IN THE SUPREME COURT OF FLORIDA

AIRCRAFT HOLDINGS, LLC,

Petitioner,

v. Case No. SC06-1303

XL SPECIALTY INSURANCE COMPANY,

Respondent.

AMENDED AMICUS BRIEF OF THE FLORIDA JUSTICE ASSOCIATION IN SUPPORT OF PETITIONER, AS TO COVER PAGE

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE FIRST DISCRICT COURT OF APPEAL, STATE OF FLORIDA

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AMICUS CURIAE STATEMENT

The Florida Justice Association files this brief as an amicus curiae to the Court. The Florida Justice Association is a statewide organization devoted to the rights of consumers and the constitutional right of access to the courts.

The issue presented in this case is whether the attorney-client privilege applies to discovery of an insurance company's claim file in a first-party insurance bad faith action. This issue directly impacts the rights of consumers, which the Florida Justice Association strives to protect.

SUMMARY OF ARGUMENT

In Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121, 1126-27 (Fla. 2005), this Court abolished the distinction that had previously existed between first- and third- party bad faith cases with regard to the rationale of the discoverability of claims file type material. This Court's analysis for reaching that conclusion applies to an insurer's assertion of attorney-client privilege as well as work product immunity. First, the attorney-client privilege does not shield an insurer's claim file, or any portion of that file, from discovery in a first-party bad faith case because the insurer owes the same duty of good faith, fairness, and honesty to the insured in processing and litigating the underlying first-party coverage claim that is owed to the insured in defending a third-party claim. Second, attorney-client communications are discoverable in a first-party bad faith action because they are essential to proving the action, especially when the lawyers involved were involved in the alleged bad faith claims handling.

In addition, any artificial distinction that permits discovery of work product and denies discovery of attorney-client communications, would encourage insurance companies to manufacture attorney-client relationships

to shield the claims handling communications from discovery in a subsequent insurance bad faith case.

This artificial distinction would also have the illogical and unfair result of providing more protection, under insurance bad faith law, to the third-party claimant than to the first-party claimant.

For each of these reasons, this Court should require disclosure of attorney-client communications found in the claim file when requested in a first-party insurance bad faith action.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE DOES NOT PREVENT DISCOVERY OF AN INSURER'S CLAIM FILE IN A FIRST-PARTY BAD FAITH CASE BECAUSE THE INSURER OWES THE SAME DUTY OF GOOD FAITH AND FAIR DEALING TO THE INSURED IN PROCESSING AND LITIGATING A FIRST-PARTY COVERAGE AS IN DEFENDING A THIRD PARTY CLAIM.

The certified question asks this Court to consider whether its decision in Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005), requires discovery of attorney-client communications found in the insurer's claim file when requested by the plaintiff in a first-party bad faith action. The answer is yes.

In Ruiz, this Court was asked to review an order denying a first-party bad faith plaintiff discovery of work product found in the insurer's claim file. Although the order on review was limited to an assertion of work product, this Court took the opportunity to reconsider the distinction it imposed in Kujawa v. Manhattan National Life Ins. Co., 541 So. 2d 1168 (Fla. 1989), between discovery available in first-party bad faith actions and that available in third-party bad faith actions. The Court held:

> 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[, Florida Statutes]

> and creates an overly formalistic distinction between substantively identical claims.

Ruiz, 899 So. 2d at 1128. This Court's broad holding requires disclosure of the insurer's claim file, including attorney-client communications and work product, when requested in a first-party bad faith action.

In 1989, this Court held that the insurer's claim file is not discoverable in a first-party bad faith action. Kujawa, 541 So. 2d at 1169. The brief opinion stated summarily that, unlike the third-party claim context, the relationship between the insurer and the insured in the context of a first-party claim is adversarial. Id. In the next sentence, the Kujawa decision concluded that the first-party claimant cannot obtain the insurer's claim file during a subsequent bad faith action. Id.

Ruiz held that this distinction between first-party and third-party bad faith actions is artificial and is based on "an outdated pre-statutory analysis." 899 So. 2d at 1127-28. In creating a statutory cause of action for first-party bad faith, the Florida Legislature mandated that insurers "use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have in dealing with third-party claims." Id. at 1128. The legislative history of section 624.155, Florida Statutes, establishes that the Legislature intended to impose an equivalent duty of good faith on insurance

companies with respect to first-party and third-party insureds. For example, a staff report to the House Committee on Insurance states, as follows:

> [Section 624.155] requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that the company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies.

Staff Report, 1982 Insurance Code Sunset Revision (H.B. 4 F; as amended H.B. 10G) (June 3, 1982).

Section 624.155 imposes a duty of good faith and fair dealing upon a first-party insurer even if the insurer takes the position that its insured's claim is not covered. If, at any time, the insurer learns of pertinent facts or relevant law which indicate that coverage might exist, the insurer has a duty to act in good faith and deal fairly with its insured. The insurer must prevent itself from establishing such an adversarial relationship with its insured that it forgets or disregards its primary duty of good faith to that insured. In this way, the first-party insurer must treat its insured fairly and honestly and must act with due regard for its insured's best interests, and the insurer must attempt to settle its insured's claim when, under all the circumstances, it could and should do so.

