

[Case Brief] Sidibe v. Sutter Health: The Oldest Chapter in the Sutter Antitrust Saga Sees New Light for Class Plaintiffs

See case page: [*Sidibe v. Sutter Health*](#)

As all eyes were fixated on [*UFCW & Employers Benefit Trust v. Sutter Health*](#) (*UEBT*), the landmark state antitrust lawsuit that the California attorney general brought against Sutter Health, another long-standing litigation against Sutter in federal court for similar claims has largely gone under the radar. With the final judgment in the state action set to be approved in state court this July, we turn our attention to *Sidibe v. Sutter Health*, the other case to watch in the ongoing antitrust challenge against Northern California hospital giant Sutter Health. Incidentally, on the day the state settlement received preliminary approval from the court, the federal suit also saw the green light to proceed to trial. This case brief looks at the road so far and the latest developments in this important federal case, which stems from largely the same facts as the high-profile state action.

The Background

The Source has been closely following *Sidibe v. Sutter*, which was initially filed in federal district court for the Northern District of California in September 2012, well before the state action was initiated. The media attention in the *UEBT*

case no doubt breathed new life into the near-decade old case. The lawsuit was brought by class action plaintiffs who purchased commercial health insurance from health plans that contracted with Sutter. They alleged that Sutter engaged in anticompetitive contracting practices that inflated their premiums and co-pays. The alleged practices used were also the subject of the state action in *UEBT v. Sutter*, which include all-or-nothing provisions and resulting geographic tying arrangements and anti-steering provisions that prevented health plans from steering members to lower-cost providers.

While *UEBT v. Sutter* was a state court action, *Sidibe* was filed in federal court because the complaint alleged violations of the federal Sherman Antitrust Act in addition to California's Cartwright Act. Specifically, the Plaintiffs alleged in the third amended complaint: 1) unlawful tying and an unlawful course of conduct in violation of the Sherman Antitrust Act § 1 and California's Cartwright Act, 2) monopolization and attempted monopolization in violation of the Sherman Act § 2, and 3) a violation of California's Unfair Competition Law (UCL).[\[1\]](#) (See details of the [allegations and legal claims](#) on Source Blog).

The Road So Far

To say *Sidibe* has been through hell and back may not be an overstatement. Over the past nine years, the lawsuit went through four amended complaints, district court dismissal, appeals court reversal and back to lower court, and most recently, summary judgment of some causes of action before even reaching a trial on the merits.

▪ District Court Dismissal (June 2014)

After Plaintiffs filed three amended complaints, Sutter filed a motion to dismiss the lawsuit for failure to state a claim, which the district court granted with prejudice in June 2014.

Sutter set forth several reasons for the motion to dismiss, including the complaint's insufficient relevant market definitions, a lack of alleged anticompetitive effects in the tied markets, and a lack of alleged facts to support unlawful monopolization, among others.

The district court agreed with Sutter that Plaintiffs failed to plead plausible relevant markets in the complaint, refusing to accept the use of "hospital service areas" (HSAs) to define the geographic markets for lack of factual support. The court evoked the market definition standard set forth in Supreme Court cases *United States v. Twombly* and *Ashcroft v. Iqbal* and called the *Sidibe* geographic definition "implausible." Since all of Plaintiff's claims rest on establishing Sutter's market power in the relevant markets, the lack of appropriate market definition, the court reasoned, would render all of Plaintiffs' claims failed. (See details of [district court ruling](#) on Source Blog).

▪ *Ninth Circuit Appeal (July 2016)*

In July 2016, in a drastic turn of fate for the *Sidibe* plaintiffs, the Court of Appeals for the Ninth Circuit reversed the lower court ruling in a de novo review on appeal. Plaintiffs argued in their [opening brief](#) to the Ninth Circuit that the district court's ruling was improper both procedurally and on the merits.

First, they argued the lower court erroneously rejected their causes of action on the grounds that they lack factual support, which is inappropriate for consideration at the pleading stage, but rather determined at a later stage in the litigation. Second, Plaintiffs contended that the court erred by holding that the geographic market allegation was implausible, given the evidence of Sutter's market power and resulting anticompetitive practices and effect. Further, Plaintiffs' reply brief heavily relied on the Ninth Circuit ruling in the FTC merger challenge of [St. Luke's Health System](#)

in Idaho, another case that focused on geographic market definition in health care. The Ninth Circuit had decided in that case that healthcare markets are unique with its additional layer of health plan options for patients and therefore warrant a unique market definition analysis. (See details of [Plaintiffs' arguments](#) on Source Blog).

After [oral arguments](#), a three-judge panel agreed with Plaintiffs that they were not required to allege extensive factual evidence to support their proposed geographic market definition at the pleading stage, and denied that the proposed definition was inherently implausible. Specifically, the [court opined](#) that "'[T]he validity of the 'relevant market' is typically a factual element rather than a legal element,' and inquiry into the commercial realities faced by consumers is more appropriately addressed at summary judgment or trial." (See details of [9th Circuit decision](#) on Source Blog).

▪ *Certification of Class (July 2020)*

Following the remand to the district court, Plaintiffs filed a fourth amended complaint which was granted in September 2017. The amended complaint changed the class definition in two ways by adding: 1) two representative employer-plaintiffs that pay premiums for their employees; and 2) subscribers of two additional commercial health plans. In June 2018, Plaintiffs filed a motion for class certification under seal in the revived lawsuit.

