

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas  
2 84th General Assembly  
3 Regular Session, 2003  
4

*As Engrossed: S3/18/03*

# A Bill

SENATE BILL 919

5 By: Senator Miller  
6  
7

## For An Act To Be Entitled

9 AN ACT TO CREATE A LIABILITY INSURANCE POOL FOR  
10 NURSING HOME PATIENTS; AND FOR OTHER PURPOSES.

### Subtitle

12 AN ACT TO CREATE A LIABILITY INSURANCE  
13 POOL FOR NURSING HOME PATIENTS.  
14  
15  
16

17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
18

19 *SECTION 1. Arkansas Code, Title 20, Chapter 10 is amended by adding an*  
20 *additional subchapter to read as follows:*

21 *20-10-1901. Title.*

22 *This subchapter shall be known and may be cited as the "Fair Care and*  
23 *Treatment Act of 2003".*  
24

25 *20-10-1902. Purpose and intent.*

26 *(a) The purpose and intent of this subchapter is to provide for the*  
27 *fair care and treatment of persons receiving long-term care in skilled*  
28 *nursing facilities duly licensed to operate in this state.*

29 *(b) This subchapter authorizes the creation of a liability insurance*  
30 *pool known as the Patient's Recovery Fund to provide a secure and sustainable*  
31 *source of funds to satisfy personal injury claims by or on behalf of patients*  
32 *of participating facilities.*  
33

34 *20-10-1903. Definitions.*

35 *As used in this subchapter:*

36 *(1) "Affiliate of a skilled nursing facility" means any person*



1 or entity controlling, controlled by, or under common control with the  
2 facility;

3 (2) "Board" means the Patient's Recovery Fund Board created by  
4 this subchapter;

5 (3)(A) "Claim" means a demand for recovery of damages from the  
6 Patient's Recovery Fund, whether based in tort, contract, or otherwise, on  
7 account of an injury to a patient of a participating facility.

8 (B) The claim may be brought by the patient, or by the  
9 guardian, representative, executor, administrator, or person acting on behalf  
10 of the patient, including a third party whose right to recover damages is  
11 derivative of the legal rights of the patient;

12 (4) "Claimant" means the person or persons alleging a claim  
13 against a skilled nursing facility;

14 (5) "Injury" means the personal injury or death of a patient of  
15 a skilled nursing facility arising out of or sustained in the course of the  
16 services rendered to the patient by the facility, its owners, principals,  
17 officers, employees, agents, and affiliates, or any person or entity  
18 providing management services to the facility, or arising out of or sustained  
19 in the course of the relationship between the patient and the facility, its  
20 owners, principals, officers, employees, agents, and affiliates, or any  
21 person or entity providing management services to the facility;

22 (6) "Occupied beds" means:

23 (A) Beds occupied by patients at midnight;

24 (B) Beds placed on hold during a period of time not to  
25 exceed five (5) consecutive calendar days during which a patient is in a  
26 hospital bed; and

27 (C) Beds placed on hold during a period of time not to  
28 exceed fourteen (14) consecutive calendar days during which a patient is on  
29 therapeutic home leave;

30 (7)(A) "Participating facility" means a skilled nursing facility  
31 that participates in and contributes to the Patient's Recovery Fund,  
32 including the owners, principals, officers, employees, agents, and affiliates  
33 of the skilled nursing facility.

34 (B) "Participating facility" does not include any  
35 unaffiliated person or entity providing management services to the facility;

36 (8) "Patient" means a person receiving care or treatment from a

1 skilled nursing facility;

2 (9) "Skilled nursing facility" means a "long-term care facility"  
3 as defined by § 20-10-213; and

4 (10) "Wrongful act" means any act or conduct, whether by  
5 commission or omission, which is a proximate cause of an injury.

6  
7 20-10-1904. Patient's Recovery Fund – Participation.

8 (a)(1) The Patient's Recovery Fund is created for the payment of valid  
9 claims and judgments against participating facilities.

10 (2) Each participating facility shall remit monthly assessments  
11 to the fund, or make payments to the fund in lieu of assessments, based upon  
12 the number of occupied beds as of the first business day of each month.

13 (3) Assessments may be prepaid upon terms approved by the board.

14 (4) Assessments and other payments, together with earned income,  
15 surplus, and all other moneys accruing to the fund, shall be held in trust by  
16 the board for the purposes set forth in this subchapter.

