

## SOUTHERN DISTRICT CIVIL ROUNDUP

# The Implied Waiver Doctrine and the Good Faith Defense

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**T**he legal maxim that “the attorney-client privilege cannot at once be used as a shield and a sword” prevents a party from relying on advice given by counsel in aid of its defense while also asserting the privilege to prevent disclosure of that advice. See *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). An “advice of counsel” defense impliedly waives the attorney-client privilege based on the rationale that it would be unfair for a party who puts privileged communications at issue to prevent the opposing party from testing the factual predicates of the defense. See *In re County of Erie*, 546 F.3d 222, 228 (2d Cir. 2008). A related defense in fraud cases is a party’s “good faith” belief in the lawfulness of its actions.

For purposes of Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) and Rule 10b-5 promulgated thereunder, good faith defeats the element of scienter—that is, that the defendant acted with the intent to deceive. Good faith also is an affirmative defense to a claim under Section 20 of the Exchange Act, which requires proof that the defendant was “in some meaningful sense [a] culpable participant[] in the fraud perpetrated by controlled persons.” *Gordon v. Burr*, 506 F.2d 1080, 1085 (2d Cir. 1974).

A party’s good faith belief in the lawfulness of its challenged conduct may be established through the



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party’s reliance on the advice of counsel, but the party need not expressly invoke counsel’s advice or offer the advice into evidence to effect a waiver of privilege. See, e.g., *Bilzerian*, 926 F.2d at 1292. Even if a party does not specifically plead or argue that it relied on an attorney’s advice, by raising a good faith defense, the party may impliedly waive the attorney-client privilege.

In *Oklahoma Firefighters Pension and Retirement System v. Elon Musk*, 2025 WL 2982003 (S.D.N.Y. Oct. 23, 2025), Southern District Magistrate Judge Gabriel W. Gorenstein addressed whether if the defendants were to assert their “good faith belief in the lawfulness of their actions (or omissions) after they first consulted with counsel” would result in an implied waiver of the privilege protecting their communications with counsel.

The case arises from plaintiff's allegations that defendants (Elon Musk and others associated with him) committed securities fraud, under Sections 10 and 20 of the Exchange Act, and Rule 10b-5, by failing to timely disclose their intent to take control of Twitter, Inc. defendants argued that no privilege waiver would arise from their assertion of a good faith defense because they would not be "asserting an advice-of-counsel defense" and did "not intend to rely on attorney-client privileged communications or documents in defense of th[e] action." Gorenstein rejected defendants' argument, concluding that under settled Second Circuit authority, even if they do not rely on privileged attorney-client communications, their assertion of a good faith defense would result in an implied waiver of the privilege.

### ***Oklahoma Firefighters v. Musk***

In *Oklahoma Firefighters*, Oklahoma Firefighters Pension and Retirement System, a public pension fund that provides retirement allowances and other benefits to firefighters in Oklahoma, brought a securities class action against Elon Musk, the Elon Musk Revocable Trust Dated July 22, 2023, Excession, LLC, and Elon Musk's wealth manager (collectively, defendants). Plaintiff filed the action on behalf of a putative class of investors who sold Twitter securities between March 15, 2022 and April 4, 2022, a period when defendants allegedly concealed Musk's material ownership stake in the company.

Plaintiff alleged that defendants "devised a scheme to secretly acquire a massive active ownership interest in Twitter," Amended Complaint, filed Apr. 30, 2024, ¶ 82 (Docket # 99), in violation of multiple provisions of the Exchange Act. In particular, plaintiff alleged that defendants deliberately failed to comply with their disclosure obligations under Section 13 of the Exchange Act, which "requires investors who surpass ownership of 5% of a company's shares to file a Schedule 13D disclosure detailing their interest in, and intentions for, the company within ten days."

Defendants' acquisition of Twitter stock crossed the 5% ownership threshold on March 14, 2022, but they did not file any disclosure forms until April 4, 2022, when they filed a Schedule 13G form—

which passive investors may file in lieu of of a 13D disclosure, but which must be accompanied by a certification attesting that the investors in fact are passive. The 13G form defendants filed allegedly was altered to omit the required certification and falsely implied that defendants were passive investors. On April 5, 2022 (the day after they filed the 13G form), defendants filed a 13D disclosure. Defendants first sought legal advice on April 1, 2022.

