IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D06-421
L.T. Case No. 02-22285-CACE-07

PROVIDENT LIFE AND ACCIDENT
INSURANCE COMPANY,

Petitioner,

v.

PETER R. GENOVESE, M.D.,

Respondent.
_____/

On Review From An Order Of The Circuit Court Of The Seventeenth Judicial Circuit In And For Broward County, Florida

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JOINT AMICI CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION AND DEFENSE RESEARCH INSTITUTE IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

The Florida Defense Lawyers Association ("FDLA") is a statewide organization of defense attorneys consisting of more than one thousand members. FDLA has been actively involved in amicus briefing in important appellate cases with statewide impact involving tort, insurance, and trial procedure issues. The Defense Research Institute ("DRI") is a national organization of defense trial lawyers and corporate counsel involved in the defense of civil litigation. Among its goals is anticipating and addressing issues germane to defense lawyers and the civil justice system.

The issue in this case is critical to the defense bar because it involves the question of whether the Florida Supreme Court, in its recent decision in Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005), abrogated the attorney-client privilege between an insurance company and its attorney who defends a first-party claim for benefits under an insurance policy. Amici support Petitioner's, Provident Life, position.

SUMMARY OF THE ARGUMENT

Important practical differences exist between the attorney-client relationship that arises in the first-party bad faith case, as opposed to a third-party situation. In a third-party case, the attorney is hired by the insurer to represent the insured in defending a claim, and owes his loyalty to the insured. This creates a common legal interest, vitiating attorney-client confidentiality concerns. In contrast, in a first-party bad faith case, there is no "commonality of legal representation," Ruiz, 899 So. 2d at 1127, as the attorney is hired by the insurance company exclusively to represent the insurer's interest in disputing a claim for which benefits have not been paid. This practical distinction supports the continued validity of the attorney-client privilege in the first-party scenario.

The trial court's order departed from the essential requirements of law because it misapplied and improperly expanded the holding in Allstate Indemnity Co. v. Ruiz, 899 So. 2d 1121 (Fla. 2005). The trial court's decision utterly eviscerates any objection to discovery requests in a first-party bad faith action based on the attorney-client privilege. The Florida Supreme Court in Ruiz considered only the issue of how the work product privilege operates in the first-party bad faith context; it neither considered nor mentioned the attorney-client privilege.

ARGUMENT

A.

CRITICAL PUBLIC POLICY CONSIDERATIONS SUPPORT THE CONTINUED VIABILITY OF THE ATTORNEY-CLIENT PRIVILEGE IN FIRST-PARTY BAD FAITH CASES.

This case arises from a dispute between the Insurer and Insured under a disability policy about when the Insured became totally disabled, leading to termination of his benefits. The current action is the resultant statutory bad faith claim brought by the Insured after he partially prevailed on the determination of total disability. See §624.155(1)(b), Fla. Stat. This petition concerns a discovery dispute: Does Ruiz require an insurer's attorney-client documents to be produced in the first-party statutory bad faith claim where the insured has sued the insurance company for disability benefits? [1]

In Ruiz, the Supreme Court in dicta broadly equated first-party and third-party bad faith actions for all discovery purposes, without acknowledging that the attorney-client privilege was fundamentally different in first-party bad faith actions as compared with third-party actions. The Supreme Court's broad brush-stroke in Ruiz in attempting to entirely "blend" first-party and third-party bad faith actions for discovery purposes simply overlooked – because it was not at issue – the

[1] Amici adopt Petitioner's Standard of Review and Statements of Facts.

differences in the attorney-client relationships arising in these two quite different scenarios.

As a practical matter, in a third-party action, the insurance company hires an attorney to defend its insured against the claim brought by the injured party. The attorney represents the insured, and the attorney generally owes his duty of loyalty to the insured. See Rules Regulating The Florida Bar, Rules of Professional Conduct, Rule 4-1.8(j).[2] Thus, no real concern over attorney-client confidentiality exists, since it is the insured's interest that is being directly represented by the attorney. This creates a "commonality of legal representation between the insurer and the insured." Ruiz, 899 So. 2d at 1127. Hence, no attorney-client privilege even arises in favor of the insurer as to the insured or a third-party beneficiary. Id.,

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[2] Fla. Bar Rule 4-1.8(j) provides in part:

> STATEMENT OF INSURED CLIENT'S RIGHTS: [I]f the lawyer learns of information indicating that the insurance company is not obligated under the policy to cover the claim or provide a defense, the lawyer's duty is to maintain that information as confidential. . . . Whenever a waiver of the lawyer-client confidentiality privilege is needed, your lawyer has the duty to consult with you and obtain your informed consent. . . . If at anytime you believe the lawyer provided by the insurance company cannot fairly represent you because of conflicts of interest between you and the company (such as whether there is insurance coverage for the claim against you), you should discuss this with the lawyer and explain why you believe there is a conflict….

citing Boston Old Colony Ins. Co. v. Gutierrez, 325 So. 2d 416, 417 (Fla. 3d DCA 1976).

