1) ANTI-KICKBACK

Arkansas law contains a criminal kickback provision in the Medicaid Fraud Act and an almost identical civil kickback provision in the Medicaid Fraud False Claims Act.

**Medicaid Fraud Act – Ark. Code Ann. § 5-55-111**

A person commits Medicaid fraud when he or she:

1. Purposely solicits or receives any remuneration (any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind) for referring an individual to a person for the furnishing or arranging of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid program or in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid program or

2. Purposely offers or pays any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind to any person to induce the person:
   a. To refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid program; or
   b. To purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid program.

Exceptions are available for knowingly offering or paying remuneration regarding:

1. Discounts given by a provider if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under the program;
2. Any amount paid by an employer to an employee who has a bona fide employment relationship with the employer for employment in the providing of covered items or services; or
3. Any amount paid by a vendor to a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under the program, if special conditions are met (written contract, fixed amounts or fixed percentage of value of purchases made, etc.); and
4. Any payment practice specified by the director promulgated pursuant to applicable federal or state law.

**Medicaid Fraud False Claims Act** – *Ark. Code Ann. § 20-77-902*

Creates civil liability and restitution available against a person:

1. Who knowingly solicits or receives any remuneration (any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind) for referring an individual to a person for the furnishing or arranging of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid program or in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid program or

2. For knowingly offering or paying any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind to any person to induce the person:
   a. To refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the Arkansas Medicaid program; or
   b. To purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the Arkansas Medicaid program.

Exceptions are available for knowingly offering or paying remuneration regarding:

1. Discounts given by a provider if the reduction is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under the program;
2. Any amount paid by an employer to an employee who has a bona fide employment relationship with the employer for employment in the providing of covered items or services; or
3. Any amount paid by a vendor to a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under the program, if special conditions are met (written contract, fixed amounts or fixed percentage of value of purchases made, etc.); and
4. Any payment practice specified by the director promulgated pursuant to applicable federal or state law.

**Important Cases:**

**Baptist Health v. Murphy, 226 S.W.3d 800 (Ark. 2006).**

Baptist Health implemented an economic credentialing policy at its hospitals prohibiting privileges at any Baptist hospital to any practitioner who, directly or indirectly, acquires or holds an ownership or investment interest in a competing hospital. Plaintiff cardiologists initially sued Baptist in federal district court, alleging violations of the federal Anti-Kickback Statute, the Arkansas Medicaid Fraud Act, the
Arkansas Medicaid Fraud False Claims Act, and the Arkansas Deceptive Trade Practices Act (“ADTPA”). The physicians also alleged that Baptist’s policy tortiously interfered with the doctor-patient relationship.

The federal court determined that it lacked jurisdiction due to the fact that the Anti-Kickback Statute contains no private right of action. The cardiologists then brought the same lawsuit in state court, and the state court granted the cardiologists’ motion for preliminary injunction, finding that they would prevail on all counts.

On appeal, the Arkansas Supreme Court held that the trial court did not abuse its discretion in granting a preliminary injunction on the claim of tortious interference. However, the Supreme Court held that the Baptist policy did not cause any violation of the federal Anti-kickback Statute, the Arkansas Medicaid Fraud Act, or the Arkansas Medicaid Fraud False Claims Act. Although the cardiologists alleged that the policy conditioned privileges upon increased referrals to Baptist hospitals, the Supreme Court ruled that the record did not support a finding of any violation of the anti-kickback statutes.

_Baptist Health v. Murphy, 373 S.W.3d 358 (Ark. 2010)._

After granting a preliminary injunction against Baptist as described above, following a bench trial, the trial court granted a permanent injunction against Baptist based on findings that the cardiologists had proven their claims for tortious interference and violation of the ADTPA by a preponderance of the evidence. The Supreme Court affirmed the permanent injunction based on tortious interference but reversed on the ADTPA claim on the grounds that the ADTPA does not authorize injunctive relief to private parties. The Court agreed that referral relationships of the cardiologists were a valid business expectancy, with which Baptist interfered, and that Baptist’s policy would disrupt the patient-physician relationship, discourage specialty hospitals, and suppress competition. The Court held that the cardiologists’ interest in patient-physician relationships and preserving continuity of care outweighed Baptists’ interests in protecting its economic viability.


