

1 **State of Arkansas**
2 **79th General Assembly**
3 **Regular Session, 1993**
4 **By: Representative Gibson**

A Bill

HOUSE BILL 1959

For An Act To Be Entitled

"AN ACT TO CREATE A MEDICAID FRAUD FALSE CLAIMS ACT."

Subtitle

"AN ACT TO CREATE A MEDICAID FRAUD FALSE CLAIMS ACT."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Definitions.

(1) "Arkansas Medicaid Program" means the program authorized under Title XIX of the federal Social Security Act, which provides for payments for medical goods or services on behalf of indigent families with dependent children and of aged, blind, or disabled individuals whose income and resources are insufficient to meet the cost of necessary medical services;

(2) "Fiscal agent" means any individual, firm, corporation, professional association, partnership, organization, or other legal entity which, through a contractual relationship with the Department of Human Services, the State of Arkansas receives, processes, and pays claims under the Arkansas Medicaid Program;

(3) "Person" means any provider of goods or services or any employee of such provider, whether that provider be an individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity under the Arkansas Medicaid Program but which provides goods or services to a provider under the Arkansas Medicaid Program or its fiscal agents;

(4) "Medicaid recipient" means any individual on whose behalf any person claimed or received any payment or payments from the Arkansas Medicaid Program or its fiscal agents, whether or not any such individual was eligible for benefits under the Arkansas Medicaid Program;

1 (5) "Records" means all documents in any form including, but not
2 limited to, medical documents and x-rays, prepared by any person for the
3 purported provision of any goods or services to any Medicaid recipient;

4 (6) "Claim" means any written or electronically submitted request or
5 demand for reimbursement made to the Arkansas Medicaid Program by any provider
6 or its fiscal agents for each good or service purported to have been provided
7 to any Medicaid recipient whether or not the State of Arkansas provides any or
8 no portion of the money which is requested or demanded.

9 (7) "Knowing" or "knowingly" means an act or omission done voluntarily
10 and intentionally, and not because of mistake or accident or other innocent
11 reason.

12

13 SECTION 2. Liability for certain acts.

14 (a) A person shall be liable to the State of Arkansas, through the
15 Attorney General, for a civil penalty and restitution if he:

16 (1) Knowingly makes or causes to be made any false statement or
17 representation of a material fact in any application for any benefit or
18 payment under the Medicaid Program; or

19 (2) At any time knowingly makes or causes to be made any false
20 statement or representation of a material fact for use in determining rights
21 to such benefit or payment; or

22 (3) Having knowledge of the occurrence of any event affecting his
23 initial or continued right to any such benefit or payment, or the initial or
24 continued right to any such benefit or payment of any other individual in
25 whose behalf he has applied for or is receiving such benefit or payment,
26 knowingly conceals or fails to disclose such event with an intent fraudulently
27 to secure such benefit or payment either in a greater amount or quantity than
28 is due or when no such benefit or payment is authorized; or

29 (4) Having made application to receive any such benefit or
30 payment for the use and benefit of another and having received it, knowingly
31 converts such benefit or payment or any part thereof to a use other than for
32 the use and benefit of such other person; or

33 (5) Knowingly presents or causes to be presented a claim for a
34 physician's service for which payment may be made under the Arkansas Medicaid
35 Program and knows that the individual who furnished the service was not

1 licensed as a physician; or

2 (6) Knowingly solicits or receives any remuneration including any
3 kickback, bribe, or rebate directly or indirectly, overtly or covertly, in
4 cash or in kind:

5 (i) In return for referring an individual to a person for
6 the furnishing or arranging for the furnishing of any item or service for
7 which payment may be made in whole or in part under the Arkansas Medicaid
8 Program, or

9 (ii) In return for purchasing, leasing, ordering, or
10 arranging for or recommending purchasing, leasing, or ordering any good,
11 facility, service, or item for which payment may be made in whole or in part
12 under the Arkansas Medicaid Program, or

13 (7) Knowingly offers or pays any remuneration including any
14 kickback, bribe, or rebate directly or indirectly, overtly or covertly, in
15 cash or in kind to any person to induce such person:

16 (i) To refer an individual to a person for the furnishing
17 or arranging for the furnishing of any item or service for which payment may
18 be made in whole or in part under the Arkansas Medicaid Program, or

