IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1303
Lower Tribunal Case No.: 1D05-4333

AIRCRAFT HOLDINGS, LLC,
Petitioner,

vs.

XL SPECIALTY INSURANCE COMPANY,
Respondent.

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE, CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL.

PETITIONER'S INITIAL BRIEF

DUNLAP, TOOLE, SHIPMAN & WHITNEY, P.A.
Gary A. Shipman (593435)
William E. Whitney (241581)
James R. Caves, III (745111)
Dana G. Toole (437093)
2065 Thomasville Road, Suite 102
Tallahassee, Florida 32308
Telephone: (850) 385-5000
Facsimile: (850) 385-7636
ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE AND FACTS

The Petitioner accepts and adopts the First District Court of Appeal's statement of the facts and summary of the case as stated in its opinion dated April 24, 2006. The case at bar involves the question of whether, and the extent to which Aircraft Holdings, LLC ("Aircraft Holdings") has the right to obtain discovery of files maintained by the XL Specialty Insurance Co. ("XL"), its counsel/third party administrators, and its Florida counsel, including work product and documents otherwise protected by the attorney-client privilege. The Trial Court found that Aircraft Holdings had the right to obtain that discovery upon the authority of this Court's decision in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), finding that Fla. Stat. 624.155**,** applied equally to third party and first party bad faith proceedings.

The First District disagreed, quashing that portion of the Trial Court's Order which would have compelled the production of documents otherwise within the scope of the attorney/client privilege and found instead that the Trial Court misapplied this Court's ruling in *Ruiz*. *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So.2d 578 (Fla. 1st DCA 2006). Significantly, the First District did not disturb the Trial Court's ruling as it pertained to the work product documents requested by Aircraft Holdings, but it also certified the following question as being 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 communication in the same circumstances?**

XL Specialty Ins. Co., 929 So. 2d at 587. Thereafter, this Court accepted the Petitioner's request for discretionary jurisdiction and this appeal followed.

SUMMARY OF THE ARGUMENT

As this Court recognized in *Ruiz*, Fla. Stat. 624.155 was:

> …designed and intended to provide a civil remedy for any person damaged by an insurer's conduct, including 'not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests' …

(Emphasis supplied.) *See Ruiz*, 899 So.2d at 1124. Having made that observation, the *Ruiz* Court then confirmed that (a) "bad faith actions do not exist in a vacuum", and (b) that Florida recognized "two distinct but very similar types of bad faith actions…first-party and third-party." (Emphasis supplied.) *See Ruiz*, 899 So.2d at 1124-1125.

With respect to the former, this Court should be aware of the Trial Court's three orders granting summary judgment in favor of Aircraft Holdings in the underlying breach of contract claim. The orders explicitly detailed the acts by XL constituting bad faith claim handling that are involved in this action. (Appendix 1.) Given the Trial Court's findings – which were appealed by XL and affirmed *per curiam* – no further discussion is warranted.

With respect to the latter, *Ruiz* recognized that Florida's common law had long recognized third party bad faith actions, but also confirmed that common law did not recognize a corresponding common law first party action. However, this

was changed by the enactment of Fla. Stat. 624.155 to (a) eliminate the disparity in treatment of insureds who are injured by bad faith; and to (b) usher out the distinction between first and third party statutory claims, not only with respect to the actions themselves, but also with respect to the scope of discovery in those actions. Citing the "inappropriate distinctions" that "some courts" have utilized in defining those discovery parameters, this Court found that:

> …It is clear that in an action for bad faith against an insurance company for failure to settle a claim within policy limits, all materials, including documents, memoranda and letters, contained in the insurance company's file, up to and including the date of judgment in the original litigation, should be produced…

(Emphasis supplied.) *Ruiz*, 899 So.2d at 1126, citing *Stone v. Travelers Ins. Co.*, 326 So.2d 241, 243 (Fla. 3d DCA 1976). As can be seen by the language contained in *Stone*, as adopted by this Court in *Ruiz*, no distinction was made between either privileged or non-privileged materials, nor were exceptions carved out for work product or other related materials. Given this choice of language, it is respectfully submitted that this Court's inquiry can and should end at this point by disapproving the First District's decision and by confirming the Trial Court's original decision to require the production of the requested materials.

