IN THE
SUPREME COURT OF FLORIDA

CASE NO. 72,388

PENELOPE R. KUJAWA, as beneficiary of
JOHN A. KUJAWA, deceased,
Petitioner,

v.

MANHATTAN NATIONAL LIFE INSURANCE COMPANY,
a foreign corporation,
Respondent.

ANSWER BRIEF

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

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STATEMENT OF THE CASE AND FACTS

Manhattan objects to Kujawa's statement of the facts as containing matters outside the record on this appeal. By separate motion, filed concurrently herewith, Manhattan has moved to strike those portions of Kujawa's Appendix C which are not part of the record in the trial court and the improper references in Kujawa's brief, as irrelevant to any issue on this appeal, immaterial, impertinent and scandalous.

STATEMENT OF THE CASE

This is an action for alleged breach of the statutory duty of good faith and fair dealing in connection with payment of the proceeds of a life insurance policy. The litigation was commenced on November 18, 1985, 45 days after the claim was submitted, by the filing of a complaint in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida. On March 24, 1986, the complaint was amended to add a count for violation of § 624.155 and § 626.9541(9), Fla.Stat. (1987), based on an alleged delay in payment of the policy proceeds. Only this later count is still pending, the policy proceeds and interest having been tendered prior to the amendment, and later accepted.

After release of her claim for the proceeds, Kujawa served a request for production on Manhattan on January 19, 1987, seeking production of all its files "pertaining to the handling of this claim." Manhattan identified its legal

department file, inter alia, in its response, but objected to its production on grounds of work product immunity and attorney-client privilege.

At a hearing on May 6, 1987, the circuit court overruled Manhattan's objections, on the apparent basis of Kujawa's argument that the privileges are inapplicable in a bad faith claim, and ordered production of the legal department file. The circuit court denied Manhattan's request for an in camera inspection of the documents prior to ordering production.

Manhattan petitioned the Florida District Court of Appeal, Fourth District, for certiorari. On April 13, 1988, the district court granted certiorari and quashed the circuit court's order on the grounds that, in the absence of a fiduciary relationship between the parties, the privileges are applicable in a cause of action under section 624.155 to the same extent as in any other type of litigation.

Kujawa petitioned this Court for discretionary review on the basis of a conflict between the decision of the fourth district and the opinion of the third district in Fidelity & Casualty Ins. Co. of N.Y. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987). This Court accepted jurisdiction on September 6, 1988.

STATEMENT OF THE FACTS

Manhattan issued a life insurance policy in the face amount of $50,000 to John A. Kujawa on January 1, 1985. The insured died in a plane crash on August 2, 1985, within the two-year contestability period provided by the policy and

mandated by section 627.409(1), Fla. Stat. (1987). Manhattan received the first notice of a claim on the policy on October 4, 1985, and advised Kujawa that a routine contestability investigation was necessary before payment could be made.

Three weeks later, Kujawa made the first allegation of bad faith, by a letter dated October 25, 1985, from the insured's employer to the Insurance Commissioner. This was followed on November 13, 1985, by a bad-faith letter to the Insurance Commissioner from counsel for Kujawa. On November 18, 1985, this litigation commenced by the filing of a complaint in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, seeking payment of the policy proceeds.

Manhattan had requested a medical authorization and statement from Kujawa in November 1985, as necessary in order to complete the contestability investigation. The medical authorization was executed by Kujawa on December 17, 1985, but she did not give the requested statement until January 16, 1986, four days after the 60-day time period prescribed by section 624.155(2) had elapsed. The policy proceeds, with interest, were tendered on January 17, 1986.

Kujawa refused to accept the tender of the policy proceeds, and on March 24, 1986, amended her complaint to add an additional count alleging that Manhattan acted in bad faith by not paying the proceeds until a contestability investigation had been completed. The amended complaint seeks compensatory damages, punitive damages, attorney's fees, interest, costs,

and other unspecified relief pursuant to sections 624.155 and 626.9541(9), Florida Statutes. On May 29, 1986, Kujawa at last accepted Manhattan's tender of payment and released her claim for interest and proceeds, thus rendering moot all but her claims under sections 624.155 and 626.9541(9).

On or about January 19, 1987, Kuwaja served a request to produce on Manhattan seeking production of "all separate files created after a claim was made in this cause pertaining to the handling of this claim whether or not the defendant has titled said files as a 'claim file'." At that point Manhattan had already produced to Kujawa on November 4, 1986, copies of its underwriting and claims department files with respect to the policy at issue.

On February 23, 1987, Manhattan responded to Kujawa's request and stated that the only other files maintained by Manhattan as to the policy at issue were its legal department files and a file containing correspondence and documents relating to the Florida Department of Insurance. No objection was made to production of the Insurance Department file. Manhattan objected, however, to production of its legal department files on the basis of attorney-client privilege and work product immunity.

Kujawa did not move to compel production of Manhattan's legal department files, but instead responded by noticing a hearing on Manhattan's objections. Neither in connection with the hearing nor at any other time did Kujawa

file with the circuit court any of the material produced by Manhattan in response to previous requests for production.

At the hearing on Manhattan's objections on May 6, 1987, counsel for Kujawa argued merely that all files of an insurer, including legal department files, are discoverable in any action alleging bad faith. To the best of counsel's recollection, there was no discussion at the hearing as to whether "the claim was largely handled by MANHATTAN's in-house attorneys and counsel", as Kujawa now contends (Kujawa Brief, p. 2). Rather, Kujawa's argument at the hearing was based entirely on two unpublished opinions dealing with bad faith claims in the automobile insurance context.

Although counsel for Manhattan argued that the cases relied upon by plaintiff were factually distinguishable and that no compelling necessity or other grounds to overcome the privilege had been shown for production of the legal department files, the circuit court overruled Manhattan's objections and ordered production of the files. Counsel for Manhattan requested that the circuit court review the documents in camera before ordering production, but this request was also denied.

