

THE BURFORD

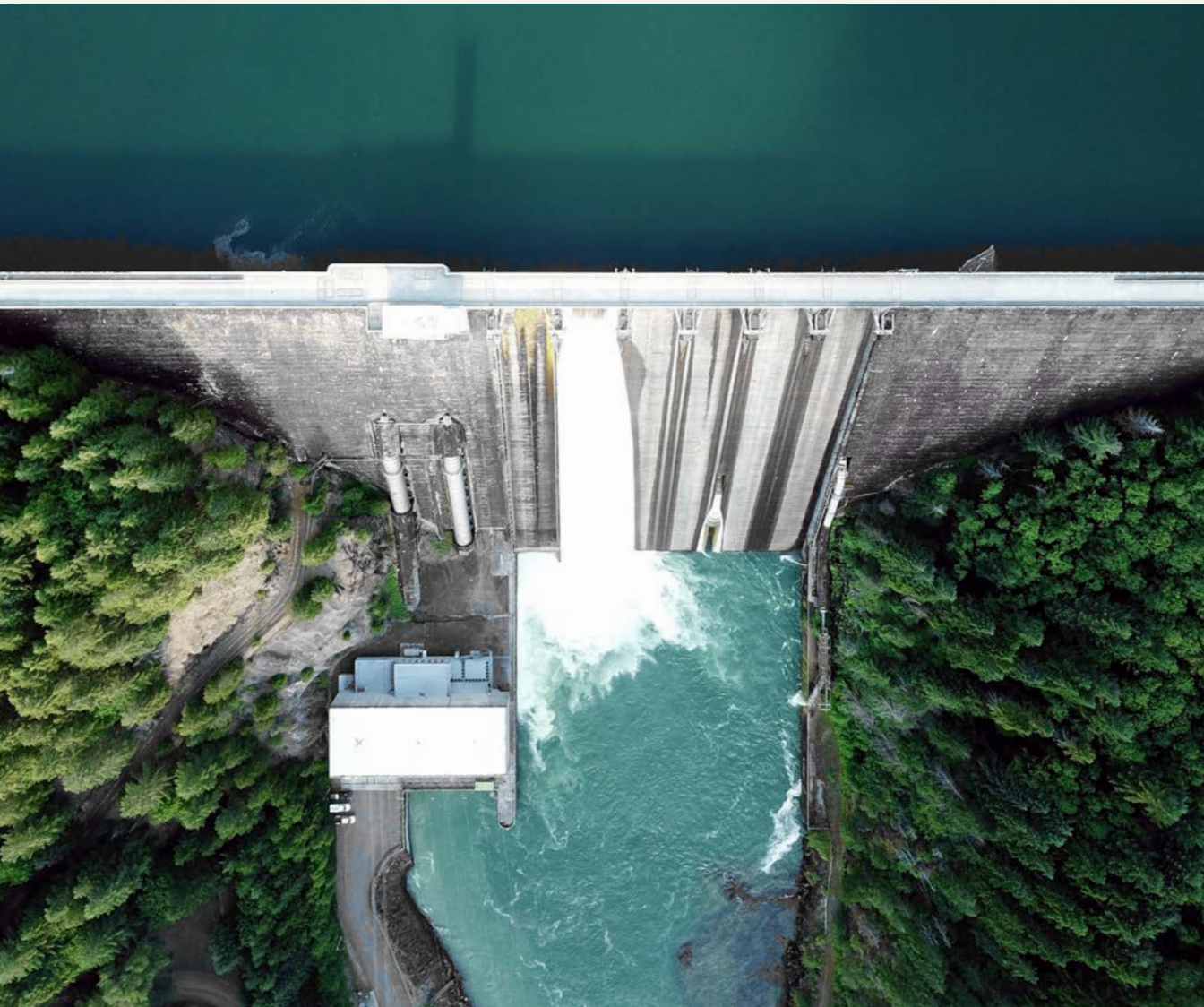
# Quarterly

A REVIEW OF LEGAL FINANCE

HEALTH CARE ROUNDTABLE  
WITH LAW FIRM LEADERS

POWERING A REBOUND  
USING INVISIBLE ASSETS

LEGAL FINANCE  
CASE STUDIES





ROUNDTABLE

# Health care roundtable: Navigating opportunity after a year of upheaval



*In April 2021, Burford Directors Christine Azar and Andrew Cohen directed questions concerning the most salient industry forces and the most high value disputes in the health care sector to a respected group of law firm leaders. Their perspectives are excerpted and gathered below.*

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Q.

