

**IN THE SUPREME COURT OF FLORIDA**

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

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**AIRCRAFT HOLDINGS, LLC,**

**Petitioner,**

**vs.**

**XL SPECIALTY INSURANCE COMPANY,**

**Respondent.**

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**AMICUS CURIAE BRIEF, UNITED POLICYHOLDERS, IN SUPPORT OF PETITIONER'S  
INITIAL BRIEF**

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**On Review of a Certified Question of Great Public Importance, Certified by  
the First District Court of Appeals**

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## IDENTITY OF AMICUS CURIAE

United Policyholders (“UP”) is a non-profit, tax-exempt charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurance and consumer rights issues. UP works on behalf of insured consumers by monitoring marketplace and legal developments that affect the general public and responds on the public’s behalf by actively participating in public policy debates at legislative, regulatory and other public hearings. UP helps preserve the integrity of the insurance system by serving as an information resource for policyholders’ interests, rights and duties.

In order to carry out its mandate, UP regularly submits amicus curiae briefs to provide courts around the country with the policyholder’s perspective in cases involving insurance principles likely to have widespread impact. In fact, this Court permitted UP to appear as amicus curiae in *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121 (Fla. 2005). This case also concerns an issue that will ultimately impact a large segment of Florida’s population, because this Court is again asked to determine the quality of evidence accessible to policyholders in seeking to enforce the good faith obligations prescribed by Fla. Stat. §624.155. This brief is accordingly submitted by UP in support of Petitioner, Aircraft Holdings, LLC’s, position.

### **ISSUE PRESENTED FOR REVIEW**

In *XL Specialty Ins. Co. v. Aircraft Holdings, LLC*, 929 So. 2d 578 (Fla. 1st DCA 2006), the First District certified the following issue for review:

DOES THE FLORIDA SUPREME COURT'S HOLDING IN *ALLSTATE INDEM. INS. CO. V. RUIZ*, 899 SO. 2D 1121 (FLA. 2004) ("*RUIZ*, 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 MATERIALS IN THE SAME CIRCUMSTANCES?

Because the First District certified the issue as one of great public importance, UP respectfully suggests that the question presented is more appropriately framed as follows:

WHETHER, IN A FIRST-PARTY ACTION UNDER FLA. STAT. §624.155, THE ATTORNEY-CLIENT PRIVILEGE SHIELDS EVIDENCE RELEVANT TO THE ISSUE OF WHETHER THE INSURER COMPLIED WITH ITS STATUTORY OBLIGATIONS OF GOOD FAITH, INCLUDING THE ADVICE OF COUNSEL CONCERNING THE HANDLING OF THE CLAIM, THE COVERAGE DETERMINATION, AND THE LITIGATION OF THE COVERAGE DISPUTE THROUGH ITS RESOLUTION.

### **SUMMARY OF THE ARGUMENT**

Florida Statute §624.155 provides a private right of action against an insurer when a policyholder is damaged by the insurer's violation of specific statutory provisions. *See* Fla. Stat. §624.155(1). The statute codified long-settled "bad faith" law in the third-party context and extended the insurer's duty to act in good faith and deal fairly to policyholders seeking first-party coverage or benefits. In both

first and third-party actions, the pertinent issue is the manner in which the insurance company investigated, evaluated, adjusted, and litigated the underlying claim so as to discharge its statutory duty of good faith. This Court has already correctly recognized the absence of any justification to apply different discovery rules to substantively identical causes of action, and that the insurance carrier's entire claim and litigation files have long been discoverable in the third-party context over claims of attorney-client privilege and work product immunity. The Legislature's enactment of §624.155, together with the privilege's protection under *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289, 1291 (Fla. 1991) until coverage has been established, dispensed with any persuasive rationale to apply different rules of discovery for substantively identical claims.

The *XL Specialty* opinion is misguided because it fails to read *Ruiz* in its proper legal and historical context and declines to respect – or even acknowledge – this Court's decision to eliminate the distinction, for discovery purposes, between first and third-party bad faith claims. The First District's holding that communications with counsel in the insurer's claim file are only discoverable where the carrier expressly raises an advice of counsel defense ignores both the purpose and nature of the attorney-client privilege, disassembles an important component of the remedial scheme contemplated by §624.155, ignores the particular vulnerability of policyholders in the claims process, and would, if

adopted, throw open the door to widespread – and perhaps even willful – conduct in direct opposition to the insurer’s statutory responsibilities. UP urges this Court to appreciate both the distinct role that insurance plays in our society, and the necessity of preventing the abuse potentially inherent in allowing the exception urged by the First District.