However, because the First District chose to parse several aspects of the *Ruiz* decision in its decision, some addition discussion is warranted, and will be discussed in this brief as follows:

I. BOTH FLA. STAT. 624.155 AND THIS COURT'S DECISION IN *RUIZ* JUSTIFY AND REQUIRE FULL, FAIR AND CONSISTENT DISCOVERY RIGHTS FOR ALL BAD FAITH CLAIMANTS AND THE FIRST DISTRICT ERRED IN CONCLUDING THAT THIS COURT'S RULING IN *RUIZ* APPLIES ONLY TO THE WORK PRODUCT PRIVILEGE.

II. UNDERLYING POLICY CONSIDERATIONS JUSTIFY AND REQUIRE FULL, FAIR AND CONSISTENT DISCOVERY RIGHTS FOR ALL BAD FAITH CLAIMANTS, AND THE FIRST DISTRICT ERRED IN FINDING THAT AN INSURER WHO ACTS IN BAD FAITH IS STILL ENTITLED TO ASSERT THE ATTORNEY-CLIENT PRIVILEGE.

ARGUMENT[1]

I. BOTH FLA. STAT. 624.155 AND THIS COURT'S DECISION IN *RUIZ* JUSTIFY AND REQUIRE FULL, FAIR AND CONSISTENT DISCOVERY RIGHTS FOR ALL BAD FAITH CLAIMANTS AND THE FIRST DISTRICT ERRED IN CONCLUDING THAT THIS COURT'S RULING IN *RUIZ* APPLIES ONLY TO THE WORK PRODUCT PRIVILEGE.

As stated previously, this Court's decision in *Ruiz* was clear in requiring an insurer who acts in bad faith to produce all materials within its files without distinction for any category of privilege. This language was central to both the *Ruiz* Court's decision and the Trial Court decision at issue in these proceedings.

In contrast to the clear and unambiguous language contained in *Ruiz*, the First District would limit this Court's decision to the work product privilege, basing that limitation on (a) the language contained in Justice Wells' partial concurring and dissenting opinion – which is nowhere contained within the majority opinion – and (b) upon a strained reading by the First District of this Court's decision in *Kujawa v. Manhattan National Life Ins. Co.*, 541 So.2d 1168 (Fla. 1989) . As this brief argues, neither of those limitations is warranted by any reading of either *Ruiz* or Fla. Stat. § 624.155.

[1] The standard of review is *de novo*, where the only issue before this Court is a question of law concerning this Court's decision in *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). *See K.V. v. State*, 832 So. 2d 264, 265 (Fla. 4th DCA 2002).

Respecting the first point, while Justice Wells' opinion is to be given great respect, it is not the opinion of this Court. Perhaps recognizing that fact, the First District claims that this point obtains greater significance because the majority did "not take issue with his characterization of the issue in the case." However, the concept of *stare decisis* is not furthered by a majority's silence respecting either concurring or dissenting opinions, and further, it is submitted that the First District's approach does not survive close scrutiny on that score. That being said, the First District's decision appears to be wholly based upon its effort to (a) limit this Court's decision in *Ruiz* to its facts; and upon (b) its effort to resurrect the decision of this court in *Kujawa.* As will be more fully described in this briefing, the first of these approaches is inappropriate because the *Ruiz* decision, by its terms, is not limited to its facts and properly stands as the bedrock for the Trial Court's decision. Respecting the second of the First District's points, *Kujawa* is clearly based upon an outmoded concept, which is not in harmony with this Court's finding that there should be no distinction between first and third party bad faith actions.

