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NEWSLETTER

Supreme Court Sows Confusion as to Patients' Information-Sharing Privacy Rights

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Ferguson v. Charleston

With all of the emphasis on HIPAA, G-L-B, COPPA and the rest of the alphabet soup of privacy legislation, a new Supreme Court decision reminds us of the constitutional underpinnings of much of privacy law. By focusing on a patient's "reasonable expectations" of privacy, the Court also throws a potential monkey wrench into privacy compliance efforts based exclusively on satisfying statutory obligations.

Supreme Court Acts

On March 21, the U.S. Supreme Court announced its 6-3 decision in Ferguson v. City of Charleston (No. 99-936), reversing the Fourth Circuit Court of Appeals and upholding Fourth Amendment damages claims of public hospital patients in connection with certain cocaine use tests performed on pregnant women. The clash between Justice Stevens' opinion of the Court and Justice Scalia's biting dissent appears to raise numerous constitutional issues about public hospital information-sharing arrangements and requirements that medical personnel report findings to law enforcement authorities. Beyond its specifics, the case has potential ramifications throughout the health care industry.Ferguson is one in a series of Fourth Amendment privacy cases before the Supreme Court this term. Earlier, in City of Indianapolis v. Edmond, the Court invalidated a highway checkpoint program whose primary purpose was the discovery and interdiction of illegal narcotics. (See December Privacy In Focus.) Still anticipated is the Court's decision in Kyllo v. U.S. (No. 99-8508), argued February 20, involving the National Guard's use without a warrant of a "thermal imager" to scan houses for marijuana grown inside.

Ferguson Background

The Ferguson case arises from patient challenges to practices employed at the Medical Center of the Medical University of South Carolina ("MUSC") to deal with a perceived "epidemic of cocaine use among its maternity patient base and the serious consequent public health problems and associated fiscal costs." The hospital adopted and refined policies under which doctors and other medical personnel, on a largely discretionary basis, selected predominantly "African-American women" receiving obstetrical care at the public hospital located in Charleston for drug testing. These pregnant women were induced to provide urine samples that then were tested for cocaine under procedures that would produce evidence admissible in a criminal trial. Where a patient tested positive for cocaine, hospital officials coordinated with the Charleston police to cause the arrest of the woman at the hospital. The plaintiffs, ten women arrested pursuant to that policy,

characterized the policy as one "of warrantless and nonconsensual drug testing for criminal investigatory purposes."

The plaintiffs brought suit in federal court against the City of Charleston and a group of law enforcement officials, hospital trustees and hospital personnel. They asserted claims for damages and injunctive relief, on various theories, including that "urine drug tests performed pursuant to the Search Policy constituted warrantless searches in violation of the Fourth Amendment." A jury found for the defendants on the ground that the plaintiffs had consented to the searches by signing standard hospital treatment consent forms.

On appeal, a panel of the U.S. Court of Appeals for the Fourth Circuit affirmed the judgment for defendants by a 2-1 vote. Judge Wilkins' majority opinion did not reach the consent issue but instead affirmed on the ground that consent was unnecessary, because the hospital practices fell within a "special needs" exception to the general Fourth Amendment requirement that a reasonable search must be supported by a valid search warrant issued on the basis of probable cause.

Fourth Amendment Applies

As conceptualized by Justice Stevens, the question before the Supreme Court was "whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." He began the majority analysis by observing that, because "MUSC is a state hospital, the members of its staff are government actors, subject to the strictures of the Fourth Amendment." Next, Justice Stevens declared that "the urine tests conducted by those staff members were indisputably searches within the meaning of the Fourth Amendment" (a proposition disputed by Justice Scalia).

Patient Privacy Expectation

In that context, Justice Stevens noted that "the invasion of privacy in this case is far more substantial" than those upheld in the Supreme Court's "special needs" cases involving the denial of a promotion or the opportunity to participate in school sports. Such denials constituted "a less serious intrusion on privacy than the unauthorized dissemination of such [urine test] results to third parties." In what promises to be frequently cited language, Justice Stevens then declared that the "reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." While the particular circumstances of the Ferguson case are narrow and presumably unusual, that broad and unqualified language will surely be used to support the arguments of advocacy groups and plaintiffs' lawyers in a number of medical privacy scenarios (as well as potentially any situation where "reasonable expectations" can be identified).

