

[Sutter Case Watch] A Huge Deal: Settlement Terms of Sutter Health Antitrust Case Will Promote Transparency and Competition in California Provider Markets

See [*UFCW & Employers Benefit Trust v. Sutter Health*](#) case page.

The high-profile [antitrust case](#) against Sutter Health settled on the eve of trial in October 2019, when the Northern California hospital giant reached a preliminary settlement agreement with the California Attorney General's office and class action plaintiffs after five years of litigation. The [terms of the settlement](#) were released late December, which include both monetary compensation for the private plaintiffs and injunctions against Sutter's conduct that will restore competition and promote transparency in the provider market.

In this post, we dissect the terms of the proposed settlement agreement and discuss how these terms may address and resolve Sutter's alleged market dominance and anticompetitive contracting practices that drive up healthcare prices.

Over Half A Billion Dollars in Monetary Damages to Appease Private Plaintiffs

As an initial matter, Sutter agreed to pay \$575 million in damages to resolve private claims that the hospital system used its market power to force patients to pay inflated prices

for healthcare services. This one-time all cash payment, which represents 60% of the nearly \$1 billion damages that plaintiffs sought at trial, will be distributed to compensate self-funded employers and union trusts that brought the initial class action case, as well as cover administrative and legal fees.

Injunctions Against Anticompetitive Contract Terms to Appease the State AG

Far beyond the effect of monetary compensation is the injunctive terms of the settlement that promise to bring more far-reaching implications to California's provider market and potentially create ripple effects across the country.

In the consolidated lawsuit against Sutter, both the California AG and private parties United Food and Commercial Workers union (UFCW) and Employers Benefit Trust (UEBT) claimed Sutter engaged in anticompetitive behavior by using three specific types of contract provisions in its contracting practices, namely all-or-nothing, anti-incentive (anti-steering or anti-tiering), and price secrecy terms. (see [The Source Blog](#) for details of these claims). The settlement agreement enjoins Sutter from enforcing each of these anticompetitive provisions in all prior, existing, or future contracts with insurers:

- All-or-nothing contracts: Sutter cannot require insurers, employers and self-funded plans to include all of Sutter's facilities and products in their provider networks by leveraging must-have providers. Sutter cannot condition participation or hospital pricing on the inclusion of other Sutter providers that the health plan would otherwise exclude in a network. The settlement agreement would allow insurers to pick and choose hospitals within the system. Additionally, Sutter

must cease bundling services and products to require the purchase of more services than necessary. Sutter is required to offer stand-alone pricing that must be lower than any bundled package price to offer insurers more choice.

- Anti-incentive provisions: Sutter is prohibited from using anti-steering and anti-tiering contract terms that impede payers' use of incentives, including differences in co-payments, co-insurance, and information as to quality and cost-effectiveness, to direct patients to cheaper and higher value health care providers. Sutter must allow the creation of narrow networks, tiered health plans, reference pricing, and value-based benefit design.
- Price secrecy or gag clauses: Sutter is prohibited from using gag clauses that prohibit insurers from disclosing prices for their healthcare services. Sutter is required to increase price transparency by allowing insurers and employers to give their members access to pricing, quality, and cost information for purposes of comparison and making better health care decisions.

Beyond the requirement to cease anticompetitive contracting practices, the settlement agreement imposes additional restraints that target Sutter's conduct:

- Out-of-network charges: The settlement requires Sutter to limit charges for out-of-network services to remedy supracompetitive out-of-network prices that Sutter was allegedly able to demand as a result of its market dominance and anticompetitive practices. These caps are reinforced by limits on allowed annual increases in Sutter's billed charges for five years for out-of-network care that include trauma care, emergency room care, rural hospitals, and other more easily steered in-patient and out-patient hospital care. The limit on out-

of-network charges will in turn prevent surprise billing.