19 (ii) To purchase, lease, order, or arrange for or recommend
20 purchasing, leasing, or ordering any good, facility, service, or item for
21 which payment may be made in whole or in part under the Arkansas Medicaid
22 Program. Subdivisions (i) and (ii) shall not apply to:

23 (A) A discount or other reduction in price obtained
24 by a provider of services or other entity under the Arkansas Medicaid Program
25 if the reduction in price is properly disclosed and appropriately reflected in
26 the costs claimed or charges made by the provider or entity under the Arkansas
27 Medicaid Program; or

28 (B) Any amount paid by an employer to an employee
29 (who has a bona fide employment relationship with such employer) for
30 employment in the provision of covered items or services; or

31 (C) Any amount paid by a vendor of goods or services
32 to a person authorized to act as a purchasing agent for a group of individuals
33 or entities who are furnishing services reimbursed under the Arkansas Medicaid
34 Program if:

35 (I) The person has a written contract, with

1 each such individual or entity, which specifies the amount to be paid the
2 person, which amount may be a fixed amount or a fixed percentage of the value
3 of the purchases made by each such individual or entity under the contract;
4 and

5 (II) In the case of an entity that is a
6 provider of services as defined in section A.C.A. 20-9-101, the person
7 discloses in such form and manner as the Director of Human Services requires
8 to the entity and, upon request, to the Director the amount received from each
9 such vendor with respect to purchases made by or on behalf of the entity; and

10 (D) Any payment practice specified by the Director of
11 Human Services promulgated pursuant to applicable federal or state law.

12 (8) Knowingly makes or causes to be made, or induces or seeks to
13 induce the making of, any false statement or representation of a material fact
14 with respect to the conditions or operation of any institution, facility, or
15 entity in order that such institution, facility, or entity may qualify either
16 upon initial certification or upon recertification as a hospital, rural
17 primary care hospital, skilled nursing facility, nursing facility,
18 intermediate care facility for the mentally retarded, home health agency, or
19 other entity for which certification is required or with respect to
20 information required pursuant to applicable federal and state law, rules,
21 regulations and provider agreements;

22 (9) Knowingly: (i) Charges, for any service provided to a
23 patient under the Arkansas Medicaid Program, money or other consideration at a
24 rate in excess of the rates established by the state, or

25 (ii) Charges, solicits, accepts, or receives, in addition
26 to any amount otherwise required to be paid under the Arkansas Medicaid
27 Program any gift, money, donation, or other consideration other than a
28 charitable, religious, or philanthropic contribution from an organization or
29 from a person unrelated to the patient as a precondition of admitting a
30 patient to a hospital, nursing facility, or intermediate care facility for the
31 mentally retarded, or as a requirement for the patient's continued stay in
32 such a facility, when the cost of the services provided therein to the
33 patient is paid for in whole or in part under the Arkansas Medicaid Program.

34 (10) Knowingly makes or causes to be made any false statement or
35 representation of a material fact in any application for benefits or payment

1 in violation of the rules, regulations and provider agreements issued by the
2 Arkansas Medicaid Program or its fiscal agents.

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4 SECTION 3. Civil penalties.

5 (a) It shall be unlawful for any person to commit any act prescribed by
6 Section 2 of this chapter, and any person found to have committed any such act
7 or acts shall be deemed liable to the State of Arkansas, through the Attorney
8 General, for full restitution and for a civil penalty of not less than five
9 thousand dollars (\$5,000) and not more than ten thousand dollars (\$10,000) for
10 each violation, plus three (3) times the amount of all payments judicially
11 found to have been fraudulently received from the Arkansas Medicaid Program or
12 its fiscal agents because of the act of that person, except that if the court
13 finds the following:

14 (1) The person committing the violation of this act furnished
15 officials of the Attorney General with all information known to such person
16 about the violation within thirty (30) days after the date on which the
17 defendant first obtained the information;

18 (2) Such person fully cooperated with any Attorney General
19 investigation of such violation, and at the time the person furnished the
20 Attorney General with the information about the violation, no criminal
21 prosecution, civil action, or administrative action had commenced under this
22 act with respect to the violation, and the person did not have actual
23 knowledge of the existence of an investigation into such violation. The court
24 may assess not more than two (2) times the amount of damages which the State
25 sustained because of the act of the person.