**The past year has been one of upheaval for all industries, but especially for health care. What has been the most significant challenge for your clients?**

**Steve McBrady:**

One of the most remarkable stories of the past year has been the ability of the health care industry, and in particular health insurers, to adapt to new challenges in delivery, processing and member care—while working in an almost entirely remote environment. Health insurers have been operating in an evolving regulatory environment, as public health officials have assessed and acted upon the risks presented by the Covid-19 pandemic. The Centers for Medicare & Medicaid Services (CMS), as well as states and localities, have issued constantly evolving guidance and regulations impacting the health care supply chain, and health insurers have quickly adapted their business to meet the needs of their members under these extraordinary circumstances.

**Jason Cowart:**

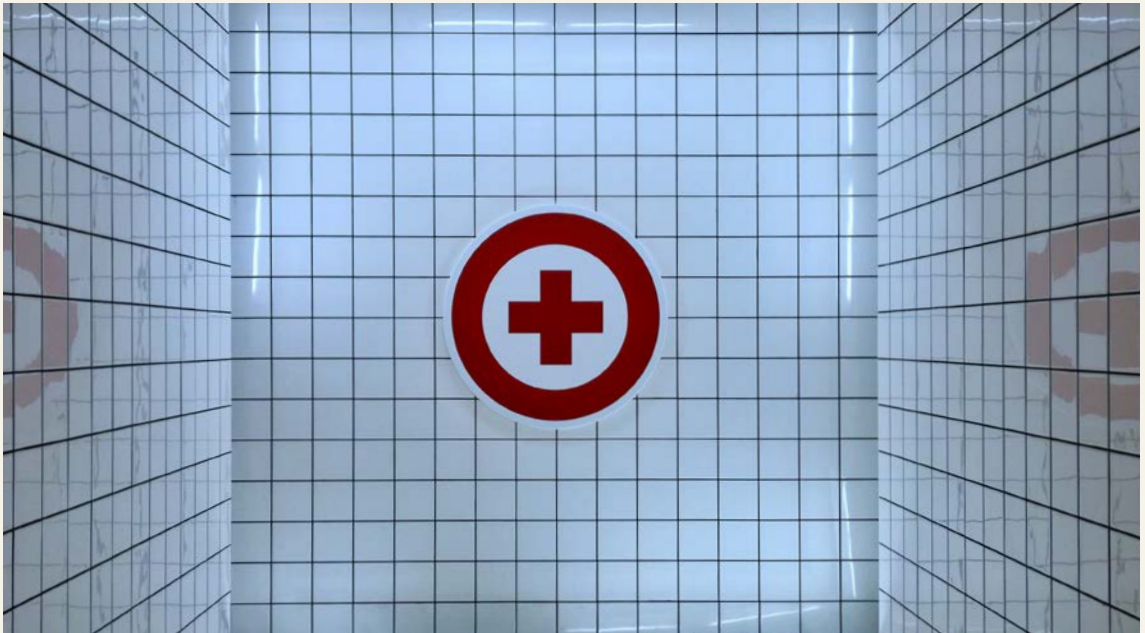
Trying to survive. I represent providers and their patients in disputes with health insurers. Before litigating such disputes, and especially because there are only a handful of health insurers, my clients must carefully balance their short-term needs (which might depend on a less than hostile relationship with the dominant health insurer) against their longer-term interests (which might require litigation). The past year made it all but impossible for many of my clients to consider anything beyond next week. At the same time, it produced record profits for the health insurance industry and left it stronger and more consolidated than ever.

**Stephanie Carman:**

My clients have continued to provide excellent care despite a number of

**“The past year made it all but impossible for many of my clients to consider anything beyond next week.”**

—JASON COWART, PARTNER, ZUCKERMAN SPAEDER



challenges. Some of the key challenges revolved around staff. For example, dealing with frequent federal and state regulatory changes and making sure that sufficient staff was available and able to serve patients was critical. This sometimes involved developing and implementing new policies, hiring or retaining employees and using staffing services. Additionally, it required making sure the staff had access to personal protective

equipment (PPE) and sufficient space and equipment to care for patients. For staff providing care in patients' homes, challenges also included having enough staff and PPE as well as ensuring that the patients' families were willing to work with the staff to ensure protections were in place and appointments were kept. Additionally, keeping staff morale up was important as they were facing constant pressures and daily changes.

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**Q.**

**What is the most important piece of advice you've given to your health care clients in the last year?**

**Jason Cowart:**

They have legal rights that they should assert. The power imbalance between providers and patients on the one hand, and health insurers on the other, has been growing for years.

Covid exacerbated that imbalance. Although providers and patients have tools they can use to enforce those rights vis-à-vis health insurers, their tools are woefully underutilized. It is time to open the toolbox.

