

# THREE KEY THINGS IN HEALTH CARE

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Published weekly by the Hunton Andrews Kurth Health Care Practice Group, *Three Key Things in Health Care* offers snapshots of three significant issues in health care that we believe merit your attention. Our goal is to provide actionable ideas that will benefit your organization. We welcome your feedback!

- **Are calls for restrictions on healthcare mergers and acquisitions warranted?**
  - In a prior issue, we noted how the COVID-19 crisis is expected to drive an increase in provider affiliation transactions as a result of the disparate impacts on more vulnerable organizations, the need for more effective collaboration and utilization of resources and a rise in bankruptcies.
  - This past week we saw news about lawmakers, regulators and organizations wanting to ensure the billions of provider relief funds distributed by CMS do not enable “opportunistic acquisitions” during and after the crisis.
  - The Pacific Business Group on Health (PBGH) and a consortium of private employers even went so far as to ask Congress to make healthcare providers pledge not to engage in mergers and acquisitions for 12 months as a condition of receiving provider relief funds.
  - Protecting consumers and employers from price gouging and unwarranted price increases by opportunistic firms seeking to leverage the current crisis is crucial, but imposing a sweeping ban on merger and acquisition activity could also negatively impact access to care – one of the other key concerns advanced by PBGH.
    - Without the option to affiliate with a more financially stable organization, many providers could go out of business or be forced to go into bankruptcy or otherwise scale back certain services in order to remain solvent.
  - Moreover, there are already many factors in place that will serve as guardrails to address opportunistic acquisitions:
    - The FTC has indicated they intend to continue to apply the same scrutiny it has in the past with respect to healthcare mergers regardless of the pandemic, and state attorney generals are likely to do the same.
    - The CMS terms and conditions for receipt of provider relief funds already have restrictions on use of funds that would limit the ability of providers to leverage those funds for acquisitions.
    - Despite the billions in provider relief funds, most health care providers are still experiencing significant financial strain with COVID-19 and will have to be measured in evaluating potential acquisitions while trying to maintain current operations.
  - **Key takeaway:** Consumers and employers are warranted in seeking to protect against opportunistic behavior that could result in unwarranted price increases, but imposing a sweeping ban on merger and acquisition activity could have significant negative impacts on access to care and should not be necessary given current guardrails in place.
- **HHS’s view that a payment from the Provider Relief Fund (a “Payment”) is “not subject to the claims of the provider’s creditors” is doubtful at best.**
  - A June 8 FAQ addresses whether a Payment is “accessible in whole or in part to bankruptcy creditors and other creditors in active litigation.” According to HHS, the answer is no:

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*Payments from the Provider Relief Fund shall not be subject to the claims of the provider's creditors and providers are limited in their ability to transfer Provider Relief Fund payments to their creditors. A provider may utilize Provider Relief Fund payments to satisfy creditors' claims, but only to the extent that such claims constitute eligible health care related expenses and lost revenues attributable to coronavirus and are made to prevent, prepare for, and respond to coronavirus, as set forth under the Terms and Conditions.*

- In the vast majority of bankruptcy cases, HHS likely is wrong on this point:
  - Dollars are fungible, and if a Payment is used by a provider to reimburse eligible expenses or lost revenues already incurred, such amount would be available for creditors.
  - This argument probably extends to all cases in which a provider has incurred eligible expenses or lost revenues, even if the provider had planned to use the payment for some future expenses.
  - Complete segregation of a Payment from other provider funds or the ability to trace the Payment coupled with the absence of *any* eligible expenses or lost revenues might support the HHS position, but even then, the result under the bankruptcy code would be uncertain.
- **Key takeaway:** Providers should assume Payments will be subject to claims of creditors, the June 8 FAQ notwithstanding.
- **Providers should plan now for a second wave of COVID-19.**
  - When the pandemic hit in late February, the country was caught largely unprepared. Hospitals were no exception.
  - Despite apparent upticks in COVID-19 cases in several locations, providers generally have seen something of a leveling off in cases requiring hospitalization. Assuming a resurgence of critical cases will materialize, hospitals would be well served to take advantage of the present "bent curve" and assess their readiness for a second wave. To that end, the following should receive focused attention:
    - PPE inventories and supply chain management challenges.
    - Training of clinical staff in the avoidance of cross contamination, informed by experience gained earlier this year.
    - Pharmacy supplies.
    - Community testing capabilities.
  - Above all, the virtual cessation of elective procedures visited catastrophic financial harm to the hospital sector - finding a way to continue to serve elective caseload while treating COVID-19 cases would seem to be of paramount importance.

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