## ARGUMENT

### I. GOOD FAITH AND FAIR DEALING

The financial security that insurance provides is, and has long been, critical to the fabric of our economy and society. As the United States Supreme Court announced in 1914:

[T]he business of insurance has ... a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world ... . It is practically a necessity to business and enterprise [and] ... is of the greatest public concern. ... the business of insurance ... [has] become clothed with a public interest, and therefore subject to be controlled by the public for the common good.

*German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 414-15 (1914).

Courts throughout the country and state departments of insurance recognize the public importance of insurance, as well as the particular vulnerability of consumers who have suffered covered losses. Susan Randall, Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners, 26 Fla. St. U.L. Rev. 625, 627 (1999) (footnotes

omitted). Insurance contracts are aleatory by definition, and since policyholders pay premiums set by the insurer in exchange for protection against a fortuitous event which may never occur, the law aims to ensure that carriers pay valid claims because that is in the public interest: policyholders purchase insurance for peace of mind in the event of covered loss, and society benefits from this bargain by a reduction in social burdens. Doris Hoopes, The Claims Environment, 1.3-1.5 (2d ed., Insurance Institute of America 2000).

Ironically, by giving insurance companies their premium dollars, policyholders actually finance their insurers' ability to resist claims. Policyholders are "therefore peculiarly vulnerable to insurers who, as a group, [are] inclined to pay nothing if they could get away with it, and, in any event, to pay as little as possible." Roger C. Henderson, The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute, 26 U. Mich. J. L. Ref. 1, 14 (1992).

When insurers do not timely provide covered benefits, of course, the result is "unpaid losses, great stress, and burdens on society." Hoopes, The Claims Environment at 9.2 (2d ed. 2000). This extreme financial incentive to reduce claim payments, coupled with the public trust placed in our insurance companies, have led courts and legislatures to fashion extra-contractual remedies for certain insurer misconduct. *Id.* Given the vast disparity in bargaining power between insurers and

their policyholders, “courts hold insurers to high standards of conduct to ensure they do not abuse their positions of power. Insurers that do are susceptible to bad faith claims.” *Id.* “Bad faith” claims evolved, in short, “from the special relationship between insurers and insureds based on the implied duty of good faith and fair dealing.” *Id.* And Florida law has given life to these principles.

## II. THE “ROAD TO RUIZ”

Florida has long recognized the fiduciary nature of the relationship between policyholder and insurer in third-party cases. *See, e.g., Auto Mut. Indem. Co. v. Shaw*, 184 So. 852, 859 (Fla. 1938). Over time, Florida courts distilled the “good faith” responsibilities of insurers in this context. *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668-69 (Fla. 2004). Chief among these is the insurer’s duty to use the same degree of care and diligence on its insured’s behalf as it would exercise in the management of its own business. *Id.*

Because of this fiduciary relationship, Florida courts have held policyholders, and third-party judgment creditors alike, entitled to discovery of the insurer’s entire claim and litigation files in third-party bad faith actions notwithstanding objections of attorney-client privilege and work product immunity. *See, e.g., United Servs. Auto Ass’n v. Jennings*, 731 So. 2d 1258, 1260 (Fla. 1999) (holding that neither attorney-client privilege nor work product immunity protected documents from underlying claim through date of stipulated

judgment); *Allstate Indem. Co. v. Oser*, 893 So. 2d 675, 677 (Fla. 1st DCA 2005) (“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 a claim”); *Dunn v. Nat’l Sec. Fire & Cas. Co.*, 631 So. 2d 1103, 1109 (Fla. 5th DCA 1994) (“Discovery of the insurer’s claim file and litigation file is allowed in a bad faith case over the objections of the insurer that production of the file would violate the work product or attorney-client privilege.”); *Superior Ins. Co. v. Holden*, 642 So. 2d 1139, 1140 (Fla. 4th DCA 1994) (noting the well-entrenched exception to the attorney-client privilege in third-party bad faith cases); *Continental Cas. Co. v. Aqua Jet Filter Sys., Inc.*, 620 So. 2d 1141, 1142 (Fla. 3d DCA 1993) (finding third-party plaintiff 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”); *Koken v. Am. Serv. Mut. Ins. Co.*, 330 So. 2d 805, 806 (Fla. 3d DCA 1976) (same).

