IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC06-2508

DCA Case No. 4D06-421

PETER GENOVESE,

Petitioner,

v.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.

On Petition for Review of a Decision of the Fourth District Court of Appeal

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RESPONDENT'S ANSWER BRIEF

SHUTTS & BOWEN LLP
John E. Meagher
Florida Bar No. 511099
jmeagher@shutts.com
Jeffrey M. Landau
Florida Bar Number 863777
jlandau@shutts.com
Stephen T. Maher
Florida Bar Number 200859
smaher@shutts.com
201 South Biscayne Boulevard
Suite 1500, Miami Center
Miami, Florida 33131
Telephone: 305-358-6300
Facsimile: 305-381-9982

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PREFACE

Petitioner Peter R. Genovese will be referred to as "Petitioner" and "Genovese." Respondent Provident Life and Accident Insurance Company will be referred to as "Respondent" and "Provident." The symbol "App." will refer to Petitioner's Appendix. The symbol "R." will refer to the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Introduction

This proceeding presents the question of whether this Court's opinion in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d. 1121 (Fla. 2005), is binding here, in a case presenting the question of whether an insurance company, in a first-party bad faith case brought pursuant to section 624.155 of the *Florida Statutes*, has the right to assert the statutorily protected attorney-client privilege with respect to communications with its attorneys in the underlying first-party breach of contract lawsuit between the insured and the insurer. The *Ruiz* case decided the question of whether certain documents were entitled to "work product" protection in "first party" insurance bad faith actions. Because that case did not involve attorney-client privileged communications, Provident asserts, in accord with the Florida District Courts of Appeal that have considered the issue, that *Ruiz* did not decide the issue presented here, and further contends that this Court did not overrule the part of its decision in *Kujawa v. Manhattan National Life Insurance Co*., 541 So.2d

1168 (Fla. 1989), where this Court expressly held that insurers are entitled to assert the attorney-client privilege in first party bad faith cases.

The trial court below determined that *Ruiz* abolished the statutory attorney-client privilege in the context of first party bad faith lawsuits. The Fourth District Court of Appeal disagreed with the trial court and quashed the trial court's order mandating production of attorney-client privileged materials. The Fourth District certified the question:

> Does the Florida Supreme Court's holding in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), relating to discovery of work product in first-party bad faith actions brought pursuant to section 624.155, Florida Statutes, also apply to attorney-client privileged communications in the same circumstances?

This Court should answer the question in the negative, reaffirm its well-reasoned holding on the attorney-client privilege in *Kujawa*, and agree with the Fourth District below, and with the other District Courts of Appeal that have examined the issue since *Ruiz*, and hold that attorney-client privileged communications must be protected from disclosure in this and other first party bad faith cases.

Statement of the Facts and the Case

Because the statement of facts set forth by Genovese is incomplete and misleading, at best, Provident sets forth its own statement of the facts and case. This lawsuit is the second of two lawsuits between the same parties arising from

the same alleged breaches of the same disability insurance policy #06-337-5016865 ("the Policy"), issued to Genovese by Provident. In late 1997, Genovese made a claim for benefits pursuant to the Policy, claiming that, due to motor neuron disease, he was totally disabled from performing the duties of his occupation as a physician/owner of three walk-in clinics. (R.9) Provident accepted Genovese's claim and began making monthly disability payments to him pursuant to the Policy. (R.9)

After obtaining additional information that call Genovese's disability status and entitlement to benefits into question, Provident initiated a declaratory judgment action in the Circuit Court for Broward County, *Provident Life and Accident Insurance Company v. Genovese*, Case No. 99-014964 (18), filed August 25, 1999 ("*Genovese I*"), seeking a declaration of its rights and obligations under the Policy and that Genovese was not totally disabled under the terms of the Policy. (R.9) After filing the *Genovese I* lawsuit, Provident continued to pay Genovese monthly disability benefits. Because Provident contested the legitimacy of Genovese's claim, those payments were made under a reservation of rights. (R.9)

On December 11, 2000, more than one year after suit was filed, and one month prior to trial, Genovese filed a motion for summary judgment, asserting that the Florida Declaratory Judgment statute could not be used by insurers such as

Provident to determine their liability to their insureds. (R.10) On January 2, 2001, less than one week prior to the scheduled start of the trial that would have resolved the factual dispute regarding Genovese's disability, the court conducted a hearing on Genovese's motion. Genovese argued that, because Provident was continuing to pay him his monthly benefits (**in order to avoid the very allegations of bad faith termination of those benefits that are the gravamen of this lawsuit**), Provident could not use Florida's declaratory judgment statute to determine its liability for payment of disability benefits pursuant to the Policy.[1] **At that same hearing, Provident forcefully argued that the declaratory judgment statute was available to an insurer so that liability could be determined without requiring the insurer to terminate the insured's monthly benefits. This way, the insured would continue to receive his benefits during the pendency of the lawsuit and the insurer would protect itself from exposure to a bad faith case.** (App. at P22/L1-P24/L17).

The Circuit Court agreed with Genovese, and told Provident the only avenue open to it to obtain a judicial determination of its liability to Genovese was to terminate Genovese's benefits. At the hearing, the court went as far as to advise

[1] A copy of the transcript of that hearing is attached as an Appendix to this brief, and shall be referenced by the transcript page and lines. *Jones v. State of Florida*, 2 So. 3d 302 (Fla. 2d DCA 2008) (stating that appellate court can take judicial notice of transcript of hearing of prior proceeding in an appeal between the same parties).

Provident: "just don't pay him," see App. at P22/L22, P24/L22, because that would then result in Provident being sued for breach of contract, at which point Provident could present the evidence concerning liability to a jury. (App. at P24/L22). On January 5, 2001, one business day before the January 8, 2001 scheduled trial date, the court entered an Order granting Genovese's motion for summary judgment and dismissed the declaratory judgment case with prejudice. (R.10) Provident appealed. (R.10).

Having thus lost its right to have Genovese's entitlement to benefits determined pursuant to the declaratory judgment act, due to Genovese's concerted efforts to make that remedy unavailable, Provident notified Genovese, through his counsel, by letter dated March 27, 2001, that it would no longer pay him monthly benefits because he did not meet the Policy definition of total disability. (R.10).

After thus securing the "denial" of his claim, the apparent goal of his summary judgment efforts, on May 17, 2001, s*ee* App. at P25/L24-P26/L12, **Genovese filed a notice "confessing error" in the Fourth District Court of Appeal, acknowledging that, despite his earlier arguments to the contrary in the Circuit Court, Provident was correct in contending that it was entitled to bring a declaratory judgment action to determine its obligations, if any, under its disability insurance policy with Genovese.**

In these proceedings, Genovese peddles a version of these undisputed facts, what he refers to as "the alleged bad faith conduct" "done by attorneys representing Provident," Brief at p. 16, that does not have much connection to the actual events, but sounds particularly menacing. Genovese asserts, on these undisputed facts, that, "the conclusion is inescapable that Provident terminated Dr. Genovese's benefits while the Summary Judgment was on appeal as a punishment for Dr. Genovese obtaining the Summary Judgment, and a method for coercing a settlement of the disability claim on terms favorable to Provident." Brief at p. 17. The termination of Genovese's benefits was, according to Genovese, "conduct by Provident and its attorneys" that "was a breach of the fiduciary duty each owed to Dr. Genovese. Brief at pp. 17-18.

However, in light of the undisputed facts, Petitioner's description of Provident's "bad faith" benefits termination as "retaliatory," "punishment," "threatening," or "coercive," Brief at p. 17, is clearly inaccurate. The undisputed facts also demonstrate that it is also untrue that "the bad faith conduct must necessarily come from the communications between Provident and its counsel in which they discussed the lack of merit of their defense and the intention to procure a favorable settlement by withholding payments." Brief at p. 17. And, Petitioner's accusation that Provident was "dragging the litigation out," Brief at p. 20, is

particularly ironic, as the record shows that it was Petitioner who, on the very eve of trial, had the case dismissed based on an admittedly specious legal argument.

On May 30, 2001, based on Petitioner's confession of error, the Fourth District Court of Appeal reversed the trial court's summary judgment, and remanded to the trial court. *Provident Life and Accident Ins. Co. v. Genovese*, 785 So. 2d 1245 (Fla. 4th DCA 2001). On September 5, 2001, **Genovese asserted a counterclaim in *Genovese I* for breach of contract resulting from the non-payment of monthly disability benefits allegedly due and unpaid following Provident's cessation of his monthly benefits on March 27, 2001**. (R.11). One month later, on October 2, 2001, Genovese served a Civil Remedy Notice of Insurer Violation, (R. 45−46), a condition precedent to a later bad faith cause of action.

