

By: Janek

S.B. No. 563

A BILL TO BE ENTITLED

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AN ACT

relating to the prevention of Medicaid fraud; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subdivision (9), Section 36.001, Human Resources Code, is amended to read as follows:

(9) "Provider" means a person who participates in or who has applied to participate in the Medicaid program as a supplier of a product or service and includes:

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

(B) a person, including a medical vendor, that provides a product or service to a provider or to a fiscal agent;

(C) an employee of a provider; ~~and~~

(D) a managed care organization; and

(E) a manufacturer or distributor of a product for which the Medicaid program provides reimbursement.

SECTION 2. Subchapter A, Chapter 36, Human Resources Code, is amended by adding Section 36.0011 to read as follows:

Sec. 36.0011. CULPABLE MENTAL STATE. (a) For purposes of this chapter, a person acts "knowingly" with respect to information if the person:

(1) has knowledge of the information;

(2) acts with conscious indifference to the truth or falsity of the information; or

1 (3) acts in reckless disregard of the truth or falsity
2 of the information.

3 (b) Proof of the person's specific intent to defraud is not
4 required in a civil or administrative proceeding to show that a
5 person acted "knowingly" with respect to information under this
6 chapter.

7 SECTION 3. Section 36.002, Human Resources Code, is amended
8 to read as follows:

9 Sec. 36.002. UNLAWFUL ACTS. A person commits an unlawful
10 act if the person:

11 (1) knowingly [~~or intentionally~~] makes or causes to be
12 made a false statement or misrepresentation of a material fact to
13 permit a person to receive a benefit or payment under the Medicaid
14 program that is not authorized or that is greater than the benefit
15 or payment that is authorized[+]

16 [~~(A) on an application for a contract, benefit,~~
17 ~~or payment under the Medicaid program; or~~

18 [~~(B) that is intended to be used to determine a~~
19 ~~person's eligibility for a benefit or payment under the Medicaid~~
20 ~~program];~~

21 (2) knowingly [~~or intentionally~~] conceals or fails to
22 disclose information that permits [~~an event~~+

23 [~~(A) that the person knows affects the initial or~~
24 ~~continued right to a benefit or payment under the Medicaid program~~
25 ~~of~~+

26 [~~(i) the person; or~~

27 [~~(ii) another person on whose behalf the~~

1 ~~person has applied for a benefit or payment or is receiving a~~
2 ~~benefit or payment; and~~

3 [~~(B) to permit~~] a person to receive a benefit or
4 payment under the Medicaid program that is not authorized or that is
5 greater than the benefit or payment [~~or benefit~~] that is
6 authorized;

7 (3) knowingly [~~or intentionally~~] applies for and
8 receives a benefit or payment on behalf of another person under the
9 Medicaid program and converts any part of the benefit or payment to
10 a use other than for the benefit of the person on whose behalf it was
11 received;

12 (4) knowingly [~~or intentionally~~] makes, causes to be
13 made, induces, or seeks to induce the making of a false statement or
14 misrepresentation of material fact concerning:

15 (A) the conditions or operation of a facility in
16 order that the facility may qualify for certification or
17 recertification required by the Medicaid program, including
18 certification or recertification as:

- 19 (i) a hospital;
- 20 (ii) a nursing facility or skilled nursing
21 facility;
- 22 (iii) a hospice;
- 23 (iv) an intermediate care facility for the
24 mentally retarded;
- 25 (v) an assisted living facility; or
- 26 (vi) a home health agency; or

27 (B) information required to be provided by a

1 federal or state law, rule, regulation, or provider agreement
2 pertaining to the Medicaid program;

3 (5) except as authorized under the Medicaid program,
4 knowingly pays, [~~or intentionally~~] charges, solicits, accepts, or
5 receives, in addition to an amount paid under the Medicaid program,
6 a gift, money, a donation, or other consideration as a condition to
7 the provision of a service or product or the continued provision of
8 a service or product [~~to a Medicaid recipient~~] if the cost of the
9 service or product [~~provided to the Medicaid recipient~~] is paid
10 for, in whole or in part, under the Medicaid program;

