IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC06-2508

PETER R. GENOVESE, M.D.,

Petitioner,

-vs-

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Respondent.
_____/

BRIEF OF PETITIONER ON THE MERITS

On Appeal from the Fourth District Court of Appeals

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PREFACE

The following designations will be used:

"Appendix" refers to the Appendix to the Petition for Writ of Certiorari from the Fourth District Court of Appeal

The symbol "R" refers to the Index to the Record-on-Appeal in the Florida Supreme Court.

STATEMENT OF THE CASE AND FACTS

Dr. Genovese is an insured under a disability policy issued by Provident in 1989 (R45, ¶7). In November 1997, Dr. Genovese submitted a claim for total disability (R45, ¶7). Provident began paying the monthly benefits under the policy on March 4, 1998 (R45, ¶7). Beginning with its benefits check dated February 5, 1999, Provident began paying benefits to Dr. Genovese under a reservation of rights (R45, ¶7). In August 1999, Provident filed suit against Dr. Genovese asking a court to declare Dr. Genovese not disabled (R45, ¶7). At least initially, Provident continued to pay monthly benefits due under the policy (R45, ¶7). During the litigation, however, counsel for Provident informed counsel for Dr. Genovese that Provident would stop paying the claim entirely if Dr. Genovese continued to defend the lawsuit (R45, ¶7). Dr. Genovese continued to defend the claim and, as a result, Provident terminated further benefits (R45, ¶7). On February 7, 2002, the jury rendered a verdict in favor of Dr. Genovese finding him totally disabled and a judgment was rendered against Provident (R42-43).

After Provident paid the back-payments owed, Dr. Genovese filed a statutory bad faith lawsuit pursuant to §624.155, Fla. Stat., for its claims handling and litigation conduct. Dr. Genovese served discovery requesting that Provident produce all claims and litigation related documents from the underlying disability benefits claim (see, generally, the First Supplemental Request for Production, as described in Provident's

Response to the Second Supplemental Request for Production, R52). Provident objected (R51-56). Pursuant to Dr. Genovese's Motion to Compel Production of Documents, the trial court ordered Provident to produce its claims file regarding the underlying litigation, over Provident's work product and attorney-client privilege objections. Provident chose not to challenge such order and produced its claims file to Genovese (R64, lines 10-11).

Provident's claims file consisted mostly of Dr. Genovese's medical records and other documents submitted by Dr. Genovese in support of his claim for benefits. Although the claims file included some attorney-client communications between Provident and its in-house attorneys, it did not include a single document referencing communications between Provident and Shutts & Bowen, its outside counsel. Dr. Genovese served a Second Supplemental Request to Produce as part of his discovery into the bad faith conduct by Provident (R48-49). The Second Supplemental Request to Produce requested that Provident produce its "entire litigation file, cover to cover, by whatever name in whatever form, regarding Plaintiff's claim(s) for disability benefits (R48). The request also asked for all correspondence and communications between Shutts & Bowen (Provident's attorneys) and Provident regarding Plaintiff's disability claims generated up to and including February 7, 2002[1] (R48).

[1] The February 7, 2002 date represents when the underlying claim for contractual benefits was resolved by the jury's verdict.

In response, Provident objected at length, contending that the documents contained in its litigation file include privileged communications between Provident's employees and Provident's attorneys who were defending the disability claim (Appendix 5). The objection also included a statement by Provident which attempted to blame Dr. Genovese for Provident's decision to terminate benefits during the litigation. Specifically, Provident stated in its objection that "BUT FOR the erroneous summary judgment obtained by Dr. Genovese in the previous suit, the previous action would have been tried to a conclusion with Dr. Genovese being paid his disability benefit by Provident pending the jury verdict therein and final judgment (R52) (capitalization in the original).

In response to a Motion to Compel filed by Dr. Genovese, the court issued the order which is the subject of the Petition (R39-40). The order required "Provident to produce all materials contained in Provident's litigation file that were created up to and including the date of resolution of the underlying claim for disability benefits" (R40). The court specifically noted that Dr. Genovese was not seeking, nor was he entitled, to discover materials generated after the underlying disability claim was concluded, including any attorney-client communications regarding the defense of the instant bad faith claim (R40).