17 (b)(1) The fund shall not be deposited or maintained in the State  
18 Treasury, but shall be a cash fund under the direction and control of the  
19 board, as set forth in this subchapter.

20 (2) The fund shall not be subject to regulation by the State  
21 Insurance Department.

22 (c)(1) Only claims or judgments arising from a wrongful act or acts  
23 which occur during a period of participation in the fund shall be covered by  
24 the fund.

25 (2) The fund shall offer tail coverage to participating  
26 facilities upon terms approved by the board.

27 (d)(1)(A) A skilled nursing facility which is certified to provide  
28 services under Title XVIII or Title XIX of the Social Security Act shall  
29 participate in and contribute to the fund as a condition of maintaining its  
30 license to provide long-term care in this state.

31 (B) A skilled nursing facility which is not certified to  
32 provide services under Title XVIII or Title XIX of the Social Security Act,  
33 or which receives no reimbursement or other payment under Title XVIII or  
34 Title XIX of the Social Security Act for services provided to any of its  
35 patients, may elect to participate in the fund, but shall not be required to  
36 participate in the fund as a condition of maintaining its license to provide

1 long-term care in this state.

2 (2)(A) Subject to the rules and regulations of the fund and upon  
3 terms approved by the board, a skilled nursing facility which is required to  
4 participate in the fund as a condition of maintaining its license to provide  
5 long-term care in this state may opt out of participation in the fund by  
6 giving notice to the administrator that the facility is owned and operated by  
7 a nonprofit, government or church affiliated organization as defined by the  
8 board.

9 (B) Wrongful acts occurring during the facility's prior  
10 period or periods of participation shall be covered.

11 (3)(A) A participating facility shall be dismissed as a  
12 participant in the fund for nonpayment of assessments or payments in lieu of  
13 assessments, as determined by the rules and regulations of the fund.

14 (B) The board shall provide by regulation for a grace  
15 period for curing a default in the payment of assessments or other payments  
16 prior to formal dismissal and may impose a late fee not to exceed five  
17 dollars (\$5.00) per occupied bed per event of default.

18 (C) Upon dismissal of a facility from the fund, wrongful  
19 acts occurring during such facility's prior period or periods of  
20 participation shall be covered.

21  
22 20-10-1905. Election by participating facility – Initial assessments  
23 and payments.

24 (a) A participating facility may elect:

25 (1) To carry a higher deductible, or to retain a higher limit of  
26 its risks, by providing evidence satisfactory to the board that it is  
27 qualified to fund its risks of loss and that the facility or its affiliate  
28 maintains segregated accounts to fund the deductible and self insured  
29 retention losses;

30 (2) To purchase commercial insurance coverage by providing proof  
31 of the coverage to the board; or

32 (3) To accept the insurance coverage provided by the fund and to  
33 pay monthly assessments as provided in this subchapter.

34 (b) A participating facility that elects to self insure or to purchase  
35 commercial insurance:

36 (1) Shall maintain coverage of not less than two hundred fifty

1 thousand dollars (\$250,000) per claim and an annual aggregate limit of  
2 coverage of not less than five hundred thousand dollars (\$500,000);

3 (2) Shall pay an administrative fee to the fund in lieu of  
4 monthly assessments, as provided in this section; and

5 (3)(A) Shall participate in the fund upon equal terms with other  
6 participating facilities.

7 (B) However, the fund shall not pay claims or judgments on  
8 behalf of the facility, unless, and only to the extent that, the facility  
9 acquires coverage from the fund.

10 (c)(1) Assessments and payments in lieu of assessments shall be paid  
11 beginning January 2004, based upon the number of occupied beds as of the  
12 first business day of the month.

13 (2) The initial amount of the aggregate annual assessment,  
14 payable monthly, shall be one thousand dollars (\$1,000) per occupied bed and  
15 the initial amount of the annual administrative fee in lieu of assessments  
16 shall be two hundred dollars (\$200) per occupied bed.

17  
18 20-10-1906. Initial limits of coverage and deductible.

19 With respect to participating facilities which elect to accept the  
20 insurance coverage provided by the fund, the initial amount of the per claim  
21 limit of coverage shall be two hundred fifty thousand dollars (\$250,000), the  
22 initial amount of the annual aggregate limit of coverage per participating  
23 facility shall be five hundred thousand dollars (\$500,000), and the initial  
24 amount of the deductible shall be ten thousand dollars (\$10,000) per claim.

