

## BILL ANALYSIS

Senate Research Center  
86R10814 MM-F

S.B. 1377  
By: Buckingham  
Criminal Justice  
4/22/2019  
As Filed

### AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Medicaid fraud crimes are reported in large quantities every year. Investigative reports have shown that those who are committing Medicaid fraud are also likely to commit Medicare fraud or other health care plan fraud. S.B. 1377 seeks to expand on the crime that is Medicaid fraud by replacing the word Medicaid with "health care" in the Code of Criminal Procedure.

Currently in statute, the Office of the Attorney General (OAG) can prosecute Medicaid fraud, but not Medicare, CHIP, etc. By expanding the language to include all health care plan fraud, OAG will be able to prosecute those defrauding all health care plans and not only Medicaid.

S.B. 1377:

- amends multiple sections, Code of Criminal Procedure, by replacing "Medicaid" program with "health care" program;
- amends Section 35A.01, Penal Code, by defining "health care program" as a program funded by this state, the federal government, or both and designed to provide health care services to health care recipients, including a program that is administered in whole or in part through a managed care delivery model; and
- amends Section 35A.02, Penal Code, to include "health care" program in the definition of what clearly defines fraud in statute.

As proposed, S.B. 1377 amends current law relating to the prosecution of health care fraud.

### RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 12.01, Code of Criminal Procedure, as follows:

Art. 12.01. FELONIES. Authorizes felony indictments, except as provided by Article 12.03 (Aggravated Offenses, Attempt, Conspiracy, Solicitation, Organized Criminal Activity), to be presented within these limits, and not afterward:

- (1) makes no changes to this subdivision;
- (2) ten years from the date of the commission of the offense:
  - (A) makes no changes to this paragraph;
  - (B) makes nonsubstantive changes;
  - (C)-(H) makes no changes to these paragraphs;
- (3) seven years from the date of the commission of the offense:
  - (A)-(H) makes no changes to these paragraphs;

(I) health care fraud, rather than Medicaid fraud, under Section 35A.02 (Medicaid Fraud), Penal Code; or

(J) makes no changes to this paragraph; or

(4)–(7) makes no changes to these subdivisions.

SECTION 2. Amends Section 3(a)(3), Article 37.07, Code of Criminal Procedure, as follows:

(3) Authorizes the state and the defendant, regardless of the plea and whether the punishment is assessed by the judge or the jury, during the punishment phase of the trial of an offense under Section 35A.02, Penal Code, subject to the applicable rules of evidence, to offer evidence not offered during the guilt or innocence phase of the trial concerning the total pecuniary loss to the affected health care program, rather than the loss to the Medicaid program, caused by the defendant's conduct or, if applicable, the scheme or continuing course of conduct of which the defendant's conduct is part. Authorizes evidence to be offered in summary form concerning the total pecuniary loss to the affected health care program, rather than authorizing an employee of the Health and Human Services Commission's (HHSC) office of inspector general or the office of the Texas attorney general's Medicaid fraud control unit, subject to the applicable rules of evidence, to testify concerning the total pecuniary loss to the Medicaid program. Provides that testimony regarding the total pecuniary loss to the affected health care program, rather than that an employee who testifies under this subdivision, is subject to cross-examination. Authorizes evidence offered under this subdivision to be considered by the judge or jury in ordering or recommending the amount of any restitution to be made to the affected health care program, rather than to the affected Medicaid program, or the appropriate punishment for the defendant.

SECTION 3. Amends Article 59.01(2), Code of Criminal Procedure, as follows:

(2) Defines "contraband" as property of any nature, including real, personal, tangible, or intangible, that is:

(A) makes no changes to this paragraph;

(B) used or intended to be used in the commission of:

(i)–(v) makes no changes to these subparagraphs;

(vi) any felony under Chapter 32 (Medical Assistance Program), Human Resources Code, or Chapter 31 (Theft), 32 (Fraud), 35A (Medicaid Fraud), or 37 (Perjury and Other Falsification), Penal Code, that involves a health care program, as defined by Section 35A.01 (Definitions), Penal Code, rather than that involves the state Medicaid program; or

(vii)–(xiii) makes no changes to these subparagraphs; or

(C)–(F) makes no changes to these paragraphs.

