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SUPREME COURT OF TEXAS
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NO. 16-0549

IN THE SUPREME COURT OF TEXAS

DR. BEHZAD NAZARI, D.D.S., ET AL
Petitioners,
v.

THE STATE OF TEXAS
Respondents,
v.

ACS STATE HEALTHCARE, LLC
Respondents.

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

PETITIONERS' REPLY BRIEF

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RECORD REFERENCES

References to the parties and record are as follows:

"Dental Group" refers to Petitioners.

"The Act" or "TMFPA" refers to Texas Medicaid Fraud Prevention Act.

References to the Record will be to the Court Record at "CR ____"

Correction to State's Statement of Facts

The State inaccurately describes its dental Medicaid responsibility. The State claims, incorrectly, that Medicaid does not cover orthodontic services to straighten rotated teeth. The Texas Medicaid system covers any "medically necessary" orthodontic service; that is, anything that is "reasonable and necessary to prevent … dental conditions … that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a disability, [or] cause illness or infirmity" in a child. 33 Tex. Admin. Code 33.2(8). This is relevant for two reasons:

First, whether a rotated tooth presents a Medicaid-covered orthodontic condition is a question that requires a diagnosis. The Dental Practice Act permits only licensed dentists to diagnose a patient's dental condition. TEX. OCC. CODE 251.003(a)(2)(C). A diagnosis is a prerequisite to determining the medical necessity of a dental service. The Dental Group's counterclaims include the allegation that the State and Xerox engaged in the unlawful practice of dentistry[1] by having unlicensed, untrained, and dentally ignorant personnel issue prior authorization approvals for orthodontic services. CR

[1] TEX. OCC. CODE § 256.001 states: "LICENSE REQUIRED. A person may not practice or offer to practice dentistry or dental surgery or represent that the person practices dentistry unless the person holds a license issued by the board." Civil and criminal penalties apply. *See* TEX. OCC. CODE §§ 264.101 ($5,000/person/day civil penalty), 264.151 (practicing dentistry without a license is a third–degree felony).

37-38. The Dental Group also claims that the State and Xerox reassured the Dental Group members that those prior authorization decisions were being ratified by licensed dentists after a thorough review of the diagnostic material (e.g. x-rays, pictures, three-dimensional models), even though the State and Xerox knew that was not true. CR 34-35.

Second, while Medicaid funds may be scarce, Federal law requires that states specifically cover dental conditions that are well beneath the "severe handicapping malocclusion" standard set out in the State's brief. In fact, Texas has been sanctioned regarding its Medicaid dental services at least twice by federal courts.[2] Most recently, in *Frew v. Hawkins*, 540 U.S. 431 (2004) the Supreme Court required the State to abide by a consent order demonstrating that Texas Medicaid had systematically violated its responsibilities by failing to deliver preventative dental and orthodontic services to Medicaid children in numerous, serious ways. *See Frew v. Gilbert*, 109 F.Supp.2d 579 (E.D.Tex. 2000) (listing the State's violations of consent order).

In response to *Frew,* the 2007 Texas Legislature significantly increased Medicaid spending for children. Because it still has not remedied

[2] See *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983), the Fifth Circuit found that Texas was not fulfilling its Medicaid responsibilities to provide sufficient preventative dental and orthodontic services for children in numerous ways.

those problems, the State remains subject to the *Frew* consent order. *See Frew v. Janek*, 820 F.3d 715 (5th Cir. 2016). This is important because *Frew* forced the State to spend more money and provide more dental services to children.[3] The State relied on Xerox to analyze and evaluate the patients' dental conditions in a way that supported the *Frew* decision's mandate to have Medicaid reach more children. Like the State, the Dental Group members relied on Xerox's decisions. But unlike the State, the Dental Group members were unaware of how Xerox was making those coverage decisions. Discovery in the sister case, Cause No. D-1-GV-14-000581; *State v. Xerox, et al.* has revealed evidence that bears heavily on all of the parties' possible claims, counterclaims and defenses.[4]

With over **two billion dollars in collective fraud claims and counterclaims among the parties**, the stakes are high in these related cases. Striking the counterclaims and third-party claims in this case effectively prevents the Dental Group from pre-trial discovery of facts that

[3]Health and Human Services September 2007 Frew Expenditure Plan https://hhs.texas.gov/sites/hhs/files/documents/laws-regulations/legal-information/2007-frew-exp-plan.pdf

[4] See Eric Dexheimer, "'PUSH! PUSH!' How a bungled private contract cost Texans $130 million", Austin American Statesman, (August. 3, 2017), http://www.mystatesman.com/news/push-push-how-bungled-private-contract-cost-texans-130-million/OGIpONvkbiVEaPESeWXiuI/

are as useful to its affirmative claims as they are to its counterclaims and possible defenses.

SUMMARY OF THE ARGUMENT

The State presents no reason for this Court to depart from the letter and spirit of *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The State's brief dives into attempting to answer questions that are not necessary to dispose of this appeal. This Court should decline the State's invitation to opine on unripe issues such as whether the Dental Group's counterclaims are properly pleaded. Instead, this Court should focus on the two reasons that the court of appeals used to justify its holding that **all counterclaims are apparently barred in a TMFPA action.**

The foundation for abrogating sovereign immunity in Texas is civil claims for "monetary relief." The term is used in *Reata* without qualification or limitation, and it is used so broadly that the phrases "monetary damages,"[5] "monetary relief,"[6] and "monetary recovery"[7] are practically synonyms. The court of appeals' opinion draws incorrect and unnecessary dissimilarities between damages, penalties, and monetary relief. The opinion creates a distinction that *Reata* neither contemplates nor supports. Because the

[5] *Reata* at 375. "Monetary damages" is used once in the opinion.
[6] *Reata* at 376-78. "Monetary relief" is used three times in the opinion.
[7] *Reata* at 377. "Monetary recovery" is used once in the opinion.

court's analysis is wrong and will produce unintended consequences far beyond the TMFPA, the court of appeals' decision should be reversed.

