IN THE SUPREME COURT OF FLORIDA

CASE No. 72,388

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

Petitioner,

vs.

MANHATTAN NATIONAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR REVIEW OF OPINION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF AMICI CURIAE AMERICAN COUNCIL OF LIFE INSURANCE AND AMERICAN INSURANCE ASSOCIATION ON BEHALF OF RESPONDENT MANHATTAN NATIONAL LIFE INSURANCE COMPANY

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ISSUE PRESENTED

WHETHER THE FILING BY THE INSURED OF A STATUTORY CAUSE OF ACTION UNDER FLA. STAT. ANN. § 624.155 ALLEGING THE INSURER'S IMPROPER PROCESSING OF A CLAIM MADE WITHIN THE POLICY'S CONTESTABLE PERIOD ABROGATES THE INSURER'S WORK PRODUCT AND ATTORNEY-CLIENT PRIVILEGES.

INTEREST OF THE AMICI

Amicus American Council of Life Insurance is the largest life insurance trade association in the United States representing the interests of 650 member life insurance companies, of which 460 are licensed to do the business of insurance in the State of Florida.

Amicus' members currently hold 95% of the life insurance in force in legal reserve life insurance companies in the United States and 93.2% in the State of Florida.

Amicus American Insurance Association is the largest property/casualty insurance trade association in the United States representing the interests of 184 member property/casualty insurance companies. Amicus' member companies currently underwrite 24.19% of the property/casualty insurance in force in the United States and 24.7% in the State of Florida. The value of the market share of property/casualty insurance provided by Amicus' member companies in the State of Florida exceeds two billion dollars in direct premiums written.

The legal and practical consequences of the opinion below are matters of grave concern to the member companies of Amici. By making no valid distinction regarding the existence of a fiduciary relationship between an insurer and its insured in "third-party" as opposed to "first-party" bad faith cases, the arguments advanced by petitioner in this case to abrogate the attorney-client and work product privileges, if accepted by this Court, could drastically enlarge the risk imposed on Amici's member insurers when claims are adjudicated. Further, the increased costs to the public who are policyholders of Amici's member companies could be substantial. Amici thus have a direct and immediate interest in the issues presented in this case.

STATEMENT OF THE CASE

Amici American Council of Life Insurance and American Insurance Association (Amici) adopt Respondent Manhattan National Life Insurance Company's (Manhattan) statement of the case filed with this court. Amici emphasize that (1) the claim filed under the policy as a result of John Kujawa's death forms the underlying basis for this instant bad faith action and was made within the policy's contestable period, and (2) Manhattan has turned over to Petitioner Penelope R. Kujawa (Kujawa) the entire underwriting and claims file in this matter. Manhattan has also offered to produce to Kujawa a file containing correspondence with the Florida Insurance Department concerning the Kujawa claim.

The remaining file which Kujawa seeks to acquire is Manhattan's separate legal file, which Amici assume constitutes communications between Manhattan's in-house attorneys and outside attorneys and claims personnel regarding the Kujawa claim. Manhattan has refused to produce this file based on the attorney-client and work product privileges. The trial court denied Manhattan's request for an in camera inspection of this legal file.

STATEMENT OF THE FACTS

Amici adopt Manhattan's Statement of the Facts filed with this court.

SUMMARY OF ARGUMENT

Petitioner Kujawa's fundamental premise that the mere filing of a bad faith action under Fla. Stat. Ann. § 624.155 abrogates an insurer's work product and attorney-client privileges is incorrect. When enacting Fla. Stat. Ann. § 624.155, the Legislature did not intend to abrogate the attorney-client and work product privileges in first party actions, where the parties occupy an adversarial relationship with each other. In fact, the Legislature is not constitutionally empowered to abolish the attorney-client privilege because that privilege is not derived solely from Fla. Stat. Ann. § 90.502, but emanates from the Rules Regulating the Florida Bar, which are approved by the Florida Supreme Court.

No fiduciary relationship exists between an insured and his insurer in a first party action under Fla. Stat. Ann. § 624.155 when a claim is filed within the policy's contestable period. In such case, the insurer and insured (or beneficiary) are clearly in an adversarial relationship due to the fact that the claim can be denied and/or the policy under which the claim is made can be rescinded for material misrepresentations by the insured. These misrepresentations need not have any nexus with the claim at issue.

A ruling in favor of Kujawa would permit contestability investigations to be conducted for some types of claims but not

for others. This abnormal result would be violative of Florida law requiring equal treatment of all like risks.