SECTION 4. Amends Article 59.06(p), Code of Criminal Procedure, as follows:

(p) Requires the attorney representing the state, notwithstanding Subsection (a) (relating to requiring all forfeited property to be administered by the local attorney representing the state, acting as the agent of the state, in accordance with accepted accounting practices and with the provisions of any local agreement entered into between the attorney representing the state and law enforcement agencies), and to the extent necessary to protect the state's ability to recover amounts wrongfully obtained by the owner of the property and associated damages and penalties to which the affected health care program

may otherwise be entitled by law, to transfer to the governmental entity administering the affected health care program all forfeited property defined as contraband under Article 59.01(2)(B)(vi), rather than requiring the attorney representing the state, notwithstanding Subsection (a), and to the extent necessary to protect HHSC's ability to recover amounts wrongfully obtained by the owner of the property and associated damages and penalties to which HHSC may otherwise be entitled by law, to transfer to HHSC all forfeited property defined as contraband under Article 59.01(2)(B)(vi). Authorizes the attorney representing the state, if the forfeited property consists of property other than money or negotiable instruments, with the consent of the governmental entity administering the affected health care program, to sell the property and deliver to the governmental entity administering the affected health care program, rather than authorizing the attorney representing the state, if the forfeited property consists of property other than money or negotiable instruments, if approved by HHSC, to sell the property and deliver to HHSC, the proceeds from the sale, minus costs attributable to the sale.

SECTION 5. Amends Section 250.006(a), Health and Safety Code, as follows:

(a) Prohibits a person for whom the facility or the individual employer is entitled to obtain criminal history record information from being employed in a facility or by an individual employer if the person has been convicted of an offense listed in this subsection:

- (1)–(15) makes no changes to these subdivisions;
- (16) makes a nonsubstantive change;
- (17)–(22) makes no changes to these subdivisions;
- (23) an offense of health care fraud, rather than Medicaid fraud; or
- (24)–(26) makes no changes to these subdivisions;

SECTION 6. Amends Chapter 35A, Penal Code, as follows:

CHAPTER 35A. New heading: HEALTH CARE FRAUD

Sec. 35A.01. DEFINITIONS.

(1) Defines "claim" as a written or electronically submitted request or demand that:

(A) is submitted by a provider or the provider's agent and identifies a service or product provided or purported to have been provided to a health care recipient as reimbursable under a health care program, without regard to whether the money that is requested or demanded is paid; or

(B) states the income earned or expense incurred by a provider in providing a service or product and is used to determine a rate of payment under a health care program.

Deletes existing text defining "claim" as having the meaning assigned under Section 36.001 (Definitions), Human Resources Code.

(2) Defines "fiscal agent" as:

(A) a person who, through a contractual relationship with a state agency or the federal government, receives, processes, and pays a claim under a health care program; or

(B) the designated agent of a person described by Paragraph (A).

Deletes existing text defining "fiscal agent" as having the meaning assigned under Section 36.001, Human Resources Code.

(3) Defines "health care practitioner" as a dentist, podiatrist, psychologist, physical therapist, chiropractor, registered nurse, or other provider licensed to provide health care services in this state, rather than as having the meaning assigned under Section 36.001, Human Resources Code.

(4) Defines "health care program."

(5) Defines "health care recipient" and deletes existing text defining "Medicaid program."

(6) Defines "managed care organization" as a person who is authorized or otherwise permitted by law to arrange for or provide a managed care plan, rather than as having the meaning assigned under Section 36.001, Human Resources Code. Deletes existing text defining "Medicaid recipient."

(7) Defines "physician" as a physician licensed to practice medicine in this state, rather than as having the meaning assigned by Section 36.001, Human Resources Code.

