

IN THE SUPREME COURT OF MISSISSIPPI

**KIRK FORDICE, AS GOVERNOR OF THE STATE
OF MISSISSIPPI,**

Petitioner,

v.

**MIKE MOORE, AS ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI,**

Respondent.

February 16, 1996

**PETITION FOR WRIT OF MANDAMUS
AND PROHIBITION AND FOR
DECLARATORY JUDGMENT**

Comes now Petitioner, Kirk Fordice, in his capacity as, and on behalf of the office of, Governor of the State of Mississippi and as Administrator of the Medicaid Division of the Office of the Governor, and files this, his Petition for Writ of Mandamus and Prohibition and for Declaratory Judgment, and would show the following:

PARTIES

1. Petitioner, Kirk Fordice, is the duly elected Governor of the State of Mississippi, and files this Petition in his capacity as Governor of the State of Mississippi, as Administrator of the Medicaid Division of Mississippi, and on behalf of such public offices and positions.

2. Respondent, Mike Moore, is the duly elected Attorney General of the State of Mississippi, and is listed as Respondent as the Attorney General of the State of Mississippi and as the representative and administrator of such public office.

3. Respondent can be served with process in his official offices, physically located in the Carroll Gartin Justice Building, Jackson, Hinds County, Mississippi, and by United States mail at his mailing address at Post Office Box 220, Jackson, Mississippi 39205-0220, and/or otherwise in accordance with the rules and laws regarding notice and/or service relating to actions pending before this Court.

**RESPONSIBILITY AND AUTHORITY
OF GOVERNOR**

4. The Governor is vested with the duty, responsibility, and authority to exercise and administer the chief executive power of Mississippi, as the supreme Executive Officer of Mississippi.

5. The Governor is vested with the duty, responsibility, and authority to administer the Division of Medicaid on behalf of the State of Mississippi and in accordance with the Mississippi Medicaid Plan.

6. The Governor is vested with the duty, responsibility, and authority to require all executive and other state officers to be present at their respective offices at all reasonable business hours, to be provided with reasonable written information relating to the execution of the duties of the public offices of the State of Mississippi, and to prevent interference with the efficient execution of the duties of such public offices by all Mississippi officials and employees of public offices of the State of Mississippi.

7. The Governor is mandated to bring all suits related to the Mississippi Medicaid Plan and/or funds received by, expended through, and otherwise related to the Mississippi Medicaid Plan, on behalf of the State of Mississippi, in the name of the Division of Medicaid.

8. The Governor is mandated to comply with the provisions of Title 43 of the Mississippi Code of 1972, and to administer the Mississippi Medicaid Plan in accordance with Title 43.

9. The Governor is mandated to receive, administer and record all funds received in civil actions and settlements are reimbursement of Medicaid funds to the respective proportionate credit of the Mississippi and federal governments in accordance with the respective, proportionate appropriation of such funds by the Mississippi and federal governments.

10. The Governor is vested with the exclusive authority to appoint an Executive Director to serve at the will and pleasure of the Governor, and subject to the direction and control of the Governor.

11. The Governor is vested with the responsibility, duty, and authority to administer the Division of Medicaid in sufficient compliance with federal laws and regulations to maintain eligibility for Medicaid funds for the State of Mississippi and the people and citizens of the State of Mississippi, and to avoid disqualification for receipt of such federal funds.

12. The Governor and the Division of

Medicaid, acting under the direction and control of the Governor, as administrator, and subject to the approval of the Governor, is vested with the exclusive authority and responsibility to affect settlement agreements for recovery of Medicaid funds, and to execute the release of any and all claims held or potentially held for recovery of Medicaid funds expended by or through the State of Mississippi.

13. The Division of Medicaid, as a division of the Office of the Governor, and as a State agency administered by the Governor, has the exclusive right to make claim for or bring civil suit for reimbursement of sums paid by the Division of Medicaid for medical assistance, treatment, or otherwise in accordance with the Mississippi Medicaid Plan.

14. The interests of the Governor, the Attorney General, the Division of Medicaid, and the State of Mississippi and people and citizens thereof are best served by an interpretation of Article 13 of Chapter 43 to the effect that, where the Governor and Attorney General have conflicting interests and intentions relating to the administration of the Division of Medicaid, the proper authority for such administration is allocated to the Governor -- the public official that is vested and charged with the chief executive powers of Mississippi, the administration of the Division of Medicaid and the Mississippi Medicaid Plan -- rather than in the Attorney General -- the public official of a subaltern executive nature that is given general powers as the legal counsel for state agencies, officials, and divisions, but whose power to bring suit on behalf of the Division of Medicaid is necessarily subject to the specifically imposed limitations of the Laws of Mississippi.