Genovese I was tried to a jury from February 4 to February 7, 2002, on both Provident's Complaint and Genovese's Counterclaim for breach of contract. The jury returned its verdict on February 7, 2002, finding that Genovese was totally disabled commencing December 8, 1997, not on November 14, 1997, as Genovese had claimed in his lawsuit. (R.11, 42-43). The verdict form required the jury, through its foreperson, to write the initial date of disability on the verdict. (R.43). Final judgment in *Genovese I* was entered on July 11, 2002, and has been satisfied, including Provident's payment of all costs, interest and attorney's fees. (R.11-12).

The instant case ("*Genovese II*"), was filed by Genovese in September 2002. The complaint contains two counts, for statutory bad faith against Provident under section 624.155 of the *Florida Statutes*, in connection with the cessation of his monthly total disability payments during the course of *Genovese I*,[2] together with a separate count for breach of contract related to Provident's termination of Genovese's benefits at age sixty-five.[3]

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[2] For example, in his Civil Remedy Notice of Insurer Violation, Genovese states with respect to the *Genovese I* lawsuit, "[p]rior to a hearing on a motion brought by Dr. Genovese in his defense, counsel for Provident informed Genovese's counsel that if he persisted in so defending Dr. Genovese, Provident would cease paying any benefits. After Dr. Genovese went forward with such motion, Provident did cease paying benefits." (R. 45) (emphasis added). Assuming *arguendo* that such a statement actually was made, it is entirely consistent with the arguments made by both Genovese's and Provident's counsel at the summary judgment hearing on January 2, 2001, in that if the declaratory judgment act could not be used to determine Provident's potential liability to Genovese while it continued to pay him benefits under a reservation of rights, the only way that Provident could obtain such a judicial determination would be to deny Genovese's claim, and open itself to a later bad faith claim. App. at P22/L7-9 (at that hearing, Provident's counsel presciently explained: "If we don't pay them – that's right. That is what makes it so silly. Then they'll come in and sue us and say we're acting in bad faith"). That, of course, is exactly what happened.

[3] The count for breach of contract is unrelated to the statutory bad faith count, and thus is not at issue on this appeal. In *Genovese I*, the jury stated on the verdict form that Genovese became disabled on December 8, 1997, after his sixtieth birthday. (R. 43). Under the terms of the Policy, disability benefits are payable for life only when the insured becomes disabled before age 60. If an insured becomes disabled after his 60th birthday, benefits are not payable for life. Based on the jury's verdict in *Genovese I* by which Genovese became disabled after his 60th birthday, Provident terminated Genovese's benefits at age 65. (R. 12).

The discovery dispute addressed by this appeal relates solely to Genovese's claim for statutory bad faith. That claim alleges that Provident wrongfully terminated Genovese's benefits via letter dated March 27, 2001, in bad faith. In discovery, Provident produced its entire claims file to Genovese, including some internal attorney-client privileged communications between Provident's claims department and in-house attorneys. Genovese then served his Second Supplemental Request for Production ("SSRFP") (R. 48-49), which sought in pertinent part:

> 1. Your entire litigation file, cover to cover, by whatever name, in whatever form, regarding Plaintiff's claim(s) for disability benefits.
>
> * * * * *
>
> 3. All correspondence and communications, by whatever name in whatever form, by and between Shutts and Bowen, John Meagher, Esquire, John Kolinski, Esquire and/or Sandra Upegui, Esquire and Provident regarding Plaintiff's claim(s) for disability benefits, generated up to and including February 7, 2002.

Provident objected to the SSRFP (R.51-60). Following a Motion to Compel by Genovese, on December 29, 2005, the trial court entered the Order at issue in the appeal. (R. 39-40). That Order required Provident to produce its complete litigation file from the *Genovese I* lawsuit up to, and including, the February 7, 2002 date of verdict. Although the trial court made it clear that Genovese could not obtain communications between Provident and its outside counsel after the date

of the verdict, it did not place any limits on the discovery of such communications during the *Genovese I* litigation. (R. 40).

Provident sought *certiorari* review to the Fourth District Court of Appeal. (R.1). At issue here is that part of the Fourth District's opinion which quashed that part of the trial court's order requiring Provident to produce communications between itself and its outside litigation counsel in *Genovese I*, finding that those communications were protected by the attorney-client privilege. *Provident Life and Accident Ins. Co. v. Genovese*, 943 So. 2d 321, 322 (Fla. 4th DCA 2006) ("*Genovese II*"). In so doing, the court certified the following question to this Court as one of great public importance:

> Does the Florida Supreme Court's holding in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), relating to discovery of work product in first-party bad faith actions brought pursuant to section 624.155, Florida Statutes, also apply to attorney-client privileged communications in the same circumstances?

STANDARD OF REVIEW

Provident agrees that the standard of review is *de novo* on the controlling questions of law presented.

SUMMARY OF THE ARGUMENT

This case is before the Court on a question certified to be of great public importance:

> Does the Florida Supreme Court's holding in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), relating to discovery of work product in first-party bad faith actions brought pursuant to section 624.155, Florida Statutes, also apply to attorney-client privileged communications in the same circumstances?

The Fourth District Court of Appeal below, like the First District before it in *XL Specialty Insurance Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578 (Fla. 1st DCA 2006), a court that had earlier certified the same question to this Court, found that *Ruiz* had not decided the question of the continued viability of attorney-client privilege from the underlying case in first party bad faith cases, and both courts found such communications were still fully protected under Florida law.

Ruiz involved only the application of the work product doctrine in a first party bad faith action. That is clear from the opinion and from what was before the Court for decision in that case. Even Petitioner agrees that this Court in *Ruiz* "recognized that it was not presented the issue of attorney-client privilege in a first party bad faith case and, therefore, could not decide that issue." Brief at p. 16.

All the District Courts of Appeal of Florida that have considered the

question since *Ruiz* have found that *Ruiz* did not decide the question of attorney-client privilege. They have also determined that the attorney-client privilege in first-party bad faith cases should continue to be protected. *See XL Specialty, Genovese II*, *Liberty Mut. Fire Ins. Co. v. Bennett*, 939 So. 2d 1113 (Fla. 4th DCA 2006), *Progressive Express Ins. Co. v. Scoma*, 975 So. 2d 461 (Fla. 2d DCA 2007), and *West Bend Mutual Insurance Company v. Higgins*, No. 5D08-2987, 2009 WL 790145 (Fla. 5th DCA Mar. 27, 2009). Thus, there is no reasoned basis to conclude that *Ruiz* is binding on the question at the heart of this dispute, whether an insured may obtain, during a first party bad faith case, the attorney-client communications between an insurer and its counsel that occurred during the preceding underlying breach of contract litigation.

Ruiz receded from a portion of this Court's opinion in *Kujawa v. Manhattan National Life Insurance Co*., 541 So. 2d 1168 (Fla. 1989). However, the District Courts of Appeal that have analyzed *Ruiz* have all concluded that the part of *Kujawa* that dealt with the attorney-client privilege remains and continues to protect the attorney-client privilege in the first party context.

That decision makes sense, because the reasoning that this Court used to abrogate the work product privilege in *Ruiz*, when applied to attorney-client privilege, does not abrogate the attorney-client privilege. In *Ruiz*, this Court's decision to abolish work product privilege in first party bad faith cases was clearly

based on the *need* for such materials. This rationale, while compelling in the work product context, cannot extend to attorney-client privileged communications. Need is never a permissible basis to allow access to attorney-client privileged communications.

In addition, work product privilege is protected by court rule, not statute, and attorney-client privilege, unlike work product privilege, is enshrined in Florida's Evidence Code, section 90.502 of the *Florida Statutes*. Section 624.155 of the *Florida Statutes*, the statutory bad faith section, does not even mention, let alone repeal, the statutory protection of attorney-client privilege contained in section 90.502 of the *Florida Statutes*. While the Court has the power to affect work product privilege, it may not abrogate the statutory protection of the attorney-client privilege. Accordingly, this Court's entire rationale for abrogating the work product privilege in *Ruiz* fails to reach the attorney-client privilege.

Important policy reasons exist to preserve attorney-client privilege that do not exist in the case of the work product privilege. The attorney client privilege is an interest traditionally deemed worthy of maximum legal protection. Few evidentiary privileges are as jealously guarded as the attorney-client privilege. Notwithstanding the probative evidence that could always be obtained through its breach, strong policy reasons exist to protect against the breach of the privilege.

