Commentary

Clarifying The Law Of Implied Privilege Waivers

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The district court in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), found that the defendants there had impliedly waived attorney-client privilege claims based on a three-part test that, in the intervening decades, has been widely followed. Recently, addressing facts essentially identical to *Hearn*'s, the Second Circuit overturned a district court's implied waiver finding and rejected the *Hearn* court's implied waiver standard as being overly inclusive. *In re County of Erie*, 546 F.3d 222 (2d Cir. 2008). As detailed below, the Second Circuit's more refined approach is an improvement on *Hearn*'s overly broad implied privilege waiver standard.

Hearn

Hearn was a 42 U.S.C. § 1983 action brought by a prison inmate against state prison officials relating to his year-and-a-half confinement in a "mental health unit" that allegedly was "a punitive isolation tier" with deplorable living conditions. *Hearn v. Rhay*, 68 F.R.D. 574, 577 (E.D. Wash. 1975). The defendant prison officials raised affirmative defenses, including that they had acted in good faith and, thus, were immune from a suit for damages. *Id.* The inmate then sought to discover "all legal advice defendants received on the legality of plaintiff's confinement in the mental health unit" based on the contention that the privilege was "not available . . . in the context of this case" or had "been waived by defendants' assertion of the good faith defense." *Id.*

Addressing the waiver claim, the *Hearn* court first noted that privilege waivers commonly result when patients sue doctors or clients sue lawyers. In those situations, three conditions are satisfied; namely, the "(1) assertion of the privilege was a result of some affirmative act, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." *Id.* at 581. Turning to the case before it, *Hearn* found there had been a waiver because "defendants invoked the privilege in furtherance of an affirmative defense they asserted for their own benefit; through this affirmative act they placed the protected information at issue, for the legal advice they received is germane to the qualified immunity defense they raised; and one result of asserting the privilege has been to deprive plaintiff of information necessary to 'defend' against defendants' affirmative defense." *Id.* *Hearn* then rejected the defendants' claims that, because they had not raised an advice of counsel defense, there was no waiver. *Id.* at 581 n.5.

Finally, the court stated that privilege claims require a need-based balancing analysis because the privilege "protects confidential attorney-client relationships only to the extent that the injury the relationship would suffer from disclosure is greater than the benefit to be gained thereby." *Id.* at 582. According to *Hearn*, "attorney-client communications are usually

incidental to [a] lawsuit," yet when "they inhere in the controversy itself" as they supposedly did there, "the benefit to be gained from disclosure far outweighs the resulting injury to the attorney-client relationship." *Id.*

Hearn's Aftermath

Hearn's implied waiver standard has been cited in literally hundreds of decisions and has been expressly followed in several jurisdictions. *E.g., Pappas v. Holloway*, 114 Wash. 2d 198, 208, 787 P.2d 30, 36 (1990). But *Hearn* has caused a great deal of angst for privilege holders based on challengers' use of its implied privilege waiver standard to support novel and sometimes overly aggressive waiver claims. As one court noted, "*Hearn* is problematic insofar as there are very few instances in which the *Hearn* factors, taken at face value, do not apply, and, therefore, a large majority of claims of privilege would be subject to waiver." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, No. 96 Civ. 7233, 2003 U.S. Dist. LEXIS 9108, *4 (S.D.N.Y. May 30, 2003) (citation and quotations omitted).

Hearn's starting point — that a privilege-holder's affirmative actions placing privileged communications "at issue" may result in a waiver – is not extraordinary and, in many instances, applying *Hearn*'s three-part test produces the correct result. But *Hearn*'s second and third prongs have been extremely useful to those advancing aggressive privilege waiver claims in two respects. First, *Hearn*'s second prong arguably suggests that implied waivers are based on the relevance of the privileged communications sought. Indeed, one way to characterize the *Hearn* defendants' "sin" is that they denied the claims against them and thereby made potentially inconsistent privileged communications relevant. Because defendants routinely defend themselves with denials and there might always be inconsistent privileged communications, the focus on relevance in *Hearn*'s second prong significantly expanded the range of cases in which privilege waiver battles could be fought.

Separately, *Hearn*'s third prong created a need-based balancing analysis. Because parties challenging privilege claims are quick to note both the potentially monumental significance of what they might find and their hopeless plight if their requests are denied, the need-based waiver standard in *Hearn*'s third prong has been extremely useful to privilege challengers.

County Of Erie

County of Erie, like *Hearn*, was a 42 U.S.C. § 1983 action by prisoners against prison officials, this time a class action challenging the legality of the Erie County Sheriff's Office's strip search policy. The district court initially ordered production of ten attorney-client e-mails based on a finding that they reflected policy-making, not legal advice. The Second Circuit granted a writ of mandamus, finding that "each of the ten disputed e-mails was sent for the predominant purpose of soliciting or rendering legal advice." *In re County of Erie*, 473 F.3d 413, 422 (2d Cir. 2007).

On remand, the district court again ordered production of the e-mails, this time based on its finding that the defendants had waived the privilege by placing the otherwise privileged communications "at issue." Relying on *Hearn*'s three-part test, the district court found that the county officials' testimony that county attorneys had been involved in discussions about changing the strip search policy meant that the defendants had "reli[ed] on privileged communications to support the contention that the strip search policy . . . was lawful." *Pritchard v. County of Erie*, No. 04-CV-534C, 2007 WL 3232096, *5 (W.D.N.Y. Oct. 31, 2007). The district court also found that "pleading conduct in conformity with the law, and then asserting privilege to protect from disclosure facts that might disprove this contention . . . placed the advice . . . about the legality of the strip search policy directly in issue." *Id.* at *4.