THE ATTORNEY GENERAL'S ACTIONS TAKEN IN VIOLATION OF THE CONSTITUTION AND LAWS OF THE STATE OF MISSISSIPPI, AND OUTSIDE OF THE POWERS AND AUTHORITY VESTED IN THE ATTORNEY GENERAL BY THE PEOPLE

15. All public officials for the State of Mississippi, including the Attorney General, are subject to the Constitution and Laws of the State of Mississippi.

16. The powers and authority of all public officials, including the Attorney General, are limited to that power and authority specifically granted by the people via the Constitution and Laws of the State of Mississippi.

17. Title 7 of the Mississippi Code of 1972 proscribes the general powers and duties of the

executive officials of the State of Mississippi, including the Governor and Attorney General, in conformity with the Constitution of the State of Mississippi.

18. Title 43 of the Mississippi Code of 1972 specifically proscribes the authority and duties of the Division of Medicaid, generally, as a Division of the Office of the Governor, and the specific duties and responsibilities of the Governor and Attorney General, respectively, relating to the Division of Medicaid, the administration of Medicaid funds, and the Mississippi Medicaid Plan.

19. The Attorney General is a subaltern executive public officer of the State of Mississippi, with general powers as the legal counsel, officer, and advisor for the State of Mississippi and the departments, agencies, and divisions thereof.

20. As such legal counsel, the Attorney General is required to act in compliance with the Constitution of Mississippi, the Laws of the State of Mississippi, and the laws and rules proscribing the legal and ethical duties and responsibilities of all attorneys and officers of Court authorized to serve as legal counsel and/or otherwise to provide legal representation in Mississippi.

21. Any and all actions of the Attorney General that are taken outside of the parameters of power and authority granted the Attorney General by the people of Mississippi, as expressed and specified by the Constitution and Laws of the State of Mississippi, are void, invalid, and of no effect.

22. The Attorney General, as legal counsel to the Division of Medicaid, is required to determine the expressed interests of the Governor and the Division of Medicaid, and to make reasonable efforts to fulfill the interests of the Governor and the Division of Medicaid, to the extent such complies with Mississippi law, and to expedite all litigation and other matters taken in the course of legal representation consistent with the expressed interests of the Governor and the Division of Medicaid.

23. To the extent of any fundamental policy differences or philosophical differences as to what constitutes the best interests of the Division of Medicaid and/or whether or not any specific civil suit is to be filed for reimbursement of Medicaid funds, and to the extent that the expressed interests of the Governor and the Division of Medicaid conflict with the expressed interests of the Attorney General, the Attorney General is required to submit to the authority and expressed interests of the Governor and the Division of Medicaid, to provide the Governor with a

consultation that includes a complete explanation of all implications of representation of the Division of Medicaid by the Attorney General relating to such conflict issue, and the advantages and risks involved, and to obtain knowing and informed consent for such legal representation, after consultation, from the Governor.

24. The Attorney General is required to refrain from attempting to unilaterally employ outside, private counsel to represent the interests of the Division of Medicaid, without the knowledge and consent of the Governor.

25. Other than fulfilling the orders and instructions of the Governor, defending suits filed against the Division of Medicaid, providing legal counsel and advice to the Governor, reviewing and providing written certification that agreements between the Division of Medicaid and the Department of Health and Human Services are in accordance with the terms and requirements of Title 14, Article 13, of the Mississippi Code, and to grant approval of the Governor's hiring of contingency fee private legal counsel for suits brought in the name of the Division of Medicaid, the Attorney General has no legal duty, authority, nor right to act as or on behalf of the Office of the Governor, Division of Medicaid.

26. Respondent has filed a lawsuit in the name of "Mike Moore, Attorney General *Ex Rel.* For the State of Mississippi," as plaintiff, such lawsuit being Cause No. 94-1429 in the Chancery Court of Jackson County, Mississippi (referred to hereinafter as the "unauthorized lawsuit") which action involves and includes suit for reimbursement and/or recovery of Mississippi Treasury and federal funds expended from the and through the Office of the Governor, Division of Medicaid, with such expenditures having been made through and in accordance with the Mississippi Medicaid Plan.

