THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496

South Carolina Property and Casualty Insurance Guaranty Association, ... Appellant-Respondent,

v.

Roger Brock, Ryan Stevens, Malachi Sanders, and Health Advantage/BCBS of Arkansas, ... Defendants,

Of whom Roger Brock is the Respondent-Appellant.

INITIAL BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err by finding that the Association may not offset the limits of liability insurance coverage available to a claimant from a solvent insurer after the claimant's insurer became insolvent?

II. Did the trial court err by finding that the Association may not offset medical insurance payments to a claimant from a solvent insurer after the claimant's insurer became insolvent?

STATEMENT OF THE CASE

This case involves interpretation of the South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. § 38-31-10 *et seq.* (the "Act"). Specifically, Respondent-Appellant Roger Brock ("Brock") agreed to settle his claim against the driver of a vehicle that collided with the vehicle in which Brock was a passenger. The driver's insurer subsequently became insolvent and Brock made a claim against the South Carolina Property and Casualty Insurance Guaranty Association ("Association"). The Association paid Brock the amount it believes is owed, and filed a declaratory judgment action on November 15, 2011, to determine whether the remaining settlement amount should be offset based on payments Brock received from other solvent insurers as a result of the automobile accident. (Complaint; R. ____). Brock denies that the Association is entitled to any of the claimed offsets. (Answer; R. ____).

The Association filed a Motion for Summary Judgment on May 10, 2012, asserting that there was no genuine issue of material fact and that the Act entitles the Association to offset Brock's liability coverage, uninsured coverage, personal injury protection, and medical insurance benefits. (Association's Motion for Summary Judgment; R. ____). Brock filed a cross-Motion for Summary Judgment on August 20, 2012, also asserting that there was no genuine issue of material fact but asserting that the Association is not entitled to the claimed offsets. (Brock's Motion for Summary Judgment; R. ____).

A hearing was held on the cross-Motions on October 24, 2012, before Judge R. Markley Dennis, Jr. (Transcript of Hearing; R. ____). By Order filed January 24,

2013, the court granted in part and denied in part the parties' motions for summary judgment. (1/24/13 Order at 18; R. ____). Specifically, the court held that the Association is entitled to the claimed offsets for Brock's uninsured coverage and personal injury protection but is not entitled to the claimed offsets for Brock's liability coverage and medical insurance benefits. (*Id.*). The Association appeals the determination that it is not entitled to the claimed offsets for Brock's liability coverage and medical insurance benefits on the basis that the Act entitles it to offset all amounts.

STATEMENT OF FACTS

The facts as described in the Order at issue are not in dispute. On or about October 2, 2009, Brock sustained injuries as a passenger in a vehicle driven by Brian Mason ("Mason") that was involved in a motor vehicle accident with another vehicle driven by Defendant Ryan Stevens ("Stevens") and insured by Defendant Malachi Sanders ("Sanders") with Aequicap Insurance Company ("Aequicap"). (1/24/13 Order at 2; R. ____). As a result of his injuries, Brock initiated a lawsuit in the United States District Court for the District of South Carolina against Stevens and Sanders, claiming entitlement to recovery for lost wages, injuries, and medical expenses. (*Id.*).

In or around January 2011, Brock and Sanders reached a settlement of Brock's claims for $185,000.00, and the lawsuit was dismissed. (*Id.* at 2-3; R. ____). It is undisputed that Aequicap, as the insurer for Sanders, was responsible for paying the settlement amount. (*Id.*). However, prior to the payment of the settlement amount, Aequicap was declared insolvent by the courts of Florida. (*Id.* at 3; R. ____). As a result of Aequicap's insolvency, Brock filed a claim with the Association, demanding payment of the $185,000.00 settlement amount. (*Id.*).

As a result of the motor vehicle accident on October 2, 2009, and in light of Aequicap's insolvency, Brock has received, or was afforded the benefit of, the following amounts from other solvent insurers:

a.	Progressive Uninsured Motorist Coverage (resident relative coverage through Brock's parents' carrier)	$ 25,000.00
b.	BC/BS Medical Bill Payment (Brock's private pay medical insurance carrier)	$ 40,590.45
c.	Progressive Personal Injury Protection (resident relative coverage through Brock's parents' carrier)	$ 5,000.00
d.	Nationwide Liability Coverage (insurer for Mason vehicle in which Brock was a passenger)	$ 22,500.00
	TOTAL	$ 93,090.45

(*Id.* at 3-4; R. ____).

Pursuant to its Complaint, the Association sought a declaration that it is entitled to an offset for all payments or coverage limits from the four solvent insurers noted above provided by S.C. Code Ann. § 38-31-100. (*Id.* at 4; R. ____). The Association has paid Brock $91,909.55 representing the difference between the settlement amount ($185,000.00) and the amounts received by or paid on behalf of Brock ($93,090.45) by the solvent insurers. (*Id.*). Brock has objected to the reduction, claiming entitlement to the full settlement amount plus all payments from other solvent insurers. (*Id.*).

