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Defrauded elderly to be reimbursed

BYLINE: Jodi Sokolowski

As many as 20,000 nursing home residents, the vast majority of whom may now be deceased, will be reimbursed through a settlement approved Dec. 28 by Hon. John Curtin, senior judge of the U.S. District Court for the Western District of New York.

The settlement resolves *Conrad v. Perales*, a class action filed in 1992 on behalf of thousands of New York nursing home residents.

Curtin approved creation of an \$11 million fund to reimburse residents who were defrauded by having to pay Medicaid co-pays even though they were eligible for Medicare.

"The thing about this case is, the state was an active participant in the fraud. In fact, the author of the fraud was a state program that (allowed for) the double billing and collection of funds of poor people," said lawyer Henry Killeen III of Killeen & Killeen, lead litigation counsel for the plaintiffs, referring to the Medicare Optimization Program (MOP II) created by the New York State Health Department in 1989.

Because the state Medicaid program, which primarily provides custodial care, is considered the "payer of last resort," nursing home residents must forward all their income, including Social Security benefits and pensions, to the facility they live at. However, seniors who qualify for Medicare, which usually involves specific medical care, can keep their income, and Medicare will cover their nursing care in full.

MOP II required nursing homes to bill both Medicaid and Medicare on behalf of nursing home residents. Homes would keep the proceeds from whichever program paid higher benefits -- usually Medicaid -- and send the remaining benefits, usually Medicare, to the state.

Federal law, however, requires nursing homes to accept Medicare reimbursement in full satisfaction of a patient's covered services.

It is believed that thousands of New Yorkers in nursing homes may have been affected.

The double-billing was discovered by Anthony Szczygiel, an attorney at Legal Services for the Elderly, Disabled or Disadvantaged of Western New York Inc. who is also a professor at the University at Buffalo Law School, where he heads the elder law clinic.

Szczygiel filed a class-action lawsuit against the New York State Health Department in 1992 contending that the state did not abide by federal requirements to refund the victims.

"This is significant for our clients," Szczygiel said Tuesday. "I am very sorry that the settlement came about long after our class members died, (but) the settlement may help avoid future problems."

The case, Killeen said, has been Szczygiel's "world" for more than a decade.

"He's given his professional career to this issue. He's been trying to make this right for a long time. It's been such a monumental effort," said Killeen, who, along with his wife, borrowed money and withdrew retirement savings to fund the litigation.

"I think justice has been done, 15 years later," said Karen Nicolson, executive director of Legal Services for the Elderly.

Data from the Center for Medicare Advocacy was used to identify class members from computer and paper records. Szczygiel and Killeen said Complete Claim Solutions has been appointed to serve as settlement administrator for the case and will locate class members and their heirs. Reimbursements will be determined according to a percentage of the illegally collected co-payments paid by each resident, which range from \$100 to \$5,000.

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