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California Attorney General Brings Action Against Sutter Health Contending its Contracting Practices Violate the Antitrust Laws

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The California Attorney General recently filed a precedent-setting antitrust action against Sutter Health, the largest health system in Northern California (*People of the State of California v. Sutter Health,* Case No. CGC-18-565398, San Francisco Superior Court), contending that Sutter Health's contracting practices violate the antitrust laws. The action, filed in the San Francisco Superior Court, seeks to "restore competition in healthcare markets in California," and claims that Sutter Health has "found a way to illegally control price and severely limit competition by compelling [insurers] to enter into contracts that improperly block any and all practical efforts to foster or encourage price competition between Sutter and any rival hospital systems." To remedy the alleged violations, the State seeks, among other things, to have the Court require Sutter Health to terminate the challenged contracting practices, to "disgorge" previously received "overcharges" that Sutter Health received as a result of those practices, and to require Sutter Health to submit to mandatory arbitration to determine Sutter Health rates going forward.

Specifically, the alleged contracting practices implemented by Sutter Health that the State has challenged include (1) requiring that an insurer

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include *all* Sutter Health facilities in their networks if they want to have *any* Sutter Health facilities in the network (an "all or nothing" provision), even in situations where lower-cost alternatives might otherwise be chosen by the insurer to reduce costs; (2) prohibiting insurers from creating "tiers" in their networks that might permit them to steer insureds to other, lower cost health providers also in the insurer's network; and (3) restricting insurers from providing information about Sutter Health's rates, allegedly to reduce potential price comparisons by prospective patients and insureds. As a result, according to the State's Complaint, the cost for inpatient procedures in Northern California, on average, is 70% higher than in Southern California.

Notably, the action is somewhat factually similar to another closely-watched case brought by the DOJ Antitrust Division against the Carolinas Healthcare System in 2016 (*United States v. The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Health System,* Case No. 3:16-cv-00311, Western District of North Carolina). In that case, the Antitrust Division (and the State of North Carolina) contend that Carolinas Health System (CHS), the largest health system in the greater-Charlotte area, also insisted upon contractual provisions in its network contracts with insurers that were designed to increase prices and restrict competition, including "anti-steering" provisions and "restrictions limiting the [insurers'] ability to inform their customers about, or incentivizes them to use, other health-service providers which may be able to provide better or more affordable service." In March of 2017, the Court denied CHS's motion to dismiss the case, and it is currently scheduled for trial in early 2019.

The Sutter Health case, however, is different from the CHS in two potentially significant ways. First, in *Carolinas Health System,* the DOJ contends that CHS's conduct constitutes a "rule of reason" violation of Section 1 of the Sherman Act. As such, to prevail, the DOJ must demonstrate both that CHS entered into such agreements with the

insurers *and* that the alleged conduct has significant anticompetitive effects in a properly defined market (contentions that CHS has already signaled in its defense of the case that it believes the DOJ will ultimately not be able to prove). In contrast, the California Attorney General's case against Sutter Health is brought under the Cartwright Act (California's antitrust law) which, unlike federal antitrust law, arguably characterizes the alleged conduct as a *per se,* rather than rule of reason, violation. Thus, if the California court ultimately agrees that the conduct alleged *is* susceptible to *per se* treatment, the State could potentially prevail in the case without the necessity of proving that the impact of the provisions in the market was, on balance, anticompetitive. Second, the relief sought by the State is significantly broader than that sought by the United States in the *Carolinas Health System* case, with the request for "disgorgement" in the *Sutter Health* case potentially totaling millions of dollars, if not more.

On May 14, Sutter Health filed its response to the California Attorney General's Complaint. Perhaps not surprisingly, Sutter Health response focuses largely on the relief sought by the State, and not the merits of the antitrust claims (given the more limited defenses available to a *per se* claim). Instead, Sutter Health challenges the State's right to seek disgorgement for the alleged "overcharges," contending that the Cartwright Act provides for no such remedy. In addition, Sutter contends that the State's request that Sutter Health be required to arbitrate the terms of its contracts with insurers going forward is "unprecedented" and that it would "threaten to upend Sutter's business model and hobble Sutter's efforts to innovate." A hearing is set on Sutter Health's motion for June 11. Stay tuned.

the information contained in this email without seeking the advice of legal counsel.