That being said, it is curious that the First District claimed that *Ruiz* receded only from "a portion" of its decision in *Kujawa,* and that this recession involved only the work product privilege. This approach apparently stems from a misreading of *Ruiz,* which is clear in indicating that the *Kujawa* decision was both

"legally and practically untenable" in providing "unjustifiably different treatment" to first and third party bad faith claims. *Ruiz*, 899 So.2d at 1131. Granted, the factual scenario presented to the *Ruiz* court was apparently limited to work product issues and did not involve issues related to the attorney-client privilege. However, this does not change the fact that, in addition to disapproving *Kujawa*, *Ruiz* was clear in approving the approach utilized by the Third District respecting third party bad faith claims in *Stone v. Traveler's Ins. Co.*, 326 So.2d 241 (Fla. 3d DCA 1976). Without belaboring the point, it should be noted that the exact and identical language appears in *Stone*, *Ruiz*, and the Trial Court's decision, to wit:

> …It is clear that in an action for bad faith against an insurance company for failure to settle a claim within policy limits, all materials, including documents, memoranda and letters, contained in the insurance company's file, up to and including the date of judgment in the original litigation, should be produced…

That rationale and language, in turn, is derived from the Third District's opinion in *Boston Old Colony Ins. Co. v. Gutierrez*, 325 So.2d 416 (Fla. 3d DCA 1976). In that case, a third party claimant sought documents in a bad faith action from the law firm that represented the insurance company in the underlying action. In finding that the claimant had that right, the *Gutierrez* court stated, in the context of a third party bad faith action, that:

> …As a third party beneficiary of the insurance policy, Gutierrez stands in the same posture as that of Brown, the insured. Just as Brown would be entitled to discovery, including deposition and

> production files by the attorneys, since both he (Brown) and Boston Old Colony were their clients, Gutierrez has the same right of discovery in furtherance of the preparation of his case.

Gutierrez, 325 So.2d at 417; *see also Continental Cas. Co. v. Aqua Jett Filter Sys., Inc.*, 620 So.2d 1141, 1142 (Fla. 3d DCA 1993); *Koken v. Am. Serv. Mut. Ins. Co.*, 330 So.2d 805, 806 (Fla. 3d DCA 1976). This language, which was cited with approval by the *Ruiz* Court, clearly entitles bad faith claimants to obtain discovery without reference to the work-product or attorney-client privileges and, by its terms, would explicitly allow a bad faith claimant to obtain production of all claim file materials without regard to those privileges.

This finding is further bolstered not only by the *Ruiz* court's rejection of *Kujawa*, but also by its whole-hearted embrace and application of the Third District's decision in *Fidelity and Cas. Co. of New York v. Taylor*, 525 So.2d 908 (Fla. 3d DCA 1987). In that case, like the case at bar, it should be observed that:

> …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 good faith. Virtually the only source of information on these questions is the claim file itself. Accordingly . . . it has been consistently held in our state that a claim file is subject to production in such an action.
>
> 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 supplied.) *Ruiz*, 899 So.2d at 1129, citing *Taylor*, 525 So.2d at 909-10.

More clear language is difficult to imagine, and taken together it is respectfully submitted that the *Ruiz* decision and the cases upon which it is premised, stand for the clear propositions that:

1. Claims-file type material presents virtually the only source of direct evidence with regard to the essential issue of an insurance company's handling of the insured's claim;
2. There is no basis for distinguishing between types of "bad faith" for purposes of gauging a claimant's right to obtain that evidence; and
3. That the evidence which is thereby obtainable includes not only an insurance company's entire claim file – without regard to whether it contains attorney-client or matters which would otherwise be considered privileged – but also all documents maintained by its counsel that relate to the manner the carrier has handled the suit.

That being said, while the *Ruiz* court stated its decision affected but a portion of the *Kujawa* decision, the fact of the matter is that the whole of the *Kujawa* decision cannot be reconciled with <u>any</u> of the foregoing. Just as this Court stated in *Ruiz*, *Kujawa* is both legally and practically untenable.

