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Long Term Care Lenders Beware: Could You Be Liable For Patient Care?

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Plaintiffs are increasingly seeking to extend to remote lenders liability for alleged negligent care of residents in long term care facilities. The current strategy is to use “alter ego and veil piercing” theories which claim that a sham corporation has been set up for the purpose of protecting shareholders from liability and/or defrauding those who would hold it accountable.

A March 2014 decision in the United States Bankruptcy Court for the Middle District of Florida illustrates this in terms of the long term care industry. In *Fundamental Long Term Care, Inc.*, Trans Healthcare, Inc. (THI) operated long term care facilities throughout the United States. THI’s wholly-owned subsidiary, Trans Health Management Inc. (THMI), provided management services to THI’s operating subsidiaries, including clinical, compliance, business management, corporate financial control, accounting, payroll and benefits administration services. The plaintiffs won their lawsuit against THI and THMI, but the judgment was not collectable from either entity.

To collect the judgment, the plaintiffs alleged that a series of entities referred to as the GTCR Group, a private equity funding group, was liable for the judgment under alter ego and veil piercing theories. The plaintiffs claimed that GTCR Group built a nationwide nursing home empire. GTCR Group provided the initial funding for THI and several million dollars in subsequent capital contributions. GTCR Group also helped raise money from other sources. One of the GTCR entities, a realty company, entered into a sale-leaseback transaction with THI whereby THMI operated nursing homes owned by the realty company. Profits from the nursing home paid the rent and management services. The plaintiffs asserted that GTCR Group was involved in the facility operator’s day-to-day management and administration under a professional services agreement; was responsible for its corporate and business strategy; and held itself out to the public as being the operator.

The Florida bankruptcy court ultimately held that the plaintiffs failed to state a claim against the lender under an alter ego or veil piercing theory. The essential elements for establishing either theory are essentially the same, and include (1) domination and control, (2) improper or fraudulent use of the corporate form, and (3) injury to the claimant as a result of the fraudulent or improper use of the corporate form. As to the first element, the court found that, while any individual fact might not be sufficient, the allegations taken together could give rise to dominion or control of the nursing home operator. On the second element, the court found no allegations in the plaintiffs’ lengthy complaint that the corporate form itself was used for an improper purpose. Instead, the allegations in the complaint recognized that THI and THMI were initially created for the legitimate purpose of operating and managing long term care facilities. The only alleged improper conduct involved placing the assets of the nursing home operator and management company out of reach of their creditors, thereby protecting the lender’s investment. Because this allegation did not cause the plaintiffs’ harm, they failed to meet the third element for extending liability.

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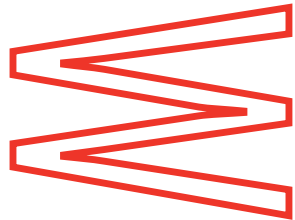
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Long Term Care Lenders Beware, *continued*

Long term care lenders should be prepared to respond to similar alter ego and veil piercing theories as plaintiffs seek to extend the boundaries of liability beyond the facility operator with responsibility for hands-on patient care. Lenders should be equipped to demonstrate, through affidavits and deposition testimony, that they are legally distinct entities uninvolved in the operation, management or control of any facility providing hands-on care to residents.



In Tennessee, it may be important to show that the lender was never the holder of the certificate of need when the long term care facility was opened. Under Tennessee regulations, the licensee has the ultimate responsibility for the operation of the facility, including the final authority to make or control operational decisions and legal responsibility for the business management. Tenn. Comp. R. & Regs. 1200-08-06-.02(3)(a). A lender may contribute capital and maintain a remote financial interest in the facility, but it does not make the decisions that affect patient care. As the Florida federal case illustrated, it is critical to establish the legitimate business purpose of the corporate structure and to break the link of causation to the plaintiffs' alleged harm.



Courts will closely scrutinize complex corporate arrangements, and lenders should prepare for responding to plaintiffs to extend liability for patient care to lenders before these arguments arise.

Pharmacies: Watch Out for Future HHS Crackdowns on Security Rule Violations

[Philip Whitaker](#), 423.209.4182, pwhitaker@bakerdonelson.com



As we all know by now, HIPAA¹ required the Secretary of the U.S. Department of Health and Human Services (HHS) to adopt regulations protecting the privacy of “protected health information” (PHI). HHS responded to that requirement by adopting what are commonly known as the HIPAA [Privacy Rule](#) and the HIPAA [Security Rule](#).

The Privacy Rule, or Standards for Privacy of Individually Identifiable Health Information, establishes national standards to protect the privacy of PHI. The Security Rule, or Security Standards for the Protection of Electronic Protected Health Information, protects a subset of information protected by the Privacy Rule, which is all PHI held or transferred in electronic form (e-PHI). The Security Rule does this by describing the administrative, physical and technical safeguards necessary to ensure the confidentiality, integrity and availability of e-PHI.

