IN THE SUPREME COURT OF FLORIDA

Case No. SC 06-2508

PETER R. GENOVESE, M.D.

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT
INSURANCE COMPANY,

Respondent.

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY

On Appeal from the District Court of Appeal, Fourth District

Case No. 4D06-421

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§ 624.155, Fla. Stat. Respectfully submitted, BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP ANTHONY J. RUSSO, ESQ. Florida Bar No.: 0508608 777 S. Harbour Island Boulevard, Suite 500 Tampa, Florida 33602 Telephone: (813) 281-1900 Attorneys for Amicus, Florida Defense Lawyers Association **CERTIFICATE OF TYPE SIZE & STYLE** 11
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American Bankers Life Assurance Co. of Fla. v. Martin, 184 F.R.D. 263 (D.V.I. 1999) was a bad faith suit against the insurer for failing to pay the insured's first-party claim. The insured asserted she was entitled to learn whether the insurer's attorneys advised the insurer to pay the claim and whether the advice was followed. 7
American Tobacco v. State, 697 So. 2d 1249 (Fla. 4th DCA 1997).....4
Dixie Mill Supply Co., Inc. v. Continental Cas. Co., 168 F.R.D. 554 (E.D.La. 1996), the insured sued its liability carrier for bad faith for failing to defend it in suits brought against it. The carrier stated as an affirmative defense that it had acted in good faith and in conformance with its obligations under the policy and the law. The insured argued these affirmative defenses placed in issue the insurer's state of mind when they committed the various acts stated in the complaint, and by raising that issue, it had waived its attorney-client privilege. The insured then demanded production of documents containing the insurer's communications with its lawyers. The insured went so far as to claim all bad faith litigation necessarily requires investigation into the insurers' states of mind when they were deciding their obligations under the policy. 8
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Leonen v. Johns-Manville, 135 F.R.D. 94, 98 (D.N.J. 1990). The court rejected the blanket rule advanced by the insured, and instead analyzed whether the insurer's communications to and from its lawyers were made for the purpose of securing or providing legal advice. 6
Palmer v. Farmers Ins. Exchange, 861 P.2d 895, 907 (Mont. 1993), the insured filed a bad faith lawsuit against the insurer after the insurer was adjudged to have improperly denied the insured's first-party UM claim. 10
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Spiniello Companies v. The Hartford Fire Ins. Co., 2008 WL 2775643 (D.N.J. July 14, 2008) the insured sued the insurer for bad faith denial of its first- party property insurance claim, and it demanded production of the insurer's correspondence with its in-house attorney arguing the documents, containing the attorney's analysis of whether coverage existed for the claim, was nothing more than business advice. This mirrors the Petitioner's claim in its Brief at pp. 18 and 21, that attorneys that provide coverage analysis for insurers are merely adjustors, whose communications are not privileged. The court acknowledged that any communications that relate to business matters, as opposed to legal matters, would not fall within the protection of the privilege, but that.....6
State v. Kaufman, 584 S.E. 2d 480, 489 (W.Va. 2003) involved an insured's suit against an insurer alleging bad faith in the delay in paying her UM claim. The trial court ordered the insurer to produce its correspondence with its attorneys because 7
Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254 (De. 1995).....8
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The Aetna Cas. & Surety Co. v. Superior Court, 153 Cal. App. 3d 467 (Cal. App. 1984) 9
The Hartford Financial Services Group, Inc. v. Lake County Park & Recreation Board, 717 N.E. 2d 1232 (Ind. App. 1999), the insurer denied part of the insured's first-party property insurance claim. The insured sued for breach of contract and bad faith and sought production of the insurer's pre-suit correspondence with its lawyers. 7

Statutes

§ 624.155, Florida Statutes 2
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STATEMENT OF IDENTITY AND INTEREST

The Florida Defense Lawyers Association (FDLA), formed in 1967, has a statewide membership of over 1,000 Florida lawyers who practice in civil litigation, primarily for the defense. FDLA members represent insured and self-insured individuals and business entities in tort, product liability, contract, intellectual property, and other civil disputes. FDLA members also represent insurers in insurance coverage and bad faith litigation.

The question certified in this case challenges the existence of an attorney-client privilege between FDLA lawyers and their insurer clients when a bad faith claim is filed. This Court's answer to that certified question will directly, and fundamentally, affect the nature of the attorney-client relationship FDLA members form with their insurer clients.

