

No. 16-0549

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**In the Supreme Court of Texas**

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

v.

THE STATE OF TEXAS,  
*Respondent,*

v.

XEROX CORPORATION ET AL.,  
*Respondents.*

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

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**BENCH EXHIBIT FOR THE STATE OF TEXAS**

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**TAB A**

**Statutory Text**

## TMFPA Offenses

### Texas Human Resources Code § 36.002. Unlawful Acts

A person **commits an unlawful act** if the person:

- (1) knowingly makes or causes to be made a false statement or misrepresentation of a material fact to permit a person to receive a benefit or payment under the Medicaid program that is not authorized or that is greater than the benefit or payment that is authorized;
- (2) knowingly conceals or fails to disclose information that permits a person to receive a benefit or payment under the Medicaid program that is not authorized or that is greater than the benefit or payment that is authorized;
- (3) knowingly applies for and receives a benefit or payment on behalf of another person under the Medicaid program and converts any part of the benefit or payment to a use other than for the benefit of the person on whose behalf it was received;
- (4) knowingly makes, causes to be made, induces, or seeks to induce the making of a false statement or misrepresentation of material fact concerning . . . (B) information required to be provided by a federal or state law, rule, regulation, or provider agreement pertaining to the Medicaid program; . . .
- (6) knowingly presents or causes to be presented a claim for payment under the Medicaid program for a product provided or a service rendered by a person who: (A) is not licensed to provide the product or render the service, if a license is required; or (B) is not licensed in the manner claimed; . . .
- (8) makes a claim under the Medicaid program and knowingly fails to indicate the type of license and the identification number of the licensed health care provider who actually provided the service; . . .
- (11) knowingly obstructs an investigation by the attorney general of an alleged unlawful act under this section; . . .
- (13) knowingly engages in conduct that constitutes a [kickback scheme] violation under Section 32.039(b).

## TMFPA Civil Remedies

### Texas Human Resources Code § 36.052. Civil Remedies (2005–present)

- (a) Except as provided by Subsection (c), a person who commits an unlawful act is liable to the state for:
- (1) the amount of **any payment** or the value of any monetary or in-kind benefit provided under the Medicaid program, directly or indirectly, as a result of the unlawful act, including any payment made to a third party;
  - (2) interest on the amount of the payment or the value of the benefit described by Subdivision (1) at the prejudgment interest rate . . . ;
  - (3) a civil penalty [within a specified range] for each unlawful act . . . ; and
  - (4) two times the amount of the payment or the value of the benefit described by Subdivision (1).

### Texas Human Resources Code § [36.004 or .052]. Civil Remedies (1995–2005)

- (a) Except as provided by Subsection (c), a person who commits an unlawful act is liable to the state for:
- (1) restitution of the value of any payment or monetary or in-kind benefit provided under the Medicaid program, directly or indirectly, as a result of the unlawful act;
  - (2) interest on the value of the payment or benefit described by Subdivision (1) at the prejudgment interest . . . ;
  - (3) a civil penalty [within a specified range] for each unlawful act . . . ; and
  - (4) two times the value of the payment or benefit described by Subdivision (1).

### Explanation:

- Before 2005, the subsection (a)(1) remedy was *already broader than damages* —it did not require proof of the State’s loss and was expressly deemed “restitution,” which turns on the defendant’s gain and not the plaintiff’s loss.
- In 2005, the Legislature added the final clause of subsection (a)(1) to include payments even to a third party. This *expanded* the remedy further, and thus the Legislature dropped the label “restitution.”



**TAB B**

**Construction Canons**

## Construction Canons

### **The TMFPA is liberally construed in favor of the Medicaid program:**

“This title [Title 2, which includes the TMFPA] shall be **liberally construed** in order that its purposes may be accomplished as equitably, economically, and expeditiously as possible.”

Texas Human Resources Code § 11.002(b).

### **Public interest is favored over private interest:**

“In enacting a statute, it is presumed that . . . (5) **public interest** is favored over any private interest.”

Texas Government Code § 311.021.

**TAB C**

***State ex rel. Ven-a-Care* Litigation**



fact issue on the question of damages, Defendants argue that this is a matter of law.

**2. Segregation.**

Defendants' argument that Plaintiffs are required to segregate the amount that VDP would have reimbursed providers "but for" Defendants' unlawful acts also fails. A plain reading of the Act demonstrates that **Plaintiffs are entitled to recover the entire payment made by VDP for Defendants' drugs.** Under the Act, a person found to have committed an unlawful act is liable for:

- (1) restitution of *the value of any payment* . . . provided under the Medicaid program, *directly or indirectly as a result of the unlawful act*;
- (2) interest on the value of the payment . . . described by subdivision (1) . . . ;
- (3) a civil penalty of: . . . (B) not less than \$1,000 or more than \$10,000 for each unlawful act; and
- (4) two times the value of the payment . . . described by subdivision (1).

TEX. HUM. RES. CODE ANN. §§ 36.052(a)(1), (2), (3) and (4). (Emphasis added).

Contrary to Defendants' assertions, the Plaintiffs' reading of the statute does not effectively remove the "as a result of" language from section 36.052(a)(1). **The Legislature's use of the words "any payment" suggests that it contemplated recovery by the State of the entire claim paid by the VDP as a result of the unlawful conduct of Defendants, not just the difference between the total claim and the amount the VDP would have reimbursed "but for" the unlawful acts.**

The only reason the VDP reimburses for Defendants' pharmaceutical products in the first place is because Defendants submitted their applications to the VDP requesting the inclusion of those products on the Texas formulary. Defendants lied in their

"Plaintiffs are entitled to recover the **entire payment** made by [the Medicaid program] for Defendants' drugs."

"The Legislature's use of the words 'any payment' suggests that it contemplated recovery by the State of **the entire claim paid by** the VDP as a result of the unlawful conduct of Defendants, **not just the difference** between the total claim and the amount the VDP would have reimbursed 'but for' the unlawful act."

## Statutory Amendment to Chapter 41

- In the 2003 *Ven-a-Care* case, the parties disputed whether CRPC chapter 41 caps the State’s civil remedies under the TMFPA.
- In 2005, the Legislature avoided future litigation on that issue by amending chapter 41 to exclude TMFPA actions:

“SB 563 would settle matters of interpretation that are debated by the Office of the Attorney General and defendants in cases involving Medicaid fraud.”

House Research Org., Bill Analysis at 2, S.B. 563, 79th Leg., R.S. (May 22, 2005).

- The PhMRA amicus brief (Br. 10) ignores this history in claiming that the Legislature “understood” that TMFPA suits are for compensatory damages.
- PhMRA cites no statute taking that view—the TMFPA has *never* called subsection (a)(1)’s remedy “compensatory damages.”
- Nor does PhMRA cite any legislative history calling that remedy “compensatory damages.”
- And this 2005 amendment to chapter 41 simply bypassed litigation on the issue:
  - *Cf., e.g., E.g., Chastain v. Koonce*, 700 S.W.2d 579, 581 (Tex. 1985) (“[t]he act was specifically amended in 1975 to clarify the legislature’s intent”); *Texas Workers' Comp. Comm'n v. Cont'l Cas. Co.*, 83 S.W.3d 901, 909 (Tex. App.—Austin 2002, no pet.) (“the legislature acted to clarify its intent”).

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Respectfully submitted.

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