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Why Sutter Health's Settlement Of Antitrust Case Sends Signals Concerning Anti-Kickback Compliance

Two weeks ago, on the eve of trial, northern California healthcare behemoth Sutter Health settled two related antitrust cases, one a class action brought by thousands of employers and a second brought by the State of California. Both cases, which had been combined for trial, alleged that Sutter had violated antitrust law and abused its market power to illegally raise prices.

So, what does this have to do with you, especially if your medical group or healthcare business has next to no market power?

Actually, it has a lot to do with you, particularly in regard to compliance with the federal Anti-Kickback Statute (the "AKS"). How can that be? Just keep reading.

Objective and Non-Objective Law

Some laws, neither antitrust laws nor the AKS among them, are objective in nature. They define what is prohibited in a manner that's clearly understood – a definite standard. Yes, it's still the case that judges and juries have to determine if the standard were violated in a particular case, but the standard is clearly capable of being understood. Take for example, something as simple as a speed limit or even something as complex as the definition of first-degree murder.

But other laws, and here's where antitrust laws and the AKS are cousins of a sort, are non-objective: so "mushy" as to be open to wide interpretation, so wide that each instance might draw 12 different opinions from 12 different people. In essence, what is touted to be a

standard is simply a tool of whimsy wielded by opponents, ladder climbing prosecutors and, even, from time to time, by those setting themselves up to run for governor.

Both antitrust law and the AKS are such that there is no bright line over which one knowingly cannot cross before triggering a purported violation.

This is especially the case when much of the power, in practical terms, in enforcing the AKS is wielded not even by judges, but by bureaucrats. And that leads us to the second major point.

Settlement is What Most Do

Although, of course, I can't get completely into the heads of Sutter Health or of the plaintiffs in the class action suit or of the California Attorney General, it's completely safe to assume that the lawsuits were settled for exactly the same reason discussed above in regard to antitrust law being non-objective: *No one was sure enough of their position to believe that it was more likely than not that they'd win.* Of course, there are other factors to consider too, such as the tremendous cost of what was likely to be a long and drawn out trial followed by a lengthy appeal.

And, that is exactly the point in connection with alleged AKS violations. Except in case of the most egregious of circumstances (bags of cash passed under the table at a Denny's) the trial could go either way, so most allegations result in settlements, settlements that nearly always extract more than a pound of flesh from the accused.

The Takeaways For You

For you, in the kickback context, this presents two actionable lessons.

The first is that staying as far away from where that bright line *might* be is the best course of action. Remember, those claiming a violation will pencil in that line far past the point you've already crossed, and then claim that the pencil line was indelible ink.

The second is that you must incorporate "AKS awareness" into your strategy and, certainly, into your operations, *on an ongoing basis*. You must vet and re-vet potential arrangements before entering into them. And, you must review your ongoing deals on a regular basis, both internally and through outside experts.

Remember that the chances are that you *will* cave in the light of an actual fight. The fight is just too expensive and the penalties are too draconian if you take it all the way and lose. That is, unless you have more fortitude, and more cash to throw at the dispute, than Sutter Health or the State of California.



Wisdom. Applied. 131 - Marrying for Money - One Hospital's Merger Urge is Your Negotiating Lesson

Last fall, Milford Hospital, located in Milford, Connecticut, announced that it was exploring a merger with Bridgeport Hospital, part of Yale New Haven Health.

All Things Personal

On a recent trip to Chicago on American Airlines, I got to the gate a few minutes before boarding started, surprised to find that the plane wasn't there. The gate agent announced that the plane was heading over from the hangar and that there'd be only a slight delay. That slight delay resulted in an approximately one hour delay by the time the plane backed away from the gate.

After a drive on the taxiway equivalent to, say, the trip from Los Angeles to San Francisco, we'd reached, but for one right turn, first position for takeoff. And, then, I watched plane after plane after plane pass us and take off.

The pilot announced that we were heading back to the gate. A mechanic had failed to sign off, attesting to some required work. The pilot said that he was required to return to the terminal to get the sign-off.

After another long drive, we were almost back at the terminal. . . but we stopped. The pilot announced that the mechanic had now confirmed that the work was done, so we didn't have to proceed to the gate, but could head back out to take off.

Why hadn't the plane been moved from the hangar to the gate on time to begin with? Why hadn't the mechanic signed off on the work before the plane left the hangar?

The lesson here is clear: Whether you're running an airline or heading to a meeting or some other appointment, show up on time, ready to perform.



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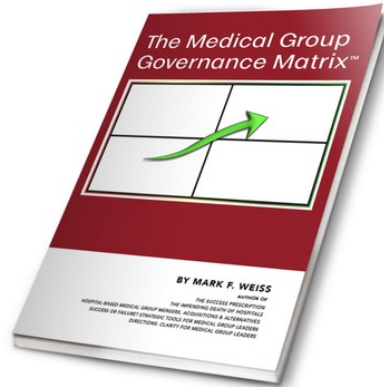
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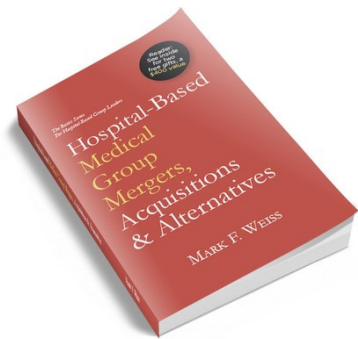
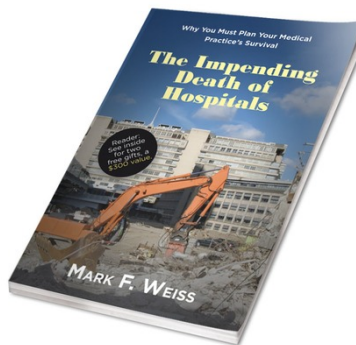
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- [Fair and Balanced Views: The Pros and Cons of Selling Your Anesthesia Group](#), Fall 2019, [Sentinel](#).
- [What's the Lifetime Value of a Patient?](#) Published in the July 2019 issue of [Outpatient Surgery](#).
- [4.5 Things Magic Mountain Taught Me About Your Business](#), Winter 2019, [Sentinel](#).

Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one in which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s your medical group’s governance structure that’s holding you back. In fact, it’s very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy [here](#).



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