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Hospital giant Sutter Health faces legal reckoning over medical pricing



Sutter Health Alta Bates Summit Medical Center in Berkeley. (Getty Images)

By JENNY GOLD
KAISER HEALTH NEWS



Economists and researchers long have blamed the high cost of healthcare in Northern California on the giant medical systems that have gobbled up hospitals and physician practices — most notably Sutter Health, a nonprofit chain with 24 hospitals, 34 surgery centers and 5,000 physicians across the region.

Now, those arguments will have their day in court: A long-awaited class-action lawsuit against Sutter is set to open Sept. 23 in San Francisco County Superior Court.

The hospital giant, with \$13 billion in operating revenue in 2018, stands accused of violating California's antitrust laws by leveraging its market power to drive out competition and overcharge patients. Healthcare costs in Northern California, where Sutter is dominant, are 20% to 30% higher than in Southern California, even after adjusting for cost of living, according to a [2018 study](#) from the Nicholas C. Petris Center at UC Berkeley cited in the complaint.

The case was initiated in 2014 by self-funded employers and union trusts that pay for worker healthcare. It since has been joined with [a similar case](#) brought last year by California Atty. Gen. Xavier Becerra. The plaintiffs seek as much as \$900 million in damages for overpayments that they attribute to Sutter; under California's antitrust law, the award can be tripled, leaving Sutter liable for as much as \$2.7 billion.



The case is being followed closely by industry leaders and academics alike.

“This case could be huge. It could be existential,” said Glenn Melnick, a healthcare economist at USC. If the case is successful, he predicted, healthcare prices could drop significantly in Northern California. It also could have a “chilling effect” nationally for large health systems that have adopted similar negotiating tactics, he said.

The case already has proved controversial: In November 2017, San Francisco County Superior Court Judge Curtis E.A. Karnow [sanctioned Sutter](#) after finding it had intentionally [destroyed 192 boxes of documents](#) sought by plaintiffs, “knowing that the evidence was relevant to antitrust issues.” He wrote: “There is no good explanation for the specific and unusual destruction here.”

Antitrust enforcement is more commonly within the purview of the Federal Trade Commission and U.S. Department of Justice. “One of the reasons we have such a big problem [with consolidation] is that they’ve done very little. Enforcement has been very weak,” said Richard Scheffler, director of the Nicholas C. Petris Center. From 2010 to 2017, there were [more than 800 hospital mergers](#), and the federal government has challenged just a handful.



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By Straight Talk

“We feel very confident,” said Richard Grossman, lead counsel for the plaintiffs. “Sutter has been able to elevate their prices above market to the tune of many hundreds of millions of dollars.”

Or, as Becerra [put it](#) at a news conference unveiling his 2018 lawsuit: “This is a big ‘F’ deal.”

Sutter vigorously denies the allegations, saying its large, integrated health system offers tangible benefits for patients, including more consistent high-quality care. Sutter also disputes that its prices are higher than those of other major healthcare providers in California, saying its internal analyses tell a different story.

“This lawsuit irresponsibly targets Sutter’s integrated system of hospitals, clinics, urgent care centers and affiliated doctors serving millions of patients throughout Northern California,” spokeswoman Amy Thoma Tan wrote in an emailed statement. “While insurance companies want to sell narrow networks to employers, integrated networks like Sutter’s benefit patient care and experience, which leads to greater patient choice and reduces surprise out-of-network bills to our patients.”

There’s no dispute that for years Sutter has worked aggressively to buy up hospitals and doctor practices in communities throughout Northern California. At issue in the case is how it has used that market dominance.

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April 13, 2018

According to the lawsuit, Sutter has exploited its market power by using an “all-or-none” approach to contracting with insurance companies. The tactic — known as the Sutter Model — involves sitting down at the negotiating table with a demand: If an insurer wants to include any one of the Sutter hospitals or clinics in its network, it must include all of them. In Sutter’s case, several of its 24 hospitals are “must-haves,” meaning it would be almost impossible for an insurer to sell an insurance plan in a given community without including those facilities in the network.

“All-or-none” contracting allows hospital systems to demand higher prices from an insurer with little choice but to acquiesce, even if it might be cheaper to exclude some of the system’s hospitals that are more expensive than a competitor. Those higher prices trickle down to consumers in the form of higher premiums.

The California Hospital Assn. contends such negotiations are crucial for financially struggling hospitals. “It can be a great benefit to small hospitals and rural hospitals that don’t have a lot of bargaining power to have a larger group that can negotiate on their behalf,” said Jackie Garman, the association’s legal counsel.

Sutter also is accused of preventing insurers and employers from tiering benefits, a technique used to steer patients to more cost-effective options. For example, an insurer might charge \$100 out of pocket for a procedure at a preferred surgery center, but \$200 at a more expensive facility. In addition, the lawsuit alleges that for years Sutter restricted insurers from sharing information about its prices with employers and workers, making it nearly impossible to compare prices when selecting a provider.

Altogether, the plaintiffs allege, such tactics are anti-competitive and have allowed Sutter to drive up the cost of care in Northern California.

Hospitals in California and other regions across the country have watched the success of such tactics and taken note. “All the other hospitals want to emulate [Sutter] to get those rates,” said Anthony Wright, executive director of the advocacy group Health Access.

A verdict that finds such tactics illegal would “send a signal to the market that the way to compete is not to be the next Sutter,” Wright said. “You want them to compete instead by providing better quality service at a lower price, not just by who can get bigger and thus leverage a higher price.”

Along with damages, Becerra’s complaint calls for dismantling the Sutter Model. It asks that Sutter be required to negotiate prices separately for each of its hospitals — and prohibit officials at different hospitals from sharing details of their negotiations. While leaving Sutter intact, the approach would give insurers more negotiating room, particularly in communities with competing providers.

Consolidation in the healthcare industry is probably here to stay: Two-thirds of hospitals across the nation are part of larger medical systems. “It’s very hard to unscramble the egg,” Melnick said.

California legislators have attempted to limit the “all or nothing” contracting terms several times, but the legislation has stalled amid opposition from the hospital industry.

Now the courts will weigh in.

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Jenny Gold