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How to Find the Money
What Avenues of Financial Relief Can Healthcare Entities Pursue?

Susan Feigin Harris, Gerald Konkel, Jeffrey Raskin

June 3, 2020

Today's Agenda

- **Coronavirus Aid, Relief, and Economic Security Act (CARES Act)**
 - Provider Relief Fund Dollars
 - Key Terms and Conditions for Discussion
 - Provider Relief Fund Traps
- **FEMA Public Assistance Application**
- **Business Interruption Insurance Coverage**
 - Typical Coverage Extensions
 - Areas of Dispute
 - Civil Authority Orders
 - What Does It Cover?



Coronavirus Aid, Relief, and Economic Security Act (CARES Act)



CARES Act created the Public Health and Social Services Emergency Fund

"Provider Relief Fund"- to reimburse hospitals, physicians and others for "healthcare related expenses or lost revenues that are attributable to coronavirus"



\$100 Billion



Paycheck Protection Program and Health Care Enhancement Act – known as CARES 3.5



+ \$75 Billion

To the Provider Relief Fund

Provider Relief Fund Dollars

Deposited in provider bank accounts April 10th without any application

HHS issued 10 pages of Provider Fund Payment Terms and Conditions *subsequent to the surprise distribution*

Provider Relief Fund Dollars (cont.)

- \$50 B allocated for general distribution to facilities and providers that bill Medicare based on eligible provider net patient revenue
 - \$30 B - Distributed "proportionate to provider's" share of Medicare fee-for-service reimbursements in 2019
 - \$20 B - Distributed to providers based on their share of net patient revenues - on April 24th with submissions of financial data from eligible providers
- Additional targeted provider relief dollars
 - \$12 B COVID-19 high impact areas
 - \$10 B Rural providers
 - \$500 M Tribal healthcare providers
 - \$4.9 B Skilled nursing facilities

Provider Relief Dollars (cont.)



Key Terms and Conditions for Discussion

Certification

- “Payment will only be used to prevent, prepare for, and respond to coronavirus and that the Payment shall reimburse the Recipient only for health care related expenses or lost revenues that are attributable to coronavirus”
- Payment will not be used to “reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse”

Reporting

- As needed to ensure compliance and in the form “as determined by the Secretary”
- Provider reports due within 10 days after end of each quarter:
 - Total amount of funds received
 - Amount of funds received that were expended or obligated for each project or activity
 - Detailed list of all projects or activities for which large covered funds were expended or obligated including the project name and description
 - Estimated number of jobs created or retained
 - Any details related to subcontractors or sub-awards

Provider Relief Fund Traps



Some believe the distribution of the initial tranche of funding was flawed given the automated deposit mechanism and conflicting language with the statutory language of the CARES Act

Application was to be submitted "justifying the need of the provider for payment"

HHS eventually "fixed" the Terms and Conditions

Dollars must not be used to reimburse expenses and losses that have been reimbursed from other sources or that other sources are obligated to reimburse

What does it mean for an "other source" to be "obligated to reimburse" expenses or losses in the future?

- In the case of insurance proceeds, this may be unknowable for months or years, long after relief funds are spent

Are providers expected to give Provider Relief Funds back if an "other source" is identified later?

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FEMA Public Assistance Application



President Trump issued a national emergency declaration March 13; public assistance funding became available from FEMA



FEMA announced that certain Emergency Protective Measures taken to respond to the COVID-19 emergency may be eligible for reimbursement under Category B of the Public Assistance program



FEMA will assist at a 75% federal cost share with applicants covering the remaining 25%



Hospitals are eligible to apply for these funds - \$489 million routed to hospitals for other expenses outside of protective gear and supplies

FEMA Public Assistance Application (cont.)



