

# Katten

Health Care

## Health Care Symposium: The Business of Health Care in the Wake of COVID, the Election and Social Uncertainty | Key Takeaways



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Michelle “Missy” Apodaca, of counsel on Katten’s Health Care team, moderated the legislative outlook at the federal and state level session of the Health Care Symposium, with Texas State Representative Rafael Anchia and John Kelliher, Managing Director—Healthcare Policy and Transactional Diligence for BRG, as panelists.

With COVID resurging and a volatile election cycle—along with the real possibility of a blue wave in Texas and across the United States—the health care industry is facing an incredible amount of uncertainty.

## **COVID is hitting already-strained state health care budgets hard. But relief is coming, no matter who wins the election.**

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- Texas, like many states, is wrestling with a number of budget issues related to health care heading into this session. These include a Medicaid shortfall (this is common in Texas and gets balanced at the beginning of every new legislative session), and the need to balance a decreased budget (especially as it relates to Article 2, the health and human services portion of the budget—that often involves provider rate cuts, but it is unclear if that is what will happen during session). At the same time, we are seeing plummeting oil prices and a decrease in sales taxes, which means a reduction in tax revenue.
- But relief is coming. No matter who wins the presidential election, we are likely to see a federal COVID stimulus bill before the end of the year. The House has already passed the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act), a \$3 trillion stimulus bill to supplement the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) package. Though Republicans in the Senate haven’t taken up the bill, they have floated an alternative of around \$1 trillion. Despite mixed signals, the Trump administration seems to be somewhere in between.

A Biden win would likely mean a final package of around \$2 trillion, which would include money for small businesses, health care providers, loans, research, housing and increased Medicaid funding for states (probably in the range of 5 to 6 percentage points).

## **Big health care disruptions are probably off the table. Even at the Supreme Court.**

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Our participants discussed various Election Day outcomes and how they might affect the ACA and federal health care legislation.

- In one scenario, they saw a divided government (either President Biden with a Republican Senate or President Trump with a Democratic Congress). This might be the least disruptive outcome for health care providers. This scenario could lead to a preservation of the status quo and a balanced approach to the looming Medicare Part A trust fund shortfalls.
- In a second scenario, they saw Democrats sweeping the House, Senate and White House. Even here, our panelists saw only modest health care proposals reaching the light of day. Dems would likely end up with a slim

Senate majority, and deficit reduction concerns may swamp hopes for ambitious overhauls. Most likely: incremental proposals for long term care, slight reductions in health care spending, slight tax increases.

- At the Supreme Court, our panelists questioned whether we would see true disruption in a Patient Protection and Affordable Care Act (ACA) ruling. The Court could deny standing or uphold the law, and even if they strike it down, it is unlikely the exchanges or Medicaid expansions would truly disappear. More likely is an administratively messy situation that requires congressional or state action to fix, but something like the current status quo would persist.

### What else is on the horizon?

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- Texas health priorities this session. Emergency preparedness. Liability protections for providers. Health data reporting (Texas has been having issues in reporting data). Increasing access to care via technology (telehealth, telemonitoring, telepharmacy, teledentistry).
- Medicaid expansion in Texas. We may see Republicans willing to increase access to care/Medicaid expansion through some mechanism as COVID worsens this fall and winter.
- National growth of Medicare Advantage. In the Sun Belt, Medicare Advantage has displaced fee for service as the dominant form of health coverage. This is likely to spread and could have major implications for health providers in the next two to five years.

On October 29, Katten hosted the first presentation of the firm's Virtual Health Care Symposium titled, "The Business of Health Care in the Wake of COVID, the Election and Social Uncertainty." During the panel titled, "Trends in M&A Transactions," partner and co-chair of Health Care Transactions and Compliance Lisa Atlas Genecov moderated and panelists included John Brock, managing director of the Transaction Advisory Practice at Berkeley Research Group; Joe Sowell, senior vice president and chief development officer of HCA Healthcare; and Lane Wood, vice president and regional general counsel of CHRISTUS Health.

The panel discussed the impact the pandemic has had on transactions in the health care industry, the types of deals that providers have been seeing and trends and differences in deal terms, including CARES Act issues, material adverse change (MAC) clauses, representations and warranties and diligence issues. Below are the top four takeaways from the program.

## 1. Overview of Health Care Mergers & Acquisitions Market

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The health care mergers and acquisitions (M&A) market saw a promising uptick of activity in the third quarter. Sectors such as behavioral health, home health and telehealth garnered great interest from private equity and strategic investors. Experts attribute the rebound to states reopening and higher volumes of patients resuming non-emergency and elective medical procedures. But while parties aim to move forward, uncertainty surrounding earnings, valuations and transaction structures pose unique challenges for buyers and sellers. Although closing a deal may be more challenging during these times, parties can reach a favorable outcome through creative transaction structuring, comprehensive due diligence and aligned key objectives.

