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Antitrust Claims Against Sutter Health Move Forward in Consolidated State Actions

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On March 14, 2019, a California state court denied Sutter Health's motion for summary judgment on claims of alleged price tampering and combination to monopolize under California's Cartwright Act, the state's principal antitrust law, in two consolidated cases. *UFCW & Employers Benefit Trust v. Sutter Health*, case no. CGC-14-538451 (Cal. Supr., filed Apr. 7, 2014), and *California v. Sutter Health*, case no. CGC-18-565398 (Cal. Supr., filed Mar. 29, 2018).

In 2018, the state of California filed a complaint against Sutter alleging that its anticompetitive conduct was largely responsible for the increased cost of health care in Northern California. Sutter is the largest hospital system in Northern California. The state's case followed on a putative class action filed in 2014 by UFCW & Employers Benefit Trust. Both complaints focused on three of Sutter's contracting practices. Plaintiffs alleged that Sutter's contracts with network vendors include all-or-nothing terms to require payors to accept all of Sutter's sites, regardless of location, cost or attractiveness, leveraging its "must-have" hospitals that are required to create commercially viable networks. Plaintiffs also alleged that Sutter uses anti-incentive terms that prohibit payors from incentivizing patients to select lower-cost providers. Finally, according to Plaintiffs, Sutter employs price-secrecy terms that prohibit payors from informing patients about the cost of procedures and services. Our alert about the state's complaint is available here.

Price Tampering

In Count I of both complaints, Plaintiffs alleged that Sutter's contracts with network vendors unlawfully control and tamper with the price terms that self-funded payors may offer their health plan enrollees. In its motion for summary judgment, Sutter argued that, as a matter of law, the only "price tampering" prohibited by the Cartwright Act is price fixing. Sutter further argued that, as a matter of fact, it did not fix prices, and that Plaintiffs' claim relies on vertical restraints that indirectly affected prices.

Sutter did not contest the fact that the Cartwright Act prohibits both horizontal and vertical price fixing. However, the parties disagree on whether it also prohibits agreements that "might in any manner" affect prices. The court rejected Sutter's argument that vertical price tampering is lawful so long as it

does not rise to the level of price fixing, holding instead that “price tampering” may be actionable under the Cartwright Act.

Combination to Monopolize

In Count III of both complaints, Plaintiffs alleged that Sutter compelled payors to agree to contract terms through which Sutter unlawfully restrained trade with the purpose and effect of obtaining or maintaining monopoly power and demanding supra-competitive prices. In its motion for summary judgment, Sutter argued that a combination to monopolize claim can only be maintained where there was a specific intent to monopolize shared by the members of the combination. Sutter further argued that payors did not have an intent to help Sutter monopolize the market. Noting that the Cartwright Act does not fully track Section 2 of the federal Sherman Act, the court held that an agreement to monopolize is prohibited by the Cartwright Act, but a shared specific intent among the co-conspirators is not an essential element of the offense.

This decision is just an early skirmish in what is likely to be a protracted battle. With the attention paid to high and increasing health care costs, contractual provisions imposed by providers with alleged “must have” status or market power are increasingly coming under attack, such as the recently resolved Department of Justice (“DOJ”) challenge to anti-steering provisions in North Carolina.[1] This case is particularly notable because it involves a challenge to a suite of contractual practices by Sutter, is brought in state court and under state law, and is brought by private plaintiffs and the State Attorney General, without any apparent involvement by the U.S. Federal Trade Commission or DOJ. It will continue to bear close watching.

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[1] Bruce D. Sokler and Farrah Short, *DOJ Antitrust Division Makes Filings in Civil Cases to Influence Development of Antitrust “No Poach” Law*, Dec. 7, 2018, available here**.**

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