false claim for payment or a claim for payment for an item or service that the claimant knows was not provided as claimed, 42 U.S.C. § 1320a-7a(a)(1)(A), (B), (i);

- knowingly making a false statement, omission, or misrepresentation of a material fact in a bid to participate as a provider of services under Medicaid, *id.* §§ 1320a-7a(a)(9), 1320a-7(h), 1320a-7b(f); and
- knowingly soliciting or receiving a kickback or bribe in return for referring a beneficiary for a Medicaid service, *id.* §§ 1320a-7a(a)(7), 1320a-7b(b)(1).

Unsurprisingly, these acts are also "unlawful acts" under the TMFPA. *See* TMFPA § 36.002(1), (2), (4), (13).

Under the Social Security Act, these prohibited acts subject a person to:

(1) an "assessment" generally set as "not more than 3 times the total amount claimed for each item or service,"

(2) an additional "civil money penalty" within a fixed range for each act, and

(3) potential exclusion from the Medicaid program.

42 U.S.C. § 1320a-7a(a). Importantly, this Social Security Act assessment is not an overpayment measure. Instead, it is based on the full amount claimed. The Act expressly states that this assessment is "*in lieu of* damages sustained by the United States or a State agency because of" an improper claim. 42 U.S.C. § 1320a-7a(a) (emphasis added). To illustrate, if a service properly warranting a $2000 payment was falsely claimed as a service warranting a $5000 payment, one might argue that the "damages" or "loss" is $3000, as the difference between the payment made and the allowable payment. But the Social Security Act assessment for this prohibited act would be the full $5000—"the amount claimed" for the service. *Id.*

Federal courts thus reject the argument that the "assessments provided for under the CMPL [42 U.S.C. § 1320a-7a] must be calculated by or limited to the actual

damages incurred by the government in cases in which such damages are ascertainable." *Chapman*, 821 F.2d at 525; *accord Horras v. Leavitt*, 495 F.3d 894, 903 (8th Cir. 2007) (agreeing with *Chapman*: "Unlike the [False Claims Act], the CMPL focuses on the amount falsely or fraudulently 'claimed.'"); *cf.* Pet. Br. 22 n.39 (wrongly stating that False Claims Act remedies "are exactly the same as the remedies under the TMFPA"). As *Chapman* explains, "it can be fairly reasoned that the difference in phrasing between the False Claims Act and the CMPL is indicative of congressional purpose." 821 F.2d at 528 ("False Claims Act [cases] are distinguishable since the language in that act differs from the language in the CMPL."). Specifically, in the Social Security Act, Congress "deliberately shifted the focus away from the actual loss sustained and onto the amount claimed as a basis for assessments." *Id.*

By providing for an assessment in lieu of damages, "Congress intended to obviate the need for the government to tie assessments to proven actual damages." *Id.* That decision reflects that "each fraudulent claim filed exacts an immense toll from society" and "our nation's Medicare and Medicaid programs." *Mayers v. HHS*, 806 F.2d 995, 999 (11th Cir. 1986) (upholding these assessments against constitutional challenge). The amount of an overpayment alone does not account for the costs of detection, investigation, and prosecution of violations, for diversion of resources from the direct provision of health services, or for the loss of public confidence in the integrity of the Medicaid program. The need to quantify those serious but complex effects is obviated by the Social Security Act's choice to use the full claim amount as a measure of the severity of a prohibited act and to deter that conduct.

As another example, consider the prohibited act (charged against some defendants here, CR.121-22) of soliciting or receiving kickbacks for steering patients to particular healthcare providers for Medicaid services. 42 U.S.C. §§ 1320a-7a(a)(7), 1320a-7b(b)(1). This conduct impairs the integrity of the Medicaid program, but it does not necessarily mean that Medicaid pays more for a given medical service than Medicaid would pay without the kickback scheme. For any specific service, Medicaid may have paid a provider the same amount for that service absent a kickback-for-referral scheme. But, despite the potential absence of financial loss to the Medicaid program in any given case, the Social Security Act still provides not only a civil penalty but also an additional assessment for a kickback scheme. 42 C.F.R. § 1003.310. So does the TMFPA. TMFPA §§ 36.002(13), 36.052(a).

In short, "loss . . . is not an element" of the Social Security Act assessment for an act violating Medicaid-program requirements. *Horras*, 495 F.3d at 903. Thus, one can at most imagine this federal assessment being called, euphemistically, a sort of liquidated damages. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 530 (2d ed. 1995) (liquidated damages: "originally a euphemism for forfeiture or penalty"); *Assessment*, Black's Law Dictionary (10th ed. 2014) ("imposition of something, such as a tax or fine, according to an established rate; the tax or fine so imposed"). In all events, the assessment is not an award defined by the amount of loss—i.e., damages. *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013) ("Actual or compensatory damages are intended to compensate a plaintiff for the injury she incurred. . . ."); Douglas Laycock, *Modern American Remedies* 15 (3d ed. 2002) ("the fundamental principle of damages is to restore the injured party as nearly as possible to the position he

would have been in but for the wrong"); *see* 42 U.S.C. § 1320a-7a(a) (Social Security Act assessment is "in lieu of" damages).

b. ***Texas criminal-action provisions***

The Medicaid program requires States, as a condition of receiving matching funds, to implement fraud detection and prevention measures. For one, a State must have a "medicaid fraud control unit," 42 U.S.C. § 1396a(a)(42)(B)(ii)(IV)(cc), which investigates program violations and can refer matters for criminal prosecution or "to an appropriate State agency" for other action, 42 C.F.R. § 1007.11. In Texas, those enforcement actions can take the form of criminal proceedings, administrative proceedings under chapter 32 of the Human Resources Code, or civil proceedings under chapter 36 of the Human Resources Code. As explained below, all three forms of sanctions turn, not on the amount of *over*payment resulting from an unlawful act, but instead on the amount of any payment resulting from the unlawful act.

The Texas Penal Code defines criminal offenses regarding the Medicaid program. Tex. Penal Code § 35A.02(a)(1)-(12). Those offenses range from knowingly making a material misrepresentation to the Medicaid program, *id.* § 35A.02(a)(1), (4), to knowingly obstructing an investigation by the Attorney General under the TMFPA, *id.* § 35A.02(a)(11) (citing TMFPA § 36.002). *See also* Tex. Hum. Res. Code § 32.0391 (criminal offense for kickback and bribery schemes).

The punishment authorized for a given offense is generally determined by "the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a re-

sult of the conduct." Tex. Penal Code § 35A.02(b)(1)-(7) (defining monetary brackets); *see also id.* § 35A.02(d) (specifying that "the amounts of the payments" resulting from a single scheme may be "aggregated in determining the grade of the offense"). This total-payments measure of the severity of a prohibited act parallels the TMFPA's measure. TMFPA § 36.052(a)(1) (unlawful act creates liability for "the amount of any payment or the value of any monetary or in-kind benefit provided under the Medicaid program, directly or indirectly, as a result of the unlawful act").

c. ***Texas administrative-action provisions***

Chapter 32 of the Texas Human Resources Code defines various Medicaid-program violations that make a person liable for sanctions assessed in an administrative proceeding. Tex. Hum. Res. Code § 32.039(b)-(p). Violations creating this liability include making a claim with a knowingly false representation, *id.* § 32.039(b)(1), soliciting or receiving kickbacks for referring a patient for a Medicaid service, *id.* § 32.039(b)(1-b), and failing to maintain documentation to support a claim for payment or engaging in any other conduct that is a program violation under HHSC rules, *id.* § 32.039(b)(3).

Violations under § 32.039(b) make a person liable for up to three times the total amount paid as a result of the violation plus interest and a per-violation penalty:

> (c) A person who commits a violation under Subsection (b) is liable to the commission for:
>
> (1) the amount paid, if any, as a result of the violation and
>
> interest on that amount determined at the rate provided by law for legal judgments and accruing from the date on which the payment was made; and

(2) payment of an administrative penalty of an amount not to exceed twice the amount paid, if any, as a result of the violation, plus

an amount [between $5,000 and $15,000 per violation, based on its nature].

Id. § 32.039(c). The only qualification is that a violation under subsection (b)(3) triggers a smaller liability: "either the amount paid in response to the claim for payment or the payment of an administrative penalty in an amount not to exceed $500." *Id.* § 32.039(b-1).

The first component of this chapter 32 administrative sanction is not the *over*-payment as a result of a violation but, rather, the *entire* amount paid as a result of the violation. *Id.* § 32.039(b-1) ("amount paid in response to the claim"), (c)(1) ("amount paid, if any, as a result of the violation"). As with the Social Security Act assessments, this award does not require proof of loss to the Medicaid program and, therefore, is not an award of actual or compensatory damages. At most, this award might be called "liquidated damages," as a "euphemism for forfeiture or penalty." Garner, *supra*, at 530. That appears to be the sense in which section 32.039 sometimes uses the word "damages." *Cf.* Pet. Br. 20 (noting caption). Indeed, in describing that same award, section 32.039 then repeatedly uses only the single term "penalty." Tex. Hum. Res. Code § 32.039(f)-(i), (*l*)-(q) (using only the term "penalty" in describing the procedures for administrative imposition of monetary awards).

Likewise, HHSC rules on false claims refer to these sanctions as "penalties." 1 Tex. Admin. Code pt. 15, ch. 357, subch. P. The rules direct that HHSC "may assess a *civil monetary penalty* against a person who submits a claim . . . that contains

a statement or representation that the person knew was false." *Id.* § 357.642 (emphasis added). The maximum amount of that penalty is:

> (1) the amount that [HHSC] or its health insuring agent pays because of the false claim and
>
> the interest on that amount determined at the rate provided by law for legal judgments . . . accruing from the date on which the payment was made; plus
>
> (2) twice the amount that [HHSC] or its health insuring agent pays because of the false claim; plus
>
> (3) $2,000 or less for each item or service for which payment was claimed.

Id. § 357.643. The penalty thus includes *both* the total amount of the payment resulting from the false claim, trebled, *and* an additional per-violation penalty. The rules then track the statutory procedures for administrative determination and review of this penalty. *Id.* §§ 357.646, 357.647; Tex. Hum. Res. Code § 32.039(f)-(m), (r).

In short, these agency rules comport with the statutory text (and the analogous federal Social Security Act): an administrative penalty under chapter 32 of the Human Resources Code is authorized based on the entire amount of the payments resulting from a Medicaid-program violation, not just the amount of any *over*payment. The State need not prove any loss to the Medicaid program to impose this administrative penalty.

d. *Texas civil-action provisions*

The State may also punish Medicaid violations through a civil action under the TMFPA. TMFPA § 36.052(e). Created in 1995, *see* Act of May 26, 1995, 74th Leg., R.S., ch. 824, 1995 Tex. Gen. Laws 4202 ("An Act relating to the prevention of Medicaid fraud; imposing civil penalties"), the TMFPA's purpose was "to create civil offenses of Medicaid fraud and enact penalties and injunctive relief." House Research Org., Bill Analysis at 1, Tex. H.B. 2523, 74th Leg., R.S. (1995); *cf.* S. Rep. No. 97-139, at 462 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 728 (in explaining impetus for the Civil Monetary Penalties Act of 1981, 42 U.S.C. § 1320a-7a, noting that criminal prosecutors may decline Medicaid-fraud cases due to backlog, insufficient expertise, or small sums involved).

The TMFPA defines numerous "unlawful acts" that impair the integrity of the Medicaid program, such as knowingly misrepresenting material facts to permit an unauthorized payment, TMFPA § 36.002(1); knowingly concealing information that permits an unauthorized payment, *id.* § 36.002(2); knowingly making a material misrepresentation regarding required information, *id.* § 36.002(4); and knowingly soliciting or receiving kickbacks for patient referral, *id.* § 36.002(13). Reflecting the Attorney General's law-enforcement function in this context, the TMFPA gives him authority to serve civil investigative demands, access state-agency documentary materials, and examine individuals under oath. TMFPA §§ 36.053, 36.054.

The TMFPA has never described the liability it creates as "damages" or defined that liability according to the State's loss. Instead, the TMFPA has always defined the civil remedies for an unlawful act as including the value of any payment resulting

from the act, trebled, plus an additional amount per violation. TMFPA § 36.052(a); ch. 824, § 1, 1995 Tex. Gen. Laws at 4205 (original TMFPA § 36.004(a)). This is the same structure as under the federal and state laws just discussed. *Supra* pp.31-38.

Every time the Legislature has amended the TMFPA, it has made the Act stronger. As originally enacted, the TMFPA did not have *qui tam* provisions allowing relators to initiate suits in the State's name. Ch. 824, 1995 Tex. Gen. Laws at 4202-08. Two years later, due to "a serious, ongoing drain on public resources," the Legislature "improve[d] the state's ability to combat fraudulent acts committed against publicly funded programs" by, among other things, "add[ing] a state qui tam cause of action to prosecute fraudulent Medicaid providers." House Comm. on Pub. Health, Bill Analysis at 1, S.B. 30, 75th Leg., R.S. (1997). Similar to the federal False Claims Act in this respect, the TMFPA now allows a private party to bring an action in the name of the State. TMFPA §§ 36.101-.117 (subchapter C). And a separate cause of action provided under subchapter C protects a relator against retaliation for bringing a fraud-exposing *qui tam* action by giving the relator a cause of action for reinstatement, twice back pay, and "special damages." *Id.* § 36.115.

About a decade after the Legislature added *qui tam* provisions to the TMFPA, Congress allowed States to keep an extra 10% of Medicaid recoveries if they have *qui tam* state-law provisions meeting federal standards. Deficit Reduction Act of 2005, Pub. L. 109-171, tit. VI, ch. 3, § 6031(a), 120 Stat. 4, 72 (codified at 42 U.S.C. § 1396h). For example, instead of keeping 40% of Medicaid recoveries and sharing the rest with the federal government, a compliant State would keep 50% of Medicaid recoveries. This increased share is a huge amount: over $100 million in state Medicaid funding

over the past decade.[11] To keep that extra funding, a qualifying state law must have *qui tam* provisions "at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of Title 31 [the federal False Claims Act]." 42 U.S.C. § 1396h(b)(2). Given concern about the TMFPA's lack of an explicit burden of proof, *see* House Comm. on Pub. Health, Bill Analysis at 1, S.B. 362, 80th Leg., R.S. (2007), the Texas Legislature replicated, in the TMFPA's *qui tam* subchapter, the federal False Claims Act's explicit standard of proof. TMFPA § 36.1021 ("In an action under this subchapter, the state or person bringing the action must establish each element of the action, including damages, by a preponderance of the evidence"); *cf.* 31 U.S.C. § 3731(d) ("the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence").

Defendants argue (Pet. Br. 18-19) that this section means the Legislature viewed at least one "action under this subchapter" (the *qui tam* subchapter C) as providing for "damages." Of course, one action under subchapter C does expressly provide for damages: the action for back pay and "special damages" for retaliation against a person's initiation of a *qui tam* action. TMFPA § 36.115(a). The natural conclusion is that the Legislature used the term "damages" to reference the retaliation action's express "damages" remedy. And this section does nothing more than specify a broad scope for the confirmation that the most relaxed standard of proof available in civil

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[11] *See* Jack Meyer & Chris Wolff, *Fighting Medicaid Fraud in Texas* 7-9 (2013) (10% share of the State's recoveries for just seven of the past ten fiscal years, 2006-2012, was $82.1 million), http://www.taf.org/Texas-Report-3-18-13.pdf.

law applies. Nothing in § 36.1021 alters the substance of the civil remedies created in § 36.052, which is not even in the *qui tam* subchapter C. *Cf.* Pet. Br. 19 (wrongly arguing that § 36.1021 applies to "the Act," as opposed to subchapter C).

It is the § 36.052 civil remedies that the State pursues here, and they do not turn on the amount of the State's loss. As the court of appeals noted, "the provision authorizing those penalties does not refer to them as 'damages' and does not limit the recovery to any type of overpayment; rather, the provision authorizes the full recovery of the payment as well as an additional double recovery of the payment plus other potential penalties." Op.16. Surely, a TMFPA recovery can offset loss from a given violation (*cf.* Pet. Br. 19)—as would any financial recovery by the State, whether labeled an assessment, penalty, restitution, or fine. But "not all compensatory recovery can be considered damages." *Wal-Mart Stores, Inc. v. Forte*, 497 S.W.3d 460, 465 (Tex. 2016). The TMFPA civil remedy does not measure the State's damages. Rather—as with Social Security Act assessments, the offense grade for criminal Medicaid fraud, and the administrative penalties for Medicaid-program violations—the TMFPA uses a total-payment measure for the severity of a sanction.

