

By: Nichols, Nelson S.B. No. 688
(Creighton, Gallego, Carter, Burkett, Coleman, et al.)

A BILL TO BE ENTITLED

1 AN ACT
2 relating to the investigation, prosecution, and punishment of
3 criminal Medicaid fraud and certain other offenses related to
4 Medicaid fraud; providing penalties.

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

6 SECTION 1. Article 12.01, Code of Criminal Procedure, is
7 amended to read as follows:

8 Art. 12.01. FELONIES. Except as provided in Article 12.03,
9 felony indictments may be presented within these limits, and not
10 afterward:

- 11 (1) no limitation:
- 12 (A) murder and manslaughter;
- 13 (B) sexual assault under Section 22.011(a)(2),
14 Penal Code, or aggravated sexual assault under Section
15 22.021(a)(1)(B), Penal Code;
- 16 (C) sexual assault, if during the investigation
17 of the offense biological matter is collected and subjected to
18 forensic DNA testing and the testing results show that the matter
19 does not match the victim or any other person whose identity is
20 readily ascertained;
- 21 (D) continuous sexual abuse of young child or
22 children under Section 21.02, Penal Code;
- 23 (E) indecency with a child under Section 21.11,
24 Penal Code; or

1 (F) an offense involving leaving the scene of an
2 accident under Section 550.021, Transportation Code, if the
3 accident resulted in the death of a person;

4 (2) ten years from the date of the commission of the
5 offense:

6 (A) theft of any estate, real, personal or mixed,
7 by an executor, administrator, guardian or trustee, with intent to
8 defraud any creditor, heir, legatee, ward, distributee,
9 beneficiary or settlor of a trust interested in such estate;

10 (B) theft by a public servant of government
11 property over which he exercises control in his official capacity;

12 (C) forgery or the uttering, using or passing of
13 forged instruments;

14 (D) injury to an elderly or disabled individual
15 punishable as a felony of the first degree under Section 22.04,
16 Penal Code;

17 (E) sexual assault, except as provided by
18 Subdivision (1); or

19 (F) arson;

20 (3) seven years from the date of the commission of the
21 offense:

22 (A) misapplication of fiduciary property or
23 property of a financial institution;

24 (B) securing execution of document by deception;

25 (C) a felony violation under Chapter 162, Tax
26 Code;

27 (D) false statement to obtain property or credit

1 under Section 32.32, Penal Code;

2 (E) money laundering;

3 (F) credit card or debit card abuse under Section
4 32.31, Penal Code; [~~or~~]

5 (G) fraudulent use or possession of identifying
6 information under Section 32.51, Penal Code; or

7 (H) Medicaid fraud under Section 35A.02, Penal
8 Code;

9 (4) five years from the date of the commission of the
10 offense:

11 (A) theft or robbery;

12 (B) except as provided by Subdivision (5),
13 kidnapping or burglary;

14 (C) injury to an elderly or disabled individual
15 that is not punishable as a felony of the first degree under Section
16 22.04, Penal Code;

17 (D) abandoning or endangering a child; or

18 (E) insurance fraud;

19 (5) if the investigation of the offense shows that the
20 victim is younger than 17 years of age at the time the offense is
21 committed, 20 years from the 18th birthday of the victim of one of
22 the following offenses:

23 (A) sexual performance by a child under Section
24 43.25, Penal Code;

25 (B) aggravated kidnapping under Section
26 20.04(a)(4), Penal Code, if the defendant committed the offense
27 with the intent to violate or abuse the victim sexually; or

1 (C) burglary under Section 30.02, Penal Code, if
2 the offense is punishable under Subsection (d) of that section and
3 the defendant committed the offense with the intent to commit an
4 offense described by Subdivision (1)(B) or (D) of this article or
5 Paragraph (B) of this subdivision;

6 (6) ten years from the 18th birthday of the victim of
7 the offense: injury to a child under Section 22.04, Penal Code; or

8 (7) three years from the date of the commission of the
9 offense: all other felonies.

