

HEALTH CARE PRIVACY ISSUES
IN CORPORATE REORGANIZATIONS

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I. OVERVIEW OF MEDICAL PRIVACY LAW AND BANKRUPTCY

A. Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the HIPAA Privacy Rule

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 104 P.L. 191; 110 Stat. 1936, sec. 261-64, authorizes the Secretary of Health and Human Services (HHS) to promulgate standards for health care information security and exchange. 42 U.S.C. § 1320d-2. Pursuant to this authority, HHS promulgated the HIPAA Privacy Rule, 45 CFR Parts 160 and 164.

Information Protected by the Privacy Rule

The Privacy Rule regulates disclosure of “individually identifiable health information,” held or transmitted by a covered entity or its business associate, regardless of medium. 45 C.F.R. § 160.103 Individually identifiable health information is information relating to an individual’s past, present, or future physical or mental health and treatment that identifies the individual or which one could reasonably believe can be used to identify the individual. *Id.* The Privacy Rule does not cover information maintained by a covered entity in its capacity as an employer or education institution. *Id.*

Entities Covered by the Privacy Rule

The Privacy Rule applies to health plans (including health, dental, vision, and prescription drug, long-term care, and Medicare supplement insurers and HMOs), and health care clearinghouses (including billing services and repricing companies). *Id.* Employer established and maintained group health plans with less than 50 participants are excluded from the Privacy Rule. *Id.*

The Privacy Rule also covers any health care provider that transmits or causes a third party to transmit health information in electronic form in certain transactions, including claims, benefit eligibility, and referral authorization requests. 45 C.F.R. §§ 160.102, 160.103. Health care providers include any person or organization that furnishes, bills, or is paid for health care. 45 C.F.R. § 160.103.

Finally, the Privacy Rule covers “business associates” of other covered entities. A business associate is essentially a person or organization that provides support services for a covered entity that involve the use or disclosure of individually identifiable health information. Business associates include legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, and financial services. *Id.*

Permitted Disclosures and Uses of Protected Information

Covered entities may not disclose protected health information unless permitted or required by the Privacy Rule or with written authorization of the individual subject of the information. 45 C.F.R. § 164.502. Protected information must be provided to individuals requesting their own protected health information or to HHS investigators. 45 C.F.R. § 164.502(a)(2). The Privacy Rule also permits disclosure in limited circumstances, including for the covered entity's own treatment, payment, and health care activities; as required by law (including statute, regulation, and court order); and in judicial or administrative hearings per order or subpoena. 45 C.F.R. § 164.512(e).

Penalties for Privacy Rule Violation.

HIPAA provides civil penalties totaling a maximum of \$25,000 for wrongful disclosure of individual identifiable health information. 42 U.S.C. § 1320d-5. HIPAA also provides criminal penalties for knowingly disclosing, using, or obtaining individually identifiable health information relating to an individual. 42 U.S.C. § 1320d-6.

HIPAA Enforcement and Opinion Letters

HIPAA and the HIPAA Privacy Rule do not create a private right of action. *See, e.g.,* Walker v. Gerald, 2006 U.S. Dist. LEXIS 43678, 15-16 (E.D. La. June 8, 2006); Rigaud v. Garofalo, 2005 U.S. Dist. LEXIS 7791 (E.D. Pa. May 2, 2005); Univ. of Colo. Hosp. Auth. v. Denver Publ. Co., 340 F. Supp. 2d 1142, 1145 (D. Colo. 2004); Jones v. Smith-McKinney Co., 2004 U.S. Dist. LEXIS 29761, 18-19 (E.D. Ky. Nov. 18, 2004). The HIPAA Privacy Rule is an agency regulation, not a statute, and it should be possible to obtain opinion letters from Health and Human Services about whether HHS considers particular transactions to violate the HIPAA Privacy Rule.

B. Privacy-Related Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) added several provisions to the Bankruptcy Code that affect the privacy of consumer information. These provisions, included in Appendix A, are discussed in turn below.

