

Fighting Medicaid Fraud in Texas

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By

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Executive Summary

The purpose of this report¹ is to evaluate recoveries obtained by the State of Texas under the Texas Medicaid Fraud Prevention Act (TMFPA) and its federal analog, the False Claims Act (FCA), as a case study of a state's experience enforcing *qui tam* laws to address fraud. Our key findings are:

- Texas has obtained tremendous recoveries through enforcement of TMPFA and the FCA. Over the period from State fiscal year 2006 through State fiscal year 2012, Texas recovered over \$821 million for state and federal taxpayers after subtracting for relators' shares and Texas State attorney fees and costs. Over \$348 million of this amount was allocated to Texas taxpayers and over \$473 million was allocated to federal taxpayers under the Medicaid state/federal share system.
- Nearly half of these recoveries – over \$394 million – resulted from fraud cases in which Texas led the investigation and prosecution of the case under TMFPA.
- Whistleblowers have played a critical role in these recoveries, with over \$800 million of the \$821 million in total recoveries stemming from whistleblower-initiated cases.
- The total budget for the Texas Attorney General's anti-fraud staff – which in the time frame reviewed has varied between \$4.75 million and \$8.45 million per year – is dwarfed by recoveries to the State generated by the work of this office.
- Provisions in TMPFA requiring defendant compensation of the State attorneys' fees and costs have brought back over \$75 million to the State between 2006 and 2012.

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Study Methodology

The purpose of this report is to provide a case study of state use of false claims laws to recover taxpayer dollars by focusing on the efforts by the State of Texas to investigate and prosecute fraud under its false claims law and its federal analog. The report analyzes recoveries to the State under the State and federal false claims laws, and assesses what other states can learn from Texas' anti-fraud initiatives.

Recoveries include funds obtained either through settlements with defendants or judgments rendered in a court proceeding. This data set of 90 cases where settlements or judgments were achieved over fiscal years 2006 through 2012 was made available to us by the Texas Attorney General's office.

While Texas FCA recovery data stretches back to FY 2000, we wished to ensure our findings were as timely and relevant as possible. Thus we chose to focus our analysis on FY 2006 through 2012. A large number of Texas TMFPA cases reached a settlement or judgment in 2010 and 2011, and the momentum continues apace. Texas reached settlement or judgment in 26 cases in FY 2012 (September 1, 2011, through August 31, 2012), a record number of settlements for the State under TMFPA, which exceeds the number of cases settled in each of the previous two years.

The table at the end of this document details funds recovered by Texas in TMFPA actions each year since 2006. Note that in some cases, certain data elements were not available from the Texas database. We were able to fill in a number of these missing data elements, and we have made note of these additions accordingly.

Background on Texas and Federal Anti-Fraud *Qui Tam* Laws

About 62 million people are covered by Medicaid nationwide in any given month. At least 75 million people are enrolled in this program at some point during the year, reflecting considerable churning on and off of the program. Total federal and state spending for Medicaid in 2012 was \$459 billion.²

Given the size and broad scope of the program, there are numerous opportunities to commit fraud, and both the federal government and, increasingly in recent years, the states, have been active in deterring, investigating, and prosecuting fraud against this program.

Congress enacted major amendments to the Federal False Claims Act (FCA) in 1986. Since then, the law has brought in over \$35 billion in civil returns to the federal government (\$24 billion in health care alone), plus approximately \$15 billion in criminal fines and civil settlement money returned to the states. The federal FCA has also sparked a parallel creation of state FCAs, beginning with California's in 1987. Since then, 28 states, the District of Columbia, and several localities have passed FCA laws.

² Vernon K. Smith, Kathy D. Gifford, and Jack Meyer, *The Economics of Medicaid Expansion: A Look at the Direct and Indirect Fiscal Considerations For States, Stakeholders, and Policy Makers*, Health Management Associates (Nov. 30, 2012).

The Texas legislature adopted the Texas Medicaid Fraud Prevention Act (TMFPA) in 1995. The legislature added *qui tam* provisions to the TMFPA in 1997 that provide whistleblowers the ability to bring a fraud action on behalf of the State.

