

ELDER LAW

BY DANIEL G. FISH

Selective Enforcement Defense to Medicaid Spousal Claims Rejected

IN TWO RECENT decisions, the Appellate Division has rejected a novel defense, selective enforcement, to suits by Medicaid against refusing spouses.

Spousal refusal lawsuits are a continuing saga¹ for married couples, when one spouse needs nursing home placement. To avoid impoverishment, the healthy spouse may "just say no" and his or her finances will be disregarded in the Medicaid application of the ill spouse. Medicaid must approve the application of the ill spouse, but retains the right to bring suit against the refusing spouse.

Defendants in suits brought by the New York City Department of Social Services have tried a variety of defenses: federal preemption (*Commissioner v. Spellman*, 672 NYS2d 298 (1st Dept., 1998)), failure to plead a condition precedent to an implied contract (*Commissioner v. Fishman*, 713 NYS2d 152 (1st Dept., 2000)), stay of proceeding to allow administrative remedy (*Commissioner v. Mandel*, *The New York Law Journal*, Sept. 14, 2001 (Sup. Ct., N.Y. County)). None of these defenses was successful.

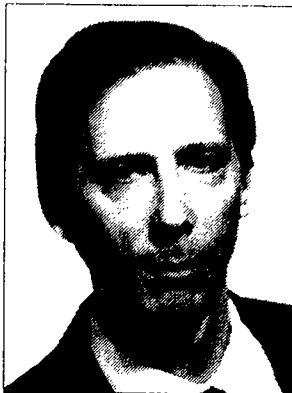
The new theory alleges that in deciding which refusing spouses to sue, Medicaid used a constitutionally prohibited standard. This defense was raised in *Commissioner v. Jones*, 761 NYS2d 191 and *Commissioner v. Warrington*, 2003 NYAppDiv. LEXIS 9158. The selective enforcement concept is currently associated with the challenge to racially motivated traffic enforcement cases that have received great publicity.

'Jones'

Harry Jones entered a nursing home in 1993. He was married at that time. A Medicaid application was filed in his name alone and his wife executed a spousal refusal form indicating that she would not make her income and/or resources available for his care. Mr. Jones' application was approved and Medicaid began making payments to the nursing home on his behalf. In 1996, Medicaid initiated litigation and Mrs. Jones filed an answer. Activity on the case was dormant for about four years. In 2001, the defendant filed a motion seeking permission to amend her answer to include a new affirmative defense, selective enforcement in prosecution. Defendant alleged that the new affirmative defense was based upon information not available at the time she filed her original answer. She also requested discovery of the manner in which the department made its decision on whom to sue among all of the refusing spouses.

In support of the claim, defendant offered the following proof: "There can be no doubt that selective and secretive enforcement decisions are taking place within DSS. The question must be answered: Has Defendant Laure Jones been targeted for ethnic or other prohibited discriminatory reasons? (Defendant is of Middle Eastern ethnicity.)"

Anita Warrington was sued as a refusing spouse and



she filed her answer in 1996. In 2000, she amended her answer to include an allegation of selective enforcement. She requested authority to conduct discovery to prove her claim.

In support of her claim, she offered the fact that Medicaid did not sue every refusing spouse. "Upon information and belief, the Plaintiff did not seek recoupment from each and every community spouse who had executed a spousal refusal letter and whose assets and income exceeded the amounts pleaded in the complaint. ... Because Plaintiff failed and/or refused to commence such recovery/recoupment actions as aforesaid, this Defendant has been discriminated against by reason of the selective enforcement of the statute by the Plaintiff."

The healthy spouse may 'just say no' and his or her finances will be disregarded in the Medicaid application of the ill spouse.

Publicity During 2000

In 2000, Medicaid announced that it intended to vigorously pursue spousal refusal cases. There was an immediate response from the media (*The New York Times*, Sept. 14, 2000, "City Called too Aggressive on Health Care Repayment: Financial Threat to Middle Class Is Seen"; *Newsday*, July 15, 2000, "It's All a Matter of Refusal"; *Village Voice*, Aug. 16, 2000, "Pinching Pennies: City Agency Targets Elderly for Payback"; *CBS News*,

Channel 2, Jan. 30, 2001. Testimony at a hearing before the city council, showed that in fiscal-year 2000, there were 40,000 applications filed for Medicaid and 3,101 of those were spousal refusals. Of these cases, 279 were referred to the legal division of Medicaid and 53 settled. There were 60 ongoing cases in litigation, but they included cases going back to 1992.

It is from these sources that Ms. Jones and Ms. Warrington based their theory of prohibited selective enforcement. They were able to demonstrate that Medicaid did not bring suit against all refusing spouses. However, they did not allege that Medicaid made its decision based upon race or sex or religion. They requested discovery of Medicaid to determine whether an impermissible standard was used.

Trial Court

The trial court allowed Ms. Jones and Ms. Warrington to amend their answer and granted discovery to support their assertion. The Department of Social Services appealed. Separate panels of the Appellate Division unanimously reversed *Jones* and *Warrington*. The *Jones* opinion found that: "Defendant's motion papers do not include any evidence or information that would provide factual support to her conclusory allegation that plaintiff's prosecution of this action is tainted by constitutionally impermissible discrimination. In the absence of a showing of even the slightest good faith basis for belief in the merit of the proposed additional affirmative defense, the motion to amend the answer should have been denied."

The *Warrington* decision noted that unequal treatment in and of itself does not give rise to constitutional equal protection guarantees. The court held that to succeed, a selective enforcement defense must show disparate treatment but must also include a showing

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that the unequal treatment is traceable to a protected class.

Conclusion: Certainty

Two separate panels of the Appellate Division, First Department, 10 judges in all, reviewed the selective enforcement argument. The rejection was unanimous. Not one judge accepted the selective enforcement argument.

Elder law clients want certainty. The question on the mind of many seniors is: "If I file a spousal refusal

Medicaid application, will I be sued? Do I have any defense?" There is no definitive answer to that question. This is a developing area and new approaches may emerge. However, clients can be told that selective enforcement is not a viable defense.

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(1) For a detailed explanation of spousal refusal see two prior NYLJ articles, Fish, Daniel G. "Spousal Refusal Lawsuits Increase" May 21, 2001 and "Medicaid Spousal Refusal Lawsuits: 'Commissioner v. Mandel'" Dec. 17, 2001.

FREEDMAN AND FISH, LLP

Daniel G. Fish
Attorney at Law

521 Fifth Avenue, New York, New York 10175

Telephone: 212.953.1172 • Fax: 212.953.5323

E-mail: dfish@fandflaw.com