Hypothetical program where homecare marketing firm would perform tests in physicians’ offices for free but allow physicians to bill Medicare and Medicaid for the test in exchange for the physician referring to the firm those patients suitable for homecare would violate the federal Anti-Kickback Statute 42 U.S.C. § 1320a-7b(b) and the anti-kickback prohibition contained in the Arkansas Medicaid False Claims Act, Ark. Code Ann. § 20-77-902(6) & (7). The opinion noted that state law tracked the federal statute “nearly verbatim” with respect to the conduct at issue.

**2) PROHIBITIONS ON SELF-REFERRAL**

Arkansas does not have a broad prohibition against physician referrals to entities with which a physician has a financial relationship. However, Arkansas has adopted a limited prohibition against physician referrals for intravenous drug therapy services where a physician, or any immediate family member of the physician, has a financial relationship with an IV drug therapy services provider.
**Home Intravenous Drug Therapy Services** - **Ark. Code Ann. § 20-77-804**

No payment for home i.v. drug therapy services shall be made to a provider in which a physician or physician’s immediate family member has an ownership interest in the provider. In no situation regarding home i.v. therapy may the physician receive compensation from the provider to induce referrals.

Exceptions are made for:

1. Physician ownership of publicly held stock or
2. Where compensation is reasonably related to items or services actually provided by the physician and does not vary in proportion to the number of referrals made by the referring physicians (however the exception does not apply to compensation provided for direct patient care services.)

The statute does not apply to a referring physician whose only ownership or financial relationship with the provider is an uncompensated officer or director of the provider.


Attorney General concluded that no state laws prevent physician owners of a rehabilitation hospital from receiving income from that hospital, even if the income is based on increases in the net revenue of the hospital. The Arkansas Attorney General explained that “there appear to be no explicit limitations on a physician’s receipt of income from any entity in which he or she owns an interest.” The opinion suggests that the physicians’ failure to disclose their ownership interest to patients could violate a broad reading of Ark. Code Ann. § 17-95-409(a)(2)(L) governing physician advertising.

**3) FALSE CLAIMS/FRAUD & ABUSE**


**Medicaid Fraud False Claims Act** – **Ark. Code Ann. §§ 20-77-901 to -911**

The Medicaid Fraud False Claims Act imposes civil liability on “persons” who either make false or fraudulent claims or cause such claims to be made to the Arkansas Medicaid program.

**Key Definitions** – **Ark. Code Ann. § 20-77-901**

"Claim" means any request or demand for money or property that is either presented to an officer, employee, agent, or fiscal agent of the Arkansas Medicaid Program or is made to a contractor, grantee, or other recipient if the money or property is spent or used on behalf of or to advance the interests of the Arkansas Medicaid Program and the Arkansas Medicaid Program either has provided a portion of the money or property requested or demanded or is reimbursing the contractor, grantee, or other recipient for any portion of the money or property requested or demanded.

“Damages” means the actual loss to the Arkansas Medicaid Program and its fiscal agents, including the total amount of all claims paid as a result of any false claim and the value of goods or services paid for but not delivered to a Medicaid recipient.
“Material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. "Knowing" or "knowingly" requires actual knowledge or acting in deliberate ignorance or reckless disregard of the truth or falsity of the information. It does not require proof of specific intent to defraud.

"Person" means any Medicaid provider of goods or services or any employee of the provider, whether that provider be an individual, individual medical vendor, firm, corporation, professional association, partnership, organization, or other legal entity or other entity that provides goods or services to a Medicaid provider under the Arkansas Medicaid Program for which the provider submits claims to the Arkansas Medicaid Program

Prohibited Conduct – Ark. Code Ann. § 20-77-902
A person shall be liable to the State of Arkansas, through the Attorney General, for a civil penalty and restitution if he or she:

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

(2) Knowingly makes or causes to be made any omission or false statement or representation of a material fact for use in determining rights to a benefit or payment under the Arkansas Medicaid Program;

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

(4) Having made or submitted a claim, request for payment, or application to receive any benefit or payment for the use and benefit of another person and having received it, knowingly converts the benefit or payment or any part thereof to a use other than for the use and benefit of the other person;

(5) Knowingly presents or causes to be presented a claim for a physician's service for which payment may be made under the program and knows that the individual who furnished the service was not licensed as a physician;

(6) Knowingly solicits or receives any remuneration¹:
   (A) In return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the program; or
   (B) In return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the program;

¹ Remuneration includes any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind.
(7) (A) Knowingly offers or pays any remuneration to any person to induce referral for items or services partially or completely reimbursed by Medicaid or to induce purchases, leases or orders paid for in part or in whole by Medicaid.

