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## SOCIAL SERVICES

***Public Assistance: Bar Participation By Person Convicted of Violation of Georgia Medical Assistance Act; Create Medicaid Fraud Forfeiture Act to Freeze Assets of Fraud Suspects***

CODE SECTIONS: O.C.G.A. §§ 49-4-146.1, -146.3 (new)  
 BILL NUMBER: HB 377  
 ACT NUMBER: 490  
 GEORGIA LAWS: 1997 Ga. Laws 1596  
 SUMMARY: The Act gives prosecutors the power to freeze and seize the property of Medicaid fraud suspects. The Act also gives the Department of Medical Assistance the authority to prohibit persons previously convicted of Medicaid fraud from participating in the program.  
 EFFECTIVE DATE: May 5, 1997<sup>1</sup>

### *History*

The Medicaid Fraud Forfeiture Act, a component of the Governor's package of bills to "crackdown on Georgia's criminals,"<sup>2</sup> gives state prosecutors the authority to freeze the assets of healthcare fraud suspects before they are dissipated.

The state created a Medicaid Fraud Control Unit in July 1995 to safeguard the \$3.2 billion Medicaid budget.<sup>3</sup> The Governor told the General Assembly in his 1997 legislative budget address: "[W]e are aggressively seeking out fraud. We have convicted 40 Medicaid providers for fraud, and 30 more providers have been indicted and are awaiting trial. We've scared the hell out of some folks. And you can see it in a noticeable drop in their billings."<sup>4</sup> Among the thirty-nine members of the fraud unit staff under the direction of a senior assistant attorney general are nineteen Georgia Bureau of Investigation investigators, two computer analysts, and four auditors.<sup>5</sup>

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1. The Act became effective upon approval by the Governor.
  2. Office of the Governor of the State of Georgia, Press Advisory, *Governor Miller's 1997 Legislative Accomplishments*, at 3 (Mar. 28, 1997) (available in Georgia State University College of Law Library).
  3. See Frank LoMonte, *Medicaid Fraud Cases Spur Call for Seizure Law*, FLA. TIMES-UNION, Mar. 15, 1997, at B1.
  4. Governor Zell Miller, Legislative Budget Address to the 1997 Georgia General Assembly (Jan. 16, 1997) (available in Georgia State University College of Law Library).
  5. See William R. Smith, *Medicaid is Easy Target for Crooks*, SOUTH., June 1997, at 37.

Despite the unit's success in prosecutions, the state found it difficult to recover stolen Medicaid funds because it could not freeze suspects' property.<sup>6</sup> As a result, the assets were dissipated by the time the fraud unit obtained a conviction.<sup>7</sup> For example, a DeKalb County couple convicted in January 1997 of stealing more than \$2 million shielded and liquidated assets so that prosecutors were only able to locate \$10,000 cash.<sup>8</sup> As a result, the couple has fifteen years to repay the \$1 million each was convicted of taking.<sup>9</sup>

HB 377 was one of several of the Governor's bills that got caught in a power struggle between the Governor and House Speaker Thomas B. Murphy during the 1997 legislative session.<sup>10</sup> On the eve of the House vote on the bill, after members of the House had tabled the bill,<sup>11</sup> the Governor and the Attorney General issued a joint letter to House members accusing those who criticized the legislation of "choosing to side with the thieves rather than the hardworking taxpayers of this state."<sup>12</sup> During the House debate, the Speaker said he "very deeply" resented the Governor saying he was siding with thieves.<sup>13</sup>

The fiery rhetoric continued after the House approved the Speaker's amendments to the bill; the Governor accused state representatives of caving in to special interests, stating: "I'd rather not have a bill than have this toothless fraud of a bill. I'm sorry that they did this because I honestly believe this is a vote that will haunt them for the rest of their careers."<sup>14</sup>

In retaliation, the Governor held up appropriations authorized in the mid-year budget for millions of dollars worth of "pork barrel" projects in legislators' home districts.<sup>15</sup> The maneuver helped secure passage of

6. See LoMonte, *supra* note 3.

7. See *id.*

8. See *id.*

9. See *id.*

10. See Dick Pettys, *Miller Overpowers Crusty Georgia House Speaker Murphy*, CHATTANOOGA FREE PRESS, Mar. 31, 1997, at A7.

11. See Record of Proceedings in the House of Representatives (Feb. 23, 1997) (available in Georgia State University College of Law Library).

12. Letter from Governor Zell Miller and Attorney General Michael J. Bowers to Members of the House of Representatives (Mar. 3, 1997) (available in Georgia State University College of Law Library).