1. Section 112. Prohibition on disclosure of name of minor children.

As a general matter, all papers filed in bankruptcy cases are public records. 11 U.S.C. § 107(a). Section 112 is an exception to this rule. Section 112 of the Bankruptcy Code prohibits the disclosure of the names of minor children in certain circumstances. Section 112 provides that a debtor may not be required to disclose the name of a "minor child involved in matters under this title" in public records, but the debtor may be

required to provide other information regarding the minor child and to disclose the name of the minor child in nonpublic matters that the court, the United States trustee, trustee in bankruptcy, or auditor may examine, but may not disclose.

Notably, the Bankruptcy Code does not define “minor child,” which might present future issues under this section. What is the age of majority? Generally majority is determined by state law and varies significantly and for different purposes (e.g., driving, drinking, marriage, sexual consent). If state law is to be referenced, what state’s law applies? The state of the debtor’s incorporation or business or headquarters or filing? Or the state of the child’s residency? And what is the reference date for determining the child’s age? The commencement of the case? The time of disclosure? Likewise, section 112 does not define “involved in matters under this title.” Does that include potential claimants or only children of individual debtors? If the latter, section 112 has little bearing on corporate reorganizations. Unfortunately, there are no obvious answers to the definitional problems of section 112.

It is important to highlight, though, what section 112 does not explicitly prohibit. Section 112 does not prohibit disclosure by any party of information other than *names* that would clearly identify a specific minor child. There is no prohibition on the disclosure of other information that could identify a specific individual. Moreover, the text of section 112 does not prohibit the *debtor’s* disclosure of the names of minor children. Section 112’s disclosure prohibition only applies to the court, the United States trustee, the trustee in bankruptcy, or an auditor. Instead, section 112 provides a protection of the debtor from being forced to make disclosures other than in certain circumstances.

2. Section 332. Consumer privacy ombudsman.

Section 332 of the Bankruptcy Code requires the appointment of a consumer privacy ombudsman for certain sales or leases under section 363(b)(1). If a debtor has disclosed a policy prohibiting the transfer of personally identifiable information, as defined by 11 U.S.C. § 101(41A), to unaffiliated persons and wishes to undertake a sale or lease outside the ordinary course of business that would be inconsistent with such policy, then the court must order the United States trustee to appoint a consumer privacy ombudsman within five days of the 363(b)(1) hearing. 11 U.S.C. §§ 332, 363(b)(1).

The consumer privacy ombudsman must be a disinterested person, other than the trustee, who may appear and be heard at the 363(b)(1) hearing. 11 U.S.C. § 332(a)-(b). The ombudsman is supposed to assist the court in evaluating from a consumer perspective privacy issues involved in the transaction, including potential alternative forms of the transaction. 11 U.S.C. § 332(b). The consumer privacy ombudsman is prohibited from disclosing personally identifiable information he or she obtains in his official capacity. 11 U.S.C. § 332(c).

If a consumer privacy ombudsman is appointed under section 332, then the court may approve the lease or sale of personally identifiable information to an unaffiliated person after finding no showing has been made that the transaction would violate applicable non-bankruptcy law and giving proper consideration to the circumstances and details of the transactions. 11 U.S.C. § 363(b)(1)(B). It is important to note that approval of a 363(b)(1) sale or lease does not require the court to find that applicable non-bankruptcy law would not be violated, only that the court find that no such showing has been made. 11 U.S.C. § 363(b)(1)(B)(ii). It bears emphasis that a consumer privacy ombudsman's appointment is only triggered by specific circumstances in a sale or lease under section 363(b)(1). Other transactions, such as retention of professionals under section 327, ordinary course sales under section 363(c), assignments under section 365, or the abandonment of estate property under section 554 do not appear to trigger the appointment of consumer privacy ombudsman. Likewise, a consumer privacy ombudsman's appointment is not triggered by litigation by the estate.

Although there are no known cases on point, there might be a question whether a consumer ombudsman should be appointed where a health care enterprise that either is subject to the Privacy Rule or has disclosed privacy policies for patients is to be sold or transferred. It may be that the appointment of a patient care ombudsman (discussed below) would obviate the need for the appointment of a consumer ombudsman, although the statutory predicates to the appointment of each are clearly different and distinct.

