IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 72,388

(District Court of Appeal of Florida,
Fourth District - Case No. 87-1513)

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

PETITIONER'S BRIEF ON JURISDICTION

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TOPICAL INDEX

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

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STATEMENT OF THE CASE

This was an action brought to recover proceeds on a life insurance policy which was subsequently amended to include a claim under Florida Civil Remedies Statute §624.155 **Fla.Stat.** Petitioner, PENELOPE R. KUJAWA, as beneficiary of JOHN A. KUJAWA, Deceased [hereinafter "KUJAWA"], was the Plaintiff, and Respondent, MANHATTAN NATIONAL LIFE INSURANCE COMPANY [hereinafter "MANHATTAN"], was the Defendant. During the course of the proceedings, MANHATTAN paid the life insurance policy proceeds and the matter continued to be prosecuted solely under the Civil Remedies Statute.

During the course of the proceedings, KUJAWA sought

production of MANHATTAN's entire claim files, which was objected to on the grounds that:

> 1. The request is objected to insofar as it calls for production of legal department files, on the basis of attorney-client privilege and work product.

KUJAWA responded to the objections indicating that the claim was largely handled by MANHATTAN's in-house attorneys and counsel, and the production was necessary for the prosecution of the claim presented. To this extent, it was noted that the only source for the information requested was from MANHATTAN.

The trial court overruled MANHATTAN's objection and ordered the claim files to be produced.

MANHATTAN filed a Petition for Writ of Certiorari in the Fourth District Court of Appeal which entered its Order on April 13, 1988 granting certiorari and quashing the trial court Order that required MANHATTAN to produce its claim files. **Manhattan National Life Insurance Co. v. Kujawa,** ___So.2d___ (Fla. 4th DCA 1988), 13 FLW 923 (April 22, 1988) [Appendix I].

In setting forth its opinion reversing the trial court, the Fourth District Court of Appeal specifically noted that:

> Our decision conflicts with a recent decision of the Third District Court of Appeal, **Fidelity & Casualty Insurance Company of New York v. Taylor,** 13 F.L.W.24 (Fla. 3d DCA Dec. 29, 1987), which holds that in a first-party action against an insurer under section 624.155(1)(b) the insurer's claim file is subject to a request to produce just as in "the familiar [action for] bad faith" failure to settle. . . a third-party's action against a liability carrier's insured". (Opinion, p.4)

This Petition for Review has been filed based upon the acknowledged conflict existing between opinions of the Third District Court of Appeal and Fourth District Court of Appeal pursuant to Art. V, §3(b)(3) **Fla.Const.** and **Fla.R.App.P.** 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

Jurisdiction is vested in the Supreme Court of Florida, pursuant to Art. V, §3(b)(3) **Fla.Const.** and **Fla.R.App.P.** 9.030(a)(2)(A)(iv), to review the decision of the District Court of Appeal of Florida, Fourth District [Appendix I], which expressly conflicts with the decision of the Third District Court of Appeal in **Fidelity and Casualty Ins. Co. of New York v. Taylor,** ___So.2d___ (Fla. 3 DCA 1987), 13 FLW 24 (January 8, 1988) [Appendix II].

STATEMENT OF THE FACTS

ON AUGUST 2, 1985, JOHN A. KUJAWA WAS A PASSENGER ON DELTA AIR LINES FLIGHT NO. 191. HE DIED WHEN THE PLANE CRASHED AT DALLAS-FORT WORTH AIRPORT.

At the time of his death, Mr. KUJAWA was employed by Ropes Associates, Inc., Fort Lauderdale, Florida, which, as part of its benefit program, had obtained a term life insurance policy through MANHATTAN, covering Mr. KUJAWA's life for $50,000.00. Following the death of Mr. KUJAWA, a claim for such life insurance benefits was prepared and forwarded to MANHATTAN, which

claim was received on October 4, 1985.