27. In addition to the Attorney General, the unauthorized lawsuit lists numerous private counsel as counsel for the Plaintiff therein. The Attorney General has not provided the Governor with a copy of any Contract of Employment relating to such private counsel. The Attorney General has advised the Governor that such counsel have been retained as counsel for Plaintiff in the lawsuit, and that such private counsel are acting in accordance with, as counsel with and/or co-counsel of, and under the direction and control of, the Attorney General.

28. The Governor did not seek employment of these private counsel for the unauthorized lawsuit, did not employ these private

counsel for the unauthorized lawsuit, and objects to the purported employment of these counsel to represent the interest of the Division of Medicaid or to attempt to recover Medicaid funds in the unauthorized lawsuit. Without such employment retention by the Division of Medicaid, all of such actions and prosecution for recovery of Medicaid funds by these outside, private counsel in the unauthorized lawsuit are contrary to the express provisions of the Laws of State of Mississippi.

29. The Attorney General was not authorized, directed nor requested by the Governor to file nor otherwise prosecute such unauthorized lawsuit.

30. The Governor first learned that the unauthorized lawsuit had been filed from press accounts relating to the unauthorized lawsuit, which press accounts were published on May 24, 1994. Prior to such date, the Attorney General never consulted with the Governor relating to the potential filing of such unauthorized lawsuit, never requested the Governor to authorize the filing of such lawsuit, never advised the Governor about the content and/or purported purpose of such lawsuit, never advised the Governor that the Attorney General had already employed, or intended to employ, numerous private counsel to represent the interests of the Division of Medicaid, and never informed the Governor that the Attorney General was proceeding to file the unauthorized lawsuit.

31. Without any provision of a copy of any proposed complaint, any provision of notice that outside, private counsel had been purportedly employed by the Attorney General, nor any consultation with the Governor regarding the potential advantages and risks of the filing of such unauthorized lawsuit, and without any permission or authority from the Governor, the Attorney General filed the unauthorized lawsuit.

32. The Governor objects to the recovery of Medicaid funds via the unauthorized lawsuit and to any and all initiation and procreation of civil litigation supposedly filed on behalf of and as the Executive Branch of the State of Mississippi and/or agencies/divisions thereof, in such instances where such civil lawsuit is not filed nor prosecuted in accordance with the will and intentions of the people and citizens of Mississippi as validly expressed by the Laws of the State of Mississippi.

33. Any and all civil litigation that is purportedly initiated and filed by and on behalf of the State of Mississippi and/or any executive divisions/agencies thereof, and any and all actions

taken in furtherance of such civil litigation, are void and of no effect, where such actions are taken in violation of Mississippi law and outside of validly granted legal authority.

34. Since the filing of the unauthorized lawsuit, the Governor has discussed the conflict of the Governor and the Attorney General relating to the unauthorized lawsuit and the disagreement about whether or not this litigation serves the best interests of Mississippi, the citizens thereof, and the Division of Medicaid.

35. The Governor has advised the Attorney General of the Governor's objection to the attempted recovery of Medicaid funds without conformity to applicable Mississippi law. The Attorney General has failed and refused to honor and comply with the Governor's expressed desire and request to cease acting outside of the legal authority granted to the Attorney General, but has, instead, amicably characterized the difference between the Governor's expressed desire and instruction and the Attorney General's actions as mere "philosophical differences."

36. If and when purporting to act as legal counsel to the Governor, and as legal counsel attempting to recover monetary funds/damages on behalf of the Division of Medicaid, the Attorney General and the private counsel are required to take any and all action consistent with the expressed intentions and interests of the Division of Medicaid, and to provide a complete explanation of the advantages and risks, and any and all factors relating thereto, of such representation, compared to the lawyers' own interests, conflict and intentions, separation from the Division of Medicaid.

37. The Governor has not been advised of the complete potential advantages and risks involved in the Attorney General's representation of the Governor and/or recovery of Medicaid funds via the unauthorized lawsuit nor of all facts relating to conflict and/or separate interests of the Attorney General nor the private counsel acting with and under the direction and control of the Attorney General in the unauthorized lawsuit.

38. The Governor has not given consent to representation of the interests of the Governor and, particularly, the Division of Medicaid, by the Attorney General nor the private counsel acting with and/or under the direction and control of the Attorney General, in relation to the unauthorized lawsuit, and considering the conflict between the Governor and the Attorney General relating to the unauthorized lawsuit and the present dispute over which public official has

the greater authority and responsibility to act as the administrator and on behalf of the Division of Medicaid.

39. The filing and prosecution of the unauthorized lawsuit is and has been done by the Attorney General and private counsel in violation of Article 13 of Chapter 43 of the Mississippi Code.