3. Section 333. Appointment of patient care ombudsman.

Section 333 of the Bankruptcy Code provides that if a debtor is a health care business, as defined by 11 U.S.C. § 101(27A), then the court shall order the appointment of a patient care ombudsman within thirty days of the commencement of the case, unless the court finds that such an ombudsman is not necessary for the protection of patients in the case. The ombudsman is responsible for monitoring the quality of patient care provided by the debtor and to represent the patient's interests. 11 U.S.C. § 333(a)(1).

The patient care ombudsman is to be a disinterested person, appointed by the United States trustee. 11 U.S.C. § 333(a)(2)(A). If the debtor provides long-term care, the patient care ombudsman may also be the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the state in which the case is pending. 11 U.S.C. § 333(a)(2)(B).

The patient care ombudsman must monitor the quality of patient care, which includes the right to interview patients and physicians if necessary. 11 U.S.C. § 333(b)(1). The ombudsman must keep patient information confidential, and may not review confidential patient records without court approval. 11 U.S.C. § 333(c)(1). Notably, the patient care ombudsman is not specifically tasked with ensuring the privacy of patient information beyond that information that comes into his or her possession. Patient privacy is only within the purview of the patient care ombudsman to the extent it affects quality of patient care. The patient care ombudsman must also make bimonthly

reports to the court, 11 U.S.C. § 333(b)(2), and immediately file a motion or report with the court if he or she determines that the quality of patient care is significantly declining or materially compromised. 11 U.S.C. § 333(b)(3).

C. Case Law Under the BAPCPA Privacy-Related Provisions

As of the late February, 2007, there were only five known cases that discuss any of the above BAPCPA provisions. Four of the five address whether a patient care ombudsman needs to be appointed under section 333. The threshold question for whether a patient care ombudsman must be appointed is whether the debtor is a health care business under section 101(27A). No known case law exists regarding sections 112 or 332.

a. *In re 7-Hills Radiology, LLC*, 350 B.R. 902 (Bankr. D. Nev. Aug. 31, 2006), held that a radiology center that only took patients on referral from doctors, did not provide advice to patients, and did not keep patient records, was not a health care business under 101(27A).

b. *In re Anne C. Banes, D.D.S. P.L.L.C.*, 355 B.R. 532 (Bankr. M.D.N.C. Nov. 16, 2006), held that a dental practice that performed surgical treatments is not a health care business under 101(27A). The court also noted that a defunct medical practice should not be classified as a health care business under 101(27A), even if it met the statutory definition of 101(27A)(B).

c. *In re The Total Woman Healthcare Center, P.C., d/b/a Joyce A. Rawls, M.D., P.C.*, 2006 Bankr. LEXIS 3411 (Bankr. M.D. Ga. Dec. 14, 2006), involved the bankruptcy of the incorporated practice of a solo practitioner ob/gyn. The physician examined patients and performed ultrasounds and biopsies at the debtor's office, but performed other services at hospitals. The debtor had scheduled mainly tax obligations; it had not scheduled obligations for deficient patient care. The court determined that a patient care ombudsman was not necessary for the protection of patients because patient care had not been adversely affected by the debtor's bankruptcy filing.

d. *In re Medical Associates of Pinellas, L.L.C.*, 2007 Bankr. LEXIS 126 (Bankr. M.D. Fla., Jan. 3, 2007), held that a debtor that provided laboratory and administrative support such as billing, insurance, human resources, and related financial services for a group of doctors, and was not engaged in offering facilities and services to the general public was not a health care business under 101(27A). The court also declined to appoint a patient care ombudsman because the debtor had ceased to do business.

There are several notable points about the limited patient-care-ombudsman case law. First, courts have interpreted section 333 as not requiring a patient care ombudsman when the debtor is not engaged in on-going health care operations. Second, the triggering

event for a section 333 hearing in two of the cases, was that the debtor designated itself as a health care business in its petition. In *7-Hills* and *Medical Associates* the court moved *sua sponte* for a patient-care-ombudsman hearing because of the designation on the petition. This suggests that debtors particularly in health care support businesses, such as HR, billing, laboratory, and technical services, should consider whether to designate themselves as health care businesses in their filings.