Three weeks thereafter, on October 25, 1985, when no response to the claim was received, Robert W. Marsh, the treasurer of Ropes Associates, Inc., contacted MANHATTAN, and was advised that the insurance company was going to exercise its rights under a contestability clause to investigate the statements made by Mr. KUJAWA on the insurance application, concerning his health. In a October 29, 1985 letter to Florida Insurance Commissioner Bill Gunter, a copy of which was sent to and received by MANHATTAN'S General Counsel, Andrew Corselli, Esq., Mr. Marsh complained that:

> Both Mr. Koonjy [MANHATTAN's claims handler] and Mr. Corselli, Manhattan's General Counsel, have stated to us that they intended to seek out any possible grounds upon which they can invalidate the policy and deny the claim.

On October 30, 1987, counsel for KUJAWA wrote MANHATTAN, advising that if payment of the life insurance proceeds was not promptly received, litigation would be instituted; and thereafter, on November 13, 1985, a letter was forwarded to Insurance Commissioner Bill Gunter, with a copy to MANHATTAN, complying with the sixty (60) day notice provisions required under the Florida's Civil Remedies Statute §624.155, **Fla.Stat.**

The within litigation was instituted on November 18, 1985 through the filing of a complaint. A responsive letter dated November 21, 1985 was subsequently received from MANHATTAN indicating that before the claim could be paid, a prompt "routine investigation" would have to be performed, and that any delay in

completing such investigation was occasioned by KUJAWA's refusal to provide a medical authorization and an interview concerning her deceased husband.

As a consequence, after receiving assurance from MANHATTAN's counsel that the investigation would be completed and the proceeds disbursed within two (2) weeks, KUJAWA provided a signed medical authorization, and agreed to give a sworn statement. This was done despite the fact that there was no policy provision contained within the MANHATTAN policy requiring that such authorization or sworn statement be provided as a condition precedent to obtaining the policy proceeds. MANHATTAN, however, has stated that this was required as a matter of procedure.

In response to a later request from KUJAWA, MANHATTAN attempted to justify its requirement that a medical authorization be provided, as well as a sworn statement of KUJAWA, based upon a New York statute which, upon review, had nothing whatsoever to do with the handling or investigation of claims.

From the discovery that MANHATTAN previously provided, it is obvious that its protestations that it was conducting a "routine investigation", as claimed in its November 21, 1985 letter, were at best inaccurate. The "routine investigation" included an extensive Equifax investigation which was performed in a clear attempt to find some means of invalidating the policy and thereby deny the claim, despite the fact that JOHN A. KUJAWAY's death was clearly not a result of any hidden health problems. Such investigation included the canvassing of ten (10) hospitals

located within a six mile radius of the KUJAWA residence; and when that proved uneventful [only one hospital admission was discovered, and that was for a different John A. Kujawa, who had a different date of birth, a different social security number, a different wife, and who resided in Arkansas], the search was expanded to nine (9) other hospitals in Broward County, Florida, extending from Hollywood, Florida to Pompano Beach, Florida. Equifax also took a sworn statement from KUJAWA, and then checked with a former employer of Mr. KUJAWA's to determine if there had been any time lost from work due to illness or sickness, and learned that there had not been any.

On January 17, 1986, MANHATTAN finally agreed to pay the claim presented by KUJAWA. Such payment, however, was conditioned upon a settlement of all causes of action. Because the sixty (60) day notice to settle under §624.155 **Fla.Stat.** had expired without payment of the policy proceeds, and because of the problems she had encountered in dealing with MANHATTAN, KUJAWA was unwilling to execute a full and complete release and to dismiss her entire claim. Instead, she filed an Amended Complaint which included a claim under the Civil Remedies Statute.

Ultimately, MANHATTAN did settle KUJAWA's claim for insurance proceeds in May, 1984, nine (9) months after the death of JOHN A. KUJAWA. The settlement included a payment of $51,581.80 to KUJAWA, with the right to continue to prosecute her action under the Civil Remedies Statute.

