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UP CLOSE | **STRATEGIES**

Case put doctors back in the driver's seat

Plaintiffs believed that HMOs were gaming the system against them.

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PLAINTIFFS' TEAM: *Joe R. Whatley Jr. and Edith M. Kallas felt that settling for money without changing industry practice would be a Pyrrhic victory.*

MONEY ISN'T everything—not even $1.5 billion, give or take a few million. Especially not to physicians frustrated by the power of managed care companies to overrule their medical judgments about patient care.

"Letting the defendant just pay money and keep on keeping on is sometimes the worst of all worlds," said Joe R. Whatley Jr. of the Birmingham, Ala., firm Whatley Drake & Kallas. Earlier this year the firm settled a string of lawsuits brought on behalf of doctors and state medical societies alleging that nearly all of the nation's managed health care providers conspired to deny or reduce payments to doctors for covered medical services.

The settlements require health maintenance organizations (HMOs) to compensate doctors for claims that they improperly denied or reduced. Even more important to the plaintiffs, the health care companies are obliged to fundamentally and permanently change the way they interact with doctors and to be much more circumspect in the way they influence the care physicians provide their patients.

"I think everyone recognizes these settlements have changed the way doctors and health plans interact," said Edith M. Kallas, Whatley's colleague.

Whatley Drake took on the managed health care industry beginning in 2000 with *In re Managed Care Litigation*, No. MDL-1334 (S.D. Fla.). The sprawling class action pitted approximately 900,000 physicians and 20 state medical associations against HMOs that collectively accounted for about 80% of the managed care industry in the United States.

THE PLAINTIFFS' HOT LIST

The plaintiffs alleged that the companies engaged in a nationwide racketeering conspiracy by gaming their claims software to delay, deny or reduce reimbursements. Within the past four years, seven of the 10 defendants in the *Managed Care* suit have settled, with cash payments well exceeding $1 billion.

A second lawsuit, *Love v. The Blue Cross Blue Shield Assoc.*, No. CV-03-21296 (S.D. Fla.), brought essentially identical claims against the Blue Cross network. Blue Cross settled in April for $131 million and agreed to make changes demanded by doctors.

Blue Cross officials did not reply to e-mails and phone calls asking for comment.

Repeated instances of HMOs, in effect, overruling their medical judgments by refusing to pay for treatments pushed the doctors to litigate, said Bob Seligson, executive director of the North Carolina Medical Society and a key actor in the litigation and settlement negotiations.

They were unbending before, and now we have their attention.

—Bob Seligson, N.C. Medical Society

'Last resort'

"Litigation was our last resort because, frankly, when you consider the time and expense, nobody wins. But we needed the managed care industry to understand that their policies were unfair," Seligson said. "What we have now is not perfect, but it is a lot better. They were unbending before, and now we have their attention."

The foundation for the litigation was set in place by the Supreme Court ruling in *Humana v Forsyth*, 525 U.S. 299 (1999), which held that managed health care companies could be sued under the Racketeer Influenced and Corrupt Organizations Act. Whatley Kallas brought its first racketeer action against an HMO in 2000 and obtained class certification on behalf of 950,000 doctors. The 11th U.S. Circuit Court of Appeals affirmed the class certification in November 2004, setting the stage for marathon settlement negotiations as the two sides prepared for a trial.

While the litigation was under way, Kallas took a pro bono assignment that taught her first hand the frustration suffered by doctors who are overruled by managed care bureaucrats. She agreed to represent a man insured by Cigna Corp., which refused to pay for treatment recommended by specialists at the Memorial Sloan-Kettering Cancer Center. The insurance company declared that the treatment was not medically necessary. Kallas quickly learned that not a single cancer specialist sat on the company's review panel. The insurance company ultimately paid for treatment and the man recently paid a visit to Kallas to celebrate three years of being cancer-free.

Kallas and Whatley said that doctors and representatives of state medical societies were key players in crafting the settlements, with the goal of preventing insurance companies from vetoing the life-and-death decisions made by doctors. The settlements all require insurers to adopt a definition of medical necessity based on generally accepted medical standards. Additionally, they are required to abide by payment rules negotiated with doctors, establish an inexpensive and efficient process for deciding billing disputes, and allow independent experts to decide appeals when claims managers deem treatment not medically necessary.

"Doctors reviewed each of the settlements—not just at the end but as the negotiations were progressing," Whatley said. "What it was really all about for the doctors and the medical societies was providing the kind of medical care the doctors are trained to provide."

One of the settling companies, Prudential Insurance Co. of America, has since left the managed care business. Consequently, it will provide $22 million to help finance enforcement of the settlement terms. Any member of the plaintiff class who believes a settling HMO is out of compliance with the settlement has access, at no charge, to a facilitator who will bring the complaint to an external appeals officer chosen by both sides.

"It's working very well," said Tim Norbeck, recently retired after 30 years as the executive director of the Connecticut State Medical Society but still active in overseeing implementation of the settlement. "We have a fund in place that really allows us to act as watchdogs. This has certainly benefited patients. Only doctors should decide what is medically necessary."

The litigation has recovered huge sums of money for doctors while changing the managed care industry for the better, Kallas said. Neither she nor Whatley nor their clients would settle for less.

"It is real important to us that the class members get the injunctive relief," Kallas said. "You shouldn't settle if [the defendants] are just going to go back the next day and do the same thing. That puts you in a worse position than if you hadn't settled at all." NLJ