[Case Watch] UCFW & Employers Benefit Trust v. Sutter Health] A Look at the Legal Arguments Through the Lens of the Court's Denial of Sutter's Motions for Summary Judgment

As part of the Case Watch series for the landmark antitrust suit against Sutter Health, this post takes a look back at the Superior Court of San Francisco's orders from March and June 2019, denying Sutter's motions for summary judgment, which set the stage for the jury trial, set to begin on Thursday, October 10, 2019. As a preview of the legal arguments we will see at trial, we dissect each of the four causes of action brought against Sutter in the context of Sutter's motions and the court's rulings.

As previously examined in our Case Watch series, both the California Attorney General and private parties United Food and Commercial Workers union (UFCW) and Employers Benefit Trust (UEBT) made factual allegations based on three specific types of contract provisions in Sutter's contracting practices: 1) **all-or-nothing terms** to require insurers to include all Sutter facilities in the provider network; 2) **anti-steering or anti-tiering provisions** that prevent insurers from incentivizing patients to choose cheaper or higher value providers; and 3) **price secrecy or gag clauses** that prohibit insurers from disclosing prices for healthcare services. (See blog post for detailed analysis of the anticompetitive nature of these contract clauses).

As a result, both plaintiffsassert, under California's Cartwright Act,[1] three causes of action: 1) Count I: **price tampering**; 2) Count II: **unreasonable restraint of trade**; and 3) Count III: **combination to monopolize**. The union plaintiffs additionally assert a fourth cause of action under the **California Unfair**

Competition Law (UCL).[2]

Legal Standard for Summary Judgment

In a motion for summary judgment, or in the alternative, summary adjudication, a party seeks to prove "that the action has no merit or that there is no defense to the action or proceeding."[3] In this case, defendant Sutter Health's motions for summary judgment, filed and heard separately by the court,[4] contend that plaintiffs did not have any evidence to support their four causes of action, and that the court should dismiss the case without a full trial.

According to Cal. Code of Civ. Proc., § 437c(c), a court should grant summary judgment only if "there is no triable issue as to any material fact"[5] and "it completely disposes of a cause of action."[6] The party moving for summary judgment, in this case Sutter, bears the burden of persuasion as to whether there is a triable issue of material fact. As a result, Sutter must prove that based on the evidence, no reasonable jury could find in favor of the plaintiffs.

Count I: Price Tampering

In Count I of both complaints, Plaintiffs allege that Sutter's contracts with insurers unlawfully control and tamper with price terms under the Cartwright Act. Specifically, the plaintiffs contend that Sutter's alleged use of contract provisions, namely all-or-nothing, anti-incentive, and price secrecy provisions, interfere with signals of price and quality, preventing meaningful competition from other providers, thereby affecting prices of healthcare services.

Sutter puts forth two defenses against this claim in its first motion for summary judgment. First, it argues that, as a matter of law, the only "price tampering" prohibited by the Cartwright Act is "price fixing", such that the vertical restraints that indirectly affect prices, as Sutter had engaged in, are not unlawful. Second, Sutter claims that, as a matter of fact, it did not fix prices. As a result, Sutter claims that it is not liable under this cause of action.

The court, in its opinion, stated that the Cartwright Act "at its heart is a prohibition against agreements that prevent the growth of healthy, competitive markets for goods and services and the establishment of prices through market forces," and that it "generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices."[7] As to the question of whether the act prohibits vertical price tampering, the court held that Sutter did not establish that "'vertical price tampering' is lawful so long as it does not rise to the level of price fixing. Rather, 'price tampering'… may be actionable under the Cartwright Act."[8]

Count II: Unreasonable Restraint of Trade (Unlawful Tying)