Moreover, if this Court were to approve the First District's determination that an insurance company can invoke the attorney-client privilege against its insured in a first-party bad faith action, it is respectfully submitted that such a result would invite insurance companies to utilize their counsel as business

advisors or as adjusters to prevent claimants from ever being able to successfully prosecute a bad faith action. Not only did the First District's misconstrue *Ruiz*, but it also (a) failed to consider the unique and important relationship between an insurance company and its insured; and (b) ignored the unique and important nature of a litigant's need to obtain the entire claim file in the prosecution of a bad faith action. *See Ruiz*, 899 So. 2d at 1128. Rather, the First District's opinion would act as a blue-print to insurance companies who seek to avoid liability for first-party bad faith by signaling to them that their claims process can be effectively shielded behind privilege. Significantly, in an Orwellian twist, this is exactly what XL has done in this case.

As evidenced by the deposition of Ryan R. Gould, Assistant Vice President, Claims Manager, for XL Specialty Insurance Company, XL Specialty outsourced its claims processing for at least some first-party claims, including the claim filed by Aircraft Holdings, to the law firm of Kern and Wooley. (Appendix 2, pages 15-17.) Mr. Gould testified that:

1. Even though he was in charge of the claim filed by Aircraft Holdings with XL, he did not generate any documents regarding this claim, nor was he aware of anyone else within XL that generated documents regarding this claim; (Appendix 2, pages 16-17.) and
2. Any documents he had in his file or would have forwarded to his corporate general counsel Mr. Llaneta, would have been created by the law firm of Kern and Wooley pursuant to their processing of Aircraft Holdings' first-party insurance claim. (Appendix 2, pages 24-25.)

Through this process, XL has effectively created a scenario where no one within the company has any independent knowledge of the processing of Aircraft Holdings' claim, and where all information respecting Aircraft Holdings' claim is managed by a law firm, or by its general counsel. (Appendix 2, pages 14-16, 24-25.) By managing and filtering claims information through its counsel, it cannot come as a surprise that XL's production was limited, and was accompanied by a significant privilege log invoking the attorney-client privilege. (Appendix 3.) It is this bulk of information that XL seeks to protect from disclosure, despite the fact that the case law clearly established that Aircraft Holdings is entitled to the entire claims file, regardless of whether it is managed by the carrier or its counsel.

Such a result runs contrary to *Ruiz*, and is unacceptable. This Court's decision in *Ruiz* abolished the arbitrary distinction between first and third-party bad faith actions with regard to discovery, and redefined the relationship between an insured and the insurance company to reflect the Florida Legislature's intent to impose an appropriate and equivalent duty of good faith on insurance companies with respect to first-party and third-party insureds. *Ruiz*, 899 So. 2d at 1129. The distinctions relied upon by the First District are exactly analogous to the illogical and untenable methodology with was utilized in *Kujawa*, and disapproved by this Court in *Ruiz*. If this Court were to approve this methodology, not only would the concept of *stare decisis* suffer, but bad faith claimants would as well. It is one

thing for insurance companies to act in bad faith; it is another thing for courts to instruct them how to get away with it.

II. UNDERLYING POLICY CONSIDERATIONS JUSTIFY AND REQUIRE FULL, FAIR AND CONSISTENT DISCOVERY RIGHTS FOR ALL BAD FAITH CLAIMANTS, AND THE FIRST DISTRICT ERRED IN FINDING THAT AN INSURER WHO ACTS IN BAD FAITH IS STILL ENTITLED TO ASSERT THE ATTORNEY-CLIENT PRIVILEGE.

As stated above, Aircraft Holdings believes the Trial Court's decision is consistent with this Court's ruling in *Ruiz*, which should have put to rest any doubt as to a bad faith claimant's right to obtain full, fair and consistent discovery from an insurer who acts in bad faith. Prior to *Ruiz*, this Court had held that:

> …an adversarial, not a fiduciary, relationship existed between the parties and that the legislature in creating the bad faith cause of action did not evince an intent to abolish the attorney-client privilege and work product immunity. We point out as did the district court below, that the holding of absolute immunity from disclosure extends only to matters arising under the attorney-client privilege. Files protected by the work product immunity only may yield to inspection if an appropriate showing under rule 1.280(b)(2), Florida Rules of Civil Procedure, can be made. Even this rule, however, precludes discovery of attorney-client matters.