The rationale for this venerable exception to the attorney-client privilege springs from the fiduciary duty owed by carrier to its policyholder: legal advice sought by the insurer in investigating the claim or evaluating coverage must ultimately serve the benefit of the policyholder as well as his or her insurer. Given this relationship, Florida courts have had no trouble concluding that a carrier is barred from raising the attorney-client privilege in a subsequent bad faith action.

*See Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 908 (Fla. 3d DCA 2004) (noting that the fiduciary relationship between a liability insurer and its policyholder bars application of the privilege).

At common law, Florida courts consistently refused to extend the same good faith obligations to insurers handling first-party claims submitted by their own policyholders. *See, e.g., Baxter v. Royal Indem. Co.*, 285 So. 2d 652 (Fla. 1st DCA 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975). The Legislature filled this remedial gap in 1982 by enacting Fla. Stat. §624.155, providing a private right of action if a policyholder is damaged by certain enumerated insurer misconduct, 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.” *See Fla. Stat. §624.155(1)(b)1*. In so doing, “[t]he Legislature has mandated that insurance companies act in good faith and deal fairly with insureds regardless of the nature of the claim presented, whether it be a first-party claim or one arising from a claim against an insured by a third party.” *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1127 (2005).

Recognizing the “misdescription of the nature of the parties’ relationship in first-party actions as being totally adversarial, an out-dated pre-statutory analysis, as opposed to applying the responsibilities that have traditionally flowed in the

third-party context, which are now codified for first-party actions,” this Court recently concluded that any distinction with regard to available discovery is unjustified and without support under §624.155. *Ruiz*, 899 So. 2d at 1127-28. The statute extending these duties to first-party claims, in short, simply codified the underlying insurance principle referenced above – that legal advice sought by the carrier with respect to investigation or evaluation of the coverage claim should ultimately serve both the insured’s and the insurance company’s interests. *Id.* at 1126-27. Because the advice is sought in order to make the correct decision concerning the availability of coverage under the insurance policy, the common interest/fiduciary exception to the attorney-client privilege is equally applicable in a first-party bad faith claim.

The *XL Specialty* court wholly ignored *Ruiz*’ elimination of the distinction in available discovery between first and third-party bad faith actions, which necessarily includes attorney-client communications in the carrier’s claim and litigation files.<sup>1</sup> The First District’s opinion misapprehends the distinct nature of the insurance relationship as codified in Florida by §624.155, and mistakenly relies upon the out-dated – and inherently ill-conceived – “adversarial relationship”

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<sup>1</sup> Nor does *XL Specialty* address the national case law cited in *Ruiz* for the proposition that a first-party claimant must be given access to the same materials to which a third-party claimant would have “unfettered access,” including privileged communications. *Ruiz*, 899 So. 2d at 1128-29.

espoused in *Kujawa v. Manhattan Nat'l Life Ins. Co.*, 541 So. 2d 1168 (Fla. 1989). See *Ruiz*, 899 So. 2d at 1127. That omission is fatal to *XL Specialty's* holding, as it cannot be reconciled with either §624.155 or long established Florida law permitting identical discovery in third-party bad faith cases.<sup>2</sup>

### **III. THE ATTORNEY-CLIENT PRIVILEGE IS NOT INVIOLOATE, AND FLORIDA LAW CONTAINS ADEQUATE PROCEDURAL SAFEGUARDS FOR INSURERS**

The attorney-client privilege, of course, recognizes that “sound legal advice or advocacy depends upon the lawyers being fully informed by the client.” *American Tobacco Co. v. State*, 697 So. 2d 1249, 1252 (Fla. 4th DCA 1997) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Because, however, “the privilege results in the exclusion of evidence, it should not be viewed as absolute and must be strictly limited to the purpose for which it exists.” *Anderson v. State*, 297 So. 2d 871, 872 (Fla. 2d DCA 1974) (citing 8 John H. Wigmore,

