THE AMERICAN LAWYER
AUGUST 2005
ALM

Class action lawyer **Joe Whatley** files big suits against global corporations for small business owners. Next up: proving that managed care companies cheated doctors out of billions.

By Matt Fleischer-Black

Main Street MUSCLE

EAR, NOSE, AND THROAT DOCTOR Michael Abidin was frustrated. Once again, an insurance company had stiffed him on a claim. Weeks before, the Alexandria, Virginia, physician had examined a female patient complaining of a hoarse throat. Abidin reviewed her family medical history looking for relatives with throat cancer. Then he slowly threaded a scope through her nose and down her throat for an examination.

Afterward, his office submitted a $205 claim to United Health Care Group Incorporated to cover his evaluation and the laryngoscopy. United chose only to pay for the laryngoscopy, which cost $122.69.

The doctor was accustomed to this treatment. During the early months of 2000, Abidin says, insurers had refused to pay for exams before procedures 15 times, maybe more—he was losing count. Why were insurers rejecting claims for standard medical practices and procedures?

At about the same time, in Birmingham, Joe Whatley, Jr., believed he had solved the mystery, which was not limited to Abidin's experience. In his view, insurers were routinely denying claims in order to improve their financial performance. Since 1990, he estimated, managed care companies had saved at least $10 billion by shortchanging doctors. So, with fellow Birmingham lawyer Archie Lamb, Jr., and Decatur, Alabama, lawyer Nicholas Roth, among others, he filed a class action on behalf of 950,000 physicians, including Abidin.

The insurers, according to the suit, swindled the doctors by systematically and fraudulently cutting their bills. Health plans rely on software to process hundreds of millions of claims a year. Each claim carries some combination of 8,000 five-digit codes to describe individual procedures. Ten leading managed care companies, the lawsuit says, rigged this software to automatically ignore some codes and change others to reflect less costly procedures. They then counted on doctors' offices being too overwhelmed or perplexed to appeal. (Not so Abidin. The doctor did appeal—twice—before United Health paid him for the throat exam.)

The insurers insist that they properly handled the vast majority of claims. They say that when they make changes in claims, it is generally because the form was filled out incorrectly or because doctors are padding their bills. In a survey reported in the *Journal of the American Medical Association* in 2000, 39 percent of physicians admitted that they exaggerated the severity of patients' conditions, made up symptoms, or altered diagnoses on claims. Insurers have invested hundreds of millions of dollars in automation to catch these problems, says Jeffrey Klein of New York's Weil, Gotshal & Manges, a spokesman for the defendants in the case. "The industry's reimbursement speed rivals or exceeds the vendor payments of virtually any other industry," Klein says.

After a six-year, up-and-down journey, the doctors will soon have their day in federal court. In September the doctors' lawyers will present their case against four insurers to a mock jury in Miami. The real trial follows in January. The stakes are high; triple damages are possible. On top of any payout, presiding judge Federico Moreno could order the companies to make expensive administrative changes.

The doctors brought their claims under the Racketeer Influenced and Corrupt Organizations act and had some early success. In 2002 Moreno let the RICO claims go forward. The next year Whatley's team settled with Aetna Inc. and CIGNA Corporation, two of the three largest health insurers. Aetna agreed to pay the doctors $500 million; CIGNA, $325 million. Both carriers agreed to modify their practices. They will, for example, no longer ignore exams like the one that Abidin performed.

In 2004 the case hit a setback when the U.S. Supreme Court ruled, 8 to 0, that insurers could force the doctors in their networks to arbitrate the RICO claims. To keep the case—and the possibility of triple damages—alive, Whatley's team switched tacks. The doctors dropped

PHOTOGRAPH BY DANIEL LINCOLN

all their claims against the insurers with whom they had contracts, in order to avoid a binding arbitration clause in those contracts. Now the doctors are suing those insurers with whom they did not have a contract—their insurers' competitors.

Klein, the insurers' lawyer, says the move was transparent. "They sue everybody else for conspiring with the company who they actually have the contract with," says Klein. "It's an absurd proposition." Yet the U.S. Court of Appeals for the Eleventh Circuit approved the doctors' reformulation of their case in November 2004; then, on May 31, the Supreme Court declined to intervene a second time, moving the case toward trial. Since that time, four smaller defendants have settled and have agreed to modify their practices. Health Net, Inc., Prudential Insurance Company of America, Anthem Inc., and Wellpoint Health Networks Inc. will also pay a total of $200 million before legal fees.

