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

PETITIONER'S BRIEF ON THE MERITS

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PETITION FOR REVIEW OF OPINION OF THE
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PETITIONER'S BRIEF UPON THE MERITS

STATEMENT OF THE CASE

This was an action that was initially brought to recover the proceeds of a life insurance policy, but which was subsequently amended to include a claim under Florida's Civil Remedy Statute, §624.155 **Fla.Stat.** During the course of the proceedings, the life insurance policy proceeds were paid, and the matter thereafter continued to be prosecuted solely based upon an alleged violation of the Civil Remedy Statute.

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.Throughout this Brief, references will be made to the following Appendices:

Appendix A: **Manhattan National Life Ins. Co. v. Kujawa,** 522 So.2d 1078 (Fla. 4th DCA 1988).

Appendix B: **Fidelity & Casualty Ins. Co. of New York v. Taylor,** 525 So.2d 908 (Fla. 3d DCA 1987).

Appendix C: The Appendix filed by KUJAWA in the Fourth District Court of Appeal as part her Response to Show Cause Order Why Petition Should Not Be Granted [The Clerk of the Fourth District Court of Appeal has indicated that this Appendix is being forwarded to the Supreme Court, and that reference to same is appropriate].

After the claim for life insurance policy proceeds was resolved, and during the course of discovery proceedings related solely to the statutory claim for alleged "bad faith", KUJAWA sought production of MANHATTAN's entire files, which request 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 that the production was necessary for the prosecution of the statutory Civil Remedy claim. 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 files to be produced.

MANHATTAN filed a Petition for Writ of Certiorari in the Fourth District court of Appeal, which granted Certiorari and quashed the Circuit Court Order that had required production of

MANHATTAN's files. **Manhattan National Life Insurance Co. v. Kujawa**, 522 So.2d 1078 (Fla. 4th DCA 1988) [Appendix A 1].

This Petition for Review has been filed based upon a conflict existing between the opinion of the Fourth District Court of Appeal in the within cause, and the decision of the Third District Court of Appeal in **Fidelity & Casualty Ins. Co. of New York v. Taylor**, 525 So.2d 908 (Fla. 3d DCA 1987) [Appendix B 1]. Jurisdiction vests pursuant to Art. V, §3(b)(3) **Fla.Const.** and **Fla.R.App.P.** 9.030(a)(2)(A)(iv).

POINT INVOLVED ON PETITION FOR REVIEW

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

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 [Appendix C 1].

At the time of his death, JOHN A. KUJAWA was employed by Ropes Association, 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. 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 [Appendix C 5, 10].

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. Following discussions with MANHATTAN's claims handler and General Counsel, Mr. Marsh submitted an initial complaint of "bad faith" handling of KUJAWA's claim, in an October 29, 1985 letter addressed to Florida Insurance Commissioner Bill Gunter. The letter specifically stated, **inter alia**, that:

> Both Mr. Koonjy [MANHATTAN's claims handler] and Mr. Corselli, Manhattan's General Counsel, have stated to us that they intend to seek out any possible grounds upon which they can invalidate the policy and deny the claim [Appendix C 5-6].*

On October 30, 1985, counsel for KUJAWA wrote to MANHATTAN, advising that if payment of the life insurance proceeds was not promptly received, litigation would be instituted [Appendix C 7]. Thereafter, on November 13, 1985, counsel for KUJAWA also wrote a letter to Florida Insurance Commissioner Bill Gunter, with a copy to MANHATTAN, in compliance with the sixty (60) day notice provisions required under the Civil Remedy Statute, §624.155 **Fla.Stat.** [Appendix C 8]. Since Robert W. Marsh had previously

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* MANHATTAN has admitted that its General Counsel, Andrew Corselli received this letter. All other correspondence referred to herein originated from MANHATTAN, was produced by MANHATTAN through discovery procedures, or the receipt and authenticity of such correspondence has been admitted by MANHATTAN [Appendix C 23-24].

written to Mr. Gunter on October 25, 1985, this was the second "bad faith" letter written to the Florida Insurance Commissioner.

The within litigation was instituted on November 18, 1985, through the filing of a complaint [Appendix C 5-26]. A 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 [Appendix C 9-10].

As a consequence, after receiving assurance from MANHATTAN's counsel that the investigation would be completed and the proceeds of the life insurance policy disbursed within two (2) weeks [Appendix C 11], KUJAWA provided a signed medical authorization [Appendix C 27], and agreed to give a sworn statement. This was done, despite the fact that there was no policy provision contained within the MANHATTAN policy which required that medical authorizations or sworn statements be provided as a condition to obtaining policy proceeds. Rather, MANHATTAN acknowledged that it was requiring this as a matter of its customary procedure [Appendix C 28-29, 30].

In response to a later request from KUJAWA [Appendix C 15-16], MANHATTAN attempted to justify its requirement that a medical authorization be provided, as well as a sworn statement of KUJAWA, based upon §4224(a)(1) of the New York Insurance Law, a copy of which was provided by MANHATTAN. In reviewing such provision, however, it was clear that the statute referred to discrimination

in amounts or payments of premiums, rates, benefits, or in the terms and conditions of policies. The cited provision had nothing whatsoever to do with the handling or investigation of claims [Appendix C 17, 32-36].

