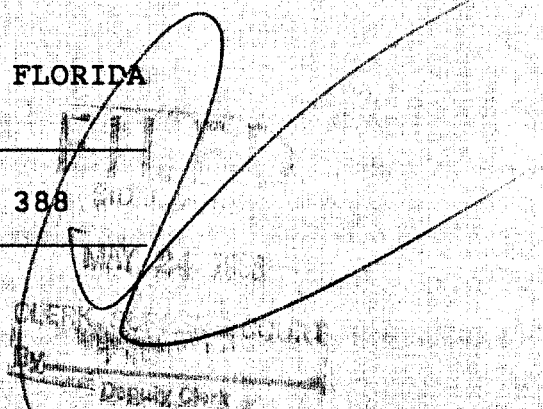
IN THE

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.

RESPONDENT'S BRIEF ON JURISDICTION

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

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SUMMARY OF THE ARGUMENT

Respondent, Manhattan National Life Insurance Company (hereinafter "MANHATTAN"), agrees with petitioner, Penelope R. Kujawa (hereinafter "KUJAWA"), that this Court has discretionary jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const., and Fla.R.App.P. 9.030(a)(2)(A)(iv), to review the opinion below based on an express and direct conflict with the recent decision of the Florida Third District Court of Appeal in Fidelity and Casualty Insurance Co. of New York v. Taylor, 13 F.L.W. 24 (Fla. 3d DCA Dec. 29, 1987). MANHATTAN does not agree, however, with KUJAWA's statement of the case and facts, or with KUJAWA's characterization of the opinions of which review is sought.

STATEMENT OF THE CASE AND FACTS

The insured, John A. Kujawa, applied to MANHATTAN on December 21, 1984 for an individual policy of life insurance in the face amount of $50,000.00, naming the insured's spouse, KUJAWA, as beneficiary. Policy number MN8500489 ("the Policy") was duly issued for delivery on January 1, 1985, in reliance on the insured's statements in the application. By its terms, and pursuant to Florida law, the Policy is contestable for two years from the date of issuance. Florida Statutes, § 627.455 (1987).

The insured died in an airplane crash on August 2, 1985, within the contestability period of the Policy. Upon receipt of the first notice of KUJAWA's claim, on or about

October 4, 1985, MANHATTAN promptly commenced a routine contestability investigation to determine if there were any material misrepresentations or omissions on the insured's application which would render the policy void ab initio, as provided by Florida Statutes § 627.409(1) (1987). Neither the manner nor the cause of the insured's death has any bearing on the requirement for a contestability investigation, which is conducted in all cases of claims made within the statutory contestability period.

KUJAWA, however, failed to cooperate with MANHATTAN in the investigation by refusing to provide a medical authorization for release of medical information concerning the insured and by refusing to meet with MANHATTAN's representative for an interview. Instead, the instant action was filed on November 18, 1985, only 45 days after MANHATTAN's first notice of the claim. KUJAWA eventually provided the necessary authorization and statement and the investigation concluded on or about January 16, 1986. MANHATTAN tendered payment of the policy proceeds and interest on January 17, 1986, which KUJAWA refused to accept.

KUJAWA thereafter filed an amended complaint on March 24, 1986, seeking punitive damages and alleging MANHATTAN acted in bad faith by not paying the proceeds until completion of the contestability investigation. The amended complaint continued to allege nonpayment of the policy proceeds. KUJAWA ultimately agreed to accept payment of the proceeds on May 19,

1986, four months after payment was first tendered, and released all but her claim under the Civil Remedies Statute, Florida Statutes § 624.155 (1987).

In connection with her "bad faith" claim, KUJAWA sought discovery from MANHATTAN, including 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'." This request included in its broad scope MANHATTAN's in-house legal department files and communications with outside counsel, as well as MANHATTAN's claims department files. MANHATTAN objected on the grounds both of work product and attorney client privilege. By its order entered May 6, 1987, the circuit court overruled MANHATTAN's objections, denied MANHATTAN's request for in camera inspection, and ordered the files to be produced.

MANHATTAN petitioned the Florida Fourth District Court of Appeal for a writ of common law certiorari on June 4, 1987. Certiorari was granted and the circuit court's order was quashed by an opinion filed on April 13, 1988. KUJAWA then petitioned this court for discretionary review.