The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Without the assurance of confidential communication, it would be impossible for an insurer's counsel to provide the company with candid legal advice in a dispute. The importance of frank discussions to fair decisions cannot be overstated.

When Petitioner seeks to abrogate the attorney-client privilege, he is not speaking for the public, who seeks fair (not one-sided) claims handling, or for policy holders, who want the company to pay only meritorious claims, or even for claimants as a whole, who want their claims fully evaluated. The insurer's duty runs to all its policy holders, not just those making claims. Policy holders count on the insurance company to weed out and deny meritless claims made by other policyholders, and the company needs access to confidential legal advice during that process and during first party litigation over claims. Where a close case cannot be fully examined because confidential legal advice is not available, all the policyholders, as well as the public interest, are the losers, even though certain members of the plaintiff's bar may not see it that way.

ARGUMENT

I. DOES THE FLORIDA SUPREME COURT'S HOLDING IN *ALLSTATE INDEMNITY CO. V. RUIZ*, 899 So. 2d 1121 (Fla. 2005), RELATING TO DISCOVERY OF WORK PRODUCT IN FIRST PARTY BAD FAITH ACTIONS BROUGHT PURSUANT TO SECTION 624.155 OF THE FLORIDA STATUTES, ALSO APPLY TO ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS IN THE SAME CIRCUMSTANCES?

A. THE ATTORNEY-CLIENT PRIVILEGE WAS NOT BEFORE THE COURT IN *RUIZ*, WAS NOT ADDRESSED THERE, WAS NOT ABROGATED THERE, AND THIS COURT SHOULD NOT ABROGATE IT HERE

In the first sentence in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), this Court stated:

> We have for review *Allstate Indemnity Co. v. Ruiz*, 780 So. 2d 239 (Fla. 4th DCA 2001), which expressly and directly conflicts with a number of cases from other district courts **with regard to issues concerning application of work product privilege to shield documents from discovery in the insurance bad faith context**.

899 So. 2d at 1122 (emphasis added). This Court also stated:

> We granted Allstate's petition **to review the district court's determination which analyzed and addressed the asserted work product privilege**. *Allstate Indemnity Co. v. Ruiz*, 796 So. 2d 535 (Fla. 2001) (table).

899 So. 2d at 1124 (emphasis added).

Thus, *Ruiz* involved only the application of the work product doctrine in a first party bad faith action.[4] Even Petitioner agrees that this Court in *Ruiz* "recognized that it was not presented the issue of attorney-client privilege in a first party bad faith case and, therefore, could not decide that issue." Brief at p. 16.[5] Because of the nature of the disputed documents in *Ruiz*, the attorney-client privilege was not an issue in *Ruiz*. The attorney-client privilege was also not raised by Allstate nor addressed by this Court.[6] The *Ruiz* trial court ordered the disputed

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[4] The majority opinion in *Ruiz* contains the phrase "work product" approximately thirteen (13) times. It contains the phrase "claim file" or "claim file type materials" and "prepared in anticipation of litigation," all phrases associated **exclusively** with "work product" protection approximately seventeen (17) times. **It does not contain the phrase "attorney-client privilege."**

[5] The record confirms this. *Ruiz*'s description of the documents at issue, and the manner in which that case had been handled, are crucial to understanding what this Court did and did not address and decide in *Ruiz*. This Court specifically observed **none of the disputed documents were "attorney-client communications which could be concealed from disclosure.**" 899 So. 2d at 1123 (emphasis added).

[6] The briefs submitted to the Florida Supreme Court in *Ruiz*, together with the oral argument in that case, confirm that the issue of attorney-client privilege was neither argued nor addressed. *See* Appendix to Petition for Writ of Certiorari (R. 35) at Tab 7 (Unofficial transcript of oral argument, not exact, but submitted to show flavor of the argument); (R.35 at Tab 8) (Petitioner's initial brief); (R.35 at Tab 9) (Respondent's brief); (R.35 at Tab 10) (Petitioner's Reply Brief); and (R.35 at Tab 11) (Amicus Brief in support of Respondent).

documents[7] to be produced after an *in camera* inspection led it to conclude that **none of the documents requested constituted attorney-client communications**.

Thus, in *Ruiz*, the effect of allegations of first party bad faith on the attorney-client privilege was not before this Court in that case and was not decided in that case. The First District Court of Appeal in *XL Specialty*, concurred with this analysis stating: "the Court in *Ruiz* could not have reached the issue of attorney-client privilege because it was totally absent in the appellate process and accordingly was not dispositive of the case." 929 So. 2d at 583. Accordingly, the *XL Specialty* court concluded, as this Court should, that this Court only intended to decide the viability of the work product privilege in the first party bad faith context in *Ruiz:*

> Therefore, the holding in *Ruiz* applies only to the work-product privilege. As stated by Justice Wells, in his separate opinion in *Ruiz*, "the only issue being decided in this case is the discovery of work product in the claims file pertaining to the underlying insurance claim." 899 So. 2d at 1132 (Wells, J., concurring in part and dissenting in part). The majority does not take issue with his characterization of the issue in the case, understandably because it

[7] The disputed documents in *Ruiz* consisted of "Allstate Indemnity's claim and investigative file and materials, internal manuals, and [Allstate insurance agent] Paul Cobb's file in connection with the pending alleged 'bad faith' action." *Id.* at 1123. The Fourth DCA had affirmed the trial court as to certain of the documents but reversed as to others, finding them to be "work product" and thus protected from discovery absent the proper showing pursuant to rule 1.280(b) of the Florida Rules of Civil Procedure, which had not been made. None of the documents were claimed to be, or found to be, attorney-client communications.

> describes it in the same manner. "[O]ur determination essentially eliminates the basis of the discovery dispute and the issue giving rise to the conflict between the decision below and the multiple decisions of other district courts of appeal *pertaining to when work product privilege attaches* to shield documents from production in this context." *Id*. at 1130 (emphasis added).

929 So. 2d at 583.

The only possible reference to attorney-client privilege in *Ruiz* was a diminutive slice of unclear dicta. The dicta in question was most recently the focus of examination by the Fifth District Court of Appeal in *Higgins.* *Higgins* found that *Ruiz* did not address the question of attorney-client privilege, and that attorney-client privilege should remain untouched in first party bad faith cases.[8] In *Higgins*, the Fifth District Court of Appeal noted:

> There is one phrase, on page 1129 of the *Ruiz* opinion:

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[8] The Court in *Higgins* noted that:

> Although the Florida Supreme Court has concluded that section 624.155 applies to first-party insurance disputes as well as third party claims, and that the immunity from disclosure of the claim file based on work product ought not to apply**, nothing in *Ruiz* suggests that the attorney-client privilege** available to any contracting party, including insurers, **somehow evaporates uniquely for insureds upon the filing of a bad-faith claim. We see nothing in *Ruiz* to suggest that a first-party insurer against whom a bad faith claim has been made is subject to the exposure of all its communications with its own counsel.**

2009 WL 790145, at *1 (emphasis added).

> In contrast, a case like this one is totally indistinguishable from the familiar "bad faith" failure to settle or defend a third party's action against a liability carrier's insureds. 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 faith. Virtually the only source of information on these questions is the claim file itself.
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> (Emphasis supplied [by Court].) **It is not clear what this means; it may be a reference to a defense of advice of counsel. This one cryptic phrase in a ten-page opinion, otherwise expressly pertaining to work product, is no basis to conclude that the attorney-client privilege no longer exists in first-party insurance cases.** *See Ruiz*, 899 So.2d at 1132 (Wells, J., dissenting).

West Bend Mutual Insurance Company v. Higgins, No. 5D08-2987, 2009 WL 790145, at *1, n. 1 (Fla. 5th DCA Mar. 27, 2009) (emphasis added, except the italicized emphasis which was supplied by the court).

All the District Courts of Appeal that have considered the question since *Ruiz* have found that *Ruiz* did not decide the question of attorney-client privilege, and have also all determined that a proper ruling on attorney-client privilege in first party bad faith cases, is that it should continue to be protected. *XL Specialty*, 929 So. 2d at 583; *Genovese II; Liberty Mut. Fire Ins. Co. v. Bennett*, 939 So. 2d 1113 (Fla. 4th DCA 2006); *Progressive Express Ins. Co. v. Scoma*, 975 So. 2d 461 (Fla. 2d DCA 2007); and *Higgins*, 2009 WL 790145, at *1. There is no reasoned basis to conclude that *Ruiz* is binding on the question at the heart of this dispute, whether an insured may obtain, during a first party bad faith case, the attorney-client

communications between an insurer and its litigation counsel during the preceding underlying breach of contract litigation. *Higgins*, the most recent and best reasoned District Court of Appeal decision on the question, makes a compelling case against permitting such discovery. Petitioner largely ignores these important recent cases in his Initial Brief.