In the discovery that has been provided to date, it is obvious that MANHATTAN's protestations that it was merely conducting a "routine investigation", as stated in its November 21, 1985 letter to KUJAWA's counsel [Appendix C 9-10], were at best inaccurate, but more likely intentionally false. Instead of a "routine investigation", an extensive Equifax Investigation was commenced in a clear attempt to find some means of invalidating the policy and thereby denying the claim for life insurance benefits, despite the fact that JOHN A. KUJAWA's death was clearly not the result of any hidden health problem. Such investigation included the canvassing of ten (10) hospitals located within a six (6) mile radius of Mr. KUJAWA's 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 [Appendix C 69, 84] -- the search was expanded to nine (9) other hospitals in Broward County, extending from Hollywood, Florida to Pompano Beach, Florida [Appendix C 69-70]. 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 [Appendix C 78-79].

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 [Appendix C 13-14]. 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 the entire lawsuit. Instead, she filed an Amended Complaint which included a claim under the Civil Remedies Statute [Appendix C 105-108].

MANHATTAN filed an Answer to KUJAWA's Amended Complaint, and included therein a Counterclaim for Interpleader [Appendix C 109-134]. KUJAWA responded with a Reply to Affirmative Defenses [Appendix C 135], and moved to dismiss the Counterclaim on the grounds that there was no basis for an interpleader action, since she, KUJAWA, was the only party claiming an interest in the policy proceeds [Appendix C 136-137].

Ultimately, MANHATTAN did settle KUJAWA's primary claim for life insurance policy proceeds in May, 1986, nine (9) months after the death of JOHN A. KUJAWA. The settlement included the payment of $51,581.80 [the face value of the policy plus interest] to KUJAWA, with the right to continue with her "bad faith" action under the Civil Remedy Statute, §624.155 **Fla.Stat.** [Appendix C 143], and the voluntary dismissal of MANHATTAN's Counterclaim for Interpleader [Appendix C 144].

Thereafter, subsequent to the conclusion of the handling of KUJAWA's claim for insurance policy proceeds, and solely as part

of her claim under §624.155 **Fla.Stat.**, KUJAWA sought production of MANHATTAN's entire claim files [Appendix C 145], which MANHATTAN 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 [Appendix C 146].

The materials which KUJAWA requested, however, are crucial to the presentation of her claim since, from the very beginning, a large portion of the handling of KUJAWA's claim was done by MANHATTAN's in-house attorneys and counsel, including Andrew Corselli and Evan Giller. Additionally, the information requested is clearly unavailable from any other source.

MANHATTAN's objection to the requested discovery was heard by the Circuit Court, following which an Order was entered on May 6, 1987, overruling MANHATTAN's objection, and ordering that the claims files be produced [Appendix C 147]. A Petition for Writ of Certiorari was then filed by MANHATTAN in the Fourth District Court of Appeal, seeking review of such order. The Petition was subsequently granted, and the order of the Circuit Court was quashed. **Manhattan National Life Ins. Co. v. Kujawa,** 522 So.2d 1078 (Fla. 4th DCA 1988). The present Petition for Review is directed to the decision of the Fourth District Court of Appeal, which quashed the Circuit Court order that required MANHATTAN to produce its complete claims files.

SUMMARY OF THE ARGUMENT

Historically, the investigative and claims files of insurance carriers have been protected from discovery under the attorney-client privilege and as work product. An exception to this protection involved third-party "bad faith" cases, where an injured party obtains a judgment in excess of available insurance coverages, in which case the tort-feasor's insurance carrier can be held liable for such excess amounts if it acted fraudulently or in "bad faith" in providing a defense for its insured.

Florida's Civil Remedy Statute §624.155 **Fla.Stat.**, which became effective in 1982, for the first time created a cause of action for an insurance carrier's failure to act in "good faith" with regard to a first party claim for insurance benefits that may be presented by its insured. The statute, by operation of law, became a part of all insurance contracts in Florida. As a consequence, each policy of insurance issued after October 1, 1982 contained a statutorily created duty on the part of insurance carriers to act in good faith toward their insureds, when handling and settling first-party claims. This duty was identical to the fiduciary duty which required that insurance carriers not act in "bad faith" toward their insureds when handling third-party claims.

If an action is brought against an insurance carrier, pursuant to §624.155 **Fla.Stat.** for alleged breach of this duty, the insured, after the primary claim for insurance benefits is resolved, is *entitled* to obtain the insurance carrier's

complete investigative and claims files through discovery, if the need for such files is adequately shown.

ARGUMENT

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

The issue raised by the present Petition for Review concerns whether the entire files of an insurance company are subject to discovery, in an action brought against such insurance company solely for alleged failure to act in "good faith" as required by Florida's Civil Remedy Statute, §624.155 **Fla.Stat.** In the present case, the Circuit Court determined that the insurance carrier, MANHATTAN, was required to provide such discovery. On certiorari, however, the Fourth District Court of Appeal held that the requested discovery was protected, and quashed the order of the Circuit Court.

In contrast to the decision of the Fourth District Court of Appeal under review herein, the Third District Court of Appeal has held, in **Fidelity & Casualty Ins. Co. of New York v. Taylor,** 525 So.2d 908 (Fla. 3d DCA 1987), that insurance company files are subject to discovery in actions brought pursuant to §624.155 **Fla.Stat.**

In order to resolve the conflict between the opinions of the Third District Court of Appeal and the Fourth District Court of

Appeal, it is first necessary to place the issue in its proper perspective.