Third, definitional issues are likely to continue to arise under section 101(27A). For example, is a pharmacy a health care business? A weight loss or nutrition center? A drug company that does clinical testing? Fourth, patient-care-ombudsman issues are distinct from consumer privacy issues. While health care privacy is an important concern, the appointment of a consumer privacy ombudsman is triggered by different events than the appointment of a patient care ombudsman. Finally, it is worth noting that none of the case law involves large core health care businesses such as hospital or nursing home bankruptcies. The role of patient care ombudsmen in large health care bankruptcies is still not addressed by case law.

D. State Law

There may be state law that governs privacy information and which could be applicable in bankruptcy. Issues of state privacy law are beyond the scope of this presentation.

II. SELECT PRIVACY ISSUES IN CORPORATE REORGANIZATIONS

The HIPAA Privacy Rule and the BAPCPA raise a variety of potential issues for corporate reorganizations of health care organizations. What follows is a consideration of select issues.

A. Schedules of Assets and Liabilities

Debtors must file schedules of their assets and liabilities after the commencement of their case. FED. R. BANKR. PRO. 1007. This presents a possible conflict with the HIPAA Privacy Rule and Section 112 of the Bankruptcy Code. If a debtor has known or contingent liabilities (or assets), such as medical malpractice claims, the scheduling of those claims could reveal either HIPAA protected information or the name of a minor.

Arguably, the HIPAA Privacy Rule does not apply because disclosures in the Rule 1007 filing are made in compliance with the Federal Rules of Bankruptcy Procedure, and the Privacy Rule does not apply to disclosures required by law.

While Section 112 does not appear to prohibit the disclosure of the name of a minor by a debtor, there is no case law testing this point. Moreover, section 112 does not have an explicit scienter element, which presents a potential problem for revealing the

name of *any* medical malpractice claimant unless the claimant's majority is known with certainty.

Even if a debtor is not technically prohibited from disclosing information in its schedules of assets and liabilities, disclosure could be inconsistent with the privacy expectations of patients and may burden estate administration by encouraging the filing of "protective" proofs of claim.

There is no clear case law guidance in this area. If privacy and other concerns are significant, debtors should consider other ways to identify these liabilities and provide notice of the commencement of their bankruptcy cases to these potential creditors.

B. Committee Appointments

Section 1102, which concerns the appointment of committees and the committees' obligation to share information, presents two distinct consumer privacy problems.¹ The first is committee appointment. The privacy issues that might constrain a debtor's scheduling of certain liabilities may also affect the ability of the debtor to inform the U.S. trustee if a medical claimant is one its largest creditors.

Second, there are questions of the committee's access to information and its ability to share that information with non-committee members. Section 1103(c)(2) of the Code gives official committees wide-ranging powers to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan." Committees are, therefore, able to receive virtually any information they request from a debtor, other than information protected by privilege.

A BAPCPA provision, codified at 11 U.S.C. § 1102(b)(3), requires that official committees share information with creditors holding the type of claims represented by the committee, but not serving on the committee. This means, then, that any information that a committee acquires can be discovered by a creditor not serving on a committee. Not only does this have obvious problems of trade secret protection for debtors, given the ability of competitors to purchase claims and gain access to committee information, without being subject to the fiduciary duties of committee members, but it also raises information privacy concerns. Notably, the appointment of a consumer privacy ombudsman is not triggered either by the provision of information to a committee or by a committee to a creditor under section 1102(b)(3).

¹ A more general and full discussion of section 1102's requirements with respect to the disclosure of information to non-committee members is contained in the presentation material by Scott Hazan, Esq., elsewhere in this book.

