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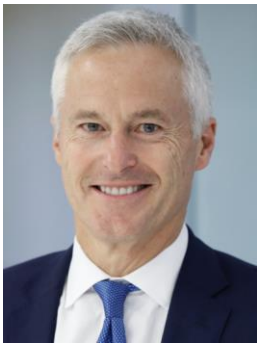
Coronavirus Q&A: Crowell & Moring's Health Care Chair

By **Jeff Overley**

Law360 (September 11, 2020, 6:39 PM EDT) -- In this edition of Coronavirus Q&A, a Crowell & Moring health practice chair discusses his work on government investigations of devastating death tolls in nursing homes and a wide range of transactions and affiliations that the pandemic's financial winners and losers could pursue.



Paul Mourning

Paul Mourning, a partner in New York City, is co-chair of Crowell & Moring LLP's health care group. Mourning joined the firm in 2018 after more than three decades at Cadwalader Wickersham & Taft LLP, where he also co-chaired a health care team.

A specialist in regulatory and transactional matters, Mourning's clients include long-term care providers hit by the pandemic's harrowing first wave, as well as health insurers that suddenly have extra investment dollars because COVID-19 delayed costly elective procedures.

Mourning shared his perspective as part of a series of interviews Law360 is conducting with prominent attorneys regarding the evolving business and legal fallout from the coronavirus crisis.

This interview has been edited for length and clarity.

Paul, thanks for taking time to speak with me. To start, talk about the COVID-19 issues you've been working on for clients.

Initially we were doing a lot of compliance work when the pandemic hit. The protocols for delivering health care and for workplace safety were changing on a daily basis, and we were in almost a triage-type situation to help interpret the constantly changing regulations.

As things have moved forward, we've been dealing with federal and state inquiries and investigations involving what has transpired during the pandemic, particularly in the New York area.

And there has also been M&A activity. The skilled nursing market in New York has been substantially impacted by the pandemic, and I know that has led to certain clients and others considering sale transactions.

Can you say anything more about the government inquiries?

Let me put it in broad terms. [The Centers for Medicare & Medicaid Services] has raised questions to make sure that funds have been spent in the right way and that the delivery of care was appropriate.

Likewise, the [New York] State Department of Health and a variety of other regulators are looking into what happened in nursing homes. There was quite a toll at nursing homes. And in New York, nursing homes were required to take in COVID patients really from the outset. And that presented a host of issues for really the entire delivery system.

But after the fact, I think regulators are trying to do their job. If there were a number of deaths at a facility, they're looking to get to the bottom of those issues, and not necessarily with any penalties or anything at the end of the day. Part of it is just understanding the situation and being better prepared to deal with similar events in the future.

New York City and surrounding areas have managed for several months to keep new infections relatively low. What has that meant for your clients?

So, this may be counterintuitive, and it may not be directly responsive to your question, but it's what I understand the facts to be.

Obviously, many skilled nursing facilities were taking in COVID-19 patients during the height of the pandemic. But what has happened since then is that the combination of the drop-off in the COVID-19 cases, plus the hiatus in elective surgeries in hospitals, has meant that the census [count of patients] in the facilities dropped off pretty precipitously. And there hasn't been a flow of new cases coming into the nursing homes.

One of the issues is that hospitals aren't discharging patients into nursing homes for rehab and things like that, because they haven't had the elective surgeries. Also, while I have no way to verify this, I think families and others are concerned about sending a relative or someone else to nursing homes at this point. They're concerned about safety, and maybe they've looked at other alternatives like home care to serve the needs of their relatives or whoever it might be.

So there's been a combination of factors that have resulted in a decrease in the census at skilled nursing facilities. And because Medicaid is the principal payor for skilled nursing facilities [and has relatively low reimbursement rates], if these facilities aren't operating at 95% census or above, they're facing huge financial challenges. We're seeing occupancies at the 70%, 72%, 73% levels, which is causing severe financial constraints for nursing homes.

The lack of elective surgeries does seem counterintuitive. I expected a rebound by now. Could one factor be that many people left NYC for the summer?