Initially, this Court established that insurance company investigative files were protected in **Vann v. State**, 85 So.2d 133 (Fla. 1956), which held that a report or other communication made by an insured to his liability insurance carrier, concerning an event which might form the basis of a claim against him that would be covered by the policy, is privileged as between attorney and client, if the insured is required to be defended under the policy terms. This application of the attorney-client privilege, as protecting communications between an insured and his insurer concerning a claim, has been generally followed by Florida Appellate Courts over the years. **Grand Union v. Patrick,** 247 So.2d 474 (Fla. 3d DCA 1971); **Sligar v. Tucker**, 267 So.2d 54 (Fla. 4th DCA 1972); **Staton v. Allied Chain Link Fence Co.**, 418 So.2d 404 (Fla. 2d DCA 1982).

In addition to the protection afforded under the attorney-client privilege, the investigative files of insurance carriers have also been held to be protected from discovery as constituting work product. **Surf Drugs, Inc. v. Vermette**, 236 So.2d 108 (Fla. 1970); **Reynolds v. Hoffman**, 305 so.2d 294 (Fla. 3d DCA 1974); **Colonial Penn Ins. Co. v. Blair**, 380 So.2d 1305 (Fla. 5th DCA 1980); **Alachua General Hospital, Inc. v. Zimmer USA, Inc.**, 403 So.2d 1087 (Fla. 1st DCA 1981).

The work product doctrine, however, is distinguishable from the attorney-client privilege, since work product materials are discoverable where there is a compelling necessity occasioned by

exceptional circumstances. **Surf Drugs, Inc. v. Vermette,** 236 So.2d 108 (Fla. 1970); **Florida Power & Light Co. v. Limeburger,** 390 So.2d 133 (Fla. 4th DCA 1980). In order to obtain such materials, however, there must be an affirmative showing by the party seeking discovery that the materials are needed for the preparation of the case and that substantially equivalent materials cannot be obtained by other means absent undue hardship. **Fla.R.Civ.P.** 1.280(b)(2); **Transamerica Ins. Co. v. Maze,** 318 So.2d 200 (Fla. 5th DCA 1981); **Ins. Co. of North America v. Noya,** 398 So.2d 428 (Fla. 5th DCA 1982); **Hartford Accident & Indemnity Co. v. U.S.C.P. Co.,** 515 So.2d 998 (Fla. 4th DCA 1987).

A significant exception to the protection which insurance company investigative and claim files have enjoyed over the years began to be carved out with this Court's early decision of **Auto Mutual Indemnity Co. v. Shaw,** 134 Fla. 815, 184 So. 852 (1938). In **Auto Mutual Indemnity Co. v. Shaw,** the right of an insured to bring a "bad faith" action against his own insurance carrier for failure to settle a third-party claim was first recognized:

> * * * The prevailing rule seems to be, however, that the insurer must act in good faith toward the assured in its effort to negotiate a settlement. * * * [T]hat 'the insurer cannot escape liability by acting upon what it considers to be for its own interest alone, but it must also appear that it acted in good faith and dealt fairly with the insured. * * * This relationship imposes upon the insurer the duty, not under the terms of the contract strictly speaking, but because of and flowing from it, to act honestly and in good faith toward the insured' * * *. 184 So. at 859.

This was followed first by **American Fire & Casualty Co. v. Davis,** 146 So.2d 615, 617 (Fla. 1st DCA 1962), and later by **Thompson v.**

Commercial Union Ins. Co. of New York, 250 So.2d 259 (Fla. 1971). In **Thompson,** the right to bring third-party "bad faith" actions was expanded, so that a judgment creditor could maintain an action directly against the tort-feasor's liability insurance company for recovery of a judgment in excess of the policy limits, based upon alleged fraud or "bad faith" of the insurer in the conduct or handling of the suit against its insured.

Most significantly, where a verdict exceeds the available insurance policy limits, and the carrier is alleged to have breached the duty it owed to its insured, all materials, including documents, memoranda, letters and files of attorneys retained by the insurance company are discoverable. **Boston Old Colony Ins. Co. v. Gutierrez,** 325 So.2d 416 (Fla. 3d DCA 1976), **Cert. denied,** 336 So.2d 599 (Fla. 1976); **Stone v. Travelers Ins. Co.,** 326 So.2d 241 (Fla. 3d DCA 1976).

Historically, common law "bad faith" actions, in which discovery of insurance company claim files has been permitted, had been limited to third-party claims involving excess judgments against tort-feasors. Actions against insurance carriers for alleged "bad faith" in handling first party claims of their insureds for insurance benefits were not permitted at common law. The rationale for this limitation was best expressed in **Baxter v. Royal Indemnity Co.,** 285 So.2d 652 (Fla. 1st DCA 1973), which involved a first-party common law claim by an insured against his own insurance company, for alleged "bad faith" in requiring its insured to resort to arbitration of an uninsured motorist claim, rather than paying the full amount of uninsured motorist coverage

benefits which were available. The insured also alleged that the insurance carrier acted in bad faith in that its actions were motivated by malice and warranted the imposition of punitive damages. In affirming the dismissal of the insured's complaint, the court stated that:

> It is the existence of the fiduciary relationship between the parties under the bodily injury liability provisions of the policy which imposes upon the insurer the obligation of exercising good faith in negotiating for and effecting a settlement of the claim against its insured and which subjects it to excess liability if it acts in bad faith or through fraud. It is because of the absence of such fiduciary relationship that no similar obligation rests upon the insurer with respect to claims made against it under the uninsured motorist provision of the policy. As noted above, 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. If a party to a contract exercises an option given to it by the clear and lawful terms thereof, it would appear immaterial whether such election was motivated by good faith, bad faith, self-interest, malice, spite, or indifference. 285 So.2d at 656-657.