- Market consolidation: The settlement agreement carves out exceptions to the injunctions against Sutter in cases of clinical integration and patient access consideration. Because clinical integration can be used as a way to mask market consolidation efforts, Sutter is required to set clear definitions for these terms to prevent it from abusing the exceptions to achieve anticompetitive purposes. Specifically, in order to claim that it has a clinically integrated system, Sutter must meet specific coordination of care standards, as mere geographic proximity and record sharing will not be enough to make this claim.
- Compliance monitor: An experienced, court-approved compliance monitor will oversee Sutter's contracts with insurers for ten years to ensure compliance with the specified parameters of the settlement terms. Sutter will pay all costs associated with the monitoring, which can be extended one time for an additional three years.

Winners, Losers, and Implications of the Settlement

What do these terms all mean for Sutter, insurers, consumers, and even beyond the California provider market? There was much anticipation that the Sutter case, had it gone to trial, would shed light on Sutter's business practices. The trial was scheduled to last at least three months, with 340 potential witnesses and 13,000 exhibits. As such, it was in Sutter's interest to settle outside of the courtroom so that much of its contracting practices would remain hidden. Also notable is that the settlement terms do not include findings of wrongdoing or that Sutter's contracting practice affected price and competition.

Nonetheless, there is much to celebrate, given the scope of the injunctions and their potential ripple effects across the country. As one of the largest actions against anticompetitive conduct in the health care marketplace in the nation, California AG Xavier Becerra called the “first-in-the-nation” settlement a “game-changer” that provides “unprecedented levels of injunctive relief to restore competition in the market.”[\[1\]](#) The injunctions imposed against Sutter place significant restrictions on Sutter’s use of market power to restrain competition and drive up healthcare prices in Northern California. The prohibition of anticompetitive contract terms and restraints on out-of-network charges and market consolidation work collectively to promote greater transparency and competition that would in turn lead to greater choice and lower costs for patients. Moreover, Health Access California, a health care consumer advocacy coalition, believes the settlement’s aim at out-of-network charges gives support to federal and state efforts to enact surprise billing legislation.[\[2\]](#) Finally, as extra security, compliance monitoring of up to thirteen years promises to keep Sutter in line for the foreseeable future.

The American Hospital Association (AHA), however, suggests the real winner from the settlement is the commercial health insurance industry, as it would give insurers the ability to “cherry-pick the hospitals with which they contract,”[\[3\]](#) giving them better contracting terms and making contracting with dominant insurers more expensive. While AHA warns that insurers, instead of consumers, will reap most of the benefits, experts are optimistic that premiums may see gradual, albeit not significant, changes.[\[4\]](#) As Sutter is prohibited from inflating prices, insurers will be able to negotiate lower prices in the long term once competition is restored in the market.

Beyond the effects on healthcare market competition and prices in California, the Sutter settlement could have more

significant implications for other large health systems across the country. As The Source Executive Editor Professor Jaime King pointed out in a [post-settlement podcast](#), Sutter is a model for many other hospital systems around the country. In a recent quote for Kaiser Health News, she indicated that while a settlement does not set a legal precedent, the outcome of this case “is strong guidance that the kinds of behavior Sutter engaged in are not going to be allowed going forward.”^[5] This sends a clear message to those health system that could lead to changes in existing and future conduct in those systems. Furthermore, Professor King believes this settlement “really opens the door for attorneys general in other states to begin examining their own health systems for similar behaviors,” which could pave the way for other state enforcement actions outside of California, to the benefit of healthcare consumers nationwide.

The settlement agreement is set for a preliminary approval hearing on February 25 by San Francisco Superior Court Judge Anne-Christine Massullo. Stay tuned as The Source Blog continues to bring the latest developments in this historic case.

^[1] Press Release: *Attorney General Becerra: State, Unions, Employers, and Workers Reach Settlement to Address Alleged Anticompetitive Practices by Sutter Health that Increased Healthcare Costs for Californians*, Dec. 20, 2019.

^[2] Don Thompson, *Health system pays \$575 million to settle anti-trust lawsuit*, AP News, Dec. 20, 2019.

^[3] Tara Bannow, *Sutter Health to pay \$575 million antitrust settlement with up to 13 years of monitoring*, Modern Healthcare, Dec. 20, 2019.

[\[4\]](#) Jenny Gold, *California AG Details ‘Historic’ Settlement Agreement In Sutter Health Antitrust Case*, Kaiser Health News, Dec. 20, 2019.

[\[5\]](#) *Id.*