(Emphasis supplied) *Kujawa* 541 So. 2d at 1169. Through *Ruiz*, this Court found not only that different types of bad faith action should be abolished, and but also rejected the concept that served as the bedrock for *Kujawa*. By rejecting the

concept that first party bad faith actions are limited by different treatment based upon the "adversarial" nature of their proceedings, this Court effectively overruled the entire philosophical underpinnings of the *Kujawa* decision. Now, instead of regarding one species of bad faith as being fiduciary and another as being adversarial, both are (or should) be treated exactly the same.

That being the case, because *Ruiz* mandates that there be no substantive distinction for purposes of discovery between first and third party bad faith claims, it follows that both types of claimants should be entitled to unfettered discovery of files maintained both by an insurance company and its counsel. A clear example of the application of this very reasoning is contained in *Cozort v. State Farm Mutual Automobile Insurance Company,* 233 F.R.D. 674 (M.D. Fla. 2005). In that case, the Middle District ordered an insurance company to produce all of the materials in its claim or litigation files, without regard to any claims of attorney-client privilege, given its finding that "the only evidence of the claim itself is the entire claim file, including the impressions and advice of counsel." *Cozort* 233 F.R.D. at 676-677. As if that were not enough, the *Cozort* court went on to indicate that Florida Law:

> . . .recognizes no attorney-client privilege in the context of bad faith claims, with respect to coverage issues. The Florida Court used broad language to clarify that 'all materials' must be produced. 'All materials' necessarily includes materials between the insurance company and its counsel regarding coverage issues. . . .

Cozort, 233 F.R.D. at 677. The Petitioner respectfully argues that the Federal District Court's reading of *Ruiz* is fair, well reasoned, and correct, where that court recognized the explicit instructions from this Court in requiring full disclosure of an insurance company's claim files to a plaintiff in a first-party bad faith action.

Such a decision is not only consistent with time-honored concepts of *stare decisis*, but it is also wholly consistent with equally time-honored notions of common sense. If this Court were to agree with the First District's approach, *stare decisis* would take an unexpected and unwarranted turn, evolving over a fifteen year period from:

1. The *Kujawa* court's approach, which regarded first party bad faith claims as being adversarial in nature, thereby precluding a claimant from obtaining either work product or attorney client privileged materials from an insurer who acts in bad faith; as contrasted with
2. The *Ruiz* court's decision, which regarded both first and third party bad faith claims as being on the same statutory footing, thereby permitting discovery of both work product and attorney client materials; as opposed to
3. The First District's decision, which would, in a fashion, resurrect a portion of *Kujawa* by limiting discovery to matters that are not attorney client in nature, thereby precluding a claimant from obtaining access to the "entire claim file" required by *Ruiz*, as well as to matters claimed to be attorney client privileged.

Such vacillations are not consistent with the Court's stated policy to either (a) avoid the application of different discovery rules to substantially identical causes of action; or to (b) create an overly formalistic distinction between substantively

identical claims. As stated by the *Ruiz* court, the pertinent issue in any bad faith claim is:

> …the manner in which the company had handled the suit, including its consideration of the advice of counsel so as to discharge its mandated duty of good faith…

Taylor, 525 So.2d at 909 (approved by *Ruiz* at 1128; disapproved by *Kujawa* at 1169).

Insofar as common sense is involved, the First District's approach is even more troubling. Without question, the nature of modern society requires that both individuals and businesses entrust their financial, and potentially actual, health into the hands of the insurance industry. *See* Roger C. Harris, *The Tort of Bad Faith in First-Party Insurance Transactions*, 26 U. Mich. J.L. Reform 1, 7-8 (1992); *see also Ruiz*, 899 So. 2d at 1125. The special nature that insurance now plays in our society is the basis for the heightened extra-contractual duty placed on insurance companies in dealing with their insureds. *See Ruiz*, 899 So. 2d at 1126 (stating that the Florida Legislature recognized the power disparity between insurance companies and insureds in enacting Fla. Stat. 624.155); Harris, *supra*, at 7-8, 21-22 (discussing, generally, the rise of bad faith litigation based on the institutional role of insurance); Randy Papetti, *The Insurer's Duty of Good Faith in the Context of Litigation*, 60 Geo. Wash. L. Rev. 1931, 1935-40 (1992) (discussing the imposition of the duty of good faith on insurance companies).