Following the **Baxter v. Royal Indemnity Co., supra,** decision, the courts of Florida have generally limited discovery of insurance companies' files to third-party "bad-faith" actions. In **U.S. Fire Ins. Co. v. Clearwater Oaks Bank,** 421 So.2d 783 (Fla. 2d DCA 1982) held that:

> In a bad faith suit against an insurance company for failure to settle within the policy limits, the plaintiff may obtain discovery of the original claim file. **Stone v. Travelers Insurance Co.,** 326 So.2d 241 (Fla. 3d DCA 1976). On the other hand, the plaintiff cannot compel disclosure of the carrier's work product, its claim file, where the cause of action is a first party claim for coverage under the policy. **Agri-Business v. Bridges,** 397 So.2d 394 (Fla. 1st DCA 1981). The reason for the distinction is that a claim for bad faith

> will lie when a carrier fails properly to perform its fiduciary obligation to defend, but a claim for bad faith cannot be prosecuted where the parties simply disagree over whether the claim is covered by the policy. In the latter case, the parties occupy a debtor-creditor relationship, and the insurance company does not commit a separate tort by refusing to pay the claim. **Baxter v. Royal Indemnity Co.**, 285 So.2d 652 (Fla. 1st DCA 1973). 421 So.2d at 784.

Accord: Agri-Business, Inc. v. Bridges, 397 So.2d 394 (Fla. 1st DCA 1981); **Travelers Ins. Co. v. Habelow**, 405 So.2d 1361 (Fla. 5th DCA 1981); **Utica Mutual Ins. Co. v. Croft**, 432 So.2d 196 (Fla. 1st DCA 1983); **Allstate Ins. Co. v. Podhurst**, 491 So.2d 1222 (Fla. 4th DCA 1986).

It is thus evident that, prior to October 1, 1982, the common law of Florida had clearly established that an insured had no right to proceed against his own insurance company, for any claimed failure to act in "good faith" in negotiating and settling the insured's own claim for insurance benefits. As a consequence, an insured was precluded from obtaining the insurance company's files with respect to any claimed "bad faith" in the handling of first-party claims. This bar, which prevented an insured from bringing a "bad faith" action against his own insurance carrier, however, was eliminated as of October 1, 1982, with the adoption of Florida's Civil Remedy Statute, §624.155 **Fla.Stat.**, which provides, **inter alia**, as follows:

> **624.155 Civil Remedy.--**
>
> (1) Any person may bring a civil action against an insurer when such person is damaged:
>
> (a) By a violation of any of the following provisions by the insurer:

1. Section 626.9541(1)(i),(o), or (x);
2. Section 626.9551;
3. Section 626.9705;
4. Section 626.9706; or
5. Section 626.9707; or

(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.**

* * *

(2) As a condition precedent to bringing an action under this section, the department and the insurer must be given written notice of the violation. The notice shall state with specificity the facts which allegedly constitute the violation and the law which the plaintiff is relying upon and shall state that such notice is given in order to perfect the right to pursue the Civil Remedy authorized by this section. No action shall lie if, within 60 days thereafter, the damages are paid or the circumstances giving rise to the violation are corrected.

(3) Upon adverse adjudication at trial or upon appeal, the insurer shall be liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff.

(4) No punitive damages shall be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Wilful, wanton, and malicious;

(b) In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

** Section 624.155 **Fla.Stat.** uses the terminology of not attempting in "good faith" to settle claims, whereas in many of the cases cited the term "bad faith" is used, or they are used interchangeably. The distinction is not deemed significant, and both terms have accordingly been utilized throughout this brief as the context seemed appropriate.

In addition to providing a cause of action for "not attempting in good faith to settle claims", §624.155(1)(a)(1) **Fla.Stat.** also provides for a cause of action based upon alleged violations of §626.9541(1)(i) **Fla.Stat.**, which provides that:

> **626.9541 Unfair methods of competition and unfair or deceptive acts or practices defined.--**
>
> (1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.--The following are defined as unfair methods of competition and unfair or deceptive acts or practices:
>
> *   *   *
>
> **(i) Unfair claim settlement practices.--**
>
> 1. Attempting to settle claims on the basis of application, when serving as a binder or intended to become a part of the policy, or any other material document which was altered without notice to, or knowledge or consent of, the insured;
>
> 2. A material misrepresentation made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy; or
>
> 3. Committing or performing with such frequency as to indicate a general business practice any of the following:
>
> a. Failing to adopt and implement standards for the proper investigation of claims;
>
> b. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
>
> c. Failing to acknowledge and act promptly upon communications with respect to claims;
>
> d. Denying claims without conducting reasonable investigations based upon available information;
>
> e. Failing to affirm or deny coverage of claims upon the written request of the insured within a reasonable

> time after proof-of-loss statements have been completed; or;
>
> f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement.

The inclusion of a cause of action for alleged "Unfair Claim Settlement Practices" in Florida's Civil Remedy Statute, §624.155 **Fla.Stat.**, emphasizes the Legislature's intention that insurance carriers are required to act in "good faith" in handling first-party claims which are presented by their insureds.