At the conclusion of the hearing on May 6, 1987, the circuit court entered its order overruling Manhattan's objections and ordering production of the documents within 30 days from the date thereof. Manhattan timely filed its petition for certiorari to the Florida Fourth District Court of Appeal on June 4, 1987, seeking certiorari to quash the circuit court's order.

By its opinion filed April 13, 1988, the Florida Fourth District Court of Appeal granted certiorari and quashed the circuit court's order, holding that:

> an insurer which is not in a fiduciary relationship to its insured and against which a cause of action is brought under section 624.155 is entitled to protection against production of its legal department file (and its claim file by whatever name) on the basis of both work product immunity and attorney/client privilege to the same extent as any other litigant.

Manhattan Life Ins. Co. v. Kujawa, 522 So.2d 1078, 1080 (Fla. 4th DCA 1988).

In its opinion the Florida Fourth District Court of Appeal noted an apparent conflict with the decision of the Florida Third District Court of Appeal in Fidelity & Casualty Ins. Co. of N.Y. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987), which had held that an insurer's entire claim file is subject to a request to produce in an uninsured motorist case, based merely on the similarity of the remedy sought rather than on the relationship between the insurer and its insured.

On April 28, 1988, Kujawa filed her petition in this court for discretionary review pursuant to Art. V, § 3(b)(3), Fla. Const., and Fla.R.App.P. 9.030(a)(2)(A)(iv), to review the opinion of the Florida Fourth District Court of Appeal based on conflict with the decision of the Florida Third District Court of Appeal in Taylor. This Court accepted jurisdiction on September 6, 1988.

SUMMARY OF ARGUMENT

First-party and third-party claims are intrinsically different, due to the very different nature of the contractual relationship between the parties in each case. The Florida Legislature, by enacting section 624.155, Fla.Stat. (1987), did not intend, either expressly or implicitly, to change the nature of the contractual relationship between insurers and their insureds and did not abolish the attorney-client privilege or work product immunity in first-party bad faith claims.

Section 624.155 imposes a duty of good faith on all insurers in discharging their contractual obligations. It does not change the nature of the contract or of the contractual relationship, where nothing in the legislative history or the plain language of the statute itself expressly or implicitly indicates any legislative intent to effect such a drastic change. To infer such an intent would be contrary to accepted principles of statutory construction and would render the statute constitutionally infirm.

The relationship between the insurer and its insured in a first-party case is adversarial by definition. Manhattan had a right and privilege to conduct a statutorily sanctioned contestability investigation, and a duty to do so in order not to discriminate unfairly between insureds who die of accidental and natural causes.

The relationship of the parties in a third-party case is, by contrast, intrinsically fiduciary in nature. The

insurer retains its insured's counsel, controls the defense, and negotiates for the settlement or other disposition of the third-party's claim against the insured. Since the attorney retained by the insurer is the same one who represents the insured, the courts have quite reasonably held that neither the insurer nor its counsel can assert the attorney-client or work product doctrines to prevent discovery of documents that, after all, should already belong to the insured. It is not the assertion of a bad faith claim, but the fiduciary relationship, that is the basis for discovery in third-party cases.

In the absence of a fiduciary relationship, the first-party bad faith claimant should not be allowed to eviscerate the work product immunity and attorney-client privilege. Only upon a showing that one of the recognized exceptions to the immunity or privilege applies may a first-party bad faith claimant obtain discovery of the insurer's legal department files. If a mere allegation of bad faith were sufficient to obtain the insurer's investigative files, all insurance claims would contain such allegations.

The opinion of the Florida District Court of Appeal, Third District, in Fidelity and Casualty Co. of New York v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987), is incorrect in assuming, without more, that the duty of good faith imposed by section 624.155, Fla.Stat. (1987), in first-party cases is identical to the fiduciary duty (imposed by contract) in third-party cases. From this premise, Taylor seeks to lay open

the files of defense counsel for its adversary's inspection, once the primary claim is resolved, if a "need" for such files is shown. This reasoning, however, scrambles beyond separation the showing required to overcome the work product immunity with the much stronger showing needed to overcome a claim of attorney-client privilege.

Petitioner's argument is simply that Taylor should be the law, but a "bad faith" right of action does not carry in its pocket automatic entitlement to the adversary's files. The usual avenues of proof are available to the insured to prove breach of duty, or to seek relief from privileges asserted by the other side.

The Fourth District correctly focused on the nature of the relationship between the parties as the key to determining whether the discovery sought should be allowed. In the absence of a fiduciary relationship, attorney-client privilege and work product immunity are fully applicable in a first-party bad faith action. The statute requires no more, and the opinion below should be affirmed.

ARGUMENT

I. THE FLORIDA LEGISLATURE, IN CREATING A FIRST-PARTY CAUSE OF ACTION FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING, DID NOT INTEND TO CHANGE THE ADVERSARIAL RELATIONSHIP BETWEEN THE INSURER AND THE INSURED IN FIRST-PARTY INSURANCE CASES.

A. In The Absence Of a Fiduciary Relationship Between The Parties, The Insured Is Not Entitled To Discovery Of Privileged Materials, Either Work Product or Attorney-Client, Upon The Mere Allegation Of a Cause Of Action Under § 624.155.

The duty of good faith and fair dealing imposed by § 624.155(1) applies to the discharge of the insurer's contractual responsibilities in both first-party and third-party insurance cases, and does not alter the nature of the contractual relationship itself. Thus, the important distinction drawn by the Florida Fourth District Court of Appeal between first-party and third-party cases as to discovery rights of the insured is correct and should be affirmed.