Despite the court of appeals' deference to the importance of the State's self-proclaimed "law enforcement action," there is no excuse for elevating "law enforcement" above fair play, substantial justice, and due process. It is a dangerous and ill-advised creation because it is unbounded by any bright lines, subject to the winds of rhetoric and the misguided rationalization of any governmental division that seeks to wield it. Because it is anathema for a "law enforcement" sword to always include an invulnerable sovereign immunity shield in the context of a civil action, this court of appeals' creation should be rejected.

ARGUMENT

I. The *Reata* rule applies in this case.

In an apparent effort to narrow the circumstances under which the Dental Groups can bring counterclaims, the State begins its argument by reaching back to the adoption of English common law in 1840. It meanders through various federal, criminal and administrative alternatives that are available to the State under the facts of this case,[8] but the State does not explain why the rules and remedies applicable in those venues are relevant

[8] State's brief at 30-39.

here. Ultimately, the State never asserts that these counterclaims would fail a pure *Reata* analysis. Instead, the State: 1) invites this Court to completely reject *Reata's* applicability here under a strained interpretation of "damages" and an overhyped application of the State "police powers" and 2) proposes that this Court apply the federal test for recoupment counterclaims, which employs different standards than *Reata* does. By embarking on a campaign to distinguish and redefine specific parts of the *Reata* opinion, the State hopes to bar the Dental Group's counterclaims.

Many of the State's arguments invite an advisory opinion.

There is no need for the Dental Group to respond to much of the State's brief, and it is also unnecessary for the Court to do so. There is no indication that the *Reata* standard cannot adequately dispose of the underlying question presented in this case—namely, whether the State has abrogated its immunity as to counterclaims that are "germane to, connected with, and properly defensive to the [government's] claims." *Reata* does not need to be sharpened or revised. This Court need only to reaffirm that *Reata* applies here because the factual distinctions raised by the State and the court of appeals do not create a different outcome.

The court of appeals held that *Reata* did not apply to this case because (1) "the recovery sought by the State [did not qualify] as a suit for damages

or monetary relief as those terms were used in *Reata,*" and (2) the State was not acting as an ordinary litigant because it was exercising its police powers. *Nazari* at 178. Thus, the only relevant questions in this appeal are:

1) Does the relief sought by the State include "monetary relief," "monetary damages," or "monetary recovery"?

2) Does the State's "posture" in this case matter to *Reata*?

These were the only two points of error the Dental Group raised in this appeal, because they were the only bases for the court of appeals' opinion. So, contrary to the State's brief, reviewing federal standards applicable to offset counterclaims is not necessary at this time. Likewise, all the other fact-specific issues raised in the State's brief do not require a response from this Court, nor do they need to be answered now—in a case that is barely four months old.[9] This Court's opinion regarding the two questions above will resolve this appeal; nothing else is necessary.[10]

[9] The State filed its lawsuit on December 23, 2014 (CR 3), and the trial court struck the Dental Group's counterclaims and third-party claims on April 28, 2015. (CR 383).

[10] *See Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex.,1993) ("The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties.").

Question 1: Does the relief sought by the State include "monetary relief," "monetary damages," or "monetary recovery"?

Although the Third Court held that all of the Act's remedies were characterized as "civil penalties that . . . do not qualify as **damages** or **monetary relief** as those terms were used in *Reata,*"[11] the following list summarizes why that conclusion is incorrect:

1) *Reata's* analysis relies only on "affirmative claims for monetary relief,"[12] **without regard to the type** of monetary relief. *Reata* simply does not contemplate or support a distinction between damages and penalties; the Third Court was wrong to create one.
2) Section 36.052(a)(1) is **the classic definition of "compensatory damages" or "actual damages."** [13] The State argues that the Act's language does not reflect true compensatory damages because it does not award the actual loss to the State. But here the State **is** seeking its actual losses. The State is demanding the full amount paid to the Dental Groups members on each claim, not some theoretical difference between what

[11] *Nazari* at 181 (emphasis in original).
[12] *Reata*, 197 S.W.3d at 378. ("Because the City asserted affirmative claims for monetary relief against Reata, the City does not have immunity from Reata's claims germane to, connected to, and properly defensive to claims asserted by the City, to the extent any recovery on those claims will offset any recovery by the City from Reata.")
[13] DAMAGES, Black's Law Dictionary (10th ed. 2014) (Actual damages: "An amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses. — Also termed compensatory damages; tangible damages; real damages.")

was paid and what should have been paid.[14] If the State prevails, this section will provide the State with actual damages from the Dental Group members.

3) Section 36.052 (titled "Civil Remedies") provides **remedies that are exactly the same** as the remedies in Hum Res. Code Section 32.039 (titled "Damages and Penalties"). Other, practically identical remedies are expressly labeled "damages" in the Texas Free Enterprise and Antitrust Act,[15] the Texas Deceptive Trade Practices Act,[16] and the Federal False Claims Act.[17] It is nonsensical for the Third Court to conclude that the nature of the relief can change simply because of the title of the remedies section statute that holds it.

4) Section 36.052(a)(2) is **the classic definition of "interest as damages."** Pre-judgment interest is always a form of damages.[18] The State's brief does not respond to this point.

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[14] Compare *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998) (The measure of fraud damages involves the difference between the value received and the value paid or represented.).

[15] TEX. BUS. & COM. CODE § 15.21 (providing for actual damages, interest, and treble damages).