10 SECTION 2. Subdivision (2), Section 1, Article 18.21, Code
11 of Criminal Procedure, is amended to read as follows:

12 (2) "Authorized peace officer" means:

13 (A) a sheriff or a sheriff's deputy;

14 (B) a constable or deputy constable;

15 (C) a marshal or police officer of an
16 incorporated city;

17 (D) a ranger or officer commissioned by the
18 Public Safety Commission or the director of the Department of
19 Public Safety;

20 (E) an investigator of a prosecutor's office;

21 (F) a law enforcement agent of the Alcoholic
22 Beverage Commission;

23 (G) a law enforcement officer commissioned by the
24 Parks and Wildlife Commission; ~~or~~

25 (H) an enforcement officer appointed by the
26 executive director of the Texas Department of Criminal Justice
27 under Section 493.019, Government Code; or

1 (I) an investigator commissioned by the attorney
2 general under Section 402.009, Government Code.

3 SECTION 3. Subsection (a), Section 3, Article 37.07, Code
4 of Criminal Procedure, is amended by adding Subdivision (3) to read
5 as follows:

6 (3) Regardless of the plea and whether the punishment
7 is assessed by the judge or the jury, during the punishment phase of
8 the trial of an offense under Section 35A.02, Penal Code, subject to
9 the applicable rules of evidence the state and the defendant may
10 offer evidence not offered during the guilt or innocence phase of
11 the trial concerning the total pecuniary loss to the Medicaid
12 program caused by the defendant's conduct or, if applicable, the
13 scheme or continuing course of conduct of which the defendant's
14 conduct is part. Subject to the applicable rules of evidence, an
15 employee of the Health and Human Services Commission's office of
16 inspector general or the office of attorney general's Medicaid
17 fraud control unit may testify concerning the total pecuniary loss
18 to the Medicaid program. An employee who testifies under this
19 subdivision is subject to cross-examination. Evidence offered
20 under this subdivision may be considered by the judge or jury in
21 ordering or recommending the amount of any restitution to be made to
22 the Medicaid program or the appropriate punishment for the
23 defendant.

24 SECTION 4. Subsection (g), Section 531.1021, Government
25 Code, is amended to read as follows:

26 (g) All information and materials subpoenaed or compiled by
27 the office in connection with an audit or investigation or by the

1 office of the attorney general in connection with a Medicaid fraud
2 investigation are confidential and not subject to disclosure under
3 Chapter 552, and not subject to disclosure, discovery, subpoena, or
4 other means of legal compulsion for their release to anyone other
5 than the office or the attorney general or their ~~[its]~~ employees or
6 agents involved in the audit or investigation conducted by the
7 office or the attorney general, except that this information may be
8 disclosed to ~~[the office of the attorney general]~~ the state
9 auditor's office, ~~[and]~~ law enforcement agencies, and other
10 entities as permitted by other law.

11 SECTION 5. Subsections (a-1), (b), (d), (f), and (g),
12 Section 22.04, Penal Code, are amended to read as follows:

13 (a-1) A person commits an offense if the person is an owner,
14 operator, or employee of a group home, nursing facility, assisted
15 living facility, intermediate care facility for persons with mental
16 retardation, or other institutional care facility and the person
17 intentionally, knowingly, recklessly, or with criminal negligence
18 by omission causes to a child, elderly individual, or disabled
19 individual who is a resident of that group home or facility:

20 (1) serious bodily injury;

21 (2) serious mental deficiency, impairment, or injury;

22 or

23 (3) bodily injury~~[, or~~

24 ~~[(4) exploitation]~~.

25 (b) An omission that causes a condition described by
26 Subsection (a)(1), (2), or (3) or (a-1)(1), (2), or (3)~~[, or (4)]~~ is
27 conduct constituting an offense under this section if:

1 (1) the actor has a legal or statutory duty to act; or

2 (2) the actor has assumed care, custody, or control of
3 a child, elderly individual, or disabled individual.

4 (d) For purposes of an omission that causes a condition
5 described by Subsection (a)(1), (2), or (3), the actor has assumed
6 care, custody, or control if he has by act, words, or course of
7 conduct acted so as to cause a reasonable person to conclude that he
8 has accepted responsibility for protection, food, shelter, and
9 medical care for a child, elderly individual, or disabled
10 individual. For purposes of an omission that causes a condition
11 described by Subsection (a-1)(1), (2), or (3), [~~or (4)~~], the actor
12 acting during the actor's capacity as owner, operator, or employee
13 of a group home or facility described by Subsection (a-1) is
14 considered to have accepted responsibility for protection, food,
15 shelter, and medical care for the child, elderly individual, or
16 disabled individual who is a resident of the group home or facility.