11 (6) knowingly [~~or intentionally~~] presents or causes to
12 be presented a claim for payment under the Medicaid program for a
13 product provided or a service rendered by a person who:

14 (A) is not licensed to provide the product or
15 render the service, if a license is required; or

16 (B) is not licensed in the manner claimed;

17 (7) knowingly [~~or intentionally~~] makes a claim under
18 the Medicaid program for:

19 (A) a service or product that has not been
20 approved or acquiesced in by a treating physician or health care
21 practitioner;

22 (B) a service or product that is substantially
23 inadequate or inappropriate when compared to generally recognized
24 standards within the particular discipline or within the health
25 care industry; or

26 (C) a product that has been adulterated, debased,
27 mislabeled, or that is otherwise inappropriate;

1 (8) makes a claim under the Medicaid program and
2 knowingly [~~or intentionally~~] fails to indicate the type of license
3 and the identification number of the licensed health care provider
4 who actually provided the service;

5 (9) knowingly [~~or intentionally~~] enters into an
6 agreement, combination, or conspiracy to defraud the state by
7 obtaining or aiding another person in obtaining an unauthorized
8 payment or benefit from the Medicaid program or a fiscal agent; [~~or~~]

9 (10) is a managed care organization that contracts
10 with the Health and Human Services Commission or other state agency
11 to provide or arrange to provide health care benefits or services to
12 individuals eligible under the Medicaid program and knowingly [~~or~~
13 ~~intentionally~~]:

14 (A) fails to provide to an individual a health
15 care benefit or service that the organization is required to
16 provide under the contract;

17 (B) fails to provide to the commission or
18 appropriate state agency information required to be provided by
19 law, commission or agency rule, or contractual provision; or

20 (C) engages in a fraudulent activity in
21 connection with the enrollment of an individual eligible under the
22 Medicaid program in the organization's managed care plan or in
23 connection with marketing the organization's services to an
24 individual eligible under the Medicaid program; or

25 (11) knowingly [~~(D)~~] obstructs an investigation by
26 the attorney general of an alleged unlawful act under this section.

27 SECTION 4. Subsection (b), Section 36.003, Human Resources

1 Code, is amended to read as follows:

2 (b) Except as ordered by a court for good cause shown, the
3 office of the attorney general may not produce for inspection or
4 copying or otherwise disclose the contents of documentary material
5 obtained under this section to a person other than:

- 6 (1) an [~~authorized~~] employee of the attorney general;
- 7 (2) an agency of this state, the United States, or
8 another state;
- 9 (3) a criminal district attorney, district attorney,
10 or county attorney of this state;
- 11 (4) the United States attorney general; [~~or~~]
- 12 (5) a state or federal grand jury;
- 13 (6) a political subdivision of this state; or
- 14 (7) a person authorized by the attorney general to
15 receive the information.

16 SECTION 5. Section 36.004, Human Resources Code, is amended
17 to read as follows:

18 Sec. 36.004. IMMUNITY. Notwithstanding any other law, a
19 person is not civilly or criminally liable for providing access to
20 documentary material under this chapter to:

- 21 (1) an [~~authorized~~] employee of the attorney general;
- 22 (2) an agency of this state, the United States, or
23 another state;
- 24 (3) a criminal district attorney, district attorney,
25 or county attorney of this state;
- 26 (4) the United States attorney general; [~~or~~]
- 27 (5) a state or federal grand jury;

1 (6) a political subdivision of this state; or

2 (7) a person authorized by the attorney general to
3 receive the information.

4 SECTION 6. Subsection (b), Section 36.005, Human Resources
5 Code, is amended to read as follows:

6 (b) A provider [~~person~~] found liable under Section 36.052
7 for an unlawful act may not, for a period of 10 years, provide or
8 arrange to provide health care services under the Medicaid program
9 or supply or sell, directly or indirectly, a product to or under the
10 Medicaid program [~~for a period of 10 years~~]. The executive
11 commissioner of the Health and Human Services Commission [~~board of~~
12 ~~a state agency that operates part of the Medicaid program~~] may by
13 rule provide for a period of ineligibility longer than 10 years.
14 The period of ineligibility begins on the date on which the
15 determination that the provider [~~person~~] is liable becomes final.
16 This subsection does not apply to a provider [~~person~~] who operates a
17 nursing facility or an ICF-MR facility.