In the face of these principles and contrary to this Court's determination of the fiduciary relationship that insurance companies have with respect to their insureds, the First District would craft a result providing greater rights to third parties–who were not parties to a contract of insurance–than they would to the actual purchaser of the insurance contract itself. As the purchaser of the insurance contract in question, Aircraft Holdings would reasonably have greater expectations of good faith and fair treatment from its own carrier than a stranger to that contract would have. However, despite that reasonable expectation, the First District would provide greater discovery rights to that stranger, than it would to XL. The fallacy of this approach is borne out by the convoluted and inexplicable efforts utilized by the First District in an effort to avoid the true meaning of *Ruiz* and to resurrect the *Kujawa* reasoning.

For example, despite the fact that *Ruiz* expressly adopted and approved both *Boston Old Colony Ins. Co. v. Gutierrez*, 325 So.2d 416 (Fla. 3d DCA 1976) and *Taylor* – which together stand for the proposition that bad faith claimants are entitled to discover claim files and attorney files without regard to privilege – the First District sought to limit *Ruiz* to its facts by (a) noting that "the underlying opinion by the Fourth District applies only to work product;" and by (b) relying upon Justice Wells' separate opinion which indicates his belief that this Court's opinion was limited to work product issues. Aircraft Holdings respectfully submits

that the *Ruiz* court was perfectly capable of limiting its opinion to the facts before it, but it chose not to do so. Instead, the *Ruiz* court simply and effectively put first party claimants on par with third party claimants who for years have been entitled to discover the files that they need to prosecute bad faith claims without regard to either the work product or attorney client privileges. That being said, if this Court were to require more than what was explicitly stated and adopted by its decision in *Ruiz*, then Aircraft Holdings believes that sound policy considerations mandate such a result.

First, it should be noted that the main point of *Ruiz* was to put all bad faith claimants on the same footing, and its adoption of *Gutierrez* makes clear that a third party claimant would be deemed to "…stand in the same posture of…the insured." *Ruiz*, 899 So.2d at 1127, citing *Gutierrez.* As a threshold matter, it is obvious to Aircraft Holdings that this means there is no attorney client relationship between a bad faith insurer and its counsel. That being the case, the First District's reliance upon its decision in *Progressive American Ins. Co. v. Lanier*, 800 So.2d 689 (Fla. 1st DCA 2001), is misplaced not only because that decision pre-dates – and is therefore trumped and displaced by this Court's *Ruiz* decision – but also because *Lanier* did not discuss or turn upon either (a) the rationale utilized by this Court in *Kujawa* or (b) the reasoning utilized by *Stone*, *Gutierrez* or *Ruiz.* On the contrary, unlike *Ruiz*, *Lanier* appears to be limited to the question of whether

documents identified on a privilege log should be regarded as privileged, without mention of the concepts and issues which are now before this Court. In the absence of a crystal ball, no one can know why the parties chose not to brief or argue these points in *Lanier*, but in any event, that outdated case cannot be read in any fashion to control the application of this Court's decision in *Ruiz*.

Second, the First District's approach is similarly flawed because it would enable a bad faith insurer and its counsel to hide – and therefore control – factual evidence pertaining to the insurer's handling of the claim, and which, by the terms of *Ruiz*, *Gutierrez*, and *Taylor*, is absolutely essential to a bad faith claimant. This concept is misplaced not only because it conflicts with those authorities but also because it is well settled that, at best, the privilege is not a favored evidentiary concept since it "serves to obscure the truth." *See United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987).