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<sup>2</sup> The *XL Specialty* court’s “statutory construction” argument – that the provisions of §90.502 must apply because “there is a complete absence of any reference in the bad faith statute, section 624.155, to the attorney-client privilege” ignores the plain fact that §624.155 does not reference the exception to the privilege in third-party actions either, though that has long been the law. The Legislature, moreover, “is presumed to know the existing law when a statute is enacted, including ‘judicial decisions on the subject concerning which it subsequently enacts a statute.’” *Crescent Miami Ctr., LLC v. Florida Dept. of Revenue*, 903 So. 2d 913, 918 (Fla. 2005) (citation omitted). There are, of course, numerous other well-recognized judicial exceptions to the attorney-client privilege not codified by Fla. Stat. §90.502(4), and which go unmentioned by the *XL Specialty* court. See Petitioner’s I.B. at 14-15.

Evidence in Trials at Common Law §2291 (J. McNaughton rev. ed. 1961) for the proposition that the attorney-client privilege is “worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.”). The privilege, then, “may be outweighed by public interest in the administration of justice in certain circumstances.” *Turner v. State*, 530 So. 2d 45, 46 (Fla. 1988) (citation omitted).

The public interest is especially paramount where a corporation, rather than an individual, is raising the privilege. Courts must “strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery.” *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1383 (Fla. 1994) (internal citation omitted). Care must be taken “to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of privilege in the corporate context will be subjected to a heightened level of scrutiny.” *Id.* The privilege must be even more strictly construed where that corporation is an insurance company, tasked with performance under an aleatory and adhesive contract imbued with the public trust.

*Ruiz*, of course, did not eliminate an insurer’s entitlement to assert the attorney-client privilege. Under Florida law, a carrier may still claim the privilege

where coverage remains at issue.<sup>3</sup> Rather, a carrier is *only* prohibited from asserting the privilege in a bad faith action as to those communications pertaining specifically to coverage, benefits, liability or damages, including the manner in which the underlying claim was investigated, evaluated, resisted and/or litigated. *See Ruiz*, 899 So. 2d at 1129-30.

Moreover, Florida law provides procedural safeguards to protect insurers from having to “unfairly” disclose attorney-client information. A first-party cause of action under §624.155 does not ripen unless and until there has been a determination of policy coverage (presupposing *arguendo* an erroneous coverage denial). *See Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1273 (Fla. 2000); *Blanchard*, 575 So. 2d at 1291. Florida law also imbues insurers with an additional opportunity to avoid ever having to disclose any attorney-client communications: the statute’s sixty-day “safe harbor” within which the carrier can cure its statutory violations and entirely avoid liability under the Civil Remedy Statute. *See Fla. Stat. §624.155(3)(d); Talat Enters., Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1281 (Fla. 2000).

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<sup>3</sup> *Ruiz*, 899 So. 2d at 1130 (cautioning that litigants filing bad faith and coverage actions simultaneously may not be entitled to such information until the resolution of the underlying coverage action) (collecting cases). It is common practice for insurers to move to dismiss or abate §624.155 actions when brought simultaneously with an action to establish policy coverage; this important distinction is unmentioned by the First District.

Given these procedural safeguards, an insurer's complaint that it will be discouraged from seeking legal advice concerning the availability of coverage for a particular claim should enjoy a skeptical reception. That argument "assumes that insurers will violate their duty to conduct a thorough investigation by failing, when necessary, to seek legal counsel regarding whether an insured's claim is covered under the policy of insurance, in order to avoid the insured later having access to such communications, through discovery." *Boone v. VanLiner Ins. Co.*, 744 N.E. 2d 154, 157 (Ohio 2001). Such a rationale for maintaining the privilege turns the concept of good faith and fair dealing on its head.

In short, the public interest in the administration of justice demands that the privilege not be applied in this limited context, because: (a) carriers owe their policyholders special duties of good faith intrinsic to the proper functioning of the insurance relationship; and (b) Florida law prohibits the disclosure of this information until after the coverage issue is resolved in the policyholder's favor *and* the carrier has eschewed its opportunity to take advantage of the cure period.

