

## In insurance fights, a healthy return for firm

With WellPoint case, Whatley Drake & Kallas adds to reputation as tough foe in health care battles.

BY NATE RAYMOND

**F**or most Americans covered under the Obama health plan, three years will need to pass before health insurance companies can no longer exclude them because of pre-existing conditions.

Thanks to a settlement in a class action against a subsidiary of WellPoint Inc., more than 120,000 California residents are getting that benefit from their insurer right now.

Approved in August, the settlement was, in part, the result of efforts by Edith Kallas, a New York partner at Whatley Drake & Kallas. Kallas has gained a reputation in recent years of going up against insurers in health insurance class actions. "We feel we've accomplished a lot," Kallas said.

Kallas has battled insurers over premiums, claims and coverage, and her scorecard includes a \$128 million settlement in 2007 with most of the Blue Cross and Blue Shield health plans in the country. The health plans had been accused of underpaying doctors.

A former partner at Milberg, Kallas took her health care practice to the Alabama-based Whatley Drake in 2006 amid the plaintiff kickback scandal and indictment that rocked her former firm. Despite the move, Kallas has managed to retain her reputation and clients, including the American Medical Association. "What we've tried to achieve is a fairness in the system for doctors and patients who don't have the leverage of insurance companies and, at least in our opinion, are taken advantage of," Kallas said.



ROHANNA MERTEENS

WHATLEY DRAKE & KALLAS

She acknowledges she's not always successful. A federal district judge in New Jersey on Sept. 23 dismissed much of a consolidated putative class action accusing Cigna of scheming to underpay for out-of-network services used by people with employer-sponsored plans. Whatley Drake is co-lead counsel for health care providers and medical societies in that case. (Other such cases have had more success. A federal judge in Los Angeles in August allowed part of a similar putative class action against WellPoint to move forward.)

The case that led to the California settlement with WellPoint's Anthem Blue Cross—the “death spiral” litigation, as lawyers on the suit refer to it—was filed in March 2010 amid the final days of debate in Congress over passage of the Obama health plan, the Patient Protection and Affordable Care Act.

WellPoint had faced controversy during the health care debate for attempting to raise California premiums by as much as 39%. In the ensuing congressional and media firestorm, WellPoint canceled the increases.

In the complaint, filed by Whatley Drake and co-counsel at the Santa Monica, Calif., advocacy group Consumer Watchdog, the plaintiffs accused Anthem of violating California's so-called “death spiral statute” by closing certain blocks of insurance without providing enrollees the option to switch to another plan.

In their view, Anthem's decision would have driven younger and healthier enrollees to other plans. Left behind would be enrollees with pre-existing conditions, who faced higher premiums. As more enrollees left, premiums would spiral out of control. “The whole point of the statute is to prevent that,” Kallas said.

“

What we've tried to achieve is a fairness in the system for doctors and patients who don't have the leverage of insurance companies.

”

—EDITH KALLAS

The plaintiffs immediately sought discovery to back an injunction, Kallas said, a request Judge Frederick Bysse granted. Meanwhile, Whatley Drake filed a public records request with the California Department of Managed Health Care for documents related to the block closures filed by Anthem, according to court documents. By the time the health department filled the request in April, Kallas and Anthem's Reed Smith lawyers were already in settlement talks. The day Kallas got the documents, Anthem also agreed to a confidentiality agreement and to produce documents.

After more than a year of negotiations, a settlement was reached in May that was preliminarily approved a month later. Under the deal, class members can switch plans without underwriting every year until 2014, when the health care law becomes effective. “However, if that law somehow does not go into effect, people will get one last chance to move,” Kallas said.

In some ways, according to Whatley Drake, the settlement has terms that are even better than the

lawyers could have achieved had the case proceeded. The death spiral law only provided for a one-time switch. The deal also provided rate caps for consumers who remain in their closed plans. “It's even broader than we originally sought,” Kallas said.

Given that the settlement was terms-based and involved no cash component, “it's hard to put a dollar value on it,” Kallas said. As part of the settlement, Anthem agreed to pay \$2 million in attorney fees and expenses, a figure based largely on hours. Bysse in his August order approving the settlement called it “fair value” in exchange for dropping the suit.

Anthem counsel Kurt Peterson of Reed Smith declined comment. Anthem in a statement said it sees “as our responsibility to develop policies that are flexible enough to meet the needs of our customers.” It also noted the company admitted no wrongdoing as part of the settlement.

While the death spiral case turned on California law, Kallas said similar results could likely be achieved in other states. Some states have statutes similar to California's death spiral law, she said, and in other cases suits could just be brought under consumer protection statutes. With health insurance premiums continuing to rise and the health care law under continued attack even after passage, there might just be a role for that kind of case. Kallas said she sees the settlement as an example of how class actions, despite the criticisms, can benefit consumers in meaningful ways. After the settlement was announced, Kallas said she received calls and e-mails from many people in the plans thanking her for the deal. “We feel good that we were able to get something for the class on a timely basis,” she said.

*Nate Raymond can be contacted nraymond@alm.com.*