40. Mississippi Code Section 43-13-121 requires the Division of Medicaid to sue in its own name, and requires the Division of Medicaid to employ the legal counsel that may represent the Division of Medicaid in suits brought in the interests of and on behalf of the Division of Medicaid, including recovery of Medicaid funds. Such statutory requirement conforms to the general intentions and purposes of federal and state laws, regulations, and rules of court, and promotes and furthers the interests of clarity, judicial efficacy, and compliance with the will of the people of the United State of America and the State of Mississippi, as validly expressed through the laws thereof.

**THE GOVERNOR IS WITHOUT ADEQUATE
REMEDY AT LAW, AND SEEKS THE AUTHORITY
OF THIS COURT TO REQUIRE THE ATTORNEY
GENERAL TO COMPLY WITH THE
CONSTITUTION AND LAWS OF THE STATE OF
MISSISSIPPI**

41. This matter is within the original jurisdiction of the Mississippi Supreme Court, in accordance with Mississippi Code Section 9-1-19. Also, and/or, in the alternative, this matter is within the jurisdiction of the Mississippi Supreme Court in accordance with the Mississippi Rules of Appellate Procedure 21.

42. The case and controversy and legal issues present in this cause necessarily involve interpretation of Constitutional and statutory provisions in a context without precedence in Mississippi law, and involve issues of such fundamental public importance that the Mississippi Supreme Court would be expected to be ultimately involved as the arbiter of the controversy and issues.

43. The interests of judicial and governmental efficacy and conformity of State action with the Constitution and Laws of Mississippi are best promoted by the exercise of original jurisdiction over this case by this Court, as specifically granted by Mississippi Code Section 9-1-19.

44. In order to avoid continuing violation and disregard for the Constitution and Laws of the State of Mississippi by the Attorney General,

and in order to facilitate the execution of the Governor's duty to supervise the official conduct of all executive officers and require compliance and faithful execution of the Constitution and Laws of State of Mississippi by such public officials, including the Attorney General, and to avoid prejudicial delay and continuing action outside of the authority of Mississippi law by the Attorney General, the Governor submits the present case and controversy to this Court pursuant to the original jurisdiction of this Court as granted by the people through the Constitution and Laws of the State of Mississippi.

**INJURY TO THE PEOPLE, CONSTITUTION, LAWS,
AND STATE OF MISSISSIPPI, AND
TO THE GOVERNOR AND DIVISION
OF MEDICAID**

45. The Attorney General's actions of initiating and filing the unauthorized lawsuit without the direction or consent of the Governor, and the Attorney General's failure and refusal to honor the request and instruction of the Governor relating to such unlawful lawsuit has caused, is causing, and/or will cause the following injuries to the Governor and the Constitution, Laws, people and State of Mississippi, and to the interests designated to the Governor for protection and responsibility:

- a. Abuse of power of State office;
- b. Invalid and void State action;
- c. Deprivation of the time, efforts, and energy of the Attorney General from the duties and responsibility legally vested in the Attorney General;
- d. Deprivation of the time, efforts, and energy of public servants, officials, and employees from the duties and responsibilities of their office, service, and employment, in order to comply with demands that may be imposed upon governmental agencies and/or officers and employees thereof, relating to discovery and/or other participation and/or compliance with requests and orders related to the unauthorized lawsuit;
- e. Interference with the freedom of access of public information as vested by law in the general public, the citizens and people of Mississippi, and people and businesses with lawful contacts to/in Mississippi;

- f. Potential obligation of payment of expenses and/or contingency fees to outside, private counsel, without conformity to State Law provisions relating thereto;
- g. Potential violation of express provisions of the Mississippi Medicaid Plan, the Constitution and Laws of the State of Mississippi, and the federal laws and regulations relating to Medicaid;
- h. Potential loss of eligibility for receipt of federal Medicaid funds;
- i. Interference with the lawful and efficient administration, expenditure, recovery and reimbursement of Medicaid funds;
- j. Interference with the lawful and efficient administration of the Mississippi Medicaid Plan;
- k. Interference with the lawful and efficient administration of a program of medical assistance for the health and relief from suffering of the people of Mississippi that may need such medical assistance;
- l. Erosion of the trust and respect of the citizens in the governmental institutions of the State of Mississippi, the supremacy of law in and relating to the State of Mississippi, and the necessary subordination of State officials to the will of the people as validly expressed in the Laws of the State of Mississippi;
- m. Potential adverse rulings, of precedential and/or otherwise binding nature, against the Division of Medicaid and/or the people and citizens of Mississippi, and subsequent hindrance of potential future civil prosecution against any or all of the defendants in the lawsuit in question, for recovery of Medicaid funds, which future prosecution may be initiated and/or filed by individual private citizens and/or otherwise in accordance with the requirements and dictates of Mississippi law;

n. Adverse effect upon local, Mississippi businesses;

o. Adverse effect upon the willingness of businesses headquartered outside Mississippi to employ the citizens of Mississippi and/or otherwise conduct business in Mississippi;

p. Diminution of the tax revenue funds base for the State of Mississippi; and

q. Adverse effect upon the business and jobs environment of Mississippi.