Count II alleges that Sutter: 1) used its market power to compel insurers to agree to its use of all-or-nothing, anti-incentive and price secrecy terms in contracts, thereby 2) unlawfully restraining trade to the detriment of other providers, restricting their ability to compete in the relevant markets, and 3) ultimately resulting in Sutter's ability to charge supracompetitive prices. Plaintiffs allege that such conduct, separately and in combination, constitutes unreasonable and unlawful restraints of trade. Additionally, Plaintiffs allege unlawful tying in the restraint of trade, which"typically involves a seller with monopoly or other extensive market power in a given product, who then refuses to sell that product unless the buyer buys (or agrees not to buy from seller's competitor) a separate product over which the seller does not have extensive independent market power."[9] Plaintiffs plead that Sutter's use of all-or-nothing contracts constitutes unlawful tying and is a per se violation of the Cartwright Act.[10]

In briefs in support of its motion, Sutter argues that Plaintiffs cannot identify any unlawful restraint by denying that each of its practice is anticompetitive or unlawful. First, Sutter addresses its use of all-or-nothing and anti-incentive contract terms. Sutter disputes that the provisions prohibit narrow or tiered provider networks or steering. Instead, Sutter contends that it "only prohibits steering where insurers have voluntarily contracted to forgo steering in exchange for discounted rates from Sutter – a bargain that is protected by California law and that is procompetitive."[11] As to the tying claim with respect to its use of all-or-nothing

contract terms, Sutter argues that Plaintiffs fail to establish the requisite elements under the claim, because they did not identify a tied product market and that in-network status is not a product or service. Even it if it were, Sutter denies tying, or requiring Plaintiffs to purchase one product or service (including a hospital in its network) in order to purchase another.

Second, with respect to Sutter's alleged supracompetitive prices, Sutter claims that its out-of-network rate is per se lawful because "unilateral action by a monopoly holder in charging allegedly excessive prices, standing alone, does not ordinarily violate antitrust laws even though high prices may have some ancillary effect on the ability of consumers of those products to compete."[12] Additionally, Sutter argues that its price secrecy terms are common in the industry and have a procompetitive effect.

In their opposition, Plaintiffs first contend that contrary to Sutter's argument, in-network status is a service and therefore can be tied. They continue to point out that they have "evidence to show that Sutter linked access to hospitals in markets it dominated (the tying product) to the health plans' purchase of in-network status in other markets (the tied product)".[13] Additionally, Plaintiffs emphasize that Sutter mischaracterized their claims, as their theory of liability is that "the combination of Sutter's practices is the challenged restraint. As such… the anticompetitive effect of the practices must be considered together." Moreover, Plaintiffs contend that each of the challenged practices is separately unlawful as they have evidence to show that they suppressed price competition.[14]

The court, in its opinion, applied a rule of reason analysis and noted that nothing in Sutter's papers contradicts the allegation that each of the terms has an anticompetitive effect. Additionally, the court agreed with Plaintiffs that the claims are "based on the combined effects of multiple contractual provisions."[15] For example, the Plaintiffs' claim does not seek to challenge Sutter's prices "standing alone." In denying Sutter's challenge of this claim, the court opined that "whether a restraint of trade is reasonable is a question of fact to be determined at trial,"[16] and Sutter "did not make a prima facie showing of the nonexistence of any triable issue of material fact. Rather, Sutter's motion turns on a series of partial challenges to discrete elements of the alleged restraint, none of which show the absence of a

triable issue of material fact."[17]

Count III: Combination to Monopolize

In Count III, both plaintiffs allege that Sutter used its "must-have" provider status to force insurers to enter contract terms that unlawfully restrained trade with the purpose and effect of obtaining and maintaining monopoly power to demand supra-competitive prices. This cause of action is built upon and an extension of Count II, the unreasonable restraint of trade.

Sutter argues that first, as a matter of law, a "combination to monopolize" cause of action requires members of the combination to share the specific intent to monopolize. Second, as a matter of fact, Sutter claims that the insurers did not have a specific intent to help Sutter monopolize the market. As a result, Sutter argues that this claim can be stripped down to only the unreasonable restraint of trade claim, which is already pled in Count II. Plaintiffs, on the other hand, disagree that all combining parties must share a specific intent to monopolize to support the claim. Citing *Kolling v. Dow Jones & Co.*,[18] Plaintiffs point out that in that case, "the 'conspiracy' or 'combination' necessary to support an antitrust action can be found where a supplier or producer, by coercive conduct, imposes restraints to which distributors involuntary *[sic]*adhere."[19]