(8) Defines "provider" as a person who participates in or has applied to participate in a health care program as a supplier of a service or product and includes:

(A) a management company that manages, operates, or controls another provider;

(B) a person, including a medical vendor, who provides a service or product to another provider or the other provider's agent;

(C) an employee of the person who participates in or has applied to participate in the program;

(D) a managed care organization; and

(E) a manufacturer or distributor of a product for which a health care program provides reimbursement.

Deletes existing text defining "provider" as having the meaning assigned under Section 36.001, Human Resources Code.

(9) Defines "service" as including care or treatment of a health care recipient, rather than as having the meaning assigned by Section 36.001, Human Resources Code.

(10) Makes no changes to this subdivision.

Sec. 35A.02. New heading: HEALTH CARE FRAUD. (a) Provides that a person commits an offense 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 a health care program, rather than under the Medicaid program, that is not authorized or that is greater than the benefit or payment that is authorized;

(2) and (3) makes conforming changes;

(4) knowingly makes, causes to be made, induces, or seeks to induce the making of a false statement or misrepresentation of material fact concerning:

(A) the conditions or operation of a facility in order that the facility is authorized to qualify for certification or recertification under a health care program, rather than the conditions or operation of a facility in order that the facility is authorized to qualify for certification or recertification required by the Medicaid program, including certification or recertification as a hospital, a nursing facility or skilled nursing facility, a hospice, an intermediate care facility for the mentally retarded, an assisted living facility, or a home health agency; or

(B) makes a conforming change.

(5) makes conforming changes and a nonsubstantive change;

(6) and (7) makes conforming changes;

(8) makes a claim under a health care program, rather than under the Medicaid program, and knowingly fails to indicate the type of license and the identification number of the licensed health care practitioner, rather than the licensed health care provider, who actually provided the service;

(9) knowingly enters into an agreement, combination, or conspiracy to defraud the state or federal government by obtaining or aiding another person in obtaining an unauthorized payment or benefit from a health care program or fiscal agent, rather than knowingly enters into an agreement, combination, or conspiracy to defraud the state by obtaining or aiding another person in obtaining an unauthorized payment or benefit from the Medicaid program or a fiscal agent;

(10) is a managed care organization that contracts with HHSC, another state agency, or the federal governing, rather than that contracts with HHSC or other state agency, to provide or arrange to provide health care benefits or services to individuals eligible under a health care program, rather than under the Medicaid program, and knowingly:

(A) makes no changes to this paragraph;

(B) fails to provide or falsifies information required to be provided by law, rule, or contractual provision, rather than fails to provide to HHSC or appropriate state agency information required to be proved by law, HHSC or agency rule, or contractual provision; or

(C) makes conforming changes;

(11) makes no changes to this subdivision; or

(12) knowingly makes, uses, or causes the making or use of a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to this state or the federal government under a health care program, rather than to this state under the Medicaid program.

(b) Makes conforming changes.

(c) Makes no changes to this subsection.

(d) Authorizes the conduct, when multiple payments or monetary or in-kind benefits are provided under one or more health care programs, rather than under the Medicaid program, as a result of one scheme or continuing course of conduct, to be considered as one offense and the amounts of the payments or monetary or in-kind benefits aggregated in determining the grade of the offense.

(e) Provides that the punishment prescribed for an offense under this section, other than the punishment prescribed by Subsection (b)(7) (relating to providing that an offense involving payments or certain benefits made under a health care program, directly or indirectly, that result in conduct that is \$300,000 or more is a felony of the first degree), is increased to the punishment prescribed for the next highest category of offense if it is shown beyond a reasonable doubt on the trial of the offense that the actor was a high managerial agent, rather than a provider or high managerial agent, at the time of the offense.

(f) Provides that the attorney general, with the consent of the appropriate local county or district attorney, has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves a health care program, rather than that involves the Medicaid program.

SECTION 7. Makes application of the change in law made by this Act prospective. Provides that, for purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 8. Effective date: September 1, 2019.