Like the FCA, TMFPA allows private citizens to file civil lawsuits on behalf of the government to recover monetary damages from individuals or entities that commit unlawful acts against the Texas Medicaid program. Texas also protects employees from being discharged or discriminated against in their employment because of lawful acts taken by individuals under TMFPA.³

Under TMFPA, it is unlawful to commit any of 13 enumerated acts, including making false statements or misrepresentations to receive a benefit or payment under the Medicaid program. Proof of the person's specific intent to defraud is not required.⁴ The law also imposes liability when a person "should know" or "should have known" information to be false, or if the person acts in deliberate ignorance of the truth or falsity of the information, or in reckless disregard of the truth or falsity of the information.

Under TMFPA the State recovers both the State's and the relators' attorneys' fees and costs out of the proceeds of any settlement or judgment. In addition, the relator is entitled to a reward from the proceeds of the action, not to exceed 25% in an intervened case, and not to exceed 30% in a declined case. Attorneys' fees are calculated at "market rates." Costs include such items as expert fees, trial consultants, travel, deposition costs, and litigation-related infrastructure expenses.

In 2005, Congress passed the Deficit Reduction Act (DRA), which included provisions designed to promote the enactment of state false claims acts. As an incentive, Congress allowed states to receive a larger share of recovered money from settlements from Medicaid fraud claims. Specifically, if a state has in effect a law meeting the federal requirements, the state would be eligible to receive a 10 percentage point boost in the state/federal ratio used to allocate the recovery. For example, in a state where typically the federal government and state would evenly split a recovery of \$10 million (i.e. a 50% federal matching rate), this law would allow the state to bring home \$6 million, leaving \$4 million for the federal government. Although the TMFPA was deemed compliant with the DRA in 2007, recent changes to the federal FCA triggered another review of the TMFPA and other state statutes. As of the date of this report, the TMFPA has been deemed non-compliant, but has a grace period until August 31, 2013, to submit changes that bring the TMFPA back within DRA compliance, and Texas retains an additional ten percentage points on all recoveries under the TMFPA.

Regardless of whether Texas prosecutes a false claims act in conjunction with the federal government, monies recovered under the TMFPA are apportioned between the federal government and the State under the state/federal Medicaid share system. In a number of cases filed under both the federal FCA and the TMFPA, the State intervened where the federal government declined. Even in those cases, the federal government is entitled to a percentage of the recovery obtained by Texas because the federal

³ In Texas, civil litigation is pursued separately from the Medicaid Fraud Control Unit, which conducts criminal investigations of providers suspected of cheating the Medicaid program or abusing the elderly.

⁴ The Texas Medicaid Fraud Prevention Act (as amended through Acts 2007, 80th Leg.) (online at <http://www.taf.org/resources/statefca/texas>).

government provides partial funding of the state Medicaid program. Since 2007, the federal government has received approximately 50% of the net proceeds of a Texas recovery.

Analysis of Texas Recoveries under TMPFA

Summary of TMPFA Actions between 2006 and July 2012

From FY 2006 through FY 2012, Texas recovered over \$821 million through Medicaid fraud actions brought under TMPFA, not including \$75.4 million returned in state attorney costs, and excluding whistleblower awards. Of this amount, over 95%, or over \$800 million, was recovered in whistleblower-initiated actions.⁵ Texas taxpayers received a substantial portion of these recoveries, as \$348.4 million was allocated for Texas under the Medicaid state/federal share system. Federal taxpayers received \$473.1 million of this amount.