ARGUMENT

The trial court correctly interpreted the Act to require the Association to offset payments to Brock from solvent insurers providing uninsured motorist ("UM") and personal injury protection ("PIP"). (*Id.* at 16-18; R. ____). However, the trial court committed reversible error when it determined that the Association may not offset the coverage available to Brock from solvent insurers providing liability coverage and medical insurance. (*Id.* at 7-15; R. ____). As set forth below, the trial court's ruling regarding liability coverage and medical insurance is contrary to the express terms and purpose of the Act. Therefore, this Court should reverse this portion of the trial court's order and declare that the Association is entitled to offsets for liability and medical insurance coverage amounts in addition to UM and PIP coverage. The Act provides that any and all coverage from solvent insurers arising from the same facts, injury or loss should be offset.

I. The Plain Language Of The Act Unambiguously Requires The Association To Set Off *All* Amounts Paid To A Claimant By *Any* Other Solvent Insurer For Injury Arising Out Of The Same Facts And Circumstances.

"When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706-07 (2012) (*citing Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996)). In this case, the Act is clear and unambiguous in its mandate that the Association must offset the amount of coverage available from any solvent insurers arising from the same facts and circumstances as the claim against the Association.

A. The Act's language is clear and unambiguous.

The Association is a nonprofit unincorporated legal entity created by the South Carolina Legislature pursuant to the Act. *See S.C. Prop. and Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994); *Builders Transp. v. S.C. Prop. and Cas. Ins. Guar. Ass'n*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992). All insurers who write any kind of insurance to which the Act applies are members of the Association as a condition of their authority to transact insurance in South Carolina. S.C. Code Ann. § 38-31-40 and § 38-31-20(11). The Association is funded by assessments paid by each member. S.C. Code Ann. § 38-31-60(c). These assessments are ultimately passed on to the consumer in the form of increased insurance rates. *See* S.C. Code Ann. § 38-73-920.

Because the Association was created by statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act. S.C. Code Ann. § 38-31-60; *see also Builders Transp.*, 307 S.C. at 406, 415 S.E.2d at 424.[1] Pursuant to the statutory scheme, the Association must "pay covered claims to the extent of the association's obligation and deny all other claims." S.C. Code Ann. § 38-31-60(d). There is no dispute that Brock's claim is a "covered claim" under the Act. The issue is whether the Act permits the Association to offset Brock's "covered claim" by the amount of other available coverage.

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[1] *See also* 44 C.J.S. Insurance § 213 ("The association is a statutory entity that depends on statutory law for its existence and for the definition of its powers, duties, and protections.")

The Act unambiguously resolves the issue by requiring claimants such as Brock to exhaust all policies providing coverage arising under the same facts and circumstances as the claim, and further requiring that the claim is reduced by the full limits of these other policies:

> A person, having a claim under an insurance policy, whether or not it is a policy issued by a member insurer, and the claim under such other policy arises from the same facts, injury or loss which gave rise to the covered claim against the association, is required to first exhaust ***all*** coverage and limits provided by ***any*** such policy. Any amount payable on a covered claim under this chapter must be reduced by the full limits of such other coverage as set forth on the declarations page and the association shall receive a full credit for such limits, or, where there are no applicable limits, the claim must be reduced by the total recovery.

S.C. Code Ann. § 38-31-100(1) (emphasis added). The Act further clarifies that the obligation to exhaust and offset coverage amounts from other solvent insurers applies even when the claim has been liquidated by means of either a judgment or settlement:

> A person who has liquidated by settlement or judgment a claim against an insured under a policy issued by an insolvent insurer, and the claim is a covered claim and is also a claim within the coverage of any policy issued by a solvent insurer, must be required first to exhaust all coverage and limits provided under the policy issued by the solvent insurer before execution, levy, or any other proceedings are begun to enforce any judgment obtained against or the settlement with the insured of the insolvent insurer.

S.C. Code Ann. § 38-31-100(5). Moreover, this is consistent with the general law regarding insurance guaranty funds, which exist in all fifty states:

> A person seeking payment from an insurance guaranty association or a fund created by multiple insurance companies generally must first exhaust other insurance available to such person, such as uninsured motorist coverage. It is the philosophy of [insurance guaranty funds] to have all potential claims against the [f]und's assets reduced by a solvent insurer, and not the [f]und,

> whenever possible. The liability of the association or fund is reduced by the amount recovered under such other insurance.

44 C.J.S. Insurance § 221.

Therefore, whenever a claimant has a claim under another insurance policy that arises from the same facts, injury or loss giving rise to their claim against the Association, the Association is entitled--without exception--to offset the amount it owes the claimant by the limits of and/or the recovery made under coverage from other solvent insurers. The offset obligation applies to "all" amounts paid by "any" insurer. This clear language, given its plain and ordinary meaning, obviates the need to include a laundry list of all possible types of insurance in the Act.

