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Sutter's Market Dominance Hiked Premiums \$411M, Jury Told

By **Bonnie Eslinger**

Law360 (February 23, 2022, 10:33 PM EST) -- An economist testifying as an expert witness in a federal antitrust class action against Sutter Health said Wednesday that the hospital giant exploited its market power over California's top five health insurers, resulting in higher prices that cost millions of premium payers about \$411 million.

Tasneem Chipty was called to the witness stand by counsel for a 3 million-member **certified class** of individuals and businesses who had purchased health insurance policies since 2011 from Blue Shield, Anthem Blue Cross, Aetna, Health Net or United Healthcare. The insurers are not parties to the litigation.

The expert, who holds a Ph.D. in economics from the Massachusetts Institute of Technology, said Sutter had "interfered with competition" and thus harmed the class members.

In Northern California there are about 11 geographic markets for hospital services, Chipty said, and Sutter hospitals are in seven areas where there are few, if any, other choices.

That has contributed to the market power the hospital organization has over the five health insurers, which account for 90% of all fully insured patients in California, she said.

The suit claims that Sutter has taken advantage of its dominance to force health insurance companies to contract with all the hospitals in their networks, including those in higher-priced regions, and would not agree to insurance programs that "steer" some patients to lower-cost hospitals, narrow coverage or tier health providers by cost.

Sutter's systemwide contracts with the health insurers are anti-competitive, and its conduct has resulted in damages to the class of approximately \$411 million, said the economist, who said she has also served as an expert witness for the antitrust division of the Department of Justice in health care cases.

Further, despite Sutter's assertions that its business practices have resulted in a higher quality product, Chipty said the evidence she's seen has not shown that the anti-competitive conduct involving its contracts is offset by any benefits.

That includes provisions in Sutter's contracts against steering, which insurers do to get customers to use lower-cost hospital services.

"It's my understanding that the anti-steering clauses prohibited health plans from incentivizing patients to use other hospitals," Chipty said.

Insurers have also complained that Sutter doesn't allow them to put its hospital services in a "tier" that would cost more to patients.

Chipty noted that insurers had testified that even when Sutter consented to participate in products that had tiering "the other terms of Sutter's contracts interfered with the ability of these products to be commercially successful."

networks. Sutter would charge a high "non-participation" rate if one of the insurers' patient members landed in the out-of-network hospital for an emergency or other reasons.

"My understanding is that Sutter required higher out-of-network prices than those charged by other hospitals," Chipty said. "The testimony in this trial is that health plans have described these out of network prices as penalties."

As a result, Sutter's price structure means that the lower-cost "narrow" and tiered network products insurers want to offer are going to be more expensive or less commercially successful because health plans will have to charge higher prices for them, the economist said.

To arrive at her conclusions, the economist said she has spent thousands of hours — at a paid rate of \$150 per hour — combing through claim records, medical bills, premium data, hospital information, memos, emails, documents and other materials.

And work for the plaintiffs on the Sutter case over the last four years done by the firm Chipty is with, AlixPartners, and the consultancy it acquired in 2020, Matrix Economics, has run up a tab of \$6.5 million, the economist said.

On Wednesday, jurors also heard from one of the lead plaintiffs in the case, David Herman, a retired San Francisco police officer who had spent over three decades in law enforcement.

He said that while he paid from \$42 to \$60 per month for his Blue Shield HMO, he discovered that taxpayers paid over \$1,200 per month for his insurance coverage.

"It's astronomical," Herman said when asked why he agreed to be a class representative. "I would like to see the cost of medical insurance come down in Northern California for my adult children and their children and my grandchildren."

During **opening statements** on Feb. 10, a lawyer for the plaintiffs told jurors that the health care nonprofit had stifled competition and "gouged" millions of individuals and businesses with high prices because the class paid the artificially inflated insurance premiums.

Sutter's lawyer told jurors during his opening that his client faces enormous competition in Northern California and thus does not hold the market power alleged — and required — for the class action's claims to succeed.

On Tuesday, a Blue Shield executive testified that the hospital giant leveraged its dominant market position to force the insurer into costly contracts but also conceded that his company worried about unhappy clients moving to other insurers if it **dumped Sutter**.

The trial is scheduled to continue on Thursday.

The plaintiffs are represented by David Brownstein and David Goldstein of Farmer Brownstein Jaeger Goldstein Klein & Siegel LLP, Matthew L. Cantor and Jean Kim of Constantine Cannon LLP, Jill M. Manning of Pearson Simon & Warshaw LLP, Allan Steyer and Suneel Jain of Steyer Lowenthal Boodrookas Alvarez & Smith LLP and Azra Z. Mehdi of The Mehdi Firm PC.

Sutter is represented by Robert H. Bunzel and Oliver Q. Dunlap of Bartko Zankel Bunzel & Miller and Jeffrey Alan LeVee and David Craig Kiernan of Jones Day.

The case is Sidibe et al. v. Sutter Health, case number 3:12-cv-04854, in the U.S. District Court for the Northern District of California.

--Additional reporting by Hannah Albarazi. Editing by Rich Mills.