Out of the \$821 million recovered under TMPFA actions in the time frame covered by this report, over \$394 million was obtained in 15 cases that were investigated, prosecuted, and settled by the State of Texas.⁶

The total recovered by Texas for the State taxpayer share alone over the 2006-2012 period—\$348.5 million—is a substantial amount of money. To put this in perspective, the State’s total spending for its share of the Children’s Health Insurance Program (CHIP) in FY 2010 was about \$350 million. In other words, the funds collected by Texas over this six-year period could have almost fully funded the CHIP program for a year, a program that covered about 503,000 children in 2010.⁷

Texas Anti-Fraud Staff Resources

While authorizing legislation is very important, legislation simply sets the stage for the critical step of law enforcement. In Texas, Attorneys General have devoted substantial staff and time to using TMFPA to reduce Medicaid fraud within the state. The office of the Texas Attorney General has a stand-alone division, the Civil Medicaid Fraud Division, whose exclusive mission is to investigate and prosecute civil actions under TMFPA.

⁵ The remaining 4% of money recovered was recovered in actions or investigations initiated by the State or federal government without a relator.

⁶ The cases are: 2006, Baxter; 2007, Harris County; 2008, Aventis; 2009, Alpha Therapeutic; 2009, Abbott; 2010, Braun; 2010, Teva; 2010, Ortho/Dermatop; 2011, Mylan; 2011, Par Pharmaceutical; 2012, Watson; 2012, Actavis; 2012, Sandoz; 2012, Janssen; 2012, Amgen. Note that the Actavis settlement is to be paid out over three years, and only one year of payments is counted here.

⁷ See <http://www.hhsc.state.tx.us/medicaid/reports/PB8/PDF/Chp-8.pdf>.

Over the last six years, concurrent with Texas’s increasing success in obtaining recoveries under TMFPA, the Attorney General’s anti-fraud staff has grown from 13 employees in 2006 to 46 employees in 2012. The chart below shows the growth of this staff as Texas’s fraud-fighting efforts have borne fruit.

Civil Medicaid Fraud (CMF) Staffing and Budget

2006-2012

Year	Staffing	Budget ⁸	Total Amount Recovered ⁹
2006	13 employees	Budget not separated from overall AG budget	\$35,779,734
2007	27 employees	\$7,092,845	\$38,417,836
2008	42 employees	\$4,754,028	\$82,576,955
2009	53 employees	\$8,345,084	\$61,949,108
2010	48 employees	\$6,174,780	\$145,784,448
2011	46 employees	\$6,272,261	\$205,145,812
2012	46 employees	\$6,520,649	\$332,052,393

Source: Texas State Attorney General’s Office; note that vacancies also varied from year to year.

Recovery of Texas State Attorneys’ Fees and Costs

The Texas Medicaid Fraud Prevention Act allows Texas to recover from defendants the cost of investigations and litigation associated with False Claims Act cases that are settled or adjudicated to success. The sums collected by the state of Texas have fluctuated widely from year to year, from as little as \$320,490 in FY 2007, to over \$38.3 million for FY 2012, with sums rising and falling depending on the number of cases resolved and the number of those resolved cases initiated and developed by the State of Texas alone. Between 2006 and 2012, the State of Texas recovered over \$75.4 million in attorney

⁸ In FY 2006 and FY 2007, the Civil Medicaid Fraud section did not have a separate budget. Beginning in FY 2008, which began on September 1, 2007, the biennial \$12 million legislative appropriation for enhanced civil Medicaid fraud efforts took effect.

⁹ This includes the Texas taxpayer share, federal taxpayer share, and recovered Texas Attorney General attorneys’ fees and costs. These numbers represent money recovered which may not include all sums from one year, but may also include some money from a previous year.

fees and litigation costs associated with successful False Claims Act cases – a sum that exceeds the total budget of the Texas Attorney General’s anti-fraud staff during that same period of time.¹⁰

Notes on Major Cases

In exploring the database, it is worth noting a few instances where the numbers are particularly significant. In the State’s case against Janssen Pharmaceuticals, which was settled in the middle of trial, Texas recovered a total of \$158 million. This was the largest settlement in a state-only case since the TMFPA was passed. In that case, the State taxpayers’ share was \$49 million, the federal share was \$49 million, the relator’s share was \$20.3 million, the relator’s attorney fees and costs were \$25.9 million, and the Texas Attorney General recovered \$13.8 million for the State’s attorneys’ fees and costs.