Florida's contestability statute, Fla. Stat. Ann. § 627.409, discourages fraud and misrepresentation in the pricing and placing of insurance. It is in the public interest for that statute to continue to be given full force and effect. Reversal of the Fourth District Court of Appeal's decision would have a chilling effect on insurers attempting to conduct routine claim inquiries under Florida's contestability statute and would encourage the commission of fraud and misrepresentation by the insurance applicant during the underwriting process.

I. THERE IS NO LEGISLATIVE INTENT TO ABROGATE THE WORK PRODUCT AND ATTORNEY-CLIENT PRIVILEGES IN ACTIONS BROUGHT UNDER FLA. STAT. ANN. § 624.155.

Fla. Stat. Ann. § 624.155 permits any person to bring a civil action against an insurer when that person is damaged by the insurer "[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so ...." Fla. Stat. Ann. § 624.155 (1)(b)(1). This statute requires an insurer to deal fairly and in good faith with its insured by not refusing to pay a claim unless proper cause exists. It is construed by Kujawa to strip an insurer of the work product and attorney-client privileges afforded every other litigant and places an insurer defending a statutory cause of action brought under § 624.155 in an admittedly disadvantaged position.

The attorney-client and work product privileges are well recognized as being available to corporations in Florida. See, e.g., Affiliated of Florida, Inc. v. U-Need Sundries, Inc., 397 So. 2d 764 (Fla. 2d Dist. Ct. App. 1981); Associated Medical Inst., Inc. v. Trube, 394 So. 2d 563 (Fla. 3d Dist. Ct. App. 1981). The attorney-client privilege is perhaps best described as the "soul of lawyering ... the cornerstone of the legal profession, without which the adversary system would not work ...." Ex Parte Taylor Coal Co., 401 So. 2d 1, 8 (Ala. 1981). It promotes the "broader public interests in the observance of law and administration of justice" by encouraging honest communications between attorney and client. Upjohn Co. v. United States, 101 S. Ct. 677, 682 (1981). However, for the attorney-client privilege to serve its purpose, the lawyer and client "must be able to predict with some degree of certainty whether particular discussions will be protected." Id. at 684.

Fla. Stat. Ann. § 624.155 makes no reference, or even any inference, to abrogation of the work product (Fla. R. Civ. P. 1.280) and attorney-client privileges (Fla. Stat. Ann. § 90.502). The rather skimpy legislative history on this statute is found in a 1982 Staff Report to the House Committee on Insurance which is quoted in Rowland v. SAFECO Ins. Co. of America, 634 F. Supp. 613 (D. M.D. Fla. 1986). This report merely paraphrases the statute's mandate that insurers act in good faith when dealing with their policyholders and does not address the aforementioned privileges. Id. at 615. It would be startling to conclude that fundamental

concepts forming the bedrock of our legal system can be negated by a statute which contains no meaningful specifics pertaining to these privileges.

Several states other than Florida have adopted legislation expressly authorizing a private cause of action for bad faith denial of first party insurance benefits. See, e.g., Massachusetts, Mass. Ann. Laws ch. 93A, §§ 5, 9; Montana, Mont. Code Ann. § 33-18-242 (preempting judicially created cause of action for bad faith, see First Sec. Bank of Bozeman v. Goddard, 181 Mont. 407, 593 P.2d 1040 (1979)); Washington, Wash. Rev. Code § 19.86.170. (Courts from 22 other jurisdictions have recognized bad faith as a tort in first party claims independent of a legislatively mandated cause of action, while at least 17 states have rejected such arguments.)

The only case on point brought under these statutes which involved a challenge to the attorney-client and work product privileges recognized these privileges, but allowed an exception to the attorney-client privilege in the case of civil fraud by the insurer. Escalante v. Sentry Ins., 743 P.2d 832, 842 (Wash. Ct. App. 1987). Acknowledging the difficulty in establishing such fraud at the discovery stage, the Washington Court of Appeals concluded that an in camera inspection by the trial court would be an appropriate method of making a showing of fraud. However, the necessity of an in camera inspection would first be based on a factual showing

> "adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the ... fraud exception ... has occurred." [W]e find this procedure to be a reasonable solution to the discovery problems associated with the attorney-client privilege in bad faith litigation.

Id. at 842-843, quoting with approval Caldwell v. District Court in and for City and Cy. of Denver, 644 P.2d 26 (Colo. 1982).