It is important to remember that Florida law has long provided that statutes which are in effect at the time that an insurance policy is issued are incorporated into the policy and form a part of its terms and conditions. **Poole v. Travelers Ins. Co.**, 130 Fla. 806, 179 So. 138 (1937); **Allison v. Imperial Casualty & Indemnity Co.**, 222 So.2d 254 (Fla. 4th DCA 1969); **U.S. Fire Ins. Co. v. Van Iderstyne**, 347 So.2d 672 (Fla. 4th DCA 1977); **Lumbermens Mutual Casualty Co. v. Ceballos**, 440 So.2d 612 (Fla. 3d DCA (1983); **Metropolitan Property & Liability Ins. Co. v. Gray**, 446 So.2d 216 (Fla. 5th DCA 1984); **Fireman's Fund Ins. Co. v. Pohlman**, 485 So.2d 418 (Fla. 1986).

> An insurance policy is a contract. §624.02 Fla.Stat. (1981). It is well settled in Florida that the statute in effect at the time the insurance contract is executed governs any issues arising under that contract. **See Metropolitan Life Insurance Co. v. Fugate**, 313 F.2d 788 (5th Cir. 1963); **Allison v. Imperial Casualty & Indemnity Co.**, 222 So.2d254 (Fla. 4th DCA 1969); **Poole v. Travelers Ins. Co.**, 130 Fla. 806, 179 So. 138 (1937). **Lumbermens Mutual Casualty Co. v. Ceballos**, 440 So.2d 612, 613 (Fla. 3d DCA 1983).

As a consequence, it is clear that the provisions of §624.155 **Fla.Stat.** formed a part of all insurance contracts issued after October 1, 1982, and more particularly, it formed a part of the MANHATTAN life insurance policy that was issued to JOHN A. KUJAWA, which provides the basis of the within proceeding.***

The judicial construction of §624.155 **Fla.Stat.** was initially provided by two federal decisions: **Roland v. Safeco Ins. Co. of America**, 634 F.Supp. 613 (M.D.Fla. 1986), and **United Guaranty Residential Ins. Co. of Iowa v. Alliance Mortgage Co.**, 644 F.Supp. 339 (M.D.Fla. 1986). In **Roland v. Safeco Ins. Co. of America**, the court first reviewed the "plain meaning" of §624.155 **Fla.Stat.** in an attempt to give effect to the intent of the legislature in enacting it. The court then reviewed the legislative history of the statute as follows:

> In addition to the language of the statute, its legislative history indicates an intent to provide a cause of action for insureds who sue their insurers for bad faith refusal to settle claims. A 1982 Staff Report to the House Committee on Insurance notes that section 624.155
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>> requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that a company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.

*** The MANHATTAN policy which insured the life of JOHN A. KUJAWA was issued effective January 1, 1985. Delta Air Lines Flight 191 crashed on August 2, 1985. MANHATTAN's justification for its attempts to deny insurance coverage to KUJAWA, were based upon its policy being within a two (2) year contestability period. From these dates, there is no question that §624.155 **Fla.Stat.** formed a part of MANHATTAN's policy.

Staff Report, 1982 Insurance Code Sunset Revision (HB 4F; as amended HB 10G)(June 3, 1982). 634 F.Supp. at 615.

In **United Guaranty Residential Ins. Co. of Iowa v. Alliance Mortgage Co., supra,** the court did not feel that it was necessary to review the legislative history:

> Where the words used by the legislature are clear and convey a definite meaning, Florida courts need not resort to rules of statutory construction. **Kokay v. South Carolina Insurance Co.,** 380 So.2d 489 (Fla. 3d DCA 1980, **aff'd,** 398 So.2d 1355 (Fla. 1980). **See also Department of Legal Affairs v. Sandford-Orlando Kennel Club, Inc.,** 434 So.2d 879 (Fla. 1983)(courts look to legislative history only to resolve statutory ambiguities) 644 F.Supp. at 342.

Relying upon both federal decisions cited above, the court in **Opperman v. Nationwide Mutual Fire Ins. Co.,** 515 So.2d 263 (Fla. 5th DCA 1987), expressly recognized the right of an insured to bring a first-party claim against his own insurance carrier for failure to settle the insured's claim for benefits pursuant to §624.155 **Fla.Stat.**:

> We agree that the plain meaning of section 624.155(1)(b) extends a cause of action to the first party insured against its insurer for bad faith refusal to settle. The language of section 624.155 is clear and unambiguous and conveys a clear and definite meaning. It provides a civil cause of action to "any person" who is injured as a result of an insurer's bad faith dealing. Thus, there is no occasion for resort to rules of statutory construction; the statute must be given its plain and obvious meaning. **Holly v. Auld,** 450 So.2d 217 (Fla. 1984). The legislature is presumed to know the existing law at the time it enacts a statute. **Ford v. Wainwright,** 451 So.2d 471, 475 (Fla. 1984); **Alder-Built Industries, Inc. v. Metropolitan Dade county,** 231 So.2d 197, 199 (Fla. 1970). There is nothing in the statute which indicates an intent to limit an existing common-law remedy. **Cf. Bankston v. Brennan,** 507 So.2d 1385 (Fla. 1987). On the contrary, the statute clearly indicates the intent to expand that remedy. 515 So.2d at 266.