(8) Knowingly makes or causes to be made or induces or seeks to induce any omission or false statement or representation of material fact with respect to the conditions or operation of any institution, facility, or Medicaid provider in order that the same may qualify to obtain or maintain any licensure or certification required to be enrolled or eligible to deliver any healthcare goods or services to Medicaid recipients by state law, federal law, or the rules of the Arkansas Medicaid Program.

(9) Knowingly:
   (A) Charges for any service provided to a patient under the program money or other consideration at a rate in excess of the rates established by the state; or
   (B) Charges, solicits, accepts, or receives, in addition to any amount otherwise required to be paid under the program, any gift, money, donation, or other consideration other than a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to the patient as a precondition of admitting a patient to a hospital, nursing facility, or intermediate care facility for the mentally retarded or as a requirement for the patient’s continued stay in the hospital, nursing facility, or intermediate care facility for individuals with intellectual disabilities when the cost of the services provided therein to the patient is paid for in whole or in part under the program;

(10) Knowingly makes or causes to be made any omission or false statement or representation of a material fact in any application for benefits or for payment in violation of the rules, regulations, and provider agreements issued by the program or its fiscal agents; or

(11) Knowingly:
   (A) Participates, directly or indirectly, in the Arkansas Medicaid Program after having pleaded guilty or nolo contendere to or been found guilty of a charge of Medicaid fraud, theft of public benefits, or abuse of adults; or
   (B) As a certified health provider enrolled in the Arkansas Medicaid Program pursuant to Title XIX of the Social Security Act or the fiscal agent of such a provider who employs, engages as an independent contractor, engages as a consultant, or otherwise permits the participation in the business activities of such a provider, any person who has pleaded guilty or nolo contendere to or has been found guilty of a charge of Medicaid fraud, theft of public benefits, or abuse of adults.

(12) Knowingly submits any false documentation supporting a claim or prior payment to the Office of Medicaid Inspector General or the Medicaid Fraud Control Unit within

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2 Ark. Code Ann. § 20-77-902(7)(B) includes statutory exceptions for disclosed discounts, bona fide employment relationships, vendor payments to a purchasing agent for a group giving reimbursed services if specific criteria are met, and any practice approved by state regulations.
the office of the Attorney General during an audit or in response to a request for information or a subpoena;

(13) Knowingly makes or causes to be made, or induces or seeks to induce, any material false statement to made to the Office of Medicaid Inspector General or the Medicaid Fraud Control Unit within the office of the Attorney General during an audit or in response to a request for information or a subpoena;

(14) Knowingly forges the signature of a doctor or nurse on a prescription or referral for healthcare goods or services or submits a forged prescription or referral for healthcare goods or services in support of a claim for payment under the Arkansas Medicaid Program;

(15) Knowingly places a false entry in a medical chart or medical record that indicates that healthcare goods or services have been provided to a Medicaid recipient knowing that the healthcare goods or services were not provided;

(16) Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to the Arkansas Medicaid Program;

(17) Knowingly makes, uses, or causes to be made or used a false record or statement that is material to a false or fraudulent claim to the Arkansas Medicaid Program;

(18) Knowingly:
   (A) Makes, uses, or causes to be made or used a false record or statement that is material to an obligation to pay or transmit money or property to the Arkansas Medicaid Program; or
   (B) Conceals or improperly avoids or decreases an obligation to pay or transmit money or property to the Arkansas Medicaid Program; or

(19) Conspires to commit any of the above violations.

