ELEVENTH CIRCUIT: "WORTHLESS SERVICES" CLAIM CONSTITUTIONAL IN CRIMINAL FRAUD CASE

The Eleventh Circuit ruled last week that a conviction for criminal health care fraud against the owner of nursing home facilities was constitutional. The Court held that the government's "worthless service" theory of fraudulent billing was not unconstitutional.

In *United States vs. George Houser*, the government alleged that the defendant conspired to defraud the government through his ownership and operation of three nursing home facilities in Georgia. The defendant, as CEO and president, was listed on each facility's Medicare provider applications. At trial, he was convicted in part on the government's theory that the claims submitted by Mr. Houser's facilities constituted "worthless services."

In particularly strong language, the Court adopted the government's description of the facilities as "barbaric" and "uncivilized." Beyond facilities in disrepair that led to unsanitary conditions, the Court noted that basic needs of residents went unmet due to the facilities' failures to pay for them and directly impacted residents' health.

The defendant acknowledged the "deplorable conditions of his nursing homes" but argued that the government's theory of fraud was unconstitutionally vague and impermissible: "determining at what point health care services have crossed the line from merely bad to criminally worthless would leave many men of common intelligence guessing."

Roundly rejecting the defendant's arguments, the Eleventh Circuit affirmed the conviction, noting that some residents of the defendant's facilities "went entirely without necessary services," and that he had actual knowledge of the conditions "through an almost daily barrage of telephone calls, emails and faxes from the administrators," and yet chose to ignore these warnings. The Court found the defendant's documented decision to ignore such warnings rose to the level of "intentional disregard."

But even in doing so, the Court came short of adopting the government's theory of worthless services—or services so below the standard of care as to have no medical value. Rather than directly rejecting the Sixth Circuit's skepticism of such claims in *Chesbrough v. VPA*, the Eleventh Circuit ruled instead that the allegedly "worthless services" were sufficiently plead and sufficiently supported by evidence as the services that they billed for were simply never provided.

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