The Florida Fourth District Court of Appeal in its decision below correctly based its discovery ruling on the nature of the contractual relationship between the parties. In the third-party context, claims files of the insurer, including legal department files, are discoverable because of the fiduciary nature of the relationship between the insurer and the insured in such a case. In a first-party "bad faith" case,

there is no fiduciary duty on the insurer, and the doctrines of work product immunity and attorney-client privilege are fully applicable.

This case involves a first-party insurance claim. First-party insurance includes life, health and disability, and property insurance. Third-party insurance is liability insurance, most commonly automobile insurance. The nature and purpose of the insurance contracted for, and the expectations of the parties with reference to such insurance, are intrinsically different in first-party and third-party cases.

Third-party insurance is intended to protect the insured against claims by third parties. The contractual relationship is fiduciary in nature, because under the terms of the policy the insurer has the exclusive right to investigate, defend, settle, or otherwise dispose of the claim against its insured, while the insured is required to rely exclusively upon the insurer and cooperate with the insurer's defense of the claim, at the peril of losing the benefits of the policy. By the nature of this relationship, the attorney for the insurer is also the attorney for the insured in a third-party case, and the attorney's work is produced on behalf of the insured as well as the insurer. Thus, the insurer cannot raise either work product immunity or attorney-client privilege as a bar to discovery by its insured in a subsequent action for the insurer's "bad faith" handling of a third-party claim. See, Stone v. Travelers Ins. Co., 326 So.2d 241 (Fla. 3d DCA 1976);

Koken v. American Service Mut. Ins. Co., Inc., 330 So.2d 805 (Fla. 3d DCA 1976).

Florida courts have long recognized the right of a third party insured to bring a bad faith claim against his insurer "for failing in good faith to settle a third party's claim, thus exposing him to liability in excess of his insurance coverage." Opperman v. Nationwide Mut. Fire Ins. Co., 515 So.2d 263, 265 (Fla. 5th DCA 1987). By enacting § 624.155(1)(b), the Florida legislature has provided a remedy to first-party insureds whose claims have not been settled in good faith by their insurers. The extension of a right of action, however, does not alter the relationship between the parties in a first-party case, nor does it change or extend the insured's right of discovery in connection with a first-party bad faith claim.

The statute in question states in pertinent part:

> (1) Any person may bring a civil action against an insurer when such person is damaged:...
>
> (b) By the commission of any of the following acts by the insurer:
>
> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests;...

Section 624.155(1)(b)(1), Fla. Stat. (1987). This statute was the first in the United States to legislatively create a

private cause of action under the Unfair Insurance Trade Practice Act, thereby adopting what is generally known as a "Royal Globe" cause of action, after the California Supreme Court's 1979 decision in Royal Globe Insurance Company v. Superior Court, 592 P.2d 329 (Cal. 1979). Ironically, Royal Globe has since been overruled by the California Supreme Court in Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal.3d 287, 758 P.2d 58 (1988).

At the most, this statute provides that the parties to a first-party insurance contract owe each other a duty to "deal in good faith" in discharging their contractual obligations. Staff Report, as cited in United Guar. Residential Ins. Co. of Iowa v. Alliance Mortgage Co., 644 F.Supp. 339, 342 n.4 (M.D.Fla. 1986). This is not a fiduciary duty.

Kujawa ingenuously claims that it is "obvious" that the Florida Legislature intended that the "duty of fair dealing" under § 624.155 be "construed as identical to the fiduciary duty that exists in third-party 'bad faith' actions." (Kujawa Brief at 24). This is clearly wrong. Not only does it misread the legislative history of the statute, but it also flies in the face of Florida case law that holds that in a first-party situation there is no fiduciary duty between the insurer and insured.

Far from being fiduciary in nature, the insurer and insured in the first-party context stand in a debtor-creditor relationship which is essentially adversarial in nature.

Allstate Ins. Co. v. Douville, 510 So.2d 1200, 1201 (Fla. 2d DCA 1987); Iowa Nat'l Mut. Ins. Co. v. Worthy, 447 So.2d 998, 1002 (Fla. 5th DCA 1984) (no fiduciary relationship between insured and personal injury protection insurer); Smith v. Standard Guardian Ins. Co., 435 So.2d 848, 849 (Fla. 2d DCA 1983)(first-party collision loss claim, held: no fiduciary duty), review denied, 441 So.2d 633 (Fla. 1983). Correspondingly, this failure to find a fiduciary duty in the first-party claim has been endorsed almost unanimously by courts of other jurisdictions. See, e.g., Quick v. State Farm Mut. Auto Ins. Co., 429 So.2d 1033, 1034-35 (Ala. 1983); Johnson v. Federal Kemper Ins. Co., 74 Md. App. 243, 536 A.2d 1211, 1213 (1988); Duncan v. Andrew County Mut. Ins. Co., 665 S.W.2d 13, 18-19 (Mo. Ct. App. 1983); Ellmex Constr. Co. v. Republic Ins. Co., 202 N.J. Super. 195, 494 A.2d 339, 345, 348 (N.J. Super. Ct. App. Div. 1985), certification denied, 103 N.J. 453, 511 A.2d 639 (1986); Beck v. Farmers Ins. Exch., 701 P.2d 795, 798-800 (Utah 1985); See also, Kanne v. Connecticut General Life Ins. Co., 607 F.Supp. 899, 908 (C.D. Cal. 1985)("While Connecticut General is obliged to act in good faith and deal fairly, this

is not a fiduciary duty.").[1/] Furthermore, recognizing this distinction, Florida courts have traditionally relied on the nature of the relationship between the parties in ruling on discovery requests in third-party cases. United States Fire Ins. Co. v. Clearwater Oaks Bank, 421 So.2d 783 (Fla. 2d DCA 1982); Travelers Ins. Co. v. Habelow, 405 So.2d 1361 (Fla. 5th DCA 1981); Agri-Business, Inc. v. Bridges, 397 So.2d 394 (Fla. 1st DCA 1981); Koken, 330 So.2d 805; Baxter v. Royal Indem. Co., 285 So.2d 652 (Fla. 1st DCA 1973).