Eligible costs must be tied to the performance of eligible work, documented and reasonable in nature and amount*



On May 15th, FEMA dished out \$6.1 billion to help the healthcare industry weather the outbreak



The federal \$2.2 T stimulus package added \$45 B to FEMA's disaster relief fund



\$489 million has been routed to hospitals for other expenses outside of protective gear and supplies; hospitals can apply for these funds



FEMA has an online PA program application process

*

- Labor costs - for overtime, for budgeted employees, or straight time and overtime for unbudgeted employees; backfill employee labor; call-back pay; night-time pay; weekend differential pay; stand-by time
- Necessary equipment
- Necessary supplies and materials

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Business Interruption Insurance Coverage

- Typical property insurance policy provides coverage of an insured's "property" against "all risks of physical loss or damage" except as otherwise excluded
- Found in first-party Property Policies
- Can have several different names
 - Business Income
 - Business Interruption
 - Time Element
- Protects the insured against losses of business income and for extra expenses from direct loss, damage, or destruction of insured property
- "Time limited" coverage, typically called "Period of Restoration" or "Period of Liability"

Business Interruption Insurance Coverage

Typical Coverage Extensions

“Contingent Business Interruption”

- Covers the insured's business income loss resulting from loss or damage to the property of others
- Typically, these are persons or companies upon whom the insured relies to supply goods or services and upon whom the insured relies to receive its goods or services manufactured
- The property damage to these persons or companies must be of a type that would be covered by the insured's policy had the damage happened to the insured's property

Civil or Military Authority

- Covers the insured's business income loss or extra expense during a period of liability (typically 30, 60 or 90 days) if “an” order of a civil authority limits, restricts or prohibits access to “an” insured property if the order is the result of physical loss or damage to property of others in a defined vicinity of insured property
- While the coverage is typically limited by time period, sometimes it also is limited by an amount
- Depending on policy language, arguments can exist that each new order impacting access to each insured policy starts the clock anew

Business Interruption Insurance Coverage

Two significant disputes with respect to coverage for COVID-19-related business interruption loss



Dispute 1

Whether “physical loss or damage” to property has taken place and what is needed to demonstrate it



Dispute 2

In policies with such exclusions, whether a “virus” or “pollutant or contaminant” or “contamination” exclusion precludes coverage

Business Interruption Insurance Coverage Civil Authority Orders

New York Mayor Emergency Exec. Order No. 103:

this order is given because of the propensity of the virus to spread person-to-person and also because *the actions taken to prevent such spread have led to property loss and damage . . .*

Los Angeles "Safer at Home" Order:

[t]his Order is given because . . . the COVID-19 virus can spread easily from person to person and it is *physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time . . .*

San Francisco Mayor Eighth Supplement to Emergency Proclamation:

[t]his order and the previous orders issued during this emergency have all been issued because of the propensity of the virus to spread person to person and also because the virus *physically is causing property loss or damage due to its proclivity to attach to surfaces for prolonged periods of time . . .*

State of Washington Stay Home – Stay Healthy Proclamation:

WHEREAS, the worldwide COVID-19 pandemic and its progression in Washington State continues to threaten the life and health of our people as well as the economy of Washington State, and *remains a public disaster affecting life, health, property or the public peace . . .*

Business Interruption Insurance Coverage Civil Authority Orders (cont.)

Harris County, Texas:

WHEREAS, the COVID-19 virus is contagious and spreads through person-to-person contact, especially in group settings; and
WHEREAS, the *COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time*; and
WHEREAS, given the...substantial risk posed by the COVID-19 virus to Harris County residents and their property, the following extraordinary measures must be taken to protect the public's safety.

State of Illinois Gubernatorial Disaster Declaration:

WHEREAS, the circumstances surrounding COVID-19 *have resulted in the occurrence and threat of widespread and severe damage, injury, loss of life and property* under Section 4 of the Illinois Emergency Management Agency Act . . .

State of Colorado Amending and Extending Executive Order Declaring a Disaster Emergency:

My administration, along with other State, local, and federal authorities, has taken a wide array of actions to mitigate the effects of the pandemic, prevent further spread, and protect against overwhelming our health care resources. COVID-19 also *physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time*.

State of Maryland Renewal of Declaration of State of Emergency:

WHEREAS, COVID-19 is a highly infectious respiratory disease that spreads easily from person to person, *physically contaminates property by attaching to surfaces for prolonged periods of time*, and may result in serious illness or death;

Business Interruption Insurance Coverage

What Does It Cover?