Provident Life sought certiorari review by the Fourth District Court of Appeal R1-34). The Fourth District denied the petition as to Provident's claim that some of

the documents were protected by a "core" work product privilege, noting that this Court made no such distinction in Allstate Indemnity Co. v. Ruiz, 899 So.2d 1121 (Fla. 2005) See Provident Life & Acc. Ins. Co. v. Genovese, 943 So. 2d 321, 322 (Fla. 4th DCA 2006). However, with regard to the documents which Provident claimed were protected by the attorney-client privilege, the Fourth District granted the petition and quashed the portion of the trial court's order requiring production of documents protected by the attorney-client privilege. Id. at 323. 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?

Dr. Genovese has sought review of the case and an answer to the certified question from this Court.

SUMMARY OF ARGUMENT

The certified question should be answered in the affirmative. In Ruiz, this Court recognized that §624.155, Fla. Stat., created a fiduciary relationship between the insurer and the insured in a first party claim. The historical context of Ruiz shows that the issue resolved by this Court in that case concerned both attorney work product and attorney-client privilege claims. In addition, the prior decision of this Court in Kujawa II and the decision of the Third District in Taylor, both of which figured prominently in this Court's analysis in Ruiz, related to both privileges. As a result, the Fourth District incorrectly limited this Court's decision in Ruiz to claims of work product privilege.

The certified question should be answered in the affirmative and this matter remanded to the Fourth District.

ARGUMENT

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

The certified question presents a pure legal issue. Therefore, our review is de novo. Kephart v. Hadi, 932 So.2d 1086, 1089 (Fla. 2006); Insko v. State, 969 So.2d 992, 997 (Fla. 2007).

Argument

The Fourth District distinguished this Court's decision in Ruiz on the basis that it did not apply to attorney-client privileged materials, only work product privileged materials. The decision in Ruiz, however, is not limited to one type of privilege, and clearly holds that the insured in a first party bad faith claim is entitled to discovery of all materials from the claim and litigation file. Based upon the broad holding of Ruiz, and considering the historical backdrop to the decision in Ruiz, this Court should answer the certified question in the affirmative.

Ruiz Receded from Kujawa and Established New Guidelines for Discovery in First Party Bad Faith

In Ruiz, this Court dispensed with the distinction between discovery in first and third party bad faith actions that it made years earlier in Kujawa v. Manhattan National Life Insurance Co., 541 So.2d 1168 (Fla.1989)[2]:

> Today, however, we reconsider the wisdom of our decision in Kujawa and a fresh look at such decision convinces us that any distinction between first – and third-party bad faith actions with regard to discovery purposes is unjustified and without support under section 624.155 and creates an overly formalistic distinction between substantively identical claims. As we have previously acknowledged in Laforet [658 So.2d 55 (Fla. 1995)] and other decisions, section 624.155 very clearly provides first-party claimants, upon compliance with statutory requirements, the identical opportunity to pursue bad faith claims against insurers as has been the situation in connection with third-party claims for decades at common law. The Legislature has clearly chosen to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have had in dealing with third-party claims. Thus, there is no basis to apply different discovery rules to the substantively identical causes of action. See Fidelity and Cas. Ins. Co. v Taylor, 525 So. 2d 908, 909 (Fla. 3d DCA 1987) (stating that in both first- and third party bad faith actions, "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"), disapproved by Kujawa, 541 So.2d 1168 (Fla.1989). We conclude the claims of protection at issue in this case may

2 Because the analysis of this issue requires the discussion of this Court's and the Fourth District's respective Kujawa opinions, the Fourth District's opinion will be referred to as Kujawa I and this Court's opinion will be referred to as Kujawa II.

> only be applied consistently with the rationale we have established in identical situations in the third-party context… We conclude that it is necessary to recede from our decision in Kujawa because it has unnecessarily produced the application of artificial and disparate discovery rules to first and third party bad faith action.

Instead, the court held that the discovery allowed in both a third and first party bad faith action were the same (Ruiz, 899 So.2d at 1129-30):

> [W]e hold that in connection with evaluating the obligation to process claims in good faith under section 624.155, 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 pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action. (Emphasis added).

This Court has thus held that the nature of the cause of action mandates that the insurer's entire claims and related litigation files are discoverable in a bad faith action. The use of broad language in Ruiz to clarify that "all materials" must be produced and specifically included litigation files is unmistakable. The phrase "all materials" necessarily includes materials between Provident and its counsel regarding the underlying claim for insurance benefits.