ARGUMENT

The discretionary jurisdiction of the Florida Supreme Court may be sought to review decisions of district courts of appeal that expressly and directly conflict with the decision of another district court of appeal or of the Supreme Court on

the same question of law. Fla. R. App. P. 9.030(a)(2)(A)(iv). The rule reflects the constitutional modifications in the Supreme Court's jurisdiction effected in 1980. See Article V, Section 3(b)(3), Florida Constitution (1980).

The opinion of the Florida District Court of Appeal, Fourth District, for which KUJAWA seeks discretionary review, expressly and directly conflicts with the decision of the Florida District Court of Appeal, Third District, in Fidelity and Casualty Insurance Company of New York v. Taylor, 13 F.L.W. 24 (Fla. 3d DCA Dec. 29, 1987).

In the present case the Fourth District Court of Appeal followed the settled law of Florida, which does not abrogate the work product privilege and the statutory attorney-client privilege except in third-party cases, such as personal injury litigation, in which a liability or casualty insurer is in a fiduciary relationship with its insured. Allstate Insurance Company v. Podhurst, 491 So.2d 1222 (Fla. 4th DCA 1986); United States Fire Insurance Company v. Clearwater Oaks Bank, 421 So.2d 783 (Fla. 2d DCA 1982); Travelers Insurance Company v. Habelow, 405 So.2d 1361 (Fla. 5th DCA 1981); and Agri-Business, Inc. v. Bridges, 397 So.2d 394 (Fla. 1st DCA 1981). Nothing in the Civil Remedies Statute, upon which KUJAWA's action is based, evidences a legislative intent to abolish either work product immunity or the attorney-client privilege, so that the Fourth District

Court of Appeal found no reason to depart from the well-settled Florida law.

In its opinion the Fourth District Court of Appeal stated:

> Our decision conflicts with a recent decision of the Third District Court of Appeal, Fidelity and Casualty Insurance Company of New York v. Taylor, 13 F.L.W. 24 (Fla. 3d DCA December 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."

Kujawa v. Manhattan National Life Ins. Co., 13 F.L.W. 923, 924 (Fla. 4th DCA Apr. 13, 1988). In a footnote to the above-quoted portion of its opinion the Fourth District Court of Appeal noted:

> Although the instant case involves 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.

Id.

The issue in both Taylor and the present case is "whether an insured asserting...a statutory cause of action [for "bad faith"] is somehow entitled, by the nature of the action alone, to have work product immunity and the statutory attorney-client privilege summarily swept aside." Kujawa, supra, at 924. In Taylor, the insured sued her insurer alleging failure to settle a claim in good faith where the

insurer had filed an action to reduce an arbitration award to the policy limits of the insured's uninsured motorists policy. The Third District Court of Appeal disregarded the nature and posture of the parties involved and looked only to the nature of the cause of action, thus making no distinction between first-party and third-party claims where "bad faith" is alleged:

> In our view, because the pertinent issues are the same, there is no basis for distinguishing between types of "bad faith" insurance cases with respect to the present question. We therefore hold, as does the substantial weight of authority elsewhere on the question, that the claim file is and was properly held produceable in this first-party case. [citing cases from jurisdictions other than Florida.]

Taylor, 13 F.L.W. at 25.

In Taylor, the Third District Court of Appeal denied the insurer's petition for certiorari and ordered production of its claim files. In the present case the Fourth District Court of Appeal granted certiorari and quashed the order of the circuit court which required production of MANHATTAN's claim files, including its legal department files. Both actions involved statutory bad faith claims by an insured against her insurer. The two opinions expressly and directly conflict, so that the discretionary jurisdiction of this court is properly invoked.

CONCLUSION

This Court has jurisdiction to review the opinion of the Florida District Court of Appeal, Fourth District, filed April 13, 1988 in this matter, which expressly and directly

conflicts with the decision of the Third District Court of Appeal in Fidelity and Casualty Insurance Company of New York v. Taylor, 13 F.L.W. 24 (Fla. 3d DCA Dec. 29, 1987). In order to provide a definite answer to a question now constantly at issue in the trial courts, we urge this Court to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, Respondent's Brief on Jurisdiction, was mailed this 23rd day of May, 1988, to **ROLAND GOMEZ, ESQ.**, 1700 Sans Souci Boulevard, North Miami, Florida 33181.

Maxine M. Long
Of Counsel

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