The issue in a statutory first-party bad faith action is the same as that in a third-party bad faith action- whether the insurer discharged its mandatory duty of good faith in handling and litigating the claim. Id.; Fidelity and Cas. Ins. Co. v. Taylor, 525 So. 2d 908, 909 (Fla. 3d DCA 1987). For this reason, this Court concluded, in Ruiz, that there is no logical basis for distinguishing between the need for the claim file to prove a third-party bad faith action and the need for this information in a first-party bad faith action. 899 So. 2d at 1128.

In addition, this Court noted that prohibiting discovery of the insurer's claim file in a first-party bad faith action "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." 899 So. 2d at 1128. This Court explained, that the claim 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.'" Ruiz, 899 So. 2d at 1128-29 (quoting Brown v. Superior Court, 670 P.2d 725, 734 (Ariz. 1983)).

The decision below, XL Specialty Ins. Co. v. Aircraft Holdings, LLC, 929 So. 2d 578 (Fla. 1st DCA 2006), appears to adopt the perspective of Justice Well's opinion, which concurs in part and dissents in part from the

majority opinion in Ruiz. Justice Well's opinion states that this Court's majority opinion should be limited only to work product found in the claim file. Ruiz, 899 So. 2d at 1132. However, that was not the opinion of the majority in Ruiz.

Never does the Ruiz decision limit its analysis to work product found in a claim file. Instead, the decision obliterates *any* distinction between the discovery required in third-party bad faith actions and that required in first-party bad faith actions. This Court held:

> We conclude that the better rule is recognition of the Legislature's mandate that the insurer's good faith obligation to process claims establishes a similar relationship with the insured requiring fair dealing, as has arisen in the third-party context, thus making the claim processing type file material discoverable under a claim for first-party bad faith just as with third-party actions. There simply is no basis upon which to distinguish between first- and third-party cases with regard to the rationale of the discoverability of the claim file type material.

Id. at 1129.

In fact, the majority decision adopts and quotes at length a decision which holds that both attorney-client communications and work product found in a claim file must be disclosed in a first-party bad faith action. That decision is Taylor, 525 So. 2d at 909, which Kujawa had specifically disapproved in 1989.

The decision below cites no compelling reasons for this Court to recede from its recent decision in Ruiz, by excluding attorney-client communications from discovery in first-party bad faith actions. In fact, such a rule would be unworkable. As in the context of third-party bad faith actions, it is nearly impossible to draw such a distinction between attorney-client communications and work product in a bad faith action. See, e.g., Boston Old Colony Ins. Co. v. Gutierrez, 325 So. 2d 416 (Fla. 3d DCA 1976). Much, if not all, of the work product relevant to an insurance bad faith action is based on attorney-client communications.

In addition, the discovery rule requiring discovery of the entire underlying claim file, including the attorney-client privilege, in third-party bad faith actions has a long and established pedigree. Since Boston Old Colony, the law has been that the attorney-client privilege is not absolute in insurance bad faith actions. Much like the fraud/crime exception to the attorney-client privilege, courts require disclosure of any attorney client communications that relate to the insurer's conduct toward its insured. Accordingly, insurers have no reasonable expectation of privacy to these communications.

Absent any suggestion of an error in this Court analysis in Ruiz, this Court should decline the First District Court of Appeal's invitation to recede from that decision.

II. EXCLUDING ATTORNEY-CLIENT COMMUNICATIONS FROM DISCOVERY IN A FIRST-PARTY BAD FAITH ACTION WOULD PERMIT INSURERS TO EFFECTIVELY HIDE ALL THEIR BAD FAITH BY CLOAKING CLAIMS HANDLING COMMUNICATIONS WITH THIS PRIVILEGE.

In the decision below, the First District held that an insurer may not be compelled to disclose those items in its claim file that constitute attorney-client communications. XL Specialty Ins. Co. v. Aircraft Holdings, Inc., 929 So. 2d 578, 583-84 (Fla. 1st DCA 2006). The First District reasoned that, when this Court spoke in Ruiz, it intended to limit its ruling only to require that work product items be disclosed when found in the claim file. Id.

Such an artificial distinction would defeat the civil remedy created in section 624.155. Adopting this discovery dichotomy would place insurance companies on a different plane whereby they can shield all relevant evidence by routing every action and decision through an attorney. Insurers can, by the simple expedient of getting law degrees for their adjusters, defeat normal discovery of their thought processes and communications. Those thought processes and communications are the heart of the insurance bad faith case

when they are affecting an improper motive and plan in the handling of the claim.

The possibility that such a discovery rule would shield most, if not all, of a claim file is not a remote or speculative possibility. In fact, such was the case here. XL Specialty Insurance outsourced some of its claims, including the subject claim, to a law firm. (Petitioner's Appendix 2, pp. 15-17). As a result, no XL Specialty Insurance employees, managers or officers had independent knowledge of Aircraft Holdings' claim. (Petitioner's Appendix 2, pp. 14-16, 24-25). This was the basis of XL Specialty Insurance's large privilege log, which itemized attorney-client privilege for most of the withheld discovery. (Petitioner's Appendix 3).