Search Held Invalid

Having set that stage, the majority went on to distinguish cases upholding the special needs exception as ones involving state interests "divorced from the State's general interest in law enforcement," whereas here "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." Rejecting the sufficiency of the program's "ultimate purpose–namely, protecting the health of both mother and child," the majority reasoned that because "law

enforcement involvement always serves some broader social purpose or objective," virtually any search "could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose." Thus, rather than finding the special needs exception applicable, the majority made express that where "state hospital" employees "undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require." On that basis, the case was remanded to the Court of Appeals to assess whether the standard hospital consent forms met the above standard.

Scalia Finds No Search

In dissent, Justice Scalia concluded that the MUSC practice "plainly does not" violate the Fourth Amendment, and the majority's decision "authorizing the assessment of damages" against the defendants "proves once again that no good deed goes unpunished." He first challenged the proposition that there had been any Fourth Amendment search at all, arguing that "the taking of the urine sample" falls outside the scope of "persons, houses, papers and effects" that the Fourth Amendment safeguards from unreasonable searches and, moreover, "it is not even arguable that the testing of urine that has been lawfully obtained is a Fourth Amendment search." He would have ruled that "information obtained through violation of a relationship of trust is obtained consensually, and is hence not a search." In that view, Justice Scalia stands alone among the nine justices.

Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia next argued that the record shows the MUSC program had a medical purpose, as well as a law enforcement purpose. He construed the majority as holding that "the addition of a law-enforcement-related purpose to a legitimate medical purpose destroys applicability of the 'special needs' doctrine." Justice Scalia then contended that, so viewed, the MUSC scenario cannot be satisfactorily distinguished from the cases where the special needs exception was held to apply.

All Reporting Implicated

Looking beyond the facts of the MUSC case, Justice Scalia charged that the majority's analysis raises major issues as to the use of "incriminating evidence from trusted sources," including not only where doctors independently comply with reporting statutes but also "a doctor's–or a spouse's–voluntary provision of information to the police." The majority, responding to this criticism in a footnote, denied that "we view these reporting requirements as 'clearly' bad," but rather such "requirements are simply not in issue here." In this way, the majority opinion itself tends to reinforce the suggestion that statutory reporting requirements, and the civil damages exposure of medical personnel reporting under them, may require additional Supreme Court Fourth Amendment scrutiny in the near future.

Ferguson's Future Implications

As the Ferguson case returns to the Fourth Circuit Court of Appeals, there remain standing between the defendant hospital personnel and actual civil liability to these plaintiffs issues as to whether signing the MUSC standard consent to treatment forms constituted valid consent to what MUSC did (as the jury found to be the case). Given the general current interest within the health care community in the redesign and implementation

of adequate and feasible consent procedures, the Fourth Circuit's future treatment of these matters could well merit continuing attention.

Readers should be clear that the duties suggested by the Ferguson decision apply to those persons who are state officials made subject to Fourth Amendment standards through operation of the Fourteenth Amendment, which would exclude purely private commercial entities or private individuals. As the federal, state and local governments become more and more deeply involved in the provision of health care, and the health care delivery system becomes more complex and interconnected, drawing the outer limits of Fourth Amendment applicability may raise difficult issues. In this regard, note the Supreme Court's February 20, 2001 decision in Brentwood Academy v. Tennessee Secondary School Association (No. 99-901), which held (5-4) that a "not-for-profit membership corporation organized to regulate interscholastic sport among the public and private high schools in Tennessee that belong to it" is "engaging in state action when it enforces a rule against a member school," owing "to the pervasive entwinement of state school officials in the structure of this association." How far this new "entwinement" doctrine will reach is anything but clear.

Beyond its direct applicability, the Ferguson decision may have continuing significance as a Supreme Court privacy precedent that actually finds to be present circumstances where civil liability under the Constitution arises in a medical information context. Famous health information privacy cases such as the Court's 1977 decision in Whalen v. Roe have discussed a constitutional right of privacy but have not found that right violated in the facts of the case at bar. Ferguson makes that finding.

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