Sutter Plaintiffs Picking Up Steam in CA Antitrust Case

See UFCW & Employers Benefit Trust v. Sutter Health case page.

Last fall, we updated you on a key California case brought by self-funded payers against Sutter Health, the dominant health care provider in Northern California, styled *UFCW &amp|Employers Benefit Trust v. Sutter Health*. At that time, the litigation had been hamstrung by Sutter's attempts to take the dispute to arbitration, which ultimately were unsuccessful, landing the parties back in state court in San Francisco County. Two years after the plaintiffs filed their complaint in April 2014, the court denied Sutter's demurrer (motion to dismiss) in April, and yesterday, the court granted the plaintiffs' motion to compel documents. The plaintiffs case seems to have picked up steam.

The Facts and Allegations

The plaintiff, grocery workers' union UEBT, is self-funded payer, which means that it directly pays medical providers for the health care services provided to the enrollees in its health plan. Self-funded payers are distinct from employers who offer the more common employer-sponsored plans, in which employers purchase commercial insurance for their employees (typically passing on some portion of the cost to those employees). UEBT filed this class action on behalf of itself and other self-funded payers, but the court will not decide whether to certify the case as a class action until at least the fall of this year. The defendants are Sutter and the group referred to as "Network Vendors," which are essentially the insurance entities that put together the provider networks accessed by UEBT and other self-funded payers in California.

UEBT's allegations relate to agreements between Sutter and the Network Vendors, which UEBT claims contain provisions that are anticompetitive and have resulted in the foreclosure of price competition and illegal overcharging of self-funded payers.

The plaintiff's pleadings describe a scheme by Sutter to use its status as a "must-have" hospital—*i.e.*, one the Network Vendors (and health plans more generally) consider indispensable to their networks—to negotiate contractual terms that insulate the provider from competition and keep prices artificially high. The case focuses on three types of allegedly anticompetitive terms:

(1) "all or nothing" language through which Network Vendors must include *all* Sutter hospitals, even in markets with more/better alternatives;

(2) "anti-incentive" terms that prevent self-funded payers from giving enrollees incentives to select lower-priced alternatives to Sutter from the network (*e.g.*, by charging lower co-pays for lower-priced providers—these terms instead require that the self-funded plans charge the same co-pay for Sutter's higher-priced care as that charged for cheaper care, which means that enrollees have no price incentive to go to other in-network providers who would cost the payer less (and could cost the patient less if lower co-pays were allowed)|and

(3) "price secrecy" terms that conceal Sutter's prices from (a) the self-funded payers and their enrollees, so that they are unable to shop for providers based on price, and (b) the Network Vendors who could otherwise compete horizontally with one another based on the prices they each negotiate with Sutter.

The plaintiffs explain that the opportunity cost of this scheme is a much more efficient market, one in which self-funded payers have multiple avenues to stimulate price competition (which lowers prices). They claim that absent

these anticompetitive contracts, the self-funded payers would exclude overpriced Sutter hospitals from their networks where market conditions permit (if no "all or nothing" terms). Or, where Sutter hospitals are included in networks, the payers could provide incentives, like lower co-pays, to their enrollees to select lower-priced competitors, making Sutter the higher-priced option (if no "anti-incentive" terms). Last, self-funded payers and their enrollees would be able to shop for the provider with the best value (if no "price secrecy" terms).

The plaintiffs claim that the defendants have committed a *per se* (inherently or presumptively illegal) price tampering under California's Cartwright Act, which they characterize as broader than the federal Sherman Antitrust Act, as well as other restraints of trade, including monopolization, also under the Cartwright Act.

The Demurrer, a.k.a. Motion to Dismiss

After losing on the arbitration issue, Sutter and the other defendants filed a demurrer, otherwise known as the state court version of a motion to dismiss the case for failure to state a claim. In their demurrer, the defendants argued that *per se* antitrust violations like price tampering require a conspiracy, which requires an agreement between two parties. They argued that the Network Vendors could not have been conspiring with Sutter because the contracts were the results of arm's-length negotiations between sophisticated parties. Moreover, they argued that the Network Vendors, unlike Sutter, would want to keep prices low, not high, and therefore they would have no rational motive to conspire with Sutter to tamper with prices to keep them artificially high. The plaintiffs countered by arguing that the Cartwright Act extends to conspiracies in which one party coerces the other, through its market power, to agree to certain terms. The plaintiffs explained that Sutter's status as a "must-have" provider and its established market power allowed it to

negotiate the anticompetitive contracts at issue, and that the Cartwright Act does not contain a loophole for misaligned motives of conspiracy members.