[16] TEX. BUS. & COM. CODE § 17.953 (providing for restitution and civil penalties).

[17] 31 U.S.C. § 3729(a); *U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 530 F. Supp. 2d 888, 891-92 (S.D. Tex. 2008), *aff'd sub nom. U.S. ex rel. Longhi v. United States*, 575 F.3d 458 (5th Cir. 2009)

[18] *Horizon/CMS Healthcare Corp. v. Auld,* 34 S.W.3d 887, 898 (Tex. 2000) ("Prejudgment interest falls within the common-law meaning of 'damages.'"); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985) ("Interest as damages is

5) Section 36.1021 **requires the State to prove each element of any its case, "including damages,"** by a preponderance of the evidence. The State and the Third Court dismiss this language, claiming it applies only to Subchapter C actions by a qui tam relator. There is no support for the conclusion that "damages" occur only when a qui tam relator brings a TMFPA claim.

6) The State notes that Section 36.052(a)(1) requires repayment of the entire amount, not just the overpayment, and suggests this is a more like a liquidated damages provision.[19] Liquidated damages are still damages—not penalties—even when they are penal in nature.[20]

Question 2: Does the State's posture in this case matter to *Reata*?

Assuming without admitting that this lawsuit actually constitutes some type of "law enforcement action," it is still a civil action seeking monetary relief, not a criminal prosecution. The Dental Group's initial brief noted that the court of appeals' opinion will effectively create an exception that will swallow *Reata*, because almost any governmental body's action contains

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compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.").

[19] State's brief at 37.

[20] *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 433 (Tex. 2005) ("Merely changing the label for these statutory damages did not, without more, change their underlying character.").

some arguable level of "law enforcement" rationalization.[21] Indeed, a review of cases both before and after *Reata* demonstrates that almost everything a governmental body does can be draped in "law enforcement action" cloth.

The following list of cases concerns situations in which courts have found that a governmental body abrogated its sovereign immunity as to offsetting counterclaims by the defendant. In each case, the State/City/agency is arguably exercising a "law enforcement" function:

Case	State's arguable "law enforcement" claim
Anderson, Clayton & Co. v. State ex rel. Allred, 62 S.W.2d 107 (Tex. 1933)	Penalties and an injunction to stop illegal/unpermitted trucking operations
Kinnear v. Texas Commission on Human Rights, 14 S.W.3d 299 (Tex. 2000)	TCHR filed suit to enforce deed restrictions and enjoin construction, alleging violations of the Texas Fair Housing Act
State v. Gonzalez, 2006 WL 2134643 (Tex.App.—San Antonio 2006, no pet.)	Seizure and forfeiture of contraband pursuant to chapter 59 of the Texas Code of Criminal Procedure
City of Dallas v. Albert, 354 S.W.3d 368 (Tex. 2011)	Settling a pay dispute between the City of Dallas and its police officers and firefighters.
Bandera County v. Hollingsworth, 419 S.W.3d 639 (Tex.App.—San Antonio 2013, no pet.)	Foreclosing on tax lien against taxpayers' property and to recovery delinquent property taxes, interest, penalties, costs, and attorney fees.
Redburn v. Garrett, 2013 WL 2149699 (Tex.App.—Corpus Christi 2013, pet denied)	Statutory penalties pursuant to Chapter 54 of the Texas Local Government Code

[21] Dental Group's initial brief at 24.

City of McKinney v. Hank's Rest. Group, L.P., 412 S.W.3d 102 (Tex. App.—Dallas 2013, no pet.)	Attorney fees incurred in securing declaratory and injunctive relief for violations of numerous code ordinances
City of New Braunfels v. Carowest Land, Ltd., 432 S.W.3d 501 (Tex. App.—Austin 2014, no pet.)	Breaches of contract related to a multi-million dollar public works projects to prevent flooding, and related easements.
Archer Group , LLC v. City of Anahuac, 472 S.W.3d 370 (Tex.App.-Houston [1st Dist.] 2015)	Money paid by mistake, money had and received, and civil theft; exemplary damages for fraud, malice, or gross negligence.
City of Conroe v. TP Property LLC, 480 S.W.3d 545 (Tex. App.—Beaumont 2015, no pet.)	City sued for the collection of ad valorem property taxes and hotel occupancy taxes, together with statutory penalties, interest, and attorney's fees.
City of Rio Grande City v. BFI Waste Services of Texas, LP, 2016 WL 5112224 (Tex.App.—San Antonio, 2016, pet. filed)	Breach of contract, quantum meruit, promissory estoppel, and fraud.

The list of real-world examples above does not include lawsuits filed under the Texas Antitrust Act,[22] or the Deceptive Trade Practices Act,[23] or any of the various regulatory or licensing statutes.[24] Nor does it include local, city, or county codes and ordinances that regulate everything from noise limits and juvenile curfews, to the removal of trees on personal property. In certain

[22] TEX. BUS. & COM. CODE § 15.21 (providing for actual damages, interest, and treble damages).
[23] TEX. BUS. & COM. CODE § 17.953 (providing for restitution and civil penalties).
[24] *See e.g.*, TEX. OCC. CODE §§ 351.603, .604 (Optometrists Act provides for civil penalties, as well civil action under the DTPA for certain violations of that Act); TEX. AG. CODE § 17.152, .153 (providing for civil action for actual damages, treble damages, civil penalties, or action under the DTPA, for failing to post notice of fuel tax rates, or document or record those rates); TEX. INS. CODE § 541.151 (provides for civil penalties, as well action under the DTPA for unfair competition and deceptive acts in insurance industry)

circumstances, each of those laws could arguably be a more important "law enforcement statute" than the TMFPA.