Arguably, first-party claimants may move for disclosure of these communications, nonetheless, asserting that they do not really constitute attorney-client communications because they were not made during the rendition of legal services. See Charles W. Ehrhardt, *Florida Evidence*, § 502.2 at 327-28 & n.9 (2005 ed.) (stating that the attorney-client privilege recognizes confidential communications made during the rendition of legal services to the client, not as a business advisor); see also Skorman v. Hovnanian of Florida, Inc., 383 So. 2d 1376, 1378 (Fla. 4th DCA 1980).

However, this mechanism is really no solution at all. As explained above, it is nearly impossible to draw a distinction between attorney-client communications and work product in an insurance bad faith case. An attorney need only offer one piece of advice regarding the handling of the claim to cloak his communication with the attorney-client privilege. The burden of fighting an institutionalized attorney-client privilege would unfairly fall on the insured. In addition, such discovery arguments would consume innumerable resources of both the courts and the parties.

Nothing in this Court's decision in Ruiz or in the analysis here suggests that this Court should require the insurer to disclose every communication it ever has with an attorney regarding the first-party bad faith action. In fact, those communications addressing the insurer's defense of the insurance bad faith case remain confidential. United Servs. Auto. Ass'n v. Jennings, 731 So. 2d 1258, 1260 (Fla. 1999); Fortune Ins. Co. v. Greene, 775 So. 2d 338, 339 (Fla. 2d DCA 2000). Only those attorney-client communications regarding the handling of the underlying claim must be disclosed. Id.

Absent any logical basis for excluding attorney-client communications from discovery in first-party bad faith actions, this Court

should refrain from adopting a discovery rule that would work to institutionalize avoiding liability in first-party bad faith actions.

III. PRECLUDING ACCESS TO ATTORNEY-CLIENT COMMUNICATIONS IN A FIRST-PARTY BAD FAITH ACTION WILL RESULT IN PROVIDING MORE PROTECTION TO THE THIRD-PARTY CLAIMANT THAN TO THE FIRST-PARTY CLAIMANT.

In Ruiz, this Court criticized that, during the period following Kujawa, "litigants in first- and third-party bad faith actions have at times been subject to unjustifiably different treatment that has impinged upon the ability of first-party bad faith litigants to fully and fairly prosecute their causes of action or judges and juries to render properly informed decisions." 899 So. 2d at 1128-29 If this Court adopts the approach taken by the First District below, this Court's decision in Ruiz will be rendered meaningless and nothing will have changed for first-party bad faith plaintiffs.

As stated above, this Court held, in Ruiz, that section 624.155 imposes a fiduciary duty on the insurer handling a first-party claim and that "there is 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." 899 So. 2d at 1128-29.

Should this Court recede from this conclusion in the context of the insurer's attorney-client communications, the result will be that plaintiffs in direct action third-party cases will be in a better litigation position than plaintiffs in first-party actions. An impeccable pedigree of cases establishes that the plaintiff in a direct action third party case is entitled to discover the entire underlying claim file. See, e.g., Thompson v. Commercial Union Ins. Co. of New York, 250 So. 2d 259 (Fla. 1971). Denying the first-party bad faith plaintiff access to the insurer's attorney-client communications will thwart that plaintiff's ability to prevail in the bad faith action. As stated above, the information found in the claim file is essential to proving a bad faith action. The same is true for attorney-client communications found within the claim file. The first-party insured would be forced to prove its first-party bad faith action without obtaining the documents generated by attorneys retained by the insurer to perform the bad faith acts. Those responsible citizens who secured insurance coverage and paid insurance premiums for that coverage are the ones who will be less likely to obtain redress when an insurer violates its duty to act in good faith.

There is no logical or legally tenable reason for adopting a rule of discovery that results in providing more protection, under insurance bad faith law, to the third-party claimant than to the first-party claimant.

CONCLUSION

Amicus Curiae, the Florida Justice Association, suggests this Court require disclosure of attorney-client communications found in the claim file when requested in a first-party insurance bad faith action, as it held in Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Gary A. Shipman, Dunlap, Toole, Shipman and Whitney, P.A., 2065 Thomasville Road, Suite 102, Tallahassee, Florida, 32308-0733, Counsel for Petitioner; Thomas M. Findley, Messer, Caparello & Self, P.A., P.O. Box 15579, Tallahassee, Florida 32317-5579, Counsel for Respondent; and Brenton N. Ver Ploeg, Ver Ploeg & Lumpkin, P.A., 100 S.E. 2nd Street, Suite 2150, Miami, Florida

33131-2151, Counsel for Amicus Curiae, United Policyholders on this **24th** day of **October** 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was typed in Times New Roman 14 point font in compliance with Fla. App. P. 9.100(1) and 9.210(a)(2).

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