Almost exactly a year earlier, beginning in January 2011, Texas tried a TMFPA case against an Icelandic pharmaceutical company, Actavis,¹¹ to judgment in the first and only case tried to judgment under the TMFPA. A unanimous Travis County jury awarded \$171 million to Texas. After interest and attorney’s fees, the verdict was for in excess of \$181 million. The Attorney General ultimately settled the case for \$84 million after Actavis appealed and demonstrated a limited ability to pay. Actavis agreed to pay this \$84 settlement in four installments. The first payment in the amount of \$38.5 million was received in December, 2011, and is the only payment credited in our analysis. The Texas taxpayer share of this \$38.5 million payment was \$13.4 million, the federal share was \$17.0 million, the relator share was \$3.55 million, the relator’s attorney fees and costs were \$2.3 million, and the Texas Attorney General’s Office recovered \$2.3 million for its attorneys’ fees and costs. Each of the subsequent payments to be made by Actavis will be apportioned among Texas, the United States and the Relator in accordance with their pro rata shares.

Another 2012 case yielded the State \$19.4 million, this time against Sandoz. A recovery from the generic drug firm Teva brought in \$28 million for Texas in 2010.

Conclusion

Initiatives by Texas to investigate and prosecute fraud under the Texas Medicaid Fraud Prevention Act have been very successful. Cases investigated and prosecuted by the State have recovered substantial funds for both the State of Texas and federal taxpayers. Finally, the amount of the recoveries appears to be growing, with 2012 seeing the highest level of recoveries to date.

¹⁰ The Texas legislature allows the Texas Attorney General’s office to contract out some litigation functions, and those costs are recoverable when cases are successful.

¹¹ Actavis is one of many pharmaceutical manufacturers named in a TMFPA action filed by Ven-A-Care of the Florida Keys. Ven-A-Care filed one of the very first TMFPA actions in Texas in 1999. Since Texas obtained the very first settlement in a Ven-A-Care action in 2003, the Attorney General has recovered more than \$498 million from defendants in all cases filed by Ven-A-Care (including Texas taxpayer, federal taxpayer, relator share, attorneys’ fees and costs).

Texas Medicaid Fraud Recoveries 2006 - 2012

Provider/Defendant	Year	Total	State share	Fed Share
Columbia III	2006	\$26,310	\$9,997	\$16,312
Gambro	2006	\$1,861,572	\$755,687	\$1,105,884
Smith-Kline	2006	\$1,536,320	\$569,447	\$966,872
Serono	2006	\$3,441,121	\$1,160,327	\$2,280,794
Tenet	2006	\$613,107	\$206,013	\$407,094
Baxter/VAC	2006	\$6,320,000	\$2,528,000	\$3,792,000
Center for Pain Management	2006	\$136,000	\$50,400	\$85,600
King	2006	\$7,781,542	\$2,916,210	\$4,865,332
Renaissance	2006	\$4,933,766	\$1,973,506	\$2,960,259
Rescare	2006	\$506,358	\$210,645	\$295,713
Roxane	2006	\$5,619,732	\$2,250,841	\$3,368,891
Pediatrix	2007	\$5,662,880	\$3,197,532	\$2,465,348
Omnicare	2007	\$2,126,784	\$779,028	\$1,347,756
Schering III	2007	\$16,067,274	\$6,882,487	\$9,184,786
Emeritus	2007	\$1,644,394	\$661,720	\$982,673
Harris County	2007	\$12,596,012	\$2,677,426	\$9,918,585
Felipe Sarda	2008	\$374,886	\$149,467	\$225,418
Medicis	2008	\$1,413,748	\$582,365	\$831,382
Marquez/Fulp	2008	\$2,534,057	\$118,647	\$2,415,410
GSK/VAC	2008	\$1,319,177	\$1,097,580	\$221,597
Purdue/Oxycontin	2008	\$3,636,209	\$1,534,512	\$2,101,697
Merck/Steinke	2008	\$22,211,836	\$10,471,162	\$11,740,674
Merck/LaCorte	2008	\$11,478,015	\$5,588,314	\$5,889,701
Walgreens/Lisitza	2008	\$2,315,834	\$1,073,071	\$1,242,762
HEB	2008	\$39,000	\$19,500	\$19,500
Aventis/VAC	2008	\$989,613	\$592,185	\$397,428
BMS/Ford/Wil/Pia/VAC	2008	\$35,410,173	\$16,683,518	\$18,726,655
Abbott/VAC (1)	2009	\$15,195,000	\$7,597,500	\$7,597,500
Cephalon/Boise	2009	\$9,901,235	\$4,480,622	\$5,420,612
Eli Lilly/Zyprexa	2009	\$29,254,581	\$13,572,004	\$15,682,577

