

California Attorney General Announces Historic \$575 Million Settlement of Antitrust Suit Against Sutter Health

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California Attorney General Xavier Becerra (AG Becerra) [announced](#) on Friday, December 20, 2019, the terms of a comprehensive settlement agreement reached with Sutter Health (Sutter), the largest hospital system in Northern California.

WHAT HAPPENED?

Procedural History

In March 2018, the California Attorney General's office brought a civil antitrust action under California state law against Sutter alleging violations of California's Cartwright Act. Sutter owns and operates 24 hospitals and 35 outpatient centers and partners with physician organizations with 5,500 members and 12,000 other physicians in northern California, among other operations. The complaint alleged that costs in northern California have rapidly increased, and are higher than in other parts of the state, in large part due to Sutter's contractual practices with commercial health plans. The complaint alleged, specifically, that Sutter:

- Used its market power in certain local markets across all markets in which the system was present to prevent plans from using steering and tiering mechanisms with their members to encourage them to use lower cost providers and thus to reduce costs;
- Forced plans to contract with all of Sutter's facilities by using its market power with "must have" hospitals to require plans also to include in their networks other Sutter facilities in areas where there are lower cost alternatives; and
- Negotiated contract provisions that prohibit plans from providing incentives to patients to use competing facilities, including lower-cost and higher-quality facilities, and prevent the disclosure of Sutter pricing prior to a service being rendered and billed.

Notably, California's lawsuit followed a private action filed almost four years prior by the United Food and Commercial Workers International Union and Employers Benefit Trust, on behalf of a class of plaintiffs. More typically, private rights of action, especially class actions, tend to follow successful government intervention.

The Settlement

The two lawsuits were consolidated and the parties announced in October 2019—just before trial was set to begin—that they reached an agreement to settle both lawsuits.

On December 20, 2019, California Attorney General Xavier Becerra announced the terms of a settlement reached with Sutter providing for both monetary and injunctive relief. The settlement resolves the claims of both the State of California, and the private plaintiffs. Below is an overview of the key settlement terms.

- **Monetary Payment** – Sutter agreed to make a one-time payment of \$575 million to satisfy the private class' damages claim, and for the release of California's claim for disgorgement of profits. While this cash payment is very large, it falls short of the almost \$ 1 billion dollars in damages the private class initially sought.
- **Narrow/Tiered Networks** – The settlement prevents Sutter from taking actions to restrict the ability of health plans to create narrow or tiered networks of in-network providers that incentivize patients to choose non-Sutter providers.
- **"Must Have" Providers** – With limited exceptions, the settlement prevents Sutter from conditioning the participation or pricing of its "must have" providers on the inclusion of its other Sutter-owned providers in a network. Four of Sutter's six "must have" providers must be made available to participate in any health plan network subject to the negotiation of mutually agreeable terms. The other two "must have" providers located in San Francisco can only decline to participate in a health plan network upon the simultaneous submission in writing of reasons for declining participation. If Plaintiffs believe Sutter's stated reasons to be pretextual, they can challenge the refusal before the settlement monitor, and the Court if necessary. Further, Sutter also is prohibited from conditioning the participation of *any* of its hospitals on the inclusion of other Sutter providers, unless such providers are "clinically integrated" or "unless the participation of additional providers is necessary to ensure patient access to care or to protect patients from undue financial risk."
- **Out-of-Network Rates** – The settlement places limits on Sutter's out-of-network rates, and places limits on allowed annual increases to facilitate health plans' ability to offer products that exclude Sutter providers or incentivize patients to select lower cost providers.
- **Pricing Transparency** – The settlement prevents Sutter from limiting health plans' ability to share information on pricing terms with self-funded payers and enrolled members.
- **Bundled Pricing** – The settlement allows Sutter to continue to offer lower prices for bundles of providers as long as Sutter also offers a standalone price for each provider.
- **Future Contracts** – The settlement prevents Sutter from enforcing provisions in prior, existing or future contracts that are inconsistent with the terms of the settlement.

The final judgment enforcing these settlement terms is to remain in effect for 10 years, but the Court may grant a one-time three-year extension of this term. A court-appointed monitor is tasked with ensuring Sutter's compliance with the settlement terms, and will have the authority to monitor and investigate Sutter's compliance, hear complaints from health plans and Plaintiffs, and make recommendations to the Judge regarding enforcing the final judgment order encompassing the agreed upon settlement. The next step to finalize the settlement involves the San Francisco Superior Court, which must still approve the settlement agreement at a hearing scheduled for February 25, 2020.

While the proposed settlement resolves AG Becerra's and the United Food and Commercial Workers International Union and Employers Benefit Trust's state law class action, Sutter is also facing a federal class action in the United States District Court for the Northern District of California, alleging Sutter engaged in similar anticompetitive conduct. That suit, *Sidibe v. Sutter Health*, 3:12-cv-04854, alleges Sutter unlawfully used its "market power" in seven specific geographic markets, to require health plans to include its providers in four other geographic markets by insisting on "systemwide contracts" with "all-or-nothing" and "anti-steering" provisions.

WHAT THIS MEANS?

AG Becerra called the deal "a game changer for restoring competition in our healthcare markets." AG Becerra further warned that "[t]his first-in-the-nation comprehensive settlement should send a clear message to the markets: if you're looking to consolidate for any reason other than efficiency that delivers better quality for a lower price, think again." While not precedential, California's settlement with Sutter may well encourage other state antitrust enforcers to bring similar actions against healthcare providers who have been accused of using their market power in anticompetitive ways.

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