**Stephanie Carman:**

“We support you and we are here to help.” The medical industry was under enormous pressure, so I wanted my clients to know that I and others appreciated everything they were doing and my colleagues and I wanted to help with whatever they needed. Additionally, as appropriate, I wanted my clients to be able to take advantage of government aid and support. Finally, clients were advised to continue to follow their policies and protocols and follow developing government guidance so they could continue to provide excellent care.

**Steve McBrady:**

I am not sure that this counts as legal advice, but one thing we have emphasized to our health care clients

over the past year is that we view our relationship as a true partnership. We are constantly trying to innovate how we deliver legal services, including an array of “alternative fee arrangements” focused on delivering value to our clients and bending the cost curve towards predictability and utility. A second part of the partnership equation is ensuring that we have the right bench to meet their needs—that means subject matter expertise in key areas like litigation, antitrust, cyber security, digital health and M&A; that means meaningful diversity at the partner, counsel and associate level; and it means investing in our clients through customized trainings that cover emerging issues of legal and business interest.

Q.

**As you help your clients continue to navigate uncertainty, what are the major economic issues your clients face?**

**Stephanie Carman:**

This crisis was unprecedented and there were many uncertainties with things changing daily or even hourly at times. Some economic issues included the costs of quickly procuring significantly more quality personal protective equipment, increases in staffing in some areas, decreases in operating margins partly due to declines in revenue as the result of changes in the services being provided and billed and declines in elective surgeries and visits to the emergency room. Finally, on the transaction side, at times, it was not certain whether mergers and acquisitions would

proceed, would be delayed or would be terminated. Clients needed to think through what options they had to make the most of the uncertainty.

**Jason Cowart:**

2021 will be an economic mixed bag for my clients. Although the US will (hopefully) gain control over Covid and enjoy an economic recovery, the health insurance industry is emerging from the crisis stronger—they have more resources and are more consolidated than ever. I am confident that health insurance companies will not hesitate to use their leverage. So, although my

clients' overall economic position is likely to improve in 2021, it is also likely that the health insurance industry's ever-growing market power will constrain that recovery.

**Steve McBrady:**

I am going to reveal a Washington bias here, but I think that the one constant, challenging issue facing our clients in every industry is the regulatory environment in Washington. I mean this in a very apolitical sense. Businesses are focused not only on new “laws” and proposed legislation on Capitol Hill, but also on the more

immediate impacts of administrative and regulatory actions by Executive Branch agencies. As a DC-based firm with a focus on regulated industries, we spend a lot of time with our clients thinking through how their businesses may be impacted by Department of Justice and Federal Trade Commission enforcement priorities, US Department of Health and Human Services (HHS) and CMS regulatory guidance, the alphabet soup of Washington oversight bodies and the use of Executive Orders to advance policy goals outside of the legislative process.

Q.

**What dispute trends do you anticipate in the months and years ahead?**

**Steve McBrady:**

One of the most interesting trends over the past couple of years is the increasing shift towards group actions focused on recovery. We litigated the Affordable Care Act (ACA) “risk corridors” cases, in which hundreds of health insurers sought and recovered approximately \$13 billion in payments owed by the Federal government under the ACA. This was one of the first major government facing actions of its kind, and it is certainly a trend we see in other market segments across the health care and antitrust spectrum.

**Stephanie Carman:**

Among others, I expect that we will see various claims under contracts and insurance policies and potential lawsuits regarding care provided and/

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**Clients needed to think through what options they had to make the most of the uncertainty.**

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—STEPHANIE CARMAN,  
GRAYROBINSON

or precautions taken or not taken in connection with staff and patients. I also expect to see a number of government investigations and even qui tam actions especially involving alleged fraudulent billing and the applications for and use of various benefits and aid that the government made available during Covid. Another potential area for disputes involves privacy and cybersecurity protections and incidents.

**Jason Cowart:**

I expect more and more cases concerning the extent of health insurance coverage and benefits. From the perspective of many of my clients, health insurance decision-making seems to frequently occur in a black box. As the Covid crisis lifts, this ongoing reality will produce more and more disputes until plan sponsors, the insurers or the government take action to ensure transparency in coverage.

**Q.**

**As the world slowly begins to reopen, what do you consider to be the biggest area of opportunity in the health care industry?**

**Jason Cowart:**

Covid demonstrated—to everyone—the singular importance of meaningful and effective health care to all aspects of American life. It obviously cast a specific spotlight on the strengths and weaknesses of our pandemic response capabilities, but also broadened

our appreciation of less traditional forms of health care, including telemedicine and behavioral health treatment. Yet, from the perspective of many of my clients, health insurers' decisions about when and if these life-saving treatments will be covered are based upon internal criteria and





considerations that often contradict, distort or ignore written plan terms. This creates a cycle of distrust that hurts everyone. My hope is that we can build on these realizations to increase transparency and break the cycle of distrust so that everyone gets the care—and not just the promise of care—that they need.