Every action the State takes could be postured as a "police power" or "law enforcement" action, especially if the potential harm to the health, safety, or finances is overstated in the government's pleadings. By manufacturing a justification that allows the State to retain its sovereign immunity shield anytime the State wields its "law enforcement" sword, the court of appeals makes the State invulnerable. That has never been the law. If the court of appeals' opinion is allowed to stand, governmental bodies will simply cloak their contract, tort, and proprietary-function lawsuits in these so-called "law enforcement" statutes to avoid potential counterclaims.

The court's conclusion that "when the State pursues an enforcement action under the [TMFPA], 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"[25] is both an unnecessary and improper distinction. That is not a reasonable construction of *Reata;* no case has ever required the State to affirmatively "posture" itself as an ordinary litigant in order to waive immunity from counterclaims.

[25] *Nazari* at 181.

II. Reply to State's argument that filing suit does not abrogate its sovereign immunity.

The State's brief clings to the fiction that its affirmative claims for monetary relief did not affect its sovereign immunity protection. Citing *United States v. Shaw*, 309 U.S. 495 (1940), the State implies that the United States Supreme Court decisions reason that an "appearance in its own courts as a plaintiff does not waive or negate its sovereign immunity from counterclaims," State's Br. at 10, and argues that the Texas Supreme Court has "long recognized the State's sovereign immunity from suit, whether the State is sued in an action or in a cross-action." State's Br. at 11-13. None of those cases support the State's proposition.

United States v. Shaw expressly recognized that the government's affirmative claim for relief waived its immunity from suit, and further waived its immunity from damages to the extent of any offsetting counterclaims. *Shaw*, 309 U.S. at 503-504. There is simply no other way to read that case; *Shaw* supports the Dental Group's argument, not the State's. In *Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991), the Supreme Court held that an Indian Tribe in a tax dispute "did not waive its sovereign immunity *merely by filing an action for injunctive relief*." (emphasis added). But here the State is not simply seeking injunctive relief, it is seeking monetary relief. If this case were only about injunctive relief,

the Dental Group would readily admit that its counterclaims would be improper. Likewise, *United States v. Longo* supports the Dental Group's argument, not the State's. There, the Supreme Court held:

> The Government by commenceing [sic] the foreclosure action *has doubtless precluded itself from raising sovereign immunity as a bar to any appropriate defense to its action.* . . We may assume for the purposes of this case without so deciding that a defense that the mortgage is void because it was induced by fraud on the part of the Government might be available. However, this does not aid the defendants [because that particular counterclaim is expressly barred by statute].

United States v. Longo, 464 F.2d at 913, 915-16. (8th Cir. 1972). The State has not, and cannot, cite to any federal law precedent that remotely supports its argument that a government body retains immunity from suit as to all counterclaims when it brings an affirmative claim for monetary relief. It does not exist.

The State's brief relies on Texas cases that have been expressly abrogated, but the State fails to put this Court on notice of the cases' annulment. State's Br. at 11-12. The State excerpts language from *Borden v. Houston,* 2 Tex. 594, (1847) and *Bates v. Republic of Texas*, 2 Tex. 616 (1847) to assert that the State never waives its immunity from suit. The Austin Court of Appeals in *State v. Precision Solar Controls, Inc.*, 188 S.W.3d 364, n.6 (Tex. App.—Austin 2006), *rev'd on other grounds*, 220 S.W.3d 994 (Tex. 2007), detailed how and why later opinions from this Court had abrogated

the exact holding the State relies on in *Borden* and *Bates*. In fact, when this Court reversed *Precision Solar Controls*, its basis for doing do clearly nullified *Borden* and *Bates*:

> The court of appeals relied on our first opinion in [*Reata*], which we have since withdrawn and replaced. [cite omitted]. ***We held that a governmental entity that brings an action waives immunity from suit for claims that are germane to, connected with, and properly defensive to its action, to the extent of an offset.*** [cite omitted]. The State argues that it has not by its action waived immunity for an intentional tort claim like Precision's. Such arguments should be further considered by the lower court in light of *Reata*.

State ex rel. Texas Dept. of Transp. v. Precision Solar Controls, Inc., 220 S.W.3d 494 (Tex. 2007) (emphasis added).

Other parts of the State's brief—which also misinterpret the holding and gist of the referenced cases—stretch into Indian Tribe cases and irrelevant situations. For example, a review of *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241 (8th Cir. 1995), demonstrates that the State's citation to *Rupp* on page 13 of its brief, while technically correct, is misleading. *Rupp* does contain the quote that "[t]he commencement of a lawsuit by itself does not, however, operate as a waiver of immunity with respect to compulsory counterclaims," but the surrounding sentences in that opinion explain that the tribe's immunity was properly waived as to recoupment counterclaims because the tribe filed a quiet title action. That lawsuit required the

defendants to assert any claims adverse to the quiet title action, and the court recognized an abrogation of immunity to counterclaims as a result. Thus, *Rupp* supports the Dental Group, not the State.

In sum, the State may quarrel with *how long* it has been the rule, but it must admit that *Reata* embodies the correct Texas interpretation of abrogation of immunity when the government files a civil suit seeking monetary relief.

III. Reply to State's argument that defendants are required to plead that its counterclaims are limited to offsetting the government's recovery.

For the first time in this case, the State asserts that the Dental Group's counterclaims are subject to wholesale dismissal because the Dental Group did not plead that its counterclaims were limited to offsetting any State recovery.[26] This argument was not raised at any time in the past, and has been waived. In any event, *Reata* and its progeny do not suggest that such clarification is required.[27] Finally, the Dental Group's prayer for relief in its

[26] State's brief at 52-53.