2. This is a sovereign-capacity action for civil sanctions, such that damages counterclaims are not seeking properly defensive relief of the same nature.

As the court of appeals correctly held, enforcement actions under § 36.052 of the TMFPA do not seek damages and thus do not allow the assertion of damages counterclaims under *Reata*. Op.16-19 ("the civil penalties that the State is seeking

against the Dental Groups do not qualify as *damages*"). Instead, "act[ing] in its sovereign capacity," the State "seeks to punish the Dental Groups for allegedly violating a public-welfare statute and to deter others from committing similar violations, and the State sought to achieve these goals by using the enforcement measures in the Act to require the payment of civil penalties." Op.16, 17. Defendants' damages counterclaims against the State are not properly defensive to the State's action for statutory penalties.

a. The civil remedies in TMFPA § 36.052 are statutory penalties, just like Social Security Act penalties and assessments and the Texas-law penalties for Medicaid-program violations. *See supra* pp.31-42. Contrary to defendants' claim that the § 36.052 remedies are the "exact same remedies" as False Claims Act damages, Pet. Br. 22, federal law expressly distinguishes False Claims Act damages from the type of civil penalties and assessments at issue here. *See supra* pp.32-33.

As defendants concede (Pet. Br. 16 n.33), the defining characteristic of damages is a measurement of the plaintiff's loss from a wrong. *See supra* p.34; *see also State v. Emeritus Corp.*, 466 S.W.3d 233, 249 (Tex. App.—Corpus Christi 2015, pet. denied) (holding that the term "'damages' . . . does not include civil penalties sought by the State"). But the civil remedies in TMFPA § 36.052(a) do not measure any overpayment or unauthorized payment by the State.

Defendants do not dispute that the remedies in subsections (a)(3) and (a)(4) of § 36.052 are not damages. *See* Pet. Br. 16 (arguing instead about "the remaining relief the State is seeking"). And defendants can assert that the remaining relief "is the classic definition of 'compensatory damages' or 'actual damages,'" Pet. Br. 16, only

by disregarding the statutory text—which nowhere ties that relief to the State's loss from an unlawful act. Instead, like the Social Security Act civil assessment upon which it is modeled, the remedy under subsection (a)(1) of TMFPA § 36.052 is a statutory penalty—an award imposed "for violation of a statute's terms without reference to any actual damages suffered." *Statutory penalty*, Black's Law Dictionary (10th ed. 2014); *see In re Longview Energy Co.*, 464 S.W.3d 353, 360 (Tex. 2015) ("A judgment that makes the 'defendant liable in excess of net gains [] results in a punitive sanction'") (brackets in original). And because the remedy under subsection (a)(2) of § 36.052 is derivative of the subsection (a)(1) remedy, it too is a statutory penalty, not damages.

That legislative design makes sense. The TMFPA is a public-welfare statute designed to deter acts that undermine the integrity of and public confidence in an expansive, vital state program. The Legislature recognized the vulnerability of this billion-dollar program (a quarter of the State budget), which cannot feasibly be protected through damages claims. *See supra* p.39. Therefore, the Legislature provided the State with a powerful tool, including potent remedies to punish and deter a host of unlawful acts that threaten the program's integrity. The Act's title, after all, is the Medicaid Fraud *Prevention* Act, not the Fraud *Recovery* Act. The TMFPA—along with the parallel civil-monetary-penalties provision of the federal Social Security Act—is an example of how "the civil fine has assumed a place of paramount importance in the compliance arsenal of federal regulators." Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1436 (1979).

b. In addition, defendants' counterclaims allege state action taken in a different capacity than the capacity in which the State sues here. For this reason as well, the counterclaims are not "properly defensive" in this TMFPA enforcement action.

The damages counterclaims here assert that state actors administering the Medicaid program breached a claims-processing contract, conspired with the contractor, or converted funds by placing an administrative hold on Medicaid payments. CR.31-34. The counterclaims thus allege that purported private rights were infringed by the State in managing contracts and funds as any party can do. *See Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001) ("Texas courts have long recognized that the State wears two hats: the State as a party to the contract and the State as sovereign.").

But suits to deter and punish civil offenses are rooted in a state's law-enforcement prerogatives. In contrast to an alleged private wrong by the State—such as conspiracy, conversion, or breach of contract—a wrong against the public's interest is an "offense":

> In its legal significance, an "offense" is a violation of law for which a penalty is prescribed. It is an act committed or omitted in violation of a public law . . . established for the protection of the public, as distinguished from an infringement of mere private rights, for which a penalty is imposed or punishment inflicted in any judicial proceeding. The word implies a violation of a law by which alone it can be denounced.

22 C.J.S. *Criminal Law: Substantive Principles* § 3, at 11 (2016).

That describes the TMFPA. It expressly deems acts "unlawful" and thus denounces them by their commission alone. TMFPA § 36.002 ("A person commits an

unlawful act if . . . .”). Of course, the TMFPA deters and punishes unlawful acts through civil proceedings, not criminal proceedings. But “[n]ot all public wrongs are crimes.” *Public wrong*, Black’s Law Dictionary (10th ed. 2014). “Whether an offense defined by statute is civil or criminal is primarily a matter of statutory construction.” 22 C.J.S. *Criminal Law: Substantive Principles* § 10, at 17 (2016). Here, the Legislature made the unlawful acts it defined civil offenses. TMFPA § 36.052.

When the State brings a civil or criminal action to deter and punish an offense, it is suing its sovereign capacity, representing the public’s interests. As the Supreme Court explained in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), when an agency imposes civil penalties for violation of a regulatory statute, it “sues in its *sovereign capacity* to *enforce* public rights.” *Id.* at 450 (emphases added). In other words, this is a sovereign-capacity enforcement action.

In bringing such a sovereign enforcement action, the State is not coming to court in a proprietary capacity seeking damages for loss, equivalent to the type of relief sought in a damages counterclaim against the State. The State acts differently than do private parties suing in tort. Op.17-18 (collecting cases); *see, e.g.*, *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013) (“In a civil penalty action, the Government is . . . a different kind of plaintiff . . . .”). The factual parity that made the competing claims in *Reata* properly defensive—both sides sought negligence damages—thus does not apply in a sovereign enforcement action. In other words, the State here is not participating in the litigation process “as an ordinary litigant.” 197 S.W.3d at 377. There is no mutuality of the capacity in which the government sues and is sued, as required for the recoupment exception to sovereign immunity.

This unique capacity in which the State sues creates important concerns not present in *Reata*. The Court in *Reata* perceived no room for policy debate about "hampering . . . governmental functions" or "the fiscal planning of the governmental entity" from "properly defensive" claims. *Id.* at 376-77, 375. But the issues on which *Reata* perceived no policy debate in the same-capacity recoupment context raise serious concerns in the context of sovereign-capacity actions, which implicate vital state programs, such as tax assessment, child-support collection, and Medicaid-fraud enforcement. These types of actions arise in a more complicated environment than one-off tort actions. The money they recover is often pursuant to a systematic effort of collection. When the State's exposure to possible claims against it is capped, not by a statutory regime crafted for such claims (such as the Tort Claims Act), but only by the extent of the government's ongoing collection efforts in its sovereign capacity, the resulting unpredictability seriously affects state budgeting and hampers important state operations. *See* Op.18-19; *cf., e.g.*, Tex. Civ. Prac. & Rem. Code §§ 101.021, .023, .055, .101 (limiting the waiver of immunity from certain torts and excluding altogether some state programs from the waiver of immunity).

As this Court has repeatedly held, the Legislature's knowledge about fiscal appropriations and state programs gives it the best vantage point to balance the interest in orderly enforcement proceedings and the effect of using those enforcement proceedings, as opposed to other processes, to address interests and claims asserted by defendants. *Taylor*, 106 S.W.3d at 695; *City of Galveston v. State*, 217 S.W.3d 466, 473 (Tex. 2007) ("Judges cannot simply abrogate immunity every time they believe

the Legislature's failure to do so 'defies logic.'"). Nothing in *Reata* negates those principles. And the decision below faithfully follows them.

Indeed, the TMFPA is a statute that speaks to sovereign immunity and in which the Legislature found it appropriate to waive sovereign immunity only in one narrow way: for certain litigation expenses when the State continues with a frivolous *qui tam* action. TMFPA § 36.112.[12] Thus, implicit in defendants' position is the argument that courts are better situated than the Texas Legislature to define the extent of sovereign immunity in TMFPA actions. But that argument flips on its head this Court's established order of deference. *Reata*, 197 S.W.3d at 375 ("the Legislature is better suited to address the conflicting policy issues involved").

* * *

In sum, whatever damages claims defendants wish to assert against state actors for allegedly breaching a contract, conspiring, or converting funds, those claims are not for relief of the same nature as sought in the State's enforcement action for statuory penalties. Instead, they are like the disallowed claim for recoupment in response to a criminal fine, *Nelson*, 135 So. at 313; or for damages in response to a restitution claim, *Green*, 33 F. Supp. 2d at 225; or for a setoff arising in a capacity apart from that in which the plaintiff sues, *Capital Concepts Props. 85-1*, 35 F.3d at 175; *Brook Mays Organ Co.*, 551 S.W.2d at 166. The counterclaims here—indeed any counterclaims—are not "properly defensive" in a TMFPA enforcement action.

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[12] *Kinnear v. Tex. Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000) (per curiam), which defendants cite (Pet. Br. 22 n.41), is distinguishable as a similar instance of statutory authorization of prevailing-party litigation expenses.

3. TMFPA enforcement actions arise from specifically defined unlawful acts, not broader transactions to which counterclaims like defendants' could be germane and connected.

Defendants' counterclaims fall outside *Reata*'s recoupment exception to sovereign immunity for a second reason. TMFPA enforcement actions arise from such precisely defined unlawful acts that counterclaims regarding a defendant's broader course of dealing with the Medicaid program cannot be germane and connected to the basis for the State's suit—and defendants' counterclaims here are not.

Under the TMFPA, liability attaches for the commission of a defined unlawful act itself, regardless of whether any damages or loss to the State is caused. None of the unlawful acts require proof of unauthorized dispensation of Medicaid funds, and many unlawful acts do not even mention the potential for such an unauthorized dispensation. *See, e.g.*, TMFPA § 36.002(4) (knowing false statement of any material fact required by law), 36.002(8) (knowing failure to indicate identification number of licensed healthcare provider who provides a claimed service), 36.002(11) (knowing obstruction of investigation of alleged unlawful act), 36.002(13) (knowing engagement in kickback-for-referral scheme).

TMFPA liability exists based only on those specifically defined unlawful acts in § 36.002—not any resulting factual loss, and not based on any broader duty of care or overall course of dealing with the Medicaid program. Accordingly, any germane and connected counterclaim under the recoupment exception must arise out of the "same transaction" as only those acts. And that is essentially impossible because those acts are so precisely and narrowly drawn. At the least, the counterclaims here do not meet that test.

In this regard, a TMFPA "unlawful act" is like the specific conduct for which the State sued in *Humble Oil*—nonpayment of a tax for a specific month. As this Court held, even the alleged overpayment of the same tax in other months was insufficiently connected to avoid sovereign immunity. 169 S.W.2d at 710. The requisite connection had to be basically that of a defense to liability—such as a claim that a payment sued over was not an underpayment but actually an overpayment (or vice versa). *E.g.*, *City of Dallas v. Albert*, 354 S.W.3d 368, 375 (Tex. 2011).

Defendants' counterclaims are like the contract claims rejected in *Berger v. City of North Miami.*, 820 F. Supp. 989, 992 (E.D. Va. 1993), as not arising out of the "same transaction" as the city's CERCLA claim, even under the federal rules' compulsory-counterclaim test. The court in *Berger* noted that the city "only needs to establish" some basic facts under CERCLA (essentially, operation of a certain facility or handling of certain waste), whereas "proof of the alleged contractual breaches will likely require more detailed testimony of the parties themselves relating to" a number of collateral issues ("their contracting behavior, their understanding of their respective contractual obligations to explain possible ambiguities in the contract language, and the circumstances surrounding the alleged breaches of the lease agreement"). *Id.* at 993.

The court noted that the contract on which the opposing party wished to sue had *some* relevance to the CERCLA claim, but that "the nature of this relevance is markedly different for each claim." *Id.* "[T]he fact that the same two parties are involved, and that a similar subject matter gave rise to both claims, however, does not mean that the two arose from the 'same transaction.'" *Id.* at 994-95 (quotation

and alteration marks omitted). Because it was "clear that the contract-based 'recoupment' claims raised here do not arise from the cleanup operations or the actual generation or disposal of hazardous wastes," it was "[e]qually clear" that "these claims do not arise from the same transaction as [the] CERCLA claim." *Id.* at 994.[13]

Similar principles apply here. Defendants' counterclaims might concern the same party as sues them (although this is unclear) and involve the same overall state program (Medicaid) as this action concerns. But defendants' counterclaims involve different aspects of their interaction with that state program than are put into dispute by the State's claims. It is irrelevant to the State's TMFPA case whether defendants' unlawful acts were detected by the State, should have been, or supported administrative payment holds. The State need only prove that defendants knowingly made prohibited statements to the Medicaid program or committed other unlawful acts. *See* CR.120-27.

Just as the contract claim alleged in *Berger* had "no necessary, logical relationship to any of the parties' liability" under the specific showings required on the CERCLA claim, 820 F. Supp. at 993-94, the contract, conspiracy, and conversion claims alleged here have no necessary, logical relationship to defendants' liability for the specifically defined TMFPA unlawful acts. Defendants' attempt to *blame* other

[13] These points distinguish *City of New Braunfels v. Carowest*, 432 S.W.3d 501 (Tex. App.—Austin 2014, no pet.), which defendants cite (Pet. Br. 27) as an example of a sufficiently germane and connected counterclaim. The city there was not suing in its sovereign capacity; the parties' opposing claims were for breach of a contract. *Id.* at 510, 523.

parties for their choice to undertake the unlawful acts alleged does not "directly or inferentially rebut" (Pet. Br. 27) the State's accusation that defendants committed those unlawful acts.

Of course, if defendants wish to argue that they did not make misstatements, they do not need counterclaims argue that the State has not met its burden of proof. Likewise, if defendants wish to contest their mental state in making misstatements, that option is available to them by way of defending against the State's charges. Defendants can always introduce proof they believe will defeat the State's allegations and negate liability. But defendants' counterclaims assert some liability by the State arising from the *review* of defendants' statements and acts—which is not any part of the transaction placed at issue in this statutory proceeding.

4. Defendants' counterclaims are not limited to an offset but rather seek affirmative recovery from the State.

A third reason places defendants' counterclaims outside the scope of the recoupment exception to sovereign immunity. A claim within that exception "can operate only as an offset to reduce the government's recovery." *Reata*, 197 S.W.3d at 375. But defendants' counterclaims have not properly been limited to an offset of the government's recovery.

Defendants present their breach, conspiracy, and conversion theories as "counterclaims," CR.30, a type of pleading that allows judgment exceeding the plaintiff's claim, entered before judgment on the plaintiff's claim, Tex. R. Civ. P. 97(c), (h). And defendants do not limit their alleged damages to the amount sought by the State here. They allege damages not only from this lawsuit but from prior administrative

actions, and defendants seek "monetary relief" including actual damages plus punitive damages, interest, costs, and attorney's fees. CR.31-33. Defendants pray that "judgment be entered . . . against the State of Texas" for those amounts. CR.40.

Defendants might have asked the trial court to redesignate their counterclaims as affirmative defenses, operating only to reduce the government's recovery, if any. *See* Tex. R. Civ. P. 71. But defendants did not do so, and the trial court did not err in treating those pleadings as counterclaims, consistent with both their form and their substance. CR.384.

The State does not acquiesce in an untimely reclassification of the counterclaims after they have been properly dismissed. *Cf.* Pet. Br. 15 n.31 (attempting such a limitation). Because the counterclaims sought more than an offset to the government's recovery, they are outside the recoupment exception to sovereign immunity for this reason as well. *Santa Clara*, 819 F. Supp. at 514 (affirming dismissal of counterclaims: "Although counterclaimants note in their brief that '[r]elief in [a recoupment] . . . counterclaim will be limited to the extent of diminishing or defeating the government's recovery,' their counterclaim is not characterized this way.").