This "reasonable solution" was the very relief Manhattan unsuccessfully attempted to obtain from the trial court, which denied Manhattan's request for an in camera inspection of its legal file. Had Kujawa made a motion to compel coupled with a proper showing in support thereof, an in camera inspection of Manhattan's legal file would have been the reasonable approach to take in this case, rather than the wholesale denial of a litigant's attorney-client and work product privileges.

Fidelity and Casualty Ins. Co. of New York v. Taylor, 525 So. 2d 908 (Fla. 3d Dist. Ct. App. 1987) appears to be the only appellate decision in any jurisdiction holding that the attorney-client and work product privileges are dissolved in first party bad faith statutory actions. The Taylor reasoning is suspect because it assumes, among other things, that the attorney-client privilege is rendered inapplicable on the same basis that the work product privilege is overcome - upon a showing that "undue hardship" exists to obtain the materials in question. Id. at 909-910. Taylor incorrectly applied the test used to overcome the work product privilege (undue hardship) to abrogate

the attorney-client privilege.

Taylor also misapplied the "undue hardship" test as it relates to work product materials which constitute attorneys' mental processes or reveal communications. The United States Supreme Court in Upjohn, supra, held that work product materials constituting attorneys' mental processes

> [c]annot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.... [W]e think a far stronger showing of necessity and unavailability by other means ... would be necessary to compel disclosure.

101 S. Ct. at 688-689. With regard to work product materials which revealed communications, the United States Supreme Court concluded that they are "protected by the attorney-client privilege." Id. at 688.

The very nature of attorney-client communications always renders them susceptible to an "undue hardship" analysis, due to the fact that the discussions between attorney and client can be obtained through no other means. In Aetna Casualty & Surety Co. v. Superior Court, 153 Cal. App. 3d 467, 200 Cal. Rptr. 471 (1st Dist. 1984), a case similar to the one presently before this court, the California Court of Appeal rejected an attempt to obtain by subpoena materials alleged to be protected by both the attorney-client and work product privileges in order to prove the insurer's state of mind in denying a claim by stating that:

> Pietrzak finally contends that by filing his bad faith action he has put Aetna's state of mind at issue and, because of this, the attorney-client privilege is not applicable. This argument is palpably untenable. If we were to adopt such a rule the attorney-client privilege would have no application in a myriad of actions where state of mind is an issue or could easily be made one.
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> ***
>
> In the present case, Aetna did not put the state of mind of its former attorney (Thornton) in issue by bringing the declaratory relief action. Rather, it was Pietrzak (the party seeking discovery) who put Aetna's state of mind at issue by filing a counter claim for bad faith denial of insurance coverage. If Pietrzak could in this manner waive the privilege on behalf of Aetna ... bad faith claims would surely proliferate as a new device for obtaining discovery.

Id., 153 Cal. App. 3d 477, 201 Cal. Rptr. 476-477 (emphasis in original).

Kujawa attempts to further negate the applicability of the work product and attorney-client privileges during the claims review process by artificially separating the "underlying action" on the policy itself from the § 624.155 bad faith claim. In reality, both actions are oftentimes filed in the same complaint, or are closely related in time. They are part and parcel of the same process. An insurer would have no effective legal representation if its attorney-client and work product materials created in the first half of litigation must be revealed during the second half of the same case, especially where the parties were at all times in an adversarial relationship.

II. THE LEGISLATURE IS NOT CONSTITUTIONALLY EMPOWERED TO ABROGATE THE ATTORNEY-CLIENT PRIVILEGE.

Even assuming legislative intent to abolish the aforementioned privileges, the Florida Legislature is not constitutionally empowered to abrogate the attorney-client privilege. Article II, § 3 of the Florida Constitution specifically directs that the government of the State of Florida be divided into three distinct branches: legislative, executive and judicial. Each separate department of government is forbidden from "exercis[ing] any powers appertaining to either of the other branches unless expressly provided herein." Id.

The Florida Constitution vests exclusive jurisdiction over the admission and discipline of attorneys in the Florida Supreme Court. Fla. Const. art. V, § 23. The Florida Bar, an official arm of the Florida Supreme Court, was established to assist in this endeavor. Id.; see also ch. 1, Rules Regulating the Florida Bar ch. 1 (hereinafter "Rules"). The Supreme Court of Florida has the "inherent power and duty to prescribe standards of conduct for lawyers" and where appropriate, to suspend or revoke the license of any lawyer who is deemed unfit to practice law. Id., Rule 3-1.2. As a condition to practice law in the State of Florida, every attorney must be a member of the Florida Bar and comply with the terms and conditions of the rules of professional conduct as established and amended by the Florida Supreme Court. See, e.g., Rules 1-3.1, 1-10.1.