Fines and Penalties – Ark. Code Ann. § 20-77-903
A person who violates the Arkansas Medicaid Fraud False Claims Act is liable for: (1) a civil penalty of not less than $5,500 or more than $11,000 for each claim; and (2) three times the amount of damages that the state sustained because of the act of the person. A person who violates the Arkansas Medicaid Fraud False Claims Act is also liable for the reasonable costs incurred by the Attorney General in enforcing the statute.³

If a defendant self-reports the fraudulent activity, the defendant may reduce its liability. Specifically, the statute provides that the trier of fact may assess not less than two times the amount of damages sustained by the state if:

   (A) The person committing the violation of this subchapter furnished the Attorney General's office with all information known to the person about the violation within 30 days after the date on which the defendant first obtained the information; and

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³ Reasonable costs can include the cost of investigation, attorney's fees, court costs, witness fees, and deposition fees.
The person fully cooperated with any Attorney General’s investigation of the violation, and at the time the person furnished the Attorney General with the information about the violation no criminal prosecution, civil action, or administrative action had commenced under this subchapter with respect to the violation and the person did not have actual knowledge of the existence of an investigation into the violation.

All civil actions under the Medicaid Fraud False Claims act must be brought within 5 years of the date on which the alleged violation was committed.

Suspension or Revocation of Provider Agreement – Ark. Code Ann. § 20-77-910
The Director of the Department of Human Services has the authority to suspend or revoke the violator’s Medicaid provider agreement in the event that the violator is found guilty of violating the Medicaid Fraud False Claims Act.

No Qui Tam Provision But Monetary Incentives Available – Ark. Code Ann. § 20-77-911
Unlike the federal False Claims Act, the Arkansas Medicaid Fraud False Claims Act does not contain a qui tam provision. However, the Arkansas Act does contain a provision that allows the court to grant monetary rewards to persons “for information the person may have provided which led to the detecting and bringing to trial and punishment persons guilty of violating the Medicaid fraud laws.” The reward shall not exceed 10% of the aggregate penalty recovered. The Attorney General may petition the court on behalf of the potential reward recipient for a reward in an amount commensurate with the quality of information provided. In the alternative, the person providing information may petition the court on his or her own behalf. Employees or fiscal agents charged with the duty of referring or investigating cases of Medicaid fraud who are employed by or who contract with any governmental entity are not eligible for any such reward.

Under the Arkansas Medicaid program, persons are required to maintain at their principal place of business all records relevant to the claimed provision of any goods or services to any Medicaid recipient for at least a period of five years from the date of claimed provision of goods or services to the Medicaid recipient. If the unavailability of records impairs or obstructs a civil action under the Medicaid Fraud False Claims Act, then the person found not to have maintained the records shall be guilty of a Class D felony; otherwise failure to maintain records is a Class A misdemeanor.

The Arkansas Attorney General has opined that this section requires persons to retain records of employee work hours (such as time cards, payroll sheets, and work schedules) for the five-year period prescribed in § 20-77-907. Ark. Op. Atty. Gen. No. 2001-060.

Important Cases
Baptist Health v. Murphy, 226 S.W.3d 800 (Ark. 2006) (see discussion above in Anti-Kickback section).

State filed suit against Janssen alleging violations of Arkansas Medicaid Fraud False Claims Act (“MFFCA”) on the grounds that Janssen failed to comply with federal labeling requirements in its Risperdal label which caused a violated of § 20-77-
902(8)(B) for knowingly making a false statement or representation of material fact “with respect to information required pursuant to federal and state law, rules, regulations, and provider agreements. A jury found in favor of the State and the court imposed penalties of $1,194,370,000 for the MFFCA violation. The Supreme Court reversed holding that under the legislative history for the MFFCA, § (8)(B) had to be read in conjunction with (8)(A) limiting liability to the making of false statements to facilities acquiring certification or recertification. Liability under (8) was clarified when the Arkansas legislature amended the statute in 2017.

The Medicaid Fraud Act imposes criminal liability on “persons” that engage in any one of the several forms of prohibited conduct set forth below or cause to be made false or fraudulent claims to the Arkansas Medicaid program.

Key Definitions – Ark. Code Ann. § 5-55-102
"Claim" means any written or electronically submitted request or demand for reimbursement or payment by any Medicaid provider or its fiscal agents for each good or service purported to have been provided to any Medicaid recipient whether or not the State of Arkansas provides any portion of the money that is requested or demanded.

"Person" means any Medicaid provider of goods or services or any employee, independent contractor, contractor, or subcontractor of the Medicaid provider, whether that provider is an individual, an individual medical vendor, a firm, a corporation, a professional association, a partnership, an organization, a risk-based provider organization, a managed care organization or another legal entity. Such entities are also persons within the meaning of the Medicaid Fraud Act even if they are not Medicaid providers under the Arkansas Medicaid Program so long as they provide goods or services to a Medicaid provider for which the provider submits claims to the Arkansas Medicaid Program or its fiscal agents.