It is appropriate at this point to discuss the decision of the Fourth District Court of Appeal that is presently under review. The reason for this is that in rendering its decision in **Manhattan National Life Ins. Co. v. Kujawa**, 522 So.2d 1078 (Fla. 4th DCA 1987), the court, although recognizing that first-party claims against insurance carriers are now statutorily permitted pursuant to §624.155 **Fla.Stat.**, nevertheless reverted to the line of cases which only permitted third-party claims for "bad faith" at common law, **i.e., Agri-Business, Inc. v. Bridges**, 397 So.2d 394 (Fla. 1st DCA 1981); **Travelers Ins. Co. v. Habelow**, 405 So.2d 1361 (Fla. 5th DCA 1981); and **U.S. Fire Ins. Co. v. Clearwater Oaks Bank**, 421 So.2d 783 (Fla. 2d DCA 1982). All of these cases involved third-party claims of bad faith, and the latter case, which was most recently decided, expressly points out that a first-party "claim for bad faith cannot be prosecuted". 421 So.2d at 784.****

In relying upon **Agri-Business, Inc. v. Bridges, supra; Travelers Ins. Co. v. Habelow, supra; and U.S. Fire Ins. Co. v. Clearwater Oaks Bank, supra**, the Fourth District Court of Appeal emphasized the fact that a fiduciary relationship exists between an insurance carrier and its insured in third-party "bad faith" cases. Then, recognizing that the Third District Court of Appeal, in **Fidelity & Casualty Ins. Co. of New York v. Taylor**, 525 So.2d

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**** The Fourth District Court of Appeal cited each of these cases as authority in its opinion. It also cited its own more recent decision in **Allstate Ins. Co. v. Podhurst**, 491 So.2d 1222 (Fla. 4th DCA 1986), which involved a first-party claim for insurance coverage, but did not include a claim under §624.155 **Fla.Stat.**

908 (Fla. 3d DCA 1987), determined that insurance company files are discoverable in actions brought pursuant to §624.155 **Fla.Stat.**, indicated that the basis for such decision appeared to be the "sameness of the issues in both types of 'bad faith' insurance cases and the difficulty of obtaining otherwise relevant facts". 522 So.2d at 1080.

Without further considering the fact that §624.155 **Fla.Stat.** imposed a statutory duty on the part of insurance carriers to act in "good faith" toward their insureds, which is virtually identical to the "fiduciary duty" that was imposed on insurance carriers by common law in third-party "bad-faith" actions, the Fourth District went on to hold as follows:

> We hold 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. 522 So.2d at 1080.

The obvious deficiency in the Fourth District's reasoning, is a total failure to recognize or discuss the fact that §624.155 **Fla.Stat.** did place a duty on insurance carriers to act in "good faith" toward their insureds when handling and settling first-party claims. Further, the court failed to consider what effect a breach of the statutorily created duty would have on insurance carriers, and whether such breach should also make insurance carrier files subject to discovery.

In **Opperman v. Nationwide Mutual Fire Ins. Co.**, 515 So.2d 263 (Fla. 5th DCA 1987), the court, after concluding that §624.155

Fla.Stat. provides a basis for the filing of a first-party claim by an insured against his own insurance carrier for alleged failure to act in "good faith", compared the type of duty that is owed by insurance companies to their insureds in first-party and third-party claim situations:

> A first party cause of action for bad faith has not been considered an unreasonable remedy by the states which have adopted it. In **Gruenberg v. Aetna Insurance Co.**, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973), the court held that the duty of an insurer to act in good faith in settling the claim of its insured was akin to the duty of the insurer to act in good faith in handling claims of third parties against the insured, and that
>
> > These are merely two different aspects of the same duty. That responsibility is not the requirement mandated by the terms of the policy itself--to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Where in so doing, it fails to deal **fairly and in good faith** with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. [Emphasis supplied in original].
>
> 108 Ca.Rptr. at 485, 510 P.2d at 1037. This legal duty is independent of any contractual obligation. **See Egan v. Mutual of Omaha Insurance,** 24 Cal.3d 809, 169 Cal. Rprt. 691, 620 P.2d 1141 (1979), **cert. denied,** 445 U.S. 912, 100 S.Ct. 1271, 63 L.Ed.2d 597 (1980). Rather, the cause of action has been described as a "tortious breach of contract." **See generally** 16A Appleman, Insurance Law and Practice, §8877.25 (1981). Following the lead of California, many states have adopted this theory of recovery by recognizing that an insurer owes to its insured an implied in law duty of good faith and fair dealing. Although not recognizing the tort because the legislature had enacted a statutory remedy for dealing with recalcitrant insurance companies, the court in **Spencer v. Aetna Life & Casualty Insurance Co.**, 227 Kan. 914, 611 P.2d 149, 151-152 (1980) cites many cases from other jurisdictions which have recognized that such a duty exists in first party actions. In addition to the judicially created remedies, many states, like Florida, have adopted statutes, which provide for a civil action

against an insurer for a bad faith refusal to pay policy benefits. For a discussion of some of these statutes, see 15A **Couch on Insurance 2d** §58:2 (1983). 515 So.2d at 266-267.

It is obvious that the Florida legislature intended that the duty which it imposed upon insurance carriers under §624.155 **Fla.Stat.** be construed as identical to the fiduciary duty that exists in third-party "bad faith" actions, since it used the identical language in the statute, that is used in **Fla.Std.Jury Instr. (Civ.)** MI 3.1. A comparison of the two provisions is appropriate:

§624.155(1)(b)(1) Fla.Stat.