Since no fiduciary duty in a first-party situation has been implied by law, to the extent that Kujawa claims it exists, this duty must have been created by the Florida legislature when it enacted § 624.155. Unfortunately for Kujawa, however,

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[1/] In Kanne, a first-party case, the parents of a sick child sued several insurance carriers participating in a group medical insurance policy for failing to cover airline expenses incurred in transporting their child to receive medical treatment. Addressing the plaintiffs' "breach of fiduciary duty" claim, the Kanne court first recognized that an implied duty of good faith and fair dealing "did not create a fiduciary relationship." Kanne, 607 F.Supp at 908:

> In the insurance contract, the implied covenant of good faith and fair dealing requires no more than "that each party is prevented from interfering with the other's right to benefit from the contract." Miller v. Elite Ins. Co., 100 Cal. App.3d 739, 756, 161 Cal.Rptr. 322, 331, (1980).

Thus, it is not correct to assume, as the petitioner does, that the duty of fair dealing imposed by § 624.155 creates a fiduciary duty between insured and insurer for the purposes of obtaining documents through discovery.

this argument must fail, since such an enactment would be in direct contravention of the substantial body of judicial precedent cited above. The legislature is presumed to be acquainted with judicial decisions on a subject concerning which it subsequently enacts a statute. Ford v. Wainright, 451 So.2d 471, 475 (Fla. 1984), and is deemed to be "fully cognizant of the status of Florida's common law at the time of enactment." Jones v. Continental Ins. Co., 670 F. Supp. 937, 942 (S.D. Fla. 1987). The court in Jones noted the continued distinction between the parties' relationship in first- and third-party cases:

> The relationship between the insurer and insured, whether fiducial or adversarial, would be one factor to be considered by the trier of fact in determining whether the insurance company had breached a duty of good faith.

Id. at 944 (emphasis added). As noted in Opperman, this is because the legal duty of good faith is independent of, and does not change, the parties' contractual obligations. 515 So.2d at 267. Thus, the courts interpreting the statute to date, except for the anomalous decision of the Third District Court of Appeal in Taylor, have continued to draw a distinction between first-party and third-party claims, in accordance with the status of Florida's common law at the time the statute was enacted.

In this case, the plain language of § 624.155, coupled with its legislative history, leads to one conclusion - that

there was no legislative intent, explicit or implicit, to extend a fiduciary duty to any first-party claim. Without this duty, there is no right to the automatic discovery sought by Kujawa in this first-party "bad faith" claim.

B. The "Plain Meaning" Of The Statute Shows No Intent To Abolish The Attorney-Client Privilege Or Work Product Immunity, Either Expressly Or Implicitly, And Such A Construction Would Be Unconstitutional.

Although it now appears accepted that § 624.155(1)(b) extends a cause of action to a first-party insured against its insurer for bad faith refusal to settle, Opperman v. Nationwide Mut. Fire Ins. Co., 515 So.2d 263 (Fla. 5th DCA 1987), a "plain meaning" analysis can in no way support the argument that the statute either explicitly or implicitly abrogates the attorney-client privilege or work product immunity in first-party cases. In fact, the "plain meaning" reasoning utilized by the Opperman court and endorsed by Kujuwa refutes this contention.

Although legislative intent is considered to be controlling as to the construction of a statute, this intent is best determined from the language of the statute itself. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla. 1982). Accordingly, rules of statutory construction need not be considered where the language of a statute is, on its face, clear and unambiguous. Holly v. Auld, 450 So.2d 217 (Fla. 1984).

Not even the most liberal interpretation of § 624.155

could lead to the conclusion, under a "plain meaning" analysis, that either the work product immunity or the attorney-client privilege was intended to be abolished by the legislature as not applicable in a first-party situation. Nor is it correct to link the extension of an insurer's duty under the statute of good faith and fair dealing to an implicit abrogation of the privileges simply because some third-party cases have allowed discovery of claims file materials. This approach confuses the contractual duties of the parties with the statutory duty imposed by § 624.155, and attempts to infer legislative intent from non-legislative sources where the statute itself is clear.

Despite Kujawa's best efforts to confuse the two issues, the duty to act in good faith in the first-party situation merely goes to the substance of the bad faith cause of action, not to discovery. Even in the third-party situation, discovery rights are not automatically triggered upon the simple act of asserting bad faith; rather, it is the contractual relationship of the parties that is the basis for discovery.

In rejecting Kujawa's unsupported insistence that the issues were interrelated, the Fourth District Court of Appeal correctly stated:

> Rather, the issue is whether an insured asserting such a statutory cause of action is somehow entitled, by the nature of the action alone, to have work-product immunity and the statutory attorney-client privilege summarily swept aside. We see nothing in the statute (creating this cause of action) which evidences a legislative intent to abolish either work product immunity or the attorney-client privilege.

Kujawa, 552 So.2d at 1080. Neither Kujawa nor the Taylor opinion of the Third District Court of Appeal has demonstrated any rationale based on either the common law or the legislative history of § 624.155 which would indicate an intent to create a fiduciary relationship between the parties or to abrogate either the attorney-client privilege or the work product immunity. This silence merely reinforces the argument that such a construction was neither intended nor considered by the Florida Legislature in enacting § 624.155. The legislature surely would have addressed such a drastic overhaul of traditional legal principles had it intended to abolish them.

Were this Court to read into the "bad faith" statute the abrogation of the attorney-client privilege or the work product doctrine, it would be violating long-standing rules of statutory construction, and would be consenting to a violation of the separation of powers doctrine as it exists in the Florida Constitution. This constitutional analysis proceeds along the following line of argument: first, accepted rules of statutory construction dictate that all statutes be construed, if possible, as constitutional; second, the state legislature may not constitutionally enact laws that infringe on the exclusive province of the judiciary; third, the attorney-client privilege, as a rule of procedure, falls within the exclusive province of the judiciary and thus may not be constitutionally abrogated by statute. Thus, especially when there is no explicit legislative intent that calls for the abolition of the

attorney-client privilege or the work product doctrine, this Court should not read an unconstitutional abrogation of these privileges into the "bad faith" statute.

