



2018 WL 823193 (Tex.) (Oral Argument)
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Supreme Court of Texas

Dr. Behzad Nazari, D.D.S., et al.

v.

The State of Texas; Xerox Corporation; and Xerox State Healthcare, LLC, f/k/a ACS State Healthcare, LLC.

No. 16-0549
February 6, 2018

Oral Argument

Appearances:

Petitioners will be represented by Jason Ray (Riggs & Ray, P.C.), from Austin.

Respondents will be represented by Scott A. Keller (Office of the Attorney General), from Austin.

Before:

Chief Justice Nathan L. Hecht; Justices Paul W. Green, Phil Johnson, Eva M. Guzman, Debra H. Lehrmann,
Jeffrey S. Boyd, John P. Devine and Jeffrey V. Brown.
Justice James D. Blacklock did not participate.

CONTENTS

ORAL ARGUMENT OF JASON RAY ON BEHALF OF THE PETITIONERS
ORAL ARGUMENT OF SCOTT A. KELLER ON BEHALF OF THE RESPONDENTS
REBUTTAL ARGUMENT OF JASON RAY ON BEHALF OF PETITIONERS

CHIEF JUSTICE NATHAN L. HECHT: We'll hear argument in 16-0549, Nazari v. The State of Texas.

MARSHAL: May it please the Court. Mr. Ray will present argument for Petitioners. Petitioners have reserved five minutes for rebuttal.

CHIEF JUSTICE NATHAN L. HECHT: You may proceed.

ORAL ARGUMENT OF JASON RAY ON BEHALF OF THE PETITIONERS

ATTORNEY JASON RAY: May it please the Court. We believe it would be fundamentally unfair to allow governmental entity to assert affirmative claims against the party or claiming it had immunity and to the party's claims against it. Those are not my words, you may recognize that as a quote, from the Reata decision. The Dental Group though does agree, it would be fundamentally unfair to allow the state to bring its TMFPA claims while maintaining immunity as to the defendant's counterclaims because those counterclaims for fraudulent misrepresentation, fraudulent inducement, breach of contract, negligence among others, represent millions in collective damage. And as I'll explain, they're not speculative. But the Dental Group isn't asking for a penny for the state. The Dental Group just wants a fair opportunity to explain how the state's actions have independently harmed them.

Reversing the lower court decision does appear to be required by Reata but more importantly permitting the dentist counterclaims to perceive would be consistent with the underlying policy issues behind sovereign immunity.

JUSTICE DEBRA H. LEHRMANN: Well, let me ask you. So I wanted to focus as being placed upon Reata, it's the use of the term, damages, whenever the state is asking for damages. What is your response to that? Does that matter?

ATTORNEY JASON RAY: It, it doesn't. The threshold issue isn't whether we-- I think the parties had spent a lot of time discussing whether the, the act provides for damages or penalties, but the real threshold issue is whether Reata applies both. Reata doesn't distinguish between damages and penalties and for good reasons the threshold issue of, of-- if Reata applies to both that means that Reata applies to any type of monetary relief that the state may seek and I believe that answer is summarily disposed of this appeal.

JUSTICE JEFFREY S. BOYD: But you contend that, that-- you don't contend Reata more of the distinction between damages and penalties.

ATTORNEY JASON RAY: I, I think that that's a distinction that this Court doesn't need to get into because if Reata applies to any monetary relief then that distinction is a-- is-- it wouldn't make a difference in the underlying, in the underlying decision. I do believe though that the issue of whether the act provides for damages or penalties it's completely briefed by both parties. I think it was briefed very well and, and we would adopt Xerox's position in their mandamus, the former brief and their amicus, the state's position in its 2003 Ven-a-Care cases, the state's position in its 2005 testimony to the legislature, where it described where the chief of the Medicaid Fraud Division after the Ven-a-Care cases came and asked for the, the statute to be revised in 2005 and, and explained that the way they calculate damages is the difference between what was paid and what should have been paid and that the changes to that statute were necessary and then the legislature adopted that in 2005.

And I would, I would submit to the Court that when something like that occurs that's les-- legislative history, that's almost tantamount to legislative intent, because the only person that testified on that bill was the state, it was brought by the state because of the arguments that had been made in the 2003 Ven-a-Care case. And if you look at the, the, the briefing in that act, 2003 Westlaw 24210395, that is the state's wonderful argument about why the, the act actually provides for damages. In fact, over 100 times they use the explanation of how the act provides for damages. So ...