17 (f) An offense under Subsection (a)(3) or (a-1)(3) [~~or (4)~~]
18 is a felony of the third degree when the conduct is committed
19 intentionally or knowingly, except that an offense under Subsection
20 (a)(3) is a felony of the second degree when the conduct is
21 committed intentionally or knowingly and the victim is a disabled
22 individual residing in a center, as defined by Section 555.001,
23 Health and Safety Code, or in a facility licensed under Chapter 252,
24 Health and Safety Code, and the actor is an employee of the center
25 or facility whose employment involved providing direct care for the
26 victim. When the conduct is engaged in recklessly, the offense is a
27 state jail felony.

1 (g) An offense under Subsection (a) is a state jail felony
2 when the person acts with criminal negligence. An offense under
3 Subsection (a-1) is a state jail felony when the person, with
4 criminal negligence and by omission, causes a condition described
5 by Subsection (a-1)(1), (2), or (3) [~~, or (4)~~].

6 SECTION 6. Subsection (d), Section 32.46, Penal Code, is
7 amended to read as follows:

8 (d) In this section:

9 (1) "Deception" [~~, "deception"~~] has the meaning
10 assigned by Section 31.01.

11 (2) "Document" includes electronically stored data or
12 other information that is retrievable in a readable, perceivable
13 form.

14 SECTION 7. Subchapter D, Chapter 32, Penal Code, is amended
15 by adding Section 32.53 to read as follows:

16 Sec. 32.53. EXPLOITATION OF CHILD, ELDERLY INDIVIDUAL, OR
17 DISABLED INDIVIDUAL. (a) In this section:

18 (1) "Child," "elderly individual," and "disabled
19 individual" have the meanings assigned by Section 22.04.

20 (2) "Exploitation" means the illegal or improper use
21 of a child, elderly individual, or disabled individual or of the
22 resources of a child, elderly individual, or disabled individual
23 for monetary or personal benefit, profit, or gain.

24 (b) A person commits an offense if the person intentionally,
25 knowingly, or recklessly causes the exploitation of a child,
26 elderly individual, or disabled individual.

27 (c) An offense under this section is a felony of the third

1 degree.

2 (d) A person who is subject to prosecution under both this
3 section and another section of this code may be prosecuted under
4 either or both sections. Section 3.04 does not apply to criminal
5 episodes prosecuted under both this section and another section of
6 this code. If a criminal episode is prosecuted under both this
7 section and another section of this code and sentences are assessed
8 for convictions under both sections, the sentences shall run
9 concurrently.

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

14 SECTION 8. Section 35A.01, Penal Code, is amended by adding
15 Subdivision (10) to read as follows:

16 (10) "High managerial agent" means a director,
17 officer, or employee who is authorized to act on behalf of a
18 provider and has duties of such responsibility that the conduct of
19 the director, officer, or employee reasonably may be assumed to
20 represent the policy or intent of the provider.

21 SECTION 9. Section 35A.02, Penal Code, is amended by
22 amending Subsections (b) and (c) and adding Subsections (e) and (f)
23 to read as follows:

24 (b) An offense under this section is:

25 (1) a Class C misdemeanor if the amount of any payment
26 or the value of any monetary or in-kind benefit provided or claim
27 for payment made under the Medicaid program, directly or

1 indirectly, as a result of the conduct is less than \$50;

2 (2) a Class B misdemeanor if the amount of any payment
3 or the value of any monetary or in-kind benefit provided or claim
4 for payment made under the Medicaid program, directly or
5 indirectly, as a result of the conduct is \$50 or more but less than
6 \$500;

7 (3) a Class A misdemeanor if the amount of any payment
8 or the value of any monetary or in-kind benefit provided or claim
9 for payment made under the Medicaid program, directly or
10 indirectly, as a result of the conduct is \$500 or more but less than
11 \$1,500;

12 (4) a state jail felony if:

13 (A) the amount of any payment or the value of any
14 monetary or in-kind benefit provided or claim for payment made
15 under the Medicaid program, directly or indirectly, as a result of
16 the conduct is \$1,500 or more but less than \$20,000;

17 (B) the offense is committed under Subsection
18 (a)(11); or

19 (C) it is shown on the trial of the offense that
20 the amount of the payment or value of the benefit described by this
21 subsection cannot be reasonably ascertained;

22 (5) a felony of the third degree if:

23 (A) the amount of any payment or the value of any
24 monetary or in-kind benefit provided or claim for payment made
25 under the Medicaid program, directly or indirectly, as a result of
26 the conduct is \$20,000 or more but less than \$100,000; or