[27] *See Sweeny Community Hosp. v. Mendez*, 226 S.W.3d 584, 593–94 (Tex.App. Houston [1st Dist.] 2007, no pet) (Surmising that "the supreme court did not intend the term 'properly defensive' to restrict jurisdiction for the type of claim raised, but, rather, to restrict jurisdiction over the amount of a claim for damages against the governmental entity to the amount that the government actually recovers.")

counterclaim contained a general prayer for relief, which authorizes the pleader to recover whatever relief its pleadings and evidence will support.[28]

CONCLUSION

The TMFPA is not a one-of-a-kind, civil "superstatute." It should not be read to upend the U.S. Supreme Court's and this Court's principle that "it would be fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it had immunity as to the party's claims against it."[29] Nor should the TMFPA be interpreted so that it avoids the principle that "governments who file suit [seeking monetary relief] must follow the same rules as the governed."[30] Because the court of appeals' opinion allows the TMPFA to gut these two principles, it must be reversed.

Likewise, "Medicaid fraud prevention" and "law enforcement action" are not magic phrases that pardon the government from accountability for its own bad acts. Real "law enforcement actions" do not offend notions of due process, they protect it. Real "law enforcement actions" produce a fundamentally fair result that aims to produce at least the shadow of justice,

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[28] *See Robinwood Building and Development Co. v. Pettigrew*, 737 S.W.2d 110, 112 (Tex. App.—Tyler 1987, no writ).
[29] *See Guar. Trust Co. v. United States*, 304 U.S. 126, 134–35 (1938); *Reata*, 197 S.W.3d at 376.
[30] *Reata*, 197 S.W.3d at 384 (J. Brister, concurring.).

if not its full embodiment. Here, the State exaggerates its "law enforcement" power, and it does so for all the wrong reasons. Because the creation of a "law enforcement action" exception to *Reata* will have negative and far-reaching consequences, the Third Court's decision should be reversed.

PRAYER

The Dental Group asks this Court to reverse the judgment of the court of appeals so its counterclaims and third-party claims can proceed in the underlying suit.

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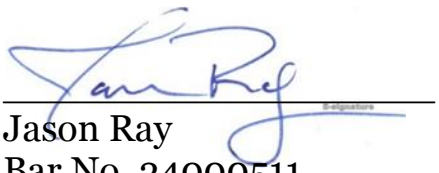

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with TRAP Rule 9.4 and contains 4,401 words in Georgia typeface of 14-point.

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NO. 16-0549

IN THE SUPREME COURT OF TEXAS

DR. BEHZAD NAZARI, D.D.S., ET AL
Petitioners,
V.

THE STATE OF TEXAS
Respondents,
V.

ACS STATE HEALTHCARE, LLC
Respondents.

APPENDIX:

1. Eric Dexheimer, "'PUSH! PUSH!' How a bungled private contract cost Texans $130 million", Austin American Statesman, (August. 3, 2017), http://www.mystatesman.com/news/push-push-how-bungled-private-contract-cost-texans-130-million/OGIpONvkbiVEaPESeWXiuI/

‘PUSH! PUSH!’ How a bungled private contract cost Texans $130 million

METRO-STATE 3

By Eric Dexheimer - American-Statesman Staff

Dr. Behzad Nazari works on a young patient at Antoine Dental Center on Friday, Feb. 14, 2014, in Houston. He was accused of fraud and sued for doing unnecessary work on kids’ braces, but won his case. (J. Patric Schneider / For the Statesman)

Posted: 9:14 a.m. Thursday, August 03, 2017

Highlights

Texas accuses Xerox of fraud, but lawsuit also exposes state mismanagement of one of its largest contracts.

A dozen years ago, Texas health care administrators hired a company to help determine when taxpayers should cover the cost of dental care for the state’s poorer residents, particularly children.

Appendix Exhibit 1

The company, later acquired by the giant corporation Xerox, deployed a team of medical specialists to review the tens of thousands of requests for dental and orthodontic care that flowed in every year. After evaluating each record, including X-rays and molds of the patient's mouth, the experts rendered a professional opinion as to whether a procedure was medically necessary, the standard to earn Medicaid coverage. The system ensured that public money was responsibly spent.

That's how it was supposed to work, anyway. What happened instead was a case of epic mismanagement that threatens to leave Texas taxpayers on the hook for more than $130 million.

Rather than retain medical professionals to analyze dental records, Xerox hired workers such as Amelia Correa, who'd dropped out of high school. Lee Friedman answered the company's phones before moving over to work as one of Xerox's so-called dental pre-authorization specialists. Amy Stabeno's prior experience consisted of working on a Dell Inc. assembly line.

All would later concede they had little understanding of the dental procedures they were approving to be paid for by taxpayers. "Can you tell us what constitutes a severe handicapping malocclusion?" Friedman was asked in a recent court deposition, referring to the standard condition under which the government-funded insurance pays for orthodontia.

"Not a clue," she answered. "Their teeth are messed up."

Records show that what was supposed to be a thorough medical assessment instead operated like a high-volume boiler room, with Xerox workers scrambling to approve as many applications as they could as quickly as possible, with no regard for their content. As the number of preapproval requests from dentists and orthodontists exploded, clerks worked faster and faster to keep up.

"Don't slow down!" a supervisor pleaded in a July 2011 email. "Keep pushing! Push! Push! Push! We need to have these cleared out!"

Subject: Still at 705 New! we need this number to be cut in half by noon!

Come on everyone keep pushing them out, we definitely have to get into tomorrows inventory today or we will be in a heap of trouble.

AMERICAN-STATESMAN STAFF

Emails from TMHP supervisors plead with clerks to process more dental pre-authorization applications.