JUSTICE DEBRA H. LEHRMANN: What about the argument that this state here was bringing an, an action that could not be brought by a private person? And the purpose is to deter bad behavior basically. What's your response to that?

ATTORNEY JASON RAY: I-- obviously there are relators in cases. So they, they can be brought on behalf of the state. But that's never been a distinction that any court either both before Rea-- Reata or after got into. It's nothing that mattered. And, and whether the, the, the, the part and parcel with the idea of whether or not the state could bring the action is, is closely associated with whether or not they are bringing an enforcement action or as the state argues in this case a law enforcement action. The third court of appeals thought it was important that the state was projecting some sort of police power. And I think when we get into that, let's be clear, there's no such thing as a law enforcement action in a civil lawsuit. The law enforcement action is a criminal action. An enforcement action which is what the state originally brought in this case, administrative claims, an enforcement action is simply an action that every state agency almost any state entity would, would bring. Whether it's the TMFPA, anti-trust, DTPA, or any other sort of, of, of statutory cause of action.

When the state brings it, that is an enforcement action, but it's not a law enforcement action. The problem you have here is that when the state nonsuited its administrative claims it had a choice, it should be refile at all, and if so, should we do it civilly or criminally. They decided civilly. And now having chosen to pursue this case in a civil venue, they are asking for a, a sort of criminal deference with regard to, to their action. No case has ever required the state to explicitly posture itself as the private plaintiff in order to wait immunity from counterclaims or to abrogate its immunity from counterclaims. And I think our brief lies out, it would be pretty difficult for any defendant in a case



brought by the state to argue that there wasn't some enforcement that the state couldn't argue that they were enforcing, trying to enforce a law. Right, it, it-- it's woven into everything what the state does.

CHIEF JUSTICE NATHAN L. HECHT: The state prevails in Xerox case which we have on the submission. Does it prevail on this case too?

ATTORNEY JASON RAY: No, your Honor, it's a separate, it's a separate issue.

CHIEF JUSTICE NATHAN L. HECHT: Well, if they're not damages for purposes of the, the-- what the state is seeking is not damages for purposes of Chapter 33 how are they damages for purposes of assessing immunity.

ATTORNEY JASON RAY: They don't have to be, your Honor. Reata-- the, the-- I think the threshold issue is whether there are damages or whether there are civil penalties, Reata doesn't matter. Reata doesn't care. It's a, it's a monetary relief. A dollar is a dollar. If it comes from compensatory damages or actual damages or liquidated damages or, or penalties or attorney's fees, right? Reata allows in, in the interest of fair play and substantial justice and it's important. That, that the offsetting nature of these means that the state fisc will never be harmed, will never be touched. And, and so if this Court decides that, that the state prevails in, in the Xerox mandamus case, of course it depends on why the Court would, would decide that the state would prevail. But if the state prevails in that case and it's because the act provides for only civil penalties and not damages, that still wouldn't matter. Unless this Court should decide that somehow Reata's distinction or the, the third court's argument that, that the civil penalty somehow shouldn't be touched in a, in a counterclaim that, that somehow that holds the water. Yeah.

JUSTICE JEFFREY S. BOYD: How do we ever, mathematically reach the question of the double damages or penalties here in terms of your claim for an offset, so in other words the state is seeking to recoup payments made to your clients plus interest and the double payment, the, the-- two times the amount of statutory damages, let's call it. And then you're asserting a, a, a, a counterclaim for an offset against that and how could your offset ever be greater than the amount of the payments that you're seeking to recoup.

ATTORNEY JASON RAY: How could they?

JUSTICE JEFFREY S. BOYD: Yeah.

ATTORNEY JASON RAY: The-- well, that goes to the nature of our counterclaims that-- which I can, which I can get into a little bit. But ultimately I, I, I think everybody here would agree that if, if Reata applies to our counterclaims whatever we had above that-- whatever we had that would exceed the state's claims, the, the trial court wouldn't have jurisdiction.