That's a great question. I really don't know how busy hospitals are in terms of orthopedic surgery and that kind of thing. My suspicion is that it's not up to its pre-pandemic peak. That would be my suspicion — that people are not running quickly back to hospitals to have those surgeries done at this point. There may still be a lag.

For facilities without enough patients, are some on the cusp of failure or putting themselves up for sale?

It all depends on the financial condition of the facility. In the New York market, there are two very different models. One is the nonprofit model, and most of our clients tend to be nonprofits. For them to survive, they've had to have put away funds over the years and [built] a substantial reserve or endowment to be able to weather this kind of situation.

A nonprofit can also have diversified its business lines and be in better shape. For example, health insurers have done relatively well under these very difficult circumstances, because their claims levels are down. And many of our clients have diversified into providing managed care [health insurance] plans. That means they're generating income in other business lines.

There's also a for-profit model, and when you look at the for-profits, it may be a whole different story. They can tap into larger pools of capital, and some of them might have better financial resources to weather what hopefully will be a short-term downturn in operations.

For facilities in dire financial straits, maybe a smaller nursing home company could put itself up for sale, and a bigger company might consider restructuring? Is that an accurate way to think about it?

I would say very accurate. We are working on sale transactions as we speak. They may have taken place anyway, but I think the pandemic has escalated those considerations and deliberations by [facilities]. And we've certainly seen several New York-area facilities that are considering transactions at this point.

For restructuring, you're right to ask about that as well. I'm not personally aware of any restructuring-type situations at this point, but I consider that a likely outcome as well.

Is there anything else, maybe in the longer term, that you're watching out for in terms of M&A?

In kind of a whole other area, there have been discussions about interesting affiliations that might come out of this, such as closer ties between hospitals and skilled nursing facilities. I've heard discussions about dedicated wings in long-term care facilities that might be set up or available if we experience things like this again in the future.

I can't predict exactly what will come out of this, but obviously there's going to be a lot of thought and planning about, "What if this should happen again?"

I would never have expected anything like this in my lifetime. But now that it's happened, my guess is that it can happen again. And it could lead to closer affiliations among providers up and down the continuum of care to make sure that patients in this situation are cared for in a way that maximizes their well-being as well as the well-being of the health care workers who are dealing with people with contagious diseases.

With every new disease, there's a learning process. And it's likely that we'll see closer affiliations among providers to be better able to deal with the lifecycle of these types of illnesses.

That makes sense. I also have a more technical question: Do you expect the ownership of long-term care providers to change as a result of the pandemic?

I think this is pushing forward a trend that preexisted the pandemic. At least in the New York area, the trend has been for-profits buying nonprofits over the last five or 10 years. And I think we'll see more of that, in part because there's a sense that for-profits have bigger pools of capital to tap and can better withstand these types of things, and that larger organizations can share costs over a wider base and achieve some economies of scale.

So this is pushing forward a process that we've already been seeing. And it's independent of clinical issues — it has more to do with the financial side of the business.

You mentioned that health insurance payors have been reporting strong earnings because COVID-19 halted nonemergency procedures. Does that carry any lasting implications?

One trend [that predates the pandemic] has been payors acquiring physician groups or other providers. I think that trend will continue, and if anything, the largest payors will have more cash to escalate that trend.

Health insurance companies have done well during the pandemic, and that could mean they have more cash to spend for acquisitions.

In closing, is there anything your clients have experienced that perhaps hasn't received as much attention as it deserves?

The one thing is that it was a hugely challenging operating environment as the pandemic broke, and my closest experience was in New York. And on the long-term care side, it was extremely challenging. As you can imagine, you've got just a constant flux in the state of the applicable regulations. And at a minimum, you want to be complying with what the state and federal governments are prescribing for safety and other things in your facilities.

And then you've got the human toll of dealing with people with this difficult condition and your staff, many of whom were impacted. So it was just an incredible, incredible challenge — I've practiced for over 30 years, and it was unlike anything that I've seen in terms of the challenge to day-to-day operations. It really took herculean efforts by people to deliver the care that was so badly needed.

--Editing by Kelly Duncan.