"Come on, everyone, I need you to push those keys as fast as you can," the supervisor wrote a month later in another email accompanied by an illustration of a drowning man. "Let's keep swimming. We can't doggie paddle today."

Those who didn't process enough requests were reprimanded.

Paid by the number of applications they processed, workers had little incentive to give the pre-authorization applications anything other than a quick review. Approval rates for the dental and orthodontic requests for Medicaid-covered procedures reached 90 percent. The fastest of the clerks approved 200 applications a day — about 2½ minutes each.

Team members often worked from home, meaning that even if they were qualified, were given sufficient time and wanted to look at the records submitted by dentists and orthodontists, they couldn't have because those were kept at the office. Investigators later found boxes filled with molds and X-rays submitted by dentists that had never been opened.

Appendix Exhibit 1

About the Author

ERIC DEXHEIMER Eric Dexheimer is a member of the Austin American-Statesman's investigative team.

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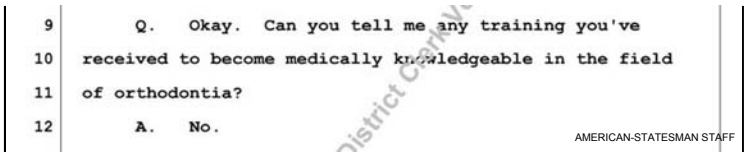


Xerox pre-authorization specialist responds to questions about her training in a deposition.

The company that held the contract before Xerox had employed two licensed dentists to review about a dozen applications a day. By comparison, Xerox employed a single dentist to oversee what grew to several hundred approval requests daily.

Records show that Dr. Jerry Felkner's reviews of the preapproval applications could be, if anything, even more cursory than his employees' work.

"He opened it at 8:48:57 and closed it at 8:49:03!" one clerk wrote to her supervisor in an email, taking note of computerized time logs showing that Felkner's medical review and approval of a case she'd just referred to him had taken exactly 6 seconds.

$130 million taxpayer bill

Although the broad outlines of the dispute between Xerox, Texas and the state's Medicaid-reimbursed dentists have been reported, the details of how Xerox furiously rubber-stamped requests for taxpayer funded dental work are just now being revealed in a huge and expanding lawsuit being heard in Travis County state district court. In the three years since it was filed, the action already has generated millions of pages of documents.

In one measure of how high the stakes are for Texas, Attorney General Ken Paxton's office, which is representing the interests of Texas, has had 50 attorneys work on it, according to information obtained under Texas open records laws. By mid-July, the state's lawyers collectively had spent 39,000 hours on the case— equivalent in the private sector to $20 million in legal fees. The earliest possible trial date is still more than a year off.

"It's like Jarndyce and Jarndyce," said Jack Stick, who oversaw state inspector general investigations into Xerox's work from 2011 to 2014, referring to the interminable legal dispute in Charles Dickens' "Bleak House." "It will never end."

The massive effort and expense highlight the steep financial exposure awaiting the dispute's loser. Texas has accused Xerox of committing fraud by knowingly ignoring pre-authorization rules, causing the state to overpay millions of dollars for undeserved dental and orthodontic Medicaid claims over a decade.

Appendix Exhibit 1

In 2012, Medicaid fraud investigators Doug Wilson, left, and Jack Stick pose in the evidence room of the state Office of ... Read More

Xerox was fired in 2014. Yet it stands to suffer costly consequences well beyond Texas. A company guilty of fraud is banned from doing Medicaid-related business with the federal government for a decade. Xerox currently holds Medicaid-related contracts for a half-dozen other states. (Earlier this year Xerox spun off its business services division into a separate company, Conduent Inc.; it's unclear how the move would affect the company's liability in the event of a loss in court.)

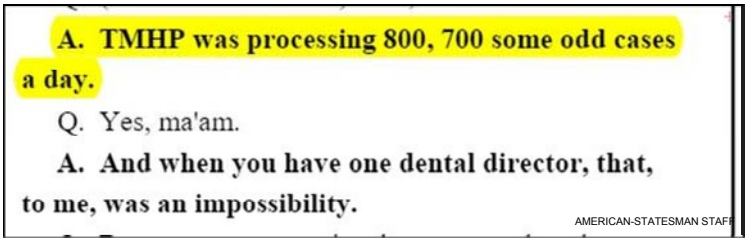
Texas, too, has plenty on the line. In August 2014, the inspector general for the U.S. Department of Health and Human Services, which investigates Medicaid fraud, concluded that while Xerox's clerks approved the Medicaid procedures without a meaningful review, it was Texas administrators who shouldered the legal blame.

A year later, the federal agency presented Texas with a bill for $133 million, the amount the U.S. government calculated the state owed for unnecessary dental payments allowed by Xerox's porous pre-authorization process. The state has tried to recover some of that by charging dozens of dentists with knowingly taking advantage of the toothless reviews by submitting applications for procedures that should not have been covered. But, except for some settlements, those efforts have been unsuccessful.

"Every time the state has alleged that a dentist has committed orthodontic fraud, they've lost," said Jason Ray, an Austin attorney who has represented 19 dentists.

That leaves only any money recovered from Xerox through the lawsuit to cover that bill. If Texas loses, state taxpayers pick up the tab.

"The stakes are very high for the taxpayers of the state of Texas, and very high for Xerox," said Raymond Winter, chief of the attorney general's Medicaid Fraud Division.


A. TMHP was processing 800, 700 some odd cases a day.
Q. Yes, ma'am.
A. And when you have one dental director, that, to me, was an impossibility.
AMERICAN-STATESMAN STAFF

State policy analyst Vivian LaFuente said Xerox's staffing was an early warning sign, though nothing was done when she alerted her ... Read More

The dispute also has laid bare embarrassing details of how loosely state bureaucrats oversaw one of Texas' largest contracts. In its defense, Xerox claims in court records that state regulators were well aware of how it was operating, so tacitly approved of its work. A company spokesman declined to answer questions about the case.