JUSTICE JEFFREY S. BOYD: Right. But I'm talking about what if we distinguished between claim to recoup payments versus claim for statutory damages or whatever you want to call the, the two times the amount. If we distinguish between those for purposes of, of, of sovereign immunity under Reata, and say that, the sovereign im-- that, that Reata-- under Reata sovereign immunity still protects the state on the statutory damages batch, but it does not protect them on the recoupment of payment batch. Would that matter because it just seems to me I, I-- your calculation-- are you calculating your damages in a way or the total exceeds the amount of the payments they're seeking to recoup.

ATTORNEY JASON RAY: Well, I don't know yet because the case proceeded for about a month before it was-- there was very little development before things ...

JUSTICE JEFFREY S. BOYD: How could your client's damages exceed the amount of the payments that the state is seeking to recoup?

ATTORNEY JASON RAY: Well, they're, they're independent damages, and, and, and perhaps I just need to get into the nature of those damages. Let's, let's start with the idea of, of-- let-- I guess I'll start with what I discussed before that they're not hypothetical, we can take one member of this Dental Group then you'll-- remember, the, the Dental

Group members are not associated, many of them aren't associated with the others. But, but Dr. Nazari for example has overs-- had spent over \$1 million to defend himself in a SOAH administrative case that was brought by the attorney general's office. And in a totally separate administrative action brought by the dental board, he had to defend himself from dental board allegations that he misscored a Medicaid bill patient's condition for the purposes of qualifying for Medicaid orthodontic care. So there are independent damages and expenses that have already been incurred by these defendants as a result of the, of the decisions that the state made but launched a thousand ships. And this, this launch of a thousand ships are in this case tens or hundreds of thousands of prior authorization approvals is the crux of the dentist counterclaims.

Because in order for, for the state to even bring this TMFPA claim, it has to, it has to essentially repudiate its whole prior authorization process. We understand that the dentist's counterclaims are inextricably intertwined because the whole thing started because the state was required by-- under federal law to render a decision before anything that wa-- was done that issue a decision about whether orthoca-- orthodontics were covered by Medicaid or whether they were covered by Medicaid. As you look in, in tab 1 of the bench book, you'll, you'll notice that Section 42 C.F.R. 447.20 says that, if Medicaid covers it then Medicaid pays for it, period. So if the Medicaid eligible family wanted braces for their child, the dentist couldn't simply provide the braces to the family at private pay rates even if the family was willing to able to do it. Tab 1 specifically says, and there's both a-- an example from a contract that was cited by one of the defendants in the case, but I would point you specifically to the provider's manual at tab 1 which is available online.

It says, providers, that's the dentists, must not bill a client unless a formal denial for the requested service has been issued TMHP stating that the service is not a benefit of Texas Medicaid which meant that before anything was done, the dentist sent their material in with an opinion about what should be done, and the state said, yes or no. In order for the state to even bring its case against the dentists in this case, they have to repudiate not only their letter but their whole methodology that led to the state saying, yes, you should provide these braces. And so there's, there's a host of damages that perhaps would go be-- go beyond even what the states specifically bringing with regard to its claims. The state may allege in it that ten claims that the dentist brought. But if-- are, are fraudulent. But that process wouldn't have only applied to those ten patients. It would have applied to hundreds, thousands, perhaps tens of thousands of patients that, that, that the state said, we've looked at this material, we believe it's covered, go forth, but you have to get paid Medicaid rates to do it.

JUSTICE JEFFREY S. BOYD: If, if we affirm and agree that the state is on immunity, Texas state against your counterclaims, can't you get in essence the exact same relief by relying on defenses and arguments against the state's affirmative claims?

ATTORNEY JASON RAY: No, your Honor, not, not necessarily, and that's the point I was just trying to make, is that the independent damage that the dentists have suffered may very well go beyond the claims that the state has brought certainly with regard to the state-- the claims that the state has brought, it all started with the prior authorization letter which means that at least with regard to those counterclaims it's the same patients rendered by the same, same services, by the same dentist on the same date. But there are potentially counterclaims that go well beyond that, that go, that go into the area of if the dentist provided services that the state said, it was medically necessary, but it's now saying we're not really sure, is Medicaid necessary, that's a violation of the Dental Practice Act, that's a violation of Medicaid law and those damages at this point could, could reach well into the thousands of, of patients that where the dentist provided services and-- but only as a result of the states on prior authorization decisions.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Ray. We will hear from the State.