Prohibited Conduct – Ark. Code Ann. § 5-55-111
A person commits Medicaid fraud when he or she:

1. Purposely makes or causes to be made any omission or false statement or representation of a material fact in any claim, request for payment, or application for any benefit or payment;

2. At any time purposely makes or causes to be made any omission or false statement or representation of a material fact for use in determining rights to a benefit or payment;

3. Having knowledge of the occurrence of any event affecting his or her initial or continued right to any benefit or payment or the initial or continued right to any benefit or payment of any other individual in whose behalf he or she has applied for or is receiving a benefit or payment, purposely conceals or fails to disclose that event with an intent fraudulently to secure the benefit or payment either in a greater amount or quantity than is due or when no benefit or payment is authorized;

4. Having made or submitted a claim, request for payment, or application to receive any benefit or payment for the use and benefit of another and having received it, purposely converts the benefit or payment or any part thereof to a use other than for the use and benefit of the other person;
(5) Purposely presents or causes to be presented a claim for a physician’s service for which payment may be made under the program while knowing that the individual who furnished the service was not licensed as a physician;

(6) Purposely solicits or receives any remuneration:
   (A) In return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under the program; or
   (B) In return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under the program;

(7)(A) Purposely offers or pays any remuneration to any person to induce referral for items or services partially or completely reimbursed by Medicaid or to induce purchases, leases or orders paid for in part or in whole by Medicaid.

(8) Purposely makes or causes to be made or induces or seeks to induce any omission or false statement or representation of a material fact with respect to the conditions or operation of any institution, facility, or entity in order that the institution, facility, or entity may qualify to obtain or maintain any licensure or certification required to be enrolled or eligible to deliver any healthcare goods or services to Medicaid recipients by state law, federal law, or state Medicaid rules.

(9) Purposely:
   (A) Charges for any service provided to a patient under the program money or other consideration at a rate in excess of the rates established by the state; or
   (B) Charges, solicits, accepts, or receives, in addition to any amount otherwise required to be paid under the program, any gift, money, donation, or other consideration other than a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to the patient as a precondition of admitting a patient to a hospital, nursing facility, or intermediate care facility for the mentally retarded or as a requirement for the patient's continued stay in the facility when the cost of the services provided therein to the patient is paid for in whole or in part under the program;

(10) Purposely makes or causes to be made any false statement or representation of a material fact in any application for benefits or for payment in violation of the rules, regulations, and provider agreements issued by the program or its fiscal agents; or

(11) Purposely:

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4 **Remuneration** includes any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind.

5 **Ark. Code Ann. § 20-77-902(7)(B)** includes statutory exceptions for disclosed discounts, bona fide employment relationships, vendor payments to a purchasing agent for a group giving reimbursed services if specific criteria are met, and any practice approved by state regulations.
(A) Participates, directly or indirectly, in the Arkansas Medicaid Program after having pleaded guilty or nolo contendere to or been found guilty of a charge of Medicaid fraud, theft of public benefits, or abuse of adults; or

(B) As a certified health provider enrolled in the Arkansas Medicaid Program pursuant to Title XIX of the Social Security Act or the fiscal agent of such a provider who employs, engages as an independent contractor, engages as a consultant, or otherwise permits the participation in the business activities of such a provider, any person who has pleaded guilty or nolo contendere to or has been found guilty of a charge of Medicaid fraud, theft of public benefits, or abuse of adults.

(11) Knowingly submits false documentation or makes or causes to be made, or induces or seeks to induce any material false statement to the Office of Medicaid Inspector General or the Medicaid Fraud Control Unit within the office of the Attorney General during an audit or in response to a request for information or a subpoena

(12) Purposely forges the signature of a doctor, nurse, or other medical professional on a prescription, referral for healthcare goods or services, or finding of medical necessity;

(13) Knowingly submits a forged prescription, referral for healthcare goods or services, or finding of medical necessity for:

(A) Payment under the Arkansas Medicaid Program; or

(B) An audit or in response to a request for information or a subpoena to the Office of Medicaid Inspector General or the Medicaid Fraud Control Unit within the office of the Attorney General

(14) Purposely places a false entry in a medical chart, medical record, or any record of services required to made to the Arkansas Medicaid Program that indicates that healthcare goods or services have been provided to a Medicaid recipient knowing that the healthcare goods or services were not provided.

