

Health giant Sutter destroyed evidence in crucial antitrust case over high prices, judge says

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Sutter Health intentionally destroyed 192 boxes of documents that employers and labor unions were seeking in a lawsuit that accuses the giant Northern California health system of abusing its market power and charging inflated prices, according to a state judge.

In a ruling this week, San Francisco County Superior Court Judge Curtis E.A. Karnow said Sutter destroyed documents “knowing that the evidence was relevant to antitrust issues. ... There is no good explanation for the specific and unusual destruction here.”

Karnow cited an internal email by a Sutter employee who said she was “running and hiding” after ordering the records destroyed in 2015. “The most generous interpretation to Sutter is that it was grossly reckless,” the judge wrote in his 12-page ruling.

Sutter, which has 24 hospitals and nearly \$12 billion in annual revenue, said the destruction was a regrettable mistake.

Employers and policymakers across the country are closely watching this legal fight amid growing concern about the financial implications of industry consolidation. Large health systems are gaining market clout and the ability to raise prices by acquiring more hospitals, outpatient surgery centers and physician offices.

“It’s stunning what Sutter did to cover up incriminating documents in this case,” said Richard Grossman, the lead plaintiffs’ lawyer representing a class of more than 1,500 employer-funded health plans.

In April 2014, a grocery workers’ health plan sued Sutter and alleged it was violating antitrust and unfair competition laws. The plaintiffs began requesting documents related to contracting practices, such as “gag clauses” that prevent patients from seeing negotiated rates and choosing a cheaper provider and “all-or-nothing” terms that require every facility in a health system to be included in insurance networks.

Sutter disputes the broader allegations in the lawsuit over its market conduct and said its charges are in line with its competitors’.

The judge said that in 2015 Melissa Brendt, Sutter’s chief contracting officer in the managed-care department, and an assistant general counsel, Daniela Almeida, authorized Brendt’s executive assistant to destroy 10 years’ worth of managed-care documents going back to 1995. The company earlier had scheduled the documents to be destroyed in 2035 — 20 years later.

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‘Fingers crossed’ that I haven’t authorized something the
FTC will hunt me down for.**

— Sina Santagata, Sutter executive assistant

The executive assistant, Sina Santagata, testified in a deposition she wasn’t aware of any other time in her 17 years at Sutter when the managed-care department destroyed records held in storage.

In his Monday ruling against Sutter, the judge singled out an email by Santagata as “particularly noteworthy.”

The executive assistant emailed Brendt, the chief contracting officer, on July 30, 2015, after sending the order to destroy the records. She wrote, “I’ve pushed the button ... if someone is in need of a box between 3/15/95 & 11/23/05 ... I’m running and hiding. ... ‘Fingers crossed’ that I haven’t authorized something the FTC will hunt me down for.”

The Federal Trade Commission enforces antitrust laws in healthcare to prevent hospitals, drugmakers and other industry players from engaging in anti-competitive behavior that could harm consumers.

Santagata testified that she was being “sarcastic” in her email, and Sutter told the judge that the FTC reference was just a “joke.”

Karnow saw no humor in it. “There are infinite topics for jokes, and the choice of this one is strong evidence” in the plaintiffs’ favor, he wrote in his order Monday.

As part of his sanctions against Sutter, the judge ordered the health system to examine email backup tapes covering 2002 through 2005 to search for documents on some of the same topics as the destroyed records. Also, Karnow said he will consider a plaintiffs’ motion for issuing jury instructions that are adverse to Sutter in light of the document destruction. The trial is scheduled for June 2019.

“The record shows that Sutter’s conduct was more than just an inadvertent error,” Karnow wrote.

Sutter spokeswoman Karen Garner said the incident was a “mistake made as part of a routine destruction of old paper records” and the Sacramento-based health system disclosed the error as soon as it was discovered.

“We regret that as part of a routine archiving process we failed to preserve some boxes of decades-old hard-copy documents,” Garner said.

The United Food and Commercial Workers and its Employers Benefit Trust initially filed the case against Sutter in 2014. The joint employer-union health plan represents more than 60,000 employees, dependents and retirees. The court certified the case as a class action in August, allowing hundreds of other employers and self-funded health plans to potentially benefit from the litigation.

In addition to its 24 hospitals, Sutter’s nonprofit health system has 35 surgery centers and more than 5,000 physicians in its network. It reported \$11.9 billion in revenue last year and income of \$554 million.

Grossman, the plaintiffs’ counsel, said he welcomed the judge’s ruling. But he said much of the evidence is irreplaceable, particularly handwritten notes from negotiating sessions and meetings involving key Sutter executives.

He said those records covered a critical period in the early 2000s when there was a “sea change in Sutter’s contracting strategy” and it implemented provisions that insulated the health system from price competition.

“This was groundbreaking in the industry,” Grossman said. “Until we address the anti-competitive behavior of entities like Sutter, we will not solve the problem of high costs in healthcare.”

The plaintiffs are seeking to recover hundreds of millions of dollars from Sutter from what it claims are illegally inflated prices. The lawsuit alleges that an overnight hospital stay at Sutter hospitals in San Francisco or Sacramento costs at least 38% more than a comparable stay in the more competitive Los Angeles market.

A study published last year found that hospital prices at Sutter and Dignity Health, the two biggest hospital chains in California, were 25% higher than at other hospitals around the state. Researchers at USC said the giant health systems used their market power to drive up prices — making the average patient admission at both chains nearly \$4,000 more expensive.

Terhune is a senior correspondent for Kaiser Health News, an editorially independent publication of the Kaiser Family Foundation.

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