13. Record of Proceedings in the House of Representatives (Mar. 4, 1997) (remarks by House Speaker Thomas B. Murphy) (available in Georgia State University College of Law Library). The Speaker, however, was less surprised by the Attorney General's remarks. See *id.* "I don't like Mike Bowers and he don't like me and neither one of us make any bones about it. . . . If he wants to call me a thief, I'll call him worse than that. But I do resent the Governor saying I'm siding with thieves. I resent that very deeply." *Id.*

14. Statement by Governor Zell Miller Concerning the Medicaid Fraud Bill (Mar. 4, 1997) (available in Georgia State University College of Law Library).

15. See Kathey Alexander & Lucy Soto, *Heated Session Could be Fuse for Political*

the Medicaid fraud bill, which had several of its original provisions restored in the Senate.<sup>16</sup> The Senate version did contain some concessions to House members' concerns, particularly language to specify that it applied to Medicaid fraud by providers, not recipients, of healthcare.<sup>17</sup> Senator Mark Taylor, the administration floor leader who handled HB 377 in the Senate, said the concessions to the House were the result of representatives being overly cautious.<sup>18</sup> Senator Taylor stated: "When dealing with the House, you're forced to take a belt and suspenders approach to legislation."<sup>19</sup>

### HB 377

As introduced, HB 377 was only four pages long because it referenced the drug forfeiture statute, Code section 16-13-49, instead of spelling out provisions for seizure and forfeiture.<sup>20</sup> In the first committee that studied the bill, the House Human Relations and Aging Committee, members adopted a substitute that put the actual seizure and forfeiture language in the bill, allowing them to amend the provisions that made them uncomfortable.<sup>21</sup>

Throughout the debate over the bill in the House, legislators expressed concern about implicating "innocent" people's property.<sup>22</sup>

*Fireworks in '98*, ATLANTA J. & CONST., Mar. 30, 1997, at C4; Pettys, *supra* note 10.

16. See Alexander & Soto, *supra* note 15.

17. See Telephone Interview with Rep. Nan Grogan Orrock, House District No. 56 (Apr. 23, 1997) [hereinafter Orrock Interview].

18. Telephone Interview with Sen. Mark Taylor, Senate District No. 12 (May 21, 1997) [hereinafter Taylor Interview].

19. *Id.*

20. HB 377, as introduced, 1997 Ga. Gen. Assem.

21. HB 377 (HCS), 1997 Ga. Gen. Assem. For example, committee member Representative Grace W. Davis expressed concern that innocent members of the family of a person accused of Medicaid fraud could be thrown out on the street if the family home and car were seized. Record of Proceedings in the House Human Relations and Aging Committee (Feb. 5, 1997) (remarks by Rep. Grace W. Davis) [hereinafter Davis Remarks] (available in Georgia State University College of Law Library). Committee Chair Representative David E. Lucas, Sr. appointed a subcommittee to address concerns about the effect of forfeitures on innocent parties. Record of Proceedings in the House Human Relations and Aging Committee (Feb. 5, 1997) (remarks by Rep. David E. Lucas, Sr.) (available in Georgia State University College of Law Library).

22. See Record of Proceedings in the House of Representatives (Feb. 23, 1997) (remarks by Rep. Mike A. Evans) (expressing fear that bill makes people prove innocence by affecting only those not convicted) (available in Georgia State University College of Law Library); *id.* (remarks by Rep. Keith Breedlove) (pointing out that bill would freeze assets on an assumption that someone had done something wrong). The measure was tabled as a result of such concerns. *Id.* When the House voted to remove the bill from the table, it was recommitted to the House Judiciary Committee for further study. See Record of Proceedings in the House of Representatives (Feb. 27,

Some lawmakers, who take a different view of drug forfeiture than Medicaid forfeiture, expressed concern about the applicability of the drug law to other circumstances.<sup>23</sup> For example, Representative Ben Allen, an opponent of the measure, points out that drug trafficking is illegal and rightly subject to strict forfeiture laws.<sup>24</sup> But, Representative Allen added, receiving Medicaid reimbursements is not illegal per se; much of the money the provider receives from the program may be legitimate and only a portion fraudulently obtained.<sup>25</sup> As a result, Representative Allen contends the same forfeiture statute should not be used.<sup>26</sup>

Concerns over the distinction between drug trafficking and Medicaid fraud led to some of the changes made in the Judiciary Committee.<sup>27</sup> The drug law, for example, allows a seizure on a warrant issued by a magistrate,<sup>28</sup> but the Medicaid law requires a hearing before a Superior Court judge before a warrant can be issued.<sup>29</sup> The owner of the property can then demand a hearing in ten days to determine if probable cause still exists for the seizure.<sup>30</sup>

With lawmakers raising such concerns the first time the measure was debated on the floor of the House, Representatives voted 112 to 58 to table the bill.<sup>31</sup> When the measure was later removed from the table, it was reassigned to the House Judiciary Committee.<sup>32</sup> Many of the concerns that were being raised involved legal issues and only one member of the Human Relations and Aging Committee was a lawyer.<sup>33</sup>

The legislators who expressed concern about "innocent" providers shared the same view expressed by the Georgia Nursing Home

1997) (remarks by Rep. Larry Walker) [hereinafter Walker Remarks] (available in Georgia State University College of Law Library).