II. Defendants' Challenge to the Dismissal of their Third-Party Claims Against Xerox Is Not Within the Scope of this Interlocutory Appeal.

Defendants present a cursory argument that the trial court erred in dismissing defendants' third-party claims against Xerox. Pet. Br. 38-39. There is no appellate jurisdiction to review that issue in this interlocutory posture. *See supra* pp.xiv-xvi. The court of appeals so held, Op.21-25, and defendants do not even address that

holding. Because that holding is undisputed, the State does not address here defendants' argument regarding their third-party claims.

Prayer

If the petition for review is granted, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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/s/ J. Campbell Barker
J. Campbell Barker

No. 16-0671

In the Supreme Court of Texas

DR. BEHZAD NAZARI, D.D.S., ET AL.,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent,

v.

XEROX CORPORATION ET AL.,
Respondents.

On Petition for Review from the
Third Court of Appeals, Austin, Texas
Cause No. 03-15-00252-CV

APPENDIX TO BRIEF ON THE MERITS FOR THE STATE OF TEXAS

Tab A: Court of Appeals Slip Opinion

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

ON MOTION FOR REHEARING

NO. 03-15-00252-CV

Dr. Behzad Nazari, D.D.S. d/b/a Antoine Dental Center; Dr. Behzad Nazari; Harlingen Family Dentistry, P.C. a/k/a Practical Business Solutions, Series LLC; Juan D. Villarreal D.D.S., Series PLLC d/b/a Harlingen Family Dentistry Group; Dr. Juan Villareal; Dr. Vivian Teegardin; Richard F. Herrscher, D.D.S., M.S.D., P.C.; Dr. Richard F. Herrscher; M&M Orthodontics, PA; Dr. Scott Malone; Dr. Diana Malone; Michelle Smith; National Orthodontix, MGMT, PLLC; Dr. John Vondrak; RGV Smiles By Rocky Salinas, D.D.S. PA; and Dr. Rocky Salinas, Appellants

v.

The State of Texas; Xerox Corporation; and Xerox State HealthCare, LLC, f/k/a ACS State HealthCare, LLC, Appellees[1]

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT NO. D-1-GN-14-005380, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

O P I N I O N

Our opinion and judgment issued on February 26, 2016, are withdrawn, and the following opinion is substituted. The Dental Groups' motion for rehearing is denied.

The State initiated an enforcement action against the Dental Groups under the Texas Medicaid Fraud Prevention Act alleging that the Dental Groups engaged in various unlawful acts and seeking to impose civil penalties. In response, the Dental Groups filed counterclaims

[1] For ease of reading, we will refer to all of the appellants as the "Dental Groups" and to Xerox Corporation and Xerox State HealthCare, LLC, f/k/a ACS State HealthCare, LLC as "Xerox."

against the State and also filed third-party claims against Xerox. Subsequent to the Dental Groups filing their counterclaims and third-party claims, the State filed a plea to the jurisdiction asserting that the Dental Groups' counterclaims against the State were barred by sovereign immunity. In addition, the State filed a motion to dismiss the Dental Groups' third-party claims against Xerox. After considering the State's requests along with the Dental Groups' responses, the district court granted the State's plea and the State's motion to dismiss. Shortly after the district court made its rulings, the Dental Groups filed an interlocutory appeal challenging both rulings. Further, although Xerox is an appellee in this case, it also filed appellate briefing challenging the district court's decision to dismiss the claims against Xerox. We will affirm the portion of the district court's order dismissing the Dental Groups' counterclaims against the State, and we will dismiss for want of jurisdiction the Dental Groups' issue urging that the district court should not have dismissed their third-party claims against Xerox.

GOVERNING LAW

Before delving into the facts underlying this case, we provide a brief overview of the relevant statutes and regulations pertaining to this appeal. This appeal stems from orthodontic services that were provided to Texas citizens and paid for by Texas Medicaid. *See* Tex. Hum. Res. Code § 32.001 (explaining that purpose of Medicaid is to "enable the state to provide medical assistance on behalf of needy individuals and to enable the state to obtain all benefits for those persons authorized" by federal law); *see also Hawkins v. Dallas Cty. Hosp. Dist.*, 150 S.W.3d 535, 536 (Tex. App.—Austin 2004, no pet.) (stating that "Medicaid is a federal-state assistance program, run by state governments within federal guidelines, that pays for health care services provided to eligible recipients—low-income people of any age—from federal, state, and local tax funds" (citing

42 U.S.C. §§ 1396-1396v)). In general, "[o]rthodontic services for cosmetic reasons only are not a covered Medicaid service," but Medicaid can be used for the "treatment of severe handicapping malocclusion and other related conditions as described and measured by the" Texas Medicaid Provider Procedures Manual. 25 Tex. Admin. Code § 33.71(a) (2015) (Tex. Dep't of State Health Servs., Orthodontic Servs. and Prior Authorization); *see also id.* § 33.2(8) (2015) (Tex. Dep't of State Health Servs., Definitions) (describing what services are medically necessary and explaining that services are not medically necessary if, among other reasons, they are "primarily for the convenience of the client or provider"); 2003 Texas Medicaid Provider Procedures Manual ("Provider Manual"), § 18.20.3, http://www.tmhp.com/TMHP_File_Library/Provider_Manuals/TMPPM/Archives%20(TMPPM%202003,%202004)/2003_TMPPM.pdf (outlining permissible orthodontic services, including "[c]orrection of severe handicapping malocclusion," "[c]rossbite therapy," "[h]ead injury involving severe traumatic deviation," and "[o]rthognathic surgery" needed for application of braces). In order for Medicaid to cover the limited types of treatment listed above, the orthodontic treatment "must be prior authorized." 25 Tex. Admin. Code § 33.71(a); *see also* Provider Manual § 18.9 (stating that "[m]andatory prior authorization is required for consideration of reimbursement" for orthodontic services). When seeking prior authorization, providers must submit documentation demonstrating the need for the treatment as well as a treatment plan. Provider Manual § 18.20.1.

Moreover, the Provider Manual in effect during the relevant time specified that "[p]roviders are **responsible** for obtaining authorization for a complete orthodontic treatment plan." *Id.* In addition, the Provider Manual explained that when submitting a claim for reimbursement, "the provider certifies" that, among other things, "[t]he information on the claim form is true,

accurate, and complete" and that the treatment is medically necessary. *Id.* § 2.2.7; *see also id.* § 2.3 (requiring provider to maintain "a current understanding of the requirements for participation in the Texas Medicaid Program"). Furthermore, the Provider Manual warned that providers who submit "a false statement or misrepresentation, or omit[] pertinent facts" in order to "obtain greater compensation" or "to meet prior authorization requirements" are "subject to review, fraud referral, and/or administrative sanctions." *Id.* § 2.3.

To ensure compliance with the various Medicaid requirements and to prevent the improper depletion of Medicaid funds, several enforcement mechanisms have been created. *See, e.g.*, Tex. Penal Code § 35A.02 (criminalizing, among other activities, making false statement or misrepresentation to receive benefit from Medicaid program); 1 Tex. Admin. Code §§ 371.1601-.1719 (2015) (Tex. Health & Human Servs. Comm'n, Medicaid & Other Health & Human Servs. Fraud & Abuse Program Integrity) (authorizing Office of Inspector General of Health and Human Services Commission to bring administrative enforcement proceeding against service providers). The enforcement mechanisms at issue in this case are found in the Texas Medicaid Fraud Prevention Act (the "Act"). *See* Tex. Hum. Res. Code §§ 36.001-.132.[2] The Act prohibits certain "Unlawful Acts," *id.* § 36.002, and authorizes the State to collect a civil penalty from an individual who has violated the Act, *id.* §§ 36.007, .052. In particular, the Act states that "a person who commits an unlawful act is liable to the state for" "the amount of any payment . . . provided under the Medicaid program . . . as a result of the unlawful act" along with "interest on the amount of the payment" as well as "a civil penalty of . . . two times the amount of the payment." *See id.* § 36.052(a)(1), (2), (4). The Act also allows for the imposition of additional civil penalties in certain circumstances, *id.*

[2] Unless otherwise necessary, we will refer to the current version of the Act.

§ 36.052(a)(3), as well as "fees, expenses, and costs reasonably incurred . . . including court costs, reasonable attorney's fees, witness fees, and deposition fees," *id.* § 36.007.

BACKGROUND

The attorney general, acting on behalf of the State, initiated an enforcement action under the Act against the Dental Groups who provided services to Medicaid patients over an extended period of time.[3] In its petition, the State alleged that the Dental Groups "submitted or caused to be submitted false statements, information or misrepresentations of material facts, or omitted pertinent facts to Texas Medicaid to obtain Medicaid prior authorization and payment for orthodontic services and appliances." In particular, the State asserted that the Dental Groups misrepresented "the severity of the patients' dental conditions, filed claims based on those [misrepresentations], and [were] paid by Texas Medicaid for services for which the patients were not qualified to receive"; that the Dental Groups "submitted or caused to be submitted claims for payment to Texas Medicaid for products and services that were never provided to Texas Medicaid recipients"; that the Dental Groups "submitted or caused to be submitted claims for payment to Texas Medicaid for products and services that were more costly than the products and services actually provided"; that the Dental Groups "engaged in an unlawful 'kickback' scheme involving

[3] Before initiating this enforcement action, the Health and Human Services Commission pursued administrative remedies against some of the Dental Groups, *see* Tex. Gov't Code § 531.102, and this Court previously reviewed the propriety of some of those remedies, *see Harlingen Family Dentistry, P.C. v. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 481, 488 (Tex. App.—Austin 2014, pet. dism'd) (invalidating agency rule allowing Commission to retain funds that were accumulated during payment hold even after payment hold had been terminated and allowing Commission to use those funds as offset); *Janek v. Harlingen Family Dentistry, P.C.*, 451 S.W.3d 97, 99 (Tex. App.—Austin 2014, no pet.) (affirming trial court's order directing Commissioner to release funds held under payment hold). Those administrative remedies and the issues from the prior cases do not bear on the issues in the current appeal.

the referral of Texas Medicaid patients to a third party/parties for the provision of oral and maxillofacial surgery services"; that the Dental Groups misrepresented "that patients had a 'crossbite' in order to obtain prior authorization, filed claims based on those false diagnoses, and were paid by Texas Medicaid for services for which the patients were not qualified"; and that the Dental Groups misrepresented "that proper, licensed employees" performed the orthodontic measures and made diagnoses, "which permitted them to receive Medicaid payments they should not have received." In light of those allegations, the State sought to recover the amount of the allegedly improper Medicaid payments made to the Dental Groups, prejudgment interest on those payments, "two times the amount or the value of such payments," additional civil penalties for specific violations, as well as the costs, attorney's fees, and expenses that the State incurred in seeking relief under the Act.

In response to the State's enforcement action, the Dental Groups filed counterclaims against the State as well as third-party claims against Xerox. During the time relevant to this appeal, the State entered into a contract with Xerox under which Xerox had the responsibility to, among other duties, review the prior-authorization requests submitted by providers seeking to perform and to be reimbursed for orthodontic services.[4] In their counterclaims, the Dental Groups alleged that "[t]he State conspired with [Xerox] to induce the [Dental Groups] into a reasonable belief that the statements, information and representations of material fact [the Dental Groups] made to Texas Medicaid to obtain prior authorizations and payment for orthodontic services and appliances

[4] The State has filed its own enforcement action against Xerox contending that Xerox made various misrepresentations regarding its prior-authorization-review process while acting as the State's fiscal intermediary for the Medicaid program. *See* No. D-1-GV-14-000581, *State v. Xerox Corp.* (Travis Cty. 53rd Jud. Dist. Ct.). That proceeding is not part of this appeal.

were, in fact, true and correct." In addition, the Dental Groups asserted that "[t]he State conspired with Xerox to allow Xerox to violate its various contractual duties," that the State "breached the terms of the contract [with Xerox] by failing to supervise Xerox," and that the State committed conversion by withholding money from the Dental Groups for "services for which [they] should be paid."

Regarding their third-party claims against Xerox, the Dental Groups alleged that Xerox committed fraud by making false representations to the Dental Groups when it issued the "prior authorization approvals" that the Dental Groups relied on. In addition, the Dental Groups argued that Xerox breached its contract with the State by failing to thoroughly review the prior-authorization requests and that this breach injured the Dental Groups, who were third-party beneficiaries to the contract. Further, the Dental Groups alleged that Xerox's actions "constitute[d] promissory estoppel" because the Dental Groups "reasonably, substantially, and foreseeably relied on Xerox's promises" that the prior authorizations were proper. Moreover, the Dental Groups urged that Xerox's "actions constitute[d] negligent hiring and/or negligent supervision" because Xerox was required to but did not hire "a licensed dentist to render a diagnosis regarding medical necessity." The Dental Groups also asserted that Xerox's failure to hire qualified staff to review the prior-authorization requests was negligent and grossly negligent and that Xerox made negligent misrepresentations to the Dental Groups by representing "that Xerox's prior authorization approvals were dispositive of medical necessity" even though "Xerox knew or should have known that its representations were false." Finally, the Dental Groups made a "[c]laim for contribution from Xerox" in the event that the district court awards "damages that represent any . . . recovery by the State against" the Dental Groups.

Subsequent to the Dental Groups filing their counterclaims as well as their third-party claims against Xerox, the State filed a joint plea to the jurisdiction and motion to dismiss the third-party claims. Specifically, the State argued that the Dental Groups' counterclaims against the State are barred by sovereign immunity. In addition, the State urged that the Dental Groups' third-party claims should be dismissed because the Act "does not authorize a defendant to bring a third party claim" or because the claims "have no basis in law or fact." Alternatively, the State alleged that even if the Act permitted third-party claims, the Dental Groups' third-party claims against Xerox are "still barred by sovereign immunity."

After considering the State's joint plea to the jurisdiction and motion to dismiss as well as the Dental Groups' responsive filings, the district court issued an order granting the State's plea and motion to dismiss. In particular, the district court dismissed with prejudice the Dental Groups' counterclaims against the State because those counterclaims are barred by sovereign immunity and dismissed the Dental Groups' third-party claims against Xerox because the Act does not authorize third-party claims. In its order, the district court explained that "the State is entitled to bring this action against defendants to the exclusion of other parties."

The Dental Groups appeal the district court's order and argue in two issues that the district court erred by dismissing their counterclaims and their third-party claims.

DISCUSSION

Dismissal of the Dental Groups' Counterclaims

In their first issue on appeal, the Dental Groups contend that the district court erred by granting the State's plea to the jurisdiction and by dismissing their counterclaims against the State because those counterclaims are not barred by sovereign immunity.

"Absent legislative waiver, sovereign immunity deprives Texas courts of subject-matter jurisdiction over any suit against" the State. *Risk Mgmt. Strategies, Inc. v. Texas Workforce Comm'n*, 464 S.W.3d 864, 868 (Tex. App.—Austin 2015, pet. dism'd); *see University of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 115 (Tex. 2010) (per curiam) (stating that "[i]n general, the State of Texas retains sovereign immunity from suit"). "The Legislature may consent to suits against [it] by statute or by resolution." *Risk Mgmt. Strategies*, 464 S.W.3d at 868. Sovereign immunity is properly asserted in a plea to the jurisdiction because it deprives a court of subject-matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Determining "[w]hether a court has subject-matter jurisdiction is a question of law, which we review de novo, when disputed facts relevant to the jurisdictional inquiry are not presented." *Risk Mgmt. Strategies*, 464 S.W.3d at 868.

When resolving the jurisdictional inquiry in this case, we have to construe various provisions of the Act. Statutory construction is a question of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). When performing that task, "the primary objective is to give effect to the Legislature's intent as expressed in the statute's language." *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). In addition, legislative intent is determined from the statute as a whole and not from isolated portions. *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008). "In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language." Tex. Gov't Code § 311.034. In other words,

"[sovereign] immunity remains intact unless surrendered in express and unequivocal terms by the statute's clear and unambiguous waiver." *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 512 (Tex. 2012).

