Update on 9th Circuit Appeal of Antitrust Case Against Sutter

June 2015 Update:

Since our last post on this case, Sutter filed its answering brief, and the plaintiffs filed their reply in the Ninth Circuit Court of Appeals. As timing would have it, between the answering brief and the reply, the Ninth Circuit decided the *St. Luke's* appeal, another case that focused on geographic market definition in a healthcare market, in February of this year (see our blog post on that case). Accordingly, the *Sidibe* plaintiffs relied heavily on *St. Luke's* in their reply brief to argue for a market definition that would allow their claims to proceed as pled in the district court. Their brief emphasizes the Ninth Circuit's description of healthcare markets as unique, in that they feature health plans who operate as both sellers and buyers. Specifically, the plaintiffs/appellants state that their assertion that health plans are the relevant consumers of healthcare services in a substitutability of demand analysis (required to determine geographic markets) precisely tracks the model followed in *St. Luke's*. Therefore, plaintiffs argue that the court's reasoning and ruling in St. Luke's demands a reversal of the district court in this case. It will certainly be interesting if a case begun by private plaintiffs (*St. Luke's*) results in this victory for other private plaintiffs (albeit with a lot of help from the FTC and the Idaho AG's Office).

February 2015 Post:

A case The Source identified as key in litigating allegations of provider market power when it was in federal district court in San Francisco is now on appeal to the Ninth Circuit. As

explained in an earlier Source Blog Post, the putative class action against California mega provider Sutter Health was filed in federal district court in in September 2012 and dismissed in June 2014.

In their opening brief to the Court of Appeals, appellants argue that the district court erred by misunderstanding its role at the motion to dismiss stage of litigation as well as by not properly considering the substance of their allegations. For starters, on procedure, the appellants contend that on a motion to dismiss, under the federal rules, the court must accept all factual allegations as true, and determine whether those allegations give rise to a cause of action. Certainly, that is the rule, and no lawyer would argue otherwise. What the plaintiffs claim on appeal that, instead of taking the facts as true, the court rejected their allegations as lacking factual support, a standard they contend is more appropriate at the summary judgment stage. As to procedure, the plaintiffs also take issue with the district court's dismissal of their claims with prejudice, i.e., without giving them another chance to amend their (third amended) complaint.

As for the merits of their claims, the appellants argue that the court improperly held that their proposed the geographic market definition was implausible, and ignored the direct evidence they put forth as to Sutter's market power. On the market definition point, they restated the plausibility and validity of their proposed use of hospital service areas ("HSAs") sourced from the Dartmouth Atlas of Healthcare. In addition, the appellants used the St. Luke's case, also presently before the Ninth Circuit (read our Blog Post), to support their plausibility point by arguing that healthcare antitrust cases have a unique market definition layer because health plan subscription options that undeniably affect patient choice must be considered as part of the analysis. Indeed, they argue that recent appellate and district courts,

as well as state and federal enforcement agencies and economists all agree that the hypothetical monopolist in the traditional market definition test described in the FTC's Horizontal Merger Guidelines "must be viewed through the prism of health plans instead of the lens of any particular patient." In addition, the appellants argue that the district court ignored entirely the direct evidence they offered of Sutter's market power, including its questionable contracting practices and anticompetitive effects like extreme price variation from nearest rivals. Indeed, these points were not the basis of dismissal, and, if the case is remanded, will certainly be the subject of considerable interest (and discovery).

We look forward to Sutter's response, and the plaintiffs' reply!