

SUBJECT: Revising criminal Medicaid fraud, exploitation of child, elderly, disabled

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 6 ayes — Gallego, Aliseda, Burkett, Carter, Christian, Zedler

0 nays

3 absent — Hartnett, Y. Davis, Rodriguez

SENATE VOTE: On final passage, April 11 — 31-0

WITNESSES: *(On House companion bill, HB 1332:)*

For — *(Registered, but did not testify:* Sandra Crenshaw, Leadership and Accountability Committee; Lee Spiller, Citizens Commission on Human Rights)

Against — Anita Bradberry, Texas Association for Home Care and Hospice

On — Brian Johnson, Texas Office of Attorney General; Karen Nelson, Texas Health and Human Services Commission - Office of Inspector General

BACKGROUND: **Medicaid fraud.** Penal Code, sec. 35A makes Medicaid fraud a crime. The offense can range from a class C misdemeanor to a first-degree felony, depending on the value of any payment or benefit. The crime is a class C misdemeanor (maximum fine of \$500) if the value of the fraud is less than \$50, and a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000) if the value is \$200,000 or more. If conduct is an offense under Medicaid fraud and another section of the Penal Code, a person may be prosecuted under either section.

Charges related to Medicaid fraud must be filed within three years if the offense is a felony and within two years if it is a misdemeanor.

Exploitation of a child, elderly or disabled individual. Penal Code, sec. 22.04 makes injury to a child, elderly individual, or disabled individual a

crime. Exploitation is included in this offense. Exploitation is defined as the illegal or improper use of an individual or his or her resources for monetary or personal benefit, profit, or gain. It is an offense for owners, operators, or employees of nursing homes or similar facilities to intentionally, knowingly, recklessly, or with criminal negligence act to, or by omission, exploit a child or elderly or disabled individual.

The offense is punished as either a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) or a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000), depending on whether the exploitation was done intentionally, knowingly, or recklessly and whether committed by an act or an omission. Persons subject to prosecution under sec. 22.04 and another section may be prosecuted under either or both sections.

DIGEST:

Medicaid fraud. SB 688 would change the statute of limitations for Medicaid fraud felonies from three to seven years, so that criminal charges would have to be filed within seven years of the offense.

The Medicaid fraud penalty value ladder would be modified:

- to add a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) if the defendant submitted more than 25 but fewer than 50 fraudulent claims under Medicaid and the submission of each claim was a Medicaid fraud offense; and
- to add a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) if the defendant submitted 50 or more fraudulent claims under Medicaid and the submission of each claim was a Medicaid fraud offense.

For offenses other than first-degree felonies, the punishment for Medicaid fraud would be increased to the next highest offense if the defendant was a provider or a high-managerial agent. The bill would define high-managerial agent as a director, officer, or employee who was authorized to act on behalf of the provider.

During the punishment phase for Medicaid fraud, the state and the defendant would be able to offer evidence not offered during the guilt or innocence phase of the trial concerning the total monetary loss to Medicaid caused by the defendant. An employee of either the Health and Human Services Commission (HHSC) Office of the Inspector General or

the attorney general's Medicaid Fraud Control Unit would be allowed to testify concerning the total loss to Medicaid and would be subject to cross-examination. Evidence offered could be considered by the judge or jury in determining the amount of any restitution.

Medicaid fraud would be added to the list of crimes that could constitute organized criminal activity.

All information and materials subpoenaed or compiled by the HHSC during a Medicaid fraud investigation would be confidential and not subject to disclosure under the Public Information Act or by discovery or subpoena. The same information and materials collected by the attorney general during a Medicaid fraud investigation would be confidential and not subject to disclosure.

SB 688 would add peace officers employed by the attorney general to the list of those able to request a court order to use certain electronic tracking devices.

The bill includes a definition of "document" in the current offense of securing execution of a document by deception. A document would be defined as including electronically stored data or other information retrievable in a readable, perceivable form.