Nothing in the provisions of the Act can be construed as a waiver of immunity for the claims at issue in this case. In fact, the only provision of the Act seeming to authorize a recovery against the State is found in section 36.112. *See* Tex. Hum. Res. Code § 36.112. That section is located in the subchapter authorizing private parties to file "a civil action . . . for the person and for the state. The action shall be brought in the name of the person and of the state." *Id.* § 36.101; *see id.* §§ 36.101-.117. In section 36.112, the legislature explained that the provisions of the Civil Practice and Remedies Code allowing parties to recover fees, expenses, and attorney's fees against a state agency for frivolous claims, *see* Tex. Civ. Prac. & Rem. Code §§ 105.001-.004, apply to Medicaid fraud-prevention claims filed by private parties on behalf of the State, Tex. Hum. Res. Code § 36.112.[5] Moreover, another section in that subchapter explains that "[e]xcept as provided by Section 36.112, this subchapter does not waive sovereign immunity." *Id.* § 36.116. In other words, that provision explains that the filing of an enforcement action by a private party does not waive the State's sovereign immunity except for recovery against the State for frivolous claims. *Id.* We do not agree with the Dental Groups' assertion that this provision demonstrates that the legislature intended to waive sovereign immunity for enforcement actions that are filed by the State rather than private parties because nothing in the remainder of the Act clearly indicates that

[5] It is worth noting that the Human Resources Code specifies that "[a] person other than the state may not intervene or bring a related action based on the facts underlying a pending action brought under this subchapter" regarding actions brought by private parties. Tex. Hum. Res. Code § 36.106.

the legislature intended to waive sovereign immunity when the State files enforcement actions under the Act.

When arguing that the district court erred by granting the Dental Groups' plea to the jurisdiction, the Dental Groups argue that by initiating this enforcement action against the Dental Groups and by "seeking monetary relief," the State waived its sovereign immunity. Stated differently, the Dental Groups contend that "[b]ecause the State initiated this action against the Dental Group[s] in the form of affirmative claims for monetary relief, it should be indisputable that the State has waived its immunity from the Dental Groups' counterclaims that relate to the subject matter of this lawsuit." Moreover, the Dental Groups contend that their counterclaims are compulsory counterclaims. *See* Tex. R. Civ. P. 97(a) (requiring pleading to assert counterclaim, "which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim").

When making these assertions, the Dental Groups primarily rely on *Reata Construction Corporation v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006).[6] In *Reata*, the City of

[6] In their briefs, the Dental Groups also refer to a prior decision by the commission of appeals that was adopted by the supreme court. *See Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107 (Tex. 1933). In *Anderson*, the State and various officials sought a temporary injunction against Anderson as well as penalties for allegedly operating and "aiding and abetting the operation of trucks over the highways of Texas . . . without obtaining permits from the State Railroad Commission." *Id.* at 107. Although the trial court denied the relief requested by the State, the State continued to arrest, prosecute, and threaten to arrest Anderson's truck drivers. *Id.* In response, Anderson sought and was given a temporary injunction against various State officials to enjoin them "from further arresting, prosecuting, and threatening to arrest the drivers." *Id.* Anderson also filed a counterclaim alleging that the officials "were acting in excess of their authority" and seeking "an order enjoining such officers from interfering with the operation of [Anderson's] trucks." *Id.* at 108. On the same day that the counterclaim was filed, the State nonsuited its claims, *id.* at 107, and the State later filed a plea to the jurisdiction seeking to dismiss Anderson's counterclaim, *id.* at 108. Ultimately, the reviewing court determined that the district court had jurisdiction over the counterclaim. *Id.* at 110. When making this determination, the court explained that the State's

Dallas issued a temporary license to Dynamic Cable Construction Corporation, Inc., to install a fiber-optic cable, and Dynamic Cable subcontracted with Reata Construction Corporation, which inadvertently drilled into a water main and flooded a nearby building. *Id.* at 373. The owner of the building sued Dynamic Cable and Reata, and "Reata filed a third-party claim against the City alleging that the City negligently misidentified the water main's location." *Id.* "Before answering Reata's third-party claim, the City intervened in the case, asserting negligence claims against Dynamic" Cable. *Id.* Subsequently, the City answered Reata's petition, "filed an amended plea in intervention asserting claims of negligence against Reata," and filed "a plea to the jurisdiction

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"immunity from suit does not extend to a suit against state officers to enjoin the enforcement of an invalid law" and that "where a state voluntarily files a suit and submits its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy." *Id.* In light of the language addressing the ability of a defendant to bring a defensive complaint, the Dental Groups contend that *Anderson* compels a determination that the district court had jurisdiction over their counterclaims.

We believe that the Dental Groups' reliance on *Anderson* is misplaced. Although the supreme court may have indicated that Anderson was free to pursue its counterclaim in response to the State's suit, those assertions were framed by the type of relief that Anderson was seeking: prospective injunctive relief against state officials who were allegedly exceeding the scope of their authority. In a subsequent opinion, the supreme court later explained that the type of relief sought by Anderson is not barred by sovereign immunity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). In particular, the supreme court explained that "while [sovereign] immunity generally bars suits for retrospective monetary relief, it does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions." *Id.* at 368-69; *see also id.* at 372 (explaining that to fall within "th[e] *ultra vires* exception, a suit must . . . allege, and ultimately prove, that the officer acted without legal authority"). Accordingly, we do not believe that the language in *Anderson* supports the Dental Groups' argument that by pursuing the enforcement action under the Act, the State waived its immunity against the types of counterclaims made by the Dental Groups.

asserting" that it was immune from suit.[7] *Id.* "The trial court denied the City's plea to the jurisdiction, and the City" appealed that decision. *Id.* at 374.

On appeal, the supreme court explained that it has "generally deferred to the Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved." *Id.* at 375. However, the court also reasoned that because sovereign immunity is a "common-law doctrine," the judiciary has the responsibility of defining the "boundaries" of the doctrine and determining "under what circumstances sovereign immunity exists in the first instance." *Id.* Moreover, the court stated that if a "governmental entity . . . chooses to engage in litigation to assert affirmative claims for *monetary damages*, the entity will presumably have made a decision to expend resources to pay litigation costs" and that if "the opposing party's claims can operate only as an offset to reduce the government's recovery, no tax resources will be called upon to pay a judgment, and the fiscal planning of the governmental entity should not be disrupted." *Id.* (emphasis added). Accordingly, the court explained that "a determination that a governmental entity's immunity from suit does not extend to a situation where the entity has filed suit is consistent with the policy issues involved with immunity." *Id.* In light of this reasoning, the court determined that "where the governmental entity has joined into the litigation process by asserting its own affirmative claims for *monetary relief*, we see no ill befalling the governmental entity or hampering of its governmental functions by allowing adverse parties to assert, as an offset, claims germane to, connected with, and properly defensive to those asserted by the governmental entity." *Id.* at 376-

[7] "Sovereign immunity protects the State from lawsuits for money damages," *Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002), and political subdivisions of the State, including cities, have a similar immunity called governmental immunity, *see Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). In this opinion, we will refer to both types of immunity as sovereign immunity.

77 (emphasis added). Moreover, the supreme court explained that its prior decisions stating "that immunity from suit does not bar claims against the governmental entity if the claims are connected to, germane to, and defensive to the claims asserted by the entity, in effect, modified the common-law immunity doctrine and, to an extent, abrogated immunity of the entity that filed suit." *Id.* at 377; *see City of Dall. v. Albert*, 354 S.W.3d 368, 375 (Tex. 2011) (explaining that when governmental entity asserts affirmative claims for monetary relief, trial court has jurisdiction over those claims as well as "certain offsetting, defensive claims asserted against the entity. . . . because the judiciary has abrogated the [State]'s common law immunity from suit as to certain offsetting claims"). Further, the supreme court reasoned that "when the City filed its affirmative claims for relief as an intervenor, the trial court acquired subject-matter jurisdiction over claims made against the City which were connected to, germane to, and properly defensive to the matters on which the City based its claim for *damages*." *Reata*, 197 S.W.3d at 377 (emphasis added); *see City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 524 (Tex. App.—Austin 2014, no pet.) (stating that courts have determined that compulsory counterclaim to claim by governmental entity "would necessarily qualify as one that is 'germane to,' 'connected with,' and/or 'properly defensive' to it"). Finally, the supreme court determined that by filing that suit, "the City must participate in the litigation process as an *ordinary litigant*" and decided "to leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to claims the City asserts." *Reata*, 197 S.W.3d at 377 (emphasis added). *But see Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 407 (Tex. 1997) (explaining that to "state what happens *if* the State consents to be sued says nothing about whether the State consents to be sued"), *superseded by statute on other*

grounds as stated in General Servs. Comm'n v. Little-Tex Insulation Co., Inc., 39 S.W.3d 591, 593 (Tex. 2001).

In light of the supreme court's decision allowing Reata to pursue claims against the City, the Dental Groups assert that they should similarly be allowed to pursue counterclaims against the State after the State initiated this enforcement action under the Act. However, it is not entirely clear that the recovery sought by the State in this enforcement action qualifies as a suit for *damages* or *monetary relief* as those terms were used in *Reata* or that the State was acting as an *ordinary litigant* when it pursued this enforcement action. In *Reata*, the City of Dallas was seeking damages stemming from Reata's alleged negligence. 197 S.W.3d at 373; *see also Albert*, 354 S.W.3d at 371-72, 375-76 (addressing suit in which firefighters sued City of Dallas alleging that City had underpaid them and in which City filed counterclaim asserting that it had overpaid firefighters and seeking "to recover alleged overpayments" and concluding that City's decision to nonsuit its counterclaims did not deprive trial court of jurisdiction over firefighters' claims to extent that claims served as offset to City's counterclaims but that after nonsuit by City, firefighters' claims could no longer serve as offset against any recovery by City); *Carowest Land*, 432 S.W.3d at 510, 527 (determining that trial court had jurisdiction over claims filed by party after City of New Braunfels filed counterclaims for breach of contract); *City of San Antonio v. KGME, Inc.*, 340 S.W.3d 870, 873, 877-78 (Tex. App.—San Antonio 2011, no pet.) (applying *Reata* and affirming trial court's determination that trial court had jurisdiction over party's contract claims and prompt-payment claims when City of San Antonio filed counterclaim for breach of contract based on same facts and controversy); *Harris Cty. v. Luna-Prudencio*, 294 S.W.3d 690, 694, 698 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (invoking *Reata* and determining that trial court had jurisdiction over

party's counterclaim against county when county filed suit against party for damages sustained in car accident involving party and one of County's employees). In contrast, by bringing this action, the State seeks to punish the Dental Groups for allegedly violating a public-welfare statute and to deter others from committing similar violations, and the State sought to achieve these goals by using the enforcement measures in the Act to require the payment of civil penalties that well exceeds any amount of Medicaid funds that were expended by the State. *See* Tex. Hum. Res. Code § 36.052(a). Moreover, the provision authorizing those penalties does not refer to them as "damages" and does not limit the recovery to any type of overpayment; rather, the provision authorizes the full recovery of the payment as well as an additional double recovery of the payment plus other potential penalties. *See id.* In fact, in section 36.006, the legislature distinguished civil penalties under the Act from damages. *See id.* § 36.006. Specifically, section 36.006 provides that "[t]he application of a civil remedy under this chapter does not preclude the application of another common law, statutory, or regulatory remedy, except that a person may not be liable for a civil remedy under this chapter and civil damages . . . if the civil remedy and civil damages . . . are assessed for the same act." *Id.*[8]

[8] The Act does mention damages in the provisions authorizing actions by private persons on behalf of the State. In particular, section 36.115 prohibits retaliation against persons who initiate an enforcement action under the Act or assist "in an action" and specifies that if retaliation is taken against the person, the person "is entitled to," among other things, "not less than two times the amount of back pay, interest on the back pay, and compensation for any special *damages* sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees." Tex. Hum. Res. Code § 36.115(a) (emphasis added). When describing the governing standard of proof, the Act also mentions damages in section 36.1021 and provides that "the state or person bringing the action must establish each element of the action, including damages, by a preponderance of the evidence." *Id.* § 36.1021. Given that section 36.1021 is found in the subchapter governing enforcement actions brought by private parties on behalf of the State, that damages are only mentioned in the context of retaliation against private parties who bring enforcement actions on behalf of the State or assist in those actions, and that the Act does not refer to the civil penalties in

Recently, one of our sister courts of appeals was asked to consider the distinction between when the State acts as a private litigant seeking damages and when the State acts in its sovereign capacity and uses its police powers to impose and recover a civil penalty. *See State v. Emeritus Corp.*, 466 S.W.3d 233 (Tex. App.—Corpus Christi 2015, pet. filed). In *Emeritus*, the State filed suit against Emeritus and sought civil penalties under the Texas Deceptive Trade Practices and Consumer Protection Act and the Assisted Living Facility Licensing Act after one of the residents living in an assisted-living facility run by Emeritus was left unsupervised and died. *Id.* at 237-38. After the State filed its suit, Emeritus argued that the State's suit was a health-care-liability claim and moved to dismiss the suit on the ground that the State failed to file a timely expert report under the Texas Medical Liability Act. *Id.* at 238; *see* Tex. Civ. Prac. & Rem. Code § 74.351(a) (requiring party pursuing health-care claim to file expert report). The trial court granted the motion to dismiss. *Emeritus*, 466 S.W.3d at 238.

On appeal, the State argued that the trial court erred because the State was not seeking "damages as required by the statutory definition of a claimant" under the Texas Medical Liability Act. *Id.* at 247. When deciding that the term "'damages' . . . does not include civil penalties sought by the State rather than a private litigant," *id.* at 249, our sister court noted that the definition of "'damages' means money claimed by, or ordered to be paid to, a person as compensation for loss or injury" and distinguished that from the definitions for "'penalty' [as meaning] a punishment imposed on a wrongdoer, usually in the form of imprisonment or a fine" and for "'civil penalty' [as meaning] a fine assessed for a violation of a statue or regulation," *id.* at 247 (citing *Black's Law Dictionary*

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section 36.052 as damages, we do not believe that the use of the word "damages" in section 36.115 and 36.1021 supports the assertion that the State is seeking "damages" or "monetary relief" as those terms were used in *Reata*.

355, 981 (9th Ed. 2010)). Moreover, our sister court explained that "various federal courts have rejected the proposition that damages, which are compensatory in nature and payable to a private litigant, are congruent with civil penalties, which are punitive in nature and payable to a governmental entity." *Id.* at 247-48; *see Gabelli v. Securities & Exch. Comm'n*, 133 S. Ct. 1216, 1223 (2013) (stating that "[i]n a civil penalty action, the Government is not only a different kind of plaintiff, it seeks a different kind of relief" because "penalties . . . go beyond compensation [and] are intended to punish[] and label defendants wrongdoers"); *Tull v. United States*, 481 U.S. 412, 422 (1987) (providing that penalties are "intended to punish culpable individuals" and not "to extract compensation or restore the status quo"); *Ellett Bros., Inc. v. United States Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001) (noting that "civil penalties . . . are not 'damages' payable to the victim, but fines or assessments payable to the government"); *see also Brown v. De La Cruz*, 156 S.W.3d 560, 561 (Tex. 2004) (explaining that statutory penalties are generally "not payable to a private litigant" but that "damages" may be awarded to private litigants). Moreover, our sister court reasoned that "the State, acting in its sovereign capacity seeking civil penalties, rather than damages, is not a claimant subject to the expert report requirement under the" Texas Medical Liability Act and that the Texas Medical Liability Act did "not apply to the case." *Emeritus*, 466 S.W.3d at 249; *see Malouf v. State ex rel. Ellis*, 461 S.W.3d 641, 647 (Tex. App.—Austin 2015, pet. filed) (determining that when State brings enforcement action under Texas Medicaid Fraud Prevention Act, it "is not a 'person' within the definition of 'claimant' under the [Texas Medical Liability Act] and, thus, not subject to the expert report requirement").

When reaching this determination, our sister court also relied on the fact that the "fundamental purposes" for the Texas Deceptive Trade Practices and Consumer Protection Act and

the Assisted Living Facility Licensing Act differ from that of the Texas Medical Liability Act. *Emeritus*, 466 S.W.3d at 249. In particular, the court noted that the purpose of the Texas Medical Liability Act is to impose tort reform in order to make health care more affordable but that the purpose of the former two statutes is to protect the populace and that those statutes "allow and engender a duty on the part of the State to enforce those statutes" through the State's police power, which "is a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort, and the welfare of the public." *Id.* at 249-50. For those reasons and others, our sister court concluded that "[t]he State is not subject to the expert report requirement in the [Texas Medical Liability Act] when it, pursuant to its police power and acting in its sovereign capacity, seeks statutory civil penalties and injunctive relief." *Id.* at 251.