**Stephanie Carman:**

This is a very exciting time for the health care industry. The industry was open to creative solutions and new opportunities during the crisis, and I think this will continue. I expect that we will see telehealth continue to expand in a number of areas and become a key component of care. I also expect to see more care being provided in patients' homes and additional remote monitoring and testing opportunities. I hope we will see the research and development of new vaccines, new treatments and new testing methods continue. Finally, I hope that the ingenuity in both the health care industry and

industry in general continues and companies and providers can work together to make a difference in how care is provided, including by enhancing the technology the health industry needs.

**Steve McBrady:**

One area where we have made a significant investment is in the corporate and transactional space. We recently added a 24-person corporate team from Kibbe & Orbe in New York and DC, in order to keep up with client demand in the transactional space. This is a trend we expect to continue. As the Covid-19 pandemic recedes, we see a significant acceleration in health care transactional activity, from bolt-on acquisitions to increased vertical integration and innovative strategic partnerships designed to enhance the delivery of health care services. Our investment in health care-focused M&A mirrors a lot of what we are seeing in the market.

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**“We are constantly trying to innovate how we deliver legal services, including an array of ‘alternative fee arrangements’ focused on delivering value to our clients and bending the cost curve towards predictability and utility.”**

—STEVE MCBRADY, CO-CHAIR, CROWELL & MORING

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**PARTICIPANTS**


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**Stephanie Carman**

Stephanie Carman is a shareholder in the Miami and Washington offices of GrayRobinson, focusing her practice on the health care industry. She provides strategic advice on regulatory issues, transactions, investigations and litigation. She represents corporate, governmental, academic and individual clients in licensure and administrative actions and federal and state courts at both the trial and appellate levels. She also works with clients on transactions and internal and government investigations.

**Jason Cowart**

Jason Cowart is a partner and New York-based litigator with Zuckerman Spaeder who represents health care providers and their patients in high-stakes disputes with health insurance companies. A recent trial victory was identified by CNN as “one of the most important and most thorough rulings ever issued against an insurance company, at the federal level, on mental health issues.”

**Steve McBrady**

Steve McBrady is Co-Chair of the Government Contracts Group at Crowell & Moring, and a member of the firm’s strategic growth committee. He represents domestic and international clients in high-stakes matters involving the US government. In 2020, he served as counsel in *Maine Community Health Options et al. v. United States* at the US Supreme Court.

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**MODERATORS**


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**Christine Azar | +1 212 235 6827 | [cazar@burfordcapital.com](mailto:cazar@burfordcapital.com)**

Christine Azar is a Director with responsibility for building business with US-based law firms and companies. Prior to joining Burford, Ms. Azar was the partner in charge of Labaton Sucharow’s Wilmington office and began her career at Blank Rome. She has been recognized as a leading litigator by numerous organizations

**Andrew Cohen | +1 212 235 6820 | [acohen@burfordcapital.com](mailto:acohen@burfordcapital.com)**

Andrew Cohen is a Director with responsibility for assessing and underwriting legal risk as well as for monitoring policy and regulatory issues in the legal finance industry. Prior to joining Burford, he was a litigator at Debevoise & Plimpton, where he specialized in litigation and regulatory matters involving financial institutions and complex financial products.

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### New York

350 Madison Avenue  
New York, NY 10017  
+1 212 235 6820

### London

Brettenham House  
2-19 Lancaster Place  
London WC2E 7EN  
+44 20 3530 2000

### Chicago

353 N. Clark Street  
Suite 2700  
Chicago, IL 60654  
+1 312 757 6070

### Washington

1750 K St. NW  
Suite 300  
Washington, DC 20006  
+1 202 788 0888

### Singapore

10 Collyer Quay Level 40,  
Ocean Financial Centre,  
Singapore 049315  
+65 6817 6218

### Sydney

Level 19  
1 O'Connell Street  
Sydney NSW 2000  
+61 8607 8890

### Hong Kong

Level 20, One ifc Hong  
Kong, No. 1 Harbour  
View Street, Central,  
Hong Kong

\* Based on public reporting of combined core litigation finance investments, unfunded core litigation finance investments and other investments as of March 22, 2021

# Burford

350 Madison Avenue  
New York, NY 10017  
+1 212 235 6820

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