Scope of Punishment – Ark. Code Ann. § 5-55-103(a)
A person who commits an act that violates Ark. Code Ann. § 5-55-111, is guilty of: (1) a Class A misdemeanor if the amount of payments illegally claimed is less than $2,500; (2) a Class C felony if the amount of payments illegally claimed is $2,500 or more, but less than $5,000; (3) a Class B felony if the amount of payments illegally claimed is $5,000 or more, but less than $25,000; or (4) a Class A felony if the amount of payments illegally claimed is $25,000 or more.

Medicaid Fraud Criminal Fines – Ark. Code Ann. § 5-55-107
Any person who is found guilty of Medicaid fraud under the Medicaid Fraud Act or pleads guilty or nolo contendere to the same shall pay one of the following fines:

(1) In cases involving no monetary loss to the Arkansas Medicaid Program, a fine of not less than $1,000 and not more than $3,000 for each omission or fraudulent act or claim;

(2) In cases involving monetary loss to the Arkansas Medicaid Program, a fine of not less than the amount of monetary loss to the Program and not more than three times the amount of the monetary loss to the Program.
These fines are waivable by the prosecuting attorney, but that waiver does not impede the trial court’s ability to impose fines pursuant to Ark. Code Ann. § 5-4-201.

**Suspension or Revocation of Provider Agreement** – [Ark. Code Ann. § 5-55-110](#)
The Director of the Department of Human Services has the authority to suspend or revoke the violator’s Medicaid provider agreement in the event that the violator is found guilty of violating the Medicaid Fraud Act.

The court may grant monetary rewards to persons “for information the person may have provided that led to the detecting and bringing to trial and punishment a person guilty of violating the Medicaid fraud laws.” The reward shall not exceed 10% of the aggregate penalty recovered.

The Attorney General may petition the court on behalf of the potential reward recipient for a reward in an amount commensurate with the quality of information provided. In the alternative, the person providing information may petition the court on his or her own behalf.

Employees or fiscal agents charged with the duty of referring or investigating cases of Medicaid fraud who are employed by or who contract with any governmental entity are not eligible for any such reward.

Under the Arkansas Medicaid program, persons are required to maintain at their principal place of business all records at least for a period of five years from the date of claimed provision of any goods or services to any Medicaid recipient. If the unavailability of records impairs or obstructs a civil action under the Medicaid Fraud Act, then the person found not to have maintained the records shall be guilty of a Class D felony; otherwise failure to maintain records is a Class A misdemeanor.

**Important Case**
*Baptist Health v. Murphy, 226 S.W.3d 800 (Ark. 2006)* (see discussion above in Anti-Kickback section).

**Illegal Medicaid Participation** – [Ark. Code Ann. § 5-55-103(b)](#)
A person commits illegal Medicaid participation if:

(a) Having been found guilty of or having pleaded guilty or nolo contendere to the charge of Medicaid fraud, theft of public benefits, Ark. Code Ann. § 5-36-202, or abuse of adults, Ark. Code Ann. § 5-28-101 et seq., that person participates directly or indirectly in the Arkansas Medicaid Program; or

(b) A certified health provider or the fiscal agent of a certified health provider employs, engages as an independent contractor, or otherwise permits participation in the business activities of the certified health provider any person who has pleaded guilty or nolo contendere to or has been found guilty of a charge of Medicaid fraud, theft of public benefits, Ark. Code Ann. § 5-36-202, or abuse of adults, Ark. Code Ann. § 5-28-101 et seq.

Illegal Medicaid participation constitutes a Class A misdemeanor for the first offense, a Class D felony for the second offence, and a Class C felony for the third and subsequent offenses.
Theft of Property – **Ark. Code Ann. § 5-36-103**
Makes it a criminal offense to (1) take the property of another with the purpose of depriving the owner of the property; or (2) obtain the property of another person by deception or by threat with the purpose of depriving the owner of the property.