Although we recognize that the issues, statutes, and circumstances in *Emeritus* differ from those in the current case, we believe that the analysis from *Emeritus* supports a determination that the civil penalties that the State is seeking against the Dental Groups do not qualify as *damages* or *monetary relief* as those terms were used in *Reata*. Moreover, in light of the fact that the purpose of the Act is to protect the populace and public fisc by punishing service providers who seek compensation through Medicaid that they are not entitled to and to discourage other service providers from behaving similarly, the analysis from *Emeritus* also persuades us that when the State pursues an enforcement action under the Act, it is not acting as an ordinary or private litigant as described in *Reata* but is instead acting in its sovereign capacity and exercising its police powers.[9]

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[9] As further support for the idea that enforcement actions under the Act are not suits for damages filed by the State in its private capacity, we note that the Act appears to have its origins in criminal rather than civil law. Specifically, most of the unlawful actions listed in section 36.002 of the Act seem to be based on the federal law outlining unlawful acts involving federal health-care programs and setting out criminal penalties for those acts. *Compare* Tex. Hum. Res. Code § 36.002,

Accordingly, although the State initiated the enforcement action forming the subject of this appeal, we conclude that the State did not "leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to" the claims that the State asserted. *See Reata*, 197 S.W.3d at 377.[10]

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with 42 U.S.C. § 1320a-7b. Moreover, a prior version of section 36.131 of the Human Resources Code criminalized the commission of an unlawful act listed in section 36.002. *See* Act of June 1, 1997, 75th Leg., R.S., ch. 1153, § 4.09, sec. 36.131, 1997 Tex. Gen. Laws 4324, 4349 (setting out circumstances in which unlawful acts under section 36.002 are punished as misdemeanors or as felonies), *repealed by* Act of May 23, 2005, 79th Leg., R.S., ch. 806, § 19, sec. 36.131, 2005 Tex. Gen. Laws 2778, 2787.

[10] As authority for their arguments attacking the district court's ruling, the Dental Groups cite federal cases stating that counterclaims are permitted under the federal False Claims Act. *See Texas v. Caremark, Inc.*, 584 F.3d 655, 657 (5th Cir. 2009) (explaining that False Claims Act is analogous to Texas Medicaid Fraud Prevention Act). In particular, federal courts have determined that sovereign immunity is not a bar to compulsory counterclaims under the False Claims Act. *See id.* at 659. Compulsory counterclaims are "those 'arising out of the same transaction or occurrence which is the subject matter of the government's suit.'" *Id.* (quoting *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir.1967)). Moreover, "'the relief sought must be of the same kind or nature as the [government's] requested relief,'" and "'any damages sought cannot exceed the amount sought by the government's claim.'" *United States v. Intrados/Int'l Mgmt. Grp.*, 277 F. Supp. 2d 55, 62 (D.D.C. 2003) (quoting *United States v. Ownbey Enters., Inc.*, 780 F. Supp. 817, 820 (N.D. Ga. 1991)) (alteration in *Intrados*). Not all counterclaims are allowed; on the contrary, "[c]ounterclaims . . . that are based on damages which are independent claims may be permitted, so long as the claims do not 'have the effect of providing for indemnification or contribution,'" but counterclaims that require a determination that the defendant is liable under the False Claims Act are barred by sovereign immunity. *United States v. Campbell*, Civ. A. No. 08-1951, 2011 WL 43013, at *11 (D. N.J. Jan. 4, 2011) (quoting *United States ex rel. Miller v. Bill Harbert Int'l Constr. Inc.*, 505 F. Supp. 2d 20, 27 (D.D.C. 2007)). In other words, a defendant may pursue a counterclaim if the counterclaim is a cause of action for damages that are independent of the defendant's liability under the False Claims Act. *Id.*; *cf. Mortgages, Inc. v. United States Dist. Court for Dist. of Nev. (Las Vegas)*, 934 F.2d 209, 213 (1991) (explaining that purpose of False Claims Act is to deter future fraudulent claims and that passage of False Claims Act was not "intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a qui tam plaintiff with 'unclean hands'").

Having determined that the district court properly dismissed the Dental Groups' counterclaims under Texas law, we need not consider federal case law addressing the False Claims Act. However, we do note that it is not entirely clear that all of the Dental Groups' counterclaims

For these reason, we overrule the Dental Groups' first issue on appeal.[11]

Dismissal of the Dental Groups' Third-Party Claims

In their second issue on appeal, the Dental Groups argue that the district court erred by dismissing their third-party claims against Xerox. When asserting in its motion that the third-party claims should be dismissed, the State argued that the Act does not authorize third-party claims or, alternatively, that the Dental Groups' claims against Xerox are barred by sovereign immunity. In its order, the district court granted the State's motion to dismiss and determined that the Act does not authorize third-party claims and that "the State is entitled to bring this action against defendants to the exclusion of other parties."

When presenting their second issue on appeal, the Dental Groups incorporate their arguments regarding the propriety of dismissing their counterclaims against the State and similarly urge that their third-party claims are permissible.[12] In its appellee's briefing, Xerox asserts that "[a]lthough Xerox benefits from the State's argument that the trial court adopted in this case, Xerox

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would be permissible under the reasoning of the cited federal cases. At least some of the Dental Groups' counterclaims seem to be premised, in part, on the idea that the State and Xerox were also responsible for misrepresentations that the Dental Groups may have made when seeking prior authorization and when seeking and obtaining payment for services that they provided. In other words, it is not entirely clear that all of the Dental Groups' counterclaims are independent of their liability under the Act.

[11] Having determined that the district court correctly granted the State's plea to the jurisdiction on the ground discussed above, we need not address the State's other jurisdictional arguments contained in its plea.

[12] As an alternative form of relief, the Dental Groups ask this Court to "reverse the trial court's grant of the Motion to Dismiss [their] third party claims, and instruct the [district] court to sever [their] third party claims against Xerox into a different cause." Given our ultimate resolution of this issue, we need not address this alternative request, but we do note that it does not appear that the Dental Groups made any request to sever their claims to the district court.

does not agree with it. There is no prohibition against . . . third-party claims in a Texas Medicaid fraud suit. Because the order under review assumes there is, Xerox agrees that it is erroneous." Moreover, Xerox argues that chapter 33 of the Civil Practice and Remedies Code applies to claims under the Act and allows for contribution claims. *See* Tex. Civ. Prac. & Rem. Code § 33.001-.017 (allowing in tort claims for person to seek recovery from "a defendant, settling person, or responsible third party" who "is found responsible for a percentage of the harm for which relief is sought"). Accordingly, Xerox contends that even if some or all of the Dental Groups' third-party claims are contribution claims, those claims may be pursued under the Act.

The portion of the order forming the subject of this issue granted the State's motion to dismiss the Dental Groups' third-party claims against Xerox on *non-jurisdictional* grounds. Moreover, as mentioned above, that order is an interlocutory order because it "fail[ed] to dispose of all issues and parties." *See B.C. v. Rhodes*, 116 S.W.3d 878, 881 (Tex. App.—Austin 2003, no pet.). While the order disposed of some of the issues between the parties, it did not resolve the allegations made by the State asserting that the Dental Groups violated the Act. Generally speaking, "[a]ppellate courts have jurisdiction over appeals from final judgments and certain interlocutory orders that the legislature has designated appealable." *Id.*; *see Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001) (explaining that "[a] party may not appeal an interlocutory order unless authorized by statute"). Stated differently, if there is no statute authorizing an appeal of an interlocutory order, "[a]n appellate court lacks jurisdiction to review" the interlocutory order. *Quest Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000). In section 51.014 of the Civil Practice and Remedies Code, the legislature has identified the types of interlocutory orders that parties may appeal from. *See* Tex. Civ. Prac. & Rem. Code § 51.014. That section does authorize an appeal for

the Dental Groups' first issue because that first issue challenged the granting of "a plea to the jurisdiction by a governmental unit." *See id.* § 51.014(a)(8). But section 51.014 does not authorize an interlocutory appeal of the granting of a motion filed by a governmental unit seeking to dismiss third-party claims on non-jurisdictional grounds. *See id.* § 51.014.

In light of the preceding, we must conclude that this Court does not have jurisdiction over the trial court's ruling regarding the State's motion to dismiss the Dental Groups' third-party claims. When a party appeals from two interlocutory rulings, "only one of which is made appealable by statute, the proper course is to dismiss that portion which is non-appealable, and to rule on the portion from which an appeal may be taken." *Bobbitt v. Cantu*, 992 S.W.2d 709, 712 (Tex. App.—Austin 1999, no pet.).

In supplemental briefing, Xerox contends that this Court does have jurisdiction over the district court's dismissal of the third-party claims under section 51.014 because although the State styled its motion as a motion to dismiss third-party claims, the State also argued in its motion, as mentioned above, that the Dental Groups' third-party claims were barred by sovereign immunity due to the fact that Xerox was working on behalf of the State during the period of time relevant to this appeal. *See Ryland Enters., Inc. v. Weatherspoon*, 355 S.W.3d 664, 666 (Tex. 2011) (recognizing that "courts should acknowledge the substance of the relief sought despite the formal styling of the pleading"). Moreover, Xerox argues that when seeking to dismiss the Dental Groups' third-party claims, the State presented similar statutory arguments that it made in its plea to the jurisdiction seeking to dismiss the Dental Groups' counterclaims. For these reasons, Xerox contends that this Court has jurisdiction to consider the district court's dismissal of the Dental Groups' third-party claims.

Although we recognize that the supreme court has explained that appellate courts may review under subsection 51.014(a)(8) a ruling by a trial court pertaining to jurisdictional challenges made by a governmental unit even if the document containing the jurisdictional challenges was not styled as a plea to the jurisdiction, we do not believe that there has been a *ruling* on the jurisdictional grounds asserted. *See Thomas v. Long*, 207 S.W.3d 334, 339-40 (Tex. 2006) (determining that appellate court had jurisdiction over jurisdictional claims that were made in governmental unit's motion for summary judgment when trial court "implicitly denied" jurisdictional challenges by reaching merits of opposing party's claims that governmental unit alleged trial court did not have jurisdiction over); *see also Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 601 (Tex. 1999) (explaining that determinations regarding whether claims may be pursued in interlocutory appeal are not "constrained by the form or caption of a pleading" and instead should focus on merits of relief sought). As set out above, the district court did not enter an order dismissing the Dental Groups' third-party claims on jurisdictional grounds; on the contrary, when making its ruling on the third-party claims, the district court explained that it was granting the State's "Motion to Dismiss Third Party Claims" and dismissing the claims on the non-jurisdictional grounds urged by the State. In particular, the district court determined that the Act and other relevant statutes allow the State to bring these types of actions "against defendants to the exclusion of other parties."[13] Moreover, this case does not present a situation like that in *Thomas* where a trial court made an implicit ruling on the jurisdictional arguments; on the contrary, the district court in this case made no determinations

[13] In its order, the district court explained that its ruling was consistent with its other "rulings in the State's litigation against Xerox." When explaining one of those prior rulings granting the State's motion to strike Xerox's third-party petition in the enforcement action against Xerox, the district court determined that the Act does not authorize those types of claims.

regarding the merits of the third-party claims and instead dismissed them. *See Thomas*, 207 S.W.3d at 339; *cf. Waller Cty. v. City of Hempstead*, 453 S.W.3d 73, 76 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (determining that appellate court "lack[ed] jurisdiction over . . . purported interlocutory appeal" and dismissing appeal for want of jurisdiction because "the trial court did not rule on the plea to jurisdiction (either expressly or implicitly through its denial of Waller County's motion for summary judgment")).

For all of these reasons, we dismiss the Dental Groups' second issue on appeal for want of jurisdiction and express no opinion regarding the district court's ruling that dismissed the Dental Groups' third-party claims. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); *see also Art Inst. of Chi. v. Integral Hedging, L.P.*, 129 S.W.3d 564, 570 (Tex. App.—Dallas 2003, no pet.) (explaining that permissible appeal of interlocutory order "cannot be used as a vehicle for carrying other non-appealable interlocutory orders to the appellate court"); *Bobbitt*, 992 S.W.2d at 713 (determining that trial court's granting of partial summary judgment is not appealable even though grant was in order that also granted relief that could be subject of interlocutory appeal).[14]

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[14] As mentioned earlier, the State also filed an enforcement action against Xerox under the Act. In that proceeding, Xerox asserted third-party claims and sought to designate service providers as responsible third parties, and the district court granted the State's motion to strike the third-party claims and denied Xerox's motion to designate responsible third parties. Xerox challenged those rulings by filing a petition for writ of mandamus in this Court. In its mandamus petition, Xerox presented similar arguments regarding the propriety of third-party claims that it makes in its appellee's brief in this case. Previously, this Court denied Xerox's petition for writ of mandamus. *See In re Xerox Corp.*, No. 03-15-00401-CV, 2016 WL 768134, *1-2 (Tex. App.—Austin Feb. 26, 2016, orig. proceeding) (mem. op.).

In its supplemental briefing in this case, Xerox also argues that in the event that this Court determines that it does not have jurisdiction over the district court's ruling dismissing the Dental Groups' third-party claims, this Court should treat the Dental Groups' second appellate issue as invoking our original jurisdiction and determine whether mandamus relief is warranted regarding the district court's ruling dismissing the Dental Groups' third-party claims. Moreover, Xerox purports

CONCLUSION

Having overruled the Dental Groups' first issue on appeal and having dismissed their second issue for want of jurisdiction, we affirm the portion of the district court's order granting the State's plea to the jurisdiction and dismissing the Dental Groups' counterclaims against the State.

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David Puryear, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed in part; Dismissed in part on Motion for Rehearing

Filed: June 17, 2016

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to incorporate its analysis from its own petition for writ of mandamus in which it challenged the district court's ruling striking Xerox's third-party petition seeking recovery from various service providers. *See id.* Assuming without deciding that Xerox's purported invocation of our original jurisdiction is proper despite the fact that the Dental Groups have not made the request at issue and despite Xerox's role in this appeal, *see CMH Homes v. Perez*, 340 S.W.3d 444, 452-54 (Tex. 2011) (treating *appellant's* briefing as petition for writ of mandamus where appellant asked that appeal be treated as mandamus petition and where policy reasons compelled treatment as mandamus petition); *Waste Mgmt. of Tex., Inc. v. Blackwell*, 130 S.W.3d 337, 342-43 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (addressing whether mandamus relief was appropriate when *appellant* filed purported interlocutory appeal as well as petition for writ of mandamus raising same issues and when appellate court determined that it did not have jurisdiction over interlocutory appeal), we note as set out above that we denied Xerox's petition for writ of mandamus. Accordingly, were we to treat the Dental Groups' second appellate issue as seeking mandamus relief, we would similarly deny the request.

Tab B: Relevant Statutory Provisions

Texas Human Resources Code
Title 2. Human Services and Protective Services in General
Subtitle C. Assistance Programs
Chapter 32. Medical Assistance Program
Subchapter A. General Provisions

§ 32.001. Purpose of Chapter

The purpose of this chapter is to enable the state to provide medical assistance on behalf of needy individuals and to enable the state to obtain all benefits for those persons authorized under the Social Security Act or any other federal act.

§ 32.002. Construction of Chapter.

(a) This chapter shall be liberally construed and applied in relation to applicable federal laws and regulations so that adequate and high quality health care may be made available to all children and adults who need the care and are not financially able to pay for it.

(b) If a provision of this chapter conflicts with a provision of the Social Security Act or any other federal act and renders the state program out of conformity with federal law to the extent that federal matching money is not available to the state, the conflicting provision of state law shall be inoperative to the extent of the conflict but shall not affect the remainder of this chapter.

§ 32.003. Definitions

In this chapter:

(1) "Health and human services agencies" has the meaning assigned by Section 531.001, Government Code.

. . . .

(4) "Medical assistance" and "Medicaid" include all of the health care and related services and benefits authorized or provided under federal law for needy individuals of this state.

Subchapter B. Administrative Provisions

§ 32.021. Administration of the Program

(a) The commission is the single state agency designated to administer the medical assistance program provided in this chapter in accordance with 42 U.S.C. Section 1396a(a)(5). Subject to applicable federal law, the commission may delegate the operation of a part of the medical assistance program to another state agency. Notwithstanding any delegation, the commission retains ultimate authority over the medical assistance program.

. . . .