#### **IV. *XL SPECIALTY* PROVIDES A BLUEPRINT FOR CHEATING POLICYHOLDERS: "LET THE GAMES BEGIN!"**

Allowing a carrier to hide behind claims of privilege invites abusive gamesmanship in situations where the insurer should be treating its policyholder (who paid premiums for such treatment) fairly and honestly and with due regard for his or her interests. Insurers will be incentivized – as in *XL Specialty* – to shift

all but the most clerical and mundane aspects of claim handling to, or through, counsel and then refuse to disclose concomitant documents under a claim of privilege.<sup>4</sup> To “push a document under the umbrella of privilege merely by turning it over to an attorney,” however, would be “patently unfair,” 6 James Wm. Moore, et al., Moore’s Federal Practice 3d §26.49[1] (3d ed. 2006), and would contravene the very purposes of §624.155.<sup>5</sup> It may also require document-by-document review of the withheld materials in order to determine whether the communication even concerns confidential legal advice, as opposed to basic claim evaluation by someone possessing a *juris doctor*.<sup>6</sup>

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<sup>4</sup> See Petitioner’s Initial Brief at 24-25.

<sup>5</sup> Such a practice is also frowned upon in other jurisdictions . See, e.g. , *Western Nat’l Bank of Denver v. Empl. Ins. of Wausau*, 109 F.R.D. 55, 57 (D. Colo. 1985) (holding the privilege is not meant to protect from disclosure materials prepared “by a person who is an attorney but acting in the capacity of an investigator and adjuster for the insurance company”). See also *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.*, 197 F.R.D. 620, 641 (N.D. Iowa 2000) (“[B]ecause [the insurer’s counsel] was acting in his capacity as a claims investigator or claims adjuster, not as an attorney, and such materials were generated in the ordinary course of the [insurer’s] business of claims investigation, no attorney-client privilege attaches.”); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991) (same); and *Mission Nat’l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) (same).

<sup>6</sup> The approach advocated by UP requires *in camera* inspection of only those documents alleged to contain attorney-client communications concerning defense of the bad faith action, created after resolution of the underlying coverage claim. In most cases, final resolution of the underlying case should dictate the cutoff.

An insurer complying with its statutory obligations of good faith and fair dealing should have no compunction about proffering its communications with counsel pertaining to coverage, benefits, liability, or damages. But a carrier with something to hide in its correspondence with counsel should not be allowed to protect such information as against the insured on whose behalf the advice was sought. As this Court appropriately enquired, without the underlying claim *and* litigation file materials, how is a judge or jury to evaluate the critical issue: whether the insurance company handled the underlying claim and “suit including its consideration of the advice of counsel so as to discharge its duty of good faith?” *See Ruiz*, 899 So. 2d at 1129 (approving *Fidelity & Cas. Ins. Co. of NY v. Taylor*, 525 So. 2d 908, 909 (Fla. 3d DCA 1987)).

The First District’s holding in *XL Specialty* engenders an unwarranted distinction between documents in the claim file reflecting mental impressions by an adjuster or attorney and communications with counsel, a point aptly made by Judge Polen in *Liberty Mut. Fire Ins. Co. v. Bennett*, 2006 WL 2818523, \*1 (Fla. 4th DCA Oct. 4, 2006) (in dissent) (“I see no reason to treat the attorney-client privilege any different [from the work product immunity] in this context.”). Suppose, for example, the carrier’s attorney advised it that a claim denial is unsupported by the law and recommends payment, but the adjuster disregards that

information, makes no note of it and denies a valid claim. Under *XL Specialty*, the first-party claimant would never discover the carrier's willful disregard of the law.<sup>7</sup>

Regardless of the context, first or third-party, unless there is the potential that the full details of its claim investigation may eventually be examined there is little incentive for insurers to act "fairly and honestly toward its insured and with due regard for her or his interests." *See Fla. Stat. §624.155(1)(b)(1)*. Eliminating this possibility by allowing insurers to maintain the privilege as to relevant claim file communications "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." *Ruiz*, 899 So. 2d at 1128

**V. MANY JURISDICTIONS HAVE HELD THE ATTORNEY-CLIENT PRIVILEGE INAPPLICABLE IN FIRST-PARTY BAD FAITH ACTIONS, EMPLOYING VARYING RATIONALES**

