

**SUBJECT:** Unauthorized harvesting of timber; payments to timber sellers

**COMMITTEE:** Criminal Jurisprudence — committee substitute recommended

**VOTE:** 8 ayes — Place, Talton, Dunnam, Farrar, Hinojosa, Keel, Nixon, A. Reyna  
0 nays  
1 absent — Galloway

**WITNESSES:** For — John C. Flemming and Ron Hufford, Texas Forestry Association;  
Gary Joiner, Texas Farm Bureau  
Against — None  
On — James B. Hull and Ron Davis, Texas Forest Service; Bobby R. Young, Texas Forestry Service

**DIGEST:** CSHB 1128 would set up a trustee system for the money involved in buying and selling timber, create a criminal offense for failing to pay sellers of timber, and make persons who harvest timber without authorization liable for damages to the timber's owner.

Timber trust money would be defined as money a person who has purchased standing timber to harvest collects for the harvested timber. The original purchaser and each officer, director, partner or agent of a timber purchaser would be considered trustees of the money. Sellers of standing timber would be considered beneficiaries of the trust money.

CSHB 1128 would make it a state jail felony (penalty of six months to two years in a state jail facility and optional fine of up to \$10,000) to retain, use, disperse or otherwise divert more than \$500 of timber trust money without first paying the seller of the timber, if done knowingly or with the intent to defraud.

A person would be acting with intent to defraud if the person retained, used, dispersed or diverted trust money with the intent to deprive a seller of the money. Persons would be presumed to have acted with intent to defraud if

they did not pay all of the sellers the purchase price of the timber within 45 days after collecting money for the timber.

It would be an affirmative defense to prosecution that:

- the person paid the sellers all the trust money they were entitled within 15 days after being given written notice at their most recent known address that a criminal complaint had been filed or that a criminal investigation was pending; and
- if two or more persons claimed to be beneficiaries of the same timber trust money, the trustee had deposited the amount of disputed money into the registry of the the district court in the county in which the standing timber was located for the district court to divide.

If conduct that was an offense under CSHB 1128 was also an offense under another law, the state could decide which offense to prosecute.

CSHB 1128 also would make persons who harvest standing timber with the knowledge that the harvesting was done without the permission of the owner and persons who cause another to harvest timber without an owner's permission jointly and severally liable to the owner for damages equal to three times the market value of the timber. Payment of damages would not preclude a prosecution under current law requiring sellers and purchasers to see that a bill of sale is given when timber is sold.

CSHB 1128 would take effect September 1, 1997.

SUPPORTERS  
SAY:

CSHB 1128 is necessary to combat the unique situation faced by the timber industry. The bill would provide for civil and criminal remedies to ensure that timber owners receive payments for their timber, that timber thieves are adequately punished and that others are deterred from defrauding timber owners.

As timber prices have increased, timber owners have been victimized by an increasing number of unscrupulous thieves. In one year the Texas Forest Service's timber theft hotline has received over 100 calls. If timber is not sold directly to a timber company, it is generally sold to a harvester who cuts the timber, sells it and then pays the owner a previously agreed-upon price. Problems have arisen when harvesters do not adhere to their agreement to

pay timber owners and when persons have cut and sold timber without authorization and without compensating the owner. One thief has used eight aliases in three states to defraud timber owners.

Current theft statutes are difficult to use in these situations because often the timber owner and the purchaser have a simple written or verbal agreement that the purchaser failed to honor, and prosecutors are sometimes reluctant to press criminal theft charges if an agreement was in place. In addition, criminal prosecutions can be difficult because the thieves sometimes use shell companies or shut down and move their business, sometimes across state lines. Also, in some small counties prosecutors do not have the manpower to mount an extensive investigation to track unauthorized timber harvesting. The misapplication of fiduciary property statutes are also difficult to use for timber thefts because they were designed to deal with a different type of situation, and prosecutors are reluctant to apply them in timber cases.

