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In his October 22, 2014 “Privilege Points” release, Tom Spahn discusses broad, concerning application of the “at issue” implied waiver doctrine:

Last week’s Privilege Point discussed the "at issue" doctrine, which can trigger an attorney-client privilege waiver without the litigant disclosing, relying on, or referring to privileged communications. Most courts recognizing the doctrine apply it only if the litigant affirmatively raises an issue to gain some advantage in litigation, rather than simply denies the adversary's allegations.

In Barker v. Columbus Regional Healthcare System, Inc., Case No. 4:12-cv-108 (CDL), 2014 U.S. Dist. LEXIS 120504 (M.D. Ga. Aug. 29, 2014), the court took a far more expansive approach. The plaintiff claimed that defendants violated the False Claims Act and other statutes by submitting false claims "with the intent to violate the law." Id. at *4. Defendant Columbus disclaimed an “advice of counsel” defense, and also disclaimed any intent to rely on privileged communications — but stated its intent "to offer evidence at trial that it believed its conduct was lawful." Id. at *4–5. The court concluded that Columbus "intend[ed] to do more than merely deny the essential elements of Plaintiff's claim" or "simply to argue that Plaintiff failed to carry its burden of proof." Id. at *11. Instead, the court held that by intending to assert its good faith belief that it had complied with the law, Columbus "injected its belief as to the lawfulness of its conduct." Id. at *7. That triggered a privilege waiver "as to communications relating to the legality of the transactions that form the basis of Plaintiff's claims." Id. The court therefore ordered Columbus to produce "all communications between it and its attorneys" relating to the lawfulness of its pertinent conduct — up to the date Plaintiff filed his compliant. Id. at *12.

Most courts do not recognize such a broad "at issue" doctrine. However, "at issue" waivers represent the most frightening way that litigants can lose their privilege — because "at issue" waivers do not depend on a litigant disclosing, relying on, or referring to privileged communications.