The trial comes at an uncertain time for managed care companies. The defendants have enjoyed double-digit growth in profits each year since 2000. Given the cyclical nature of the business, profits are likely to slow over the coming years, says Curt Morrison, a health care analyst at Morningstar, Inc. A loss in court could damage the insurers' reputation and hurt their standing in policy debates.

WHATLEY SEES THE doctors' case as an example of little guys standing up to resist the financial clout of large buyers. In his view, insurers have effectively prevented doctors from negotiating better pay. They must accept the terms and conditions that the insurers offer. "It's very important to advance the rights of people who rely on somebody to get paid," says Whatley.

Antitrust regulators have not often pursued cases against big buyers for squeezing suppliers. The Federal Trade Commission had an opportunity during the recent merger between cigarette makers R.J. Reynolds Tobacco Holdings Inc. and Brown & Williamson Tobacco Co. The agency could have imposed conditions to protect the negotiating power of tobacco growers, but didn't. There are now just three major U.S. buyers of tobacco leaf.

In the doctors' case and others, Whatley is emerging as a private watchdog, scrutinizing business competition. To help cattle ranchers who must accept the prices offered to them, he has sued the three biggest meatpackers for antitrust violations. To help Main Street druggists in similar circumstances, he has sued the four dominant pharmacy benefit managers.

Whatley acquired his sense of fair play from his parents and from his hometown, Monroeville, Alabama, population 7,000. The author Harper Lee, who wrote *To Kill a Mockingbird*, grew up in Monroeville. The book was published in 1960, when Whatley was 7 years old. "*To Kill a Mockingbird* played a role in the lives of everybody who grew up in my generation in Monroeville," Whatley says. "It's . . . to a large extent about racial injustice." When Whatley entered the county high school, the students were nearly all white. Then the courts ended segregation, but many of Whatley's neighbors simply sent their children to new all-white private academies. Whatley's banker father, Joe Sr., and his mother kept their son in public school.

As a teenager, Whatley witnessed a peculiar celebration that inspired his skepticism toward big business. A nonunion textile mill was honoring employees for 25 years of service. Weeks before, the mill had laid off several of the honorees. "The fact that they go and pick older workers who devote that many years to the company, who've worked for them for 25 years, and lay them off, made me realize the potential for mistreatment," he says.

Whatley went north for college, to Harvard University, where he studied labor economics, but returned south for law school, at the University of Alabama, and a clerkship with a federal judge in Birmingham in 1980. From there, he joined Birmingham's Cooper, Mitch & Crawford, one of the few firms in the Southeast to represent unions.

In the years that followed, his hometown provided another business lesson. Wal-Mart Stores, Inc., opened a store in town. Whatley saw his neighbors' shops on the town square falter and close. Some neighbors didn't find equivalent jobs. "Wal-Mart is damaging our economic base in this country," by taking away money from local merchants, he says.

Some of that money ends up in the pockets of consumers, who pay less at Wal-Mart than they did at the local shops. Whatley is not persuaded that the aggregation of power in the hands of Wal-Mart, the insurance industry, or the cattle cartel is a good thing. "You'll see arguments that what the antitrust laws are all about is having cheaper prices for consumers. That's not the only goal of antitrust laws. The goal is also to have markets that operate competitively, markets that operate fairly," he says.

Whatley's doctor clients are hardly suffering. Doctors, on average, earn $187,000 a year, according to the Robert Wood Johnson Foundation. Still, from 1995 to 1999, says the Center for Studying Health Care Change, doctors' income declined 3.5 percent.

Whatley himself has been rewarded. Through the earlier doctors' settlements, his firm has earned more than $4 million, about one-and-a-half times its investment in hours and expenses since 1999. Such success has helped him pull through a business squeeze of his own: Tort reform has dried up consumer class actions in Alabama. In a bigger shift, now that his practice involves more antitrust cases, he resides part-time in New York City.

Whatley's legal campaign for small business began not with doctors but with ranchers. A thousand miles away from Whatley's office, cattle rancher Bob Rothwell has seen neighbors in Nebraska's Sandhills region give up feeding steers and take to truck driving. The Rothwell family has ranched for six generations, but Rothwell says meatpacking companies are threatening his livelihood. In the late 1980s, leading packers signed up select ranchers to pledge their livestock in advance, and stopped bidding on Rothwell's cattle. Competition shriveled like a cornstalk in winter.