The chilling effect of the discovery sought also has other serious constitutional implications, both Florida and federal, which should be considered by this Court in deciding the issue before it. If the relationship between the parties in a first-party case can be retroactively changed from adversarial to fiducial by the filing of a bad faith claim, then both the parties' contract obligations and the insurer's right to freely consult counsel are impaired, in violation of Article I, Sections 10 and 4, Florida Constitution, and Article I, Section 10 and the First Amendment, United States Constitution.

When the construction of a statute is at issue, as in this case, this Court has a duty, if reasonably possible, to resolve all doubts concerning the validity of the statute in favor of its constitutionality and to ascertain the legislative intention and effectuate it. State v. Aiuppa, 298 So.2d 391 (Fla. 1974). See also, Bunnell v. State, 453 So.2d 808 (Fla. 1984) ("Courts should resolve every reasonable doubt in favor of the constitutionality of a legislative act"); Falco v. State, 407 So.2d 203 (Fla. 1981) ("If a statute can be construed to be constitutional it should be"). Accordingly, where § 624.155 is silent as to the abrogation of the attorney-client privilege or the work product doctrine, this

Court should construe it in such a manner that it would be constitutional. Since the abrogation of the attorney-client privilege or work product doctrine by a statute is arguably an unconstitutional intrusion by the legislative branch into areas that are specifically within the rule-making and procedure jurisdiction of the Florida Supreme Court, accepted rules of statutory construction should lead to the conclusion that this Court must interpret § 624.155 as not having authorized the abrogation of the attorney-client privilege or the work-product doctrine.

This Court, in Re: Florida Evidence Code, 372 So.2d 1369 (Fla. 1979), adopted the provisions of the statutorily enacted evidence code as a rule, to the extent that they are procedural. The attorney-client privilege, as found in the Florida Evidence Code, is a matter of procedure rather than of substantive law,[2/] so that the separation of powers provision

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2/ As Professor Moore has noted:

> Without embarking on a detailed analysis of the meaning of "substance" and "procedure" in the context of the Rules of Evidence, it is clear that rules of privilege are subject to rational classification as procedural.

10 J. Moore & H. Bendix, Moore's Federal Practice ¶501.05 (2d ed. 1988).

of the Florida Constitution serves to prohibit the legislature from enacting any law that would essentially eliminate the attorney-client privilege. Article II, Section 3, of the Florida constitution provides:

> The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The Florida legislature has no constitutional authority to enact any law relating to judicial practice and procedure. Graham v. Murrell, 462 So.2d 34 (Fla. 1st DCA 1984). Article V, Section 2 of the Florida Constitution specifically mandates that:

> The Supreme Court shall adopt rules for the practice and procedure in all courts . . .

Although it is possible for the legislature to repeal by general law, enacted by a two-thirds vote, any of the rules for the practice and procedure as adopted by the Supreme Court, there was no explicit repeal of the rules of privilege by the legislature. Nor could the passage of section 624.155 constitute an implicit repeal of rules of practice and procedure adopted by the Supreme Court. Carter v. Sparkman, 97 S.Ct. 740 (1976). All conflicts between statutes and rules of practice and procedure adopted by the Supreme Court should be resolved in favor of the rules of procedure. See § 25.371, Florida Statutes ("When a rule is adopted by the Supreme Court concerning practice and procedure, and such rule conflicts with

a statute, the rule supersedes the statutory provision"); State v. L.H., 392 So.2d 294 (1980), Chappell v. Florida Dep't of HRS, 391 So.2d 358 (1980); Hauser v. Dr. Chatelier's Plant Food Co., Inc., 350 So.2d 548 (1977).

Kujawa may not urge this Court to construe § 624.155 so that the privileges are either explicitly or implicitly abrogated, because the statute must be construed as constitutional, if possible. Thus, this Court should hold that the work product immunity and attorney-client privilege survive its enactment. Furthermore, where the privileges survive the enactment of § 624.155, they should not then be judicially abolished by this Court in the first-party bad faith claim, where there is no fiduciary duty between the insured and insurer or other justification for such a drastic overthrow of long-standing precedent.

II. BOTH THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT IMMUNITY APPLY AND SHOULD CONTINUE TO BE APPLIED IN FIRST-PARTY BAD FAITH CASES.

A. The Taylor Court Erroneously Assumes That The Extension Of a Right Of Action By § 624.155 Eliminates All Distinctions Between First- And Third-Party Cases As To Discovery.

The decision of the Florida Third District Court of Appeal in Fidelity and Casualty Ins. Co. of N.Y. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987), is incorrect in failing to

distinguish between first-party and third-party bad faith claims as to discovery, and should be overruled. Kujawa is incorrect in basing her discovery request for legal files, or claim files, in this first-party action on the Florida Third District Court of Appeal's presumed analogy to third-party claims. See Taylor, 252 So.2d at 909 ("A case like this one is totally in distinguishable from the familiar 'bad faith' failure to settle or defend a third party's action against a liability carrier's insureds."). The duties that exist in a first-party insurance relationship are fundamentally different from those in the third-party situation, and should be treated as such, even in the context of a "bad faith" claim. The Taylor court confuses the statutory duty of good faith with the contractual fiduciary duty in third-party cases. The statutory duty applies to the insurer's discharge of its contractual obligations, but does not change those responsibilities. Gruenberg v. Aetna Ins. Co, 510 P.2d 1032, 1037 (Cal. 1973).