MARSHAL: May it please the Court. Mr. Keller will present argument for the Respondents.

ORAL ARGUMENT OF SCOTT A. KELLER ON BEHALF OF THE RESPONDENTS

ATTORNEY SCOTT A. KELLER: Thank you, Mr. Chief Justice, and may it please the Court. Defendant's claims about prior authorization for Medicaid payments are not defenses to their own misrepresentation's information concealing and kickbacks. The Petitioner just conceded multiple times that their counterclaims are quote, independent, unquote, from the state's claims and that is a fatal concession because under *Reata*, a defendant's claims that aren't germane connected or properly defensive to the state's claims, sovereign immunity still applies. The test that *Reata* set forth was not that anytime the state comes and brings a lawsuit that it opens itself up to any counterclaim, rather the court said, five different times that the test was, is the counterclaim connected to germane and properly defensive in addition only seeking an offset.

JUSTICE EVA M. GUZMAN: Can something be connected to it if it is the, the ray if you will that gives rise to the counterclaim? Is that enough to establish that connection that we thought about in *Reata*?

ATTORNEY SCOTT A. KELLER: The connection-- and, and I believe the federal precedence here are in a harmony with your case law as well. You're looking at, is this the same transaction or occurrence. And that test, and I think *Humble Oil* is the best precedent that flushes out what that means, from this Court, just because you have the same parties, just because you have similar subject matter, that does not mean at all that what you have is an equitable recoupment counterclaim. There in *Humble Oil* you're talking about an overpayment of tax in one month versus an underpayment of tax in other month. And what the court said, was he could not bring that claim, sovereign immunity still apply. And in short here, whether the state or Xerox granted prior authorization is an administrative matter that Medicaid program has nothing to do with whether defendants have committed unlawful acts. I think it's important to understand that this is really a three-step process in how prior authorization the Medicaid payments are made. At step one, you have dentists providing the state and state's contract engage in Xerox with information. They are making representations about what are the health care needs of a particular patient. But this is long before prior authorization is made, this is before the state does anything.

And we allege that at that step misrepresentation is concealing information and kickback schemes had occurred. Step two is when the state gets that information. It evaluates it in terms-- whether it's going to issue an administrative prior authorization for payment. Now this is essentially a *prima facie* document that says, what you are proposing appears to be covered by the Medicaid statute. And then there's step three where the dentist then perform the services, come back to the state, ask for payment, and make additional representations. Now what you heard my friend say was essentially something along the lines of when the state grants prior authorization at step two. That absolves anything that the dentist may have done before or after that. That cannot be the law ...

JUSTICE JEFFREY S. BOYD: But that goes to the merits of their legal theory not to the question of immunity.

ATTORNEY SCOTT A. KELLER: Correct. Except since we're not talking about the transaction occurrence of what information the dentists were giving the state but rather we're talking about what the state was doing with that information. Those are not sufficiently connected.

JUSTICE JEFFREY S. BOYD: But how, how does step one cause the state any kind of loss? I'm not going to call it damage or monetarily, but any kind of loss whatsoever until you get through steps, two and step three, there's, there's no loss at all, if they misrepresent the severity of a child-- of a patient's orthodontic needs but the state never pays a dollar to cover those services there's no loss whatsoever. And what they're saying is the only way a loss ever occurs is if he get through step two and the state does it wrong. Why isn't that germane to the claim under step one?

ATTORNEY SCOTT A. KELLER: Well, if you look at this particular statute, 36.052, the civil remedy provision here, loss is not an element of calculating what a party would be liable to the state.

JUSTICE JEFFREY S. BOYD: Payment, payment-- I mean, you're, you're demanding the payment back.

ATTORNEY SCOTT A. KELLER: Yes, we, we ...

JUSTICE JEFFREY S. BOYD: So that's, that's why I'm trying to use a word that's not full of legal ramifications, not

call it damages or monetary relief, I'm just using loss in a nonpartisan way. That loss, the payment you're trying to get back, you never make the payment until you get through steps two and three.