SB 688 would allow conduct that was an offense under Medicaid fraud and an offense under another section of the Penal Code to be prosecuted under both sections.

With the consent of the local county or district attorney, the attorney general would have concurrent jurisdiction with the local prosecutor to prosecute a Medicaid fraud offense.

Exploitation of a child or an elderly or disabled individual. SB 688 would move the offense of exploitation of a child or elderly or disabled individual from its current placement as an assault offense to the Penal Code chapter on fraud. The crime would be a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000).

Persons who were subject to prosecution for this crime and other crimes could be prosecuted for either or both crimes, and Penal Code provisions allowing defendants to sever from each other two or more offenses would

not apply. If a person was prosecuted for two different crimes and received a sentence for both convictions, the sentences would run concurrently.

With the consent of the local county or district attorney, the attorney general would have concurrent jurisdiction with the local prosecutor to prosecute an exploitation offense that involved the Medicaid program.

Effective date. The bill would take effect September 1, 2011, and would apply only to offenses committed on or after that date. If the prosecution of a Medicaid fraud offense was barred by the statute of limitations before September 1, 2011, it would remain barred.

SUPPORTERS
SAY:

SB 688 would give the attorney general's Medicaid Fraud Control Unit and local prosecutors additional tools to combat Medicaid fraud and better protect children, the elderly, and disabled persons from exploitation.

Medicaid fraud. Medicaid fraud is a complex and costly crime for taxpayers that also robs Medicaid patients of critically needed services.

By extending the time that law enforcement officers could bring Medicaid fraud felony charges from three to seven years, SB 688 would recognize that criminal prosecutions for Medicaid fraud often take longer to assemble. These cases sometimes take several months or years to materialize. Furthermore, the seizure of records and analyses of complex accounting details can take longer than the current three-year limit. SB 688 would match this crime's statute of limitations to that of similar white-collar crimes, such as credit card abuse and fraudulent use of identifying information.

Creating third- and second-degree penalty offenses based on the number of individual Medicaid offenses committed would allow for fewer witnesses and make the sentencing fit the crime. For example, under current law, a person who committed 50 instances of fraud worth \$10 each would be charged with 50 class C misdemeanors. However, under SB 688, the same person could be charged with a second-degree felony, which would be fairer and more efficient. Other offenses, such as the fraudulent use of identifying information, carry penalties based on the number of offenses rather than the overall monetary damages. For instance, it would be a third-degree felony for someone to fraudulently use identifying information five to 10 times.

Adding an enhancement to the next highest category of punishment would be appropriate for providers and high-managerial agents who committed Medicaid fraud. For a theft offense under current law, the penalty is enhanced if the defendant is in a contractual relationship with the government and obtained the stolen property via the contractual relationship. SB 688 would make that enhancement parallel for Medicaid fraud. A high-managerial agent within a provider's office holds a position of trust related to the government contract and should receive the enhanced penalty if convicted of Medicaid fraud, just as a provider should.

SB 688 also would allow evidence of the total monetary loss to Medicaid not considered at the guilt or innocence phase of the trial to be considered in the punishment phase. This would not change the punishment range established by the verdict, but could be a factor in determining the length of the sentence and any restitution owed to the government. Case law already provides that a court can assess a restitution amount that exceeds the penalty range for which the defendant was convicted. Every dollar stolen should be repaid, even if each incident of fraud did not merit discussion at the guilt or innocence phase.

Any additional evidence considered during the punishment phase would be subject to pretrial discovery orders, motions to suppress, and cross-examination. All the rules of evidence would apply; the defendant would know about the additional evidence during the guilt or innocence phase through regular discovery, so would not be surprised at the punishment phase. The process could help some defendants by allowing them to plea bargain down to a lesser degree of punishment while still allowing the state to seek the full amount of restitution.