## 2. How the Pandemic Has Influenced the Market

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State executive orders temporarily paused all non-emergency and elective medical procedures to contain the spread of the pandemic. But even as providers ramp up to accommodate the growing waitlist of patients, the changing pattern of health care use may indicate that patients are still concerned about receiving treatment in an emergency department environment. Emergency rooms have seen a decline in non-COVID-19 patients; these patients are seeking health care through telehealth, urgent care, home health and ambulatory surgical centers (ASCs). This trend may provide new synergies between hospitals and health systems, physician practices and ASCs who seek to expand service lines and maintain efficient supply chains.

## 3. How Transaction Processes and Terms Have Changed Since the Start of the Pandemic

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Transaction processes and terms continue to evolve in response to the pandemic. The due diligence process may take longer as parties are generally more cautious, and buyers examine target companies' financials and supply chain logistics more closely. Panelists also reported difficulties physically uploading materials into virtual data rooms during the stricter stay-at-home orders. Representation and warranty insurance (RWI) also continues to evolve. While RWI can help offload some uncertainties, COVID-19 policy exclusions are the market standard. Parties should fully expect

and prepare to negotiate exclusions and allocate COVID-19-related risks through deal terms, including conditions to closing, covenants between signing and closing, representations and warranties and/or purchase price adjustments.

Recently, the Small Business Administration (SBA) issued guidance stating that SBA lenders must obtain SBA approval before consenting to certain change of ownership transactions, unless the borrower first applies for loan forgiveness and escrow the amounts borrowed plus interest with the lending institution.<sup>1</sup> If a target company has received a Payment Protection Program (PPP) loan, the parties should review SBA guidance to avoid potential transaction delays.

#### **4. Trends and Thoughts on What Health Care M&A Will Look Like Post-COVID-19**

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Motivated parties will continue to pursue transactions despite economic uncertainty, as evidenced by the strong third quarter. As patients continue to resume overdue non-emergency medical procedures outside of hospital emergency departments, alternative care delivery models may provide new opportunities for partnerships and joint ventures. Similarly, the need for innovation and efficient adaptation will remain in light of telehealth's growing popularity in an increasingly competitive digital health market.

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<sup>1</sup> See <https://www.sba.gov/document/procedural-notice-5000-20057-paycheck-protection-program-loans-changes-ownership>.

Health Care partner Kenya Woodruff moderated the Regulatory and Compliance session of Katten's Health Care Symposium, with Ruth Ann Dorrill, Regional Inspector General of the Department of Health and Human Services (HHS) Office of the Inspector General's Office of Evaluation and Inspections (OIG-OEI), Daphne Walker, Chief Legal Counsel of JPS Health Network, and Janice Jacobs, Managing Director of Corporate Compliance and Risk Management with BRG, as panelists.

The discussion covered emerging trends and topics related to (1) COVID-19's impact on OIG-OEI's key priorities; (2) operational and legal challenges faced by healthcare providers in responding to COVID-19; (3) how the legal framework governing telemedicine has evolved to meet the demands of COVID-19; and (4) potential risks that providers should prepare to manage going forward.

## 1. What is COVID-19's impact on OIG-OEI's priorities?

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The panelists discussed how OIG-OEI's key priorities are aligned with addressing the COVID-19 pandemic. For example, the panelists explored how OIG-OEI's efforts to prevent waste, fraud and abuse helps to ensure that HHS's limited funds are available to be used in the appropriate manner, which in some situations assists with efforts to combat COVID-19. In addition, the panelists considered how OIG-OEI's increased focus on collaborating with other federal government agencies (e.g., the Department of Homeland Security) promotes cost-effectiveness and ensures that HHS is able to provide better services to its beneficiaries. Finally, the panelists discussed how OIG-OEI's efforts to improve its data management and artificial intelligence capabilities will increase OIG-OEI's ability to efficiently identify potential billing issues, which ultimately contributes to OIG-OEI's efforts to prevent waste, fraud and abuse. Related to this effort, OIG-OEI plans to announce a new artificial intelligence tool in the coming days.

## 2. What operational and legal challenges do providers face due to the COVID-19 pandemic?

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The panelists discussed how the COVID-19 pandemic has created operational and legal challenges for providers. The panelists explained that the operational challenges that providers wrestle with include developing methods to respond to limitations of critical health care resources (e.g., masks, gloves, hospital beds, etc.), establishing practices to manage COVID-19 infections amongst patients and staff, and developing the legal and technical infrastructure to provide telemedicine services to patients at an increased scale. In addition, the panelists noted that the legal challenges that providers face involve navigating conflicting federal, state and local legal guidance and ensuring that operations are structured to comply with applicable federal relief fund legal restrictions. Finally, a the panelists remarked that a less obvious challenge that providers face lies in managing patient reluctance to visit with providers on a non-emergency basis due to fears of COVID-19.

### **3. How has the legal framework governing telemedicine evolved to meet the demands of the COVID 19 pandemic?**

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The panelists examined how the legal framework governing telemedicine has evolved to meet the demands of the COVID-19 pandemic. Currently, providers are able to provide telemedicine services broadly and receive reimbursement for such services on an expanded basis. For example, the panelists explored how the telehealth expansion waiver for Medicare, among other things, removed the rural location and site restrictions, relaxed HIPAA's applicability and removed certain equipment requirements, and revised the reimbursement rules to waive certain cost-sharing obligations and reimburse telemedicine services at the same rate as in-person visits. In addition, the panelists discussed how many state governments have promulgated emergency legal guidance to expand the ability of health care providers to provide telemedicine during the COVID-19 pandemic.