ATTORNEY SCOTT A. KELLER: That-- that's correct, but the unlawful act is the misrepresentation. It is the kickback scheme. And yes, a payment is made, but a tab A of our bench exhibit we point out the statutory text is not damages, it's not loss, it is the amount of any payment made. And, and think about this scheme. If, if, if a party could come to the state and make a misrepresentation and then the state grants prior authorization because we were given incorrect fraudulent information, but then somehow because we relied on that information, we could not seek to recoup that payment, that would massively disrupt the entire Medicaid scheme. Another aspect of this is that you don't need damages or loss because think about a kickback scheme or think about a misrepresentation about who's performing the services. Neither of those situations necessarily require over payment.

JUSTICE JEFFREY S. BOYD: How many damage are lost to prove the liability under the statute or grant you that but you have pled for relief in the form of numerous things one of which is a recoupment of all those payments? And what they're saying is, well, at least as to that relief, recoupment of that, they, they have other arguments too, but at least as to that relief, you're not entitled to it because you'd never made the payment but for the fact that you guys fraudulently cons-- in a conspiracy with Xerox and all the stuff misrepresented to us what it was that we needed to give you to get the prior authorization and approval to proceed.

ATTORNEY SCOTT A. KELLER: And a few things here, Justice Boyd. First of all, their conspiracy claims are not a shred of evidence for those, those are absurd claims regardless even coming back to the immunity issue. What they are trying to allege is that because there is an independent bad actor Xerox in addition to the scheme that somehow that would absolve them or stop the state from arguing about what their unlawful acts were about misrepresenting or concealing information. And your Honor raised the point. What defenses would be available even if sovereign immunity applied? And I think what's going on here is I, I think what the dentists are trying to do is essentially backdoor raising in a estoppel argument. But as the Durham case holds in footnote 8 of our brief, the estoppel is not a defense that can be raised against the state. And so I think what is going on here is we're trying to reach breach of contract claims, and by the way, they have no standing to raise those because they're arguing about our contract with Xerox, the third party and they're not a beneficiary to it. Then they're trying to come up with the conspiracy that the state has somehow conspired to violate its own laws which cannot be illegally a tenable theory?

And then somehow there's a property right or a conversion claim when the state says, we do not want to grant administrative payments now because we, we believe there's something going on here that is fraudulent with their Medicaid program. By the way, that happens long after step three, that is not at all connected to whether misrepresentations are being made in the system. And so this goes back to there needs to be not only the same transaction or occurrence but the same kind of relief that is being sought in a defensive matter. And when the state is bringing claims that there has been fraud performed misrepresentations in the context of its Medicaid program there's nothing defensive then about another party saying, yeah, but you've breached another contract or you should have continued to allow us to get these administrative payments down the causal chain in the future point in time. And, and Mr. Chief Justice, to your question, if the state prevails in Xerox and (a)(1) is not damages, then we also win this case. And the reason for that is because if we are not asserting damages, then the kind of relief, the nature of relief that could possibly be asserted in counterclaim would be something that no private party could possibly bring against, the state would be bringing in a sovereign capacity and enforcement action to recoup money that has been taken from the Medicaid system. Moreover, here what ...

JUSTICE JEFFREY S. BOYD: If you had not-- if the state had not made some of these payments and Nazari or another provider believed that the state should have made the payments and filed suit seeking to recover payments that the state have withheld, would that be a suit for damages?

ATTORNEY SCOTT A. KELLER: If a private party sued the state to say, you should have been turning over payments, I, I suppose depending how they pleaded it it could be a claim for damages to the private party but they would not be premised on an unlawful act. And, and seek-- but the thing about this particular statutory scheme is when the state is suing, we are not suing to try to make the state whole in the sense of there was a breach of contract and

you want to put the party in the position of where they would have been in the contract. These actions were brought to deter, to punish, to also recompense the state for having to investigate these crimes, in addition ...

JUSTICE JEFFREY S. BOYD: But in, but in the, in the question I-- in the hypothetical I just gave, there's no doubt the state would have-- first thing they do is file a plea to jurisdiction saying start immunity bars that claim because you're seeking monetary relief damages. That's how our immunity applies, right?

ATTORNEY SCOTT A. KELLER: Yes, without a waiver, sovereign immunity, that's correct.

