

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BENEFIT MANAGEMENT OF)
MAINE, INC.,)
)
Plaintiff)
)
v.)
)
ALLSTATE LIFE INSURANCE)
COMPANY, et al.,)
)
Defendants)

Civil No. 90-0159 P

MEMORANDUM DECISION ON PLAINTIFF'S MOTIONS
TO COMPEL PRODUCTION OF DOCUMENTS ¹

¹ See Docket Nos. 31 and 45.

The plaintiff seeks to compel the production of certain documents which the defendants have withheld on attorney-client privilege and/or work-product doctrine grounds. The plaintiff concedes that the documents, 14 in number,² are protected by the attorney-client privilege or the work-product doctrine. *See* Plaintiff's Memorandum of Points and Authorities in Support of its Motion to Compel Testimony and Production of Documents Allegedly Covered by the Attorney/Client and Work Product Privileges at 16; Plaintiff's Reply Memorandum of Points and Authorities in Support of its Motion to Compel Testimony and Production of Documents Allegedly Covered by the Attorney/Client and Work Product Privileges ("Plaintiff's Reply Memorandum") at 1; Report of Telephone Conference and Order (Docket No. 48). It asserts that it is nevertheless entitled to these documents on the basis of the applicability of the crime/fraud exception.

In this diversity action, where Maine law supplies the rule of decision concerning the plaintiff's fraud claims which generate the instant discovery controversy, questions surrounding invocation of the attorney-client privilege are controlled by Maine law. *See* Fed. R. Evid. 501; *Gagne v. Ralph Pill Elec. Supply Co.*, 114 F.R.D. 22, 24-25 (D. Me. 1987). Federal law, on the other hand, controls issues surrounding the work-product immunity doctrine even in diversity cases because Fed. R. Civ. P. 26(b)(3) explicitly addresses work product. *Gagne*, 114 F.R.D. at 26.

Attorney-Client Privilege

Under Maine law the attorney-client privilege is vitiated [i]f the services of the lawyer were

² *See* Exhibit A to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Compel Testimony and Production of Documents Allegedly Covered by the Attorney-Client Privilege and Work-Product Doctrine.

sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Me. R. Evid. 502(d)(1). This court, construing Me. R. Evid. 502(d)(1) in *Gagne*, held that a party must present *prima facie* evidence of fraud to justify stripping the privilege on this ground. *Gagne*, 114 F.R.D. at 25. The moving party need not prove that the attorney knew of the client's fraud or that the client intended to employ the attorney in furtherance of the fraud. *In re Sealed Case*, 676 F.2d 793, 812, 815 (D.C. Cir. 1982), *cited by Gagne*, 114 F.R.D. at 25. Instead, the relevant inquiry is (1) whether there has been a *prima facie* showing that the client committed fraud; and (2) if so, whether the privileged material reasonably relates to the subject matter of the fraud. *In re Sealed Case*, 676 F.2d 793, 814-15 (D.C. Cir. 1982).

Prima facie evidence is "such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary 1071 (5th ed. 1979). In Maine, a party must prove fraud by clear and convincing evidence of each of five elements: (1) the making of a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of its truth or falsity; (4) for the purpose of inducing another to act in reliance upon it; and (5) justifiable reliance by the other upon the representation as true, causing him to act upon it to his damage. *Arbour v. Hazelton*, 534 A.2d 1303, 1305 (Me. 1987). To be "clear and convincing," evidence must establish a factual conclusion to be highly probable. *Taylor v. Commissioner of Mental Health & Mental Retardation*, 481 A.2d 139, 154 (Me. 1984). Against the backdrop of this controlling caselaw, I have examined whether the plaintiff's evidence establishes a high probability of fraud. Mindful that the plaintiff must make out only a *prima facie* case, I have focused on its submissions alone.

The plaintiff alleges that the defendants perpetrated against it in 1988 the following three

separate but related fraudulent acts:

(1) Defendant Northbrook intentionally misrepresented its authority and right to invoke the Withdrawal and Suspension Clause of its Group Agency Agreement with the plaintiff in order to induce the plaintiff's consent to the termination of that agreement;

(2) Both defendants intentionally misrepresented defendant Allstate Life's commitment to the group life and health insurance business in order to induce the plaintiff to consent to the termination of the Group Agency Agreement and enter into two replacement service agreements with the defendants; and

(3) Both defendants intentionally withheld material information from the plaintiff following execution of the replacement service agreements in order to induce the plaintiff to continue to place business with the defendants.

See Plaintiff's Reply Memorandum at 4.

These allegations of fraud are not buttressed in any degree by the plaintiff's submitted evidence which I have reviewed in detail. They depend, instead, on speculation unsupported by facts in the record. Despite the plaintiff's failure to make a *prima facie* showing of fraud, I have conducted an *in camera* examination of the documents at issue to determine if they, or any of them, evidence any of the acts of fraud alleged by the plaintiff. I conclude that they do not. Accordingly, the crime/fraud exception to the attorney-client privilege embodied in Me. R. Evid. 502(d)(1) does not apply.

Work-Product Immunity

The immunity from document production afforded by the work-product doctrine does not apply in circumstances where the party who seeks production presents sufficient facts to establish

probable cause to believe that a crime or fraud has been committed and that the documents were prepared and used in connection with the criminal or fraudulent scheme. *Gagne*, 114 F.R.D. at 27-28; *see also Craig v. A.H. Robins Co.*, 790 F.2d 1, 4 (1st Cir. 1986); *In re John Doe Corp.*, 675 F.2d 482, 492-93 (2nd Cir. 1982).

Just as I have concluded in connection with my analysis of the crime/fraud exception to the attorney-client privilege issue that the plaintiff has failed to make out a *prima facie* case of fraud, so too do I find that the plaintiff has failed to satisfy the probable cause standard.

Conclusion

For the foregoing reasons, the plaintiff's referenced motions to compel production are **DENIED** on the present record. The Clerk shall seal and retain the 14 documents submitted by the defendants for my *in camera* review so that they may be available in the event reconsideration by a district judge of this court is sought pursuant to 28 U.S.C. ' 636(b)(1)(A) or in the event of appeal.

So Ordered.

Dated at Portland, Maine this 29th day of May, 1991.

David M. Cohen
United States Magistrate Judge