18 SECTION 7. Subsections (a) and (c), Section 36.052, Human
19 Resources Code, are amended to read as follows:

20 (a) Except as provided by Subsection (c), a person who
21 commits an unlawful act is liable to the state for:

22 (1) [~~restitution of~~] the amount [~~value~~] of any payment
23 or the value of any monetary or in-kind benefit provided under the
24 Medicaid program, directly or indirectly, as a result of the
25 unlawful act, including any payment made to a third party;

26 (2) interest on the amount [~~value~~] of the payment or
27 the value of the benefit described by Subdivision (1) at the

1 pre-judgment interest rate in effect on the day the payment or
2 benefit was received or paid, for the period from the date the
3 benefit was received or paid to the date that [~~restitution is paid~~
4 ~~to~~] the state recovers the amount of the payment or value of the
5 benefit;

6 (3) a civil penalty of:

7 (A) not less than \$5,000 or more than \$15,000 for
8 each unlawful act committed by the person that results in injury to
9 an elderly person, as defined by Section 48.002(a)(1) [~~48.002(1)~~],
10 a disabled person, as defined by Section 48.002(a)(8)(A)
11 [~~48.002(8)(A)~~], or a person younger than 18 years of age; or

12 (B) not less than \$1,000 or more than \$10,000 for
13 each unlawful act committed by the person that does not result in
14 injury to a person described by Paragraph (A); and

15 (4) two times the amount [~~value~~] of the payment or the
16 value of the benefit described by Subdivision (1).

17 (c) The trier of fact may assess a total of not more than two
18 times the amount [~~value~~] of a payment or the value of a benefit
19 described by Subsection (a)(1) if the trier of fact finds that:

20 (1) the person furnished the attorney general with all
21 information known to the person about the unlawful act not later
22 than the 30th day after the date on which the person first obtained
23 the information; and

24 (2) at the time the person furnished all the
25 information to the attorney general, the attorney general had not
26 yet begun an investigation under this chapter.

27 SECTION 8. Section 36.053, Human Resources Code, is amended

1 by adding Subsections (c) through (f) to read as follows:

2 (c) The office of the attorney general may not release or
3 disclose information that is obtained under Subsection (b)(1) or
4 (2) or any documentary material or other record derived from the
5 information except:

6 (1) by court order for good cause shown;

7 (2) with the consent of the person who provided the
8 information;

9 (3) to an employee of the attorney general;

10 (4) to an agency of this state, the United States, or
11 another state;

12 (5) to any attorney representing the state under
13 Section 36.055 or in a civil action brought under Subchapter C;

14 (6) to a political subdivision of this state; or

15 (7) to a person authorized by the attorney general to
16 receive the information.

17 (d) The attorney general may use documentary material
18 derived from information obtained under Subsection (b)(1) or (2),
19 or copies of that material, as the attorney general determines
20 necessary in the enforcement of this chapter, including
21 presentation before a court.

22 (e) If a person fails to file a statement as required by
23 Subsection (b)(1) or fails to submit to an examination as required
24 by Subsection (b)(2), the attorney general may file in a district
25 court of Travis County a petition for an order to compel the person
26 to file the statement or submit to the examination within a period
27 stated by court order. Failure to comply with an order entered

1 under this subsection is punishable as contempt.

2 (f) An order issued by a district court under this section
3 is subject to appeal to the supreme court.

4 SECTION 9. Section 36.054, Human Resources Code, is amended
5 by amending Subsection (e) and adding Subsection (e-1) to read as
6 follows:

7 (e) The [~~Except as ordered by a court for good cause shown,~~
8 ~~the~~] office of the attorney general may not produce for inspection
9 or copying or otherwise disclose the contents of documentary
10 material obtained under this section except:

11 (1) by court order for good cause shown;

12 (2) with the consent of the person who produced the
13 information;

14 (3) to an employee of the attorney general;

15 (4) to an agency of this state, the United States, or
16 another state;

17 (5) to any attorney representing the state under
18 Section 36.055 or in a civil action brought under Subchapter C;

19 (6) to a political subdivision of this state; or

20 (7) to a person authorized by the attorney general to
21 receive the information [~~to a person other than an authorized~~
22 ~~employee of the attorney general without the consent of the person~~
23 ~~who produced the documentary material~~].

