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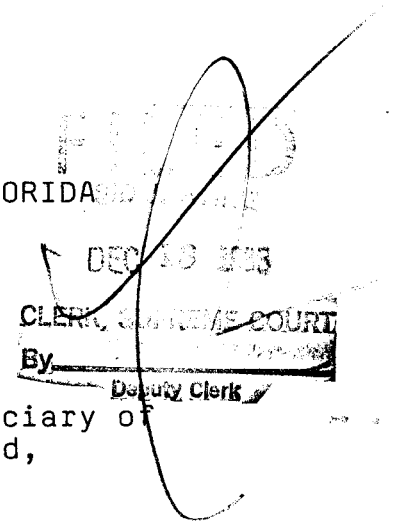

IN THE SUPREME COURT OF FLORIDA

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 REPLY BRIEF ON THE MERITS

STEVEN A. EDELSTEIN, ESQUIRE
LAW OFFICES OF ROLAND GOMEZ
8100 Oak Lane
Miami Lakes, Florida 33016
(305) 825-5506 - Dade
(305) 766-2990c- Broward

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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PETITIONER'S REPLY BRIEF UPON THE MERITS

STATEMENT OF THE CASE AND FACTS

KUJAWA adopts the Statements of the Case and Facts as set forth in her Initial Brief Upon the Merits heretofore filed with this Court. She specifically rejects MANHATTAN'S Statement of the Case and Statement of the Facts, which contain statements that are totally false and misleading, and which are more fully addressed in the Argument portion of this Reply Brief.

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.

SUMMARY OF THE ARGUMENT

In its Brief on the Merits, MANHATTAN has misrepresented facts, and what its responsibilities toward KUJAWA are, all of which are material to a proper understanding of the issue presented. In particular, there was no requirement that MANHATTAN conduct the investigation that it did, particularly when it had no actual or constructive knowledge of any misrepresentation on JOHN A. KUJAWA'S insurance application. The legal issue presented has been adequately briefed, except for MANHATTAN's alleged constitutional issue, which doesn't in fact exist.

ARGUMENT

In its Statement of the Case, MANHATTAN has incorrectly stated that its policy proceeds and interest were tendered to KUJAWA prior to the filing of KUJAWA's Amended Complaint (MANHATTAN Brief, p. 1). This is incorrect. The only offer which MANHATTAN made, prior to the Amendment of KUJAWA's Complaint, included the policy proceeds, plus costs and attorneys fees. (Appendix 13-14) The inclusion of interest was not communicated to KUJAWA, and was not included in such offer.

Interestingly, MANHATTAN has produced a check dated "12/17/85", which purportedly represents the payment of the policy proceeds with interest. Such check, however, appears to have been issued much later, and to have been back-dated, when compared with MANHATTAN's "Jan. 31, 1986" check for $750.00 made payable to KUJAWA's counsel, representing attorneys fees. Both checks are drawn on the same account; however, the January 31, 1986 check has

the printed number "42000023480" on it, while the December 17, 1985 check has the much higher number "4300003501" printed on it.

Further to the above, MANHATTAN has consistently stated that it was unable to pay KUJAWA's claim until it completed the investigation that it stated was mandatorily required during a "contestability period" (Appendix C 9-10, 17, 32-35). The medical authorization which MANHATTAN needed to complete its investigation, however, was not forwarded to MANHATTAN until December 18, 1985, the day after the "12/17/85" date on MANHATTAN's check. Additionally, the investigation, which MANHATTAN's had performed by Equifax, Inc. (Appendix C 67-84), was not concluded until January 27, 1986, and was not received by MANHATTAN until January 31, 1987, when it was date stamped into the Claims Department (Appendix C 77-79). Under these circumstances, there are serious questions concerning the check which MANHATTAN issued and dated "12/17/85". Even if no such questions existed, however, it is obvious that the check which was issued on 12/17/85 did not include interest through January, 1986.

In its Statement of the Facts, MANHATTAN has indicated that there is a two year contestability period that was "provided by the policy and mandated by section 627.409(1), Fla. Stat. (1987)" (MANHATTAN Brief, pp. 2-3). This also is totally false, for numerous reasons.

First, 1987 Statutes do not apply to a 1985 claim. Second, §627.409(1) **Fla.Stat.** (1985) says nothing about contestability periods. It relates to Representations in applications for

insurance. Third, since KUJAWA's claim was presented, MANHATTAN has continuously attempted to assert that it was somehow required to conduct an investigation of the claim because it was within a contestability period. This was initially based upon New York law, however, when push came to shove, the "New York" law which MANHATTAN relied upon had nothing whatever to do with claims handling. Section 4224(a)(1) of the New York Insurance Laws relates to discrimination in payments of premiums, rates, benefits provided in policies, and in terms and conditions of policies (See KUJAWA Brief on the Merits, pp. 5-6, Appendix C 15-16, 17, 32-36). MANHATTAN has totally failed to provide any authority for its assertion that it is "required" to conduct an extensive investigation into a claim that is made during a contestability period, based solely upon the time that the claim is presented.

At the present time MANHATTAN is arguing that it is "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)" (MANHATTAN Brief, pp. 36-37). Here again, it should be pointed out that 1987 statutes do not apply to 1985 claims. In this particular instance, however, this is not important, because the statute which MANHATTAN relies upon didn't exist in either 1985 or in 1987. In point of fact, it never existed at all.

