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Tampa lawyers come to aid of Florida's seniors

Pro bono efforts secure elders their rights under federal Medicaid law

By Jan Pudlow

Senior Editor

John Yanchunis is Batman, and Jill Bowman is Wonderwoman.

Together, these Tampa lawyers at James, Hoyer, Newcomer & Smiljanich were a superhero duo swooping in to rescue 41,000 of Florida's elderly in nursing homes.

In a pro bono case, they took on the state in a class action suit for violating federal law for 16 years and declared victory. The result was a policy change, an administrative rule, a statutory change, \$52 million in new funding, and notification by the state to every Medicaid recipient.

That's how Sarasota lawyer Babette Bach introduced them at the Elder Law Section luncheon at The Florida Bar's Annual Meeting in Orlando, when Yanchunis and Bowman were presented with the Chair's Honor Award.

"In 2003, when the Agency for Health Care Administration announced it was arbitrarily just going to stop covering eyeglasses, hearing aids, and dentures for our Medicaid recipients, I decided that we had had enough of the state violating federal law," Bach said.

Previously Bach had brought four different cases at an administrative level to prove the federal law existed.

"When I got that letter, I just hit the roof," said Bach. She reacted by researching class action lawsuits and reputable firms who handle them. She approached the James Hoyer law firm for help.

Armed with a notebook of legal documents, Bach walked into the fancy high-rise office in downtown Tampa, with mahogany woodwork and oriental carpets. Inviting Bach to sit at a long conference table, Yanchunis proved to be a very receptive audience.

"It bothered Ms. Bowman and me to the core that the state refused its obligation to fund the program. People had broken dentures and could not eat. They could not read because their eyeglasses were broken. Or they couldn't go to a cardiologist of their choice," Yanchunis said.

"This was a fundamental quality of life issue. What better group of people to represent than the elderly poor of ill health? We couldn't ask to represent a more deserving group of people."

The firm fully funded all the costs of this litigation and donated all their legal time.

"Even a lot of elder law attorneys still don't understand the impact of this lawsuit," Bach said. "Once somebody is eligible for Medicaid, they can use their own income to pay for any medical need they may have. If the medical need is not covered by Medicaid, Medicare, or private insurance, then for the first time in the history of Florida, they get to keep their own income to cover any uncovered medical need: eyeglasses, dentures, or anything that is not currently covered."

At issue is a federal law that Florida has not followed since 1988 involving the administration of Medicaid's Institutional Care Program. That federal law mandates that these low-income elders should be allowed to use their own money – in pensions and Social Security checks – to pay for such needed medical expenses as eyeglasses and repairing dentures, as well as paying to maintain Medicare and to pay for supplemental insurance premiums that would allow them to see health care specialists of their choice.

Instead, for 16 years, Florida only allowed these elders to keep a \$35 monthly allowance for personal needs and took the rest of their limited income to pay for the cost of their nursing home care.

Affidavits of doctors and other officials in the lawsuit filed in federal court in the Middle District of Florida in Tampa (Case No. 8:03-CIV-2381-T-24MAP) described the declining health of already chronically ill nursing home patients. One woman could no longer go to medical specialists for wound care and an eye disease because the nursing home took almost her entire Social Security check and she could no longer pay her insurance supplement. Slowly, she quit going to medical specialists she needed; the nursing home would no longer take her; and her health continued to decline until she died.

The lawsuit, pending from November 2003 to July 2004, did not seek an award of retroactive damages, but requested that the court require the defendants – the Florida Department of Children and Families and AHCA – to immediately begin complying with federal law.

"The lawsuit resulted in the passage of rule changes by the legislature, and funding retroactive to July 2004," Yanchunis said.

There was no trial or settlement, Yanchunis explained, yet, "we claimed victory."

"What happened was, during the motion for preliminary injunction and class action, the state argued to the judge: 'Don't entertain a hearing. Instead, let us try to go to the legislature to fund the program.' The judge agreed with that. There were rule changes and statutory changes for the state to bring the program into compliance," Yanchunis said.

As Bach recounted, "The attorney general stood up in federal court and said it was cheaper to pay them off one by one, and that the state knew they were in violation of federal law, but didn't have the funding until the legislature appropriates the money."

At the Elder Law Section luncheon, Judge George Greer, another award recipient for his courage to follow the law in the Terri Schiavo end-of-life case, commented: "You know, one of the things lawyers get bashed about is class action suits. We constantly hear it. The good stuff about class action suits doesn't get noticed.

"I am a probate judge and have been since dirt was young. I didn't know until this afternoon what Batman had done. That's sad this isn't out there where the public knows that there are good lawyers. And John is a very good lawyer doing great things for disadvantaged people and not getting paid for it. It's just a shame that's not out there for everybody to know. I compliment you. That's great stuff."

Even though elder law attorneys "expect to see dramatic changes in dramatic reductions in Medicaid benefits," Bach said, "none should affect the gains we got in this program."

Yanchunis said his work on this case is not over.

"We are ever-vigilant. If the state does not comply with any aspect of that program," he promised, "we will file another suit."