26 (b) A person violating this act shall also be liable to the State of
27 Arkansas for the costs of a civil action brought to recover any such penalty
28 or damages.

29 (c) The entirety of any penalty, less any reward which may be
30 determined by the court pursuant to this act, shall be credited to the General
31 Revenues of the State of Arkansas.

32 (d) For actions under this act, the following shall apply:

33 (1) To enable the court to properly fix the amount of
34 restitution, the Attorney General shall, after appropriate investigation,
35 recommend an amount that would make the victim whole with respect to the money

1 fraudulently received from the Arkansas Medicaid Program or its fiscal agents,
2 the expense of investigation, and all other measurable monetary damages
3 directly related to the cause of action.

4 (2) If the defendant disagrees with the recommendation of the
5 Attorney General, he shall be entitled to introduce evidence in mitigation of
6 the amount recommended.

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8 SECTION 4. Disposition of offender.

9 (a) For actions under this act, whether tried by the Court or
10 the jury, the restitution and penalty shall be fixed by the Court.

11

12 SECTION 5. Civil investigative demands.

13 (a) If the Attorney General has reasonable cause to believe that a
14 person has information or is in possession, custody or control of any document
15 or other tangible object relevant or that would lead to the discovery of
16 relevant information in an investigation to an investigation for violation of
17 this article, the Attorney General may serve upon the person, before bringing
18 any action in the circuit court, a written demand to appear and be examined
19 under oath, to answer written interrogatories under oath and to produce the
20 document or object for inspection and copying. The demand shall:

21 (1) Be served upon the person in the manner required for service
22 of process in the State of Arkansas or by certified mail with return receipt
23 requested.

24 (2) Describe the nature of the conduct constituting the violation
25 under investigation.

26 (3) Describe the class or classes of documents or objects with
27 sufficient definiteness to permit them to be fairly identified.

28 (4) Contain a copy of the written interrogatories.

29 (5) Prescribe a reasonable time at which the person must appear
30 to testify, within which to answer the written interrogatories and within
31 which the document or object must be produced, and advise the person that
32 objections to or reasons for not complying with the demand may be filed with
33 the Attorney General on or before that time.

34 (6) Specify a place for the taking of testimony or for production
35 and designate a person who shall be custodian of the document or object.

1 (7) Contain a copy of subsections (b) and (c) of this section.

2 (b) If a person objects to or otherwise fails to comply with the
3 written demand served upon him under subsection (a), the Attorney General may
4 file an action in the circuit court for an order to enforce the demand. Venue
5 for the action to enforce the demand shall be in Pulaski county. Notice of
6 hearing the action to enforce the demand and a copy of the action shall be
7 served upon the person in the same manner as that prescribed in the Arkansas
8 Rules of Civil Procedure. If the court finds that the demand is proper, that
9 there is reasonable cause to believe there may have been a violation of this
10 chapter and that the information sought or document or object demanded is
11 relevant to the violation, it shall order the person to comply with the
12 demand, subject to modifications the court may prescribe. If the person fails
13 to comply with such order, the court may issue any of the following orders
14 until the person complies with such order:

15 (1) Adjudging the person in contempt of court.

16 (2) Granting injunctive relief against the person to whom the
17 demand is issued to restrain the conduct which is the subject of the
18 investigation.

19 (3) Granting such other relief as the court may deem proper.

20 (c) The court may award to the Attorney General costs and reasonable
21 attorney fees as determined by the court against the person failing to obey
22 the order. Upon motion by the person and for good cause shown, the court may
23 make any further order in the proceedings that justice requires to protect the
24 person from unreasonable annoyance, embarrassment, oppression, burden or
25 expense.

26 (d) If the Attorney General determines that disclosure to the
27 respondent of the evidence relied on to establish reasonable cause is not in
28 the best interests of the investigation, he may request that the court examine
29 the evidence in camera. If the Attorney General makes this request, the court
30 may examine the evidence in camera and then make its determination.

31 (e) Any procedure, testimony taken, or material produced under this
32 section shall be kept confidential by the Attorney General before bringing an
33 action against a person under this chapter for the violation under
34 investigation unless any of the following applies:

35 (1) Confidentiality is waived by the person whose testimony is

1 disclosed.