Dialysis/Cantor	2009	\$1,071,073	\$490,322	\$580,750
Alpha Therapeutic/VAC	2009	\$908,500	\$454,250	\$454,250
Houston Diagnostic	2009	\$650,000	\$6,840	\$643,160
Mylan/innovator	2010	\$5,642,016	\$2,354,936	\$3,287,080
AstraZeneca/albuterol	2010	\$65,058	\$25,929	\$39,129
Ortho/Dermatop/VAC	2010	\$436,491	\$187,751	\$248,740
UHS/Moilan (McAllen Hosp.)	2010	\$3,712,118	\$1,828,038	\$1,884,080
Aventis/Azmacort	2010	\$2,783,130	\$1,077,850	\$1,705,280
Pfizer/Kopch et al	2010	\$52,379,648	\$25,351,244	\$27,028,404
Braun/VAC	2010	\$711,000	\$711,000	
Medtronic/Poteet	2010	\$449,835	\$240,184	\$209,651
IVAX/Kammerer (12)	2010	\$224,255	\$224,255	
Omni/Kammerer (12)	2010	\$1,651,371	\$1,651,371	
FORBA(Small Smiles) (2)	2010	\$394,956	\$63,387	\$331,569
Otsuka/Pia – Abilify	2010	\$220,745	\$97,586	\$123,159
Bayshore	2010	\$330,745	\$165,372	\$165,372
Intermune (4) (12)	2010	\$563,783	\$563,783	
Teva/VAC (3)	2010	\$63,031,255	\$28,031,255	\$35,000,000
AstraZeneca/Wetta & Krus	2011	\$21,674,142	\$9,794,246	\$11,879,895
Novartis/Lalley (TOBI)	2011	\$9,527,698	\$4,387,234	\$5,140,463
Ortho/Maher	2011	\$2,847,022	\$1,250,899	\$1,596,122
KOS/Cashi	2011	\$428,731	\$173,475	\$255,256
Forrest/Gobble	2011	\$7,210,383	\$2,662,059	\$4,548,323
Glaxo/Eckard	2011	\$16,781,623	\$5,046,090	\$11,735,533
Allergan/Beilfuss (Botox)	2011	\$2,657,873	\$1,256,996	\$1,400,877
Novartis/McKee	2011	\$15,190,457	\$6,817,387	\$8,373,070
Mylan/VAC	2011	\$53,121,249	\$11,121,249	\$42,000,000
Schwarz/Conrad	2011	\$1,933,647	\$744,537	\$1,189,110
Serono/Amato (Rebif)	2011	\$733,425	\$282,231	\$451,194
Dallas/Moore	2011	\$1,823,842	\$341,842	\$1,482,000
Ameritox/Mau	2011	\$87,200	\$28,553	\$58,647
Addison/Moore settlements (7)	2011	\$1,095,371	\$189,744	\$905,627
Par/VAC	2011	\$55,311,000	\$24,411,000	\$30,900,000
UBC/Root	2012	\$902,750	\$384,861	\$517,889
Sandoz/VAC	2012	\$44,111,287	\$19,361,287	\$24,750,000