As with New York, Florida does not have a statutory provision which precludes discrimination in claims handling. What Florida does have, is its Civil Remedy Statute, §624.155(4) **Fla.Stat.**, which provides, **inter alia**, that punative damages may only be

awarded in situations where the alleged failures to act in "good faith" "occur with such frequency as to indicate a general business practice" and are either:

> (a) Willful, 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 policy.

The present case is clearly one where MANHATTAN, without any justification whatsoever, arbitrarily decided to attempt to avoid its responsibility to pay to KUJAWA the life insurance policy proceeds that it owed. In so doing it violated §624.155 **Fla.Stat.**, which violation forms the sole basis of KUJAWA's present cause of action.

It should be noted that MANHATTAN has stated that it 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)" ["1987" rather than 1985 again]. (MANHATTAN Brief, p. 35). In actuality, the rule was more correctly stated in **North Miami General Hospital v. Central National Life Ins. Co.**, 419 So.2d 800 (Fla. 3d DCA 1982), wherein it was held that:

> The rule is that an insurance company has the right to rely on an applicant's representations in an application for insurance and is under no duty to inquire further, **New York Life Insurance Company v. Nespereira**, 366 So.2d 859 (Fla. 3d DCA 1979), unless it has actual or constructive knowledge that such representations are incorrect or untrue. **Hardy v. American Southern Life Insurance Company**, 211 So.2d 559 (Fla. 1968); **Joe's Creek Industrial Park, Inc. v. Loyal American Life Insurance Company**, 251 So.2d 348 (Fla. 2d DCA 1971).

Considering this rule, it is perhaps curious at best, to know why MANHATTAN chose to conduct such an extensive investigation into KUJAWA's claim, on the pretext that it was a "routine investigation", when it had no actual or constructive knowledge of the existence of any incorrect or untrue representation on the insurance application. Clearly the investigation itself turned up nothing which indicated any misrepresentation on the insurance application. The only logical conclusion is that the Treasurer of JOHN A. KUJAWA's employer was accurate, when he wrote to Florida's Insurance Commissioner, and stated 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](See KUJAWA's Brief on the Merits, p.4).

Despite the various inaccuracies and misrepresentations both of fact and law, which have been set forth in MANHATTAN's Brief, the real issue presented in this proceeding concerns the duty which an insurance carrier has to act in "good faith". MANHATTAN has argued that in a third-party bad faith action, this duty is created, based upon a fiduciary duty that exists between the insured and the insurance carrier, which is different from the duty which is imposed upon insurance carriers by §624.155 **Fla.Stat.** It is not disputed that the duties imposed in each situation are identical. MANHATTAN merely argues that the duties are derived from different sources.

KUJAWA, on the other hand, takes a more pragmatic approach, **i.e.**, "a rose is a rose is a rose". Stated otherwise, the duty to

act in good faith, is the duty to act in good faith. The source of the duty is not as significant as the duty itself, as long as they both form a part of the insurance contract, and there is no dispute that the duty exists in both first-party and third-party claim situations (See KUJAWA Brief on the Merits, p. 18).

Both sides have briefed the issue concerning whether KUJAWA is entitled to discovery of MANHATTAN's complete files, and the arguments presented do not need to be rehashed at this juncture [other than the constitutional argument, which is addressed below]. Sufficeth to say, the proof that is required to establish a first-party "bad faith" action, which is brought pursuant to §624.155 **Fla.Stat.**, is the same proof that is required to establish a third-party "bad faith" action. To preclude the discovery in a first-party "bad faith" action, of the same materials that are discoverable in a third-party "bad faith" action, is itself discriminatory. It could totally prevent a wronged insured from proving his cause of action against the insurer which wronged him, and thus emasculate the Civil Remedy Statute. Clearly the statute only has value if it serves as a deterent against insurance carriers acting in bad faith. If no cause of action can be proven, because insurance carriers can hide behind the "fiduciary duty" argument advanced by MANHATTAN, and preclude discovery of their files, than the statute will have no value at all.

The only argument which MANHATTAN has advanced, which has not previously been addressed by KUJAWA, relates to a claimed constitutional question. It is submitted that no real

constitutional question is presented in the present proceeding. As noted by MANHATTAN, the Florida legislature has previously enacted statutes which include procedural aspects, despite the constitutional prohibition against this. **See, e.g.,** The Florida Evidence Code, Chapter 90 **Fla.Stats.** In reviewing such statutes, this Court has adopted the procedural aspects, thus eliminating any constitutional infirmity. **In re Florida Evidence Code,** 372 So.2d 1369 (Fla. 1979). Surely, if a similar situation existed in the present case, the matter is being considered by the proper authority that can clarify or rectify any procedural questions that may be presented.

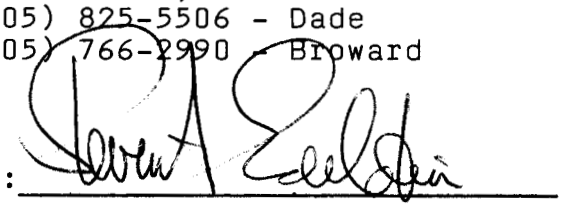
CONCLUSION

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,

STEVEN A. EDELSTEIN, ESQUIRE
LAW OFFICES OF ROLAND GOMEZ
8100 Oak Lane
Miami Lakes, Florida 33016
(305) 825-5506 - Dade
(305) 766-2990 - Broward

By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of Petitioner's Notice of Firm Name Change and Change of Address was served by mail this 12th day of December, 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: 
STEVEN A. EDELSTEIN