The court examined the elements required to establish an action for combination in restraint of trade under the Cartwright Act, which are: 1) the formation and operation of the conspiracy; 2) illegal acts done pursuant thereto; and 3) damage proximately caused by such acts.[20] Based on the stated elements, and a legal analysis of *In re Cipro*,[21] the legal authority used by the parties, the court held that "an agreement to monopolize is prohibited by the Cartwright Act if it constitutes an unreasonable restraint on trade… [and] shared specific intent amongst all co-conspirators is not an essential element of that offense."[22] As to Sutter's argument that this claim can be disposed of given the claim of unreasonable restraint of trade in Count II, the court ruled that "Sutter has not cited authority to support the proposition that a distinct theory of liability can be removed from a case on summary adjudication because it was pled as a separate cause of action."[23]

Count IV: California Unfair Competition Law (UCL)

In Count IV, the private plaintiff UEBT separately alleges that Sutter's actions are acts of unfair competition under the California Unfair Competition Law, and that they have suffered injury as a result of those actions by paying inflated prices for hospital services. Sutter puts forth the argument that this claim falls within the Cartwright Act claims because it is based on the same conduct, and thus should be dismissed on the same basis. The court reasoned that because Sutter's challenge to the Cartwright Act claims is rejected, the challenge to this claim is also rejected.

Finally, in response to Sutter's separate motion for summary judgment on all counts, the court reasoned that counts I, II, and III rely on the same "body of conduct",[24] and because Sutter's arguments do not dispose of Count II, they do not dispose of Count I and III by the same reasoning. In rejecting Sutter's challenges on all four counts, the court denied Sutter's motion for summary judgment, allowing the case to proceed to trial.

As the jury trial in this case goes forward on October 10, these causes of action will take center stage in dictating the evidence the parties will present to prove their positions. The Source previously analyzed the court's recent ruling on antitrust standards that Plaintiffs are subject to in proving each claim. Together, these pretrial rulings may offer a glimpse into how the parties may structure their cases to present to the jury. The Source will closely follow the trial and continue to bring the latest developments in this important case that promises far reaching implications in the healthcare industry.

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[1]Cal. Bus. & Prof. Code §§ 16720 to 16728.

[2]Cal. Bus. & Prof. Code §§ 17200 to 17210.

[3]Cal. Code of Civ. Proc., § 437c(a)(1).

[4]Sutter filed for summary judgment for Counts I and III on December 20, 2018, which the court denied in an order dated March 14, 2019. Sutter later filed for summary judgment for all counts and the motion was denied in the court order dated June 13, 2019.

[5]Cal. Code of Civ. Proc., § 437c(c).

[6]Order Re Sutter's Motion for Summary Adjudication of Counts I and III at 2, UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al., No. CGC 14-538451 (Cal. Super. Ct. S.F. City and Cnty. 2019).

[7]*Id.*at 5.

[8]*Id.*at 7.

[9]Order Re Sutter's Motion for Summary Judgment or, in the Alternative, Summary Adjudication at 5, UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al., No. CGC 14-538451 (Cal. Super. Ct. S.F. City and Cnty. 2019).

[10]*Id*. at 4.

[11]*Id.*at 6.

[12]*Id.*at 9.

[13]*Id*. at 8.

[14]*Id.*

[15]*Id.*at 12.

[16]*Id*. at 4.

[17]*Id.*

[18]Kolling v. Dow Jones & Co. (1982) 137 Cal.App.3d at 720.

[19]Order Re Sutter's Motion for Summary Adjudication of Counts I and III at 10, UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al., No. CGC 14-538451 (Cal. Super. Ct. S.F. City and Cnty. 2019).

[20]*Id*. at 9.

[21]*In re Cipro (2015) 61 Cal.4th 116.*

[22]*Id*.at 13.

[23]*Id*.at 11.

[24]Order Re Sutter's Motion for Summary Judgment or, in the Alternative, Summary Adjudication at 14, UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al., No. CGC 14-538451 (Cal. Super. Ct. S.F. City and Cnty. 2019).