Adding Medicaid fraud to the list of crimes that could be considered organized criminal activity would give prosecutors another tool to bring to justice those who worked together to commit the offense. Other similar white-collar crimes, such as fraud and money laundering, also are considered organized criminal activity.

Making Medicaid fraud investigation materials confidential and not subject to disclosure by the Attorney General's Office would be sensible because the same materials are treated similarly for HHSC investigations, and the agencies frequently share documents on these cases. Details of these investigations should remain confidential to protect providers when no criminal charges are brought.

SB 688 also would authorize the attorney general's peace officers to request court orders for enhanced tracking devices. The Medicaid Fraud Control Unit currently must partner with an agency whose peace officers already are authorized to use the enhanced tracking devices, and this can delay operations significantly. For instance, federal officers are authorized to request court orders for electronic tracking devices, but the attorney general may be forced to wait a few months until a federal officer is available. The new authority would extend to all attorney general peace officers, not just to those investigating Medicaid fraud.

The bill would ensure that the Penal Code definition of "document" within the offense of securing a document by deception was broad enough to include electronic documents, such as electronic bank statements. Since Medicaid funds primarily are received via electronic transfer, the ability to use electronic payment records as evidence would be critical to prosecuting this crime.

Exploitation of a child or an elderly or disabled individual. The bill would move the offense of exploitation of a child or elderly or disabled individual from the Penal Code chapter on assault offenses to a more appropriate place with other fraud offenses in Penal Code, ch. 32. Exploitation is a crime involving the illegal or improper use of a person's resources for monetary gain and is similar to fraud. Exploitation committed with criminal negligence by omission would be dropped from the law because exploitation is a financial crime, making it overt. Exploitation is currently a state-jail felony if engaged in recklessly or with criminal negligence, but SB 688 would make exploitation a third-degree felony if the person committed the offense intentionally, knowingly, or recklessly.

Taking advantage of a child or an elderly or disabled person is a serious crime that deserves a third-degree felony punishment, no matter the dollar amount of the exploitation or the level of intent. Vulnerable populations deserve protection. Even if the exploitation was committed merely recklessly, it would deserve the third-degree felony punishment. Other crimes involving fraud, such as forgery and credit card abuse, impose a uniform penalty and do not apply a value ladder.

OPPONENTS
SAY:

Medicaid fraud. The current statute of limitations for Medicaid fraud adequately balances the needs of prosecutors and the accused. Extending the statute of limitations for Medicaid fraud could render accused persons

unable to defend themselves adequately. Over time, witnesses' memories fade, and evidence becomes more difficult to obtain.

Creating third- and second-degree penalty offenses based on the number of individual Medicaid offenses committed could result in penalties too harsh for the crime. It would not be fair for a person who defrauded Medicaid 25 individual times at a value of \$10 each, a total of \$250, to be punished at the third-degree felony level (two to 10 years in prison and an optional fine of up to \$10,000).

Allowing evidence of Medicaid fraud instances not addressed at the guilt or innocence phase to enter the punishment phase would essentially punish the defendant for crimes not proven and for which he or she was not convicted.

Exploitation of a child or an elderly or disabled individual. SB 688 would enhance the penalty for exploitation when done recklessly from a state-jail felony to a third-degree felony. A third-degree felony for such a low level of intent could be too severe, and enhancement is not an effective deterrent, especially in the case of reckless intent.

Another problem with the exploitation offense penalty is that a person who exploited an individual for a few dollars could receive the same punishment as someone who exploited an individual for hundreds of thousands of dollars. Exploitation of a child or an elderly or disabled individual should be punished according to a value ladder, instead of as a third-degree penalty for all offenses. Medicaid fraud and theft both are punished according to a monetary value ladder to ensure that the punishment fits the level of the damage caused by the crime.

NOTES:

The companion bill, HB 1332 by Creighton, was considered in a public hearing by the House Criminal Jurisprudence Committee on March 15 and left pending.