IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO.: 72-388

(District Court of Appeal of Florida,
Fourth District - Case 87-1513)

PENELOPE R. KUJAWA, as beneficiary
of JOHN A. KUJAWA, Deceased,

Petitioner,

vs.

MANHATTAN NATIONAL LIFE
INSURANCE COMPANY,

Respondent.

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AMICUS CURIAE BRIEF
OF ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND FACTS

Amicus agrees with the Statement of the Case and Facts of Petitioner.

POINT ON APPEAL

WHETHER THE DISTRICT COURT ERRED WHEN IT QUASHED THE CIRCUIT COURT ORDER THAT REQUIRED MANHATTAN TO PRODUCE ITS COMPLETE FILES, IN THIS CAUSE OF ACTION FOR VIOLATION OF FLORIDA'S CIVIL REMEDY STATUTE, §624.155 FLA. STAT.

The Third District in Fidelity and Casualty Insurance Company of New York v. Taylor, 525 So.2d 908 (3rd DCA, 1988) ordered production of an insurer's complete claims file in an action pursuant to F.S.§624.155. The Court reasoned that in such cases liability is premised upon the carrier's conduct in processing and paying a given claim. This includes the carrier's consideration of the advice of counsel so as to discharge its mandated duty of good faith. Since the only source of information on these issues is the claim file, it was held producible notwithstanding the work product immunity and the attorney/client privilege.

The Court observed that this result is identical to that already established in 3rd party claims. The Court perceived no basis to distinguish between bad faith in the 1st party versus the 3rd party contexts relative to the necessity for Plaintiffs to discover how the claim was handled.

The Fourth District in Manhattan National Life Insurance Co. v. Kujawa, 522 So.2d 1078 (4th DCA, 1988) rejected the approach in Taylor, and held that the carrier's claim files in a first

party action pursuant to §624.155 was entitled to the protections of the work product immunity, and the attorney/client privilege.

The basis of their decision was that in a 1st party action, the insurer is not in a fiduciary relationship with the insured, unlike the 3rd party setting.

Amicus contends that whether a carrier is in a fiduciary relationship with its insured is a distinction without a difference with regard to the scope of 1st party versus 3rd party discovery in a bad faith case.

The critical fact is that F.S.§624.155 imposes duties on a 1st party insurer similar if not identical to that of the fiduciary duties in 3rd party claims. It is the imposition of duty by the legilature which sets standards for carrier behaviour, and establishes the need for discovery as broad as that permitted in 3rd party cases.

The only possible avenues for any insured to prove breach of duty is discovery of the entire claim file. This is the law of Florida as to 3rd party bad faith claims. To deny this right to 1st party insureds renders the entire statutory scheme of F.S.§624.155 ineffectual.

Judge Aronovitz in Jones v. Continental Insurance Co., 670 F.Supp 937, 940 (S.D.Fl. 1987) explained that the duty of good faith in 3rd party cases was implied in law because "There is

said to exist a fiduciary relationship between the insured and his insurance company."

At bar, the duty of good faith in 1st party cases derives from the statutory scheme of F.S.§624.155.

The issue here is not as the Fourth District assumed, the source of the duty to act in good faith, be it fiduciary (3rd party) or statutory (1st party), but rather given the existence of the identical remedy in either setting should 1st party insureds be denied the same ability to discover their cases as 3rd party insureds.

The legislative history of §624.155 reads:

> §624.155 requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims but not in uninsured motorist coverage: the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies. (Cites omitted)
>
> Jones Id. at 941

Judge Aronovitz cited Judge Black's analysis of that history in United Guaranty Residential Insurance v. Alliance Mortgage Co., 644 F.Supp. 339,342,n.4 (M.D.,Fla.1986.

> "This language demonstates that the legislature intended to extend the liability of insurers for bad faith claims arising out of liability insurance policies (3rd party actions) to bad faith claims arising out of any insurance policy." (Emphasis added)

In fact, Judge Aronovitz concluded that the overall

structure of the statute also supports the argument that F.S.§624.155(1)(6)(1) is meant to apply to first party actions. Jones supra, 942.

He further opined that since the legislature provided a cause of action for bad faith for 1st party insureds while using language usually reserved for 3rd party claims, the legislature intended for the full contours of the statute to be determined by reference to general principles of Florida insurance law that could be equally applicable in the first party context. Jones supra 944.

Ironically, the Fourth District in Industrial Fire & Casualty Insurance Co. v. Romer, 432 So.2d 66, 69 n.5(4th DCA), Judge Hurley concurring, rev.denied 441 So.2d 633 (Fla. 1983) stated in dicta that with the passage of §624.155 (1)(6)(1), Florida had joined the ranks of those states which impose an implied covenant of good faith and fair dealing on first party insurance contracts.

Finally, in Opperman v. Nationwide Mutual Fire Insurance Co., 515 So.2d 263, 266-267 (5th DCA, 1987), the Court cited language from the premium first party bad faith claim case Greenberg v. Aetna Insurance Co., 9 Cal.3rd 566 (1973) that the duty of an insurer to act in good faith in settling the claim of its insured was akin to the insurer's duty of good faith in handling claims of 3rd parties against the insured.

The Greenberg opinion reflected that the two types of claims reflected different aspects of the same duty; the duty imposed by law to act fairly and in good faith.

The ineluctable conclusion from the foregoing is that the Legislature intended that 1st party actions be treated indentically with 3rd party actions whether their origin is fiduciary or statutory.

Amicus contends that a pronouncement of the legislature §624.155 ought to be accorded equal authority to a judicial authority to a judicial construction that an insurance contract implies a fiduciary duty.

The fiduciary distinction fails in light of the reality that both 1st and 3rd party actions address identical issues which can only be discovered through the insurer's claim files.

Amicus can find no valid justification in law or logic to deny first party insureds the same rights to discover their cases as third party insureds.

SUMMARY OF THE ARGUMENT

Florida courts have agreed that discovery of the insurer's entire claim file, including work product and attorney/client privileged material, is necessary and authorized in 3rd party claim cases.

Since the duties imposed upon the insurers in 1st party claims, pursuant to F.S.§624.155, are simply a different aspect of the same duty mandated in 3rd party claims i.e. to deal in good faith where the insured, 1st party insured, should be accorded the same right to discover their cases as 3rd party insureds.

The fact that the right to 3rd party party bad faith claims derives from the fiduciary relationship arising from insurance contracts as interpreted by the courts, whereas the right to 1st party bad faith claims derives from the legislature's enactment of F.S.§624.155, should make no difference in the scope of discovery permitted in the two cases, since the issues in both types of cases are the same and the claims file is the only source of information on these issues.

To deny equality of treatment with regard to discovery rights to 1st party claimants would defeat the legislature's purpose for enacting F.S.§624.155 by rendering it ineffectual.

CONCLUSION

Accordingly, it is respectfully requested that this Court adopt the reasoning, if not the opinion, of the Third District, Schwartz, Chief Judge in Taylor, reverse the decision in Kujawa and remand this case to the trial court for reinstatement of its May 6, 1987 Order that the claims file be produced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered/mailed this 2nd day of October, 1988, to: Steven A. Edelstein, Esq., 1700 Sans Souci Blvd., North Miami, FL 33181; to Maxine Long, Esq., Brenton Ver Ploeg, Esq. and Phillip D.Parris, Esq., Shutts & Bowen, 1500 Chopin Plaza, Miami, FL 33131, and to Diane Tutt, Esq., 110 S. E. 6th Street, Fort Lauderdale, FL, to Jeffrey White, ATLA, 1050 31st St.,N.W., Washington, D.C.

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