CSHB 1128 would address this situation by establishing a procedure to be followed by persons who purchase timber for harvesting and by establishing criminal remedies for timber owners if the procedure is not followed. Money from selling harvested timber would be considered trust money, and persons who purchase standing timber for harvest would be considered trustees of the money. Sellers of timber would be the beneficiaries of the trust money.

CSHB 128 would make it a criminal offense for a trustee to retain or divert more than \$500 of the trust money without paying the seller for the timber. This would be similar to procedures used in the construction industry in which money paid to contractors and others is considered a trust fund for labors, subcontractors and others. This procedure is appropriate for timber sales because both kinds of transactions involve parties that receive money and then pass it through to others. The procedures in CSHB 1128 would solve problems that prevent the current theft statute from being used for timber thefts because the bill would allow criminal charges to be brought even if an agreement to cut and sell the timber had been established between the seller and purchaser.

Persons would be guilty of a criminal offense only if they knowingly or with intent to defraud retained more than \$500 of the trust money. A timber buyer would have 45 days after collecting the money for the timber to pay sellers, which would be ample time since mills typically pay harvesters within seven days. In addition, it would be a defense to prosecution if trustees paid timber sellers within 15 days of being notified of pending criminal proceedings or deposited the trust money into the district court's registry if there was a dispute among trustees. This criminal offense would be properly punished as a state jail felony since the value of the theft in almost all cases would be in the thousands of dollars and in the Penal Code theft of \$1,500 to \$20,000 is punished as a state jail felony. The presumption of intent to defraud if the trustee did not pay beneficiaries within the set time period would track similar presumptions found in other criminal statutes, such as the theft by check offense.

Although the 1993 Penal Code revisions established broad categories of offenses, in this situation the framework is inadequate. Since 1993 the Legislature has fine tuned the Penal Code to cover specific situations such as theft of livestock. CSHB 1128 would be another minor adjustment to the code to fit the unique circumstances faced by the timber industry.

CSHB 1128 also would make persons who harvest standing timber without authorization liable to the timber owner for damages up to three times the market value of the harvested timber. This would be an appropriate penalty for harvesting timber without authorization since timber can have a 30-year growing cycle before it is sold, and owners sometimes sell their timber only once in their lifetime. Owners may have been waiting to sell the timber for a specific purpose, such as retirement benefits or money for a college education. It is appropriate that all persons who harvest timber without authorization and who cause others to do so be held jointly and severally liable. This would put teeth in the law, deter thieves, and ensure that timber owners can look to all those who engaged in fraudulent activities to recover damages.

**OPPONENTS  
SAY:**

CSHB 1128 would be an inappropriate use of criminal law to combat what is more appropriately handled as a civil matter. Civil suits for damage to property and other wrongs and the law governing business transactions are more appropriate for dealing with these situations.

CSHB 1128 is unnecessary because persons who steal timber can be prosecuted under current Penal Code theft or misapplication of fiduciary property provisions. The 1993 Penal Code revisions established broad provisions and eliminated many special provisions, and it should not be distorted with special exceptions for specific circumstances.

It is inappropriate to make all offenses involving defrauding timber owners of trust money state jail felonies. The Penal Code establishes punishments for theft and other property crimes according to a “value ladder” that takes in account the value of the theft, and CSHB 1128 should adhere to those provisions. In addition, the presumption that a trustee acted with intent to defraud if the trustee did not pay beneficiaries within 45 days of collecting the money could be construed as an unconstitutional lowering the burden of proof for the state.

The bill's provisions for joint and several liability would be out of line with the revisions to tort law that were enacted in 1995 by the 74th Legislature. Those revisions raised the threshold for joint liability to 50 percent, meaning that a defendant can be forced to pay the entire award only if the defendant is at least 51 percent at fault. CSHB 1128 would vary from this standard by making all persons involved with harvesting timber without authorization jointly and severally liable, regardless of their percentage of fault.

NOTES:

The committee substitute eliminated a provision in the original version of the bill that would have changed the current penalty for failing to see that a bill of sale for timber is given and added the provisions establishing procedures for handling money from timber sales as trust money.