Some District Courts have decided that this Court's decision in Ruiz applies only to compel production of documents claimed to be protected by the attorney work product privilege, not to attorney-client privileged materials. See, Liberty Mut. Fire

Ins. Co. v. Bennett, 939 So.2d 1113, 1114 (Fla. 4th DCA 2006), and XL Specialty Ins. Co. v. Aircraft Holdings, LLC, 929 So.2d 578 (Fla. 1st DCA 2006). An analysis of the historical context of Ruiz, however, shows that there is no distinction between work product and attorney-client privileged materials, and that both must be produced in a first part bad faith claim brought pursuant to §624.144, Fla. Stat.

The Change in Analysis of Taylor and Kujawa I

The analysis of Ruiz turns on this Court's handling of Taylor and Manhattan Nat. Life Ins. Co. v. Kujawa, 522 So.2d 1078 (Fla. 4th DCA 1988) (Kujawa I). This Court had jurisdiction of Kujawa I because of the conflict between it and Taylor. Both Kujawa I and Taylor involved discovery orders compelling the insurer in a first party bad faith case to produce its litigation file over objections based on both attorney-client and attorney work product privileges. When this Court first addressed the conflict in Kujawa II, the Court disapproved Taylor and approved Kujawa I. In a short opinion, this Court concluded that the relationship between the insurer and the insured claiming first party benefits was adversarial and that, therefore, an absolute privilege of non-disclosure applied to attorney-client materials held by the insurer. The Court also noted that only a qualified immunity protected attorney work product materials, and that production of those materials could be compelled upon the requisite showing pursuant to Fla. R. Civ. P. 1.280(b)(2) . Importantly, in a dissenting opinion, Justice Shaw wrote that he believed the enactment of §624.155, Fla. Stat.

establishes a fiduciary relationship between the insurer and the insured in a first party claim, "thus making the claim processing file discoverable under the bad faith count." Id.

Approximately 16 years later, this Court was asked to review the discovery rules established by the Kujawa II decision in Ruiz. This Court concluded that the distinction between first part and third party claims for purposes of discovery was untenable, and held that the same discovery is available in a first party claim as is available in a third party claim. In coming to its conclusion, this Court wrote that "we now agree with the analytical approach of the court in Fidelity and Casualty Ins. Co. of New York v. Taylor, 525 So.2d 908 (Fla. 3d DCA 1987)," which was previously disapproved in Kujawa II.

In Taylor, the Third District permitted the discovery of the entire first party claim file over attorney-client and attorney work product privilege objections and wrote (Taylor, 525 So.2d at 909 -10) (emphasis added):

> In a "first-party" action against an insurance carrier founded upon section 624.155(1)(b), which affirmatively creates a company duty to its insured to act in good faith in its dealings under the policy, liability is based upon the carrier's conduct in processing and paying a given claim. [Citations omitted.] Thus, the action is totally unlike an ordinary "insured vs. insurer" action brought only under the policy, in which the carrier's claim file is deemed not producible essentially because its contents are not relevant to the only issues involved, those of coverage and damages, and in which there is therefore no basis for overcoming the

> work product and attorney-client privileges which would ordinarily attach to these materials. [Citations omitted.]
>
> In contrast, a case like this one is totally in-distinguishable from the familiar "bad faith" failure to settle or defend a third-party's action against a liability carrier's insureds. [citations omitted] In those cases, like this one, the pertinent issue is the manner in which the company has handled the suit including its consideration of the advice of counsel so as to discharge its mandated duty of good faith. Virtually the only source of information on these questions is the claim file itself. Accordingly, applying the rules that the work product privilege is overcome by a showing that the materials give clues to relevant facts which may not otherwise be secured, and that the attorney-client privilege is likewise commonly rendered inapplicable, it has been consistently held in our state that a claim file is subject to production in such an action. [Citations and footnotes omitted.]
>
> In our view, because the pertinent issues are the same, there is no basis for distinguishing between types of "bad faith" insurance cases with respect to the present question. We therefore hold, as does the substantial weight of authority elsewhere on the question, that the claim file is and was properly held producible in this first-party case. (Emphasis added.)

This Court then receded from Kujawa II, writing "we believe that a portion of our decision in [Kujawa II] is both legally and practically untenable" and "to the extent necessary, recede from our decision in [Kujawa II] as explained herein." Ruiz, 899 So. 2d at 1131. The "explanation within" regarding Kujawa II was because it "produced the application of artificial and disparate discovery rules to first and third-party bad faith actions." Id. at 1129.