The statement by the Florida Third District Court of Appeal that the attorney-client privilege is not applicable in a first-party action is based on flawed logic also evident in Kujawa's brief herein. Both rely on United Servs. Auto Ass'n v. Werley, 526 P.2d 28 (Alaska 1974); Werley, however, clearly recognizes the attorney-client privilege in a first-party action, but allows discovery of attorney-client communications based on the traditional "fraud" exception to the privilege. Accordingly, the Werley court held that the insurer's refusal,

without proper cause, to compensate the insured for a loss covered by the insurance policy satisfied both prongs of the fraud exception. Not only was there a sufficient "allegation of a continuing or future 'civil fraud', but there was also 'prima facie evidence' in support of this allegation." Werley, 526 P.2d at 33. "Prima facie evidence," in turn, could be presented as to whether the defense proffered by the insurer and its counsel was a "bad faith legal defense."3/

Furthermore, both the Third District Court of Appeal and Kujawa fail to distinguish between work product immunity and attorney-client privilege. Instead, they group together all files within the possession of an insurer and baldly assert that all are automatically subject to discovery merely on a presumption of need. This completely ignores both the nature and the importance of the attorney-client privilege.

3/ The Werley court stated the plaintiff's burden as follows:

> If one of the defenses to Werley's claim against USAA is not shown by prima facie evidence to have been a bad faith legal defense, then USAA's refusal to pay Werley's claim would not have been in bad faith, and USAA should prevail in its attempt to vacate the superior court's production order on the ground of attorney-client privilege.

526 P.2d at 33. After finding that this burden was met under its facts, the Werley court then went on to note that its finding that the legal defense was made in bad faith did not express any opinion as to the underlying bad faith claim. Id. at 35, n.26 ("Our conclusion is directed solely to the issue of whether Werley has satisfied the discovery prerequisite of demonstrating prima facie evidence of fraudulent activity in order to come within an exception to the attorney-client privilege").

The petitioner's extensive reliance on Brown v. Superior Court, 137 Ariz. 327, 670 P.2d 725 (1983), for example, illustrates this mistaken reliance on cases ordering the discovery of claims files as a basis for discovery of legal department files. In Brown, the insured sought discovery of the insured's entire claims file and the insurer responded that the file was not subject to discovery by virtue of the qualified work product immunity. The insured was not seeking the discovery of legal department or insurance counsel files in Brown, and the insurer never raised attorney-client privilege. See Brown, 670 P.2d at 735, n.7 ("Continental does not raise the issue of attorney-client privilege, and we do not address that question. Further, we have no way of determining whether any material in the file is within the privilege."). In this case, Manhattan objected to production of its legal department files on the basis both of work product immunity and attorney-client privilege, thus presenting an entirely different set of facts from those presented by Brown.

Kujawa's claim that Manhattan's production of its claims files necessitates the production of its legal department file is equally misleading. Petitioner relies on a third-party case, Boston Old Colony Ins. Co. v. Gutierrez, 325 So.2d 416 (Fla. 3d DCA), cert. denied, 336 So.2d 599 (Fla. 1976), which merely stands for the proposition that attorney's files that are discoverable by an insured in a third-party action may also be discovered by a third-party beneficiary/

plaintiff standing in the shoes of the insured. Not even the most expansive reading of Boston leads to the petitioner's unwarranted conclusion that Manhattan's voluntary production of its claims files requires the production of material protected by the attorney-client privilege in a first-party action.

Kujawa's argument does not explain or justify the Taylor decision, but merely urges this Court blindly to follow it. This would only lead to confusion compounded. The Taylor opinion should be overruled.4/

B. Discovery Should Not Be Ordered Where Kujawa Failed To Either Plead Or Satisfy One Of The Clearly Established Exceptions To These Privileges.

The Fourth District Court of Appeal correctly analyzed the issues raised by discovery requests in "bad faith" litigation and exposed the misunderstanding of the issues that pervades the Third District's analysis. Both the attorney-client privilege and the work product immunity apply when these objections are raised by the insurer in good faith. These

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4/ In the event that this Court does not overrule the Taylor decision on the basis of its flawed reasoning, it should at least limit Taylor to the context of an uninsured motorist policy. Uninsured motorist policies are arguably only quasi-first-party insurance. They are not available except in conjunction with third-party liability insurance, and may contain consent-to-settle clauses that give the insurer control of the insured's claim, thus imposing what may be a quasi-fiduciary duty to this limited extent. See Evans v. Florida Farm Bureau Casualty Ins. Co., 384 So.2d 959, 961 (Fla. 1st DCA 1980) (duty from insurer to insured implied where uninsured motorist coverage contained written consent clause).

claimed privileges and immunities may only be overridden by a sufficient showing of one of the traditionally recognized exceptions, such as fraud or waiver in the case of attorney-client privilege or "substantial need" and inability to otherwise obtain the information in the case of work product immunity.

The first-party insured in asserting a bad faith claim has no greater discovery rights than any other litigant, where there is no fiduciary duty. This type of action is no different from any other civil action, including those alleging fraud or other intentional torts. In any of these cases a plaintiff could assert the necessity of access to his opponent's counsel's files to obtain proof for his case. That assertion is, however insufficient to overcome either work product immunity or the attorney-client privilege. If a mere allegation of bad faith were sufficient, all insurance claims would contain such allegations. Maryland American Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 458 (Tex. 1982). Kujawa has ample and adequate alternatives to obtain proof of bad faith, including depositions of insurance company personnel, review of Insurance Department records and other means.

The normal exceptions to work product immunity and attorney client privilege apply in first-party cases, and would allow discovery even of privileged matters upon a sufficient showing by the insured and after in camera inspection of the requested documents by the trial court.

Under § 90.502(2), Fla.Stat. (1987), Florida's codification of the attorney-client privilege:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

This section also specifically delineates when the attorney-client privilege does not apply. Accordingly:

> (4) There is no lawyer-client privilege under this section when:
>
> (a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud....
>
> (c) A communication is relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer, arising from the lawyer-client relationship....
>
> (e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by any of them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.