In the health care context, information about medical malpractice claims, including individual claims, may be particularly relevant to a committee in assessing a variety of issues involved in a chapter 11 case. As discussed below, feasibility of a plan of reorganization could be impacted by the likely amount of medical malpractice claims. Although a particular approach to dealing with the issue of plan feasibility is discussed below, here another more generic approach is discussed: the use of joint defense or joint interest agreements. Under such agreements, the debtor's disclosure of materials to the committee does not waive any privilege the debtor might claim, such as attorney-client privilege. Such agreements, however, can cover only materials that would be privileged in the debtors' hands. While this might well protect health care information related to medical malpractice claims, it might not cover other private consumer or health care information.

Questions remain about the extent and enforceability of joint defense agreements between the debtor and a committee in the face of a challenge by a non-committee member seeking information under section 1102(b)(3). In Delphi's chapter 11 reorganization, there was a challenge to the scope of such a joint defense agreement, albeit not in a health care context. Delphi and its unsecured creditors' committee had entered into a joint interest agreement that originally was intended to protect all information transmitted between them. General Motors objected to the scope of the agreement. General Motors argued that, at least as it related to General Motors (and frankly other creditors), the agreement should only apply to keep from General Motors otherwise privileged information relating to specific potential claims against General Motors, in particular, an SEC investigation of the accounting of General Motor's spin-off of Delphi. The Bankruptcy Court for the Southern District of New York ultimately approved an order that permitted the joint interest agreement, but substantially limited its scope and preserved third parties' ability to litigate whether materials fell within the scope of the agreement, making more information that might be shared with the Committee necessarily available to General Motors. *See Order Approving Joint Interest Agreement Between Debtors and Official Committee of Unsecured Creditors, Implementing Protective, Order, and Approving Procedures to Protect Information in Fee Statements, In re Delphi Corp.*, No. 05-44481 (Bankr. S.D.N.Y., April 18, 2006). A copy of this order is attached as Appendix B.

C. Proofs of Claims

Management of publicly available claims registers, such as claims administrators' websites, presents further problems where there is an desire or requirement to protect private information from public disclosure. For example, a proof of claim for tort claimants might include personal medical information or the name of a minor child. Even if a claimant might expect that a filed document would be available for public inspection at a clerk's office, it is unclear that the same claimant would expect for its proof of claim to be readily available, worldwide, over the internet.

It is not clear that the Bankruptcy Code's requirement for the filing of proofs of claim is a sufficient requirement for disclosure as to obviate the need to be concerned about privacy. Proofs of claim are publicly available in the office of the clerk of the bankruptcy court pursuant to the general provision of 11 U.S.C. § 107. The interaction between section 107 of the Bankruptcy Code and the HIPAA Privacy Rule has not yet been explored by courts. The HIPAA Privacy Rule does not apply to disclosures required by law. Section 107 of the Bankruptcy Code, however, does not require the disclosure of information; it only provides that information that is filed with the court be publicly available. Whether this is enough to exempt a bankruptcy claims agent's posting on a website from the HIPAA Privacy Rule is unclear.

In light of this uncertainty, there would seem to be two options available to estates where claims agents are employed who generally post proofs of claims on their websites. First, the debtor can obtain a court order requiring the posting of all proofs of claim, so any disclosure falls within the HIPAA Privacy Rule exemption for disclosures required by law, which includes those required by court order. 45 C.F.R. § 164.512(e). Section 112 of the Bankruptcy Code's protection of minors might still present a challenge, for although it does not explicitly apply to the debtor, much less the claims agent, there is no case law interpreting the provision.

Second, the debtor can obtain an order relieving a claims agent from having to post on its website information that might be subject to the HIPAA Privacy Rule. This was the option utilized in the Saint Vincent's Catholic Medical Centers chapter 11 reorganization. Specifically, Saint Vincent's proposed that in lieu of posting individual claim information for medical malpractice claimants, the claims agent would instead post and update a table listing the total number of medical malpractice claimants, the aggregate amount of those claims, and total amount allowed. The claims agent was also required to list a telephone number for medical malpractice claimants to call to get information about their particular claim and to provide specific disclaimer language explaining why medical malpractice proofs of claim were not available on its website. The court adopted Saint Vincent's proposal, which was not opposed by any party-in-interest in its case. *See* Order Granting the Debtors' Motion for an Order Pursuant to Bankruptcy Code Section 105(a) Seeking Authority for Claims Agent Bankruptcy Services, LLC to Limit Information Regarding Medical Malpractice Claimants' Proof of Claim Forms on Its Website, *In re* St. Vincents Catholic Medical Centers of New York, No. 05-14945 (Bankr. S.D.N.Y. May 10, 2006). A copy of Saint Vincent's motion and order are attached as Appendix C.