Court documents show state workers knew of the company's rubber-stamped pre-authorization reviews as early as 2007, alerting managers to the company's potentially costly misdeeds. Yet little was done about it for another four years, as tens of millions of dollars flowed out the door.

Even when regulators finally took action, no public employee was held accountable for the lapses.

"There were conversations about, 'How did we miss this?' " Billy Millwee, who managed the Texas Medicaid program at the time, recalled in a recent

Appendix Exhibit 1

deposition. “Believe me, I did a lot of self-reflection about how did I miss this, and I felt badly about that. But no — no one was fired, no one was terminated.”

Early warnings ignored

The Texas Health and Human Services Commission hired a company known as Texas Medicaid and Healthcare Partnership, or TMHP, to manage its Medicaid claims in 2004. Xerox purchased it in 2009, keeping the name.

Like the contract with its predecessor, National Health Insurance Co., the arrangement called for Xerox to vet dental pre-authorization requests with “medically knowledgeable” personnel, according to documents and testimony. In the past, Texas officials, as well as NHIC, interpreted that to mean licensed dentists would evaluate each application.

A former NHIC employee recalled its dentists painstakingly checking to make sure procedures met the criteria for Medicaid funding.

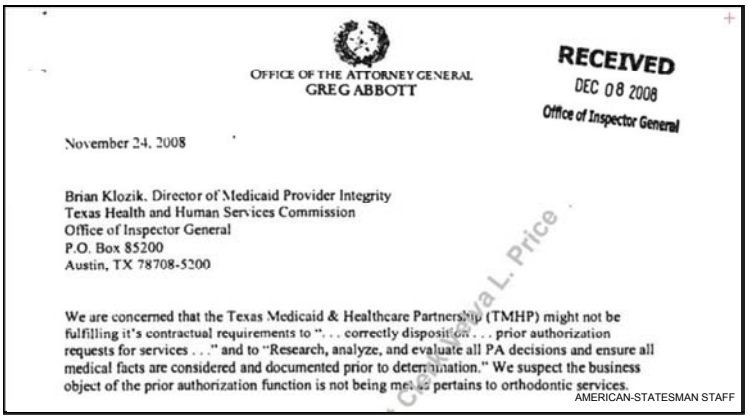
“Sometimes they were there 30 minutes (per request); sometimes they were there 45 minutes, sometimes they would call the providers for clarification of something,” recalled Vivian LaFuente, a dental assistant.

LaFuente was later hired by Texas to help oversee the dental pre-authorization process on behalf of the state. It was from that post that she became one of the first to raise alarms that Xerox’s reviews were considerably less rigorous.

By early 2007, LaFuente noticed the number of procedure requests had exploded from a dozen a day to hundreds — and yet Xerox employed only a single full-time dentist.

“My concern were the numbers — that how can a, one, licensed dentist approve this many cases in one day?” she recalled in a December 2016 deposition.

The surge in volume wasn’t a complete mystery. In 2007, Texas had settled a large class action lawsuit, agreeing to spend dramatically more money on fixing poor children’s teeth.



OFFICE OF THE ATTORNEY GENERAL
GREG ABBOTT

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Office of Inspector General

November 24, 2008

Brian Klozik, Director of Medicaid Provider Integrity
Texas Health and Human Services Commission
Office of Inspector General
P.O. Box 85200
Austin, TX 78708-5200

We are concerned that the Texas Medicaid & Healthcare Partnership (TMHP) might not be fulfilling it's contractual requirements to ". . . correctly dispositi[illegible] . . . prior authorization requests for services . . ." and to "Research, analyze, and evaluate all PA decisions and ensure all medical facts are considered and documented prior to determination." We suspect the business object of the prior authorization function is not being met as it pertains to orthodontic services.

AMERICAN-STATESMAN STAFF

After interviewing Xerox’s dentist, an attorney general inspector warns that the company is not doing any meaningful review of applications for ... Read More

But in an apparent effort to save money, court documents show, Xerox used the medically untrained clerks instead of dentists — or even nurses or hygienists — to handle its pre-authorization reviews. In depositions, several acknowledged that their preparation for the job was minimal.

“We have no training material, really,” Friedman recalled. “Our training lasted maybe — maybe an hour.”

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When LaFuente brought her concerns to the attention of her manager, however, she said they came to nothing.

“Well, she appreciated my work and for informing her of what was going on,” LaFuente recalled. “But that was about it.”

Several months later, documents show, LaFuente forwarded her concerns to the state health agency’s inspector general, the unit in charge of watchdogging Texas Medicaid operations. Once again, the warnings apparently went unheeded.

When asked about LaFuente’s alerts, Millwee, the program head, said he could not explain why they had not “escalated” up the state’s chain of command. (Now a consultant for a Philadelphia health care company, Millwee did not respond to an interview request.)

State was ‘lied to’

More red flags appeared. In 2008, an audit by the state inspector general’s office confirmed LaFuente’s earlier observations: The vast majority of pre-authorization requests were being rubber-stamped by medically untrained clerks. When Xerox asked the state for more money to hire additional dentists and medically trained specialists, administrators refused, and the company’s assembly line system continued.

Around the same time, during a series of meetings with dentists, Felkner, the Xerox dentist, acknowledged that he never looked at much of the clinical evidence the dentists were required to send in for the Medicaid pre-authorization review.

“The providers that were there literally threw their hands up in the air and said, ‘Why do we submit these diagnostic tools if you’re not looking at them?’ ” recalled LaFuente, who attended the meetings.