*Dilday v. Arkansas, 250 S.W.3d 217 (Ark. 2007).*
The State of Arkansas indicted Dr. James Dilday, a psychiatrist, and his practice, Biological Psychiatry, P.A., with insurance fraud in violation of Ark. Code Ann. § 5-36-103 and § 23-66-502 for defrauding several insurance companies and one self-insured employer by making false Medicaid claims for psychiatric services that he said he performed. The charges against Dr. Dilday were dismissed, and his practice pleaded no contest. Subsequently, the state brought new criminal charges against Dr. Dilday for theft of property in violation of Ark. Code Ann. § 5-36-103 based on the same underlying conduct. Dr. Dilday was also charged with failing to keep records of Medicaid claims. Dr. Dilday sought to dismiss the second set of charges on the basis of double jeopardy and claim preclusion. The Arkansas Supreme Court affirmed denial of Dr. Dilday’s motion to dismiss, holding that the two criminal actions concerned separate allegations of fraud involving different victims and alleging violation of different statutes. Although this case involved the alleged submission of false claims to Arkansas Medicaid, the case makes no reference to the state bringing claims against Dr. Dilday under the Medicaid Fraud Act or the Medicaid Fraud False Claims Act.

4) **UNFAIR BUSINESS PRACTICES**

**Unfair Practices Act** – **Ark. Code Ann. § 4-75-201** to -217
The purpose of the Act is to foster competition by prohibiting unfair and discriminatory practices in business. Its primary areas of regulation applicable to health care include price differentials, rebates and refunds, and sales below cost.

**Noncompetitive Practices and Price Differentials** – **Ark. Code Ann. § 4-75-207**
The Act makes unlawful any person, firm or corporation doing business in Arkansas acting with the intent to destroy the competition of any regular established dealer or to prevent the competition by selling or furnishing the product or service at a lower rate in one geographic area than in another (after making allowance for differences, if any, in the grade, quality or quantity and in the actual cost of transportation from the point of production/manufacture). This ban on locality discrimination includes any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this chapter.

**Secret Payments or Allowance of Rebates, Refunds.** – **Ark. Code Ann. § 4-75-208**
The secret payment or allowance of rebates, refunds, commissions or unearned discounts is an unfair trade practice, whether in the form of money or otherwise or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions to the injury of a competitor and where the payment or allowance tends to destroy competition.

**Sales Below Cost** – **Ark. Code Ann. § 4-75-209**
It is unlawful 1) to sell, offer for sale, or advertise for sale any article or product or service or output of a service trade at less than the cost to the vendor or 2) to give, offer to give or advertise the intent to give away any article or product or service or output of a service trade for the purpose of injuring competitors and destroying competition.
Cost includes raw materials, labor and overhead (which must include without limitation labor, including salaries of executives and officers, rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance, and advertising.). As applied to distribution, cost is the lower of the invoice cost or the replacement cost of the article or product to the distributor and vendor plus the cost of doing business by the distributor and vendor.

If a particular trade or industry has an established cost survey for the locality and vicinity where the alleged offense is committed, the cost survey is competent evidence to be used in proving the costs. For an injunction or prosecution of any person as an officer, director or agent, it is sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom the person acts.

Exceptions to the sales below cost prohibition:

1. A product purchased at a lower rate outside the ordinary course of business (through forced sale or bankruptcy, for example) cannot be used as a basis for justifying a price lower than replacement cost unless the article is kept separate from goods purchased through ordinary channels, is advertised and sold as merchandise purchased outside the ordinary course of business, and the advertising states the conditions under which the goods were purchased and the quantity of the merchandise to be sold or offered for sale.

2. As long as notice is given to the public thereof, the sales below cost restriction does not apply to a good faith closing out of stock for the purpose of discontinuing trade in the commodity, or seasonal goods or bona fide sale of perishable goods to prevent a vendor’s loss by spoilage or depreciation. Also it does not apply to damaged or deteriorated goods or to an officer acting under court order or in an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product or service or output of a service trade in the same locality or trade area.

Penalties – Ark. Code Ann. § 4-75-212
Remedies include injunctions prohibiting the behavior, as well as damages. Civil actions may be brought by private parties. Also the Arkansas Attorney General can seek declaratory judgment, injunctions, recovery of damages and civil penalties up to $1000 per violation and reasonable expenses, investigative costs and attorney’s fees.