Although the decision in Ruiz did not explicitly involve a claim of attorney-client privilege, the decision in Taylor, upon which Ruiz relies, did involve a claim of attorney-client privilege. The Third District held that neither the attorney-client privilege, nor the attorney work product privilege, apply to any document related to first party bad faith litigation. That fact, coupled with the holding in Ruiz that first and third party discovery must be the same because the fiduciary duty owed to the insured is the same in both instances leads to the conclusion that the litigation file materials are not protected by the attorney-client privilege in either first or third party cases.

Because this Court held that discovery in first party bad faith claims should be the same as discovery in third party bad faith claims, the scope of discovery allowed in this case can only be discernible by looking at the scope of discovery allowed in third party bad faith claims. Similarly, in Allstate Indemnity Company v. Oser, 893 So.2d 675 (Fla. 1st DCA 2005), the court upheld the trial court's discovery order by noting that in a third party bad-faith action, "no attorney-client or work-product privilege ordinarily extends to protect documents that were created before the date of the judgment that gave rise to such claim." Oser, 893 So.2d at 677. In United Services Automobile Association v. Jennings, 731 So.2d 1258 (Fla. 1999), this Court held that the scope of discovery after a Cunningham stipulation was the same as the

discovery available after the entry of an excess judgment.[3] With regard to the specific scope, the Court wrote (Jennings, 731 So. 2d at 1260):

> Finally, we note that the permitted discovery of the insurer's claim file is limited to materials related to the insurer's handling of the claim through the date of the stipulation and agreement that concluded the underlying negligence claim and is the basis of the stipulated judgment. The required discovery does not include any attorney-client communication or work-product material which pertains to the insurer's defense of itself in the bad-faith action and which was generated subsequent to the stipulation and agreement, even though such privileged materials are physically included in what is referred to as the claims file.

Although the Court noted the existence of privileges from disclosure of the documents related to the "bad faith" defense after the entry of the stipulation, there was no such privilege noted for documents created before the stipulation. The court stated that all documents created prior to the entry of the stipulation were discoverable.

This same rule for discovery is set forth in numerous Florida decisions. Dunn v. National Security Fire and Casualty Co., 631 So.2d 1103, 1109 (Fla.5th DCA 1993) (In bad faith suits against insurance companies for failure to settle within the policy

3 A "Cunningham" stipulation refers to an agreement of the parties to treat an agreed amount as the functional equivalent of a final judgment, without the time and expense necessary to obtain a final judgment. Cunningham v. Standard Guaranty Ins. Co., 630 So.2d 179 (Fla.1994).

limits, all materials in the insurance company's claim file up to the date the judgment in the underlying suit are obtainable, and should be produced when sought by discovery); Continental Casualty Co. v. Aqua Jet Filter Systems, Inc., 620 So.2d 1141, 1142 (Fla. 3d DCA 1993) (the plaintiff in a third party bad faith action against an insurance company for failure to settle the claim for policy limits is entitled to the entire litigation file of the insured's counsel from the inception of the lawsuit until the date that the judgment was entered in the underlying action). See also, Stone v. Travelers Insurance Company, 326 So.2d 241 (Fla. 3d DCA 1976).

The First District concluded, however, that the decision in Ruiz does not mean that an insurer no longer has an attorney-client privilege for claim documents. In XL Specialty Insurance Company v. Aircraft Holdings, LLC., 929 So.2d 578 (Fla. 1st DCA 2006), the court held that Ruiz is limited to work-product privilege materials only, and that the portion of Kujawa which related to the attorney-client privilege was not changed by Ruiz. It quashed an order which compelled an insurer to produce attorney-client privileged documents[4].

In drawing the conclusion that this Court's decision in Ruiz did not address claims of attorney-client privilege, the court did not discuss this Court's reliance on Taylor, nor the fact that Taylor dealt with both attorney-client and attorney work

product privileges. The court's conclusion not only limits the decision in Ruiz in a manner which was not intended by this Court, but is also contrary to the Court's holding that discovery in a first party bad faith case be identical to that permitted in a third party case. Although this Court stated that it did not decide the issue of attorney-client privilege in first party bad faith cases, it did not limit the reasoning of the decision to work product privilege. It merely 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.