Although not mentioned in the Petitioner's Initial Brief, the "best case" for the argument that *Ruiz* decided any question of attorney-client privilege is stated in *Adega v. State Farm Fire and Cas. Ins. Co.*, No. 07-20696-CIV, 2008 WL 1009719 (S.D. Fla. Apr. 9, 2008). In *Adega*, Magistrate Judge Brown explained that he was "begrudgingly"[9] following an interpretation of *Ruiz* made by Judge

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[9] Judge Brown explained his reservations with his decision in some detail:

> The reason for the use of the word "begrudgingly" is because of the analysis that appears in the *Ruiz* decision and those cases following it, addressing whether it includes attorney-client protected materials in its decision allowing discovery. While the Florida courts have discussed, at length, the discovery that should be permitted in a bad faith case, **there has been precious little analysis of the sanctity of the attorney-client privilege - a cornerstone of the entire judicial/legal system in this country**. Even in *XL Specialty*, which ruled that Ruiz did not intend that discovery include attorney-client protected documents, **there is precious little discussion about that privilege itself**, and even less in [*Liberty Mutual Fire Insurance Company v.*] *Bennett* [939 So.2d 1113, 1114 (Fla. 4th DCA 2006)].

Adega v. State Farm Fire and Cas. Ins. Co., No. 07-20696-CIV, 2008 WL 1009719, at *2 (S.D. Fla. Apr. 9, 2008) (emphasis added). While this observation was arguably true of earlier District Court of Appeal decisions on the question, it is (cont.)

Moreno in *Nowak v. Lexington Insurance Company*, No. 05-21682-CIV-MORENO, 2006 WL 3613760, at *1 (S.D. Fla. June 22, 2006)[10] finding that "[t]here is some 'persuasive indication' that the Supreme Court would differ with *XL Specialty* and find the attorney-client privilege does not protect attorney-client material from discovery in a subsequent first-party bad faith suit." *Id.* However, as shown above, those courts' prediction that this Court would overrule *XL Specialty* was speculation based exclusively on dicta in *Ruiz*.[11]

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clearly not true of the recently decided *West Bend Mutual Insurance Company v. Higgins*, No. 5D 08-2987, 2009 WL 790145, at *1, n. 1 (Fla. 5th DCA Mar. 27, 2009).

[10] After ruling as he did, Judge Moreno certified the issue of whether the attorney-client privilege applies as a bar to discovery in a first-party bad faith suit is one that involves a controlling question of law as to which there is substantial ground for difference of opinion, 28 U.S.C. § 1292(b), and stayed the case "pending the Eleventh Circuit's review of the Certified Question or the Florida Supreme Court's decision on this issue, whichever is sooner."

[11] Not all federal district courts have interpreted *Ruiz* in the manner it was interpreted by Judges Moreno and Brown. The Federal District Court in *Valenti v. UNUM Life Insurance Company of America*, Case No. 8:04-CV-1615-T-30TGW, (R.35 at Tab 12) also interpreted *Ruiz*:

> In light of the fact that the *Ruiz* decision only talked about the work product doctrine, it would be an unreasonable leap to conclude that the decision also negated the attorney-client privilege in bad faith insurance actions. After all, the attorney client privilege is a deeply embedded principle of law, far more than the work product doctrine. Further, the attorney client privilege has been statutorily defined in Florida. *See* Section 90.502, Florida Statutes. The statute, moreover, has set forth specific exceptions to the attorney client privilege, § 90.502(4), Fla. Stat., and there is no exception for bad faith

(cont.)

Magistrate Judge Brown identified the dicta in *Ruiz* that he found provided "some 'persuasive indication' that the Supreme Court would differ with *XL Specialty*":

> Having stated these reservations, this Court concludes that the language in *Ruiz* "all materials including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and *pertaining in any way to coverage*, benefits, liability or damages [are discoverable]" (emphasis added) certainly suggests that this includes materials normally considered to be protected by the attorney client privilege. 899 So. 2d at 1130. This is particularly so in view of the Supreme Court's favorable agreement with the language in *Taylor* that "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." 899 So. 2d at 1129 (quoting *Taylor*, 525 So. 2d at 909-10) (emphasis added). It is but the tiniest of jumps to recognize that one cannot examine "consideration of the advice of counsel" without crossing the bridge of the attorney-client privilege.

Adega v. State Farm Fire and Cas. Ins. Co., No. 07-20696-CIV, 2008 WL 1009719, at *2 (S.D. Fla. Apr. 9, 2008) (emphasis in original). Thus, the argument that this Court would "differ with *XL Specialty*" was based on conjecture about the meaning of a diminutive slice of dicta in the *Ruiz* opinion, and was not based upon

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> insurance actions. It is appropriate to assume that the Florida Supreme Court would give deference to this statutory scheme and would not, *sub silentio*, create another exception to the attorney client privilege.

Valenti unpublished Order, pp. 4-5. This Magistrate Judge's order was appealed to and affirmed by the District Judge. (R. 35 at Tab 13).

a legal analysis of the law regarding attorney-client privilege. Since those errant federal cases were decided, that unclear dicta has been effectively disposed of by the incisive analysis in *Higgins* quoted above.

The analysis by some of the federal courts that has predicted this Court would "differ" with *XL Specialty* and other such cases also ignores this Court's clearly stated and oft observed practice of not overruling its previous decisions *sub silentio*. *Puryear v. State*, 810 So. 2d 901, 905-06 (Fla. 2002). There, this Court clearly stated:

> We take this opportunity to expressly state that this Court does not intentionally overrule itself *sub silentio*. Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary *dicta* statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding. Where this Court's decisions create this type of disharmony within the case law, the district courts may utilize their authority to certify a question of great public importance to grant this Court jurisdiction to settle the law.

The District Courts of Appeal that have addressed the question have properly discounted the unclear dicta in *Ruiz* that has led some federal courts astray, and they have continued to follow this Court's holding concerning attorney-client privilege in *Kujawa*. The federal courts that have strayed have clearly departed from the rules of interpretation set out by this Court to be used in just this situation.

Magistrate Judge Brown did not have the benefit of *Higgins*, the recent Fifth District case that properly discounted the unclear dicta in *Ruiz* and did a masterful job explaining the rationale for the decision to honor attorney-client privilege in first-party bad faith cases. Not only did *Higgins* conduct the very analysis that Magistrate Judge Brown bemoaned had not before existed, *Higgins* even cites *Adega* (with a *cf*. preface) and appears to have adopted Magistrate Judge Brown's historical analysis of the attorney-client privilege. In *Adega*, Magistrate Judge Brown noted that the attorney-client privilege "has been around a lot longer than bad faith litigation." *Adega*, 2008 WL 1009719, at *2.

> Indeed, said privilege probably existed before the advent of insurance in this country - a necessary prerequisite to any bad faith claim. "The attorney-client privilege is the oldest of the privileges known to the common law." *Upjohn Company v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584(1981). It is "older than the proverbial hills" and long recognized in our judicial system. *See, e.g., Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of *when free from the consequences or the apprehension of disclosure*") (emphasis added). Likewise, it has long been recognized as applicable when the client is a corporation. *See, e.g., United States v. Louisville & Nashville R. Co*., 236 U.S. 318, 336, 35 S.Ct. 363, 369 (1915).

Id. *Higgins* recognizes, and relies in part, on that history and purpose of the attorney-client privilege.

B. THE RATIONALE USED TO VITIATE THE WORK PRODUCT PRIVILEGE IN *RUIZ* DOES NOT LOGICALLY EXTEND TO VITIATE THE ATTORNEY-CLIENT PRIVILEGE

Ruiz reached the result it did for reasons articulated in the Court's opinion. The court concluded that: "We also clarify, and to the extent necessary, recede from our decision in *Kujawa* and adopt the rule of law articulated within this decision for addressing the discoverability of documents in first-party bad faith actions." *Ruiz*, 899 So. 2d at 1131. What was the precise "rule of law articulated within" that decision? The answer to that question is not clearly set out in the opinion, but the answer can be found within it.