(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** [Emphasis supplied].

Fla.Std.Jury Instr. (Civ.) MI 3.1

The issue for your determination is whether (defendant) acted in bad faith in failing to settle the claim of (name) against (insured). An insurance company acts in bad faith in failing to settle a claim against its [policyholder][insured] within its policy limits **when, under all of the circumstances, it could and should have done so, had it acted fairly and honestly toward its [policyholder][insured] and with due regard for his interests** [Emphasis supplied].

The similarity of the duties owed in first-party "bad faith" actions as opposed to third-party "bad faith" actions was expressly recognized in **Fidelity & Casualty Ins. Co. of New York v. Taylor**, 525 So.2d 908 (Fla. 3d DCA 1987), the Third District Court of Appeal decision which is in conflict with the decision presently under review. Insofar as the **Fidelity & Casualty Ins. Co. of New York v. Taylor** accepts the obvious fact that §624.155

Fla.Stat. has imposed a duty upon insurance carriers to act in "good faith" toward their insureds, it is respectfully submitted that such decision is the one which should be established as the law in Florida, and should be followed accordingly. In considering the duty that the statute imposes upon insurance carriers, the Third District recognized the following:

> * * * a case like this one [involving a first-party "bad faith" claim under §624.155 **Fla.Stat.**] is totally indistinguishable from the familiar "bad faith" failure to settle or defend a third-party's action against a liability carrier's insureds. See **Stone v. Travelers Ins. Co.**, 326 So.2d 241 (Fla. 3d DCA 1976); **Boston Old Colony Ins. Co. v. Gutierrez,** 325 So.2d 416 (Fla. 3d DCA 1976), cert. denied, 336 So.2d 599 (Fla. 1976); **American Fire & Casualty Co. v. Davis,** 146 So.2d 615 (Fla. 1st DCA 1962); see also **U.S. Fire Ins. Co. v. Clearwater Oaks Bank,** 421 So.2d 783, 784 (Fla. 2d DCA 1982). In those cases, like this one, the pertinent issue is the manner in which the company has handled the suit including its consideration of the advice of counsel so as to discharge its mandated duty of good faith. Virtually the only source of information on these questions is the claim file itself.
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> *　　　　*　　　　*
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> In our view, because the pertinent issues are the same, there is no basis for distinguishing between the types of "bad faith" insurance cases with respect to the present question. 525 So.2d at 909-910.

Since the duty owed by insurance carriers in the handling and settling of first-party claims under §624.155 **Fla.Stat.** was held to be indistinguishable from the duty owed in third-party "bad faith" claims, the Third District Court of Appeal correctly held that insurance carrier files are subject to production:

> We therefore hold, as does the substantial weight of authority elsewhere on the question, that the claim file is and was properly held producible in this first-party case. **In re Bergeson,** 112 F.R.D. 692 (D.Mont. 1986); **Joyner v. Continental Ins. Cos.,** 101 F.R.D. 414 (S.D.Ga. 1983); **APL Corp. v. Aetna Casualty & Sur. Co.,** 91 F.R.D. 10 (D.Md. 1980); **Cigna-INA/Aetna v. Hagerman-Shambaugh,**

473 N.E.2d 1033 (Ind.Ct.App. 1985); **Brown v. Superior Court**, 137 Ariz. 327, 670 P.2d 725 (1983); **United Servs. Auto. Ass'n. v. Werley**, 526 P.2d 28 (Alaska 1974). 525 So.2d at 910.

It is obvious that when it enacted §624.155 **Fla.Stat.**, the Florida Legislature intended to create a cause of action against insurance carriers that fail to act in "good faith" when handling and settling first-party claims of their own insureds. In order to prosecute such a claim, however, it is vitally important that the insured be able to obtain the insurance carrier's files, since without such production it would be virtually impossible to dctermine and establish whether the insurance carrier fulfilled the duty that the statute imposed upon it. As was stated in **Brown v. Superior Court In and For Maricopa County**, 137 Ariz 327, 670 P.2d 725 (1983), one of the cases cited by the Third District Court of Appeal in **Fidelity & Casualty Ins. Co. of New York v. Taylor, supra:**

> The tort of bad faith arises when an insurance company intentionally denies, fails to process, or fails to pay a claim without a reasonable basis for such action. **Sparks v. Republic National Life Ins. Co.**, 132 Ariz. 529, 538, 647 P.2d 1127, 1136 (1982); **Noble v. National American Life Ins. Co.**, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981); **Farmers Insurance Exchange v. Henderson**, 82 Ariz. 335, 338-39, 313 P.2d 404, 406 (1957)(insurer must give equal consideration to both its own interests and the insured's interests). No matter how the test is defined, bad faith is a question of reasonableness under the circumstances. **Sparks, supra.** The portions of the claims file which explained how the company processed and considered Brown's claim and why it rejected the claim are certainly relevant to these issues.
>
> Further, bad-faith actions against an insurer, like actions by a client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared

> history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming. **APL Corporation v. AETNA Casualty & Surety Co.**, 91 F.R.D. 10, 13-14 (D.Md. 1980). The "substantial equivalent" of this material cannot be obtained through other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to be very important evidence on the issue of whether Continental acted reasonably. 670 P.2d at 734.