Should this Court agree with the Petitioner's position that no privilege persists in a bad faith case, FDLA members will be unable to represent their insurer clients secure in the knowledge that their communications with their clients will remain confidential. The consequence of this loss of security will be a chilling of the communications between client and attorney, since both will know those communications will be discoverable in any subsequent bad faith case, regardless of merit. The ability of FDLA members to carry out their professional duties would plainly suffer in the wake of such a ruling.

Moreover, Petitioner bases his request for relief on a presumption that an insurer, in a first-party case, is bound by a fiduciary duty to the insured, and that same duty is shared by the insurer's lawyer. This Court's forthcoming ruling, therefore, may impose on FDLA lawyers a fiduciary obligation to parties adverse to their insurer clients. In these two ways the Petitioner challenges the fundamental attributes of confidentiality and fiduciary duty that FDLA lawyers have to their insurer clients.

SUMMARY OF ARGUMENT

The outcome of this case will determine whether FDLA lawyers will represent their insurer clients in coverage matters with, or without, a reliable, enforceable, attorney-client privilege. The Petitioner urges this Court to adopt a drastic proposition that "the attorney working for the insurer" is bound by a fiduciary duty to the insured not only during the course of the insurer's pre-suit consideration of the insured's claim, but also in the course of coverage litigation between the insurer and insured. Petition at p.23.

The Petitioner's proposition, if adopted by this Court, would severely impede a lawyer's ability to represent an insurer in a coverage matter. The Rules Regulating the Florida Bar prohibit a lawyer from representing a client if the lawyer's representation would be materially limited by the lawyer's responsibilities to a third person. R. Regulating Fla. Bar 4-1.7(2). Imposing a fiduciary duty to the insured on the insurer's lawyer would constitute such a "responsibility to a third person." Petitioner's proposition thus conflicts with established tenets of the attorney-client relationship, and would act to deprive insurers of an unfettered right to counsel.

Moreover, Petitioner's argument is based on an erroneous presumption that the legislature implied in the creation of § 624.155, Fla. Stat., an unstated understanding that the insurer's attorney-client privilege would become ineffective in any action brought under its provisions.

Petition at p.18. But this statute alters the common law, and so it must be read narrowly. Therefore, it cannot be read to imply the destruction of the attorney-client privilege that has been expressly created by the legislature in § 90.502, Fla. Stat.

Finally, several states' courts have considered arguments that an insurer's attorney-client privilege becomes unenforceable in a bad faith action. The great majority of these courts have rejected those arguments, and have gone on to preserve the attorney-client privilege, and the beneficial societal ends which it serves. Amicus urges this Court to join with those courts, and act in this case to preserve the insurer's attorney-client privilege in actions brought under

A

The outcome of this case will determine whether FDLA lawyers will represent their insurer clients in coverage matters with, or without, a reliable, enforceable, attorney-client privilege. The stakes are high for Amicus members in this case. Indeed, Petitioner tells this Court, at page 23 of its Brief, that "[t]he insurer *and the attorney working for the insurer* both owe a fiduciary duty to the insured to act in good faith pursuant to R. Regulating Fla. Bar 4-1.7(2). Those fiduciary obligations to the insured third party would conflict with the lawyer's professional obligations to the insurer client. The fiduciary obligation to the insured third party

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[1] "R. Regulating Fla. Bar 4-1.7Rule 4-1.7 conflict of interest; current clients . . .a lawyer shall not represent a client if: . . . (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to . . . a third person. . . ."

would require the lawyer, while counseling the insurer before litigation, or representing the insurer, after litigation has commenced, to exercise of the utmost good faith and loyalty toward the *insured*, and to avoid acting adversely to the *insured's* interest. Fisher v. Grady, 178 So. 852, 860 (Fla.1937). The Petitioner's proposition is thus illogical and unworkable.

