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Reversible Error: District Court Stutters, Ninth Circuit Shudders, Litigation Continues for Sutter

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Introduction

Over ten years ago, individuals and businesses insured by health plans that contract with Sutter Health filed a class action lawsuit against Sutter Health alleging antitrust violations under federal and California laws. Sutter is a healthcare giant in Northern California, serving over 100 communities and 3 million people, and includes 24 hospitals, five medical foundations, and 40 ambulatory service centers.

The case was tried to a jury on only the California law allegations in 2022, and the jury returned a verdict in favor of Sutter Health on both tying and unreasonable course of conduct claims. On appeal, in a split decision, the Ninth Circuit set aside the jury verdict and ordered a new trial. The court found that 1) the jury instructions' failure to include Sutter's purpose and intent as an element that the jury should consider and 2) exclusion of evidence created prejudicial errors and warranted a reversal of the jury verdict and remand to the district court for a new trial.

The class action was not the only attack on Sutter's growth and payor contracting strategies. Notably, in 2021, Sutter reached a settlement in another case involving allegations of anticompetitive conduct, brought by the California Attorney General and United Food and Commercial Workers and Employers Benefit Trust (UEBT). The settlement required Sutter to pay $575 million and agree to at least 10 years of detailed and specific injunctive relief.

California's Cartwright Act

The Cartwright Act is California's antitrust law. While it mirrors the federal laws, the California courts have held that it is broader than the Sherman Act in certain respects. In this case, the plaintiffs alleged Sutter engaged in illegal tying and unreasonable conduct in violation of the law. First, the plaintiffs alleged that the system illegally required health plans to use all Sutter providers and affiliated physicians' groups—or else have zero access to any of them. Second, they alleged that

Sutter's exclusive dealing arrangements required members of the plaintiff class to obtain all their medical care though Sutter providers and forced them to pay more for premiums.

The Absence of Purpose in the Jury Instructions

The word "purpose" was the lynchpin for the Ninth Circuit's reversal. In the trial court the parties argued over the jury instructions for how to prove an unreasonable course of conduct claim. Under the model jury instructions for California, a plaintiff must prove, for one, that "the purpose or effect of the defendant's conduct was to restrain competition" and instruct the jury to weigh the "anticompetitive or beneficial purpose or effect" of a challenged restraint.

Sutter proposed instructions removing the word "purpose" because, it argued, longstanding precedent held that anticompetitive purpose alone does not offend the antitrust laws. Plaintiffs proposed leaving the word "purpose" in both instructions. Ultimately, the district court instructed the jury that to prove a claim for unreasonable course of conduct, plaintiffs had to prove that "the effect of Sutter's conduct was to restrain competition," and that the jury should consider whether "Sutter's challenged restraint has an anticompetitive or beneficial effect on competition."

The appeals court held that first, the model instructions use of the phrase "purpose or effect" stemmed directly from the text of the law in two ways: a) definitionally as "a combination of capital, skill or acts by two or more persons for any of the following *purposes*," and b) by explaining that an agreement or combination is *not* unlawful if its "*purpose and effect*" is "to promote, encourage or increase competition." Second, the majority found that California's Supreme Court has consistently defined the rule of reason analysis as whether a "contract, combination, or conspiracy . . . has as its Purpose or Effect an unreasonable restraint of trade." Therefore, according to the majority, the district court's exclusion of "purpose" from both instructions was in contravention to both the text of the Cartwright Act and the California Supreme Court's longstanding interpretation of the law. Because the jury was not instructed that it could consider the antitrust purpose, the Ninth Circuit found that the district court had committed prejudicial error.

Excluding Evidence Relevant to Sutter's Purpose and Strategy

Sutter attempted to exclude evidence related to other investigations and litigations from 1999 and evidence related to its practices pre-2006. Citing the Federal Rules of Evidence, the district court excluded evidence that is nonetheless relevant because "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." The district court additionally denied the plaintiffs' offer of proof that twenty-three pre-2006 documents should be admitted at trial.

The evidence at issue centered precisely on Sutter's purpose – its strategy for forcing "all or nothing" contracting instead of permitting payers to selectively contract to have only a subset of Sutter hospitals in their networks. To the plaintiffs, this would result in an illegal tie, where the hospitals from geographic areas where Sutter had less competition and more market power would be tied with hospitals where it faced more competition.

According to the Ninth Circuit majority, the plaintiffs' contentions that Sutter (1) had previously negotiated individual contracts; (2) then implemented systemwide contracting with the purpose of imposing anticompetitive terms to charge supracompetitive prices; and (3) ultimately imposed those terms over the health plans' objections, resulting in exactly the supracompetitive pricing Sutter had predicted—necessarily relied on pre-2006 evidence.

To justify the exclusion of the pre-2006 evidence under the Federal Rules, the district court had found that it could confuse the issues, waste time, and delay the trial as the parties litigated “collateral issues.” The district court added that the evidence about prior litigation and investigations risked unfair prejudice. The Ninth Circuit dedicated nine pages of its 98-page opinion refuting that any of these dangers justified the exclusion. Finding that the district court abused its discretion, the majority held that the error was prejudicial.

Dissent

Circuit Judge Bumatay, invoking the opening line from the soap opera Day of Our Lives, argued that it is up to the district court to determine the requisite time appropriate to assess the history of anticompetitive conduct. Historical evidence may be probative, he wrote, but the district courts have the authority to manage complex litigation by setting reasonable cutoff dates.

Judge Bumatay additionally disagreed with the majority regarding its finding on the word “purpose.” In his dissent, he contended that by finding consideration of antitrust purpose necessary and finding that any jury instruction without this consideration reversable error, the majority crafted a new antitrust rule that makes antitrust purpose an element of every antitrust case.

Conclusion

Following the 2021 settlement and 2022 jury verdict, Sutter Health likely believed it was out of the legal woods, resolving this set of anticompetitive allegations. But now, Sutter faces the possibility of another jury trial and additional damages. With purpose, intent and pre-2006 evidence back on the table for plaintiffs following the Ninth Circuit’s decision, it will undoubtedly be more difficult for Sutter to prevail in a second trial based on evidentiary rulings.

While the substance of the opinion centered on the requirements of the Cartwright Act, it did not need to rely on the arguably greater scope of the Act. The suggestion that “all or nothing contracting” could be considered an illegal tying arrangement, and the purpose evidence that could be an important element in “rule of reason” analysis of hospital-payor contracting terms could be invoked and applied in other courts confronting such issues under federal law, as well.

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