A strong indicator of what was, and was not, part of the rule of law articulated within *Ruiz* can be found is in that same sentence, which clearly shows that this Court believed that its rule only required it to recede from *Kujawa* "to the extent necessary" for its decision there. *Id*. This is reinforced elsewhere in the *Ruiz* decision, where the Court discusses how "a portion" of *Kujawa's* analysis was misguided. *Ruiz*, 899 So. 2d at 1131. This is strong evidence that part of *Kujawa* survived *Ruiz*, and still remains viable today. Logic dictates that the portion of *Kujawa* that survived *Ruiz* and remains viable today is the part that was not at issue in *Ruiz*, i.e., the part of *Kujawa* dealing with attorney-client privilege.

The First District has already confirmed that this is how it reads the *Ruiz* decision. In *XL Specialty*, that court analyzed this Court's decision in *Ruiz*, and

concluded that this Court only receded from that portion of its decision in *Kujawa* dealing with work product. The First District explained that:

> Because the Court in *Kujawa* held that the attorney-client privilege applies to discovery in a bad faith action, and is not eliminated, and the Court in *Ruiz* did not recede from that portion of the opinion, we continue to apply the portion of *Kujawa* relating to attorney-client privilege as controlling precedent. Therefore, we hold that the trial court erred by compelling production of attorney-client privileged documents."

XL Specialty, 929 So. 2d at 583-84. Thus, the "rule of law articulated within" *Ruiz* did not involve attorney-client privilege, and did not alter that part of *Kujawa*'s holding that protected attorney-client privilege from disclosure in first party bad faith cases.

Logic also dictates that the part of *Kujawa* that remains viable is the part dealing with attorney-client privilege for another reason. That is because the reasoning that this Court used to abrogate the work product privilege in *Ruiz*, when applied to attorney-client privilege, does not abrogate attorney-client privilege. Petitioner argues that this Court "did not limit the reasoning of the [*Ruiz*] decision to work product privilege." Brief at p. 16. However, in *Ruiz* this Court did limit its reasoning to work product, not by saying that its reasoning was limited, but by using reasoning that, by its nature, is limited to work product.

The Court's decision to abolish work product privilege in first party bad faith cases was clearly based on the *need* for such materials.

> [W]e conclude that to continue to recognize any such distinction [between first-party and third-party bad faith] and restriction would not only hamper but would impair the viability of first-party bad faith actions in a manner that would thwart the legislative intent in creating the right of action in the first instance. Just as we have concluded in the context of third-party actions, we conclude that **the claim file type material presents virtually the only source of direct evidence with regard to the essential issue of the insurance company's handling of the insured's claim**. *See id.; see also Brown v. Superior Court*, 137 Ariz. 327, 670 P.2d 725, 734 (1983) ("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."). **Given the Legislature's recognition of the need to require that insurance companies deal fairly and act in good faith and the decision to provide insureds the right to institute first-party bad faith actions against their insurers, there is simply no logical or legally tenable basis upon which to deny access to the very information that is necessary to advance such action but also necessary to fairly evaluate the allegations of bad faith-information to which they would have unfettered access in the third-party bad faith context**.

Ruiz, at 1128-29 (emphasis added).

It is well established that need is a sufficient legal basis for a court to allow the discovery of work product in Florida. Thus, the Court's action in *Ruiz* can best be understood as **a blanket finding of need for non-privileged claim file materials in first-party bad faith cases**, so that no plaintiff in such a case is required to make an independent showing of "undue hardship" in order to obtain the insurer's claim file "work product" documents. That blanket finding of need was justified, in the Court's mind, by its conclusion that the work product in question was "the very information that is necessary to advance such action but

also necessary to fairly evaluate the allegations of bad faith-information." *Id*. Such a blanket determination was not only within this Court's power to make under the established parameters of the work product doctrine, it was consistent with the mandate that this Court saw in the governing legislation, Section 624.155, Florida Statutes.

This rationale, while compelling in the work product context, cannot extend to attorney-client privileged communications. That is the case, first, because need is never a permissible basis to allow access to attorney-client privileged communications. *Quarles & Brady, LLP v. Birdsall*, 802 So. 2d 1205, 1206 (Fla. 2d DCA 2002 ("Undue hardship is not an exception to attorney-client privilege, nor is disclosure permitted because the opposing party claims that the privileged information is necessary to prove his or her case."). And, second, because attorney-client privilege is enshrined in the Florida Evidence Code, section 90.502 of the *Florida Statutes*. Section 624.155 of the *Florida Statutes*, the statutory bad faith section, does not even mention, let alone repeal, the statutory protection of attorney-client privilege contained in section 90.502 of the *Florida Statutes*. Accordingly, Petitioner is incorrect when, after correctly conceding that the *Ruiz* Court "did not decide the issue of attorney-client privilege in first party bad faith cases," he states the *Ruiz* Court "did not limit the reasoning of the decision to work

product privilege." Brief at p. 16. The entire rationale of *Ruiz* is inapplicable to the attorney-client privilege.

In addition, in contrast to the attorney client privilege, work product privilege is not a creature of statute and, at best, provides only limited protection from disclosure:

> [W]ork product is a device born of practical necessity to facilitate the orderly prosecution and defense of lawsuits. *Hickman v. Taylor*, 329 U.S. 495 (1947). It is designed to protect the work and mental impressions of counsel under the circumstances controlled by Florida Rule of Civil Procedure 1.280(b)(3). Work product may be susceptible to disclosure based on considerations of need and relevance; attorney-client privilege is not. Although the Florida Supreme Court has concluded that section 624.155 applies to first-party insurance disputes as well as third-party claims, and that the immunity from disclosure of the claim file based on work product ought not to apply, nothing in *Ruiz* suggests that the attorney-client privilege available to any contracting party, including insurers, somehow evaporates uniquely for insureds upon the filing of a bad-faith claim. We see nothing in *Ruiz* to suggest that a first-party insurer against whom a bad faith claim has been made is subject to the exposure of all its communications with its own counsel.

West Bend Mutual Insurance Company v. Higgins, No. 5D 08-2987, 2009 WL 790145, at *1 (Fla. 5th DCA Mar. 27, 2009).

The attorney-client privilege is statutory, has not been repealed or limited by the Legislature, and is supported by important policy reasons, reasons so important that they are not subject to abrogation based on need.

1. Provident's Statutory Attorney-Client Privilege Has Not Been Abrogated or Limited and Can Only Be Abrogated or Limited by the Legislature

Petitioner hardly touches on the statutory attorney-client privilege in his brief. However, the statutory nature of the privilege clearly is fatal to Petitioner's request that this Court jettison the attorney-client privilege.

Requests for Production 1 and 3 at issue here, quoted in the Statement of the Case and Facts, seek documents protected by the attorney/client privilege. The trial court order, properly quashed below by the Fourth District, ordered Provident to produce all such documents from *Genovese I*, up to February 7, 2002, based solely on *Ruiz*. The Order clearly departed from the essential requirements of law and required reversal by the Fourth District to protect Provident's statutory attorney-client privilege.

Florida's Evidence Code provides that "[a] communication between lawyer and client is 'confidential' if it is not intended to be disclosed to third persons other than: (1) Those to whom disclosure is in furtherance of the rendition of legal services to the client, and (2) those reasonably necessary for the transmission of the communication." FLA. STAT. § 90.502(1)(c). The statute further provides that:

> (2) A client[12] has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential

[12] The attorney-client privilege applies to confidential communications between lawyers and their corporate clients. *Shell Oil Co. v. Par Four Par'*, 638 (cont.)

> communications when such other person learned of the communications because they were made in the rendition of legal services to the client.
> (3) The privilege may be claimed by: (a) The client . . . [or] (e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence. Privileged communications are not discoverable unless one of the statutory exceptions applies.

Id. § 90.502(2)-(3)(a), (e).

Privileged communications are not discoverable unless one of the statutory exceptions applies. *Id.* None of the five statutory exceptions have been alleged or apply in this case. Petitioner concedes this. (Brief at p. 18). The *Higgins* court also addressed the exceptions to attorney client privilege, and found none of them applicable there. This Court should reach the same conclusion.

> Section 90.502 recognizes certain limited exceptions to attorney-client privilege, most notably, where a crime or fraud is facilitated through attorney-client communications. § 90.502(4)(a), Fla. Stat. (2007). There are also implied waivers, such as litigant's reliance on an "advice of counsel" defense. But those are not implicated here.

Higgins, 2009 WL 790145, at *2. This Court should follow the same analysis.

