

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

COMMITTEE: Human Services — committee substitute recommended

VOTE: 5 ayes — Rose, Darby, Hughes, Legler, Walle

0 nays

4 absent — Herrero, Elkins, Hernandez, Naishtat

SENATE VOTE: On final passage, April 23 — 30-0

WITNESSES: For — (*Registered, but did not testify:* Katrina Daniels, Bexar County District Attorney Susan D. Reed)

Against — Samuel England, ACLU of Texas

On — Rick Copeland, Office of the Attorney General Medicaid Fraud Control Unit

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 the value of any monetary or in-kind benefit provided or claimed. The crime is a class C misdemeanor (maximum fine of \$500) if the value of the fraud is less than \$50. It is 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.

The current statute of limitations for Medicaid fraud is three years. This means that charges relating to Medicaid fraud must be filed within three years from the date of the commission of the offense.

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. Under sec. (a-1), it is an offense for owners, operator, or employees of nursing homes or other

similar facilities to intentionally, knowingly, recklessly, or with criminal negligence act or to intentionally, knowingly, or recklessly by omission exploit a child or elderly or disabled individual. Exploitation is defined to mean the illegal or improper use of an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

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 is done intentionally, knowingly, or recklessly and whether it is done 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. CSSB 1432 would change the statute of limitations for Medicaid fraud from three to seven years, so that criminal charges had to be filed within seven years of the date of the offense.

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

The punishment for Medicaid fraud would be increased to the next highest offense if the defendant was a provider of a service or product or was a high managerial agent. The bill would define high managerial agent to be a director, officer, or employee who was authorized to act on behalf of provider and had duties that could be assumed to represent the policy or intent of the provider.

CSSB 1432 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.

Exploitation of a child or an elderly or disabled individual. CSSB 1432 would move the offense of exploitation of a child or elderly or disabled individual from its current placement under the crime of injury to a child or elderly or disabled individual 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 for 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.

The bill would expand the list of convictions that result in nursing homes and similar facilities being unable to hire a worker to include convictions for exploitation of a child or an elderly or disabled individual.

Miscellaneous. CSSB 1432 would include 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 that was retrievable in a readable, perceivable form.

The bill also would eliminate a duplicate listing by removing the crimes of indecency with a child, sexual assault of a child, and aggravated sexual assault of a child from the list of offenses with a statute of limitations of 10 years from the 18th birthday of the victim. They would remain on the list of offenses that have no limitation.

The bill would take effect September 1, 2009, and would apply only to offenses committed on or after that date.

**SUPPORTERS
SAY:**

CSSB 1432 would give prosecutors additional tools to combat Medicaid fraud and to better protect children as well as elderly and disabled persons from exploitation. Medicaid fraud is increasing, and in fiscal 2008, 97 providers were convicted in Texas of an estimated \$182 million in Medicaid fraud.

Medicaid fraud. CSSB 1432 would recognize that criminal prosecutions for Medicaid fraud often take longer to put together than those for other crimes by extending the time that law enforcement officers could bring charges in these cases from three to seven years. It can take longer for these cases to come to light in the first place, and getting documents from governmental entities and providers and others can take longer than the current three-year limit. CSSB 1432 would place this crime among other white collar crimes, such as credit card abuse and fraudulent use of identifying information.

Adding a definition of high managerial agent to the Medicaid fraud statute would give prosecutors additional tools and discretion to target those

committing fraud. Allowing Medicaid fraud committed by providers and high managerial agents to be punished for the next highest offense would be appropriate because these actions are committed by those in authority. It also would put these punishments in line with others imposed upon persons with contracts with the state. This is appropriate since Medicaid also is provided under a contract with the government.

Adding Medicaid fraud to the list of crimes that can be considered organized criminal activity if certain conditions are met would give prosecutors another tool to go after those who work together to commit the offense. Other, similar white collar crimes, such as fraud and money laundering, also are included under organized criminal activity.

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. Medicaid funds are primarily received via electronic transfer so access to electronic payment records is necessary to prosecute 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 assaultive offenses to a more appropriate place with 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 offenses.

It would be appropriate to impose the same punishment for exploitation crimes, instead of using a value ladder that would increase the punishment as the value of the amount exploited increased, because it often is difficult to put an exact value on exploitation. 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 amount of exploitation. Other crimes involving fraud, such as forgery and credit card abuse, impose a uniform penalty for all offenses and do not apply a value ladder.

CSSB 1432 would prohibit persons convicted of exploitation from working in nursing homes or similar facilities because of the danger that

they could present to residents. It would be appropriate to include this offense with the 23 other offenses that prohibit employment at these facilities.

Miscellaneous. CSSB 1432 also would reconcile the statutes of limitation for indecency with a child, sexual assault of a child, and aggravated sexual assault of a child with changes made to those laws in 2007 that placed them into the category of no limitation.

OPPONENTS
SAY:

Medicaid fraud. The current statute of limitation 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.

Exploitation of a child or an elderly or disabled individual.

Exploitation of a child or elderly or disabled individual should be punished according to a value ladder, instead of as a third-degree penalty for all offenses, as CSSB 1432 would require. Under the bill, 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. Medicaid fraud is punished according to the value of the amount of fraud, and the same principle should be applied to exploitation of a child or elderly or disabled individual.

NOTES:

The committee substitute added the provisions changing the statute of limitations for Medicaid fraud and prohibiting nursing homes and similar facilities from hiring persons convicted of exploitation of a child or elderly or disabled individual.