Although several state supreme courts have considered the issue of whether the attorney-client privilege shields disclosure of communications relevant to the coverage investigation or lawsuit in a bad faith case, the justifications supporting disclosure vary and have sometimes produced rulings difficult to apply. The brightest line seems to have been drawn in Ohio, whose Supreme Court recently

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<sup>7</sup> *Bennett*, 2006 WL 2818523 at \*1 (in dissent) ("Indeed, the most telling evidence of bad faith, while otherwise arguably privileged, might be the insurer's attorney's advice to the insurer that it should settle the case for policy limits. In the face of an alleged unreasonable refusal to settle, why should not the insured be able to discover such information?").

endorsed an exception to the attorney-client privilege in first-party bad faith cases on the straightforward ground that the information goes to the very heart of the case. *See Boone v. VanLiner Ins. Co.*, 744 N.E. 2d 154, 157 (Ohio 2001) (holding insured entitled to attorney-client communications related to the issue of coverage, finding such materials simply “unworthy of protection”).

A few other jurisdictions have considered a modified civil fraud exception to the privilege in bad faith actions, reasoning that “just as there is no justification for the attorney-client privilege when a communication was made for the purpose of committing fraud, there is no justification for the privilege when a communication was made with the purpose of evading a legal or contractual obligation to an insured without reasonable justification.” *Hutchinson v. Farm Family Cas. Ins. Co.*, 867 A.2d 1, 6 (Conn. 2005); *United Servs. Auto Ass’n v. Werley*, 526 P. 2d 28, 33 (Alaska 1974). Florida, of course, already recognizes a crime/fraud exception to the attorney-client privilege in *any* context. *See Fla. Stat. §90.502(4)*. Requiring a first-party policyholder in a bad faith action to rely on that exception, however, disregards the special nature insurance plays in our society and the trust a policyholder must place in his or her insurance company to evaluate a claim for policy benefits in good faith. And, in Florida, the statute itself.

The more common approach in jurisdictions mandating disclosure of attorney-client communications in the first party context, however, is reliance on

an “implied waiver” theory. This approach, espoused by Wigmore, is premised upon fundamental fairness: an insurance carrier cannot use the privilege in order to shield discovery into matters that are in some way relevant to its defenses, which, while they need not expressly include reliance on “advice of counsel,” must necessarily aver that the carrier acted in “good faith.” *See* 8 John H. Wigmore, *Evidence in Trials at Common Law* §§2327, 2388 (J. McNaughton rev. ed. 1961).

Courts extending the Wigmore approach in this context consider whether the insurer has raised any issue where its subjective and allegedly reasonable evaluation is implicated. If so, the privilege has been impliedly waived under the theory that the carrier has placed the communications at issue. To hold otherwise, these courts reason, would be unfair to the policyholder, who otherwise would not be able to challenge the insurer’s assertions of reasonableness or “routine claim handling.” *See, e.g., State Farm Mut. Auto Ins. Co. v. Lee*, 13 P.3d 1169, 1178 (Ariz. 2000) (where “insurer makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny ‘an opposing party an opportunity to uncover the foundation of those assertions in order to contradict them’ ... such a point is reached when the party asserting the privilege claims its conduct was proper and permitted by law”); *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995) (finding implied waiver of privilege because without access to legal file, policyholder

would be unable to challenge insurer’s “routine claim handling” defense); *Hutchinson*, 867 A.2d at 8 (finding that where insurer raises a “routine [claim] handling” defense, the “at issue” exception applies).<sup>8</sup>

This approach can be unnecessarily difficult to apply because it requires an analysis of the insurer’s actions after the institution of the bad faith lawsuit. UP also respectfully submits that this approach elevates form over substance, because as a practical matter, once an insurance company avers – as it presumably must – that its conduct in denying a claim was reasonable or made in good faith, it has impliedly waived its ability to assert the privilege and the policyholder is entitled