In the context of the case at bar, and other bad faith actions, this goes far beyond a philosophical concept. As recognized by this Court in *Ruiz*,

> …how is one to ever determine whether an insurance company has processed, analyzed, or litigated a claim in a fair, forthright, and good faith manner if access is totally denied to the underlying file materials that reflect how the matter was processed and contain the direct evidence of whether the claim was processed in "good" or "bad" faith?

899 So.2d 1128-9. If this Court were to adopt the First District's approach, it is respectfully submitted that *every* bad faith claimant could expect to have each of

the crucial items of evidence contained in the files of an insurer or its counsel to be cloaked with an "attorney-client" privilege, thereby depriving them of the sole source of the ammunition needed to have any chance of prevailing. This result is not countenanced in third party bad faith actions, and should not be permitted in first party actions either.

For these reasons, the First District's reasoning is not persuasive – not only to the extent that it runs contrary to *stare decisis* and common sense – but also in that it seeks to engraft upon Fla. Stat. 624.155 provisos that were not intended by the legislature. As stated above, when this section was enacted, it was well settled that third party claimants had the right to obtain both work product and attorney-client privileged matters through discovery in a bad faith action. See *Boston Old Colony Ins. Co. v. Gutierrez,* 325 So.2d 416 (Fla. 3d DCA 1976), *Stone v. Travelers Ins. Co.*, 326 So.2d 241, 243 (Fla. 3d DCA 1976); and Fla. Stat. 624.155 did not operate to displace those authorities. Nonetheless, for some reason, the First District (erroneously) believes those privileges in the context of a third party action to continue because "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." *XL Specialty Ins. Co.*, 929 So. 2d at 584.

As such, there are a number of recognized exceptions to the attorney client privilege, but none were required to be mentioned by either Fla. Stat. § 90.502 or §

624.155, as suggested by the First District. For example, communications between an attorney and client are not protected by the privilege when the attorney is not acting in his capacity as a lawyer but is performing some other capacity, such as being merely business advisor or escrow agent. *Skorman v. Hovnanian of Florida, Inc.*, 383 So. 2d 1376, 1378 (Fla. 4th DCA 1980). Further, where the communication between the client and attorney only relays the underlying facts, the contents of such communication are not within the traditional scope of the privilege. *Upjohn Co. v. United States*, 449 U.S. 393, 396 (1980). Based upon these and other concepts, other jurisdictions have not hesitated to explicitly permit the discovery rights mandated by *Ruiz*, that the First District seeks to trump. A good starting point for that analysis is contained within the Arizona Supreme Court's decision in *Brown v. Superior Court*, 670 P.2d 725 (Ariz. 1983).

In *Brown*, the Arizona Supreme Court held that a first-party bad faith plaintiff was entitled to discovery of the company's claim file, including documents containing the "mental impressions" of the company's counsel, and explicitly found that these materials were relevant and discoverable. Specifically, the *Brown* court held that issues pertaining to where, how, and why the company denied the claim were the central issues to the plaintiff's bad faith claim and that its counsel's "strategy, theories, mental impressions, and opinions" were directly at

issue. *Brown, 670* P.2d at 735. With respect to those findings, the *Brown* Court noted that:

> …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. *APL Corporation v. AETNA Casualty & Surety Co.*, 91 F.R.D. 10, 13-14 (D. Md. 1980). The 'substantial equivalent' of this material cannot be obtained through other means of discovery. The claims file 'diary' is not only likely to lead to evidence, but to be very important evidence on the issue of whether [the insurance company] acted reasonably.

Brown, 670 P.2d at 734. At the risk of being redundant, nearly identical language is contained in *Ruiz, Gutierrez*, and *Taylor*.

Similarly, in *Silva v. Fire Insurance Exchange*, 112 F.R.D. 699 (D. Mt. 1986), the Federal District Court relied on the analysis in *Brown* and found that:

> …The time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured's claim. Under extraordinary circumstances, and upon a particularized showing of good cause, the Court will entertain a motion for protective order to preclude the dissemination of particular information in the file. In the absence of such an exception, the general rule in cases of this nature should be that the plaintiff is absolutely entitled to discovery of the claims file.