When a lawyer counsels an insurer as to its obligations under the insurance contract before a coverage decision is made, the insurer and its attorney require the assurance that their communications will remain confidential. This confidentiality encourages the full and frank communication between attorneys and their clients and thereby promotes the broader public interest in the observance of law and administration of justice. American Tobacco v. State, 697 So. 2d 1249, 1252(Fla. 4th DCA 1997). Moreover, providing an opinion of "no coverage" to the insurer client would be directly adverse to the insured third party, presumably violating the fiduciary duty to do nothing to harm the principal's interest. R. Regulating Fla. Bar 4-3.1§ 90.502(4), Fla. Stat. Other limitations on the privilege are set out in the rules regulating the Florida Bar, notably Rule 4-1.6 (establishing circumstances when an attorney may and must disclose confidential communications). Attorneys who abuse the privilege are subject to sanction by the Court, or to discipline by the Bar. Petitioner asks this court to simply heap an ill-defined, unnecessary fiduciary duty onto the considered and balanced mix of legislative, judicial, and Bar regulation of the attorney-client privilege. Amicus urges the Court to resist the Petitioner's poorly conceived proposal.

B

Petitioner's argument is based on an assumption that because the legislature created § 624.155, Fla. Stat. that would abrogate an insurer's attorney-client privilege when suit is brought under its provisions. What the Petitioner seeks is a blanket rule that the abrogation of the insurer's attorney-client privilege is implied in the provisions of § 624.155, Fla. Stat., a statute that altered the common law. Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co., 753 So. 2d 1278, 1283 (Fla. 2000)("the civil remedy provided in subdivision (1)(b)1 was not in existence for first-party insureds before the adoption of the civil remedy statute . . .") As this Court stated in *Talat Enterprises, Inc.*, 753 So. 2d at 1283. This Court should avoid the extremely broad construction of § 90.502, Fla. Stat.

C

Petitioner raises several arguments to support its assertion that an insurer's attorney-client privilege is destroyed when the insured files an insurer bad faith claim. These arguments are not new. The courts of several states have considered and, for the most part, rejected these arguments.[2] Amicus urges this Court to joint with that majority of courts that hold an insurer's

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[2] Only a small minority of jurisdictions disregard the attorney-client privilege when a bad faith claim is stated. *See e.g., Boone v. Vanliner Ins. Co.,*
744 N.E. 2d 154 (Ohio 2001)Boone v. Vanliner Ins. Co., 744 N.E. 2d 154, 158 (Ohio 2001)(holding that in an action alleging bad faith denial of insurance coverage, the insured is entitled to

attorney-client privilege remains intact when the insured brings a first-party, bad faith claim. A summary of those cases follows.

In Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1 (Conn. 2005) the court held an adversarial relationship exists between insureds and their insurance company in first-party litigation, with no attributes of a fiduciary relationship. (*Hutchinson* involved a dispute over uninsured motorist coverage.)

Instead of finding a blanket waiver of the attorney-client privilege, as urged by the insured, the Connecticut court invoked the procedure for applying the fraud exception to the attorney-client privilege to determine whether the insured could obtain the protected materials. If the insured could establish at an evidentiary hearing, using non-privileged materials, that probable cause existed showing the insurer had acted in bad faith, and that it sought advice of its attorneys in order to conceal or facilitate its bad faith, then the materials could be examined *in camera* to determine whether the privilege would, or would not, apply. § 90.502, Fla. Stat. *See Spiniello Companies v. The Hartford Fire Ins. Co.*,

2008 WL 2775643 (D.N.J. July 14, 2008)*Leonen v. Johns-Manville*,

135 F.R.D. 94 (D.N.J. 1990)*Spiniello Companies*, 2008 WL 2775643 at *3.

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discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage.

Like the Petitioner here, the insured argued that the mere allegation the insurer had denied its claim in bad faith was sufficient to pierce the privilege. (Petition at p.18.) The court rejected this argument concluding the chilling effect it would have on the attorney-client relationship must be avoided. *State v. Kaufman*,

584 S.E. 2d 480 (W.Va. 2003)*Kaufman*, 584 S.E.2d at 489. The supreme court reversed this ruling holding that "the bringing of a related first-party bad faith action by the insured does not automatically result in a waiver of the insurance company's attorney-client privilege concerning the under-lying insurance claim." *The Hartford Financial Services Group, Inc. v. Lake County Park & Recreation Board*,

717 N.E. 2d 1232 (Ind. App. 1999)*Lake County*, 717 N.E. 2d at 1235. The appellate court reversed the trial court's order that the insurer produce its privileged communications, rejecting the insured's argument that Hartford's counsel was not acting as an attorney, but simply an outside claims adjuster, and that the attorney simply provided business advice when opining on the insurer's duties to pay the claim. *American Bankers Life Assurance Co. of Fla. v. Martin*,

184 F.R.D. 263 (D.V.I. 1999)*Martin*, 184 F.R.D. at 265. The insurer resisted the request arguing it had not asserted the defense of reliance on the advice of counsel and, accordingly, had not waived the privilege.