24 (e-1) The attorney general shall prescribe reasonable terms
25 and conditions allowing the documentary material to be available
26 for inspection and copying by the person who produced the material
27 or by an authorized representative of that person. The attorney

1 general may use the documentary material or copies of it as the
2 attorney general determines necessary in the enforcement of this
3 chapter, including presentation before a court.

4 SECTION 10. Section 36.102, Human Resources Code, is
5 amended by amending Subsections (b) through (e) and adding
6 Subsection (c-1) to read as follows:

7 (b) The petition shall be filed in camera and, except as
8 provided by Subsection (c-1) or (d), shall remain under seal until
9 at least the 180th [60th] day after the date the petition is filed
10 or the date on which the state elects to intervene, whichever is
11 earlier. The petition may not be served on the defendant until the
12 court orders service on the defendant.

13 (c) The state may elect to intervene and proceed with the
14 action not later than the 180th [60th] day after the date the
15 attorney general receives the petition and the material evidence
16 and information.

17 (c-1) At the time the state intervenes, the attorney general
18 may file a motion with the court requesting that the petition remain
19 under seal for an extended period.

20 (d) The state may, for good cause shown, move the court to
21 extend the 180-day deadline [time during which the petition remains
22 under seal] under Subsection (b) or (c). A motion under this
23 subsection may be supported by affidavits or other submissions in
24 camera.

25 (e) An action under this subchapter may be dismissed before
26 the end of the period during which the petition remains under seal
27 [prescribed by Subsection (b), as extended as provided by

1 ~~Subsection (d), if applicable,~~ only if the court and the attorney
2 general consent in writing to the dismissal and state their reasons
3 for consenting.

4 SECTION 11. Section 36.103, Human Resources Code, is
5 amended to read as follows:

6 Sec. 36.103. ANSWER BY DEFENDANT. A defendant is not
7 required to file in accordance with the Texas Rules of Civil
8 Procedure an answer to a petition filed under this subchapter until
9 ~~[the 20th day after the date]~~ the petition is unsealed and served on
10 the defendant ~~[in compliance with the Texas Rules of Civil~~
11 ~~Procedure]~~.

12 SECTION 12. Subsection (a), Section 36.104, Human Resources
13 Code, is amended to read as follows:

14 (a) Not later than the last day of the period prescribed by
15 Section 36.102(c) or an extension of that period as provided by
16 Section 36.102(d), the state shall:

- 17 (1) proceed with the action; or
18 (2) notify the court that the state declines to take
19 over the action.

20 SECTION 13. Subsection (c), Section 36.110, Human Resources
21 Code, is amended to read as follows:

22 (c) A payment to a person under this section shall be made
23 from the proceeds of the action. A person receiving a payment under
24 this section is also entitled to receive from the defendant an
25 amount for reasonable expenses, reasonable attorney's fees, and
26 costs that the court finds to have been necessarily incurred. The
27 court's determination of expenses, fees, and costs to be awarded

1 under this subsection shall be made only after the defendant has
2 been found liable in the action~~[, plus reasonable attorney's fees~~
3 ~~and costs. Expenses, fees, and costs shall be awarded against the~~
4 ~~defendant]~~.

5 SECTION 14. The heading of Subchapter D, Chapter 36, Human
6 Resources Code, is amended to read as follows:

7 SUBCHAPTER D. [~~CRIMINAL PENALTIES AND~~] REVOCATION OF CERTAIN
8 OCCUPATIONAL LICENSES

9 SECTION 15. Subsection (b), Section 36.132, Human Resources
10 Code, is amended to read as follows:

11 (b) A licensing authority shall revoke a license issued by
12 the authority to a person if the person is convicted of a felony
13 under Section 35A.02, Penal Code [~~36.131~~]. In revoking the
14 license, the licensing authority shall comply with all procedures
15 generally applicable to the licensing authority in revoking
16 licenses.