2 (2) Confidentiality is waived by the person who produced to the
3 Attorney General the material being disclosed.

4 (3) The testimony or material is disclosed solely to the person,
5 or the person_s attorney, who testified or provided the material to the
6 Attorney General.

7 (4) Disclosure is authorized by court order.

8 (f) The Attorney General may disclose the testimony or material to an
9 agency director of the State of Arkansas, the United States or any other
10 state, or prosecuting attorney or United States Attorney.

11 (g) An investigator conducting an examination pursuant to this section
12 may exclude from the place of examination any person, except the person being
13 examined and person_s counsel.

14 (h) Nothing in this section shall be construed to limit the Attorney
15 General_s authority to access provider records in accordance with existing
16 provisions of the Arkansas Code.

17

18 SECTION 6. Order compelling testimony or production of evidence;
19 immunity; contempt.

20 (a) In any proceeding or investigation under this act, if a person
21 refuses to answer a question or produce evidence of any kind on the ground
22 that he may be incriminated and if the Attorney General or prosecuting
23 attorney requests the court in writing to order the person to answer the
24 question or produce the evidence, the court may make this order and the person
25 shall comply with the order. If the court denies the request, the court shall
26 state its reasons for denial in writing. After complying, the testimony or
27 evidence, or any information directly derived from the testimony or evidence,
28 shall not be used against the person in any proceeding or prosecution of a
29 crime or offense concerning which he gave an answer or produced evidence under
30 the court order. Immunity obtained pursuant to this section does not exempt
31 any person from prosecution, penalty or forfeiture for any perjury, false
32 swearing or contempt committed in answering, or failing to answer, or in
33 producing, or failing to produce, evidence in accordance with the order.

34 (b) If a person refuses to testify after being granted immunity and
35 after being ordered to testify as prescribed in subsection (a) of this

1 section, he may be adjudged in contempt.

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3 SECTION 7. False claims procedure.

4 (a) A subpoena requiring the production of documents or the attendance
5 of a witness at an interview, or a trial or hearing conducted under this
6 section may be served by the Attorney General or any duly authorized law
7 enforcement officer in the State of Arkansas personally, telephonically or by
8 registered or certified mail. In the case of service by registered or
9 certified mail, such return shall be accompanied by the return post office
10 receipt of delivery of such demand.

11 (b) A civil action under this section may not be brought more than:

12 (1) Five (5) years after the date on which the violation of this
13 *act is committed.*

14 (c) In any action brought pursuant to this act, the State of Arkansas
15 shall be required to prove all essential elements of the cause of action,
16 including damages, by a preponderance of the evidence.

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18 SECTION 8. False claims jurisdiction.

19 Any action under this act may be brought in the circuit court of the
20 county where the defendant, or in the case of multiple defendants, any one
21 *defendant resides.*

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23 SECTION 9. Suspension of violators.

24 The Director of the Department of Human Services may suspend or revoke
25 the provider agreement between the department and the person in the event the
26 person is found guilty of violating the terms of this act.

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28 SECTION 10. Injunctions against fraud.

29 Whenever it appears that any person is engaged or intends to engage in
30 the transfer, conversion or destruction of assets, records or property in an
31 effort to avoid detection of violations of this act the Attorney General may
32 apply to the Chancery Court of Pulaski County or to the court in which the
33 records or property are located to seize and impound the property. The
34 application for ex parte order shall be in writing and furnish a reasonable
35 basis for the granting of the proposed order and demonstrate that an emergency

1 exists which would support the granting of the motion. If the order is
2 granted, the respondent shall be served with a copy of the order seizing and
3 impounding his records by the day following the issuance of the order. If the
4 order is granted the respondent shall be granted a hearing no later than five
5 (5) days after issuance of the order for the purpose of determining whether
6 the order should be continued. The burden at all stages of the proceeding
7 shall be upon the state to prove by preponderance of evidence the necessity of
8 the order of seizure.

9

10 SECTION 11. Reward for the detection and punishment of Medicaid fraud.

11 (a) The Court is authorized to pay a person such sums, not
12 exceeding ten percent (10%) of the aggregate penalty recovered, or in any case
13 not more than one hundred thousand dollars (\$100,000), as it may deem just for
14 information such person may have provided which led to the detecting and
15 bringing to trial and punishment persons guilty of violating the Medicaid
16 fraud laws.