46. The Governor is without adequate remedy at law, and necessarily invokes both the legal and equitable jurisdiction of this Court to remedy the injuries and wrongs as set out hereinabove, and such other injuries and wrongs as may be determined by this Court to be necessarily related to this case and controversy.

47. The will of the people of Mississippi, and the general and specific provisions and intentions of the Constitution and Laws of the State of Mississippi and the federal laws and regulations relating to administration of the Division of Medicaid, are only complied with by a cessation of actions on the part of the Attorney General that are taken without legal authority and against the expressed interests and instructions of the Governor.

Wherefore, premises considered, Petitioner prays that this Court exercise its jurisdiction over this case and controversy, consider this Petition for Writ of Mandamus and Prohibition, and for Declaratory Judgment, and set a schedule for the filing of the Attorney General's Answer/Response and the briefs for this action.

Furthermore, Petitioner prays that this Court, upon consideration of this case and controversy upon the legal merits, issue a Declaratory Judgment to the effect that:

A. The Governor is the administrator of the Division of Medicaid;

B. Suits brought for recovery of Medicaid funds must be brought in the name of the Division of Medicaid by the administrator of the Division of Medicaid;

C. Private, legal counsel that are

retained/employed on a contingency basis to represent the interests of the Division of Medicaid must be employed by the Division of Medicaid and the administrator thereof, subject to the approval of the Attorney General;

D. Insofar as Cause No. 94-1429 in the Chancery Court of Jackson County, Mississippi, involves a suit for damages consisting of Medicaid funds and the reimbursement therefor, such lawsuit and the actions and prosecution thereof by the Attorney General, as "Mike Moore, Attorney General *ex rel* State of Mississippi," and the actions of the Attorney General relating to such filing and prosecution, are unauthorized and outside the legal authority of the Attorney General, until instructed and authorized by the Governor to prosecute such civil action on behalf of and in the name of the Division of Medicaid;

E. The Division of Medicaid is not subject to *res judicata*, collateral estoppel, sanction, release, accord and satisfaction, nor other legal affect of any sort that may potentially affect a party to such cause;

F. The Attorney General is subject to the Constitution and Laws of the State of Mississippi, and has no valid legal authority to file civil actions nor otherwise take actions that are contrary to and outside of the parameters of the powers of his office as vested by the people through validly enacted Mississippi law.

And furthermore, Petitioner prays that this Court issue a Writ of Mandamus and Prohibition requiring the Attorney General and/or all public and private legal counsel acting with and/or at the direction and control of the Attorney General;

G. To erase and desist from actions for recovery of Medicaid funds until employed and/or directed to do so by the Governor;

H. To notify the trial court and all parties to the unauthorized lawsuit that the Division of Medicaid is not a party to such lawsuit and that no Medicaid funds are included in the damages claims of such lawsuit;

I. To limit the exercise of the power, resources, and position of the Attorney General's office in accordance with the provisions of the Constitution and Laws of the State of Mississippi;

J. To refrain from using the power and position of the Attorney General's office to file and prosecute civil suits, restrain State personnel from fulfilling the duties of their respective offices or

unlawfully interfere therewith, retain private counsel for representation of Mississippi and/or agencies/divisions thereof, and/or purportedly execute contracts for legal employment on a contingency basis, outside of the provisions of Mississippi law; and

K. To refrain from legal representation of the interests of the Division of Medicaid, and/or other action relating thereto, inconsistent with the expressed wishes and instruction of the Governor as administrator of the Division of Medicaid;

And furthermore, Petitioner prays for any and all such Orders and Writs of this Court as may be necessary and appropriate to effect such and to otherwise further the interests of law, the Governor, the Attorney General, and the people and the State of Mississippi, as deemed appropriate by this Court.

Respectfully submitted,

KIRK FORDICE, as and on behalf of the Office of the Governor and Administrator of the Division of Medicaid

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