

SUBJECT: Civil and criminal Medicaid fraud offenses and civil penalties

COMMITTEE: Public Health — committee substitute recommended

VOTE: 8 ayes —Kolkhorst, Coleman, S. Davis, V. Gonzales, S. King, Laubenberg, Schwertner, Truitt

0 nays

3 absent — Naishtat, Alvarado, Zerwas

SENATE VOTE: On final passage, March 30 — 31-0

WITNESSES: (*On House companion bill, HB 1034:*)
For — None

Against — None

On — Raymond Winter, Office of the Attorney General

BACKGROUND: The Texas Medicaid Fraud Prevention Act (TMFPA), Human Resources Code, ch. 36, allows the attorney general to seek civil damages and injunctive relief against those who commit Medicaid fraud. The statute lists 13 types of civil offenses, including knowingly making a claim under the Medicaid program for:

- a service or product that has not been approved or acquiesced in by a treating physician or health care practitioner;
- a service or product that is substantially inadequate or inappropriate when compared to generally recognized standards within the particular discipline or within the health care industry; or
- a product that has been adulterated, debased, mislabeled, or that is otherwise inappropriate.

Acts of Medicaid fraud also are punishable under the Penal Code, ch. 35A. The criminal statute lists 12 offenses, including one that mirrors the civil offenses discussed above.

The federal Social Security Act, sec. 1909, allows a state to receive an increased share of Medicaid fraud recoveries if it has a law relating to false or fraudulent claims that meets certain federal requirements.

DIGEST: CSSB 544 would make several changes to the TMFPA and one change to the Penal Code.

Civil and criminal offenses. For either a civil or criminal offense, a person would commit an unlawful act if the person knowingly caused to be made, not just made, a claim under the Medicaid program for:

- a service or product that had not been approved or acquiesced in by a treating physician or health care practitioner;
- a service or product that was substantially inadequate or inappropriate when compared to generally recognized standards within the particular discipline or within the health care industry; or
- a product that had been adulterated, debased, mislabeled, or that was otherwise inappropriate.

Civil penalties. The bill would amend civil penalties for a person who committed an unlawful act.

For each unlawful act resulting in injury to an elderly person, disabled person, or person younger than 18, a person would be liable to the state for a civil penalty of \$5,500 to \$15,000. For each unlawful act that did not result in injury to those parties, a person would be liable to the state for a civil penalty of \$5,500 to \$11,000. In either case, if minimum or maximum penalties under the federal False Claims Act were higher than those imposed by the TMFPA, the federal penalty guidelines would apply.

Attorney's fees. The bill would add language allowing a private plaintiff who brought a suit under the TMFPA to recover reasonable expenses, reasonable attorney's fees, and costs from a defendant if the state made a settlement with a defendant that the court determined, after a hearing, was fair, adequate, and reasonable.

Suits barred. A private plaintiff could not bring an action that was based on the public disclosure of allegations or transactions in a criminal or civil hearing in which the state or an agent of the state was a party, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the person bringing the action was an original

source of the information. “Original source” would mean an individual who:

- had direct and independent knowledge of the information on which the allegations were based and had voluntarily provided the information to the state before filing an action based on the information; or
- had knowledge that was independent of and materially added to the publicly disclosed allegations and who had voluntarily provided the information to the state before filing an action based on the information.

Before dismissing a suit for being a barred action, the court would have to give the attorney general an opportunity to oppose the dismissal.

Retaliation. A person, including an employee, contractor, or agent, who was discharged, demoted, suspended, or discriminated against in the terms and conditions of employment because of efforts to aid a suit under the TMFPA or stop violations of the TMFPA would be entitled to reinstatement and back pay.

Definitions. The bill would add definitions for “material” and “obligation.” Material would be defined as having a natural tendency to influence or be capable of influencing. Obligation would be defined as a duty, whether or not fixed, that arose from:

- an express or implied contractual, grantor-grantee, or licensor-licensee relationship;
- a fee-based or similar relationship;
- a statute or regulation; or
- the retention of any overpayment.

Effective date. The bill would take effect September 1, 2011, and would apply to conduct that occurred on or after the effective date or to a civil action commenced on or after the effective date.

**SUPPORTERS
SAY:**

CSSB 544 would allow claims to be brought against manufacturers of adulterated drugs under the TMFPA and the Penal Code. Current law allows claims to be brought against pharmacists for dispensing adulterated drugs, but is less clear that manufacturers can be sued for producing defective drugs. Claims against manufacturers already are available under

federal law. The bill would allow Texas to independently bring suits to hold manufacturers accountable for introducing defective drugs into the market. The bill also would allow claims to be brought against others in the chain of distribution, such as a distributor who did not maintain medications at the proper temperature, causing them to become dangerous or ineffective.

The bill also would allow Texas to continue to receive an increased share of Medicaid fraud recoveries. Medicaid fraud recoveries are currently split according to the federal Medicaid assistance percentage (FMAP). This ensures that the state and federal government split recoveries based on their respective contributions to Medicaid. However, if a state statute meets certain requirements, such as being “as effective” as the federal False Claims Act in rewarding and facilitating suits by private parties and providing for penalties no less than what are available under federal law, the state can keep an additional 10 percent of Medicaid fraud recoveries. For example, if a state has an FMAP of 60 percent, ordinarily 60 percent of any recovery would belong to the federal government and 40 percent would belong to the state. However, if the state had a law that met federal requirements, 50 percent of the recovery would belong to the federal government and 50 percent would belong to the state. Recent changes to federal law require changes to Texas law so that the TMFPA will continue to meet federal requirements.

**OPPONENTS
SAY:**

CSSB 544 is unnecessary because suits can already be brought against drug manufacturers under federal law.

NOTES:

The committee substitute differs from the Senate-passed bill by changing several provisions to comply with Social Security Act, sec. 1909. Civil penalties were increased, attorney’s fees for private plaintiffs were expanded, an exception for when a suit is barred was expanded, retaliation protections were strengthened for contractors and agents, and definitions were revised.

The House companion, HB 1034 by Shelton, was considered in a public hearing of the House Public Health Committee and left pending on April 6.