So. 2d 1050, 1050-1051 (Fla. 5th DCA 1994) ("This privilege covers communications on legal matters between corporate counsel and corporate employees."); *see also Tail of the Pup, Inc. v. Webb*, 528 So. 2d 506 (Fla. 2d DCA 1988) ("[P]rivilege was applicable to prevent discovery of correspondence between corporation and its corporate counsel, though party seeking discovery owned 25% of corporation's stock.").

The only dispute in a first party contract case is entitlement to coverage under the policy. In a first party case like this, counsel representing the insurance company **never** represents the insured during that dispute and always remains adverse. In such a context, there is no dispute that the attorney-client privilege that arises is solely between the insurance company and its counsel. *Scoma* is probably the most recent discussion of the effect of the various different configurations of representation on confidentiality in bad faith cases. There, the Second District aligned itself with the First and Fourth District on the question before the Court here, and explained:

> if the insured or the insurance company retained separate attorneys to represent only that party's specific interests, they should each be able to preserve their respective attorney-client privilege as to their communications with their own lawyers.

Scoma, 975 So. 2d at 467. In *Genovese I*, the underlying lawsuit between Provident and Genovese, Provident never retained counsel to represent Genovese, nor was it required to do so. Accordingly, the privilege should not be disturbed.

When the Legislature adopted section 624.155 of the *Florida Statutes*, it attempted to provide similar remedies in the first party bad faith context to those available in third party bad faith context. By statute, the Legislature created a first party bad faith remedy that did not exist at common law. But the Legislature did not simultaneously repeal or limit the attorney client privilege. Looking at this situation, the court in *Higgins* accurately stated: "If there is to be a 'first-party-

bad-faith-brought-under-section-624.155-exception' to Florida's statutory privilege for communications between attorney and client, it would be up to the Legislature to create it." *Higgins*, 2009 WL 790145, at *2.

Pursuant to the Florida Constitution, art. 2, section 3: "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." *Id.* As this Court expressly held in *The Sebring Airport Authority v. McIntyre*, 783 So. 2d 238, 244-245 (Fla. 2001):

> Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

Id.; a*ccord Penelas v. Arms Technology, Inc*., 778 So. 2d 1042, 1045 (Fla. 3d DCA 2001) ("The power to legislate belongs not to the judicial branch of government, but to the legislative branch.").

2. Provident's Attorney-Client Privilege Is Based on Strong Policy Grounds that Must Be Honored Here

This Court must recognize, as the *Higgins* court did, that the attorney client privilege "is an interest traditionally deemed worthy of maximum legal protection," *Higgins*, 2009 WL 790145, at *1, and as the court in *Scoma* did, that

"[f]ew evidentiary privileges are as jealously guarded as the attorney-client privilege," *Scoma*, 975 So. 2d at 469. Notwithstanding the probative evidence that could always be obtained through its breach,[13] strong policy reasons protect against the breach of the privilege.

"There are two broad justifications that underlie the privilege." Steven Plitt, *The Elastic Contours of the Attorney-Client Privilege and Waiver in the context of Insurance Company Bad Faith: There is a Chill in the Air*, 34 SETON HALL L. R, 513, 528 (2004).

> The first justification is that the privilege promotes the disclosure of all relevant information by the client to enable the attorney to effectively represent the client or to give adequate legal advice. Without the privilege it is presumed that many clients would not communicate all relevant information to the attorney if adverse parties could use it against them in subsequent litigation. The second justification is that an attorney must be able to openly communicate legal advice and strategies to the client in order to adequately represent him or her, and that the attorney would not engage in such communications if adverse litigants could discover them in subsequent litigation. Because "sound legal advice or advocacy serves public ends," the privilege is necessary to promote full and unrestricted communication within the attorney-client relationship.

Id. at 528-29 (footnotes omitted).

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[13] "**As with virtually any other dispute resulting in litigation,** communications between an insurance company and its attorney might be revealing, **or even probative, but that will not defeat the privilege because it has a broader purpose**." *Higgins*, 2009 WL 790145, at *2 (emphasis added).

Higgins noted that "the purpose of the attorney-client privilege is to '**encourage full and frank communication between attorneys and their clients** and thereby promote broader public interests in the observance of law and administration of justice.'" *Higgins*, 2009 WL 790145, at *2 (citing *America Tobacco v. State*, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997) (emphasis added). That is particularly important in the context at issue here: during the underlying action that has later led to a claim of first party bad faith.

Faced with a dearth of case law in his favor, Petitioner argues that, since Florida law "permits discovery and introduction into evidence of an insurer's litigation conduct in the underlying coverage suit," it follows that "the legislature must have intended, implicitly, to allow discovery into the conduct." Brief at pp. 16, 17. Genovese's premise, however, is incorrect, for two reasons.

First, as *Higgins* explains:

> A first-party claim under section 624.155 is subject to **an objectively determinable test -** whether, if it acted fairly and honestly and with due regard for her or his interests, the insurer should have paid its insured more money. Proof of the claim does not depend on disclosure of attorney-client communications, and even if it did, it would not justify eliminating the privilege.

Higgins, 2009 WL 790145, at *2 (emphasis added). Second, this Court has recognized the **absolute** immunity, from a subsequent bad faith suit, of anything done or said by the attorney during the course of a legal proceeding. This **absolute** litigation privilege was enunciated by this Court in *Levin, Middlebrooks, Mabie,*

Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Co., 639 So. 2d 606, 608 (Fla. 1994).[14]

Levin involved a bad faith action by an insured against an insurance carrier for failing to settle a claim. During discovery in the bad faith action, the insurer identified the insured's attorney in the underlying breach of contract action as a person having relevant knowledge of important facts in the suit. The insurer then certified its intention to call that attorney as a witness during its defense of the bad faith action and filed a motion to disqualify the firm. As a result of that representation, the firm was disqualified from the case. When the insurer failed to call counsel as a witness at the ensuing trial, the disqualified firm filed a claim for tortious interference with a business relationship against the insurer.

The insurer insisted the claim was barred by the litigation privilege. This Court agreed, writing that "**absolute immunity** must be afforded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding." 639 So. 2d at 608 (emphasis added). This Court explained the sound policy reasons behind that rule:

> In balancing policy considerations, we find that absolute immunity must be afforded to **any act** occurring during the course of a judicial proceeding, **regardless of whether the act involves** a defamatory

[14] All of Genovese's lower court and federal cases cited in "support" of his argument pre-date the *Levin* opinion. *See* Brief at p. 16 and cases cited therein.

> statement or other **tortious behavior** such as the alleged misconduct at issue, **so long as the act has some relation to the proceeding**. The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.

Id. (emphasis added). The similarity of the Court's rationale here to the one underlying the attorney-client privilege is striking. The desire for "unhindered communication" is not, as Genovese would portray, a fertile ground for corporate mischief, but rather, a societal good to be pursued.

Levin was a significant development in an existing line of authority. In *Montejo v. Martin Memorial Medical Center, Inc*., the Fourth District explained the context and importance of *Levin* in Florida law: "Prior to *Levin*, the court had already decided that statements amounting to perjury, libel, slander, and defamation were not actionable. The essence of *Levin* was its **extension of absolute immunity to acts taken during the proceeding**, not just statements made therein." 935 So. 2d 1266, 1269-70 (4th DCA 2006) (emphasis added).[15]

[15] Because the case at bar arrives at this Court while in the discovery stage, Petitioner's claim has not yet been tested by summary judgment, a test it is unlikely to pass.

This Court first recognized the principle of the litigation privilege in Florida "essentially providing legal immunity for actions that occur in judicial proceedings," in *Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907). *See Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 383 (Fla. 2007). In *Echevarria*, this Court held that the litigation privilege applies in all causes of action, whether for common-law torts or statutory violations. It noted that "courts in Florida have applied *Levin* to uphold the use of the privilege in such diverse actions as civil conspiracy and tortious conduct in interfering with custody and visitation rights." *Id*. at 384. There, this Court reiterated that "[i]t is the perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications, that is at the heart of the rule." *Id*.

If the law develops as Petitioner has requested, and this Court rules that there is no attorney-client privilege in first party bad faith cases communications as the underlying suit, what will happen? That is not a difficult question to answer. The Court should not be so naïve as to think that, as long as the insurance company acts fairly, it has nothing to fear in the bad faith context. [16] Indeed, much of

[16] The idea that the possibility of a bad faith case is rare if the insurer is acting fairly ignores the very realities demonstrated by this case. What this case demonstrates is that fairness has little to do with anything. Here, Petitioner maneuvered Provident into a "Catch-22" position, where it faced being unable to (cont.)