On the other hand, if the insurer in this third-party scenario has a dispute with its insured over a coverage issue, it would typically hire another attorney (coverage counsel) to represent the company regarding that coverage dispute. This attorney in the coverage dispute owes no duty whatsoever to the insured, since his client's – the insurer's – interest is directly adverse to the insured. Therefore, any attorney-client communication between the insurance company and its coverage counsel would not be discoverable in a later bad faith case.

In contrast, in a first-party case, the attorney who is hired by the insurer does not represent the insured; instead, the attorney represents the insurance company in its dispute over the coverage for or the extent of payment for a benefits claim. For example, in this case, the Insured and the insurance company had a factual dispute over the Insured's qualifications for disability benefits under the disability policy. Other types of disputes could arise, of course, under other types of direct payments due under, for example, medical or life policies.

In this type of first-party coverage dispute, the basic disagreement is typically over whether a claim is covered under the policy or to what extent payment is due. Nonetheless, the attorney-client privilege that arises is entirely in favor of the insurance company, because the company is in disagreement with its

insured over coverage or the amount of payment. It is this very disagreement that has led to the original lawsuit in the first place.

Even though the Legislature attempted in Section 624.155 to provide similar remedies in first-party disputes that the common-law afforded in third-party disputes, these pragmatic distinctions in the attorney-client relationship still exist. Notably, since the Legislature created this statutory remedy for first-party bad faith – a remedy that did not exist under the Florida common-law – the attorney-client privilege may be deemed repealed by the Legislature only to the extent that Section 624.155 is unavoidably inconsistent with Section 90.502 (attorney-client privilege). See Town of Indian River Shores v. Richey, 348 So. 2d 1 (Fla. 1977)(repeal of statute by implication is not favored and can be upheld only where irreconcilable conflict shows legislative intent).

The issue then becomes whether an insurer is entitled to actively defend a claim in a first-party case that it believes is outside policy coverage, through the vigorous representation of an attorney. If the insurance company is correct, this will help reduce company losses and, ultimately, reduce premiums for all policyholders covered by the company. But, if the insurance company's communications with its attorney in defense of that first-party claim must later be disclosed in discovery in a first-party bad faith action brought under Section 624.155, the insurance company will have to think twice about how vigorously it

can defend these cases, even if claims are not covered, since all of this information would eventually become discoverable. Consequently, the insurer will not be able to communicate openly with its own attorney.

The purpose of the attorney-client privilege is based on the basic and long-standing prerogative that promotes a client's right to effective legal representation. See Owen v. State, 773 So. 2d 510 (Fla. 2000). It is designed to encourage full and frank communications between attorneys and their clients, and thereby promote broad public interest in observance of law and administration of justice. See First Union Nat'l Bank v. Turney, 824 So. 2d 172 (Fla. 1st DCA 2001). Principles underlying the privilege recognize the need for an advocate and a counselor to know all details that relate to the client's position for seeking representation in the first place. Id.

These purposes cannot be fulfilled without confidentiality. If the attorney-client privilege is no longer available to the insurer in defending a first-party claim, the insurance company will be forced to compromise its defenses of all claims – including those that are clearly not covered. Ultimately, this will result in higher premiums for all policyholders, as more questionable claims will have to be paid. This cannot be a sound public policy that the Supreme Court knowingly adopted in Ruiz, and it should not be adopted by this Court as an accident of the Ruiz

decision. No irreconcilable conflict between the attorney-client privilege and Section 624.155 requires the complete abrogation of this vital protection.

Based on the practical differences in attorney-client relationships that arise in these different circumstances, the attorney-client privilege must prevail in first-party bad faith actions where the attorney representing the insurance company has no attorney-client relationship with the insured, but is opposing the insured in the insured's effort to assert a benefits claim. In these circumstances, which were not considered by the Supreme Court in Ruiz, valid public policy reasons continue to exist to assure protection of the attorney-client communications between the insurance company and its attorney who is representing its interest in defending a coverage issue. Otherwise, the insurer will be deprived of vigorous legal representation.

Ruiz allows the production of work product documents in order to allow a plaintiff in a first-party bad faith case to prove his case. That should be enough. The court in Ruiz did not take the next and unnecessary step of directly abolishing the statutory attorney-client privilege that the insurance company has with its own attorney, directly representing the insurance company's interests and indirectly representing other policyholders against a single insured whose claim is being challenged. This Court likewise should not take this unnecessary step.