¹ Health Insurance Portability and Accountability Act of 1996 (P.L. No. 104-191, 110 Stat. 1936 (1996)).

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Pharmacies, *continued*

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A 2009 law called the Health Information Technology for Economic and Clinical Health (HITECH) requires, among other things, that HHS provide for periodic audits of covered entities to check their compliance with HIPAA requirements. The HHS Office for Civil Rights (OCR) has responsibility for enforcing both the Privacy Rule and the Security Rule. In November 2013, the Office of the Inspector General (OIG) issued a report finding that the OCR was

not meeting all federal requirements in its oversight and enforcement of the Security Rule. In particular, the OIG found that OCR had not complied with HITECH's requirement that it provide for periodic audits of covered entities to ensure their compliance with the requirements of the Security Rule.

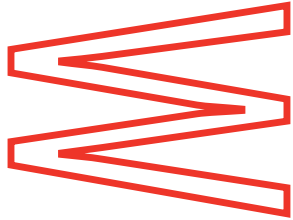
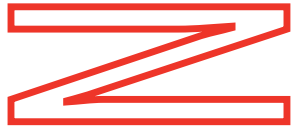
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Following the release of the OIG's findings, OCR audited a number of covered entities and stepped up its HIPAA enforcement activities significantly. Some of the OCR's activities since the OIG's release of its report criticizing the OCR included settlements with various covered entities for Security Rule violations. In two settlements that arose out of the theft of unencrypted laptop computers containing e-PHI, the covered entities were required to pay a total of \$1,975,220 in fines for Security Rule violations. In two other settlements arising out of a failure to secure e-PHI on network computers, the covered entities were required to pay a total of \$4,800,000 in fines for Security Rule violations.

In June 2014, a chief regional counsel with the OCR warned covered entities and their business associates to be ready for aggressive punishment by the OCR, and he reportedly predicted that the \$10 million in HIPAA fines levied during the then-preceding 12-month period would be substantially less than the HIPAA fines he expects the OCR to impose through June 2015.

Pharmacies are subject to the same HIPAA fines as any other HIPAA-covered entity and rank fifth among HIPAA-covered entities that OCR requires to take corrective action to comply with the Privacy and Security Rules. (OCR prepared a list of 1,200 companies for a new round of HIPAA audits that began at the end of 2014 and have continued into 2015.) Two-thirds of the companies on the list are HIPAA-covered entities such as pharmacies and nursing homes, and the balance are business associates – those organizations that store or process PHI maintained by covered entities. Audits conducted to check compliance with the Security Rule will focus on compliance with the rule's administrative, physical and technical safeguards. Fines for willful neglect violations not corrected within 30 days can be up to \$50,000 per violation. Intentional violations or violations that involve fraud are subject to more severe penalties, including prison.

We can expect HHS to continue to surprise HIPAA-covered entities, including pharmacies, with big-ticket penalties throughout 2015. Many of the violations of HIPAA's Security Rule for which covered entities have been sanctioned to date could easily have been avoided by (1) securing laptop computers and other portable devices, and (2) performing a comprehensive risk analysis of security management processes on an ongoing basis, identifying the risks and implementing appropriate security measures.



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Pharmacies, *continued*

To better protect your pharmacy operations from potential violations of HIPAA’s Security Rule, we recommend the following:

- Appoint a trusted employee as your Security Official, responsible for developing and implementing your security policies and procedures. That appointment should be documented.
- Have your Security Official review the six educational programs sponsored by the OCR on compliance with Privacy and Security Rules. Of particular relevance to complying with the Security Rule are the programs “Your Mobile Device and Health Information Privacy and Security,” and “Understanding the Basics of HIPAA Security Risk Analysis and Risk Management.” These programs are available at www.hhs.gov/ocr/privacy/hipaa/understanding/training.
- Invest in available software to assist your Security Official with Security Rule compliance.
- Have your Security Official study the “Audit Program Protocol” at <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/audit/protocol.html> and conduct a self-audit of your pharmacy’s compliance with the Security Rule.

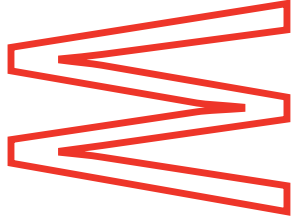
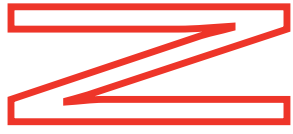
In the Trenches

[Jim Levine](#) with valuable contributions from [John McGehee](#), [Philip Whitaker](#), [Ross Schram](#), [William Richardson](#) and [Ryan Freeman](#), represented a senior housing financing company in 11 loans totaling \$67 million for an Indiana nursing home portfolio.