112 F.R.D. at 699-700. *See also, Marsillo v. Nat'l Surety Corp. (In re Bergson)*, 112 F.R.D. 692 (D. Mt. 1986). Both decisions from these Federal District Courts permitting full and fair discovery by a plaintiff in a first-party bad faith action were

grounded on the unique role the insurance company's files play in a bad faith action, as was described in *Brown*.

More recently, the Supreme Court of Ohio has addressed this issue and also determined that the attorney-client privilege does not preclude full and fair discovery by a plaintiff in a first-party bad faith action. *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154 (Ohio 2001). In *Vanliner*, the Ohio Court considered that state's policy on the discovery of documents in first-party bad faith actions which would be considered privileged in other contexts. *Id.* at 157-58. The Court concluded that the plaintiff was entitled to the discovery of the materials in question where such documents, which went to the establishment of the company's lack of good faith, were "unworthy" of the protection of the privilege. *Id.* at 158. Such a determination, that an insurance company's files are "unworthy" of the privilege, is consistent with a number of other jurisdictions which have analogized bad faith claims to those of civil fraud to justify full and fair discovery by a plaintiff.

An early decision making this comparison was *United Services Automobile Association. v. Werley*, 526 P. 2d 28, 33 (Alaska 1974), which analogized a first-party bad faith action to one alleging fraud in determining that the plaintiff was entitled to discovery of the insurance company's files, including materials which would be considered privileged in other contexts. This decision was relied on by Supreme Court of Washington in *Escalante v. Sentry Insurance & Mutual*

Company, 743 P.2d 832, 842-43 (Wash. 1987), *overruled on other grounds by, Ellwein v. Hartford Accident & Indemnity Company,* 15 P.3d 640, 647 (Wash. 2000). In *Escalante*, the Washington Court co-opted the civil fraud exception to the attorney-client privilege to find that a plaintiff in a first-party bad faith action could discover materials normally protected by the privilege. *Id.* Further, other courts have adopted various traditional exceptions to the attorney-client privilege, such as waiver, to further the ability of a plaintiff in a first-party bad faith action to engage in full and fair discovery. *See Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288 (D. Mt. 1998) (using an implied waiver argument to permit discovery of materials otherwise protected by the privilege); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254 (Del. 1995)

While these approaches are distinct from the justification for full and fair discovery as it is articulated in *Ruiz*, they are illustrative of the measures other courts have utilized to overcome the inherent unfairness created by an insurance company which seeks to defend against a bad faith suit by invoking the attorney-client privilege in an attempt to thwart necessary discovery. Such a result has not been permitted in third party bad faith claims for many years, and it is unjust, unfair, and inappropriate to permit an insurance company to withhold more documents from one of its own insureds than it would be permitted to withhold from a stranger to its insurance contract.

CONCLUSION

The Petitioner, Aircraft Holdings LLC, is entitled to full, fair, and unfettered discovery of all documents and materials in the Defendant/Respondent's files which were created on or before the resolution of the underlying contract litigation. Because this Court has clearly abandoned the distinction with regard to discovery between first and third-party bad faith actions brought pursuant to section 624.155, Florida Statutes, the Plaintiff/Petitioner respectfully requests that this Court answer the certified question in the affirmative, quash the First District Court's opinion, and reinstate the trial court's order compelling discovery.

Gary A. Shipman (593435)
William E. Whitney (241581)
James R. Caves, III (745111)
Dana G. Toole (437093)
DUNLAP, TOOLE, SHIPMAN & WHITNEY, P.A.
2065 Thomasville Road, Suite 102
Tallahassee, Florida 32308
Telephone: (850) 385-5000
Facsimile: (850) 385-7636
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas M. Findley, Esq., MESSER, CAPARELLO & SELF, P.A., 2618 Centennial Place, Tallahassee, Florida 32308; and Celene Humphries, Esq., Swope, Rodante, P.A., 1234 East Fifth Avenue, Tampa, Florida, 33605 on this ___day of October, 2006.

I FURTHER CERTIFY that the font and size requirements have been complied with (Times New Roman 14).

_____

ATTORNEY