23. See Davis Remarks, *supra* note 21; see also Telephone Interview with Rep. Ben Allen, House District No. 117 (Apr. 22, 1997) [hereinafter Allen Interview].

24. Allen Interview, *supra* note 23.

25. *Id.*

26. *Id.*

27. HB 377 (HCS), 1997 Ga. Gen. Assem.

28. 1991 Ga. Laws 886, 892 (codified at O.C.G.A. § 16-13-49(g)(1) (1996)).

29. HB 377 (HCS), 1997 Ga. Gen. Assem.

30. See *id.*

31. See Georgia House of Representatives Voting Record, HB 377 (Feb. 25, 1997). An earlier vote to recommit the bill failed 68-99. See *id.*

32. See Georgia House of Representatives Voting Record, HB 377 (Feb. 27, 1997); Walker Remarks, *supra* note 22.

33. See Record of Proceedings in the House of Representatives (Mar. 4, 1997) (remarks by Rep. David E. Lucas, Sr.) (available in Georgia State University College of Law Library). In his remarks, Representative Lucas said no one on the Human Relations Committee, which he chairs, is a lawyer. *Id.* However, Representative Mack Crawford, of House District No. 129, is a member of the Committee and lists "attorney" as his occupation. See Members of the General Assembly of Georgia, Senate and House of Representatives, First Session of 1997-1998 Term (Jan. 1997).

Association.<sup>34</sup> Although the nursing home organization supports the concept of taking the assets of those who defraud the state, lobbyist W. Gayle Sexton said the group was concerned that there were no protections and no due process for people falsely accused.<sup>35</sup> Ms. Sexton stated: "We were concerned about getting some protections for the innocent providers."<sup>36</sup> Once the measure was assigned to the House Judiciary Committee, many of those issues were addressed without the nursing home association even requesting the changes.<sup>37</sup> Ms. Sexton added that lawyers were able to see the due process problems.<sup>38</sup>

When the bill came back to the House on March 4, 1997 from the Judiciary Committee, Representative Thurbert E. Baker, of the 70th District, the Governor's floor leader and the primary sponsor of the bill, explained that the measure had been changed to address the concerns raised in the earlier debate.<sup>39</sup> Representative Baker said the bill was changed to apply only to Medicaid providers.<sup>40</sup> To address the issue of "innocent" owners having property seized, the bill would give such persons a right to request an expedited hearing to ensure their assets do not get caught up in any proceedings.<sup>41</sup> For properties that are subject to forfeiture, a requirement was added mandating that the search warrant, which initiates the process of seizure, be issued by a superior court judge, rather than by a magistrate as is done in drug cases.<sup>42</sup> In addition, the property owner has the right to request another hearing within ten days of the seizure to determine whether probable cause still exists to seize the property.<sup>43</sup> Provisions of the drug law that allow seizure without due process and that allow the court to maintain jurisdiction in cases when constitutional issues were involved regarding the seizure were eliminated in the Judiciary Committee version of the bill.<sup>44</sup> Another change allows for the introduction of the outcome of the criminal case as evidence in the civil forfeiture proceeding.<sup>45</sup> In addition, changes were made to require a judge to decide whether there would be a forfeiture in the subsequent

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34. See Telephone Interview with W. Gayle Sexton, Lobbyist, Georgia Nursing Home Association (Apr. 28, 1997).

35. *Id.*

36. *Id.*

37. See *id.*

38. *Id.*

39. Record of Proceedings in the House of Representatives (Mar. 4, 1997) (remarks by Rep. Thurbert E. Baker) (available in Georgia State University College of Law Library).

40. *Id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.*

civil proceeding.<sup>46</sup> Finally, the bill provided that the presumption that proceeds were obtained through fraud can be rebutted through clear and convincing evidence.<sup>47</sup>

The bill presented to the House followed the drug law provision that a forfeiture complaint be filed within sixty days from the date of seizure.<sup>48</sup> This provision was changed to thirty days in a floor amendment sponsored by the House Speaker.<sup>49</sup>

The Speaker's amendments also added a jury trial requirement for forfeiture proceedings.<sup>50</sup> This represented another departure from drug law, which merely requires a bench trial.<sup>51</sup> Another of the Speaker's amendments provided that Medicaid funds recovered from any asset seizure would be returned to the general fund of the State Treasury, rather than directly to the Department of Medical Assistance.<sup>52</sup>