B.

THE SUPREME COURT'S DECISION IN RUIZ DID NOT ABROGATE THE ATTORNEY-CLIENT PRIVILEGE IN FIRST-PARTY BAD FAITH CASES.

In the order under review, the trial court determined that the Florida Supreme Court intended its ruling in Ruiz to extend to documents protected by the attorney-client privilege. Ruiz, however, solely addressed the issue of application of the work product doctrine to an insurance company's claim file in a first-party bad faith action. The holding in Ruiz does not affect the application of Florida's statutory attorney-client privilege, because the attorney-client privilege was never raised in that case.

The first sentence of the Ruiz opinion leaves little doubt about its scope:

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

899 So. 2d at 1122 (emphasis added). The court in Ruiz further stated:

> It is our view that the conflict regarding whether the work product privilege attaches. . . .

Id. Despite the express wording of the majority opinion in Ruiz, limiting its holding to application of the work product privilege, the trial court in the instant

case held that the Supreme Court also silently intended to completely abrogate the attorney-client privilege in first-party bad faith cases. This conclusion is based on implication. But, this implication is contrary to the Supreme Court's own express directive that it does not overrule itself by implication. See Puryear v. State, 810 So. 2d 901 (Fla. 2002).

The trial court necessarily concluded that Ruiz entirely overruled Kujawa v. Manhattan National Life Insurance Co., 541 So. 2d 1168 (Fla. 1989). A careful reading of the majority opinion demonstrates that Ruiz does not entirely overrule Kujawa, but was directed at the part of Kujawa relating to the single issue before the court in Ruiz – whether the work product privilege applied to preclude disclosure of insurance claim file materials. See Ruiz, 899 So. 2d at 1131 ("Unfortunately, a portion of our decision in Kujawa legitimatized a distinction between first- and third-party bad faith claims for discovery purposes. . . ." (emphasis added)). The Ruiz court concluded: "[W]e believe that a portion of our decision in Kujawa is both legally and practically untenable, and that receding from that decision does not offend the principle of stare decisis." Id. (emphasis added). Thus, it was only that portion of Kujawa that dealt with work product that was overruled, not the portion dealing with attorney-client privilege.

Justice Wells, in his concurring/dissenting opinion, highlights the fact that the Ruiz court addressed only the work product privilege in receding in part from

Kujawa: "I emphasize that the only issue being decided in this case is the discovery of work product in the claims file pertaining to the underlying insurance claim." Id. (Wells, J. concurring in part and dissenting in part). The majority opinion did not dispute this characterization of its holding as being limited to the work product privilege.

That the Florida Supreme Court did not expressly recede from Kujawa on the issue of attorney-client privilege is underscored by the fact that the court in Kujawa directly addressed the issue of attorney-client privilege: "We point out . . . that the holding of absolute immunity from disclosure extends only to matters arising under the attorney-client privilege." Kujawa, 541 So. 2d at 1169. Since Ruiz did not expressly address the attorney-client privilege, the majority holding in Kujawa regarding the absolute immunity from production of attorney-client privileged information remains viable.

It is manifest from the face of its decision that the Supreme Court in Ruiz addressed only the work product privilege, and not the attorney-client privilege. The attorney-client privilege provides far more vital protection to confidential communications than the work product privilege, and has been codified at Section 90.502, Florida Statutes. It is entirely unreasonable to assume that this important and express statutory privilege would be completely abolished in first-party bad faith actions by the Ruiz decision without even mentioning it.

Although the Supreme Court could have been clearer in Ruiz about the scope of its holding, it simply did not address the issue of the attorney-client privilege, nor did it mention Section 90.502. It would require an unjustified leap in logic to infer that this express statutory privilege had been abrogated and had been held inapplicable in all first-party bad faith actions brought under Section 624.155, when Ruiz did not even mention Section 90.502.

This identical issue is currently pending in the First District Court of Appeal in XL Speciality Insurance Co v. Aircraft Holding, LLC, 1D05-4333. Oral argument was held on January 25, 2006. Since it seems clear the Supreme Court will ultimately resolve this issue, this Court may want to consider on it own motion whether it is appropriate to certify the trial court's decision as one requiring immediate resolution and being of great public importance, pursuant to Fla.R.App.P. 9.030(a)(2)(B).

CONCLUSION

Ruiz should not be expanded to destroy the important protections afforded by the attorney-client privilege, particularly when critical policies promoting the administration of justice would be needlessly undercut.

Respectfully submitted,

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