

## **BILL ANALYSIS**

Senate Research Center

C.S.S.B. 688  
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Health & Human Services  
3/23/2011  
Committee Report (Substituted)

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

The Medicaid Fraud Control Unit (MFCU) of the Office of the Attorney General investigates and prosecutes criminals who defraud and abuse the Medicaid program. As criminals become more sophisticated and organized in stealing from taxpayers, additional tools are needed to effectively pursue them.

C.S.S.B. 688 implements several tools to help MFCU effectively investigate and prosecute criminal and civil Medicaid fraud, including changing the statute of limitations on Medicaid fraud from three to seven years; authorizing MFCU commissioned peace officers to locate and track offenders in the scope of a criminal investigation; enhancing opportunities for recovery of state assets; defining "exploitation" as an offense of fraud; including electronic records as evidence in prosecution; creating a new definition of "high managerial agent," who may be prosecuted instead of solely an owner of a healthcare provider; enhancing penalties; and allowing Medicaid fraud to be prosecuted as an organized crime.

C.S.S.B. 688 amends current law relating to the investigation, prosecution, and punishment of criminal Medicaid fraud and certain other offenses related to Medicaid fraud, and provides penalties.

### **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, to add Medicaid fraud under Section 35A.02 (Medicaid Fraud), Penal Code, to the list of offenses for which felony indictments, except as provided in Article 12.03 (Aggravated Offenses, Attempt, Conspiracy, Solicitation, Organized Criminal Activity), may be presented, and not afterward, within seven years from the date of the commission of the offense.

SECTION 2. Amends Section 1(2), Article 18.21, Code of Criminal Procedure, to redefine "authorized peace officer" to include an investigator commissioned by the attorney general under Section 402.009 (Authority to Employ and Commission Peace Officers), Government Code.

SECTION 3. Amends Section 3(a), Article 37.07, Code of Criminal Procedure, by adding Subdivision (3), 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, to offer evidence not offered during the guilt or innocence phase of the trial concerning the total pecuniary 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 an employee of the Health and Human Services Commission's Office of the Inspector General (OIG) or the Office of the Attorney General's (OAG) Medicaid fraud control unit to testify concerning the total pecuniary loss to the Medicaid program. Provides 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 Medicaid program or the appropriate punishment for the defendant.

SECTION 4. Amends Section 531.1021(g), Government Code, as follows:

(g) Provides that all information and materials subpoenaed or compiled by OIG in connection with an audit or investigation or by OAG in connection with a Medicaid fraud investigation are confidential and not subject to disclosure under Chapter 552 (Public Information), and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than OIG or the attorney general or their employees or agents involved in the audit or investigation conducted by OIG or the attorney general, except that this information may be disclosed to the state auditor's office, law enforcement agencies, and other entities as permitted by other law.

SECTION 5. Amends Sections 22.04(a-1), (b), (d), (f), and (g), Penal Code, as follows:

(a-1) Deletes existing text providing that a person commits an offense if the person is an owner, operator, or employee of a group home, nursing facility, assisted living facility, intermediate care facility for persons with mental retardation, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to a child, elderly individual, or disabled individual who is a resident of that group home or facility exploitation.

(b)-(g) Makes conforming changes.

SECTION 6. Amends Section 32.46(d), Penal Code, to define "document" in this section. Makes nonsubstantive changes.

SECTION 7. Amends Subchapter D, Chapter 32, Penal Code, by adding Section 32.53, as follows:

Sec. 32.53. EXPLOITATION OF CHILD, ELDERLY INDIVIDUAL, OR DISABLED INDIVIDUAL. (a) Defines "child," "elderly individual," "disabled individual," and "exploitation" in this section.

(b) Provides that a person commits an offense if the person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual.

(c) Provides that an offense under this section is a felony of the third degree.

(d) Authorizes that a person who is subject to prosecution under both this section and another section of this code be prosecuted under either or both sections. Provides that Section 3.04 (Severance) does not apply to criminal episodes prosecuted under both this section and another section of this code. Requires the sentences, if a criminal episode is prosecuted under both this section and another section of this code and sentences are assessed for convictions under both sections, to run concurrently.

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

SECTION 8. Amends Section 35A.01, Penal Code, by adding Subdivision (10) to define "high managerial agent."

SECTION 9. Amends Section 35A.02, Penal Code, by amending Subsections (b) and (c) and by adding Subsections (e) and (f), as follows:

(b) Provides that an offense under this section is a felony of the third degree if certain conditions are met, including if it is shown on the trial of the offense that the defendant submitted more than 25 but fewer than 50 fraudulent claims under the Medicaid program and the submission of each claim constitutes conduct prohibited by Subsection (a) (relating to the conditions that constitute a Medicaid fraud offense). Provides that an offense under this section is a felony of the second degree if certain conditions are met, including if it is shown on the trial of the offense that the defendant submitted 50 or more fraudulent claims under the Medicaid program and the submission of each claim constitutes conduct prohibited by Subsection (a).

(c) Authorizes that an actor, if conduct constituting an offense under this section also constitutes an offense under another section of this code or another provision of law, be prosecuted under either this section or the other section or provision or both this section and the other section or provision.

(e) Provides that the punishment prescribed for an offense under this section, other than the punishment prescribed by Subsection (b)(7) (relating to a Medicaid fraud 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 provider or high managerial agent at the time of the offense.

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

SECTION 10. Reenacts Section 71.02(a), Penal Code, as amended by Chapters 153 (S.B. 2225), 1130 (H.B. 2086), and 1357 (S.B. 554), Acts of the 81st Legislature, Regular Session, 2009, and amends it to provide that a person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit certain offenses, including an offense under Chapter 34, 35, or 35A. Makes nonsubstantive changes.

SECTION 11. Repealer: Section 22.04(c)(4) (defining "exploitation"), Penal Code.

SECTION 12. (a) Makes application of Article 37.07, Code of Criminal Procedure, and Sections 22.04, 32.46, 35A.01, 35A.02, and 71.02, Penal Code, as amended by this Act, prospective,

(b) Provides that the change in law made by this Act in amending Article 12.01, Code of Criminal Procedure, does not apply to an offense if the prosecution of that offense becomes barred by limitation before the effective date of this Act. Provides that the prosecution of that offense remains barred as if this Act had not taken effect.

SECTION 13. Effective date: September 1, 2011.