Our Mississippi long term care defense team, including [Davis Frye](#), [La’Verne Edney](#) and [Jean Bertas](#), has taken 17 cases to jury trial or arbitration, resulting in a total damages payout (not counting cases on appeal) of approximately \$25,000 in the past four years. Some of these successes include:

- Defense verdict for a long term care management company in a medical negligence claim brought against one of their Mississippi facilities. The case involved serious pressure wound injuries resulting in the amputation of one of the patient’s legs.
- Reversal by Mississippi Court of Appeals of an adverse Hinds County Circuit Court jury verdict against a long term care facility, holding that the trial court inappropriately excluded exculpatory evidence at trial.
- Directed verdict affirmed by Mississippi Court of Appeals in a nursing home lawsuit in which the plaintiff claimed that a long term care facility neglected a resident, allegedly causing her to develop a stage IV pressure wound and, ultimately, her death.

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In the Trenches, *continued*

- Defense verdict in a nursing home negligence case in which the plaintiff alleged that a resident suffered the amputation of her right leg as a result of an improperly managed foot wound.
- Finding of no liability in an arbitration in which the claimant alleged that a nursing home resident was subject to neglect, resulting in a stage IV pressure ulcer, sepsis and death.

[Rich Faulkner](#) and [Amy Andrews](#) represented a group of pharmacists who own and operate an independent pharmacy in acquiring interests in two more retail pharmacies. In one transaction, the client acquired all of the assets of an independent pharmacy located in Sweetwater, Tennessee. In the other, our client acquired a 50 percent interest in a retail pharmacy located in Benton, Tennessee.

[Ken Beckman](#), [Mary O’Kelley](#), [William Richardson](#), [Mary Aronov](#), [Lynn Landau](#) and [Carla Peacher-Ryan](#) assisted a national long term care provider with a multi-state refinancing transaction totaling more than \$60 million. With eight facilities located in six states, the transaction represented a significant unwinding of sale-leaseback financing with a publicly traded REIT. The transaction also involved the re-acquisition of all of the real estate for these related facilities.

[Jim Levine](#), on a pro bono basis, advised a private non-profit organization serving adults and children with intellectual disabilities in connection with the refinancing of several of its HUD homes with approximately \$3 million in new zero percent rate commercial bank loans. The loans were made possible due to tax credits provided under the community development tax credit program administered by the Tennessee Housing Development Authority.

[Ben Bodzy](#) and [Meg Sutton](#) obtained summary judgment for a skilled nursing facility less than two weeks before trial in a contentious whistleblower case in Tennessee state court.

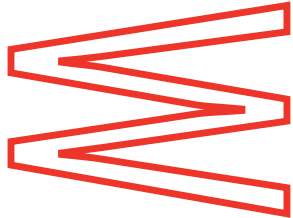
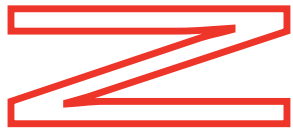
[Davis Frye](#) and [Sterling Kidd](#) obtained a finding of no liability in an arbitration in which the claimant alleged the nursing home neglected a resident, allegedly resulting in malnutrition, dehydration, pressure ulcers, infection and death.

[Davis Frye](#) and [Zachary Busey](#) obtained summary judgment in an employment suit filed against the client by a former employee (and union steward) who claimed to have been the subject of race discrimination, a hostile work environment based on her age, retaliation and slander.

[Jim Levine](#) was featured in a [Law360 Dealmakers Q&A Series](#) and in an article in the [Hamilton County Herald](#).

[Josh Powers](#) talked with the [Hamilton County Herald](#) about his path to becoming a medical malpractice litigator.

[Jackson Free Press](#) featured [La’Verne Edney](#) discussing her career.



* This schedule is subject to change.

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- 5.5.2015:** Under Attack: 10 Steps to Take if You Have a Data Breach
presented by [Gina Greenwood](#)
- 6.9.2015:** False Claims Act Enforcement Developments for Nursing Homes and Other Long Term Care Providers
presented by [Ted Lotchin](#) and [Jason Edgecombe](#)
- 7.14.2015:** Managing Employees in Difficult Situations
presented by [Jenna Bedsole](#)
- 8.11.2015:** Are You Ready? What to Expect During an OCR HIPAA Investigation or Audit
presented by [Gina Greenwood](#)
- 9.15.2015:** Ten Hot Topics in Labor and Employment
presented by [Rusty Gray](#) and [Jenna Bedsole](#)
- 10.13.2015:** Public Health Emergency Planning and Preparedness
presented by [Ted Lotchin](#) and [Jason Edgecombe](#)
- 11.10.2015:** Proper and Improper Use of Background Checks and Arrest Records
presented by [Angie Davis](#)
- 12.15.2015:** Fraud and Abuse Compliance Program 101: Do You Have a Plan?
presented by [Gina Greenwood](#)

To receive information about the webinar series or to register, email rsvp@bakerdonelson.com.

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