The Supreme Court of Florida has mandated that a member of the Florida Bar not reveal the confidences and secrets of his client except in limited circumstances not pertinent to this litigation (Rule 4-1.6). Accordingly, the attorney-client privilege derives its existence not merely from Fla. Stat. Ann. § 90.502, but the exclusive jurisdiction of the Florida Supreme Court to govern the Florida Bar. This expectation of confidentiality cements the relationship between clients and lawyers and permits the orderly practice of law. Any attempt by the Legislature to directly or indirectly interfere with or prohibit an attorney from exercising his ethical duties to his client under the aforementioned Rules would constitute an impermissible infringement by the Legislature upon the Judicial branch.

In Graham v. Murrell, 462 So. 2d 34 (Fla. 1st Dist. Ct. App. 1984) the First District Court of Appeal of Florida held that the Legislature's attempt to require an attorney to move the court to assess attorney's fees and costs against the attorney's client constituted a law relating to "practice and procedure" and therefore invaded the province of the judiciary. Statutes pertaining to "practice and procedure" were defined by the court in Murrell as those which

> encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion.

Id. at 35, quoting Justice Adkins in his concurring opinion in In re Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972). The Murrell court concluded that the Legislature may not place an attorney on the "horns of an ethical dilemma" by forcing the attorney to choose "between a violation of a statute or a violation of a specific Canon [of Ethics] insofar as they clearly conflict." Id. at 36 (emphasis in original). Kujawa in this instant case argues that as a matter of "practice and procedure," the attorney-client (and the work product) privilege is suspended whenever a bad faith action is brought under Fla. Stat. Ann. § 624.155. This the Legislature may not do because it is not the Legislature's prerogative to regulate the conduct between an attorney and his client in a manner contrary to that required by the Florida Supreme Court.

III. NO FIDUCIARY RELATIONSHIP EXISTS BETWEEN AN INSURED AND HIS INSURER IN FIRST PARTY CASES WHEN A CLAIM IS FILED UNDER A POLICY WITHIN THAT POLICY'S CONTESTABLE PERIOD.

Petitioner Kujawa acknowledges that the Manhattan life insurance policy which insured the life of John A. Kujawa was issued effective January 1, 1985 (Kujawa brief at 19) and that John Kujawa died in an airplane accident on August 2, 1985 (Kujawa brief at 3). The claim under the policy was received by Manhattan on October 4, 1985 (Kujawa brief at 3) and unquestionably fell within Florida's contestability statute (§ 627.409). The

significance of § 627.409 has not adequately been addressed by Kujawa to this court 1/

Florida law clearly provides that an insured need not possess bad faith or fraudulent motives for an insurer to rescind a policy for the insured's material misrepresentations and concealments in the application, when the claim is submitted within the policy's contestable period. See Life Ins. Co. of Virginia v. Shifflet, 201 So. 2d 715 (Fla. 1967). An innocent misrepresentation material to the acceptance of the risk by the insurer constitutes sufficient grounds to rescind a policy. Id.; see also Continental Assur. Co. v. Carroll, 485 So. 2d 406 (Fla. 1986). Accordingly, John Kujawa's policy was subject to rescission if he committed misrepresentations in the application for the policy which were material to the acceptance of the risk, regardless of whether the misrepresentations were related to the claim submitted under the policy. Id.; see also Shafer v. John Hancock Mutual Life Ins. Co., 189 A.2d 234 (Pa. 1963).

Petitioner Kujawa's argument misses or ignores these controlling legal principles. By not addressing the ramifications of § 627.409, Kujawa apparently concludes that because John Kujawa's death was accidental, any material misrepresentation he

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1/ For purposes of brevity, Amici adopt Manhattan's argument that no fiduciary relationship exists between an insured and her insurer in first party claims, and concentrate on the effect of § 627.409 in this litigation.

may have made in the application could not have formed the basis for policy rescission. Kujawa's reasoning in ignoring § 627.409 appears to be that a fiduciary relationship existed between the parties because the contestability statute was inapplicable and the parties could not have occupied an adversarial position.