27 (B) it is shown on the trial of the offense that

1 the defendant submitted more than 25 but fewer than 50 fraudulent
2 claims under the Medicaid program and the submission of each claim
3 constitutes conduct prohibited by Subsection (a);

4 (6) a felony of the second degree if:

5 (A) the amount of any payment or the value of any
6 monetary or in-kind benefit provided or claim for payment made
7 under the Medicaid program, directly or indirectly, as a result of
8 the conduct is \$100,000 or more but less than \$200,000; or

9 (B) it is shown on the trial of the offense that
10 the defendant submitted 50 or more fraudulent claims under the
11 Medicaid program and the submission of each claim constitutes
12 conduct prohibited by Subsection (a); or

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

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

22 (e) The punishment prescribed for an offense under this
23 section, other than the punishment prescribed by Subsection (b)(7),
24 is increased to the punishment prescribed for the next highest
25 category of offense if it is shown beyond a reasonable doubt on the
26 trial of the offense that the actor was a provider or high
27 managerial agent at the time of the offense.

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

5 SECTION 10. Subsection (a), Section 71.02, Penal Code, as
6 amended by Chapters 153 (S.B. 2225), 1130 (H.B. 2086), and 1357
7 (S.B. 554), Acts of the 81st Legislature, Regular Session, 2009, is
8 reenacted and amended to read as follows:

9 (a) A person commits an offense if, with the intent to
10 establish, maintain, or participate in a combination or in the
11 profits of a combination or as a member of a criminal street gang,
12 the person commits or conspires to commit one or more of the
13 following:

14 (1) murder, capital murder, arson, aggravated
15 robbery, robbery, burglary, theft, aggravated kidnapping,
16 kidnapping, aggravated assault, aggravated sexual assault, sexual
17 assault, forgery, deadly conduct, assault punishable as a Class A
18 misdemeanor, burglary of a motor vehicle, or unauthorized use of a
19 motor vehicle;

20 (2) any gambling offense punishable as a Class A
21 misdemeanor;

22 (3) promotion of prostitution, aggravated promotion
23 of prostitution, or compelling prostitution;

24 (4) unlawful manufacture, transportation, repair, or
25 sale of firearms or prohibited weapons;

26 (5) unlawful manufacture, delivery, dispensation, or
27 distribution of a controlled substance or dangerous drug, or

1 unlawful possession of a controlled substance or dangerous drug
2 through forgery, fraud, misrepresentation, or deception;

3 (6) any unlawful wholesale promotion or possession of
4 any obscene material or obscene device with the intent to wholesale
5 promote the same;

6 (7) any offense under Subchapter B, Chapter 43,
7 depicting or involving conduct by or directed toward a child
8 younger than 18 years of age;

9 (8) any felony offense under Chapter 32;

10 (9) any offense under Chapter 36;

11 (10) any offense under Chapter 34, ~~or~~ 35, or 35A;

12 (11) any offense under Section 37.11(a);

13 (12) any offense under Chapter 20A;

14 (13) any offense under Section 37.10; ~~or~~

15 (14) any offense under Section 38.06, 38.07, 38.09, or
16 38.11;

17 (15) ~~(14)~~ any offense under Section 42.10; or

18 (16) ~~(14)~~ any offense under Section 46.06(a)(1) or
19 46.14.

20 SECTION 11. Subdivision (4), Subsection (c), Section 22.04,
21 Penal Code, is repealed.

22 SECTION 12. (a) The changes in law made by this Act to
23 Article 37.07, Code of Criminal Procedure, and Sections 22.04,
24 32.46, 35A.01, 35A.02, and 71.02, Penal Code, apply only to an
25 offense committed on or after the effective date of this Act. An
26 offense committed before the effective date of this Act is covered
27 by the law in effect when the offense was committed, and the former

1 law is continued in effect for that purpose. For purposes of this
2 section, an offense was committed before the effective date of this
3 Act if any element of the offense occurred before that date.

4 (b) The change in law made by this Act in amending Article
5 12.01, Code of Criminal Procedure, does not apply to an offense if
6 the prosecution of that offense becomes barred by limitation before
7 the effective date of this Act. The prosecution of that offense
8 remains barred as if this Act had not taken effect.

9 SECTION 13. This Act takes effect September 1, 2011.