### **4. What types of compliance issues should providers be prepared to manage going forward?**

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At the conclusion of the session, the panelists discussed potential compliance challenges that health care providers should prepare to face as the COVID-19 pandemic continues and, eventually, comes to its end. The key issue that the panelists emphasized is that providers should not become "comfortable" in this relatively less restrictive regulatory context. The panelists noted that government agencies would likely attempt to monitor health care providers more strictly after the COVID-19 pandemic ends, and that audits and investigations of providers' actions could potentially begin six years after the COVID-19 pandemic has ended. As a result, the panelists encouraged providers to have an increased focus on compliance issues right now (e.g., by ensuring that adequate documentation is created for providers who work remotely, by increasing the frequency of internal compliance reviews and audits, etc.) to ensure that each action that a provider takes during the pandemic is defensible from a compliance perspective to enforcement agents in the future.

Barrett R. Howell, partner, moderated a discussion at Katten's Health Care Symposium on federal investigations and enforcement featuring Jacob Foster, Assistant Chief of the National Rapid Response Strike Force at the Department of Justice, and Greg Russo, Managing Director—Healthcare for BRG.

## COVID and telehealth fraud

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Since the COVID pandemic began, the scale and scope of health care fraud has increased. Focusing the conversation on telehealth fraud, the participants attribute this to primarily two factors: First, the fear around COVID, especially among vulnerable patients (the elderly, those with asthma or other conditions) makes them more susceptible to fraud (e.g., fake COVID tests). Second, the availability of government stimulus funding for testing and other health care support has drawn fraudsters and increased fraud activity. Combining those factors with technology can allow a single fraudster to reach farther and wider than ever before, creating a marked expansion of fraud activities.

For health care providers, understanding the investigation and enforcement environment under COVID is critical. Here are three takeaways from the discussion and three things you can do to protect yourself and your company.

### **1. What you should know: The government charges fraud cases based on billings, not collections.**

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Fraud charges, especially around health care fraud and telehealth fraud, are based on the amount the defendant intended to obtain, not the amount that was actually obtained. In the 2019 Operation Brace Yourself fraud case, 25 individuals were charged for \$1.7 billion in allegedly fraudulent claim submissions for durable medical equipment, but \$900 million was collected. In this particular case, the amounts were so big that this distinction didn't affect the charges brought; but with smaller-scale fraud cases, this difference could matter.

#### **What you can do: Familiarize yourself with fee schedules and check charge masters.**

Fee schedules and charge masters are often taken with a grain of salt in the health care industry. But they do mean something to the US Department of Justice. Familiarize yourself with the billing rates for the procedures, tests and durable medical equipment you are ordering on behalf of patients. That metric could be quite important if you are ever faced with an investigation.

### **2. What you should know: The government is looking at provider-patient interactions in investigating fraud.**

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Are you caring for patients directly? Are you approving orders? These two questions are inextricably linked for government investigators, and telehealth providers are of particular interest in fraud enforcement. A lack of patient contact raises red flags for investigators and can draw attention to your practice.

**What you can do: Document the patient interactions that led to specific orders.**

One important question government investigators ask in identifying fraud is: Were the tests (or procedures, durable medical equipment, etc.) in question ordered by the treating physician?

There are a few data points that help investigators determine this: Does the ordering physician have the ability to observe the patient and be familiar with the patient's history (even if that means just a video call consultation)? Do the ordered tests treat a specific medical problem? Is the order based on a chart, not just an intake form? These data points make a difference to government investigators, so documenting this information with your orders can be of critical importance.

**3. What you should know: The government is looking for outliers.**

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A single red flag usually is not enough to trigger an investigation. Are you treating patients with different issues using the same set of tests or orders? Are you ordering certain tests, and so forth, more than your peers (i.e., are your orders in line with a standard of care observable across the industry)? The government is checking analytics to find outliers, and those providers whose data is outside expected ranges are likelier to receive scrutiny.

**What you can do: Run the analytics yourself.**

Providers themselves, especially with the help of outside data firms, can easily perform the data analytics performed by government investigators. The more proactive you can be about monitoring your activity, addressing red flags and reporting irregularities to the government, the more protected you, your company and your employees will be.



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Missy Apodaca helps health care providers plan for and accomplish long-term objectives while tackling the challenges of day-to-day operations. With experience as top in-house counsel for a health plan and years in private practice advising on emerging health care trends, Missy brings a combination of business savvy and legal experience her clients need. Missy's clients include hospitals and health systems, physician practices, health care providers and technology companies working in the health care space.



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Lisa Atlas Genecov, national co-chair of the firm's Health Care practice, counsels health care providers in connection with major transactions and regulatory issues, helping them to discover strategic opportunities under the Affordable Care Act and other health care laws. She has more than 30 years of experience structuring transactions and implementing strategic affiliations that achieve her clients' goals.



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