25  
26 20-10-1907. Patient's Recovery Fund Board – Powers and duties.

27 (a)(1) The Patient's Recovery Fund Board shall have four (4) directors  
28 and shall consist of:

29 (A) A physician, a registered nurse, and a pharmacist, all  
30 of whom shall be licensed in this state; and

31 (B) A private citizen.

32 (2) The private citizen director, who shall be a non-voting  
33 director, shall have training and experience in risk management or in general  
34 business management.

35 (3) The Governor shall appoint the private citizen director, who  
36 shall be the chairman of the board.

1           (4) The Attorney General shall appoint the physician director,  
2 who shall be the vice chairman of the board, from a list of two (2) nominees  
3 submitted by the Arkansas Medical Society, or its successor.

4           (5) The President Pro Tempore of the Senate shall appoint the  
5 nurse director, who shall be the secretary of the board, from a list of two  
6 (2) nominees submitted by the Arkansas Nurses Association, or its successor.

7           (6) The Speaker of the House of Representatives shall appoint  
8 the pharmacist director from a list of two (2) nominees submitted by the  
9 Arkansas Health Care Association, or its successor.

10           (7) Nominations shall be submitted to the officials responsible  
11 for the appointment of the voting directors on or before July 1, 2003.

12           (8) The initial board shall be appointed on or before August 1,  
13 2003.

14           (9) The initial terms shall be staggered so that the private  
15 citizen director and the pharmacist director shall serve for three (3) years,  
16 the physician director shall serve for two (2) years, and the nurse director  
17 shall serve for one (1) year.

18           (10)(A) Subsequent terms shall be three for (3) years.

19           (B) Directors shall be eligible for reappointment.

20           (b)(1) A director may be removed for cause by the Governor upon ten  
21 (10) days' written notice to the director.

22           (2) A director whose term expires, or who resigns, is removed,  
23 or becomes incapacitated, shall be replaced within forty-five (45) days after  
24 the vacancy or expiration of the term by a successor of the same profession  
25 or standing, who shall be nominated and appointed as provided in this  
26 section.

27           (3) If a successor is not appointed within the forty-five (45)  
28 day period, the remaining directors shall select an interim director of the  
29 same profession or standing who shall serve for the new term or the unexpired  
30 portion of the term.

31           (4) Directors whose terms expire shall continue to serve until  
32 their successors are appointed.

33           (c)(1) The board shall supervise the management and activities of the  
34 fund.

35           (2) Each director shall be compensated from the fund at the rate  
36 of one hundred fifty dollars (\$150) per hour devoted to official board

1 activities, not to exceed one thousand five hundred dollars (\$1,500) each  
2 month, plus out-of-pocket expenses incurred within the state, documented by  
3 appropriate receipts.

4 (3) Directors shall be immune from suit while acting in their  
5 official capacities, except for intentional wrongful acts or violation of  
6 fiduciary duty.

7 (d)(1) The board shall have the power and discretion, after notice to  
8 the affected participating facilities and a hearing, and based upon accepted  
9 risk management practices, to determine:

10 (A) The amount of the aggregate annual assessment per  
11 occupied bed;

12 (B) The amount of the annual administrative fee in lieu of  
13 monthly assessments;

14 (C) The amount of the per claim limit of coverage;

15 (D) The amount of the annual aggregate limit of coverage  
16 per participating facility; and

17 (E) The amount of the per claim deductible.

18 (2) Notice of a change in the amounts, or any of them, shall be  
19 given to the affected participating facilities not less than sixty (60) days  
20 prior to the effective date of the change.

21 (e)(1) The board shall determine terms, conditions, and charges for  
22 providing tail coverage to participating facilities and may offer  
23 supplemental coverage to participating facilities upon terms approved by the  
24 board.

25 (2) However, supplemental coverage shall be not less than one  
26 hundred thousand dollars (\$100,000) per claim.

27 (f) The board may:

28 (1) Enter into contracts, and to sue and be sued, in its own  
29 name;

30 (2) Borrow public or private funds in such amounts and upon such  
31 terms as may be negotiated with a creditor or creditors, subject to otherwise  
32 applicable laws; and

33 (3) Assess an annual surcharge upon the assessments of a  
34 participating facility, after notice and a hearing, that demonstrates a  
35 disproportionately high history of payable claims or judgments, the surcharge  
36 not to exceed two hundred dollars (\$200) per occupied bed.