JUSTICE JEFFREY S. BOYD: So we're talk-- so we're talking about the same dollars here. The only difference is here the state did pay it and one-- and now they're suing to get it back. But it's the same dollar we're talking about.

ATTORNEY SCOTT A. KELLER: Well ...

JUSTICE JEFFREY S. BOYD: And if the provider were suing for it to get it in the first place, it would be a suit for damages, but, but you're arguing that when the state suing to get it back it's not a suit for damages.

ATTORNEY SCOTT A. KELLER: Well, but this goes to what the Reata test is. It, it-- Justice Boyd, it cannot be the case anytime the state comes to court and raises a claim. That then whatever pool of money we're talking about that the state is trying to get back through an enforcement action could be subject to any type of counterclaim even when it's not connected, I mean, that's Humble Oil ...

JUSTICE JEFFREY S. BOYD: Well, that should be germane and connected and properly defensive.

ATTORNEY SCOTT A. KELLER: That's right, yes.

JUSTICE JEFFREY S. BOYD: But it's still-- it's, it's germane and connected and properly defensive to a claim for monetary relief and slash or damages. It, it-- that's not quite real clear under, under Reata in progeny, but, but it still same claim for the same dollars either ...

ATTORNEY SCOTT A. KELLER: Yeah, but it has to be properly defensive, and I believe what, what the Petitioner just said, that this is an independent claim, that even today they're saying, yeah, their damages theory or their counterclaim theory for the amount of damages could very well exceed what the state is seeking. That is fatal to their claim not because the offset necessarily just says, well, show us how much money you should get back and then zero it out. The nature of what they are asking for goes far beyond what the state could be seeking. If that's the case, they're not raising a counterclaim that actually is defensive. In other words, their claim doesn't rebut a charge of misrepresentation or concealing information or kickback, rather what they are trying to do is get around the fact that they do not have a legislative statutory waiver of sovereign immunity for the breach of contract claim to backdoor and estoppel claim that they cannot be raising against the state. Which is why the Reata test having the prongs of connected this germaneness properly defensive or in the federal case law it's, it's termed the same transaction or occurrence, the kind of relief, whether it's an offset.

All of those apply because when the state is coming to court, this is a tacit abrogation of sovereign immunity but the legislature has not provided this. And no court has held that when a sovereign brings a lawsuit that it opens itself up to any type of counterclaim but that is the position that the Petitioners are, are, are charging towards here. If anything, a minority of jurisdictions actually recognized contrary to this Court's Reata opinion that no counterclaims can be raised against the state. Now this Court has concluded otherwise and to prevail in this case you can abide by Reata and abide by the majority position and the federal position. But that test its imposed has to have teeth in limiting those claims or all says, it's going to significantly deter the state when it potentially seeks to correctly punish for unlawful acts into the program. In addition, another harm that the state suffers here, it's not just about the amount of money to the state, what we're talking about here are when dentists make misrepresentations to conceal information and have kickback schemes and the state pays money to that, needy individuals are not getting Medicaid money because that Medicaid money is fraudulently going to doctors that should not be receiving it. This goes to the fa-- the integrity of



the state's Medicaid system. So whether ...

CHIEF JUSTICE NATHAN L. HECHT: So then do you argue that if they limited their counterclaims and said, all right, maybe we could claim some independent in the recovery, but we're not going to, we're just going to claim defensively to the state's claim, that the state's-- that Reata would waive immunity for that.

ATTORNEY SCOTT A. KELLER: Well, Mr. Chief Justice, I think what they'd be-- having a counterclaim would have to be in its nature truly defensive. For instance, in a breach of contract claim, if sovereign raises a breach of contract claim against a private party and the private party counterclaim is saying, no, you actually sovereign breached that contract first therefore your breach claim actually fails on the merits, that's properly defensive or negligence lawsuit for instance as Reata. If the sovereign says, you're negligent and the private party says, no, actually your own acts were negligent to begin with so your claim fails, that is the type of properly defensive claim that is actually rebutting what the state's claims are. But here the counterclaims they are raising are not actually defensive to a misrepresentation charge. In other words, if they're correct that somehow the state breached its contract with Xerox, that does not defend against the misrepresentation or a concealment of information claim. Indeed, I don't know how if the state somehow had breached the contract with Xerox, that hurts the dentists at all, they would have been in the same position.

