

[Sutter Case Watch] The Landmark Sutter Health Antitrust Case was Settled. Will COVID-19 Uproot it Like it Did Everything Else?

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

When Sutter Health reached a preliminary settlement agreement with California Attorney General Xavier Becerra restricting its anticompetitive practices, antitrust experts breathed a collective sigh of relief on clinching a favorable outcome. Then came COVID-19. As with all other aspects of business and life, the pandemic has turned existing order upside down. Will it throw a wrench in the all but finalized case that would've served as strong guidance to other health systems in the country?

The terms of the settlement in the high-profile antitrust case were released last December in a [preliminary settlement agreement](#) filed with the Superior Court of San Francisco. Sutter agreed to both monetary compensation for the private plaintiffs in the amount of half a billion dollars, as well as injunctions against its anticompetitive conduct, including bundling of services, all-or-nothing contracting, and gag clause provisions (see [The Source Blog](#) for details). The terms promise to improve competition and promote transparency in the provider market, and more importantly, serve as a model for similar antitrust enforcement cases in other states.

To finalize the settlement, the case was set for a preliminary approval hearing in front of Superior Court Judge Anne-Christine Massullo on February 25, at which Judge Massullo

requested supplemental filings to address issues including: 1) potential substantial change in the regulatory framework regarding how medical services are provided; 2) authority for the AG's request to share in attorney fees; 3) steps to ensure diversity selection of the monitor; and 4) appropriate process to educate the court about specific provisions of the injunction.[\[1\]](#) Specifically, the court requested supplemental filings from Plaintiffs that would provide, among other things, a term-by-term summary of the proposed injunction, explaining as to each term, what the term does and does not prohibit Sutter from doing, how the restriction serves the purpose of unfettering the market from anticompetitive conduct, and justification for any limitations in the restriction imposed.[\[2\]](#)

The court ordered supplemental filings by March 18 and a further preliminary approval hearing on April 6. But when the coronavirus pandemic hit, courthouses around the country temporarily shuttered, and the court issued an order on April 3 staying the case for 60 days, with the preliminary approval hearing set to resume on June 22. Then Sutter saw an opportunity, and communications between the parties began to break down. While COVID-19 might be interrupting all aspects of life as we know it, for Sutter it could be seen as a lifeline in all the chaos to reverse losses from the settlement. According to recent reports, Sutter Health posted an operating loss of \$236 million for the first quarter of 2020, and a net loss of \$1.1 billion,[\[3\]](#) largely attributed to declines in non-COVID-19 related hospital services due to the pandemic.

In a [letter to the court](#) on May 28, Sutter cited adverse financial and operational impact from COVID-19 and asserted that the circumstances have changed substantially since the parties entered the settlement. As a result, Sutter maintains that it may be forced to make operational changes "that could render impracticable and otherwise materially impact key

injunctive relief provisions,"[\[4\]](#) because compliance with such would "interfere with Sutter's ability to provide coordinated and integrated care to patients in California."[\[5\]](#) Sutter suggests that the proposed settlement should be modified or at least reevaluated to take into account the disruption in the healthcare industry caused by COVID-19, preferably when the healthcare landscape stabilizes.

In addition, Sutter claims that [SB 977](#), a bill co-sponsored by the AG that arose out of the Sutter litigation, may change existing antitrust law that formed the basis of the settlement. Sutter reasons that SB 977, should it be passed at the end of the legislative session in September, could materially impact the injunction or even render it necessary. SB 977 was sent to suspense file after the Senate Appropriations Committee hearing on June 9, with opposition from provider organizations including California Hospital Association, Adventist, and Stanford Healthcare. While a vote-only suspense hearing will be held after the committee has a better sense of the state budget, a suspense bill can often times fail to proceed without further discussion. Regardless of the fate of SB 977, antitrust experts believe it has no bearing on the Sutter settlement, as the injunctions should be imposed on Sutter regardless of what SB 977 may do.

Taken together, Sutter is requesting continued stay of the preliminary approval process, either in hopes of walking back on specific provisions of the settlement, or at the very least, delay the final settlement amidst the indefinite uncertainty of the COVID-19 crisis. At the court status conference held on May 29, Judge Massullo indicated that in order to formally consider Sutter's request, Sutter needs to file a noticed motion by June 12 to either stay the case and/or to continue the motion for preliminary approval. In the meantime, the court ordered that the 60-day stay entered on April 3 will be allowed to expire as previously ordered and the original June 22 hearing date will proceed as either a

status conference or further hearing on preliminary approval of the settlement.

Will Sutter continue to create more obstacles to the settlement in the COVID-19 chaos? Attorneys for Sutter seemed to indicate so. Whether they will succeed, however, is a much bigger question. At the May 29 status conference, Emilio Varanini from the AG office pointed to the financial support that Sutter is getting from federal relief grants.^[6] As of May 12, Sutter has received \$200 million in COVID-19 grants from the Coronavirus Aid, Relief, and Economic Security (CARES) Act's Provider Relief Fund, \$1 billion in accelerated Medicare payments from the Centers for Medicaid and Medicare, and other benefits from the CARES Act's assistance programs.^[7] Varanini also noted that federal antitrust authorities including the Federal Trade Commission and Department of Justice have said that COVID-19 is not an excuse to disregard antitrust law.^[8] At the same time, the federal case against Sutter is also heating up (look for The Source's updated coverage on that case forthcoming). As uncertainty from the COVID-19 crisis rages on, one thing is for certain, like the pandemic, the Sutter Health drama is far from over.

^[1] Order re (1) Plaintiffs' Motion for Preliminary Approval of Settlement; and (2) Plaintiffs' Motion to Appoint a Monitor, UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al., No. CGC 14-538451 (Cal. Super. Ct. S.F. City and Cnty. 2020).

^[2] *Id.* at 2.

^[3] Ron Shinkman, *COVID-19 shreds Sutter Health's finances in matter of weeks*, Healthcare Dive (May 15, 2020), <https://www.healthcaredive.com/news/covid-19-shreds-sutter-healths-finances-in-matter-of-weeks/578021/>.

[4] Letter to Judge Anne-Christine Massullo Re: UFCW v. Sutter Health, CGC-14-538451, from Jones Day and Bartko, Zankel, Bunzel & Miller, Attorneys for Defendant Sutter Health (May 28, 2020).

[5] Transcript of Status Conference at 17, UFCW & Employers Benefit Trust, et al. v. Sutter Health, et al., No. CGC 14-538451 (Cal. Super. Ct. S.F. City and Cnty. 2020) (May 29, 2020), </nas/content/live/sourceonhealth/wp-content/uploads/2020/06/2020-05-29-Hearing-Transcript.pdf>.

[6] *Id.* at 22.

[7] Tara Bannow, *Sutter Health's operating loss margin nears 20% in April*, Modern Healthcare (May 27, 2020), <https://www.modernhealthcare.com/finance/sutter-healths-operating-loss-margin-nears-20-april>.

[8] Joint Antitrust Statement Regarding COVID-19 (March 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.