This approach plays very loosely with the facts in this case and, as mentioned above, Florida law. Within three weeks after Kujawa's claim was filed with Manhattan, Kujawa had threatened suit against Manhattan (Kujawa brief at 4), and the insurer had informed Kujawa of its right under the policy's contestability clause to conduct an investigation of the claim. Both Kujawa and Manhattan were aware that litigation could result from this claim.

Kujawa's reasoning not only misconstrues the purpose and intent behind § 627.409 but would lead to the anomalous result of permitting insurers to investigate only those claims which occurred within a policy's contestable period that did not involve accidental death. Such an approach by an insurer involving its claim handling activities would be violative of not only New York Insurance Law § 4224 (a point emphasized by Manhattan to Kujawa early in this case), but Fla. Stat. Ann. § 626.9541(1)(g).

Both of these statutes mandate that insurers not engage in any unfair discrimination between individuals of the same actuarial class in the payment of benefits under any life insurance policy, or in any other manner whatsoever. Id. Subsection 626.9541(1)(g) essentially requires that like risks be

treated alike. Manhattan attempted to comply with this statutory requirement by instituting a routine contestability investigation on the Kujawa claim just as it would have done for any other claim submitted within a policy's contestable period. Accordingly, Manhattan had not only the right under the policy to conduct a contestability investigation, but the duty under Florida law to treat all claims filed within the contestable period alike. In this case, equal treatment called for a routine contestability investigation initiated by Manhattan.

Baxter v. Royal Indemnity Co., 285 So. 2d 652 (Fla. 1st Dist. Ct. App. 1973), a case quoted extensively by Petitioner Kujawa (Kujawa brief at 13-14), supports the proposition that an insurer exercising its option under the insurance policy to conduct a contestability review cannot have committed the tort of bad faith. Baxter involved a first party common law claim against an insurer for its alleged bad faith in requiring its insured to undergo arbitration of an uninsured motorist claim, a requirement clearly provided under the terms of the contract. The First District Court of Appeal of Florida affirmed the trial court's dismissal of the lawsuit against the insurer noting that

> the terms of the contract entered into between the parties provide that if they cannot agree with regard to any claim made by the insured under the questioned section of the policy, the dispute will be settled by arbitration. It is difficult to rationalize how either party could be charged with the commission of a tort merely because it elected to exercise a lawful option open to it under the contract.

Id. at 656-657.

The principle that a party exercising an option under an insurance contract cannot have committed the tort of bad faith was accepted by the Fifth District Court of Appeal of Florida in Opperman v. Nationwide Mutual Fire Ins. Co., 515 So. 2d 263 (Fla. 5th Dist. Ct. App. 1987), when the insurer acts in good faith and with proper cause in reliance on said contractual provision. Id. at 266. There is a strong presumption that Manhattan acted in good faith due to Manhattan informing Kujawa very early in the claims process that a contestability investigation would be conducted, an approach that complied with the requirements of New York Ins. Law § 4224 and Fla. Stat. Ann. § 626.9541.

The possible results of such contestability investigation and Kujawa's early stated intention to sue Manhattan clearly established that the parties occupied an adversarial position with respect to each other shortly after John Kujawa's death. Consequently, there could be no fiduciary relationship between Kujawa and Manhattan.

IV. IT IS SOUND PUBLIC POLICY TO MAINTAIN THE INTEGRITY OF THE INSURANCE UNDERWRITING PROCESS BY GIVING CONTINUED VIABILITY TO FLORIDA'S CONTESTABILITY STATUTE. REVERSAL OF THE COURT'S DECISION BELOW WILL THWART THAT POLICY.

As with any form of insurance, a predictable allocation of risk and cost, based upon historical patterns of claim payments, is essential to the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events such as illness, accident, or death. Underwriting of insurance is

described as the "process by which an insurer determines whether or not and on what basis it will accept an application for insurance." See Health Insurance Association of America, A Course in Group Life and Health Insurance pt. A 379 (1985) [hereinafter "HIAA (1985)"]. For example, underwriting for life insurance is properly performed when future mortality 2/ experience has been properly predicted. HIAA (1985) at 366. The foundation upon which insurance underwriting and pricing is based is the principle that pricing should be based on risk. See K. Black, Jr. and H. Skipper, Jr., Life Insurance 404 (11th ed. 1987). Therefore, determining not only the proper pricing but whether to offer coverage depends on the insurer's ability to adequately evaluate risk.