1           (g) The board shall promulgate rules and regulations to govern:

2                   (1) The terms and conditions of participation in the fund;

3                   (2) The administration of the fund, including the collection,  
4 management, and disposition of fund assets; and

5                   (3) The procedures for the timely resolution of claims before  
6 the administrator.

7  
8           20-10-1908. Administrator – Powers and duties.

9           (a)(1) The board shall employ an administrator of the fund who is a  
10 graduate of an accredited four-year college or university with at least ten  
11 (10) years' experience in the field of risk management or business  
12 administration.

13                   (2) All qualifications, terms, and conditions of employment,  
14 including compensation, which shall be paid from the fund, shall be at the  
15 sole discretion of the board.

16                   (3) The board shall employ the administrator in sufficient time  
17 for the administrator to assume the duties of office on or before January 1,  
18 2004.

19           (b)(1) The administrator shall conduct and supervise the business  
20 affairs of the fund, pursuant to a written business plan approved by the  
21 board, which may include a plan for voluntary mediation of claims.

22                   (2) The administrator shall employ appropriate professional  
23 personnel to assist with the business affairs of the fund, which shall  
24 include a nationally recognized risk management consultant.

25                   (3) With board approval, the administrator may purchase or lease  
26 appropriate office space, equipment, and other necessary assets for the use  
27 of the fund, and may expend fund moneys for all other necessary and  
28 appropriate purposes, subject to the rules and regulations of the fund.

29           (c) The administrator shall exercise best efforts to locate and  
30 approve a list of commercial insurance carriers to offer supplemental  
31 insurance coverage in aggregate amounts of up to two million five hundred  
32 thousand dollars (\$2,500,000) at negotiable rates.

33  
34           20-10-1909. Patient's Recovery Fund Advisory Board.

35           (a)(1) The Patient's Recovery Fund Advisory Board shall have five (5)  
36 members and shall consist of the Insurance Commissioner, the Attorney

1 General, the Director of the Department of Human Services, one (1) director  
2 appointed by the President Pro Tempore of the Senate, and one (1) director  
3 appointed by the Speaker of the House of Representatives.

4 (2) The directors appointed by the presiding officers of the  
5 Senate and the House of Representatives shall serve for terms of two (2)  
6 years and shall be eligible for reappointment.

7 (b)(1) The advisory board shall advise the board and the administrator  
8 on the proper execution of the fund and the business plan approved by the  
9 board.

10 (2) The advisory board shall meet at least semiannually to  
11 review and examine financial statements and progress reports, prepared by the  
12 administrator and previously reviewed by the board, and to advise the  
13 administrator and the board of the sufficiency of the reports.

14 (3) The financial statements shall include a balance sheet and  
15 income statement, prepared according to generally accepted accounting  
16 principles.

17 (4) The advisory board shall issue an annual financial report  
18 prepared and certified by a certified public accountant on the first business  
19 day of July of each year, which shall be subject to public inspection.

20  
21 20-10-1910. Accumulation of fund assets – Disposition.

22 (a)(1) All moneys held by the fund shall be deposited in banks located  
23 within the state or shall be invested in obligations which are permitted  
24 investments for the board of trustees of any public employee retirement  
25 system of any political subdivision of the state.

26 (2) An accurate inventory of all personal property of the fund  
27 shall be maintained at all times.

28 (b) The fund shall be used and expended only for:

29 (1) The payment and satisfaction of claims and judgments  
30 pursuant to this subchapter;

31 (2) The payment of reasonable fees and expenses incurred by  
32 counsel employed by the fund; and

33 (3) The payment of the costs of operation of the fund including,  
34 but not limited to, compensation, fees, and ordinary business expenses.

35  
36 20-10-1911. Claims – Authority of administrator.

1       (a)(1) A claim against a participating facility which maintained  
2 coverage from the fund for the relevant period shall be filed with the  
3 administrator by the claimant on a form created by the administrator.

4       (2) The claimant shall serve copies of the claim upon the  
5 parties.

6       (3) Claims shall be for compensatory damages only and shall not  
7 include punitive damages, costs, or attorney's fees.

8       (4) Within twenty (20) days after the filing of the claim, the  
9 participating facility shall file its response to the claim on a form created  
10 by the administrator.

11       (5) If service of the claim is effected by mail or by electronic  
12 means, three (3) days shall be added to the time for filing a response.