The discoverability of attorney-client materials is especially important in this case because some of the alleged bad faith conduct occurred during the litigation and was done by attorneys representing Provident. Section 624.155, Fla. Stat. specifically obligates insurers to act in the utmost of good faith and fair dealing with respect to its insureds. Florida courts have recognized that §624.155, Fla. Stat., permits discovery and introduction into evidence of an insurer's litigation conduct in the underlying coverage suit. Hollar v. International Bankers Ins. Co., 572 So. 2d 937 (Fla. 3d DCA 1990). In Home Insurance Co. v. Owens, 573 So.2d 343, 344 (Fla. 4th DCA 1990), the court held that an insurer's conduct during litigation was relevant, admissible evidence in a bad faith case. The court agreed with the Eleventh Circuit Court of

[4] Although this Court accepted jurisdiction of XL Specialty, the matter was settled prior to the issuance of an opinion by this Court and dismissed. Aircraft Holdings,

Appeals in T.D.S. Inc. v. Shelby Mutual Insurance Co., 760 F.2d 1520 (11th Cir.1985), rehearing denied, 769 F.2d 1485 (11th Cir.1985), in which the insurer was accused of utilizing an arson defense in bad faith. It held that the conduct of an insurer during the litigation tended to prove the allegation that the claim was denied without a proper investigation and without supporting evidence.

These decisions provide the basis for discovery of the attorney-client communications between the insurer and its counsel in the underlying first party claim. If insurer bad faith conduct includes litigation conducted in bad faith, then the legislature must have intended, implicitly, to allow discovery into the conduct. In this case, counsel for Provident was apparently instructed by Provident to tell counsel for Dr. Genovese that Provident would take retaliatory action (e.g. terminate the provisional payments during litigation) if Dr. Genovese continued to prosecute his contract action. The threat, which was eventually carried out, was made in an effort to force Dr. Genovese to settle his disability claim on terms which were less favorable than the contract provided. If proven, then there is no doubt that Provident will be liable for bad faith pursuant to §624.155, Fla. Stat.

However, a portion of the proof of 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

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LLC v. XL Specialty Ins. Co., 993 So. 2d 510 (Fla. 2008).

withholding payments. Although Provident's objection to the discovery of its communications between its attorneys and employees does not explicitly so state, 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 of coercing a settlement of the disability claim on terms favorable to Provident. This conduct by Provident and its attorneys was a breach of the fiduciary obligation each owed to Dr. Genovese.

When the legislature created the right to bring a claim against an insurer for conduct such as the conduct of Provident through its attorney, then it must have also intended to give the insured the ability to discover the evidence to prove the claim, even if the conduct involved an attorney. It is doubtful that the legislature would allow insurers to conceal the evidence of their misdeeds by acting through an attorney as it would defeat the purpose of the statute. If Provident's adjuster was instructed by a superior to suspend benefits to coerce a settlement, contacted Dr. Genovese, threatened him, and then carried out the threat by stopping the payment of benefits, the evidence of that conduct would be discoverable through the claim file. The result should be no different if the insurer used an attorney instead of an adjuster. It is doubtful that the legislature intended to protect the insurer who utilized an attorney to perform the bad faith act, yet allow discovery into the conduct of an insurer who used an adjuster to perform the bad faith act.

In §90.502(4)(a), Fla. Stat., the legislature created an exception to the attorney-client privilege when "[t]he services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud." Although the allegations in this case do not involve a crime or fraud on the part of Provident at this time, the language of §90.502(4)(a), Fla. Stat. is an indication that the legislature will not allow the attorney-client privilege to be used to subvert the intention of other statutes. In similar cases involving an insured who was a professional, the insured has uncovered evidence that Provident has a company policy of making unreasonable denials of disability claims and biased and unethical claims handling decisions which target high-end disability claims brought by professionals. Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004). See also, Merrick v. Paul Revere Life Ins. Co., 500 F.3d 1007 (9th Cir. 2007). This same evidence appears to be available in this case, but Petitioner has been denied access to it because of the Fourth District's decision preventing discovery of the entire litigation file.

In Ruiz, this Court noted the decision of the Alaska Supreme Court holding that the attorney-client privilege does not protect conduct which is not lawful. United Services Automobile Ass'n v. Werley, 526 P.2d 28, 32-33 (Alaska 1974) ("When an insurer through its attorney engages in a bad faith attempt to defeat, or at least reduce the rightful claim of its insured, invocation of the attorney-client privilege for

communications pertaining to such bad faith dealing seems clearly inappropriate.") The court in Werley did not limit the discussion to crimes and fraud. It noted that while the exception to the privilege is absolute for crime and fraud, it can also apply to any communications for an unlawful purpose. Included in that category by the court were documents evidencing an insurer's bad faith refusal to pay a claim and the prosecution of meritless defenses in an uninsured motorist claim. It viewed a prima facie showing of bad faith as sufficient to prove that the attorney-client privilege objection should be overruled. This is similar to the argument made in Judge Farmer's special concurrence in the decision below in which he wrote (Provident Life, 943 So. 2d at 324):