Petitioner's discussion of the need to abrogate attorney-client privilege in this case is based on absurd, paranoid hypotheticals, such as the contention that they need to obtain "the documents generated by attorneys retained by insurer to perform bad acts." Brief at p. 21. Contrary to Petitioner's cynical view of legal counsel, the law assumes that the operation of attorney-client privilege has a salutary effect on client conduct. What Petitioner here, and others in similar circumstances are chasing, when seeking attorney-client communications, is the hope that some candid privileged communication in this case that can be deconstructed and forged into a sound bite capable of infuriating a jury. Since, as this case demonstrates, a bad faith case can be manufactured even where an insurer tries to **pay** the claim during the pendency of the lawsuit, the possible loss of the attorney-client privilege looms large in **every** first party case, if this Court rules as Petitioner requests.

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have Petitioner's entitlement to benefits decided by a court unless it stopped paying him benefits. Petitioner then confessed error in the declaratory action appeal, conceding his argument was baseless. Upon remand, Petitioner promptly took the steps necessary to set up his bad faith case, counterclaiming for breach of contract and sending a statutory bad faith notice, based on the termination of benefits that it had so cleverly engineered. This Court should be cognizant of the realities of how law is practiced in this area when crafting its decision. *Cf. Massachusetts Casualty Ins. Co. v. Rossen*, 953 F.Supp. 311, 315 (C.D. Cal. 1996) (In a declaratory judgment action to determine whether an insured was disabled and entitled to benefits under his policies, "[a] reservation of rights protects an insurer from potential liability for bad faith if it were to withhold payments, and it also provides the insured with the use of the payments until the determination is made. Thus, the use of a reservation of rights protects both parties."

Without the assurance of confidential communications, it would be impossible for an insurer's counsel to provide candid legal advice in any first party case, let alone the difficult case. But in the difficult cases, where such advice is needed most, counsel would be bound to follow their ethical duty to protect their clients. The flow of candid communication will cease. Why? Because every lawyer will seek to zealously represent their client and no lawyer will knowingly create evidence that can be used against the client in a later proceeding.

That will necessarily result in the cessation of effective attorney-client communication in the underlying first party cases, where it is needed most. Insurance companies will no longer have the advice of counsel when they make the most difficult decisions. And, the idea that Plaintiff's should always win difficult decisions is fundamentally flawed. The insurer's duty runs to all its policy holders, not just those making claims. Policyholders count on the insurance company's ability to weed out and deny meritless claims made by other policyholders. Where a close case cannot be fully examined because of some potential future cost, all the policyholders not making claims, as well as the public interest, are the losers, even though certain members of the plaintiff's bar may not see it that way.

As *Higgins* recognizes, the public interest is not served where the result in the underlying lawsuit will necessarily suffer from a lack of good legal advice, when it is needed the most, because the plaintiff's bar has succeeded in securing a

rule that prevents the free flow of advice at that critical time. Petitioner is not speaking for the public, which seeks fair (not one-sided) claims handling, or for policy holders, who want the company to pay only meritorious claims, or even for claimants as a whole, who want their claims fully evaluated, when he seeks the abrogation of the attorney-client privilege. It is in the interest of all those who are not presently bad faith plaintiffs to keep the rule as it is, because they are disadvantaged, rather than benefited, by the requested change.

The irony of the result of the requested change should not be ignored. A change advanced as creating a better process will, in practice, create one much worse. When the candor of counsel is eliminated from the process, outside counsel will be hard-pressed to opine that a claim should be paid. Rather, all claim decisions will be met with a hearty "pat on the back" for a job well done, even where counsel may have misgivings concerning the client's claim decision. That is so because any half-way candid exploration of the pitfalls of the decision would later be seen on a PowerPoint in front of a jury. Claim settlements will be more, not less, difficult to achieve – unless, like Petitioner here, one believes that all claims, regardless of merit, should simply be paid.

C. THIS COURT SHOULD FOLLOW THE OTHER WELL-REASONED FLORIDA DECISIONS ON THIS QUESTION AND NOT ABROGATE ATTORNEY-CLIENT PRIVILEGE IN FIRST-PARTY BAD FAITH CASES

This Court should give great weight to the fact that District Court decisions from the four Florida appellate districts that have considered this issue after *Ruiz*, all support the conclusion that *Ruiz* did not decide the question of whether the insurance company's attorney-client privilege has been abrogated by the creation of the statutory first party bad faith cause of action.

In reaching their conclusions, the courts in *Higgins* and *Scoma* both cited *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578 (Fla. 1st DCA 2006) with approval. The *XL Specialty* court, like the *Higgins* court, began with an analysis of *Ruiz*. In a section of the Opinion titled "***Ruiz* Does Not Eliminate the Attorney Client Privilege**," the court explained that:

> XL argues that the trial court's order erroneously requires it to produce letters drafted by its counsel regarding the legal issues in the bad faith case. As the trial court quoted in its order, the Florida Supreme Court's holding in *Ruiz* pertained to documents "in the underlying claim and related litigation file." *Id*. at 1130. The Court's ruling in *Ruiz* does not pertain to documents relating to the bad faith litigation in any way. Aircraft Holdings provides no other authority for compelling attorney-client privileged documents relating to the bad faith claim. Therefore, those documents are protected from disclosure by the privilege as provided in section 90.502, Florida Statutes (2005).

929 So. 2d at 582.

In *XL Specialty*, the court also analyzed this Court's decision in *Ruiz*, to recede from a portion of the decision in *Kujawa* regarding work product. The First District of Appeal found that:

> Because the Court in *Kujawa* held that the attorney-client privilege applies to discovery in a bad faith action, and is not eliminated, and the Court in *Ruiz* did not recede from that portion of the opinion, we continue to apply the portion of *Kujawa* relating to attorney-client privilege as controlling precedent. Therefore, we hold that the trial court erred by compelling production of attorney-client privileged documents.

XL Specialty, 929 So. 2d at 583-84.[17]

The First District also found that:

> Even if this court were not required to follow *Kujawa* or *Lanier*, the plain meaning of sections 90.502 and 624.155 indicates that the attorney-client privilege has not been eliminated in first-party bad faith actions. Aircraft Holdings argues that XL's attorney-client privilege was eliminated once Aircraft Holdings filed the bad faith action pursuant to section 624.155 [the same argument made by Petitioner here]. For this argument to prevail, we would need to interpret section 624.155 to substantively include as part of the bad faith claim how an insurance company, as a client to a lawyer, reacted

[17] The First District also held in *XL Specialty* that "even if the Court in *Ruiz* receded from *Kujawa* in its entirety, as argued by Aircraft Holdings [and by Petitioner here], controlling precedent [in the First District], *Progressive American Insurance v. Lanier*, 800 So. 2d 689 (Fla. 1st DCA 2001), indicates that the attorney-client privilege should be applied in a first-party bad faith action." *Id*. at 584. In *Lanier*, the Court found, in a first party bad faith case, that the trial court had departed from the essential requirements of law by requiring production of documents "that constitute attorney-client communications." *Id*. The First District reasoned that since *Ruiz* did not overrule *Lanier*, it was still binding precedent there.

> to its lawyer's advice on the initial claim and in conducting litigation on a breach of contract action. That is, if the legislature placed the communications between an insurance company and its lawyer at issue as part of the bad faith claim provided in section 624.155, then there is no attorney-client privilege when the bad faith action is filed. Because Aircraft Holdings argues that section 624.155 substantively eliminates the privilege provided by section 90.502 in this instance, the applicability of section 90.502 is substantive rather than procedural. Accordingly, we are analyzing the two statutory sections, 624.155 and 90.502, under statutory construction principles, rather than applying a procedural rule of privilege to section 624.155. *See City of North Miami v. Miami Herald Publ'g Co*., 468 So.2d 218 (Fla. 1985) (comparing chapter 119 and section 90.502 regarding disclosure of attorney-client privileged documents).

Id. at 384-85 (footnotes omitted) (bracketed material supplied).[18]

The *XL Specialty* court then explained:

> There is a complete absence of any reference in the bad faith statute, section 624.155, to the attorney-client privilege. Nor is there any mention within section 624.155 that bad faith includes how the insurance company reacted to advice of counsel, with respect to the claim or in a breach of contract action, in a first-party action. Accordingly, the express provisions of section 90.502 apply and the attorney-client privilege is not eliminated by a plain reading of the statutes.