Initially, in certifying the damages class, U.S. Magistrate Judge Laurel Beeler denied Plaintiffs' claim that 100% of the alleged inflated hospitals costs were passed onto consumers in the form of higher premiums. Plaintiffs then reworked their calculations for the overcharges using Medical Loss Ratio data and determined the overall weighted passthrough rate to be 98.86%. [\[2\]](#) In July 2020, the court granted certification for the damages class for members that had paid premiums from 2011 to present for a fully insured health insurance policy from

Blue Shield, Anthem Blue Cross, Aetna, Health Net or United Healthcare.[\[3\]](#)

▪ *Partial Summary Judgment on Specific Claims (October 2020, March 2021)*

On the road to trial, both parties moved for summary judgment on their claims, a few which were granted by the court. First, in October 2020, Plaintiffs succeeded in their summary judgment claim on “distinct products,” which is a required element for the tying cause of action that alleged the products were tied together. The court agreed with Plaintiffs that the inpatient hospital services at Sutter’s tying hospitals were products that were distinct and separate from those offered at the tied hospitals,[\[4\]](#) paving the way for Plaintiffs to advance the tying claim under the Sherman and Cartwright Acts at trial.

In March 2021, the court largely [rejected Sutter’s motion](#) for summary judgment but gave Sutter a small triumph by granting summary judgment against one of the causes of action – the federal monopoly claim. The court denied summary judgment on the tying claims and course-of-conduct claims under Sherman Act § 1 and Cartwright Act, ruling there are triable issues of material fact under the legal standard for summary judgment. Specifically, Judge Beeler concluded there are fact disputes about how Sutter used its market power from the tying market and the combined effect of the systemwide contract provisions in the tied markets.[\[5\]](#)

Judge Beeler did, however, grant summary judgment for Sutter on the monopolization and attempted monopolization claims under Sherman Act § 2. As stated in the opinion, Sherman Act § 2 monopolization claim has two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”[\[6\]](#) The court

acknowledged there are material disputes as to the existence of Sutter's monopoly power under the first element. However, under the second element, Plaintiffs alleged only that Sutter's intent to monopolize the tied markets can be inferred from its systemwide contracts. The court determined that to be insufficient evidence to show disputed material facts about Sutter's willful maintenance of the alleged monopoly power.[\[7\]](#) As to attempted monopolization, the required elements are (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[\[8\]](#) Judge Beeler held that this claim failed because Plaintiffs did not cite evidence for a dangerous probability of monopolization, other than higher prices in the tied markets, particularly when there was undisputed evidence of falling market share in those markets.[\[9\]](#)

Additionally, as previously held in the class certification decision, the court dismissed claims from 2008 to 2010 because Plaintiffs could not show damages for the class during that period.

As a result, the standing issues heading to trial are, for 2011 to present:

- Tying claims (Sherman Act § 1 and Cartwright Act);
- Course-of-conduct claims (Sherman Act § 1 and Cartwright Act);
- ~~Monopolization and attempted monopolization claims (Sherman Act § 2)~~ – DISMISSED;
- Unfair business practices claims (California's Unfair Competition Law).

What's Next

After nearly a decade of litigation, the stage has finally been set for a trial on the merits in this case. A jury trial

before Magistrate Judge Laurel Beeler is set to begin in San Francisco on October 4 and expected to last four weeks through October 29.

On the way to trial, the court is also scheduled to hear Plaintiffs' motion on sanctions against Sutter for intentionally destroying 192 boxes containing millions of "highly relevant" evidence dating from 1995 to 2005. Sutter's alleged conduct first came to light and made headlines in [November 2017](#), which spurred the California attorney general to join in the *UEBT* state case, bringing ensuing media attention. Sanctions including the need for relevant jury instructions were issued by the San Francisco Superior Court in the *UEBT* case which has since settled. The *Sidibe* Plaintiffs are seeking similar findings and jury instruction for trial when the motion is heard on August 5, 2021.[\[10\]](#)

One of consequences of the pre-trial settlement in the state action was that Sutter was able to continue to conceal evidence of its anticompetitive practices over the years. Barring a last-minute settlement à la *UEBT*, a jury trial in *Sidibe* may finally bring to light exactly how egregious Sutter's anticompetitive conduct were, and potentially serve as a cautionary tale for other dominant health systems across the country.

[\[1\]](#) 15 U.S.C. §§ 1-2.

[\[2\]](#) Order Granting Motion to Certify Class Under Rule 23(B)(3) And Denying Motion for Sanctions, *Sidibe v. Sutter Health*, N.D. Cal., No. 3:12-cv-04854 (July 30, 2020).

[\[3\]](#) *Id.*

[\[4\]](#) Order Granting Plaintiffs' Rule 56(D) Motion for Partial

Summary Judgment Re: Distinct Products, *Sidibe v. Sutter Health*, N.D. Cal., No. 3:12-cv-04854 (October 23, 2020).

[\[5\]](#) Order Granting Sutter's Motion for Summary Judgment for 2008 to 2010 and for the § 2 Claims and Otherwise Denying the Motion, at 9, *Sidibe v. Sutter Health*, N.D. Cal., No. 3:12-cv-04854 (March 9, 2021).

[\[6\]](#) *Id.* at 11.

[\[7\]](#) *Id.* at 14.

[\[8\]](#) *Id.*

[\[9\]](#) *Id.* at 15.

[\[10\]](#) Plaintiffs' Notice of Motion and Motion for Sanctions Based on Sutter's Spoliation of Evidence, *Sidibe v. Sutter Health*, N.D. Cal., No. 3:12-cv-04854 (April 9, 2021).