> The primary duty of the fiduciary is broadly described as loyalty. Everything the carrier and its chosen lawyer do must be faithful to that duty and designed to further the interests of the insured in both covering and defending against the claim. One aspect subsumed within this duty of loyalty deals with confidentiality. When it is in the best interests of the insured not to disclose to someone outside their relationship communications between the insured and the chosen lawyer, the attorney-client privilege must be asserted. But when anything happens or they learn anything that relates in any way to the claim, these fiduciaries must disclose it to the insured. If the carrier and its chosen lawyer have a duty to disclose everything to the insured, it follows that they cannot possibly have a privilege then or later refuse to disclose it.

Similarly, the conduct of the attorneys in the underlying litigation in this case was part of the wrongdoing by Provident. If employees of Provident discussed that

bad faith conduct with Provident's attorneys in an effort to plan the bad faith conduct, then those plans should not be protected by the attorney-client privilege. Since it also appears that the threat of dragging the litigation out was made and carried out by Provident's attorneys, the communications between Provident and its attorneys would be evidence of a wrongful act taken against the insured with which both Provident and its attorneys had a fiduciary duty.

The documents necessary to prove an insurers' bad faith in a first party bad faith case will always come from the insurer. The existence of bad faith is decided by review of those documents against the standard of care of a reasonable insurance company, acting "fairly and honestly toward its insured and with due regard for her or his interests." §624.155, Fla. Stat. (2001). According to Provident's argument below, an insured attempting to prove a claim for first party bad faith must prove the claim, if at all, without obtaining the documents generated by the attorneys retained by the insurer to perform the bad faith acts.

An example may be of some use in this discussion. Assume for this discussion that Provident received the claim from Genovese and immediately gave the application to an attorney to decide whether the claim should be denied. After researching the relevant authorities, and applying the law to the information in the file about Dr. Genovese's disability, the attorney concluded that the claim should be paid because Dr. Genovese was disabled and the coverage applied. Finally, assume that

Provident decided it would nevertheless deny the claim, hoping that it would be able to force a discounted settlement of the claim.

In the factual scenario above, the actions of the attorney, and the communications with the attorney during which the insurer decided to act in bad faith, are part of the ordinary business of the insurer in deciding whether to honor or deny the claim and not part of a bad faith claim. The attorney was not consulted to assess the insurer's exposure for an alleged bad faith claims handling process after the conduct had taken place. Indeed, no bad faith claim even accrued in the scenario described because the underlying claim was not determined in favor of the insured until much later. Because it is performed by an attorney, however, Provident claims that the communications, thoughts and mental impressions are privileged. Provident's claim of privilege is based solely on the fact that a lawyer was involved in the claim process, rather than non-lawyer adjusters. If the alleged bad faith acts were performed by both adjusters and lawyers, Provident's discovery limitation would allow discovery regarding the acts performed by the adjusters, but allow the insurer to conceal information about the acts committed by the attorneys.

If the rule espoused by Provident existed, then the discoverable portion of the claim file could easily be devoid of any information other than medical records and correspondence with other parties. As in the case here, the claim file would have no useful information in it. As pointed out by this Court in Ruiz, and the Third District in

Taylor, the only source for evidence of insurer bad faith in a first party context will always come from the claim process and the claim file. (Ruiz at 1128-29):

> 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. [Citations omitted.]

Recognizing a privilege would only provide bad faith insurers with the means to prevent discovery of their bad faith conduct. The insurer and the attorney working for the insurer both owe a fiduciary duty to the insured to act in good faith pursuant to §624.155, Fla.Stat. There is no legal basis to keep as privileged the bad faith conduct of an insurer and attorney who owe fiduciary duties to the insured to act in good faith. Allowing them to keep evidence of their bad faith conduct secret by having an attorney take part in the bad faith conduct thwarts the purpose §624.155, Fla. Stat.

CONCLUSION

For the reasons stated above, this Court should answer the certified question in the affirmative and remand this matter to the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to JOHN E. MEAGHER, ESQ. and JOHN T. KOLINSKI, ESQ. 201 S. Biscayne Blvd., Ste. 1200, Miami, FL 33602; GARY C. ROSEN, ESQ., P.O. Box 9057, Ft. Lauderdale, FL 33310, by mail, on February 12, 2009.

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CERTIFICATE OF COMPLIANCE

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Jurisdiction is Times New Roman 14pt.

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