These exceptions to the attorney-client privilege are supplemented by the client's ability to waive this privilege. See § 90.507, Fla. Stat. (1987).

The work product immunity is derived from § 1.280(b)(2), which allows discovery of:

> documents and tangible things otherwise discoverable...and preprared in anticipation of litigation or for trial...only upon a showing that the party seeking discovery has need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Quite simply, it is the existence of the fiduciary relationship in the third-party situation, not the "bad faith" cause of action itself, which results in discovery of documents despite the insurer's or counsel's assertion of the attorney-client privilege or work product immunity. The nature of the third-party claim allows the work product doctrine to be overcome by the traditional exception that allows discovery from any attorney who had counseled the defendant/fiduciary regarding the underlying action. Hodges v. Southern Farm Bureau Casualty Ins. Co., 433 So.2d 125, 132 (La. 1983) ("We see no reason to forbid Hodges, the client, from discovering the work product of his own attorney with whom he placed his confidence and trust during the pendency of the Nichols claim.").

As to the attorney-client privilege, because counsel for the insurer is also effectively counsel for the insured in the third-party case, the insured essentially waives the application of the privilege through the subsequent request for counsel's documents, preventing counsel from asserting it. Shapiro v. Allstate Ins. Co., 44 F.R.D. 429, 431 (E.D.Pa.

1968)("... with respect to all matters from the beginning of the litigation until the termination of the attorney-client relationship between the assured and the attorney, there can be no attorney-client privilege which would prevent disclosure to the policy holder."). Similarly, the attorney-client privilege in the third-party "bad faith" action may be overcome by the "common interest" exception to the privilege. Layton v. Liberty Mut. Fire Ins. Co., 98 F.R.D. 457 (E.D.Pa. 1983)("As the communications of a 'lawyer represent[ing] two clients in a matter of common interest,' they are not protected by the attorney-client privilege.", citing Truck Ins. Exchange v. St. Paul Fire and Marine Ins. Co., 66 F.R.D. 129, 139 (E.D.Pa. 1975)).

Kujawa would like this Court to adopt the overbroad position, based on Taylor, that the work product burden is automatically satisfied in a first-party bad faith case, solely because of an implicit presumption that the insurer's files will have information, necessary to the claimant's case and otherwise unobtainable, regarding the processing of the claim. Should a court someday adopt the very reasonable position that the duty of good faith runs both ways, it is hard to imagine that Kujawa or other claimants would be as enthusiastic about having no work product immunity or attorney-client privilege as they are about their opposition having none.

The insured in this case is, however, no different than any other litigant. The insured must show that it could

not acquire the requested documents or their substantial equivalents through other means and that it could not proceed in the absence of these documents without undue hardship. This burden is not automatically satisfied by the mere filing of a bad-faith claim. Where this test has not been satisfied, many courts have withheld discovery of claims files protected by the work product doctrine in first-party cases. See, Joyner v. Continental Ins. Co., 101 F.R.D. 414, 417 (S.D. Ga. 1983); Carver v. Allstate Ins. Co., 94 F.R.D. 131, 135-36 (S.D. Ga. 1982); Bozeman v. State Farm Fire and Cas. Co., 420 So.2d 89, 90-91 (Ala. 1982); United States Fire Ins. Co. v. Clearwater Oaks Bank, 421 So.2d 783, 784 (Fla. 2d DCA 1982); Moskowitz v. Travelers Indem. Co., 91 A.2d 976, 457 N.Y.S.2d 563, 564 (1983).

Rather than mechanically tossing aside this important component of our adversarial system, the proper response to discovery objections, entirely consistent with Manhattan's actions before the trial court, would be for the party seeking discovery to request an in camera inspection of the documents to assist the trial court in weighing the conflicting needs of the parties. In fact, a number of courts, including some of those loosely cited by the petitioners for broader propositions, provided such inspection. See, Joyner, 101 F.R.D. at 417, Brown v Superior Court, 670 P.2d at 730 (1983); Utica Mut. Ins. Co. v. Croft, 432 So.2d 196, 197 (Fla. 1st DCA 1983); Group Hosp. Serv., Inc. v. Dellana, 701 S.W.2d 75, 76, 77 (Tex. Ct.App. 1985).

It is of course still more difficult for a litigant to overcome the attorney-client privilege than the work product immunity, because of the sanctity of the privilege in our common-law heritage. Incredibly, Kujawa and the Taylor court avoid this issue by blandly dismissing the attorney-client privilege as inapplicable.

Without a prima facie showing by the discovering party that the attorney and insurer were engaged in fraudulent activity, the attorney-client privilege remains inviolable. Where Kujawa has not alleged fraud, and the facts of this case do not support a claim of fraud, no legal file materials within the scope of the attorney-client privilege are subject to discovery. There was never any denial of Kujawa's claim for the policy proceeds. Kujawa's claim under § 624.155 rests on Manhattan's alleged refusal to promptly pay benefits under its policy. Manhattan's legal defense is that its contestability investigation was authorized by the policy and by statute, thus excluding it from the reach of the Werley "civil fraud"

exception.[5/] See also Baxter v. Royal Indem. Co., 285 So.2d 652, 656-657 ("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.").

III. DUE TO THE NECESSARILY ADVERSARIAL NATURE OF A CONTESTABILITY INVESTIGATION, GRANTING THE DISCOVERY SOUGHT WOULD HAVE A SERIOUS CHILLING EFFECT ON MANHATTAN'S EXERCISE OF ITS LEGAL RIGHTS AND DUTIES.