C. Plan Feasibility

Section 1129(a)(11) requires the Court to make a determination of the feasibility of a plan of reorganization. This presents problems when dealing with protected personal information. To engage in any sort of feasibility proposal, the Court needs to be able to consider the finances of the debtor, including contingent liabilities. The valuation of certain contingent liabilities, such as medical malpractice claims, however, is highly contingent upon the individual identity of the claimant and the nature of the injury—HIPAA Privacy Rule protected information.²

There is no case law on the interaction of section 1129(a)(11) of the Code and the HIPAA Privacy Rule. Arguably, disclosure of personal medical information for the purposes of section 1129(a)(11) falls within the Privacy Rule's exception for "as required by law," but because there is no explicit requirement of disclosure in section 1129(a)(11), this might be a stretch. The challenge for a debtor is to maintain the required level of privacy while providing the Court with sufficient information to make the feasibility determination.

The solution employed in the St. Vincent's Catholic Medical Center's chapter 11 reorganization was to use an outside estimation expert operating under a stipulated protocol and protective order. The Debtors, the Creditors' Committee and the Tort Committee jointly moved for the retention of Caronia Corporation as an estimation consultant for medical malpractice claims asserted against the Debtors. Caronia was engaged to submit a single aggregate estimate of the Debtors' medical malpractice liability for the court to use solely for feasibility purposes. The Debtors, the Creditors' Committee, and the Tort Committee also stipulated to an agreed protocol and protective order that provided that the Debtors were to provide Caronia with appropriately designated confidential information for the estimation without affect to the Debtors' insurance coverage, or giving rise to claims of violation of duty of confidentiality or waiver of any applicable privilege.

It is important to note that the solution in St. Vincent's was a consensual one among the major parties. Absent such a consensual arrangement, privacy issues in

² This particular issue is even more complicated given the Bankruptcy Court's lack of jurisdiction over medical malpractice claims. 28 U.S.C. § 157(b)(5) (providing that the District Court has exclusive jurisdiction to fix the amount of a personal injury claim). This severely impacts the effect of any conclusion by the Bankruptcy Court, other than to speculate on the likelihood that a debtor will be able to perform under a proposed plan of reorganization. The Bankruptcy Court cannot, for example, estimate medical malpractice claims, individually or in the aggregate, in a way that limits the ultimate allowed amount of those claims. These materials only address privacy concerns in the plan process, although the resolution described in these materials effectively addressed the Bankruptcy Court's limited jurisdiction as well.

feasibility determinations would be far more difficult to resolve. It is also important to note that the Caronia retention did not trigger the appointment of a consumer privacy ombudsman under section 333 of the Code because such an ombudsman is only appointed in the context of a section 363(b) lease or sale. A copy of the joint Caronia retention application and agreed protocol and protective order are attached as Appendix D.

III. CONCLUSION.

The nexus of bankruptcy and privacy law presents a variety of issues for corporate reorganizations, and consumer privacy issues are sure to become increasingly salient in corporate reorganizations. The broad scope of the HIPAA Privacy Rule is hard to reconcile with the need to share information for effective corporate reorganizations. The bankruptcy process is heavily dependent on creditor participation, which requires full financial disclosure. *See In re Barney's*, 201 B.R. 701, 707 (Bankr. S.D.N.Y. 1991). Likewise, the consumer privacy provisions of the BAPCPA raise many questions that courts have only begun to clarify. Until there is more case law providing guidance, court-approved consensual solutions to issues provide the surest course for concerns about the disclosure of otherwise private information in corporate reorganizations.