(g) Funds collected as a result of the imposition of penalties shall be applied to the protection of the health or property of residents of nursing facilities, including the cost of relocation of residents to other facilities and maintenance or operation of a facility pending correction of deficiencies or closure, or to incentive programs which recognize the highest quality care to residents who are entitled to Medicaid.

. . . .

(n) An assessment of monetary penalties under this section is subject to arbitration under Subchapter H-2, Chapter 242, Health and Safety Code.

. . . .

* * *

§ 32.024. Authority and Scope of Program; Eligibility

(a) The commission shall provide medical assistance to all persons who receive financial assistance from the state under Chapter 31 and to other related groups of persons if the provision of medical assistance to those persons is required by federal law and rules as a condition for obtaining federal matching funds for the support of the medical assistance program.

(b) The commission may provide medical assistance to other persons who are financially unable to meet the cost of medical services if federal matching funds are available for that purpose. The executive commissioner shall adopt rules governing the eligibility of those persons for the services.

* * *

§ 32.032. Prevention and Detection of Fraud and Abuse

The executive commissioner shall adopt reasonable rules for minimizing the opportunity for fraud and abuse, for establishing and maintaining methods for detecting and identifying situations in which a question of fraud or abuse in the program may exist, and for referring cases where fraud or abuse appears to exist to the appropriate law enforcement agencies for prosecution.

* * *

§ 32.039. Damages and Penalties

. . . .

(b) A person commits a violation if the person:

(1) presents or causes to be presented to the commission a claim that contains a statement or representation the person knows or should know to be false;

(1-a) engages in conduct that violates Section 102.001, Occupations Code;

(1-b) solicits or receives, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, or rebate, in cash or in kind for referring an individual to a person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the medical assistance program, provided that this subdivision does not prohibit the referral of a patient to another practitioner within a multispecialty group or university medical services research and development plan (practice plan) for medically necessary services;

(1-c) solicits or receives, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, or rebate, in cash or in kind for purchasing, leasing, or ordering, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item for which payment may be made, in whole or in part, under the medical assistance program;

(1-d) offers or pays, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, or rebate, in cash or in kind to induce a person to refer an individual to another person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the medical assistance program, provided that this subdivision does not prohibit the referral of a patient to another

practitioner within a multispecialty group or university medical services research and development plan (practice plan) for medically necessary services;

(1-e) offers or pays, directly or indirectly, overtly or covertly any remuneration, including any kickback, bribe, or rebate, in cash or in kind to induce a person to purchase, lease, or order, or arrange for or recommend the purchase, lease, or order of, any good, facility, service, or item for which payment may be made, in whole or in part, under the medical assistance program;

(1-f) provides, offers, or receives an inducement in a manner or for a purpose not otherwise prohibited by this section or Section 102.001, Occupations Code, to or from a person, including a recipient, provider, employee or agent of a provider, third-party vendor, or public servant, for the purpose of influencing or being influenced in a decision regarding . . . ;

(2) is a managed care organization that contracts with the commission to provide or arrange to provide health care benefits or services to individuals eligible for medical assistance and:

(A) fails to provide to an individual a health care benefit or service that the organization is required to provide under the contract with the commission;

(B) fails to provide to the commission information required to be provided by law, commission rule, or contractual provision;

(C) engages in a fraudulent activity in connection with the enrollment in the organization's managed care plan of an individual eligible for medical assistance or in connection with marketing the organization's services to an individual eligible for medical assistance; or

(D) engages in actions that indicate a pattern of:

(i) wrongful denial of payment for a health care benefit or service that the organization is required to provide under the contract with the commission; or

(ii) wrongful delay of at least 45 days or a longer period specified in the contract with the commission, not to exceed 60 days, in making payment for a health care benefit or service that the organization is required to provide under the contract with the commission; or

(3) fails to maintain documentation to support a claim for payment in accordance with the requirements specified by commission rule or medical

assistance program policy or engages in any other conduct that a commission rule has defined as a violation of the medical assistance program.

(b-1) A person who commits a violation described by Subsection (b)(3) is liable to the commission for either the amount paid in response to the claim for payment or the payment of an administrative penalty in an amount not to exceed $500 for each violation, as determined by the commission.

(c) A person who commits a violation under Subsection (b) is liable to the commission for:

(1) the amount paid, if any, as a result of the violation and interest on that amount determined at the rate provided by law for legal judgments and accruing from the date on which the payment was made; and

(2) payment of an administrative penalty of an amount not to exceed twice the amount paid, if any, as a result of the violation, plus an amount:

(A) not less than $5,000 or more than $15,000 for each violation that results in injury to an elderly person, as defined by Section 48.002(a)(1), a person with a disability, as defined by Section 48.002(a)(8)(A), or a person younger than 18 years of age; or

(B) not more than $10,000 for each violation that does not result in injury to a person described by Paragraph (A).

. . . .

(e) In determining the amount of the penalty to be assessed under Subsection (c)(2), the commission shall consider:

(1) the seriousness of the violation;

(2) whether the person had previously committed a violation; and

(3) the amount necessary to deter the person from committing future violations.

(f) If after an examination of the facts the commission concludes that the person committed a violation, the commission may issue a preliminary report stating the facts on which it based its conclusion, recommending that an administrative penalty under this section be imposed and recommending the amount of the proposed penalty.

(g) The commission shall give written notice of the report to the person charged with committing the violation. The notice must include a brief summary of the facts, a statement of the amount of the recommended penalty, and a statement of the person's right to an informal review of the alleged violation, the amount of the penalty, or both the alleged violation and the amount of the penalty.

(h) Not later than the 10th day after the date on which the person charged with committing the violation receives the notice, the person may either give the commission written consent to the report, including the recommended penalty, or make a written request for an informal review by the commission.

(i) If the person charged with committing the violation consents to the penalty recommended by the commission or fails to timely request an informal review, the commission shall assess the penalty. The commission shall give the person written notice of its action. The person shall pay the penalty not later than the 30th day after the date on which the person receives the notice.

(j) If the person charged with committing the violation requests an informal review as provided by Subsection (h), the commission shall conduct the review. The commission shall give the person written notice of the results of the review.

(k) Not later than the 10th day after the date on which the person charged with committing the violation receives the notice prescribed by Subsection (j), the person may make to the commission a written request for a hearing. The hearing must be conducted in accordance with Chapter 2001, Government Code.

(l) If, after informal review, a person who has been ordered to pay a penalty fails to request a formal hearing in a timely manner, the commission shall assess the penalty. The commission shall give the person written notice of its action. The person shall pay the penalty not later than the 30th day after the date on which the person receives the notice.

(m) Within 30 days after the date on which the commission's order issued after a hearing under Subsection (k) becomes final as provided by Section 2001.144, Government Code, the person shall:

(1) pay the amount of the penalty;

(2) pay the amount of the penalty and file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty; or

(3) without paying the amount of the penalty, file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(n) A person who acts under Subsection (m)(3) within the 30-day period may:

(1) stay enforcement of the penalty by:

(A) paying the amount of the penalty to the court for placement in an escrow account; or

(B) giving to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the commission's order is final; or

(2) request the court to stay enforcement of the penalty by:

(A) filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the amount of the penalty and is financially unable to give the supersedeas bond; and

(B) giving a copy of the affidavit to the executive commissioner by certified mail.

(o) If the executive commissioner receives a copy of an affidavit under Subsection (n)(2), the executive commissioner may file with the court, within five days after the date the copy is received, a contest to the affidavit. The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true. The person who files an affidavit has the burden of proving that the person is financially unable to pay the amount of the penalty and to give a supersedeas bond.

(p) If the person charged does not pay the amount of the penalty and the enforcement of the penalty is not stayed, the commission may forward the matter to the attorney general for enforcement of the penalty and interest as provided by law for legal judgments. An action to enforce a penalty order under this section must be initiated in a court of competent jurisdiction in Travis County or in the county in which the violation was committed.

(q) Judicial review of a commission order or review under this section assessing a penalty is under the substantial evidence rule. A suit may be initiated by filing a petition with a district court in Travis County, as provided by Subchapter G, Chapter 2001, Government Code.

(r) If a penalty is reduced or not assessed, the commission shall remit to the person the appropriate amount plus accrued interest if the penalty has been paid or shall execute a release of the bond if a supersedeas bond has been posted. The accrued interest on amounts remitted by the commission under this subsection shall be paid at a rate equal to the rate provided by law for legal judgments and shall be paid for the period beginning on the date the penalty is paid to the commission under this section and ending on the date the penalty is remitted.

(s) A damage, cost, or penalty collected under this section is not an allowable expense in a claim or cost report that is or could be used to determine a rate or payment under the medical assistance program.

(t) All funds collected under this section shall be deposited in the State Treasury to the credit of the General Revenue Fund.

(u) Except as provided by Subsection (w), a person found liable for a violation under Subsection (c) that resulted in injury to an elderly person, as defined by Section 48.002(a)(1), a person with a disability, as defined by Section 48.002(a)(8)(A), or a person younger than 18 years of age may not provide or arrange to provide health care services under the medical assistance program for a period of 10 years. The executive commissioner by rule may provide for a period of ineligibility longer than 10 years. The period of ineligibility begins on the date on which the determination that the person is liable becomes final.

(v) Except as provided by Subsection (w), a person found liable for a violation under Subsection (c) that did not result in injury to an elderly person, as defined by Section 48.002(a)(1), a person with a disability, as defined by Section 48.002(a)(8)(A), or a person younger than 18 years of age may not provide or arrange to provide health care services under the medical assistance program for a period of three years. The executive commissioner by rule may provide for a period of ineligibility longer than three years. The period of ineligibility begins on the date on which the determination that the person is liable becomes final.

. . . .

* * *

§ 32.0391. Criminal Offense

(a) A person commits an offense if the person intentionally or knowingly commits a violation under Section 32.039(b)(1-b), (1-c), (1-d), (1-e), or (1-f).

(b) An offense under this section is a state jail felony.

(c) If conduct constituting an offense under this section also constitutes an offense under another provision of law, including a provision in the Penal Code, the person may be prosecuted under either this section or the other provision.

(d) With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section.

* * *

Texas Human Resources Code
Title 2. Human Services and Protective Services in General
Subtitle C. Assistance Programs
Chapter 36. Medicaid Fraud Prevention
Subchapter A. General Provisions

§ 36.001. Definitions

In this chapter:

(1) "Claim" means a written or electronically submitted request or demand that: (A) is signed by a provider or a fiscal agent and that identifies a product or service provided or purported to have been provided to a Medicaid recipient as reimbursable under the Medicaid program, without regard to whether the money that is requested or demanded is paid; or (B) states the income earned or expense incurred by a provider in providing a product or a service and that is used to determine a rate of payment under the Medicaid program.

(3) "Fiscal agent" means: (A) a person who, through a contractual relationship with a state agency, receives, processes, and pays a claim under the Medicaid program; or (B) the designated agent of a person described by Paragraph (A).

. . . .

(6) "Medicaid program" means the state Medicaid program.

. . . .

(9) "Provider" means a person who participates in or who has applied to participate in the Medicaid program as a supplier of a product or service and includes . . .

(12) "Unlawful act" means an act declared to be unlawful under Section 36.002.

§ 36.002. Unlawful Acts

A person commits an unlawful act if the person:

(1) knowingly makes or causes to be made a false statement or misrepresentation of a material fact to permit a person to receive a benefit or payment under the Medicaid program that is not authorized or that is greater than the benefit or payment that is authorized;

(2) knowingly conceals or fails to disclose information that permits a person to receive a benefit or payment under the Medicaid program that is not authorized or that is greater than the benefit or payment that is authorized;

(3) knowingly applies for and receives a benefit or payment on behalf of another person under the Medicaid program and converts any part of the benefit or payment to a use other than for the benefit of the person on whose behalf it was received;

(4) knowingly makes, causes to be made, induces, or seeks to induce the making of a false statement or misrepresentation of material fact concerning . . . (B) information required to be provided by a federal or state law, rule, regulation, or provider agreement pertaining to the Medicaid program;

(5) except as authorized under the Medicaid program, knowingly pays, charges, solicits, accepts, or receives, in addition to an amount paid under the Medicaid program, a gift, money, a donation, or other consideration as a condition to the provision of a service or product or the continued provision of a service or product if the cost of the service or product is paid for, in whole or in part, under the Medicaid program;

(6) knowingly presents or causes to be presented a claim for payment under the Medicaid program for a product provided or a service rendered by a person who: (A) is not licensed to provide the product or render the service, if a license is required; or (B) is not licensed in the manner claimed;

(7) knowingly makes or causes to be made a claim under the Medicaid program for: (A) a service or product that has not been approved or acquiesced in by a treating physician or health care practitioner; (B) a service or product that is substantially inadequate or inappropriate when compared to generally recognized standards within the particular discipline or within the health care industry; or (C) a product that has been adulterated, debased, mislabeled, or that is otherwise inappropriate;

(8) makes a claim under the Medicaid program and knowingly fails to indicate the type of license and the identification number of the licensed health care provider who actually provided the service;

(9) conspires to commit a violation of Subdivision (1), (2), (3), (4), (5), (6), (7), (8), (10), (11), (12), or (13);

(10) is a managed care organization that contracts with the commission or other state agency to provide or arrange to provide health care benefits or services to individuals eligible under the Medicaid program and knowingly:

(A) fails to provide to an individual a health care benefit or service that the organization is required to provide under the contract; (B) fails to provide to the commission or appropriate state agency information required to be provided by law, commission or agency rule, or contractual provision; or (C) engages in a fraudulent activity in connection with the enrollment of an individual eligible under the Medicaid program in the organization's managed care plan or in connection with marketing the organization's services to an individual eligible under the Medicaid program;

(11) knowingly obstructs an investigation by the attorney general of an alleged unlawful act under this section;

(12) knowingly makes, uses, or causes the making or use of a false record or statement material to an obligation to pay or transmit money or property to this state under the Medicaid program, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to this state under the Medicaid program; or

(13) knowingly engages in conduct that constitutes a violation under Section 32.039(b).

* * *

§ 36.006. Application of Other Law

The application of a civil remedy under this chapter does not preclude the application of another common law, statutory, or regulatory remedy, except that a person may not be liable for a civil remedy under this chapter and civil damages or a penalty under Section 32.039 if the civil remedy and civil damages or penalty are assessed for the same act.

* * *

§ 36.007. Recovery of Costs, Fees, and Expenses

The attorney general may recover fees, expenses, and costs reasonably incurred in obtaining injunctive relief or civil remedies or in conducting investigations under this chapter, including court costs, reasonable attorney's fees, witness fees, and deposition fees.

* * *

§ 36.008. Use of Money Recovered

The legislature, in appropriating money recovered under this chapter, shall consider the requirements of the attorney general and other affected state agencies in investigating Medicaid fraud and enforcing this chapter.

* * *

Subchapter B. Action by Attorney General

§ 36.051. Injunctive Relief

(a) If the attorney general has reason to believe that a person is committing, has committed, or is about to commit an unlawful act, the attorney general may institute an action for an appropriate order to restrain the person from committing or continuing to commit the act.

(b) An action under this section shall be brought in a district court of Travis County or of a county in which any part of the unlawful act occurred, is occurring, or is about to occur.

§ 36.052. Civil Remedies

(a) Except as provided by Subsection (c), a person who commits an unlawful act is liable to the state for:

(1) the amount of any payment or the value of any monetary or in-kind benefit provided under the Medicaid program, directly or indirectly, as a result of the unlawful act, including any payment made to a third party;

(2) interest on the amount of the payment or the value of the benefit described by Subdivision (1) at the prejudgment interest rate in effect on the day the payment or benefit was received or paid, for the period from the date the benefit was received or paid to the date that the state recovers the amount of the payment or value of the benefit;

(3) a civil penalty of:

(A) not less than $5,500 or the minimum amount imposed as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $5,500, and not more than $15,000 or the maximum amount imposed as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $15,000, for each unlawful act committed by the person that results in injury to an elderly person, as defined by Section 48.002(a)(1), a person with a disability, as

defined by Section 48.002(a)(8)(A), or a person younger than 18 years of age; or

(B) not less than $5,500 or the minimum amount imposed as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $5,500, and not more than $11,000 or the maximum amount imposed as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $11,000, for each unlawful act committed by the person that does not result in injury to a person described by Paragraph (A); and

(4) two times the amount of the payment or the value of the benefit described by Subdivision (1).