The necessity and continued viability of the distinction between first-party and third-party insurance claims after the enactment of § 624.155 is especially well-illustrated by the contestability aspects of the present case. The insured, John A. Kujawa, died while the policy was still within the contestability period. The Florida legislature has required that every policy of life insurance issued for delivery in the State of Florida include the following provision:

5/ To demonstrate the applicability of the exception to attorney-client privilege would require a factual showing by Kujawa "adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the .... fraud exception .... has occurred." Escalante v. Sentry Ins., 49 Wash. App. 375, 743 P.2d 832, 842-43, citing Caldwell v. District Court in and for City and Cty. of Denver, 644 P.2d 26, 33 (Colo. 1982). Work product issues require a more substantial showing of necessity and hardship than in the typical case, because of the "unique nature" of the bad faith claim. Escalante, 743 P.2d at 844, citing Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

> [T]he policy shall be incontestable after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue, except for nonpayment of premiums....

Section 627.455, Fla.Stat. (1987). In compliance with the statute, the policy in question provided a two-year contestability period.

The purpose of a contestability provision is to prevent fraud and equitably adjust the risk between the insurer and the insured as to any material misrepresentations on the application. By statute the insurer is entitled to rely on the representations made by the insured in the application, and is under no duty to investigate before issuing the policy. Section 627.409, Fla.Stat. (1987). Any misrepresentations, omissions, concealment of facts or incorrect statements on the application may render the policy void ab initio if discovered within the contestability period. This is so, even if the misrepresentation was wholly innocent, if the effect is that the insurer would not have issued the policy at all or at the same rate or would not have provided the same coverage had it been given the true facts. Continental Assurance Co. v. Carroll, 485 So.2d 406 (Fla. 1986); Life Ins. Co. of Virginia v. Shifflet, 201 So.2d 715 (Fla. 1967).

Unlike third-party insurance, life insurance cannot be cancelled except for nonpayment of premiums. Thus, after the two-year contestability period, the insurer cannot rescind the

policy even if the insured intentionally misrepresented the facts on the application. During the contestability period, therefore, the insurer has the right and duty to investigate every claim, including the representations made in the insured's application, regardless of the cause of the loss. There can be no distinction made between accidental death and death from any other cause in the investigation of a claim on a life policy during the contestability period. If a material misrepresentation is found, the policy is still void, although the death resulted from an accidental cause wholly unrelated to the misrepresentation. Dedic v. Prudential Ins. Co. of America, 165 N.W.2d 295 (Mich. App. 1968).

Kujawa's bad faith claim is based on the fact that Manhattan advised her a contestability investigation was necessary before the claim could be paid. Even though the insured's death was due to an accident, it was still necessary to determine whether the policy itself was valid before any claim on the policy could be paid. The specific procedures by which an insurer conducts a contestability investigation are not prescribed by statute or by express language in the policy, just as procedures for underwriting policies, adjusting claims and handling other insurance processes are not prescribed.

Manhattan agrees that it is generally under a duty of good faith and fair dealing pursuant to section 624.155 in the discharge of its contractual responsibilities. Manhattan is also under a duty not to discriminate in discharging its

contractual responsibilities, including the investigation of claims within the contestability period. Section 629.954(1)(g), Fla.Stat. (1987). Thus, Manhattan in good faith cannot omit or alter its procedures or its duty to conduct a contestability investigation based merely on the fact that the insured's death was accidentally caused. Such discrimination between classes of insureds, i.e., between those dying accidentally and all others, would be not only unfair, but is specifically prohibited by the laws of both Florida and the State of New York, which regulates Manhattan.

It is not bad faith to do that which one is required to do or privileged to do. Baxter v. Royal Indemnity Co., 285 So.2d 652 (Fla. 1st DCA 1973). Merely alleging that Manhattan acted in bad faith by conducting a contestability investigation, including obtaining authorization for release of the insured's medical records and taking the statement of the beneficiary, Kujawa, does not give Kujawa carte blanche to review Manhattan's files, whether they be claims files or legal department files.

If Kujawa is allowed the discovery sought, on the shallow grounds asserted in her brief, it would have serious consequences for Manhattan and all other providers of first-party insurance. The chilling effect of knowing the insurer's files may be thrown open to the other side at the mere allegation of bad faith would severely limit the insurer's right to consult counsel and to thoroughly investigate the

claim. The unfettered right to discovery claimed by Kujawa is entirely contrary to the expectations of the parties in entering into the contract, and is not a matter which can be judicially legislated.

CONCLUSION

Section 624.155 does not abolish either the attorney-client privilege or the work product immunity. The Florida Fourth District Court of Appeal correctly held that the mere pleading of a first-party bad faith case does not automatically overcome either the work product doctrine or the attorney-client privilege in the absence of a fiduciary relationship between the parties. The district court also correctly recognized in this case that the Petitioner's request for Manhattan's legal department file failed to meet one of the judicially recognized exceptions to these privileges, so that the files were thus protected from discovery.

The opinion of the Florida District Court of Appeal, Fourth District, in this matter should therefore be affirmed, and the decision of the Florida District Court of Appeal, Third

District, in Fidelity & Casualty Ins. Co. of N.Y. v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987), should be overruled to the extent that it is inconsistent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18th day of November, 1988, to ROLAND GOMEZ, ESQ., 8100 Oak Lane, Suite 400, Miami Lakes, Florida 33016, PHILLIP E. STANO, ESQ., American Council of Life Insurance, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004; MICHAEL LOVENDUSKY, ESQ., American Insurance Association, Law Department, 1130 Connecticut Avenue, N.W., #1000, Washington, D.C. 20036; RICHARD A. BARNETT, ESQ., Academy of Trial Lawyers, Barnett & Hammer, P.A., 4651 Sheridan Street, #325, Hollywood, Florida 33021; DIANE H. TUTT, ESQ., Florida Defense Lawyers Assoc., Suite 1507, The 110 Tower, 110 S.E. 6th Street, Fort Lauderdale, Florida 33301.

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