The single most important document relied on by insurers in the underwriting process is the application for insurance. It typically serves two functions, namely (1) to provide the underwriter with relevant medical information about the applicant, including past treatment, diagnosis, and current health status, and (2) to serve as a triggering device to inform an insurer to conduct further inquires into an applicant's health status.

Section 627.409 provides the chief deterrent (i.e., policy rescission) to insurance applicants who are tempted to supply

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2/ "Mortality" is defined as "the death rate at each age as determined from prior experience". See HIAA (1985) at 366.

fraudulent or material misinformation to an insurer during the underwriting process. If applicants for life and property and casualty insurance can lie with impunity on applications, this will seriously impair the use of an applicant's status as represented in the application as a valid and reliable predictor of risk. If this predictor of risk is rendered useless, insurers will be unable to predict either the degree of risk being assumed or claims that will be made under the policy. Claims experience for low-risk and high-risk insureds would become roughly equivalent as increasing numbers of high-risk insureds represent themselves as low-risk insureds for the purpose of obtaining a policy at a lower premium.

Faced with the prospect of large and unpredictable claims -- claims not anticipated in the contractual scheme of the insurer-insured relationship based on the information submitted in the application -- Amici's member insurers may be unable to provide certain types of insurance coverages. Such a result would be detrimental to those members of the insurance buying public who would otherwise qualify for insurance coverages at lower rates and would defeat actuarial predictions based on truthful applications, causing rates to rise and inevitably lead to low-risk individuals subsidizing high-risk insureds. This subsidization would discourage lower-risk individuals from buying life and property and casualty insurance and would drive up the cost of coverage for everyone.

These concerns are not merely theoretical. Insurance fraud costs insurers and the public at least fifteen (15) billion dollars annually and increases some policy premiums by twenty-five (25) percent. A.M. Best Co., Best's Insurance Management Reports (Release No. 46, December 14, 1987). The U.S. Chamber of Commerce estimates that one in ten claims presented to insurers for payment is either partially or completely fraudulent. Id. Meaningful access to and application of contestability statutes such as Fla. Stat. Ann. § 627.409 provides a last line of defense against such fraud.

The aforementioned insurance principles are firmly grounded in common sense and in an understanding of human nature and have received judicial recognition. See, e.g., Mutual Benefit Life Ins. Co. v. JMR Electronics Corp., 848 F.2d 30, 34 (2d Cir. 1988). (misrepresentation by an insured of his smoker status warrants policy rescission, otherwise an applicant "would have everything to gain and nothing to lose" when making such material misrepresentation in his application for insurance).

Contestability investigations are undertaken to determine if any fraud and/or material misrepresentation occurred in the underwriting process, not to deny otherwise legitimate claims. Fla. Stat. Ann. § 627.409 would be rendered useless if the efforts an insurer expended to conduct such inquiry were not subject to the same privileges afforded to every other potential litigant. If an insurer cannot solicit legal advice and maintain confidences

when conducting an investigation, a chilling effect would be felt throughout the insurance industry's claim review process whenever a claim, questionable or not, is filed during a policy's contestable period.

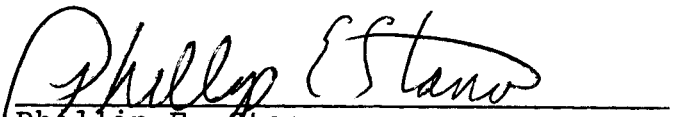
It is a fact of life that many claims filed with insurers warrant a second look for numerous reasons. A decision adverse to Manhattan in this case would render useless Florida's contestability statute and encourage fraud and deception. No public good can come from a decision that provides an incentive to deceive. A ruling by this court in favor of Kujawa would constitute such a decision.

CONCLUSION

For the reasons cited above, and based on the arguments made in Manhattan's brief filed with this court, Amici respectfully request that the decision of the Fourth District Court of Appeals be affirmed.

Dated: Washington, D.C.
November 18, 1988

Respectfully submitted,



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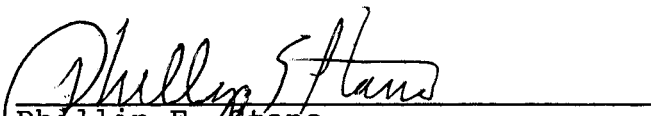
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all Counsel of Record, postage prepaid and properly addressed this 18th day of November, 1988.



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