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[18] The omitted footnotes explain that "When section 90.502 was enacted and revised, the Florida Supreme Court adopted it as a rule to the extent that the privilege is procedural. *In re Fla. Evidence Code*, 372 So.2d 1369 (Fla. 1979); In re Fla. Evidence Code, 638 So.2d 920 (Fla. 1993); *In re Fla. Evidence Code*, 675 So.2d 584 (Fla. 1996); *In re Amendments to the Fla. Evidence Code*, 825 So.2d 339 (Fla. 2002)" and that "[a]lthough the attorney-client privilege has been codified as part of the Florida Evidence Code, the work product privilege, addressed in *Ruiz*, is not part of the Evidence Code, but is provided by rule. See Fla. R. Civ. P. 1.280(b)(3). Accordingly, this statutory comparison was not applicable and therefore absent in the *Ruiz* analysis."

Id. at 585.

The *XL Specialty* court then proceeded to apply the applicable rules of statutory construction to these statutes:

> In *Stoletz v. State*, 875 So.2d 572 (Fla. 2004), the Florida Supreme Court discussed statutory construction:
>
> > This Court has repeatedly held that the plain meaning of statutory language is the first consideration of statutory construction. *See State v. Bradford*, 787 So.2d 811, 817 (Fla. 2001). In addition, "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms." *McKendry v. State*, 641 So.2d 45, 46 (Fla. 1994).
>
> *Id*. at 575. As in *Stoletz*, the language of the general statute dealing with bad faith, section 624.155, and the language of the more specific statute dealing with attorney-client privilege, section 90.502, is plain and unambiguous. There is an attorney-client privilege specifically provided within section 90.502 and the bad faith statute has no language to eliminate the privilege.

XL Specialty, 929 So.2d at 585. (footnote omitted). In the accompanying footnote, *id*. at n. 5, the court explained:

> Had the legislature intended to eliminate the privilege when the underlying claim on the policy was concluded, as argued by Aircraft Holdings [and as argued here], it could have said so in section 624.155 but did not. Cf.§ 624.311(2), Fla. Stat. (2005) ("The records of insurance claim negotiations of any state agency or political subdivision are confidential and exempt from s. 119.07(1) until termination of all litigation and settlement of all claims arising out of the same incident.").

Next, the *XL Specialty* court examined section 90.502(3) of the *Florida Statutes* to determine who may claim the privilege in a first party bad faith case. It

concluded that the attorney-client privilege belonged exclusively to the insurance company alone, based on the clear language of the statute. "The insurance company, as the client, is the holder of its attorney-client privilege. There is no provision within the statute for the insured to claim the insurance company's attorney-client privilege." *Id*. The *XL Specialty* court also found that none of the statute's five listed instances when there is attorney-client privilege applied in the case of a first-party bad faith case.[19]

The *XL Specialty* court concluded that:

> Therefore, the trial court erred by not giving section 90.502, the attorney-client privilege, full effect. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("Where possible, courts must give full effect to all statutory

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[19] The Court noted, at 929 So. 2d at 586:

> Section 90.502 also describes circumstances when there is no attorney-client privilege recognized although the communications would otherwise fall within the scope of the privilege. *See* FLA. STAT. § 90.502(4) (2005) (listing five instances where there is no lawyer-client privilege). There is no exception provided for communications between an insurance company and its lawyer in the event a bad faith action is filed. *Id.; see Eastern Air Lines, Inc. v. U.S. Aviation Underwriters, Inc*., 716 So. 2d 340, 343 (Fla. 3d DCA 1998) (ruling that the attorney-client privilege was not eliminated and recognizing that "[n]one of those five circumstances [in section 90.502(4)] is present in this case"). Because the legislature did not provide an exception to the attorney-client privilege for a bad faith action in its list of exceptions, we decline to create one. *See Young v. Progressive S.E. Ins. Co*., 753 So. 2d 80, 85 (Fla. 2000) (applying *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another, to a list of statutory exclusions).

> provisions and construe related statutory provisions in harmony with one another."); *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002) (stating that "a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless").

Id. at 586-87. This Court should follow the *XL Specialty* court's reasoning and approve the decision below.

The decision below, *Provident Life and Accident Ins. Co. v. Genovese*, 943 So. 2d 321 (Fla. 4th DCA 2006), relied on *XL Specialty* and on *Bennett*. In *Bennett*, the insured brought an action against an automobile insurer to recover for bad faith in handling a claim for uninsured motorist (UM) benefits. The trial court required insurer to produce the entire claims file, "overruling objections based on work product and attorney-client privilege" and the insurer petitioned for writ of certiorari. The Fourth District Court of Appeal granted the petition as to the information covered by the attorney-client privilege and, as in this case and *XL Specialty*, certified the question to this Court as one of great public importance.

The *Bennett* court essentially agreed with *XL Specialty* that *Ruiz* did not abrogate the attorney-client privilege in first-party bad faith cases, and held that the trial court should not have overruled the attorney-client privilege objections to the discovery requested in that case:

> In *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005), the Florida Supreme Court held that the work product privilege did not protect from discovery the insurer's file in a statutory first-party bad

> faith claim, and the trial court accordingly correctly applied *Ruiz* in holding the work product privilege in-applicable. We agree with Liberty Mutual, however, that the attorney-client privilege, which was not at issue in *Ruiz*, does apply. *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578 (Fla. 1st DCA 2006) (holding that *Ruiz* did not do away with the attorney-client privilege in first-party bad faith cases); *United Servs. Auto. Ass'n v. Buckstein*, 891 So. 2d 1153 (Fla. 4th DCA 2005) (upholding the attorney-client privilege in a first-party bad faith case before the supreme court decided *Ruiz*).

Bennett, 939 So. 2d at 1114.

In *Scoma*, the Second District relied on *Genovese* and expressly endorsed *XL Specialty* and agreed with the reasoning of the First and Fourth District Courts of Appeal on the issue presented here (the Fifth District decision in *Higgins* was decided later), which is in accord with all the other Districts and makes it unanimous.

> At least three courts have held that the insurance company's attorney-client privilege with counsel it hires or retains to represent its interest is not waived or abrogated in a bad faith action brought by the insured. *XL Specialty Ins. Co.*, 929 So. 2d 578, *review granted*, 935 So. 2d 1219 (Fla. 2006); *Liberty Mut. Fire Ins. Co. v. Bennett*, 939 So. 2d 1113 (Fla. 4th DCA 2006); *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905 (Fla. 3d DCA 2004). **We agree with the reasoning of these cases**.

Scoma, 975 So. 2d at 467 (emphasis added).

CONCLUSION

For all of the foregoing reasons, Provident requests that this Court approve the decision of the Fourth District Court of Appeal quashing the December 29, 2005 order of the trial court, and remanding the case with directions that the trial court recognize the attorney-client privilege, and that it provide any other guidance to the trial court that may be appropriate under the circumstances.

Respectfully submitted,

SHUTTS & BOWEN LLP
John E. Meagher
Florida Bar No. 511099
jmeagher@shutts.com
Jeffrey M. Landau
Florida Bar Number 863777
jlandau@shutts.com
Stephen T. Maher
Florida Bar Number 200859
smaher@shutts.com
201 South Biscayne Boulevard
Suite 1500, Miami Center
Miami, Florida 33131
Telephone: 305-358-6300
Facsimile: 305-381-9982

By _____
Stephen T. Maher

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to Respondent's Answer Brief was mailed on this 7th day of April, 2009 to: Gary C. Rosen, Esquire, Becker & Poliakoff, P.A., P.O. Box 9057, Fort Lauderdale, Florida 33310-9057; Jeffrey M. Liggio, Esq. and Richard Benrubi, Esq., Liggio & Benrubi, P.A., Attorneys for Petitioner, 1615 Forum Place, Suite 3B, West Palm Beach, Florida 33401; Bard D. Rockenbach, Esq., Burlington & Rockenbach, P.A., Attorneys for Petitioner, Courthouse Commons, Suite 430, 444 W. Railroad Avenue, West Palm Beach, Florida 33401; Caryn L. Bellus, Esq., Kubicki Draper, Counsel for FDLA, Penthouse, 25 West Flagler Street, Miami, Florida 33130; and Paul L. Nettleton, Esq. and Nancy C. Ciampa, Esq., Carlton Fields, P.A., Attorneys for State Farm, Suite 4000, 100 S.E. Second Street, Miami, Florida 33131.

Of Counsel

CERTIFICATE OF TYPE SIZE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Brief has been prepared using Times New Roman 14 point font.

Of Counsel