Representative Allen's amendment would have required that criminal proceedings begin within thirty days of the seizure.<sup>53</sup> Representative Allen said he was concerned that without this provision, the state could seize property and never begin criminal proceedings.<sup>54</sup> The danger of this occurring would be greatest in a case in which evidence of wrongdoing is too slight to convince a jury beyond a reasonable doubt in a criminal proceeding, but is strong enough to convince a jury by the preponderance of the evidence in a civil forfeiture proceeding.<sup>55</sup>

State officials claim, however, that Representative Allen's amendment would have gutted the bill because it would force prosecutors to wait until late in the investigation to initiate the seizure.<sup>56</sup> By that time, the suspect likely would be aware of the investigation and would have dissipated his or her assets.<sup>57</sup>

Representative Austin Scott proposed an amendment to take out the words "or after," to require that the state file the forfeiture action before the property is seized.<sup>58</sup> This was omitted from the final version

46. *See id.*

47. *See id.*

48. *See* HB 377 (HCS), 1997 Ga. Gen. Assem.

49. *Compare id. with* HB 377 (HCSFA), 1997 Ga. Gen. Assem.

50. *See* HB 377 (HCSFA), 1997 Ga. Gen. Assem.

51. *See* 1991 Ga. Laws 886, 903 (codified at O.C.G.A. § 16-13-49(p)(6) (1996)).

52. *See id.*

53. *See id.*

54. Allen Interview, *supra* note 23.

55. *See id.*

56. *See* Orrock Interview, *supra* note 17. "It takes longer than that [30 days] with a complex case." *Id.*; *see also* Record of Proceedings in the Senate (Mar. 24, 1997) (remarks by Sen. Mark Taylor) [hereinafter Taylor Remarks] (available in Georgia State University College of Law Library).

57. Taylor Remarks, *supra* note 57.

58. Telephone Interview with Rep. Austin Scott, House District No. 165 (Apr. 22,

of the bill.<sup>59</sup> Representative Scott said he was trying to ensure due process,<sup>60</sup> stating "Medicaid fraud is a problem and we need to stop it."<sup>61</sup> He also added, "I personally have a problem when we talk about government seizures before due process. That is not the way our government is set up."<sup>62</sup>

In the Senate committee, the Governor's legislative leaders succeeded in getting back the sixty-day time period that had been whittled down to thirty.<sup>63</sup> Also, the Senate committee removed the Allen and Scott amendments.<sup>64</sup>

On the floor of the Senate, an amendment sponsored by Senator Mike Crotts added a Code section to prohibit a provider who has been convicted of violating Medicaid law from being put back in the program.<sup>65</sup>

The Senate defeated an amendment proposed by Senator Thomas E. Price, who is a physician, that would have made the measure apply to recipients as well as providers.<sup>66</sup> This amendment was supported by the Medical Association of Georgia, but was opposed by the Governor's floor leader.<sup>67</sup>

Senator Taylor also opposed an amendment by Senator Edward E. Boshears that would have amended the bill to ensure that Medicaid recipients would not be denied medication because of bureaucracy.<sup>68</sup> Lieutenant Governor Pierre Howard determined that the amendment was not germane to the bill.<sup>69</sup>

The bill went back to the House, where as a result of a compromise, there was an amendment by the Governor's floor leader and the primary sponsor of the bill (Representative Baker), the Speaker, and others.<sup>70</sup> The amendment provided that the forfeiture complaint be

1997).

59. *See id.* As a result, the phrase "or after" was added back in the bill. *See id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See* Taylor Remarks, *supra* note 56.

64. *See id.*

65. The measure passed by a 40-0 vote after Senator Crotts explained that a person who has defrauded Medicaid could under current law get back into the system five years after conviction. *See Lawmakers '97* (GPTV broadcast, Mar. 24, 1997) (remarks by Sen. Crotts) (videotape available in Georgia State University College of Law Library).

66. *See id.* (remarks by Sen. Price). Although Senator Price told senators that it is important to recognize that recipients can commit fraud and that they were included in the original bill, the amendment was defeated 19-45. *Id.*

67. *See* Taylor Interview, *supra* note 18.

68. *See Lawmakers '97* (GPTV broadcast, Mar. 24, 1997) (remarks by Sen. Boshears) (videotape available in Georgia State University College of Law Library).

69. *See id.* (remarks by Lt. Gov. Howard).

70. *See* O.C.G.A. § 49-4-146.3 (Supp. 1997).



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filed within thirty days of the seizure, instead of sixty, and provided that a hearing be held before a jury—unless waived by the claimant.<sup>71</sup>

The House agreed to the Senate version as amended.<sup>72</sup> The Senate also agreed, so the measure was spared going to a conference committee.<sup>73</sup>

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71. *See id.*

72. *See* Final Composite Status Sheet, Mar. 28, 1997.

73. *See id.*