The insured asserted her claim of bad faith trumped that argument, but the court disagreed. Instead, the court ruled that the more restrictive view set out in Rhone-Poulenc Rorer, Inc. v.

Home Indemnity Co., 32 F.3d 851, 863 (3d Cir. 1994) applied. In *Rhone-Poulenc*, the court stated "advice is not in issue merely because it is relevant, and does not necessarily become in issue because the attorney's advice might affect the client's state of mind in a relevant matter." *Rhone-Poulenc*, 32 F.3d at 863.

In *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7 (D. Mass. 1997), the insured sued its insurer for breach of contract and bad faith refusal to pay his first-party property insurance claim. The insured sought production of the insurer's attorney-client communications arguing a blanket exception to the attorney-client privilege exists in bad faith actions. *Ferrara*, 173 F.R.D. at 12. "A simple assertion that an insured cannot otherwise prove her case of bad faith does not *automatically* permit an insured to rummage through the insurer's claims file." *Dixie Mill Supply Co., Inc. v. Continental Cas. Co.*,

168 F.R.D. 554 (E.D.La. 1996)*Dixie Mills*, 168 F.R.D. at 556.

The court rejected this argument saying it sweeps too broadly. "Such a rule would permit a plaintiff to force a defendant to abrogate its privilege simply by asserting in the complaint that the defendant acted in bad faith, which the defendant then denies and says that, to the contrary, it acted in good faith." *Dixie Mills*, 168 F.R.D. at 556.

In Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254 (De. 1995), the insured sued its UM carrier for bad faith withholding of benefits. The trial court ordered the insurer to produce documents that the insurer claimed were either exempt from discovery under the work

product doctrine or the attorney-client privilege. The trial court ordered production of all materials without differentiating between the two categories, fusing them into a single "substantial need" analysis. *Tackett*, 653 A.2d at 259. "A party cannot force an insurer to waive the protections of the attorney-client privilege merely by bringing a bad faith claim." *Tackett*, 653 A.2d at 258. Only when the insurer makes factual assertions that place in issue the advice of its counsel will waiver be found.

In The Aetna Cas. & Surety Co. v. Superior Court, 153 Cal. App. 3d 467 (Cal. App. 1984), the insurer commenced a declaratory action to determine its obligations under a first-party property insurance policy. The insured counterclaimed for bad faith denial of the claim, and demanded production of the insurer's communications with its lawyers, and sought to depose its lawyers. *Aetna*, 153 Cal. App. 3d at 471.

The court rejected each of these arguments. The insured's "joint client" theory was based on the duty of the insurer to conduct a neutral investigation of the claim, and duty to give as much consideration to the insured's interest as to its own. This is like the "fiduciary duty" argument Petitioner raises here. (Petition at p. 23.) The court rejected this argument, noting the cases involving a duty to conduct a neutral investigation did not involve legal disputes on the basic issue of coverage. *Aetna*, 153 Cal. App. 3d at 476.

Finally, the court rejected the insured's contention that by filing his bad faith action he put the insurer's state of mind at issue and, therefore the insurer's attorney privilege was not applicable. *Palmer v. Farmers Ins. Exchange*,

861 P.2d 895 (Mont. 1993)*Palmer*, 861 P. 2d at 899. In the subsequent bad faith case, the insured sought production of correspondence between the insurer and its attorneys in order to obtain evidence for its bad faith case that focused on the litigation tactics of defense counsel in the underlying UM breach of contract trial. *Palmer*, 861 P. 2d at 904-905.

The courts of these various states have all recognized the great and abiding value of the attorney-client privilege between insurers and their lawyers in first-party coverage matters. Amicus urges this Court to understand defense lawyers could not carry out their professional duties under the weight of the Petitioner's ill-conceived, and unworkable proposal.

CONCLUSION

Amicus FDLA, and its Florida lawyer members, respectfully urge this Court to preserve the insurer's attorney-client privilege in proceedings conducted under

The undersigned certifies that the type, size, and style utilized in this Brief is 14 point Times New Roman.

ANTHONY J. RUSSO, ESQ.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing amicus brief has been furnished by regular U.S. Mail on April 10, 2009 to the following.

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