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THE PLAINTIFFS'
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WHATLEY DRAKE & KALLAS

MONDAY, OCTOBER 22, 2007

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The plaintiffs' bar isn't dead yet

FUNNY THING about the death of the class action: Someone forgot to send the memo to the plaintiffs' bar.

Judging from the dozens of nominations we received for this, our sixth, annual list of the country's most prominent plaintiffs' firms, the plaintiff's bar is as aggressive as ever, maybe even more so. Plaintiffs' attorneys racked up impressive verdicts and settlements in the usual areas like securities fraud and products liability since last year, while exploring fresh ground against self-serving managers and controlling shareholders in corporate deal-making.

They even got something like a class action to fly in Europe, as staff reporter Vesna Jaksic discovered.

The bottom lines on these cases look bigger, too. The top five firms in the Securities Class Action Services ranking of plaintiffs' firms by settlement value brought in nearly \$12.8 billion in 2006, compared with a shade less than \$9.8 billion in 2005.

What we've got here, said Stanley Bernstein of Bernstein Liebhard & Lifshitz in New York, is "the law of unintended consequences of the Securities Reform Act" and other tort reforms.

That process has culled the herd of weaker cases, but freed plaintiffs' counsel to more vigorously litigate the cases that remain. Witnesses who might have escaped notice in the past are more likely to find themselves in a deposition room now.

"When you finally survive all the hurdles that Congress and the courts have put in the way, you've got an unbelievable case—and that case is going to be pursued to the very end," Bernstein said. "The ultimate dollars paid are going to be bigger."

"Good firms are creative and tenacious and will find ways to win," said Sherrie R. Savett, a partner at Philadelphia's Berger & Montague. "Even if the cases are difficult and there are obstacles—legal obstacles, difficult judges, evidentiary problems."

As Bernstein noted: "Fraud's the same." And a vigilant plaintiffs' bar is perhaps the best corrective, as staff reporter Lynne Marek reports. Our regular contributor Peter Page found another example involving health insurers accused of gaming the system to deny or delay reimbursements to doctors. Matthew Hirsch of NLJ affiliate *The Recorder* examines what

happens when a settlement doesn't stay settled.

The Hot List is our unscientific survey of the litigation scene since the summer of 2006. We asked our readers to nominate exemplary firms that devote at least half of their resources to plaintiffs' work, and which have achieved at least one significant win during that period. "Significant" means winning an awful lot of money through a bench or jury verdict, or otherwise defining industry practices or the progress of related litigation.

We also considered firms' track record over the preceding five years, and supplemented the fat pile of nominations we received with our own research. We recognize that important cases don't always end in verdicts, so we highlight a number of significant settlements here. We admit that the process was subjective, and that some wonderful firms didn't quite make the cut.

Of those that did, seven firms were on last year's list—including Coughlin Stoia Geller Rudman & Robbins, minus former name partner William S. Lerach, one of the year's casualties.

—MICHAEL MOLINE

Whatley Drake & Kallas

Whatley Drake & Kallas was founded in Birmingham, Ala., just nine years ago, but is fast building a reputation for its leadership role in class actions that have recovered billions of dollars and forced significant corporate reforms. In 2004, name partner Joe R. Whatley Jr. won a \$1.28 billion jury verdict for a class of cattle ranchers in *Pickett v. Tyson Fresh Meats Inc.* that, although tossed by the judge, was the largest to date involving alleged anti-competitive practices in that industry. The 45-attorney law firm also has offices in New York and Boston.

NOTEWORTHY CASES:

■ ***Love v. The Blue Cross Blue Shield Assoc.***, No. CV-03-21296 (S.D. Fla.). Co-lead counsel Edith M. Kallas, Joe R. Whatley Jr. and Joseph P. Guglielmo. Roughly 90% of the country's Blue Cross affiliates settled this racketeering class action alleging that they gamed their reimbursement systems to delay and deny payments to doctors. The plaintiffs claimed that some insurers rigged their computer systems to automatically reject or downgrade certain medical services. The deal guarantees \$131 million for the doctors and medical societies involved, plus additional reforms that could boost the value of the case above \$1 billion. It followed similar successful actions against insurers beginning in 2003.

■ ***In re Brokerage Antitrust Litigation***, No. MDL-1663 (D.N.J.). Co-lead counsel Edith M. Kallas, Joe R. Whatley Jr. and Joseph P. Guglielmo. The plaintiffs claimed that in tying broker commissions to the number of policies they sold or renewed, insurance companies and brokers violated antitrust and racketeering laws. Zurich Insurance Co. settled for more than \$100 million, and the Arthur J. Gallagher & Co. brokerage settled for \$28 million.

■ ***In re HealthSouth Corp. Securities Litigation***, No. CV-02-BE-1500-S (N.D. Ala.). Coordinating counsel Doug Jones and Jack Drake, with Labaton Sucharow and Coughlin Stoia Geller Rudman & Robbins. The plaintiffs secured approval in January for a partial settlement of claims arising from massive accounting fraud. The company and several of its former officers and directors agreed to pay \$445 million in HealthSouth securities to class members.

UP CLOSE | STRATEGIES

Case put doctors back in the driver's seat

Plaintiffs believed that HMOs were gaming the system against them.

By Peter Page

SPECIAL TO THE NATIONAL LAW JOURNAL

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 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.



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

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.

'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

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

—Bob Seligson, N.C. Medical Society

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**



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