And in, in so far as their unlawful acts are concerned about whether they made misrepresentations and concealed information. So we prevailed here-- and, and the court of appeal should be affirmed for multiple reasons. First of all, there is the, the connectedness prong. And this is that we are suing based on the unlawful acts of the dentists and this is the Humble Oil point. Just because we have the same parties and similar subject matter, that's not enough. But even beyond the connectedness prong, the germaneness prong, this goes to the same nature of relief. This is not a suit for damages. According to our position in Xerox, if-- again, if we win in Xerox, we win here. Regardless though loss is not an element. And we are suing in our sovereign capacity for public wrongs within the Medicaid program. And if I could also ...

JUSTICE JEFFREY S. BOYD: If we got out of the government context here completely, and it was an insurance company who had paid claims but then later discovered they were-- that the claims were based on fraudulent representations, and so the sued the insured to re-- to recoup those payments that had been made, do you agree that that would be a suit for damages?

ATTORNEY SCOTT A. KELLER: Yes, but I believe that that would be a suit in tort, a common law tort, it would not be a statutory scheme for an administrative ...

JUSTICE JEFFREY S. BOYD: The breach of contract, one or the other.

ATTORNEY SCOTT A. KELLER: Yes, it ...

JUSTICE JEFFREY S. BOYD: It provide not-- well, I guess there could be a statutory violation of the insurance code, but, but it's to either way whatever theory the relief sought at least to the extent that they were seeking to recoup payments that had been made, the insurance company would be seeking damages.

ATTORNEY SCOTT A. KELLER: If it were under the common law. But let's change the hypothetical a little bit. Let's say the legislature had passed the statute that said that, the state could bring an action for unlawful act, the unlawful act to providing misrepresentation in the context of an insurance dealing and then they were going to be these various penalties set up, that would be much more analogous to what's actually occurring here. What-- especially in the, the text that the statute says, the state can recover the amount of any payments and any payment is not just overpayment, there is no element of loss. If there's, if there's any ambiguity and we submit there is not, at tab B over a bench book, there are two construction canons that favor the state here. First of all, the Medicaid act should be liberally construed in favor of the Medicaid program. In addition the public interest in this context should be favored to over the private interest. And the reason for this is we are jointly administering a federal state program to provide benefits to needy individuals. And so this is not a situation where the state is acting, you know, as if it is own contract

or if it's just the state here. Rather the state is trying to administer a benefit program and when individuals are defrauding from that program and not only takes away from the state, it takes away from other needy individuals who need those benefits.

And if I can also finally turn to tab C of our bench book, this is responsive to the brief in the pharmaceutical's amicus brief and, and the point that my friend raised about the state's position. We have consistently argued that the state is entitled to any payment, the entire payment, and this is page 9 of our bench exhibit, this is in the State of Texas versus - this is the Ven-a-Care litigation. And we say very clearly here, plaintiffs are entitled to recover in the, the state, the entire payment made for the Medicaid program for defendant's drugs. In other words, the state has not said, this is somehow damages or this is loss. Now there are some confusion from some legislative history that has been cited in the pharmaceutical's amicus brief and if I can address that as petitioner's counsel address it here, the quote in the pharmaceutical amicus brief is being taken massively out of context. And if you go to the hearing in the house in 2005 and I'm going to read from the transcript that, this is it, hour 4.05 minute Representative Reynolds asks a question to the head of the Civil Medicaid Fraud Division, Mr. O'Connell responds, okay, for example, and this came in to our [inaudible] case. [inaudible] case is the Ven-a-Care litigation that I just quoted from our bench book.

If what the defendants alleged in that case, and it's not the state, but what the other party, was that the state could not recover any civil penalty because we're already in treble damages, etcetera, etcetera, etcetera. I raise that because the testimony from Mr. O'Connell there was under the assumption not of the state's position but what the challengers to the state's position we're assuming. And later Mr. O'Connell goes on to say, and theoretically again referring to the challenger's position, not the state's position, under the statute they would be pay treble of \$30 difference and then the most we could get in civil penalties, it was 180, and it was doubling that trebling, you know. And for smaller cases, it's really not an effective deterrent. I raise all that by way of saying, that portion of legislative history that was quoted is not in context. And what Mr. O'Connell was referring to here was not the state's position but the other parties' position. What the legislature did in 2005 is it cleared it all up by saying that Chapter 36 will not ap-- Chapter 36 will not be covered by the Chapter 41 provisions. So we would ask that you affirm the court of appeals Reata's test.