(b) In determining the amount of the civil penalty described by Subsection (a)(3), the trier of fact shall consider:

(1) whether the person has previously violated the provisions of this chapter;

(2) the seriousness of the unlawful act committed by the person, including the nature, circumstances, extent, and gravity of the unlawful act;

(3) whether the health and safety of the public or an individual was threatened by the unlawful act;

(4) whether the person acted in bad faith when the person engaged in the conduct that formed the basis of the unlawful act; and

(5) the amount necessary to deter future unlawful acts.

(c) The trier of fact may assess a total of not more than two times the amount of a payment or the value of a benefit described by Subsection (a)(1) if the trier of fact finds that:

(1) the person furnished the attorney general with all information known to the person about the unlawful act not later than the 30th day after the date on which the person first obtained the information; and

(2) at the time the person furnished all the information to the attorney general, the attorney general had not yet begun an investigation under this chapter.

(d) An action under this section shall be brought in Travis County or in a county in which any part of the unlawful act occurred.

(e) The attorney general may:

(1) bring an action for civil remedies under this section together with a suit for injunctive relief under Section 36.051; or

(2) institute an action for civil remedies independently of an action for injunctive relief.

§ 36.053. Investigation

(a) The attorney general may take action under Subsection (b) if the attorney general has reason to believe that:

(1) a person has information or custody or control of documentary material relevant to the subject matter of an investigation of an alleged unlawful act;

(2) a person is committing, has committed, or is about to commit an unlawful act; or

(3) it is in the public interest to conduct an investigation to ascertain whether a person is committing, has committed, or is about to commit an unlawful act.

(b) In investigating an unlawful act, the attorney general may:

(1) require the person to file on a prescribed form a statement in writing, under oath or affirmation, as to all the facts and circumstances concerning the alleged unlawful act and other information considered necessary by the attorney general;

(2) examine under oath a person in connection with the alleged unlawful act; and

(3) execute in writing and serve on the person a civil investigative demand requiring the person to produce the documentary material and permit inspection and copying of the material under Section 36.054.

. . . .

* * *

§ 36.054. Civil Investigative Demand

(a) An investigative demand must:

(1) state the rule or statute under which the alleged unlawful act is being investigated and the general subject matter of the investigation;

(2) describe the class or classes of documentary material to be produced with reasonable specificity to fairly indicate the documentary material demanded;

(3) prescribe a return date within which the documentary material is to be produced; and

(4) identify an authorized employee of the attorney general to whom the documentary material is to be made available for inspection and copying.

. . . .

* * *

§ 36.055. Attorney General as Relator in Federal Action

To the extent permitted by 31 U.S.C. Sections 3729-3733, the attorney general may bring an action as relator under 31 U.S.C. Section 3730 with respect to an act in connection with the Medicaid program for which a person may be held liable under 31 U.S.C. Section 3729. The attorney general may contract with a private attorney to represent the state under this section.

* * *

Subchapter C. Action by Private Person Authorized

§ 36.101. Action by Private Person Authorized

(a) A person may bring a civil action for a violation of Section 36.002 for the person and for the state. The action shall be brought in the name of the person and of the state.

(b) In an action brought under this subchapter, a person who violates Section 36.002 is liable as provided by Section 36.052.

§ 36.102. Initiation of Action

(a) A person bringing an action under this subchapter shall serve a copy of the petition and a written disclosure of substantially all material evidence and information the person possesses on the attorney general in compliance with the Texas Rules of Civil Procedure.

(b) The petition shall be filed in camera and, except as provided by Subsection (c-1) or (d), shall remain under seal until at least the 180th day after the date the petition is filed or the date on which the state elects to intervene, whichever is earlier. The petition may not be served on the defendant until the court orders service on the defendant.

(c) The state may elect to intervene and proceed with the action not later than the 180th day after the date the attorney general receives the petition and the material evidence and information.

(c-1) At the time the state intervenes, the attorney general may file a motion with the court requesting that the petition remain under seal for an extended period.

(d) The state may, for good cause shown, move the court to extend the 180-day deadline under Subsection (b) or (c). A motion under this subsection may be supported by affidavits or other submissions in camera.

(e) An action under this subchapter may be dismissed before the end of the period during which the petition remains under seal only if the court and the attorney general consent in writing to the dismissal and state their reasons for consenting.

§ 36.1021. Standard of Proof

In an action under this subchapter, the state or person bringing the action must establish each element of the action, including damages, by a preponderance of the evidence.

§ 36.103. Answer by Defendant

A defendant is not required to file in accordance with the Texas Rules of Civil Procedure an answer to a petition filed under this subchapter until the petition is unsealed and served on the defendant.

§ 36.104. State Decision; Continuation of Action

(a) Not later than the last day of the period prescribed by Section 36.102(c) or an extension of that period as provided by Section 36.102(d), the state shall:

(1) proceed with the action; or

(2) notify the court that the state declines to take over the action.

(b) If the state declines to take over the action, the person bringing the action may proceed without the state's participation. A person proceeding under this subsection may recover for an unlawful act for a period of up to six years before the date the lawsuit was filed, or for a period beginning when the unlawful act occurred until up to three years from the date the state knows or reasonably should have known facts material to the unlawful act, whichever of these two periods is longer, regardless of whether the unlawful act occurred more than six years before the date the lawsuit was filed. Notwithstanding the preceding sentence, in no event shall a person proceeding under this subsection recover for an unlawful act that occurred more than 10 years before the date the lawsuit was filed.

(b-1) On request by the state, the state is entitled to be served with copies of all pleadings filed in the action and be provided at the state's expense with copies of all deposition transcripts. If the person bringing the action proceeds without the state's participation, the court, without limiting the status and right of that person, may permit the state to intervene at a later date on a showing of good cause.

§ 36.105. Representation of State by Private Attorney

The attorney general may contract with a private attorney to represent the state in an action under this subchapter with which the state elects to proceed.

§ 36.106. Intervention by Other Parties Prohibited

A person other than the state may not intervene or bring a related action based on the facts underlying a pending action brought under this subchapter.

§ 36.107. Rights of Parties if State Continues Action

(a) If the state proceeds with the action, the state has the primary responsibility for prosecuting the action and is not bound by an act of the person bringing the action. The person bringing the action has the right to continue as a party to the action, subject to the limitations set forth by this section.

(b) The state may dismiss the action notwithstanding the objections of the person bringing the action if:

(1) the attorney general notifies the person that the state has filed a motion to dismiss; and

(2) the court provides the person with an opportunity for a hearing on the motion.

(c) The state may settle the action with the defendant notwithstanding the objections of the person bringing the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. On a showing of good cause, the hearing may be held in camera.

(d) On a showing by the state that unrestricted participation during the course of the litigation by the person bringing the action would interfere with or unduly delay the state's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may impose limitations on the person's participation . . . .

§ 36.108. Stay of Certain Discovery

(a) On a showing by the state that certain actions of discovery by the person bringing the action would interfere with the state's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for a period not to exceed 60 days.

(b) The court shall hear a motion to stay discovery under this section in camera.

(c) The court may extend the period prescribed by Subsection (a) on a further showing in camera that the state has pursued the criminal or civil investigation or proceedings with reasonable diligence and that any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

§ 36.109. Pursuit of Alternate Remedy by State

(a) Notwithstanding Section 36.101, the state may elect to pursue the state's claim through any alternate remedy available to the state, including any administrative proceeding to determine an administrative penalty. If an alternate remedy is pursued in another proceeding, the person bringing the action has the same rights in the other proceeding as the person would have had if the action had continued under this subchapter.

(b) A finding of fact or conclusion of law made in the other proceeding that has become final is conclusive on all parties to an action under this subchapter. For purposes of this subsection, a finding or conclusion is final if:

(1) the finding or conclusion has been finally determined on appeal to the appropriate court;

(2) no appeal has been filed with respect to the finding or conclusion and all time for filing an appeal has expired; or

(3) the finding or conclusion is not subject to judicial review.

§ 36.110. Award to Private Plaintiff

(a) If the state proceeds with an action under this subchapter, the person bringing the action is entitled, except as provided by Subsection (b), to receive at least 15 percent but not more than 25 percent of the proceeds of the action, depending on the extent to which the person substantially contributed to the prosecution of the action.

(a-1) If the state does not proceed with an action under this subchapter, the person bringing the action is entitled, except as provided by Subsection (b), to

receive at least 25 percent but not more than 30 percent of the proceeds of the action. The entitlement of a person under this subsection is not affected by any subsequent intervention in the action by the state in accordance with Section 36.104(b-1).

(b) If the court finds that the action is based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a Texas or federal criminal or civil hearing, in a Texas or federal legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award the amount the court considers appropriate but not more than 10 percent of the proceeds of the action. The court shall consider the significance of the information and the role of the person bringing the action in advancing the case to litigation.

(c) A payment to a person under this section shall be made from the proceeds of the action. A person receiving a payment under this section is also entitled to receive from the defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred. The court's determination of expenses, fees, and costs to be awarded under this subsection shall be made only after the defendant has been found liable in the action or the claim is settled.

(d) In this section, "proceeds of the action" includes proceeds of a settlement of the action.

§ 36.111. Reduction of Award

(a) If the court finds that the action was brought by a person who planned and initiated the violation of Section 36.002 on which the action was brought, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action the person would otherwise receive under Section 36.110, taking into account the person's role in advancing the case to litigation and any relevant circumstances pertaining to the violation.

(b) If the person bringing the action is convicted of criminal conduct arising from the person's role in the violation of Section 36.002, the court shall dismiss the person from the civil action and the person may not receive any share of the proceeds of the action. A dismissal under this subsection does not prejudice the right of the state to continue the action.

§ 36.112. Award to Defendant for Frivolous Action

Chapter 105, Civil Practice and Remedies Code, applies in an action under this subchapter with which the state proceeds.

§ 36.113. Certain Actions Barred

(a) A person may not bring an action under this subchapter that is based on allegations or transactions that are the subject of a civil suit or an administrative penalty proceeding in which the state is already a party.

(b) The court shall dismiss an action or claim under this subchapter, unless opposed by the attorney general, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a Texas or federal criminal or civil hearing in which the state or an agent of the state is a party, in a Texas legislative or administrative report, or other Texas hearing, audit, or investigation, or from the news media, unless the person bringing the action is an original source of the information. In this subsection, "original source" means an individual who:

(1) prior to a public disclosure under this subsection, has voluntarily disclosed to the state the information on which allegations or transactions in a claim are based; or

(2) has knowledge that is independent of and materially adds to the publicly disclosed allegation or transactions and who has voluntarily provided the information to the state before filing an action under this subchapter.

§ 36.114. State Not Liable for Certain Expenses

The state is not liable for expenses that a person incurs in bringing an action under this subchapter.

§ 36.115. Retaliation Against Person Prohibited

(a) A person, including an employee, contractor, or agent, who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of a lawful act taken by the person or associated others in furtherance of an action under this subchapter, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this subchapter, or other efforts taken by the person to stop one or more violations of Section 36.002 is entitled to:

(1) reinstatement with the same seniority status the person would have had but for the discrimination; and

(2) not less than two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

(b) A person may bring an action in the appropriate district court for the relief provided in this section.

(c) A person must bring suit on an action under this section not later than the third anniversary of the date on which the cause of action accrues. For purposes of this section, the cause of action accrues on the date the retaliation occurs.

§ 36.116. Sovereign Immunity Not Waived

Except as provided by Section 36.112, this subchapter does not waive sovereign immunity.

§ 36.117. Attorney General Compensation

The office of the attorney general may retain a reasonable portion of recoveries under this subchapter, not to exceed amounts specified in the General Appropriations Act, for the administration of this subchapter.

Subchapter D. Revocation of Certain Occupational Licenses

§ 36.132. Revocation of Licenses

. . . .

(b) A licensing authority shall revoke a license issued by the authority to a person if the person is convicted of a felony under Section 35A.02, Penal Code. In revoking the license, the licensing authority shall comply with all procedures generally applicable to the licensing authority in revoking licenses.

* * *

Penal Code
Title 7. Offenses Against Property
Chapter 35a. Medicaid Fraud

§ 35A.01. Definitions

In this chapter:

(1) "Claim" has the meaning assigned by Section 36.001, Human Resources Code.

(2) "Fiscal agent" has the meaning assigned by Section 36.001, Human Resources Code.

(3) "Health care practitioner" has the meaning assigned by Section 36.001, Human Resources Code.

(4) "Managed care organization" has the meaning assigned by Section 36.001, Human Resources Code.

(5) "Medicaid program" has the meaning assigned by Section 36.001, Human Resources Code.

(6) "Medicaid recipient" has the meaning assigned by Section 36.001, Human Resources Code.

(7) "Physician" has the meaning assigned by Section 36.001, Human Resources Code.

(8) "Provider" has the meaning assigned by Section 36.001, Human Resources Code.

(9) "Service" has the meaning assigned by Section 36.001, Human Resources Code.

(10) "High managerial agent" means a director, officer, or employee who is authorized to act on behalf of a provider and has duties of such responsibility that the conduct of the director, officer, or employee reasonably may be assumed to represent the policy or intent of the provider.

§ 35A.02. Medicaid Fraud

(a) A person commits an offense if the person:

(1) knowingly makes or causes to be made a false statement or misrepresentation of a material fact to permit a person to receive a benefit or payment under the Medicaid program that is not authorized or that is greater than the benefit or payment that is authorized;

(2) knowingly conceals or fails to disclose information that permits a person to receive a benefit or payment under the Medicaid program that is

not authorized or that is greater than the benefit or payment that is authorized;

(3) knowingly applies for and receives a benefit or payment on behalf of another person under the Medicaid program and converts any part of the benefit or payment to a use other than for the benefit of the person on whose behalf it was received;

(4) knowingly makes, causes to be made, induces, or seeks to induce the making of a false statement or misrepresentation of material fact concerning:

(A) the conditions or operation of a facility in order that the facility may qualify for certification or recertification required by the Medicaid program, including certification or recertification as . . . ; or

(B) information required to be provided by a federal or state law, rule, regulation, or provider agreement pertaining to the Medicaid program;

(5) except as authorized under the Medicaid program, knowingly pays, charges, solicits, accepts, or receives, in addition to an amount paid under the Medicaid program, a gift, money, a donation, or other consideration as a condition to the provision of a service or product or the continued provision of a service or product if the cost of the service or product is paid for, in whole or in part, under the Medicaid program;

(6) knowingly presents or causes to be presented a claim for payment under the Medicaid program for a product provided or a service rendered by a person who:

(A) is not licensed to provide the product or render the service, if a license is required; or

(B) is not licensed in the manner claimed;

(7) knowingly makes or causes to be made a claim under the Medicaid program for:

(A) a service or product that has not been approved or acquiesced in by a treating physician or health care practitioner;

(B) a service or product that is substantially inadequate or inappropriate when compared to generally recognized standards within the particular discipline or within the health care industry; or

(C) a product that has been adulterated, debased, mislabeled, or that is otherwise inappropriate;

(8) makes a claim under the Medicaid program and knowingly fails to indicate the type of license and the identification number of the licensed health care provider who actually provided the service;

(9) knowingly enters into an agreement, combination, or conspiracy to defraud the state by obtaining or aiding another person in obtaining an unauthorized payment or benefit from the Medicaid program or a fiscal agent;

(10) is a managed care organization that contracts with the Health and Human Services Commission or other state agency to provide or arrange to provide health care benefits or services to individuals eligible under the Medicaid program and knowingly:

(A) fails to provide to an individual a health care benefit or service that the organization is required to provide under the contract;

(B) fails to provide to the commission or appropriate state agency information required to be provided by law, commission or agency rule, or contractual provision; or

(C) engages in a fraudulent activity in connection with the enrollment of an individual eligible under the Medicaid program in the organization's managed care plan or in connection with marketing the organization's services to an individual eligible under the Medicaid program;

(11) knowingly obstructs an investigation by the attorney general of an alleged unlawful act under this section or under Section 32.039, 32.0391, or 36.002, Human Resources Code; or

(12) knowingly makes, uses, or causes the making or use of a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to this state under the Medicaid program.