17 SECTION 16. Title 7, Penal Code, is amended by adding
18 Chapter 35A to read as follows:

19 CHAPTER 35A. MEDICAID FRAUD

20 Sec. 35A.01. DEFINITIONS. In this chapter:

21 (1) "Claim" has the meaning assigned by Section
22 36.001, Human Resources Code.

23 (2) "Fiscal agent" has the meaning assigned by Section
24 36.001, Human Resources Code.

25 (3) "Health care practitioner" has the meaning
26 assigned by Section 36.001, Human Resources Code.

27 (4) "Managed care organization" has the meaning

1 assigned by Section 36.001, Human Resources Code.

2 (5) "Medicaid program" has the meaning assigned by
3 Section 36.001, Human Resources Code.

4 (6) "Medicaid recipient" has the meaning assigned by
5 Section 36.001, Human Resources Code.

6 (7) "Physician" has the meaning assigned by Section
7 36.001, Human Resources Code.

8 (8) "Provider" has the meaning assigned by Section
9 36.001, Human Resources Code.

10 (9) "Service" has the meaning assigned by Section
11 36.001, Human Resources Code.

12 Sec. 35A.02. MEDICAID FRAUD. (a) A person commits an
13 offense if the person:

14 (1) knowingly makes or causes to be made a false
15 statement or misrepresentation of a material fact to permit a
16 person to receive a benefit or payment under the Medicaid program
17 that is not authorized or that is greater than the benefit or
18 payment that is authorized;

19 (2) knowingly conceals or fails to disclose
20 information that permits a person to receive a benefit or payment
21 under the Medicaid program that is not authorized or that is greater
22 than the benefit or payment that is authorized;

23 (3) knowingly applies for and receives a benefit or
24 payment on behalf of another person under the Medicaid program and
25 converts any part of the benefit or payment to a use other than for
26 the benefit of the person on whose behalf it was received;

27 (4) knowingly makes, causes to be made, induces, or

1 seeks to induce the making of a false statement or
2 misrepresentation of material fact concerning:

3 (A) the conditions or operation of a facility in
4 order that the facility may qualify for certification or
5 recertification required by the Medicaid program, including
6 certification or recertification as:

7 (i) a hospital;

8 (ii) a nursing facility or skilled nursing
9 facility;

10 (iii) a hospice;

11 (iv) an intermediate care facility for the
12 mentally retarded;

13 (v) an assisted living facility; or

14 (vi) a home health agency; or

15 (B) information required to be provided by a
16 federal or state law, rule, regulation, or provider agreement
17 pertaining to the Medicaid program;

18 (5) except as authorized under the Medicaid program,
19 knowingly pays, charges, solicits, accepts, or receives, in
20 addition to an amount paid under the Medicaid program, a gift,
21 money, a donation, or other consideration as a condition to the
22 provision of a service or product or the continued provision of a
23 service or product if the cost of the service or product is paid
24 for, in whole or in part, under the Medicaid program;

25 (6) knowingly presents or causes to be presented a
26 claim for payment under the Medicaid program for a product provided
27 or a service rendered by a person who:

1 (A) is not licensed to provide the product or
2 render the service, if a license is required; or

3 (B) is not licensed in the manner claimed;

4 (7) knowingly makes a claim under the Medicaid program
5 for:

6 (A) a service or product that has not been
7 approved or acquiesced in by a treating physician or health care
8 practitioner;

9 (B) a service or product that is substantially
10 inadequate or inappropriate when compared to generally recognized
11 standards within the particular discipline or within the health
12 care industry; or

13 (C) a product that has been adulterated, debased,
14 mislabeled, or that is otherwise inappropriate;

15 (8) makes a claim under the Medicaid program and
16 knowingly fails to indicate the type of license and the
17 identification number of the licensed health care provider who
18 actually provided the service;

19 (9) knowingly enters into an agreement, combination,
20 or conspiracy to defraud the state by obtaining or aiding another
21 person in obtaining an unauthorized payment or benefit from the
22 Medicaid program or a fiscal agent;