Novo/Black	2012	\$292,028	\$95,656	\$196,372
Elan-Esai/Chartok	2012	\$8,273,299	\$3,436,692	\$4,836,607
Watson/VAC	2012	\$23,497,393	\$11,299,278	\$12,198,115
Omni/Resnick	2012	\$1,033,907	\$362,339	\$671,567
Rowlett (part of Addison/Moore)	2012	\$56,163	\$8,980	\$47,182
City of Hurst (part of Addison/Moore)	2012	\$67,735	\$11,017	\$56,718
Southwest General (part of Addison/Moore)	2012	\$42,047	\$6,797	\$35,250
Pfizer/Wethe (detrol)	2012	\$329,655	\$116,375	\$213,279
UTSW/Gentilelo	2012	\$1,200,000	\$358,545	\$841,454
Actavis/VAC (5)	2012	\$30,354,105	\$13,395,772	\$16,958,333
Hawthorn/Heiden	2012	\$1,425,551	\$519,430	\$906,120
Maxim/West (6)	2012	\$1,164,788	\$432,217	\$732,571
Janssen/Jones	2012	\$97,952,000	\$48,976,000	\$48,976,000
All Smiles	2012	\$1,199,000	\$599,000	\$600,000
Amgen/VAC	2012	\$869,000	\$434,500	\$434,500
Merck/Vioxx	2012	\$24,366,284	\$8,328,034	\$16,038,250
KV/Ethex (8)	2012	\$321,685	\$8,119	\$313,566
Medtronic/Schroeder	2012	\$72,333	\$28,061	\$44,272
Dava/Conrad (9) (12)	2012	\$18,680	\$18,680	
Kanneganti/Grubbs (10) (12)	2012	\$6,000	\$6,000	
NextCare/Granger & Saidani (11)	2012	\$9,006	\$3,512	\$5,494
Walgreens/Chin	2012	\$33,972	\$11,523	\$22,448
Express/Morgan/McKesson	2012	\$9,006	\$3,512	\$5,494
Glaxo/Gerharty (multiple)	2012	\$51,376,976	\$17,845,048	\$33,531,928
TOTALS		\$821,580,806	\$348,473,843	\$473,106,963

Notes to Texas Medicaid Fraud Recoveries Table

1. There were discovery sanctions against Abbott not included in this total.
2. Settlement is being paid out over 5 years. Last payment was received in January 2012.
3. This settlement was part of a multistate settlement with Florida, California, and the federal government. The grand total for all the participating states and the federal government was \$169 million, none of which would have been recovered absent the Texas litigation. The federal government's share of the entire settlement was \$100 million, but this amount was not itemized to show how much was allocated to the fraud that occurred in each of these states or in other federal programs. The federal share for the amount of fraud occurring in Texas is at least \$35 million.
4. Settled in FY 2008, but paid out over installments.
5. \$84 million to be paid out in 3 installments of 3 fiscal years -- totals reflect the payments received in each fiscal year.
6. \$8,564,817.00 to be paid in installments -- first 2 two installments received. Totals reflect the payments received in each fiscal year. After all payments are made, the total state share will be \$2,554,626, total federal share will be \$4,314,976. The federal share in this payment is calculated from the overall split, with the Texas share actually known.
7. These figures include settlements with 10 towns. Each town had different settlements and different relator's shares, so we combined them all together.
8. \$711,465 to be paid in installments. First state installment of \$11,599 received. Federal sum reflects the total sum they will receive. After all payments are made, the Texas state share will be \$240,233.
9. The total settlement was for \$11 million, and included \$5.73 million to be paid to the federal government and \$5,083,345 paid to the states collectively, with an addition sum to be paid to the Public Health Service.
10. Partial settlement only. Texas was not a party to the federal settlement.
11. Mostly Medicare settlement for \$10 million, to be paid out over 5 years. First Medicaid installment to state received, but total reflects the sum after all the installment payments are made.
12. Settlement was done with the federal government and representatives from the National Association of Medicaid Fraud control units without specific state and federal breakouts. Money shown is the Texas state share alone.