- Either “Gross Profit” Loss or “Gross Earnings” Loss
 - Gross Profit
 - Loss from decrease in sales and increase in costs of doing business
 - Gross Earnings
 - Loss of earnings as reflected in total net sales less cost of materials and supplies consumed in the operations or services rendered by the insured
- Extra Expenses
 - The “necessary” expense incurred during the covered period of restoration or period of liability that it would not have incurred had there been no loss or damage to property

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Questions?

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Biography



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Named Texas' 2018 Lawyer of the Year, Susan Feigin Harris concentrates on the regulatory, business, corporate, governance, compliance, and contracting needs of a diverse group of healthcare clients. She regularly addresses federal and state healthcare regulations, and works with state and federal healthcare agencies involving Medicare and Medicaid licensing, certification, reimbursement, compliance, enforcement, and recoupment actions. Susan's clients include hospitals, physician groups, lab companies, post-acute providers, and healthcare innovations companies.

Biography



Gerald Konkel

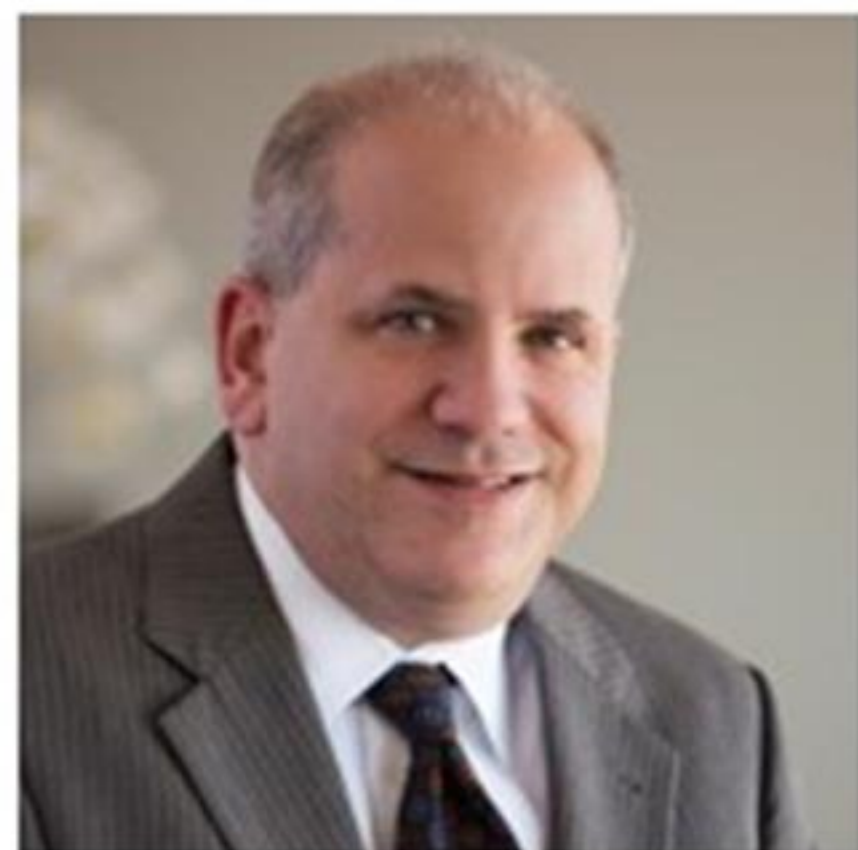
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Biography



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Jeffrey S. Raskin advises clients in litigation, mediation, and arbitration around insurance coverage matters, and intellectual property, commercial, real estate, and environmental disputes. Head of Morgan Lewis's Insurance Recovery Practice in the San Francisco office, Jeffrey counsels clients seeking recovery for catastrophic losses in securities, environmental, asbestos, silica, toxic tort, product liability, intellectual property, and employment practices cases. Jeffrey has handled first-party claims for loss covered by policies for physical damage and business interruption, title, and fidelity and crime.

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