13       (6) The administrator may provide for the submission of copies  
14 of affidavits or other exhibits in support of a claim or defense.

15       (b)(1) The administrator has the sole authority to approve, modify, or  
16 settle any claim against a participating facility to the extent of the  
17 applicable limit of coverage provided by the fund, including the deductible.

18       (2) The administrator is without authority to approve, modify,  
19 or settle any such claim, or to consent to any award, in an amount greater  
20 than the applicable limit of coverage provided by the fund, including the  
21 deductible.

22  
23       2-10-1912. Disposition of claims.

24       (a)(1)(A) The administrator may make such investigation of the claim  
25 as the administrator considers necessary.

26       (B) Upon application of any party, or on the  
27 administrator's own motion, the administrator shall conduct a preliminary  
28 conference.

29       (2) The administrator may enter a written order disposing of the  
30 claim without adjudication.

31       (b) If the administrator determines that a claim should be  
32 adjudicated, or if the claimant or participating facility is dissatisfied  
33 with the administrator's disposition of the claim, the claim shall be  
34 referred to the circuit court.

35  
36       20-10-1913. Payment of claims.

1       (a)(1) With respect to a participating facility that maintained  
2 coverage from the fund for the relevant period, a claim that has been  
3 approved or settled by the administrator, or a claim that has been  
4 adjudicated to a final administrative order or a final judgment of a circuit  
5 court, shall be paid as follows:

6               (A) The participating facility shall pay the deductible  
7 and the self-insured portion of the award, if any, that were in effect when  
8 the claim accrued; and

9               (B) If commercial insurance coverage is inapplicable, the  
10 fund shall pay the balance of the award to the claimant, subject to the per  
11 claim limit of coverage and the annual aggregate limit of coverage per  
12 participating facility in effect when the claim accrued, exclusive of fees  
13 and expenses.

14               (2) The fund shall not pay punitive damages or costs and  
15 attorney's fees incurred by the claimant.

16               (b)(1)(A) Claims or judgments which become final and unappealable  
17 during the first six (6) months of the calendar year shall be paid by the  
18 fund on the following August 15.

19               (B) Claims or judgments which become final and  
20 unappealable during the last six (6) months of the calendar year shall be  
21 paid by the fund on the following February 15.

22               (2)(A) If the balance in the fund is insufficient to pay in full  
23 all claims and judgments which have become final and unappealable during a  
24 six-month period, the award paid to each claimant shall be prorated.

25               (B) Any amount left unpaid as a result of the proration  
26 shall be paid before the payment of claims or judgments which become final  
27 and unappealable during any subsequent six-month period.

28               (c)(1) Pre-judgment interest shall not be payable on any claim or  
29 judgment.

30               (2) Simple interest at the rate of six percent (6%) per annum  
31 shall be paid on the unpaid balance of a claim or judgment from and after  
32 August 15 or February 15, as the case may be, subject to the judgment or  
33 decree of a circuit court.

34  
35       20-10-1914. Participating facilities – Employment of counsel.

36       (a) Upon request by a participating facility, other than a

1 participating facility that maintained commercial insurance coverage for the  
2 relevant period, the fund shall employ counsel to defend any claim or action  
3 against the facility for recovery of damages on account of an injury.

4 (b)(1) Fees and expenses incurred by counsel employed by the fund  
5 shall be paid by the fund.

6 (2) However, the administrator has the authority to determine  
7 the reasonableness of the fees and expenses, subject to the rules and  
8 regulations of the fund.

9  
10 SECTION 2. EMERGENCY CLAUSE. It is found and determined by the  
11 General Assembly of the State of Arkansas that adequate commercial insurance  
12 coverage at affordable rates is not available for nursing homes in this  
13 state; that lawsuits and claims which may become lawsuits threaten the  
14 financial stability of nursing homes; and that patients of nursing homes do  
15 not have recourse to adequate sources of funds to redress legitimate claims  
16 for personal injury. Therefore, an emergency is declared to exist and this  
17 act being immediately necessary for the preservation of the public peace,  
18 health and safety shall become effective on:

19 (1) The date of its approval by the Governor;

20 (2) If the bill is neither approved nor vetoed by the Governor,  
21 the expiration of the period of time during which the Governor may veto the  
22 bill; or

23 (3) If the bill is vetoed by the Governor and the veto is  
24 overridden, the date the last house overrides the veto.

25  
26 /s/ Miller