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<sup>8</sup> Some jurisdictions decline to find waiver of the privilege in first party bad faith actions absent express invocation of an “advice of counsel” defense, but rely on a perceived “adversarial” relationship between insurer and insured (with many citing to *Kujawa*). Such cases are accordingly unpersuasive because they misapprehend the nature of the insuring relationship as codified by our Legislature in §624.155. *See, e.g., Palmer v. Farmers Ins. Co.*, 861 P.2d 895, 905-06 (Mont. 1993) (holding that where claimant and insurer are adverse, attorney client privilege applies); *State ex rel. Brison v. Kaufman*, 584 S.E.2d 480 (W. Va. 2003) (advising that first party bad faith action does not automatically result in waiver of privilege, noting adversarial nature of process and relying on *Kujawa* for support); *Hutchinson*, 867 A.2d at 10 (citing *Kujawa* to note when the relationship is adversarial rather than fiduciary, the attorney-client privilege protects the insurer), *cf* dissent at 13 (the better rationale is the “combination of need and relevance in the context of the special, quasi-fiduciary nature of the first party insurance relationship ... provides a particularly compelling basis for disclosure”); *see also Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995) *abrogated in part on other grounds by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 47-48 (Iowa 2004) (holding, in worker’s compensation case, that insurer is entitled to the privilege because parties are adverse, but nonetheless finding implied waiver by insurer).

to discover the basis for that contention. *See Lee; Tackett; and Hutchinson*, discussed *supra*. Although this approach is predicated on “fundamental fairness,” it may allow the insurance company’s response to dictate the privilege’s applicability, an open invitation to litigation prestidigitation.

This Court need not struggle with the application of a balancing test, however, as Florida’s “bright line” is already in place. Since 1991, Florida law has held that a first-party cannot proceed under §624.155 unless and until there has been a determination of coverage. *Blanchard*, 575 So. 2d at 1291. The insurer maintains its privilege until that determination is made – through the entire claim investigation and underlying coverage action. It is only *after* coverage is established, and *after* the insurer elects not to remedy its statutory violations during the cure period, that the issue even arises. At that point, the insurance company has already taken its position on coverage; it must be held to – and the policyholder entitled to fully explore – that position. For these reasons, this Court correctly held that,

*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.*

*Ruiz*, 899 So. 2d at 1129-30 (emphases supplied).<sup>9</sup>

### CONCLUSION

For the reasons set forth above, this Court should grant Petitioner's requested relief and confirm that, in a first-party action brought pursuant to §624.155, the attorney-client privilege does not bar production of attorney-client communications generated during the claim investigation and underlying coverage action which are relevant to the issue of whether the company evaluated the claim in good faith. Such a rule is both faithful to the underlying purpose of the attorney-client privilege, and properly respects the Legislature's decision to require good faith and fair dealing from insurers with respect to first-party insurance claims.

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<sup>9</sup> To our knowledge, every federal district court in Florida to have considered this issue following this Court's decision in *Ruiz* has held that an insurer may not refuse to disclose the attorney-client communications within the carrier's claim and litigation files in a first-party §624.155 action. *See Cozort v. State Farm Mut. Auto. Ins. Co.*, 233 F.R.D. 674, 677 (M.D. Fla. 2005) ("as set forth ... in *Ruiz*, state law recognizes no attorney-client privileges in the context of [first-party] bad faith claims; April 10, 2006 Discovery Order in case styled *Saewitz v. Lexington Ins. Co.*, Case No. 05-21917-CIV-Lenard/Klein (carrier's argument "that *Ruiz* did not eliminate the attorney-client privilege in first party bad faith cases ... is unnecessarily cramped, ignores the context in which *Ruiz* arose, as well as the prior precedent, and misinterprets *Ruiz* and its aftermath"); March 16, 2006 Discovery Order in case styled *Nowak v. Lexington Ins. Co.*, Case No. 05-216-82-CIV-Moreno/Simonston ("*Nowak*") (same) and June 19, 2006 Stay Order in *Nowak* (finding "persuasive indication" that, based on Florida law and the language of *Ruiz*, this Court will disagree with *XL Specialty*). Copies of the *Nowak* and *Saewitz* Orders are attached *via* Appendix.

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**CERTIFICATE OF SERVICE**

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**CERTIFICATE OF COMPLIANCE**

Undersigned counsel hereby certifies that this Brief is in the Times New Roman 14-point font and is therefore in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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