In 1996 Whatley teamed with Alabama lawyers who filed three class actions on behalf

JOE WHATLEY, JR.

BORN: Selma, Alabama, June 14, 1953

EDUCATION: Harvard College, 1975, and the University of Alabama School of Law, 1978. Clerk to Frank McFadden, former chief U.S. district court judge for the Northern District of Alabama.

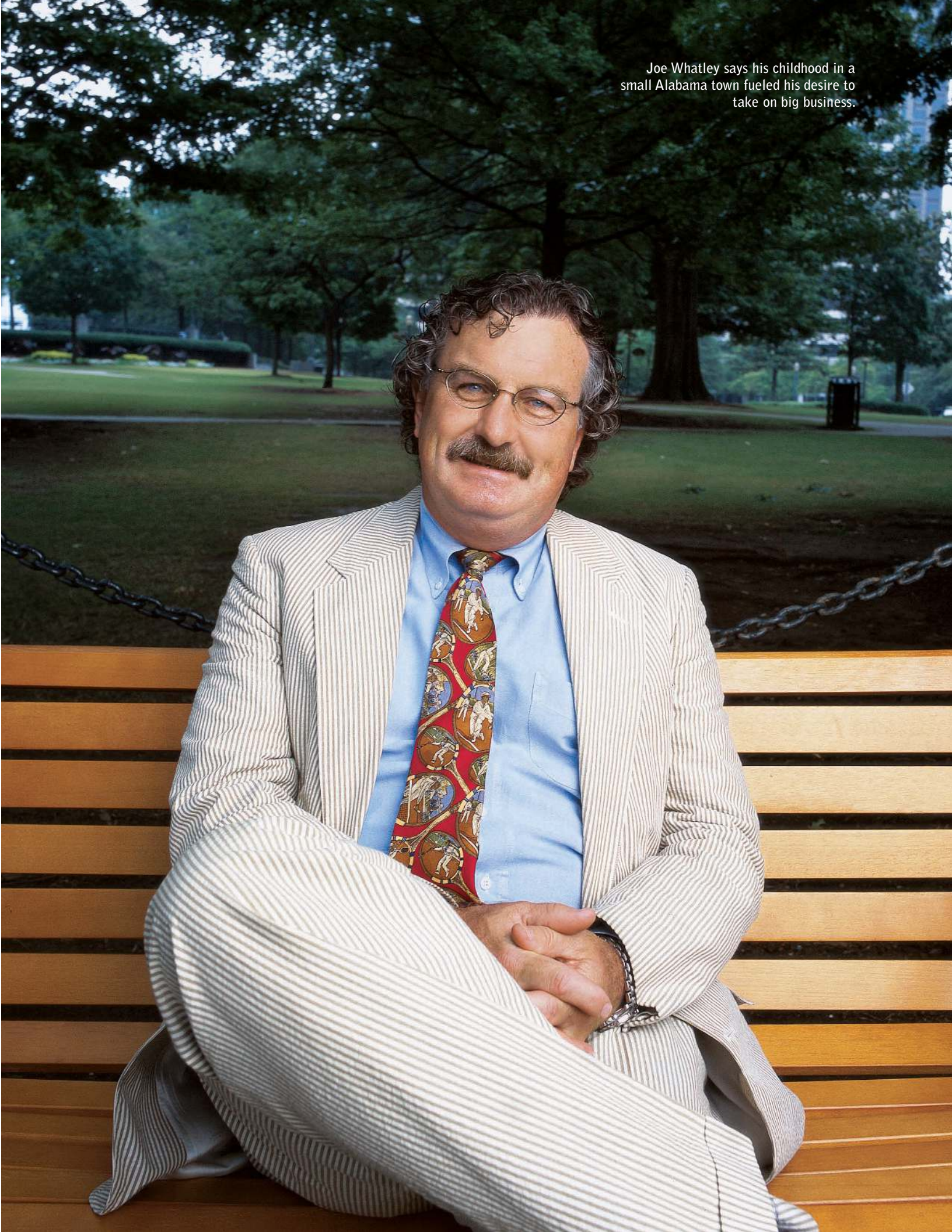
CAREER HIGHLIGHTS: Garnered an $81.6 million settlement from Jenkens & Gilchrest for investors who relied on the firm's discredited tax-avoidance advice (2005).