23 (10) is a managed care organization that contracts
24 with the Health and Human Services Commission or other state agency
25 to provide or arrange to provide health care benefits or services to
26 individuals eligible under the Medicaid program and knowingly:

27 (A) fails to provide to an individual a health

1 care benefit or service that the organization is required to
2 provide under the contract;

3 (B) fails to provide to the commission or
4 appropriate state agency information required to be provided by
5 law, commission or agency rule, or contractual provision; or

6 (C) engages in a fraudulent activity in
7 connection with the enrollment of an individual eligible under the
8 Medicaid program in the organization's managed care plan or in
9 connection with marketing the organization's services to an
10 individual eligible under the Medicaid program; or

11 (11) knowingly obstructs an investigation by the
12 attorney general of an alleged unlawful act under Section 36.002,
13 Human Resources Code.

14 (b) An offense under this section is:

15 (1) a Class C misdemeanor if the amount of any payment
16 or the value of any monetary or in-kind benefit provided under the
17 Medicaid program, directly or indirectly, as a result of the
18 conduct is less than \$50;

19 (2) a Class B misdemeanor if the amount of any payment
20 or the value of any monetary or in-kind benefit provided under the
21 Medicaid program, directly or indirectly, as a result of the
22 conduct is \$50 or more but less than \$500;

23 (3) a Class A misdemeanor if the amount of any payment
24 or the value of any monetary or in-kind benefit provided under the
25 Medicaid program, directly or indirectly, as a result of the
26 conduct is \$500 or more but less than \$1,500;

27 (4) a state jail felony if the amount of any payment or

1 the value of any monetary or in-kind benefit provided under the
2 Medicaid program, directly or indirectly, as a result of the
3 conduct is \$1,500 or more but less than \$20,000;

4 (5) a felony of the third degree if the amount of any
5 payment or the value of any monetary or in-kind benefit provided
6 under the Medicaid program, directly or indirectly, as a result of
7 the conduct is \$20,000 or more but less than \$100,000;

8 (6) a felony of the second degree if the amount of any
9 payment or the value of any monetary or in-kind benefit provided
10 under the Medicaid program, directly or indirectly, as a result of
11 the conduct is \$100,000 or more but less than \$200,000; or

12 (7) a felony of the first degree if the amount of any
13 payment or the value of any monetary or in-kind benefit provided
14 under the Medicaid program, directly or indirectly, as a result of
15 the conduct is \$200,000 or more.

16 (c) If conduct constituting an offense under this section
17 also constitutes an offense under another section of this code or
18 another provision of law, the actor may be prosecuted under either
19 this section or the other section or provision.

20 (d) When multiple payments or monetary or in-kind benefits
21 are provided under the Medicaid program as a result of one scheme or
22 continuing course of conduct, the conduct may be considered as one
23 offense and the amounts of the payments or monetary or in-kind
24 benefits aggregated in determining the grade of the offense.

25 SECTION 17. Subsection (d), Section 41.002, Civil Practice
26 and Remedies Code, is amended to read as follows:

27 (d) Notwithstanding any provision to the contrary, this

1 chapter does not apply to:

2 (1) Section 15.21, Business & Commerce Code (Texas
3 Free Enterprise and Antitrust Act of 1983);

4 (2) [~~7~~] an action brought under the Deceptive Trade
5 Practices-Consumer Protection Act (Subchapter E, Chapter 17,
6 Business & Commerce Code) except as specifically provided in
7 Section 17.50 of that Act;

8 (3) an action brought under Chapter 36, Human
9 Resources Code; [~~7~~] or

10 (4) an action brought under Chapter 21, Insurance
11 Code.

12 SECTION 18. Section 36.131, Human Resources Code, is
13 repealed.

14 SECTION 19. (a) This Act applies only to conduct that
15 occurs on or after the effective date of this Act. Conduct that
16 occurs before the effective date of this Act is governed by the law
17 in effect at the time the conduct occurred, and that law is
18 continued in effect for that purpose.

19 (b) For purposes of this section, conduct constituting an
20 offense under the penal law of this state occurred before the
21 effective date of this Act if any element of the offense occurred
22 before that date.

23 SECTION 20. This Act takes effect September 1, 2005.