(b) An offense under this section is:

(1) a Class C misdemeanor if the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is less than $100;

(2) a Class B misdemeanor if the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $100 or more but less than $750;

(3) a Class A misdemeanor if the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $750 or more but less than $2,500;

(4) a state jail felony if:

(A) the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $2,500 or more but less than $30,000;

(B) the offense is committed under Subsection (a)(11); or

(C) it is shown on the trial of the offense that the amount of the payment or value of the benefit described by this subsection cannot be reasonably ascertained;

(5) a felony of the third degree if:

(A) the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $30,000 or more but less than $150,000; or

(B) it is shown on the trial of the offense that the defendant submitted more than 25 but fewer than 50 fraudulent claims under the Medicaid program and the submission of each claim constitutes conduct prohibited by Subsection (a);

(6) a felony of the second degree if:

(A) the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $150,000 or more but less than $300,000; or

(B) it is shown on the trial of the offense that the defendant submitted 50 or more fraudulent claims under the Medicaid program and the submission of each claim constitutes conduct prohibited by Subsection (a); or

(7) a felony of the first degree if the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $300,000 or more.

(c) If conduct constituting an offense under this section also constitutes an offense under another section of this code or another provision of law, the actor

may be prosecuted under either this section or the other section or provision or both this section and the other section or provision.

(d) When multiple payments or monetary or in-kind benefits are provided under the Medicaid program as a result of one scheme or continuing course of conduct, the conduct may be considered as one offense and the amounts of the payments or monetary or in-kind benefits aggregated in determining the grade of the offense.

(e) The punishment prescribed for an offense under this section, other than the punishment prescribed by Subsection (b)(7), is increased to the punishment prescribed for the next highest category of offense if it is shown beyond a reasonable doubt on the trial of the offense that the actor was a provider or high managerial agent at the time of the offense.

(f) With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the Medicaid program.

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United State Code Annotated
Title 42. Public Health and Welfare
Chapter 7. Social Security
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification
Part A. General Provisions

§ 1320a-7a. Civil monetary penalties

(a) Improperly filed claims

Any person (including an organization, agency, or other entity, but excluding a beneficiary, as defined in subsection (i)(5) of this section) that--

(1) knowingly presents or causes to be presented to an officer, employee, or agent of the United States, or of any department or agency thereof, or of any State agency (as defined in subsection (i)(1) of this section), a claim (as defined in subsection (i)(2) of this section) that the Secretary determines--

(A) is for a medical or other item or service that the person knows or should know was not provided as claimed, including any person who engages in a pattern or practice of presenting or causing to be presented

a claim for an item or service that is based on a code that the person knows or should know will result in a greater payment to the person than the code the person knows or should know is applicable to the item or service actually provided,

(B) is for a medical or other item or service and the person knows or should know the claim is false or fraudulent,

(C) is presented for a physician's service (or an item or service incident to a physician's service) by a person who knows or should know that the individual who furnished (or supervised the furnishing of) the service--

(i) was not licensed as a physician,

(ii) was licensed as a physician, but such license had been obtained through a misrepresentation of material fact (including cheating on an examination required for licensing), or

(iii) represented to the patient at the time the service was furnished that the physician was certified in a medical specialty by a medical specialty board when the individual was not so certified,

(D) is for a medical or other item or service furnished during a period in which the person was excluded from the Federal health care program (as defined in section 1320a-7b(f) of this title) under which the claim was made pursuant to Federal law.[14]

(E) is for a pattern of medical or other items or services that a person knows or should know are not medically necessary;

(2) knowingly presents or causes to be presented to any person a request for payment which is in violation of the terms of (A) an assignment under section 1395u(b)(3)(B)(ii) of this title, or (B) an agreement with a State agency (or other requirement of a State plan under subchapter XIX of this chapter) not to charge a person for an item or service in excess of the amount permitted to be charged, or (C) an agreement to be a participating physician or supplier under section 1395u(h)(1) of this title, or (D) an agreement pursuant to section 1395cc(a)(1)(G) of this title;

(3) knowingly gives or causes to be given to any person, with respect to coverage under subchapter XVIII of this chapter of inpatient hospital services subject to the provisions of section 1395ww of this title, information

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[14] So in original. Probably should be "law, or".

that he knows or should know is false or misleading, and that could reasonably be expected to influence the decision when to discharge such person or another individual from the hospital;

(4) in the case of a person who is not an organization, agency, or other entity, is excluded from participating in a program under subchapter XVIII of this chapter or a State health care program in accordance with this subsection or under section 1320a-7 of this title and who, at the time of a violation of this subsection--

(A) retains a direct or indirect ownership or control interest in an entity that is participating in a program under subchapter XVIII of this chapter or a State health care program, and who knows or should know of the action constituting the basis for the exclusion; or

(B) is an officer or managing employee (as defined in section 1320a-5(b) of this title) of such an entity;

(5) offers to or transfers remuneration to any individual eligible for benefits under subchapter XVIII of this chapter, or under a State health care program (as defined in section 1320a-7(h) of this title) that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under subchapter XVIII of this chapter, or a State health care program (as so defined);

(6) arranges or contracts (by employment or otherwise) with an individual or entity that the person knows or should know is excluded from participation in a Federal health care program (as defined in section 1320a-7b(f) of this title), for the provision of items or services for which payment may be made under such a program;

(7) commits an act described in paragraph (1) or (2) of section 1320a-7b(b) of this title;

(8)[15] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim for payment for items and services furnished under a Federal health care program; or[16]

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15 So in original. Two pars. (8) have been enacted.

16 So in original. The word "or" probably should not appear.

(9)[17] fails to grant timely access, upon reasonable request (as defined by the Secretary in regulations), to the Inspector General of the Department of Health and Human Services, for the purpose of audits, investigations, evaluations, or other statutory functions of the Inspector General of the Department of Health and Human Services;

(8)[2] orders or prescribes a medical or other item or service during a period in which the person was excluded from a Federal health care program (as so defined), in the case where the person knows or should know that a claim for such medical or other item or service will be made under such a program;

(9)[4] knowingly makes or causes to be made any false statement, omission, or misrepresentation of a material fact in any application, bid, or contract to participate or enroll as a provider of services or a supplier under a Federal health care program (as so defined), including Medicare Advantage organizations under part C of subchapter XVIII of this chapter, prescription drug plan sponsors under part D of subchapter XVIII of this chapter, medicaid managed care organizations under subchapter XIX of this chapter, and entities that apply to participate as providers of services or suppliers in such managed care organizations and such plans;[18]

(10) knows of an overpayment (as defined in paragraph (4) of section 1320a-7k(d)) of this title) and does not report and return the overpayment in accordance with such section;

shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $10,000 for each item or service (or, in cases under paragraph (3), $15,000 for each individual with respect to whom false or misleading information was given; in cases under paragraph (4), $10,000 for each day the prohibited relationship occurs; in

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17 So in original. Two pars. (9) have been enacted.

18 So in original. Probably should be followed by "or"'.

cases under paragraph (7), $50,000 for each such act,[19] in cases under paragraph (8),[20] $50,000 for each false record or statement,[6] or[21] in cases under paragraph (9),[22] $15,000 for each day of the failure described in such paragraph);[23] or in cases under paragraph (9),[24] $50,000 for each false statement or misrepresentation of a material fact). In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim (or, in cases under paragraph (7), damages of not more than 3 times the total amount of remuneration offered, paid, solicited, or received, without regard to whether a portion of such remuneration was offered, paid, solicited, or received for a lawful purpose; or in cases under paragraph (9), an assessment of not more than 3 times the total amount claimed for each item or service for which payment was made based upon the application containing the false statement or misrepresentation of a material fact). In addition the Secretary may make a determination in the same proceeding to exclude the person from participation in the Federal health care programs (as defined in section 1320a-7b(f)(1) of this title) and to direct the appropriate State agency to exclude the person from participation in any State health care program.

(b) Payments to induce reduction or limitation of services

(1) If a hospital or a critical access hospital knowingly makes a payment, directly or indirectly, to a physician as an inducement to reduce or limit medically necessary services provided with respect to individuals who--

(A) are entitled to benefits under part A or part B of subchapter XVIII of this chapter or to medical assistance under a State plan approved under subchapter XIX of this chapter, and

(B) are under the direct care of the physician,

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19 So in original. The comma probably should be a semicolon.

20 So in original. Probably is a reference to the first paragraph (8).

21 So in original. The word "or" probably should not appear.

22 So in original. Probably is a reference to the first paragraph (9).

23 So in original. Probably should be "paragraph;".

24 So in original. Probably is a reference to the second paragraph (9).

the hospital or a critical access hospital shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $2,000 for each such individual with respect to whom the payment is made.

(2) Any physician who knowingly accepts receipt of a payment described in paragraph (1) shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $2,000 for each individual described in such paragraph with respect to whom the payment is made.

(3)(A) Any physician who executes a document described in subparagraph (B) with respect to an individual knowing that all of the requirements referred to in such subparagraph are not met with respect to the individual shall be subject to a civil monetary penalty of not more than the greater of--

(i) $5,000, or

(ii) three times the amount of the payments under subchapter XVIII of this chapter for home health services which are made pursuant to such certification.

(B) A document described in this subparagraph is any document that certifies, for purposes of subchapter XVIII of this chapter, that an individual meets the requirements of section 1395f(a)(2)(C) or 1395n(a)(2)(A) of this title in the case of home health services furnished to the individual.

(c) Initiation of proceeding; authorization by Attorney General, notice, etc., estoppel, failure to comply with order or procedure

(1) The Secretary may initiate a proceeding to determine whether to impose a civil money penalty, assessment, or exclusion under subsection (a) or (b) of this section only as authorized by the Attorney General pursuant to procedures agreed upon by them. The Secretary may not initiate an action under this section with respect to any claim, request for payment, or other occurrence described in this section later than six years after the date the claim was presented, the request for payment was made, or the occurrence took place. The Secretary may initiate an action under this section by serving notice of the action in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure.

(2) The Secretary shall not make a determination adverse to any person under subsection (a) or (b) of this section until the person has been given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is entitled to

be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.

(3) In a proceeding under subsection (a) or (b) of this section which--

(A) is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or nolo contendere) of a Federal crime charging fraud or false statements, and

(B) involves the same transaction as in the criminal action,

the person is estopped from denying the essential elements of the criminal offense.

(4) The official conducting a hearing under this section may sanction a person, including any party or attorney, for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include . . . .

(d) Amount or scope of penalty, assessment, or exclusion

In determining the amount or scope of any penalty, assessment, or exclusion imposed pursuant to subsection (a) or (b) of this section, the Secretary shall take into account--

(1) the nature of claims and the circumstances under which they were presented,

(2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and

(3) such other matters as justice may require.

(e) Review by courts of appeals

Any person adversely affected by a determination of the Secretary under this section may obtain a review of such determination in the United States Court of Appeals for the circuit in which the person resides, or in which the claim or specified claim was presented, by filing in such court (within sixty days following the date the person is notified of the Secretary's determination) a written petition requesting that the determination be modified or set aside. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in

the Court[25] the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, remanding for further consideration, or setting aside, in whole or in part, the determination of the Secretary and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Secretary with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be made a part of the record. The Secretary may modify his findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and he shall file with the court such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

(f) Compromise of penalties and assessments; recovery; use of funds recovered

Civil money penalties and assessments imposed under this section may be compromised by the Secretary and may be recovered in a civil action in the name of the United States brought in United States district court for the district where the claim or specified claim (as defined in subsection (r)) was presented, or where the claimant (or, with respect to a person described in subsection (o), the person) resides, as determined by the Secretary.

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[25] So in original. Probably should be "court".

Amounts recovered under this section shall be paid to the Secretary and disposed of as follows:

(1)(A) In the case of amounts recovered arising out of a claim under subchapter XIX of this chapter, there shall be paid to the State agency an amount bearing the same proportion to the total amount recovered as the State's share of the amount paid by the State agency for such claim bears to the total amount paid for such claim.

(B) In the case of amounts recovered arising out of a claim under an allotment to a State under subchapter V of this chapter, there shall be paid to the State agency an amount equal to three-sevenths of the amount recovered.

(2) Such portion of the amounts recovered as is determined to have been paid out of the trust funds under sections 1395i and 1395t of this title shall be repaid to such trust funds.

(3) With respect to amounts recovered arising out of a claim under a Federal health care program (as defined in section 1320a-7b(f) of this title), the portion of such amounts as is determined to have been paid by the program shall be repaid to the program, and the portion of such amounts attributable to the amounts recovered under this section by reason of the amendments made by the Health Insurance Portability and Accountability Act of 1996 (as estimated by the Secretary) shall be deposited into the Federal Hospital Insurance Trust Fund pursuant to section 1395i(k)(2)(C) of this title.

(4) The remainder of the amounts recovered shall be deposited as miscellaneous receipts of the Treasury of the United States.

The amount of such penalty or assessment, when finally determined, or the amount agreed upon in compromise, may be deducted from any sum then or later owing by the United States or a State agency (or, in the case of a penalty or assessment under subsection (o), by a specified State agency (as defined in subsection (q)(6)), to the person against whom the penalty or assessment has been assessed.

(g) Finality of determination respecting penalty, assessment, or exclusion

A determination by the Secretary to impose a penalty, assessment, or exclusion under subsection (a) or (b) of this section shall be final upon the expiration of the sixty-day period referred to in subsection (e) of this section. Matters that were raised or that could have been raised in a hearing before

the Secretary or in an appeal pursuant to subsection (e) of this section may not be raised as a defense to a civil action by the United States to collect a penalty, assessment, or exclusion assessed under this section.

(h) Notification of appropriate entities of finality of determination

Whenever the Secretary's determination to impose a penalty, assessment, or exclusion under subsection (a) or (b) of this section becomes final, he shall notify the appropriate State or local medical or professional organization, the appropriate State agency or agencies administering or supervising the administration of State health care programs (as defined in section 1320a-7(h) of this title), and the appropriate utilization and quality control peer review organization, and the appropriate State or local licensing agency or organization (including the agency specified in section 1395aa(a) and 1396a(a)(33) of this title) that such a penalty, assessment, or exclusion has become final and the reasons therefor.

(i) Definitions

For the purposes of this section:

(1) The term "State agency" means the agency established or designated to administer or supervise the administration of the State plan under subchapter XIX of this chapter or designated to administer the State's program under subchapter V of this chapter or division A of subchapter XX of this chapter.

(2) The term "claim" means an application for payments for items and services under a Federal health care program (as defined in section 1320a-7b(f) of this title).

(3) The term "item or service" includes (A) any particular item, device, medical supply, or service claimed to have been provided to a patient and listed in an itemized claim for payment, and (B) in the case of a claim based on costs, any entry in the cost report, books of account or other documents supporting such claim.

(4) The term "agency of the United States" includes any contractor acting as a fiscal intermediary, carrier, or fiscal agent or any other claims processing agent for a Federal health care program (as so defined).

(5) The term "beneficiary" means an individual who is eligible to receive items or services for which payment may be made under a Federal health care program (as so defined) but does not include a provider, supplier, or practitioner.

. . . .

(7) The term "should know" means that a person, with respect to information--

(A) acts in deliberate ignorance of the truth or falsity of the information; or

(B) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(j) Subpoenas

(1) The provisions of subsections (d) and (e) of section 405 of this title shall apply with respect to this section to the same extent as they are applicable with respect to subchapter II of this chapter. The Secretary may delegate the authority granted by section 405(d) of this title (as made applicable to this section) to the Inspector General of the Department of Health and Human Services for purposes of any investigation under this section.

(2) The Secretary may delegate authority granted under this section and under section 1320a-7 of this title to the Inspector General of the Department of Health and Human Services.

(k) Injunctions

Whenever the Secretary has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject to a civil monetary penalty under this section, the Secretary may bring an action in an appropriate district court of the United States (or, if applicable, a United States court of any territory) to enjoin such activity, or to enjoin the person from concealing, removing, encumbering, or disposing of assets which may be required in order to pay a civil monetary penalty if any such penalty were to be imposed or to seek other appropriate relief.

(*l*) Liability of principal for acts of agent

A principal is liable for penalties, assessments, and an exclusion under this section for the actions of the principal's agent acting within the scope of the agency.

. . . .

(r) For purposes of this section, the term "specified claim" means any application, request, or demand under a grant, contract, or other agreement for money or property, whether or not the United States or a specified State agency has title to the money or property, that is not a claim (as defined in subsection (i)(2)) and that--

(1) is presented or caused to be presented to an officer, employee, or agent of the Department or agency thereof, or of any specified State agency; or

(2) is made to a contractor, grantee, or any other recipient if the money or property is to be spent or used on the Department's behalf or to advance a Department program or interest, and if the Department--

(A) provides or has provided any portion of the money or property requested or demanded; or

(B) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

. . . .