Obtained $1billion and changes in business practices from health insurers Aetna and CIGNA for 900,000 doctors who accused the companies of underpayment (2003).

Won court-ordered changes to Alabama's higher education system for Alabama A&M and other historically black universities. The universities claimed state administrators had shortchanged them on funding and other resources (1985–95).

Successfully defended the United Steelworkers of America against racketeering charges, despite bribery convictions of union representatives (1994).

Defended city of Birmingham's minority business enterprise system against reverse discrimination claims (1989).



Joe Whatley says his childhood in a small Alabama town fueled his desire to take on big business.

of Rothwell and other ranchers, who accuse Tyson Foods, Inc., Swift & Company, and Cargill, Incorporated's Excel Corporation division—the biggest meatpackers—of illegally drying up the cash market for cattle. They argued that the packers' long-term supply contracts with the other ranchers restrained trade in violation of the Packers and Stockyards Act of 1921. A federal jury agreed. In February 2004 the jurors rejected Tyson's argument that its contracts had kept prices low for consumers. The jury awarded Whatley's ranchers $1.28 billion in actual damages for lost profits.

Whatley's team didn't win over the trial judge, though. Judge Lyle Strom overturned the jury decision, concluding that Tyson had good commercial reasons for the contracts. In December 2004 Whatley argued an appeal for the ranchers in the Eleventh Circuit. At press time the judges had not released a decision. Two antitrust experts, speaking privately because of their corporate clientele, say that the ranchers have a good chance to win on their argument of illegal restraint of trade.

WHEN WHATLEY STARTED working for the doctors, their way of life seemed to him to be at risk, too. "I had a number of friends who had gotten themselves out of medicine," he says. Beyond the paperwork, they were being driven crazy by insurers overruling their judgments. One friend retired in his forties and began teaching middle school. "It struck me as sad that someone invested so much of his life to become a doctor, especially one who was a specialist, and then just said 'I'm fed up with it,' " says Whatley.

The 2003 settlements with Aetna and CIGNA helped remedy his friends' concern. In it, the companies agreed to review patients' records before denying care. They also pledged to trust doctors' judgments more. They promised to approve treatments or tests accepted by practicing doctors, even if related scientific studies had not been completed. "The medical community can see to it that health plans no longer run roughshod over physicians with impunity again," wrote the editorial board of *American Medical News*, a weekly publication of the American Medical Association. (The AMA was not a plaintiff.)

To win, the doctors' lawyers must show that the companies acted in concert to deny claims. It's not enough to simply show that they all adopted the same tactics. They may have done so because they all came to independent decisions that such tactics made sense. On the other hand, Whatley will not have to show that a conspiracy was explicitly discussed. He can urge the jury to infer intent from circumstances.

One of his threads of evidence will be a series of "users group" meetings held by McKesson Corporation, which makes ClaimCheck, the software that most of the insurers use (or have adapted). At those meetings, the insurers' executives told McKesson how to program its ClaimCheck software, he says. Did they do that to chisel the doctors? "What they're going to say is, 'There's no way they could have done anything else,' " says Michael Bruyere of Lord, Bissell & Brook in Atlanta, who has been following the case. " 'Just look at how much money was made, the meetings they had, what the product of those meetings were.' " (The doctors did not sue McKesson, because of gaps in the initial evidence, says Whatley.)

Klein replies that this is all a fantasy. Key evidence about the meetings remains under seal.

This will not be an easy case to explain to a jury. The health care reimbursement system has many moving parts. There are about 800,000 different benefit plans; 5 million processing rules in ClaimCheck; and a coding system that regularly expands to allow for new procedures. "Physicians spend 8–12 percent of whatever they collect on actually collecting it," says Ken Beasley, a Memphis-based consultant to physicians. On the other side, insurers spend $10 billion annually to reconcile the nearly 40 percent of claims that they cannot process automatically.

Some observers say the complexity may benefit the doctors. "Jurors typically feel better about their physicians than they do about their insurance company," says Bruyere, who represents both types of litigants in fraud cases. Whatley hopes that jurors will not hold it against doctors that they live in the rich part of town. "In our economy, jurors assume everyone has to make money," says Whatley.

If jurors see the case his way, Whatley's own payday may be coming up soon.

E-mail: mfleischer@alm.com.