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ARTICLES

Rules, Standards, and the Attorney-Client Privilege: When the Privilege Is "At Issue in the Discovery Rule Context

Kenneth Duvall 1

In recent decades, the battle over the proper scope of evidentiary privileges has in large part been waged over one particular exception to the privilege: the "at-issue" carve-out. Under this exception, holders of the privilege waive it when their conduct in the litigation makes the communications into an issue. This article focuses in upon a particular scenario where the at-issue dispute comes into play: the "discovery rule." When a defendant pleads the statute of limitations, the plaintiff can toll the running of the statute until the point when they discovered, or should have discovered, that they had a legal injury. Yet the point of discovery can often be determined only through access to privileged communications. Part I of this article sets forth the general framework of rules and standards that divide the two sides of the debate. Part II will determine whether material protected by the attorney-client privilege is put at issue by invoking the discovery rule. Finally, Part III will offer a solution to the rule versus standard debate, at least within the context of putting the privilege at issue under the discovery rule.

Is It Time to Shed a "Tier" for Four-Tier Prescription Drug Formularies? Specialty Drug Tiers May Violate HIPAA's Anti-Discrimination Provisions and Statutory Goals

Joseph J. Hylak-Reinholtz & Jay R. Naftzger 33

This article will analyze whether specialty drug tiers violate HIPAA. This is a question of first impression—no federal or state court decision provides an answer. It begins with a discussion about the development of prescription drug coverage in the United States and the emergence of drug tiers as a cost-saving mechanism. We will provide a historical overview of accepted discrimination and risk classification within insurance. Next, we will discuss HIPAA's statutory language, legislative history, and key parts of the Final Rule implementing the law. We also address the impact of national health care reform under the Patient Protection and Affordable Care Act. Based on the foregoing, we will argue that HIPAA, its statutory history, and the relevant federal regulations demonstrate that specialty drug tiers violate HIPAA's anti-discrimination provisions, yet we acknowledge that reasonable minds could differ on that conclusion. On this note, we argue that specialty drug tiers should be universally rejected because such drug plans not only violate

HIPAA, but are inconsistent with HIPAA's broader goals of ensuring that Americans continue to have access to affordable health insurance benefits and repudiating discrimination on the basis of an insured's health status. Additionally, such drug tiers fail to satisfy the basic principles of insurance, do not further the same salutary social goals as traditional prescription drug formularies (i.e., formularies with three tiers), and adversely affect patient access to specialty drugs. We conclude by arguing that legislators and regulators should promote the public policy used to pass HIPAA into law and exercise their authority to end the proliferation of specialty tier drug plans.

The Age of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and For All

Sarah Mazzochi 75

Impunity remains one of the greatest challenges facing international peace and security today. A recent example of impunity's lingering existence is the events occurring in Kenya after the 2007 presidential elections. The International Criminal Court handed down indictments for six high-ranking officials in the state, but it remains unseen what effect this will have on the deeply rooted culture of impunity in the state. An older, but possibly more well-known, example of the consequences of impunity is the Lockerbie incident. However, in terms of combating impunity, the Lockerbie incident is considered a success. It is unknown how the indictments handed out for the six high-ranking Kenyan officials over the state's post-election violence will play out, but it too has the potential of ending positively by having those most responsible for the crimes against humanity brought to justice, either in Kenya or before the ICC. Not all situations will be as lucky. Therefore, the existing international legal framework must do a better job of preventing impunity. This article seeks to lay out possible changes to current international law that are necessary to combat impunity, particularly regarding the international crime of terrorism. This article will show that there exists a comprehensive definition of terrorism in current international law, that terrorism should be counted as a crime against humanity or a war crime, that universal jurisdiction fits acts of terrorism, and that states are under a jus cogens *duty to extradite or prosecute those accused of acts of terrorism. Therefore, by using this framework, terrorists worldwide cannot hide behind the screen of impunity. This approach is certainly novel. However, it is by linking the above mentioned concepts together that the end of impunity for acts of terrorism can become realistic. Because acts of terrorism have been considered the greatest threat to international peace today, the international community is more pressed than ever to end impunity for acts of terrorism once and for all. The framework mapped out in this article is but one way to achieve this goal.*

NOTE & COMMENT

A Pleading Problem: Seventh Circuit Decision in *Swanson v. Citibank* Illustrates the Unstable State of Federal Pleading Standards in the Post-*Iqbal* Era

Trisha Chokshi 103

Citizen access to federal courts has become much more difficult in recent years in the wake of two Supreme Court decisions: Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*, which raised the pleading standard a plaintiff must satisfy before her case can go to court. Prior to* Twombly *and* Iqbal*, courts interpreted Rule 8 of the Federal Rules of Civil Procedure liberally and required plaintiffs to allege a relatively basic set of facts. Under the new standard, known as "plausibility pleading," plaintiffs must plead some facts to demonstrate that their claim is plausible on its face. By examining a recent Seventh Circuit decision,* Swanson v. Citibank*, this Note illustrates the substantial difficulty that lower courts now face when they interpret pleadings in federal courts. While the majority opinion in* Swanson *interprets* Twombly *and* Iqbal *as consistent with Rule 8, the split among the circuit court judges illustrates the inherent difficulty in assessing how the new plausibility standard is to be applied and how high the Supreme Court meant to place the bar when it established a higher pleading standard. This Note begins with an overview of the common law and equity systems of pleading and the eventual drafting of the Federal Rules of Civil Procedure. It then tracks the development of the plausibility standard by dissecting the Supreme Court's opinion in* Twombly *and* Iqbal*. It will conclude by arguing that the Seventh Circuit missed the opportunity to remedy the ambiguity in the new standard, which, in fact, is not consistent with Rule 8 and notice pleading principles at all. Instead, the Seventh Circuit has adopted a context-specific approach that requires courts to apply a sliding scale to the alleged facts, which will inevitably lead to a greater burden on plaintiffs.*

Opening the Broom Closet: Recognizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans

Bradford S. Stewart 135

An unprecedented examination of the legal rights and treatment of emergent earth-based religious beliefs, including Wicca and other forms of Neo-Paganism, by the judicial as well as legislative branches of federal and state government. The negative and inaccurate stereotypes of various forms of Neo-Paganism are juxtaposed against its fundamental belief system that is peaceful, benevolent, and more similar than dissimilar to the features commonly recognized in other prevalent religious beliefs. Specific areas where Neo-Pagan adherents suffer disparate treatment through the machinations of government are then demonstrated in three sections. First, parental rights of Neo-Pagans are explored to show how various courts have adopted an implicit or explicit bias against Neo-Pagan parents having custody rights or even the right to raise a child in accordance with their spiritual beliefs. Second, the ironically prejudicial impact of Title VII's Religious Entity Exemption is analyzed to show how the exemption is unconstitutionally overbroad and permits religious majoritarianism to subjugate smaller and

stigmatized religious beliefs. The third area of discriminatory treatment against Neo-Pagans examined is in evidentiary proceedings where a number of states have tolerated prejudicial and irrelevant inquiries into a witness's Neo-Pagan beliefs that enable improper stereotypes to undermine a Neo-Pagan's rights in a testamentary capacity.

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