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**COURT URGED TO OVERTURN JUDGMENTS
BASED ON ALLEGED MISREPORTING OF AWP**
(SmithKline Beecham v. Alabama; Novartis v. Alabama)

The Washington Legal Foundation (WLF) this week urged the Alabama Supreme Court to overturn massive judgments entered against two major pharmaceutical companies. The multi-million dollar judgments in favor of the State of Alabama were based on unsupported allegations that the companies misreported the "wholesale acquisition cost" (WAC) and "average wholesale price" (AWP) for their products.

In a brief filed in *SmithKline Beecham Corp. v. State of Alabama* and *Novartis Pharmaceutical Corp. v. State of Alabama*, WLF argued that Alabama failed to introduce evidence that the defendants did anything that could constitute fraud -- they did not provide any misleading information to Alabama, Alabama did not rely on any such information, any reliance by Alabama would have been unreasonable, and Alabama suffered no damages.

WLF filed its brief on behalf of itself and the Alabama Civil Justice Reform Committee. WLF's brief was drafted with the *pro bono* assistance of Matthew C. McDonald and Kirkland E. Reid of the law firm of Jones Walker in Mobile, Alabama.

"WLF is concerned that the judgments in these combined cases, if confirmed by the Alabama Supreme Court, would constitute a dramatic change in the law governing fraud and would significantly expand the business community's potential tort liability," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Alabama is represented in this case by private plaintiffs' attorneys, who are being paid on a contingency fee basis. This case illustrates all too well the problems created by such arrangements. The attorneys are pursuing litigation strategies designed to maximize monetary recovery -- and thus to maximize contingent attorney fees -- without regard to the effects that the judgments they obtain may have on the State's system of justice," Samp said.

The suit involves payments made by Alabama in connection with its administration of the Medicaid program within the State. When Medicaid recipients obtain prescription drugs from pharmacies, Alabama Medicaid pays a fee to the pharmacies, designed to cover the pharmacies' acquisition and dispensing costs plus a modest profit. In order to determine the reimbursement amount, Alabama obtains

information released by every drug company regarding its WAC and AWP. Alabama now claims that it "discovered" several years ago that drug companies inflate their WAC and AWP data -- thereby causing Alabama to pay pharmacies too much for the drugs.

In fact, it has been widely understood for decades -- by pharmaceutical companies, by the federal government, by companies that gather pricing data, and by nonprofit groups that deal with health care issues -- that WAC and AWP do not represent actual transactional prices paid by wholesalers to manufacturers (in the case of WAC) or paid by pharmacies to wholesalers (in the case of AWP). Rather, they are list prices and do not reflect discounts offered by manufacturers to various wholesalers.

In its brief filed in support of SmithKline Beecham and Novartis, WLF argued that Alabama Medicaid officials could not possibly have thought that WAC and AWP were actual transactional prices. WLF further argued that even if Alabama officials so believed and relied on that belief in setting reimbursement rates, any such belief was unreasonable -- because Alabama would have quickly discovered its error if it had ever bothered to ask anyone what was meant by WAC and AWP. WLF argued that if fraud liability can be upheld under these circumstances, the requirement that a plaintiff in a fraud case demonstrate "reasonable reliance" on the defendant's alleged misrepresentation will have been robbed of all meaningful content.

WLF argued that the evidence at trial was clear that Alabama did not actually rely on WAC and AWP in establishing reimbursement rates. WLF noted that pharmacists have repeatedly threatened to cease participating in the Medicaid program if proposals to reduce their reimbursement rates were adopted. Alabama has a strong interest in ensuring that Medicaid recipients have ready "access" to pharmacies that handle Medicaid claims and thus would not want large numbers of pharmacists to drop out of the program. WLF argued that Alabama established reimbursement rates based on an amount necessary to maintain pharmacist participation in Medicaid, not based on its alleged misunderstanding of WAC and AWP.

WLF is a public interest law and policy center with supporters in all 50 States, including many in Alabama. WLF regularly appears before federal and state courts to promote economic liberty and a limited and accountable government. In particular, WLF litigates in support of tort reform and of efforts to prevent entry of excessive tort judgments against the business community.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF's brief is posted on WLF's web site, www.wlf.org.