Following defendants' answer to the complaint, plaintiff filed a discovery motion to require defendants to disclose whether they intended to rely on an advice of counsel defense or assert that they acted in "good faith." Defendants ultimately stated that they would not be offering evidence that they "followed... counsel's guidance in making proper disclosures," but they further stated that they intended to "assert their good faith belief in the lawfulness of their actions (or omissions) after they first consulted with counsel on April 1, 2022." (Docket #196, 198). Gorenstein therefore addressed whether if defendants asserted a good faith defense, such a defense would effectuate an implied or "at issue" waiver of the attorney-client privilege.

### **Effecting an Implied or 'At Issue' Waiver**

Judge Gorenstein first reviewed the law on whether an assertion of "good faith" effectuates an implied or "at issue" waiver of the attorney-client privilege, describing the Second Circuit's decision in *Bilzerian* as the "perfect example where such a waiver occurred." In *Bilzerian*, the court affirmed the trial court's ruling that a defendant's testimony about his own good faith belief in the legality of his actions opened the door to cross-examination into communications he had with his attorney on the subject.

The *Bilzerian* court explained that "fairness require[d]" waiver because by asserting that he had a good faith belief that his actions were lawful, the defendant put at issue the extent of his knowledge of the law and his basis for his alleged understanding of what the law required. Gorenstein observed that the *Bilzerian* court found "waiver even though there was no effort by the defendant to actually offer into evidence his attorney's advice."

In addition to Bilzerian, Gorenstein cited to numerous other opinions from district courts within the Second Circuit “consistently recogniz[ing]” an implied waiver “even if the privilege holder does not attempt to make use of a privileged communication.” Gorenstein concluded that these cases were consistent with the “waiver doctrine’s goal to achieve ‘fairness.’” Gorenstein reasoned that an assertion of a good faith belief necessarily places privileged communications at issue, and the opposing party should be permitted to obtain discovery regarding the relevant communications so it can test the factual basis for the good faith assertion.

Finally, Judge Gorenstein rejected defendants’ assertion that the Second Circuit’s decision in *In re County of Erie*—issued nearly 18 years after Bilzerian—stands for the proposition that an implied or “at issue” waiver occurs only if a party intends to argue that it actually relied on counsel’s advice. Defendants pointed to language from *In re County of Erie* stating that for a waiver to occur “a party must rely on privileged advice from his counsel to make his claim or defense.” Gorenstein explained that analyzed in context, the quoted language does not reflect a change in the Second Circuit’s law on implied waiver. He noted that *In re County of Erie* did not involve “a good faith or state of mind defense” and relied heavily on Bilzerian for its reasoning, and concluded that *In re County of Erie* could not reasonably be interpreted as sub silentio overruling or even retreating from the Circuit’s law on waiver as presented in Bilzerian.

### **Application of the Implied Waiver Law**

Having determined that a party’s assertion of a good faith belief in the lawfulness of its alleged conduct ordinarily waives attorney-client privilege as to the communications at issue and makes such evidence discoverable, Gorenstein next applied the doctrine of implied waiver to the case at hand. Gorenstein concluded that “it would obviously be unfair for defendants to be permitted to offer evidence or argue that they had a good faith belief that their alleged conduct was lawful while at the

same time barring plaintiff from examining the evidence that would most obviously put that claim to the test: the advice defendants’ attorneys gave them about that very conduct.”

Accordingly, he concluded that invoking a good faith defense would effect a waiver of privilege. Because defendants had asserted that they would only invoke the good faith defense if Judge Gorenstein determined that they could do so without waiver, Gorenstein ruled that defendants would be precluded from offering argument or evidence in support of their belief that their conduct was lawful after consulting with their counsel on April 1, 2022.

Gorenstein then addressed a related issue: whether defendants could offer evidence of the “involvement” of their attorneys beginning on April 1, 2022. With the preclusion order in effect, Gorenstein explained that evidence of counsel’s involvement no longer presents a waiver or discovery issue, and instead “is a question of whether such evidence will be admissible at trial.” He concluded that that question appropriately is resolved through a motion in limine.

Gorenstein went on to note, however, that with the preclusion order in effect, evidence related to defendants’ consultation with counsel “would not seem to be relevant to any issue in the case,” and if the evidence were permitted, “plaintiff would likely be entitled to a jury instruction that the evidence could not be used to infer... good faith.”

### **Conclusion**

Oklahoma Firefighters reinforces that defendants cannot offer argument or evidence that they had a good faith belief in the lawfulness of their conduct while simultaneously invoking the attorney-client privilege in discovery to try to shield their communications with counsel relevant to their conduct. In such circumstances, an implied waiver will be found even if a defendant does not intend to offer into evidence the advice it received.

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