The defendants further argued that the plaintiffs' claims fail under the "rule of reason," or the more extensive balancing test used to evaluate antitrust violations used when a court determines an offense is not illegal *per se*. Under the rule of reason, to support claims of restraints of trade, plaintiffs must demonstrate that a defendant has market power (basically, the ability to raise prices without affecting demand) in those markets. The defendants argued that plaintiffs fail to properly define the relevant markets at issue in the case, and to establish that Sutter has market power in those markets. The plaintiffs counter that because they have pled direct evidence of market power (foreclosed competition, anticompetitive contract terms, sustained supracompetitive prices), as well as indirect evidence (supracompetitive prices in markets where Sutter has a low market share, higher barriers to entry than naturally occur in health care markets), they need not define the relevant geographic markets, but their offered definition is nonetheless sufficient to survive the pleading stage. The plaintiffs offered a geographic market definition based on hospital utilization data|Sutter argues that the plaintiffs only defined where patients do go to receive care, and not where they could go, as the law requires. The defendants also argued that the plaintiffs have not alleged anticompetitive effects, which plaintiffs counter with explanations of Sutter's foreclosure of price competition and supracompetitive prices.

The defendants' demurrer relied heavily on the dismissal of *Sidibe v. Sutter*, the federal putative class action that was dismissed in 2014 and is now before the Ninth Circuit on the issue of whether the plaintiffs properly pled relevant geographic markets. The plaintiffs countered that the *Sidibe* case involved a different type of plaintiff (indirect

purchasers of commercial insurance)|different contractual terms (only the "all-or-nothing" language overlaps)|and a different geographic market definition. Further, the plaintiffs conclude their opposition by stating that "Sutter's focus on the allegations in Sidibe only demonstrates its inability to identify any legal deficiency in the allegations of UEBT in this case."

The court denied Sutter's demurrer in April, and the case went forward.

Sutter's Out-of-Court Tactics

Meanwhile, on the sidelines, Sutter appears to be attempting to keep other self-funded payers from joining the class action by demanding that consent to arbitration of claims related to provider-insurer contracts. As we blogged earlier, Sutter tried to take the class action to arbitration by claiming that UEBT was bound by the arbitration clauses in Sutter's contracts with Anthem (to which UEBT was not a party). Both the trial court and the appellate court were unconvinced, Sutter's motion was denied and that denial was affirmed on appeal, and the parties returned to the trial court to litigate.

Frustrated by Sutter's out-of-court activities, the plaintiffs filed for a protective order in an attempt to have the court intervene and stop Sutter's efforts to commit would-be class members to arbitration. As reported in Kaiser Health News, Sutter filed declarations by other self-funded payers including one by the chief executive of the Pacific Business Group on Health, a group representing large employers, that discusses PBGH members' concerns over Blue Cross of California/Anthem's attempts to get them to sign attestation forms binding them to the arbitration close in the 2016 Anthem-Sutter contract. The declaration explains PBGH's members' concern over signing the attestation clauses could be boiled down to the fact that "[t]heir choice is between two

unacceptable alternatives: Pay 95 percent out-of-network pricing for enrollees that access Sutter services or agree to give up their claims in this litigation."

The court denied the motion for protective order on the grounds that Sutter's activities did not present a threat to the class action. The judge clarified that "Class representatives and their counsel have not been inhibited, and any erroneous impressions of the putative class members (who sign off on the new contract) that they cannot be in the class can be remedied in notice following any certification order." In other words, if the class is certified, these self-funded payers will still be considered class members.

Most recently, the plaintiffs also moved to compel documents in the case that they believed they were being denied in the discovery process. Yesterday, they won that motion. We will be watching as this case moves forward!