We win whether going on the connectedness prong, the germaneness prong, or even the offset because these are independent claims, some of the immunity has not be abrogated.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, General Keller. Mr. Ray, you have five minutes.

REBUTTAL ARGUMENT OF JASON RAY ON BEHALF OF PETITIONERS

ATTORNEY JASON RAY: May it please the Court. An ana-- analysis of whether the counterclaims are properly defensive is pretty straightforward, properly defensive is the quantitative term that this Court used in Reata, connected to-- or germane to and connected with is a qualitative. Reata at 377 indicates that properly defensive just means that the counterclaims offset the government's monetary recovery. In City of Dallas versus Albert, the court reiterated that properly defensive means offsetting defensive and actually referred back to earlier cases as, as did Reata stating that, that a claim of offset was referred to as a defensive matter back in the day, for example, when Reata was decided. And in fact, other courts have picked up on that in Sweeny versus-- Sweeny Community Hospital v. Mendez, that's 226 S.W.3d 584, the Houston Court of Appeals said, quote, the Supreme Court-- and this is talking about Reata, the Supreme Court did not intend the term, properly defensive, that's quoted, to a strict jurisdiction for the type of claim raised. But to restrict jurisdiction over the amount of the claim for damages against the governmental entity to the amount that the governmental entity actually recovers.

To your question, Justice, about, about the amount, at this point we're not even sure what the state is alleging in terms of its damages because we haven't gotten into any disclosures that would, that would allow us to know what their



specific damages are as to each specific defendant, and there's a lot of defendants in this case. So it's possible that our claims might, might be larger, our counterclaims might be larger than the state's claims, but ultimately we concede that the trial court would have no jurisdiction to hear anything that would, that would go beyond what the state is requesting. And ...

CHIEF JUSTICE NATHAN L. HECHT: I'm not clear about your answer earlier thoroughly about it. As Justice Boyd's question to be, can't you get the same relief purely defensively and I understood your answer to be no that that your claims were independent and went beyond the state's claims.

ATTORNEY JASON RAY: Well, I, I think the answer is yes. We can get the claims defensively. We-- to the extent that the state required us to provide the services is now saying that the services that it required us to provide are, are-- were in correctly provided, yes, those are clearly connected to-- connected with and germane to and we have counterclaim specifically on those. Right? So there are specific defensive claims on those specific patients that the state may bring, that they bring ten claims with regard to ten patients, then, then we have a prior authorization decision from the state that said, go and, and provide these services. And so we would have claims directly defensive to that. And I believe that-- I hope that answers your question, Justice Boyd, does it not?

JUSTICE JEFFREY S. BOYD: I'll do some more digging. Thank you.

ATTORNEY JASON RAY: I apologize if it, if it, if it didn't touch ...

JUSTICE JEFFREY S. BOYD: Well, and, and, and these are murky waters.

ATTORNEY JASON RAY: Well, at the end of the day, I, I, I think that issue really goes to something that the trial court will have to get into as the, the facts of the state's claims and the counterclaims are flushed out. We haven't gotten there yet. We talk about them today because I don't want the Court, the dentist don't want the Court to be concerned that there is a, a-- that the counterclaims lack merit and therefore this Court shouldn't spend its time on this case. There's certainly more than enough here to get is over jurisdictional hurdle that would kick this back to the trial court for a determination on the issue of what claims are germane to and connected with, and, and how they're properly defensive. Ultimately the question here, are counterclaims permissible on the TMFPA case? It's pretty straightforward in Reata. The state is seeking monetary relief and the core concepts outlined in Reata, efficiency, fair play, substantial justice, and still protecting the state's budget, regardless of what dollar the, the state is asking for. The state's budget is, is, is protected. All of those are fulfilled. So we ask this Court to reverse the court of appeals' opinion [inaudible] Reata and then find that the state has abrogated [inaudible].

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Ray. Justice Blacklock is not sitting in the case. Case is submitted. And the Court will be in a brief recess.

MARSHAL: All rise.