17 (1) Upon disposition of any *civil* action relating to violations
18 of this act in which a penalty is recovered, the Attorney General may petition
19 the court on behalf of a person who may have provided information which led to
20 the detecting and bringing to trial and punishment persons guilty of Medicaid
21 fraud to award such person in an amount commensurate with the quality of
22 information determined by the court to have been provided, in accordance with
23 requirements of this act.

24 (2) If the Attorney General elects not to petition the court on
25 behalf of such person, the person may petition the court on his own behalf.

26 (3) *Neither the state nor any defendant within the action shall*
27 *be liable for expenses which a person incurs in bringing an action under this*
28 *section.*

29 (4) *Employee or fiscal agents charged with the duty of referring*
30 *or investigating cases of Medicaid fraud who are employed by or contract with*
31 *any governmental entity shall not be eligible to receive a reward under this*
32 *subsection.*

33

34 SECTION 12. Records.

35 (a) No potential Medicaid recipient shall be eligible for medical

1 assistance unless he has, in writing, authorized the Director of the
2 Department of Human Services to examine all records of his own, or of those
3 receiving or having received Medicaid benefits through him, whether the
4 receipt of such benefits would be allowed by the Arkansas Medicaid Program or
5 not, for the purpose of investigating whether any person may have violated
6 this act, or for use or potential use in any legal, administrative, or
7 judicial proceeding.

8 (b) No person shall be eligible to receive any payment from the
9 Arkansas Medicaid Program or its fiscal agents unless that person has in
10 writing, authorized the Director of the Department of Human Services to
11 examine all records for the purpose of investigating whether any person may
12 have committed the crime of Medicaid fraud, or for use or for potential use in
13 any legal, administrative, or judicial proceeding.

14 (c) The Attorney General shall be allowed access to all records of
15 persons and Medicaid recipients under the Arkansas Medicaid Program to which
16 the Director of the Department of Human Services has access for the purpose of
17 investigating whether any person may have violated this act, or for use or
18 potential use in any legal, administrative, or judicial proceeding.

19 (d) Notwithstanding any other law to the contrary, no person shall be
20 subject to any civil or criminal liability for providing access to records to
21 the Director of the Department of Human Services, the Attorney General, or the
22 prosecuting attorneys.

23 (e) Records obtained by the Director of the Department of Human
24 Services or the Attorney General, pursuant to this chapter shall be classified
25 as confidential information and shall not be subject to outside review or
26 release by any individual except when records are used or potentially to be
27 used by any government entity in any legal, administrative, or judicial
28 proceeding.

29 (f) All persons under the Arkansas Medicaid Program are required to
30 maintain at their or its principal place of Medicaid business all records at
31 least for a period of five (5) years from the date of claimed provision of any
32 goods or services to any Medicaid recipient.

33 (g) Any person found not to have maintained all records shall be guilty
34 of a Class D felony if the unavailability of records impairs or obstructs a
35 civil action pursuant to this act. Otherwise, the unavailability of records

1 shall be a Class A misdemeanor.

2

3 SECTION 13. All provisions of this act of a general and permanent
4 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas
5 Code Revision Commission shall incorporate the same in the Code.

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7 SECTION 14. If any provision of this act or the application thereof to
8 any person or circumstance is held invalid, such invalidity shall not affect
9 other provisions or applications of the act which can be given effect without
10 the invalid provision or application, and to this end the provisions of this
11 act are declared to severable.

12

13 SECTION 15. All laws and parts of laws in conflict with this act are
14 hereby repealed.

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16 SECTION 16. EMERGENCY. It is hereby found and determined by the General
17 Assembly that the Attorney General and the prosecuting attorneys are in need
18 of specific legislation by which to eliminate fraud in the Arkansas Medicaid
19 Program and that immediate passage of this act is necessary to protect the
20 integrity of the program. Therefore, an emergency is hereby declared to
21 exist, and this act, being necessary for the immediate preservation of the
22 public peace, health and safety, shall be in full force and effect from and
23 after its passage and approval.

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25 /s/B. Gibson

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