

# The Source and Various Stakeholders File Amicus Briefs Urging 9th Circuit to Reverse Jury Verdict of *Sidibe v. Sutter Health* on Appeal

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

After the state action [UEBT v. Sutter Health](#) settled prior to trial, the [Sidibe class action](#) in federal court continued to shine the spotlight on hospital giant Sutter Health. In March 2022, a jury verdict in the Northern District Court of California cleared Sutter of anticompetitive allegations in this decade-long case. Class plaintiffs swiftly [filed an appeal](#) in the Ninth Circuit Court of Appeals to overturn the decision, citing inaccurate jury instructions and exclusion of key evidence that impacted the final outcome of the case. The Source, along with state antitrust regulators and experts across the country agreed and filed amicus briefs in the Ninth Circuit last month in support of overturning the lower court judgment. In this issue of "[Sutter Health Case Watch](#)", we take a closer look at some of the main issues on appeal that various stakeholders weighed in on in the amicus briefs.

## Who Were the Amici?

While the state action joined by the California attorney drew nationwide attention, it did not proceed to trial due to settlement. The *Sidibe* class action in federal court, on the other hand, saw the rare opportunity to put the hospital giant on trial, but the jury verdict no doubt sent shockwaves through healthcare antitrust world. The appeal garnered the attention of many stakeholders, including California's and several other state attorneys general, various consumer groups, and healthcare

antitrust experts and economists across the country. A total of eight amicus briefs, including one from The Source, were filed in the Ninth Circuit in support of a reversal of the case:

1. [Attorneys General from California, Illinois, New Mexico, North Carolina, Oregon, Rhode Island, and District of Columbia](#)
2. [American Antitrust Institute \(AAI\) and Committee to Support the Antitrust Laws \(COSAL\)](#)
3. [California Health Care Coalition \(CHCC\)](#)
4. [Consumer Action and U.S. PIRG](#)
5. [Purchaser Business Group on Health \(PBGH\)](#)
6. [Catalyst for Payment Reform \(CPR\)](#)
7. [13 Scholars of Healthcare Economics](#)
8. [The Source on Healthcare Price & Competition and UC Berkeley's Petris Center](#)

## **What Did the Amici Argue?**

1. *Improper Exclusion of Pre-2006 Evidence Including History and Purpose of Restraint*

Many of the amici, including the state attorneys general, The Source/Petris Center, AAI/ COSAL, PBGH, and CPR, argued that the district court wrongfully excluded all pre-2006 evidence, including the history and purpose of Sutter's challenged conduct. This excluded historical evidence is highly probative and critical to the plaintiffs' case, and its inclusion is required under both federal case precedent and state law. The nature and purpose of the alleged restraint is a particularly important element under California's antitrust statute, the Cartwright Act, which finds either anticompetitive purpose *or* effect to be an unreasonable restraint of trade. California and six other state AGs, as enforcers of their state antitrust laws, sharply criticized the court's error in failing to properly apply state antitrust law, under which the case was brought, by omitting instructions on anticompetitive purpose. Additionally, as The Source pointed out in its brief jointly filed with the UC Berkeley's Petris Center, the sweeping exclusion of pre-2006 historical evidence also effectively

barred telling admissions by Sutter executives that showed Sutter's deliberate, anticompetitive intent to dominate the market and raise prices, and thus merit reversal.

## *2. Improper Consideration of Kaiser Due to Failure to Identify Relevant Buyer in the Market*

Another major reversible error the district court committed, according to the amici, is its failure to properly identify commercial health plans as the relevant and direct purchaser of Sutter's healthcare services. As well-established by antitrust case precedents and undisputed economic analyses, this issue was the main focus of the amicus brief filed by several scholars of healthcare economics, and further echoed by The Source/Petris Center, AAI, CPR, and the state AGs. As the amici explained, the healthcare market operates on a two-stage model of competition, in which health insurers contract with hospitals for healthcare services and form provider networks which are then offered to patients who enroll in the health plans. As a result, commercial health plans are the relevant buyers as direct purchasers of Sutter's inpatient hospital services, not patients. Because the district court's jury instructions did not specify who the relevant buyer was for purposes of determining Sutter's market power, it resulted in confusion and the improper discussion of market power as related to patient markets, i.e., Kaiser Permanente. However, given that Kaiser is a closed network and its providers do not contract with commercial insurers, it is not available as an alternative to Sutter from the perspective of health insurers and thus entirely irrelevant for purposes of determining Sutter's ability to demand tying from the insurers.

## *3. Importance of Antitrust Enforcement as Constraint on Harmful System Power*

Amicus briefs from The Source/Petris Center, Catalyst for Payment Reform, Consumer Action/U.S. PIRG, and others also urged the 9th Circuit to consider the importance of vigorously enforcing antitrust laws to ensure adequate competition in the marketplace. As The Source/Petris Center brief pointed out, a vacuum in hospital merger enforcement over several decades has resulted in dominant health systems such as Sutter Health that have garnered significant market power. With the operation of several "must-have" hospitals, Sutter leveraged this system power to

illegally impose tying conditions and other contractual provisions such as all-or-nothing clauses. Evidence also shows that such conduct substantially increases the prices health plans and their subscribers must pay. As such, private enforcement of antitrust laws and monetary damages are a critically important tool and serve as an important deterrent to a growing number of dominant hospital systems like Sutter to ensure they do not unreasonably harm consumers.

In response to the plaintiffs-appellants' opening brief filed on October 3 and the slew of amicus briefs supporting it, Sutter was originally required to submit their answering brief by November 2. They requested and received a two-month extension to January 3, 2023. Stay tuned to The Source's [Sutter Case Watch series](#) for the latest development as this case proceeds on appeal in the 9th Circuit.