The Second Circuit, seeking "to clarify the scope" of implied waiver jurisprudence so as "to modify the very broad application of the [implied waiver] rule that has found favor in some quarters," granted a second writ of mandamus. *In re County of Erie*, 546 F.3d 222, 227 (2d Cir. 2008). It began by observing that "[u]nderlying any determination that a privilege should be forfeited is the notion of unfairness," which "'has been decided . . . on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted.'" *Id.* at 229 (citation omitted).

Turning to *Hearn*'s implied waiver standard on which the district court had relied, the Second Circuit noted that, "[a]ccording to *Hearn*, an assertion of privilege by one who pleads a claim or affirmative defense 'put[s] the protected information at issue by making it relevant to the case.'" *Id.* (*quoting Hearn*). The

Second Circuit found this test too broad because "privileged information may be in some sense *relevant* in any lawsuit." *Id.* (italics in original). "The *Hearn* test . . . would open a great number of privilege communications to claims of at-issue waiver" and lacks "the essential element of reliance on privileged advice in the assertion of a claim or defense in order to effect a waiver." *Id.* Rejecting *Hearn*'s implied waiver test, the Second Circuit held that, for there to be an implied "at issue" waiver, "a party must *rely* on privileged advice from his counsel to make his claim or defense." *Id.* (italics in original).

On the facts presented in *County of Erie*, the Second Circuit found that the district court erred in finding that the county defendants' qualified immunity claims placed the privileged communications at issue because that defense is evaluated under "an objective, not a subjective, test." *Id.* Similarly, the Second Circuit found that the county officials' deposition testimony did not result in an implied waiver because "the principal substance of the attorney-client communications was not revealed." *Id.* at 230. Further, there was no waiver because the deposition testimony "was not before a 'decision-maker or fact finder,'" so the plaintiffs "ha[d] not been placed in a disadvantaged position at trial." *Id.*

Reconciling The Holdings In Hearn and County Of Erie

Faced with the same basic facts — prison officials raising a "good faith" qualified immunity defense in a § 1983 action — *Hearn* found there was an implied waiver and *County of Erie* found there was not. Oddly, these contrary holdings are consistent because, a few years after *Hearn*, the Supreme Court significantly narrowed the scope of what is relevant to the underlying qualified immunity defense.

Specifically, *Hearn*, relying on *Wood v. Strickland*, 420 U.S. 308 (1975), found that the state officials' qualified immunity affirmative defense placed "at issue" not only the objective reasonableness of their conduct, but also their subjective good faith. *Hearn*, 68 F.R.D. at 578. Because the officials' state of mind was at issue, *Hearn* found that asserting the defense required permitting the prisoner to explore legal advice the officials may have received before acting as they did. In 1982, however, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), eliminated the qualified immunity defense's subjective element, and it was *Harlow*'s objective standard that was the basis for the Second Circuit's no waiver finding in *County of Erie*. 546 F.3d at 229. Presumably, if the purely objective standard *Harlow* now requires had applied when *Hearn* was decided in 1975, *Hearn* would have been decided differently.

Weaknesses In Hearn's Analytical Framework

But even if *Hearn* and *County of Erie* might have reached the same result if they had been applying the same standard for assessing the qualified immunity defense, *Hearn*'s analytical framework for resolving implied privilege waiver claims is an extremely broad one. As the Second Circuit found in *County of Erie*, to the extent that *Hearn* suggests that mere relevance is enough to support an implied privilege waiver claim, any such standard is unduly expansive. Instead, and as the Second Circuit found, the privilege-holder must take an affirmative act that is expressly based on or places at issue his or her legal advice. *County of Erie*, 546 F.3d at 229.

Moreover, and although the Second Circuit did not consider the need-based showing provided for in *Hearn*'s third prong, that aspect of *Hearn* likely did not survive *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). In *Swidler & Berlin*, the government claimed that, at least when the privilege-holder had died and the communications were being sought in connection with a criminal investigation, courts could engage in a need-based balancing analysis in determining whether to uphold privilege claims. The Court was not persuaded, observing that "[b]alancing *ex post* the importance of the information against client interests . . . introduces substantial uncertainty into the privilege's application" and, "[f]or just that reason, [the Court] ha[d] rejected use of a balancing test in defining the contours of the privilege." 524 U.S. at 409 (citation omitted). As the Sixth Circuit observed in *Ross v. City of Memphis*, 423 F.3d 596, 604 (6th Cir. 2005), "*Swidler & Berlin*'s reasoning is . . . fatal to the reasoning of *Hearn v. Rhay*."

The End Of Hearn's Loose Implied Waiver Standards

County of Erie may signal the end of courts relying on *Hearn*'s broad implied privilege waiver standards by, for example, finding implied waivers simply because the challenging party establishes

that the communications are "highly relevant" or that its need for the communications somehow "outweighs" any interest in preserving the privilege. As the Second Circuit found, the more appropriate standard is that the privilege-holder must "rel[y] on privileged advice in the assertion of the claim or defense in order to effect a waiver." *County of Erie*, 546 F.3d at 229. ■