See also APL Corp. v. Aetna Casualty & Surety Co., 91 F.R.D. 10 (D.Md. 1980), **Handgards, Inc. v. Johnson & Johnson**, 413 F.Supp. 926 (N.D.Cal. 1976), and **Hodges v. Southern Farm Bureau Casualty Ins. Co.**, 433 So.2d 125 (La. 1983), each of which is discussed in **Fidelity & Casualty Ins. Co. of New York v. Taylor**, 525 So.2d 908, 910, n. 4 (Fla. 3d DCA 1987).

It is recognized that in various cases, a cause of action under 624.155 **Fla.Stat.** may be joined with a primary action to recover insurance benefits, as indeed was the situation in the present case. In fact, pursuant to **Schimmel v. Aetna Casualty & Surety Co.**, 506 So.2d 1162 (Fla. 3d DCA 1987), it is required that both causes of action be brought in the same proceeding based upon the rule against splitting causes of action. Under such circumstances, Florida courts have held that until the right to coverage has been established, the disclosure of the insurance company's work product and privileged materials contained in its files cannot be compelled. **Allstate Ins. Co. v. Swanson**, 506 So.2d 497 (Fla. 5th DCA 1987); **Allstate Ins. Co. v. Shupack**, 335 So.2d 620 (Fla. 3d DCA 1976); **Travelers Ins. Co. v. Habelow**, 405 So.2d 1361 (Fla. 5th DCA 1981). No such problem is present herein, however, because the underlying claim for life insurance benefits

was clearly resolved prior to the time that discovery of MANHATTAN's files was sought; and such discovery was requested solely with regard to the §624.155 **Fla.Stat.** claim.

In the within proceeding, MANHATTAN has produced portions of its files, but has withheld what it describes as its "legal department files". In this particular case, however, MANHATTAN used its legal department, including its General Counsel, to handle KUJAWA's claim from its commencement. This is evident from the first October 25, 1985 letter that was sent by Robert W. Marsh, the Treasurer of JOHN A. KUJAWA's employer, Ropes Associates, Inc., to Florida Insurance Commissioner Bill Gunter, in which it is indicated that:

> Both Mr. Koonjy [MANHATTAN's claims handler] and Mr. Corselli, Manhattan's General Counsel, have stated to us that they intend to seek out any possible grounds upon which they can invalidate the policy and deny the claim [Appendix C 5-6].

As a consequence, MANHATTAN's attempt to distinguish between its "claim files" and its "legal department files" is clearly a red herring. The files in actuality are, or should be considered to be, one and the same, in this action for failure to act in "good faith" as provided for under §624.155 **Fla.Stat.** Moreover, if MANHATTAN's files are discoverable at all, based upon alleged "bad faith", which MANHATTAN presumably conceded when it produced what it indicated were its "claim files", than the files of its attorneys are also discoverable. **Boston Old Colony Ins. Co. v. Gutierrez**, 325 So.2d 416 (Fla. 3d DCA 1976), **Cert. denied**, 336 So.2d 599 (Fla. 1976).

CONCLUSION

From the facts of this case, and from the authorities cited, KUJAWA believes that the Fourth District Court of Appeal erred in quashing the Circuit Court order that required MANHATTAN to produce its complete files in this cause of action brought pursuant to §624.155 **Fla.Stat.** It is accordingly respectfully urged that this Court reverse the decision of the Fourth District Court of Appeal rendered herein, and that it adopt the decision of the Third District Court of Appeal in **Fidelity & Casualty Ins. Co. of New York v. Taylor,** 525 So.2d 908 (Fla. 3d DCA 1987) as the law in Florida relating to discovery of insurance carrier files in actions brought for violation of §624.155 **Fla.Stat.**

It is further respectfully requested that this Court enter an order awarding KUJAWA attorney's fees in accordance with the motion that has been filed with this Court.

Respectfully submitted,

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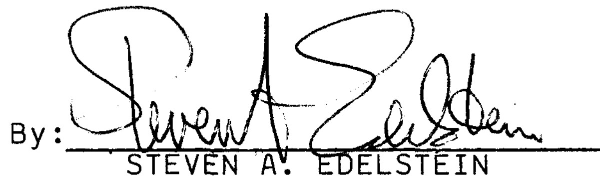
By:____________________

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of Petitioner's Brief Upon the Merits was served by mail this 24th day of October, 1988 to: THE HONORABLE EUGENE S. GARRETT, Circuit Court Judge, Broward County Courthouse, 201 S.E 6th Street, Fort Lauderdale, Florida 33301; MAXINE M. LONG, ESQUIRE, Shutts and Bowen, 1500 Edward Ball Building, Miami Center, 100 Chopin Plaza, Miami, Florida 33131; DIANE H. TUTT, ESQUIRE, Suite 1507, The 110 Tower, S.E. 6th Street, Fort Lauderdale, Florida 33301; RICHARD A. BARNETT, ESQUIRE, Barnett & Hammer, P.A., 4651 Sheridan Street, Suite 325, Hollywood, Florida 33021; PHILLIP STANO, ESQUIRE, American Council of Life Insurance, 1001 Pennsylvania Avenue, N.W., Washington D.C. 20004-2559; and JEFFREY WHITE, ESQUIRE, Association of Trial Lawyers of America, 1050 - 31st Street, N.W., Washington D.C. 20007.

By: 
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