Thereafter, subsequent to conclusion of the handling of KUJAWA's claim for insurance proceeds, and solely as part of her claim under §624.155 **Fla.Stat.**, KUJAWA sought production of MANHATTAN's entire claim files, which MANHATTAN objected to. The files were required to be produced, but, on certiorari, the Order requiring such production was quashed. This Petition for Review follows.

ARGUMENT

As previously noted, jurisdiction of this Court vests pursuant to Art. V, §3(b)(3) **Fla.Const.** and **Fla.R.App.P.** 9.030(a)(2)(A)(iv), both of which grant this Court discretionary jurisdiction to review decisions of District Courts of Appeal which expressly and directly conflict with a decision of another District Court of Appeal.

The decision with respect to which review has been sought specifically acknowledges the existence of a conflict with the decision of the Third District Court of Appeal in **Fidelity and Casualty Ins. Co. of New York v. Taylor,** ___So.2d___ (Fla. 3d DCA 1987), 13 FLW 24 (January 8, 1988) [Appendix II]. Under such circumstances, it would respectfully be shown that, as acknowledged by the Fourth District Court of Appeal, there is an express and direct conflict between the opinion with respect to which review is sought, and an opinion of another District Court of Appeal, i.e. the Third District Court of Appeal.

It is significant to note that MANHATTAN utilized in-house

counsel to process KUJAWA's claim rather than just relying upon claims adjusters. From the very beginning, MANHATTAN's General Counsel, Andrew Corselli, Esq., was involved in the handling of the claim as well as another in-house attorney, Evan Giller, Esq. Such attorneys directly negotiated both with KUJAWA and with Robert W. Marsh, the Treasurer of Ropes Associates, Inc., JOHN A. KUJAWA's employer. In effect, through utilizing counsel rather than insurance investigators and adjusters, MANHATTAN has attempted to protect its claim files under the attorney client privilege and work product doctrine. The Fourth District Court of Appeals specifically recognized this in a footnote which indicated that:

> 1. Although the instant case involved the production of the insurer's legal department file rather than its claim file, we think that is too fine a distinction upon which to avoid recognizing a conflict with the Taylor case. (Opinion, p.4, n.1)

From this footnote, it is quite evident that the Fourth District Court of Appeal negated the distinction that MANHATTAN has made between the production of its files which were handled by attorneys, and the normal production of other insurance company's files which are handled by insurance adjusters or claims personnel. In effect, the Court recognized that what is involved in the presently pending litigation is the claim files of an insurance carrier, whether handled by adjusters or attorneys, to the same extent that the issue was addressed in **Fidelity and Casualty Ins. Co. of New York v. Taylor, supra.**

Here there is a direct conflict between the two decisions of the Third District Court of Appeal and the Fourth District Court of Appeal, as a consequence of which this Court should accept jurisdiction resolves such conflict.

CONCLUSION

This Court has jurisdiction to review KUJAWA's Petition for Review of the Opinion of the Fourth District Court of Appeal filed April 13, 1988, which expressly and directly conflicts with a decision of the Third District Court of Appeal.

Respectfully submitted,

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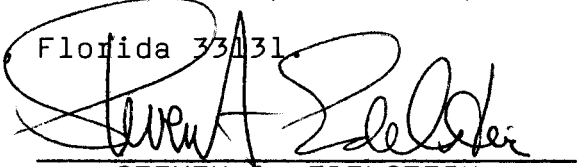
By _____
STEVEN A. EDELSTEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the above and foregoing Petitioner's Brief on Jurisdiction with Appendices were mailed this 28th day of April, 1988, to: THE HON. EUGENE S. GARRETT, Circuit Court Judge, Broward County Courthouse, 201 S.E. Sixth Street, Ft. Lauderdale, Florida 33301; and to MAXINE M. LONG, BRENTON VER PLOEG and PHILLIP D. PARRISH, ESQUIRES, Shutts & Bowen, 1500 Chopin Plaza, Miami, Florida 33131.



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