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February 12, 2018

Re: No. 16-0549; *Dr. Behzad Nazari, D.D.S., et al. v. The State of Texas v. Xerox Corporation, et al.*; In the Supreme Court of Texas

No. 16-0671; *In re Xerox Corporation and Xerox State Healthcare, LLC f/k/a ACS State Healthcare, LLC*; In the Supreme Court of Texas

By E-Filing

Mr. Blake Hawthorne, Clerk
Supreme Court of Texas
Post Office Box 12248
Austin, TX 78711

Dear Mr. Hawthorne:

Please accept this *amicus curiae* letter brief regarding points raised during the *Nazari* and *Xerox* oral arguments.

Interest of Amicus Curiae

This letter is submitted by Xerox Corporation and Xerox State Healthcare, LLC (collectively "Xerox"). No one other than Xerox has paid for the preparation of this letter brief. In *Nazari*, the providers brought third-party claims against Xerox, which the State successfully moved to dismiss. Xerox is thus not a party to the *Nazari* appeal in this Court, but it has a common interest with the providers in having the Texas Medicaid Fraud Prevention Act interpreted correctly. Both cases before this Court involve a common issue about the nature of the civil remedies in Tex. Hum. Res. Code § 36.052(a). Xerox wishes to make clear that the statute's (a)(1) remedy contains a causation requirement – found in the words "as a result of the unlawful act." So whenever the State pursues that remedy, it has to prove that the bad act caused harm.

I. Section 36.052(a)(1) only allows recovery of a payment made "as a result of" an unlawful act and therefore operates like damages to redress a loss.

In the *Nazari* oral argument, the State addressed an issue that warrants clarification. Specifically, the State argued that it is not required to prove a "loss." That may be true for certain liability provisions, but it is not true for recovery under the (a)(1) remedy. The relevant exchange ends with the Court properly distinguishing the two:

Mr. 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 Boyd: Payment—payment, I mean, you're demanding the payment back.

Mr. Keller: Yes, we—

Justice Boyd: Well, 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 non-partisan way here. That loss, the payment you're trying to get back, you never *make* the payment until you get through Steps 2 and 3.

Mr. Keller: That's correct, but the unlawful act is the misrepresentation. It is the kickback scheme. And, yes, a payment is made, but at Tab A of our bench exhibit, we point out the statutory text here is not damages, it's not loss, it is the amount of any payment made.

. . . 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 is performing the services. Neither of those situations necessarily require overpayment.

Whereas the State deflected by focusing on liability, Justice Boyd refocused the point on remedies, reminding the State that it had pleaded for "recoupment of all those payments" under (a)(1), which *does* require proof of a loss:

Justice Boyd: You don't need damage or loss to prove the **liability** under the statute, I'll 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. . . .

Nazari argument at 20:40-22:20.

The Court hit the nail on the head, and this colloquy illustrates two important points about the (a)(1) payment remedy.

First, the State must prove a "loss" under the statute whenever it seeks recovery of payments under § 36.052(a)(1). Why? Because the requirement in (a)(1) to prove that a payment was made "**as a result of**" an unlawful act "imposes a requirement of but-for causation." *See Burrage v. United States*, 134 S. Ct. 881, 889 (2014). But-for causation requires evidence that without the act, "the injury would not have occurred." *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 929 (Tex. 2015) (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 774 (Tex. 2010)); *see also* PhRMA Amicus Brief in support of Xerox at 12-13; *id*. in support of Nazari at 11-12.

Thus, where a person commits an unlawful act, the State may only seek to recover a payment under § 36.052(a)(1) where it also proves that it made the payment "as a result of" the unlawful act. The State has conceded this point in the Xerox case when describing the significance of the § 36.052(a)(1) causation requirement.

In the State's own words:

> [B]y using, in the remedies section, the phrases "directly or indirectly" and "as a result of" the unlawful act, the Legislature defined the scope of the remedy the State may recover from an *already-liable* defendant. Should the State fail to show the payment or benefit was made "as a result of" the unlawful act, ***the State may not recover those amounts***, but the defendant is nonetheless still liable for the unlawful act, and for a civil penalty for the unlawful act.

Tab A (Cause No. D-1-GV-14-000581, *State v. Xerox Corp. et al.*, State Response to Xerox MSJ at 22, filed Feb. 29, 2016) (emphasis added); *see also* Xerox Reply Br. 10-11.

Whenever the State proclaims that it need not prove any losses to recover under the TMFPA, the Court should note that the point is overbroad and inaccurate in these lawsuits. At minimum, the State *does* need to prove the loss of a payment as a result of an unlawful act if it seeks to recover payments under § 36.052(a)(1).

Second, that the (a)(1) payment remedy is available only with proof of causation confirms that it is *damages* to make the State whole for the injury of unauthorized payments, not a penalty that is automatically triggered by any and every unlawful act. Despite its concessions about causation above, the State sometimes focuses on unlawful acts that would not result in a payment without clarifying that it could not seek the (a)(1) remedy for those acts. For example, during the *Nazari* argument, when the Court was testing the State's position on the nature of the (a)(1) remedy, the State pivoted to the unrelated point that certain unlawful acts would not necessarily result in an unauthorized payment, such as a kickback scheme.