Important Cases
To violate the state’s Unfair Practices Act, below cost sales must be done with the specific intent of destroying competition. Pricing products below cost as a “loss leader” to increase foot traffic or proving that a store branch varied prices of products in response to local competition is not proof of intent to destroy competition. The statute does not provide the inference of specific intent based solely on below cost pricing behaviors.

The Arkansas Fair Practices Act only applies to price discrimination within Arkansas and is not applicable beyond state borders; no interstate application is allowed.

Little Rock Cardiology Clinic PA v. Baptist Health, No. 4:06CV01594 JLH (E.D. Ark., Aug. 29, 2008).
A cardiology group, Little Rock Cardiology Clinic, brought federal antitrust claims against Baptist Health, Arkansas Blue Cross & Blue Shield, and several related entities alleging that the defendants had conspired to monopolize the market for cardiology services for privately insured patients in a sixteen county area of central Arkansas. The group alleged that in response to their opening Arkansas Heart Hospital in 1997, their doctors were excluded from the provider network used by Blue Cross and its affiliates. The federal court dismissed the claims against defendants other than Baptist Health on statute of limitations grounds. Although the court held that the claims against Baptist Health were timely filed, the court dismissed those claims for failure by the group to adequately define the market that was the target of the alleged conspiracy. The court ruled that none of the defendants in the case offered the same services as the plaintiff cardiology group and, therefore, none of the defendants competed in the same market.

The Act regulates the insurance trade to prevent unfair competition or unfair or deceptive acts or practices within the state’s insurance industry.

A health carrier (HMO, hospital medical services corporation, or disability insurance company) shall pay a 12% per annum penalty for late payment of claims under a health insurance contract pursuant to regulations promulgated by the Insurance Commissioner, without necessary demand for payment by a claimant. Hiring a third party administrator to process claims does not relieve the health care carrier of liability of the penalty.

5) GENERAL WHISTLE-BLOWER PROTECTIONS

A public employer shall not take adverse action against a public employee who in good faith communicates to an appropriate authority the existence of a waste of public funds, property or manpower (excluding federal funds) or a suspected violation of a law, rule, or regulation adopted under the law of Arkansas or a political subdivision of the state. The statute also protects a public employee from adverse action in response to:

1) The employee’s participation in an investigation, hearing, court proceeding, legislative or other inquiry or form of administrative review or as retaliation for an employee’s objection to; or
2) Refusal to carry out a directive that the employee reasonably believes to be violation of a law or a rule or regulation of Arkansas.

The public employee does not have to notify the public employer of the perceived waste or violation prior to notifying the appropriate authority. But the communication to the appropriate authority shall be made at a time and in a manner which gives the public employer reasonable notice of need to correct the waste or violation.

Key Definitions – Ark. Code Ann. § 21-1-602
Good faith is present if there is a reasonable basis in fact for the potential waste or violation. Good faith is not present if the public employee has no personal knowledge of a factual basis for the communication or when the public employee knew or reasonably should have known that the communication of the waste or violation was malicious, false or frivolous. Waste “means a public employer’s conduct or omissions which result in substantial abuse,
misuse, destruction, or loss of public funds, property, or manpower belonging to or derived from state or local political subdivision’s resources.”

Adverse action includes discharging, threatening, discriminating, or retaliating against the employee in any manner that affects the employee’s employment, including compensation, job location, rights, immunities, promotions or privileges.

Civil Liability – **Ark. Code Ann. § 21-1-604**
An employee who alleges a violation of the whistle-blower act may bring a civil action in chancery court within 180 days of the alleged violation of the Act. Should such action occur, the employee has the burden of proof that an adverse action resulted from the employee’s reporting of waste or violations. The employer has an affirmative defense if it can establish that the adverse action taken against the employee was due to employee misconduct, poor job performance or a reduction in workforce unrelated to any report made concerning employer waste or violations.

6) HELPFUL LINKS
- Arkansas Attorney General Opinions
- Arkansas General Assembly
- Arkansas Medicaid
- Arkansas Department of Human Services
- Arkansas Medicaid Fraud Control Unit
  Office of the Attorney General
  200 Catlett-Prien Tower
  323 Center Street
  Little Rock, AR 72201-2610
  1-866-810-0016 or (501) 682-7760
  FAX (501) 682-8135