In late 2008, an investigator from then-Attorney General Greg Abbott’s office issued yet another warning. Marcus Holley had just interviewed Felkner as part of a Medicaid fraud case. Felkner explained that he trusted the dentists to accurately represent their patients’ need for Medicaid procedures, so he almost never rejected a request.

“We are concerned that TMHP might not be fulfilling its contractual requirements,” Holley wrote to the state Health and Human Services Commission.

Dr. Jerry Felkner, Xeroxs only dentist charged with reviewing tens of thousands of applications for taxpayer-funded dental work, testifies by video ... Read More

It wasn’t until five months later, in May 2009, that Millwee summoned Xerox executives to a meeting. “I told Xerox that I needed assurances that dental professionals were reviewing the requests and that they were not just ‘rubber-stamping’ them,” he recalled in an affidavit.

They “assured me that Dr. Felkner’s statements were misunderstood and assured me that Xerox used qualified dental ‘para-professionals,’ ” Millwee continued, adding, “If Xerox had told me the truth about what it was and was not doing … then I would have immediately taken steps.”

‘Something got past us’

Texas officials claim it wasn’t the only time Xerox officials mischaracterized the company’s work.

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“There was opportunity after opportunity after opportunity for Xerox to come clean, and they did not,” said Winter, the state’s lead lawyer. He said he has identified more than 40 separate instances in which Xerox misled state officials about its dental program:.

“The (state) folks who were assessing this were lied to by people they trusted and worked with,” he said.

Millwee said he was ready to officially declare Xerox had failed to follow the terms of its contract, a step that could have resulted in large fines. Instead, after meeting with company executives, he dropped the matter — essentially choosing to believe what Xerox’s executives said over what government investigators had found — a decision he now regrets.

“Based on what I know today, I believe the Marcus Holley letter was probably more accurate than not,” he said in a deposition, adding that the state audit, too, had been prescient. “I’m sorry. Looking back, I wish I would’ve paid a hell of a lot more attention to that audit now than I did then.

“Best efforts were made,” Millwee concluded of what was to become a $130 million mess. “Something got past us.”

Over the next two years, Xerox’s team of medically untrained clerks continued to approve hundreds of millions of dollars’ worth of taxpayer-funded dental care. In late 2011, after another audit confirmed the company was not doing what it was paid to do, Xerox hired more dentists and trained workers. Months later, Texas moved the program to managed care, ultimately firing Xerox in May 2014.

At the end, even Xerox’s clerks were not surprised.

“Dental has been messed up almost from Day 1,” Stabeno wrote to a colleague in a February 2011 email. “Now it’s so out of hand that fixing it is going to take years. I saw the writing on the wall 7 yrs. ago.”

Reader Comments 3

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Timothy Gaffney from Facebook 7 hours ago

Research how the burials & money is handled for deaths in the TDC. It is somewhere in the UTMB agreement. Good luck

Like Reply

ezaustin 10 hours ago

I cannot believe what I read in this article. It supports the theory I've always held that when people are handling other people's money, e.g. state of Texas, they aren't concerned about the outcome. Also makes me wonder about whether the state employees (administrators) were qualified to make a judgment re: letting such a contract. Were their any checks and balances in place?

1 Like Reply

Jana Bintz from Facebook 10 hours ago

Maybe that is part of where are education money is going.

1 Like Reply

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Prison heat ruling forces Texas to move 1,000 inmates, some to Austin

by Chuck Lindell, American-Statesman Staff

Texas prison officials told a federal judge Thursday they will temporarily move 1,000 inmates to air-conditioned facilities, including the Travis County State Jail, to comply with a court order requiring relief for heat-sensitive prisoners. Last month's order from U.S. District Judge Keith Ellison of Houston required prison officials to provide...

GREG KELLEY CASE: Texas Ranger tears into Cedar Park police work

by Tony Plohetski , Andrea Ball , American-Statesman Staff, KVUE News

In striking testimony Thursday, a Texas Ranger said he has identified three suspects in the child sexual assault case that led to Greg Kelley's conviction and 25-year prison sentence. One of those suspects, he said, is Kelley. Another is Johnathan McCarty, who prosecutors have previously named. Ranger Cody Mitchell said on the stand that...

House approves Medicaid bill, but it's not one of Abbott's priorities

by Johnathan Silver, American-Statesman Staff

In a show of unity Thursday, the Texas House voted 138-0 to give initial approval to legislation that would restore tens of millions of dollars in funding for therapy services for children with disabilities. There's just one problem, though: it's not one of Gov. Greg Abbott's 20 priorities for the special session, making the bill&rsquo...

Man found guilty of murder for deadly 2015 stabbing near Pflugerville

by Ryan Autullo, American-Statesman Staff

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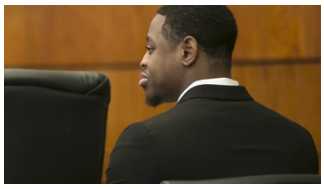

Multiple witnesses to a 2015 deadly stabbing attack in a quiet neighborhood in northeastern Travis County identified the attacker as a black man with dreadlocks, standing under 6 feet tall. Christopher Harris testified Thursday at his murder trial that the real assailant was an intruder that he didn't know. But two other men who were in...

88-year-old killed in Southeast Austin dump truck crash last week

by Katie Hall, American-Statesman Staff

A passenger died Monday from injuries he received in a crash in Southeast Austin last week, Austin police said. George Melvin, 88, was a passenger in a car that was hit by a dump truck around 11 p.m. July 27 in the 800 block of Bastrop Highway. Melvin died from his injuries on Monday, police said. Police said the dump truck changed lanes and struck...

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