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Sutter Health Settles California Attorney General Antitrust Case With Cash and an Agreement to Make Significant Changes to its Operations

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The terms of a settlement that resolved antitrust litigation between the State of California and Sutter Health, the largest health system in Northern California, have now become public, almost two months after the settlement put an end to the case. The settlement, which was inked only days before a trial in the case was set to begin, includes both the payment of a significant sum of money by Sutter Health and an agreement to accept structural reforms to its business. In addition, the settlement includes a first-of-its-kind agreement by Sutter Health to the appointment of a court-approved monitor who will oversee Sutter Health's compliance with the settlement for a period of at least ten years.

The action was commenced by the State in San Francisco Superior Court in 2018, and followed a similar action brought against Sutter Health by two unions that had been filed a few years earlier. In each case, the plaintiffs alleged that Sutter Health had used its size (the Sutter Health network consists of 24 hospitals, 36 ambulatory surgery centers and 16 cardiac and cancer centers) to insist upon contractual provisions in its contracts with insurers that had the effect of excluding competitors and increasing healthcare costs in Northern California. While Sutter Health denied the plaintiffs' allegations

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in both cases, and did so again in the settlement agreement, Sutter Health has agreed to pay the plaintiffs $575 million (to be split between the unions and the State), and Sutter Health will eliminate the use of certain provisions in its insurer contracts. Notably, these restrictions include the elimination of the use of "all-or-nothing" provisions in its contracts with insurers, which required insurers to contract with all of Sutter Health's facilities if they wanted to contract with any of them and, according to plaintiffs, resulted in higher rates to consumers. The settlement also prohibits Sutter Health from refusing to offer stand-alone pricing for its services and products, and imposes rate restrictions on Sutter Health's out-of-network rates.

In announcing the settlement, which still requires court approval, California Attorney General Xavier Becerra stated that "Today's settlement will be a game changer for restoring competition in our healthcare markets. Sutter must stop practices that drive patients into more expensive health services and products, and it must operate under the watchful eye of a court-approved monitor selected by the Attorney General's Office for at least ten years." He continued: "This first-in-the-nation comprehensive settlement should send a clear message to the markets: if you're looking to consolidate for any reason other than efficiency that delivers better quality for a lower price, think again. The California Department of Justice is prepared to protect consumers and competition, especially when it comes to healthcare."

Notably, the settlement follows the settlement of an action brought by the U.S. Department of Justice Antitrust Division against Atrium Health, a large Charlotte, North Carolina health system that had allegedly utilized similar contracting provisions in its contracts with insurers, in 2018. Like the settlement in the Sutter Health case, in the Atrium case, Atrium ultimately agreed to terminate the use of the contract provisions that the DOJ alleged had anticompetitive effects, including "steering

provisions" that allegedly limited the ability of insurers to choose health systems that competed with Atrium. And, in a statement quite similar to California Attorney General Becerra's, in announcing the Atrium settlement, DOJ Assistant Attorney General Makan Delrahim, who leads the Antitrust Division, stated that "Atrium's steering restrictions interfered with the competitive process, resulting in fewer choices and higher costs for consumers."

Viewed together, the Atrium and Sutter Health cases, and settlements, send an unmistakable message to large health systems that their contracting practices can present significant antitrust issues, and that both federal and state antitrust regulators are prepared to take action to challenge such provisions if and when they arguably create harm to competition and consumers. Stay tuned.

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