It is important to keep liability and remedies straight. The (a)(1) payment remedy contains a causation element, whereas the (a)(3) penalty remedy does not. In this respect, a comment from the Court during the Xerox oral argument bears clarification.

During the Xerox argument, Chief Justice Hecht correctly observed that not every unlawful act would result in an unauthorized Medicaid payment. His comment then might be taken to suggest, however, that the payment remedy in § 36.052(a)(1) would be available for *any* violation under § 36.002—even if the violation did not result in an unauthorized payment:

> Section (a)(1) allows the state to recover a payment or benefit provided as a result of an unlawful act. As a result. Then you look at what's unlawful in 002. And the first three are either paying something that you shouldn't have paid or paying more than you should have paid. So that does sound sort of like damages. But then you keep going, and some of what's unlawful is misrepresenting the conditions of a facility, accepting a gift or money or other contribution, representing that somebody's licensed when they're not, ***and for all those, I guess, the (a)(1) applies***. So that if you took a donation or bribe, and payment was made but it should've been made anyway, you just shouldn't have taken a bribe, you would still have to in essence forfeit the payment, and that doesn't sound like damages; that sounds like more of a penalty.

To the extent that the preceding observation suggests that the (a)(1) payment remedy is available even without causation, it is incorrect. As explained above, Xerox and the State agree that the (a)(1) remedy is not available for every unlawful act or where the State does not prove causation. That remedy is only triggered when needed to make the State whole.

Justice Lehrmann inquired during the *Nazari* argument about the State's position that "the purpose [of the TMFPA] is to deter bad behavior." Yes, the (a)(3) civil penalty serves this purpose and thus is available without proof of causation. But deterrence is not the statute's only purpose, nor even its primary purpose. The Legislature's stated reasons for enacting the TMFPA in 1995 were to recover "losses." It introduced the legislation "to focus on a . . . cost component and the losses that the State incurs as a direct result of fraud." *See* Xerox Brief on the Merits at Tab E (transcription of proceedings before the Texas House Committee on Public Health, HB 2523). The Act was described as providing the Attorney General statutory authority and "the latitude to pursue restitution" and "to prevent the staggering losses we incur each year as a result of Medicaid fraud."); *id.* at 11 ("losses that . . . the State incurs as a result -- direct result of fraud."). This is why, on page 3 of its Original Petition in the Xerox suit, the State alleges that it suffered a "loss."

Because redressing losses is undeniably a purpose of the TMFPA's (a)(1) payment remedy, the Court should hold that this remedy is within the meaning of "damages" in Chapter 33 and "monetary relief" in *Reata.* To be sure, Xerox agrees with the *Nazari* providers that *Reata* contemplates broader relief than just damages and encompasses all remedies under the TMFPA. But at the very least, it would apply to the (a)(1) remedy, which fits squarely within the core of damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 1,576 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4.

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: February 12, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, a true and correct copy of the above and foregoing letter was forwarded to all counsel of record, via efiling, as follows:

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TAB A

Excerpt from State of Texas's Response to the Xerox Parties' Motion for Summary Judgment Regarding State Claims Seeking a Double Recovery

CAUSE NO. D-1-GV-14-000581

THE STATE OF TEXAS,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
v.	§	
	§	**53RD JUDICIAL DISTRICT**
XEROX CORPORATION; XEROX STATE HEALTHCARE, LLC; ACS HEALTHCARE LLC, A XEROX CORPORATION,	§	
Defendants.	§	**TRAVIS COUNTY, TEXAS**

STATE OF TEXAS'S RESPONSE TO THE XEROX PARTIES' MOTION FOR SUMMARY JUDGMENT REGARDING STATE CLAIMS SEEKING A DOUBLE RECOVERY

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simply ***measured*** by the amount the State paid, without reference to whether the State sustained any actual loss or "damage" from the unlawful conduct.

Notably, in the liability section of the TMFPA, there is no causation requirement. A person is liable if he knowingly makes a false statement, regardless of whether that misrepresentation actually caused harm or harm to the State. *See, e.g.*, Tex. Hum. Res. Code §§ 36.002(1) (affirmative false statements), 36.002(2) (omissions), 36.002(4) (false statements regarding information required by law). Likewise, by using, in the remedies section, the phrases "directly or indirectly" and "as a result of" the unlawful act, the Legislature defined the scope of the remedy the State may recover from an *already-liable* defendant. Should the State fail to show the payment or benefit was made "as a result of" the unlawful act, the State may not recover those amounts, but the defendant is nonetheless still liable for the unlawful act, and for a civil penalty for the unlawful act. In contrast, with a tort cause of action there can be no liability without causation of damages. *See Cunningham v. Blue Cross Blue Shield of Tex.*, No. 2- 06-363-CV, 2008 WL 467399, at *5 (Tex. App.—Fort Worth Feb. 21, 2008, pet. denied) (citing *Wheaton Van Lines, Inc. v. Mason*, 925 S.W.2d 722, 728 (Tex. App.—Fort Worth 1996, writ denied) ("In any cause of action, whether grounded in tort, contract, or a hybrid of the two, causation is the essential element necessary to attribute fault for one's injuries to another."); *Brookhouser v. State of California*, 10 Cal. App. 4th 1665, 1677, 13 Cal. Rptr. 2d 658, 665 (1992) ("It is axiomatic that a defendant cannot be held liable in tort for a harm he or she did not cause.").