Press Release

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WLF Asks Full Sixth Circuit to Review Panel Decision Expanding False Claims Act Liability

(United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.)

"The Sixth Circuit panel's decision turns the False Claims Act into a vehicle for punishing garden-variety regulatory infractions. The Supreme Court has explicitly instructed the lower courts not to do this."
—Corbin K. Barthold, WLF Litigation Counsel

WASHINGTON, DC—On July 2, 2018, Washington Legal Foundation urged the United States Court of Appeals for the Sixth Circuit to rehear *en banc* a panel decision expanding liability under the False Claims Act.

The False Claims Act imposes treble damages and heavy civil penalties on a company caught defrauding the government. A private party, known as a "relator," may sue on the United States' behalf to collect these damages and penalties. To establish liability, however, the relator must show, among other things, that any misrepresentation the company made to the government was material to the government's decision to pay claims. The relator must show, in other words, that the government, had it known all the facts, would likely have refused to pay the company.

The relator here accused a home-health agency of submitting Medicare reimbursement claims that failed to divulge the agency's violation of a certification timing rule. The regulation at issue requires a home-health agency to acquire a doctor's certification that the care underlying the claim was necessary. The agency acquired all necessary certifications; Prather alleged merely that the agency had not acquired them fast enough before submitting the claims to the government. The panel concluded that Prather's lawsuit may proceed past the pleading stage.

In its brief, WLF argues that the panel failed to undertake the pragmatic, context-specific analysis of materiality required by *Universal Health Services, Inc. v. Escobar*, 136 S.Ct. 1989 (2016). Had it undertaken this analysis, WLF explains, the panel would have had to account for the fact that the healthcare industry's administrative costs are skyrocketing while the Medicare program is racing toward insolvency. Given these factors, it is implausible that the government, had it known about any failure to comply with the timing requirement, would have taken the draconian step of declining to pay the home-health agency's claims.

WLF's brief urges the full Sixth Circuit to review the case *en banc* and reverse the panel's cramped reading of *Escobar*.

Celebrating its 41st year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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