Here, it is undisputed that Brock's claims under the liability and medical insurance policies arise from the same facts, injury or loss as his claim against the Association. (1/24/13 Order at 3; R. ____). Consequently, the trial court erred by finding the Association should not offset amounts available to Brock by those solvent liability and medical insurance providers and should be reversed as to its rulings on those payments.

B. The trial court wrongly relied on case law from other jurisdictions interpreting statutes readily distinguishable from South Carolina's Act.

The trial court correctly applied the plain language of the Act and case law from other jurisdictions to find offsets for PIP and UM coverage are required by the Act. (1/24/13 Order 16-18; R. ____). However, the trial court ignored the plain language of the Act and misconstrued case law from other jurisdictions interpreting very different statutory language when it incorrectly determined that offsets for liability coverage and

medical coverage were not required under the broad language of South Carolina's Act. (*Id.* at 7-15; R. ____). The trial court's ruling is inconsistent in that it offset a portion of the amounts available from the solvent insurers rather than offsetting any and all of these amounts.

While no reported South Carolina appellate court decision addresses the issue, other state courts have addressed similar statutes with broad offset requirements. All states have statutorily created guaranty associations, and they all have offset provisions. (*See* Table A, detailing other state statutes). Nine other states have statutes like South Carolina's that refer to offset of all payments from any insurance policy providing payments relating to the same facts, injury or loss. *Id.* The four courts construing these statutes like South Carolina's have consistently held the guaranty association is entitled to an offset of other insurance recovered by claimants. (*See* Table B, case law from states with offset provisions like South Carolina).

On the other hand, most state statutes do not include South Carolina's broad language referring to payments from all policies providing coverage relating to the "same facts, injury or loss." *See* S.C. Ann. § 38-31-100(1). Rather than using the "same facts, injury or loss" language, these statutes instead have language that arguably requires the claim under the "other insurance" also to be a covered claim in order to be offset. For example, the statute applied in *Int'l Collection Serv. v. Vermont Prop. & Cas. Ins. Guar. Ass'n*, 555 A.2d 978 (Vt. 1988), provides:

> § 3619. Nonduplication of recovery
>
> (a) Any person having a claim against an insurer under any provision in an insurance policy other than policy of an insolvent insurer **which is also a covered claim**, shall be required to

> exhaust first his right under such policy. Any amount payable on a covered claim under this subchapter shall be reduced by the amount of any recovery under such insurance policy.

Vt. Stat. Ann. Tit. 8, § 3619 (emphasis added).

This language in the Vermont statute is materially different than the language in South Carolina's statute and, unlike courts interpreting language similar to our statute, courts construing statutes utilizing the language in the Vermont statute have consistently found it ambiguous. *See, e.g., Int'l Collection*, 555 A.2d at 980. As a result, decisions regarding the offset requirement under statutes with language similar to Vermont have been conflicting. *Cf. Int'l Collection*, 555 A.2d at 980 (finding provision ambiguous and permitting offset of liability insurance) and *R & R Indus. Park, LLC v. Utah Prop. & Cas. Insur. Guar. Ass'n*, 199 P.3d 917 (Utah 2008) (finding provision ambiguous and not permitting offset against any amount less than insured's total loss). Because the statutes applied in the other cases have the "covered claim" standard for an offset rather than the "same facts, injury or loss" standard found in South Carolina's offset provision, these other cases are not instructive on the interpretation of the Act in this case.

Importantly, the trial court relied on cases related to offsetting payments from solvent liability and medical insurance providers all construing language similar to Vermont's statute, but ignored authority construing language similar to South Carolina's permitting offset. As a result, the trial court erroneously ruled payments from liability and medical insurers should not be offset and therefore should be reversed.

II. Even If The Act Is Ambiguous, The Trial Court Misconstrued The Legislature's Intent.

Because the language of the Act is clear and unambiguous, the trial court should not have attempted to construe the statute. *See Anderson*, 397 S.C. at 556, 725 S.E.2d at 706-07. Even though the trial court seems to have recognized the limited purpose of the Act, the Order nonetheless applies the Act inconsistently with its purpose of providing limited protection to insureds of insolvent insurers.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly." *Id.* The South Carolina Supreme Court has previously determined the intent of the Act. As stated in *Carolinas Roofing*, the purpose of the Association is "to provide **some** protection to insureds whose insurance companies become insolvent." 315 S.C. at 557, 446 S.E.2d at 424 (emphasis added). This language evidences the Legislature's intent to limit the Association's liabilities to less than those of the insolvent insurer.

Further, the Legislature's intent to limit the obligations of the Association is consistent with the majority view that the Association is not obligated to make the insured whole as a result of the insolvency. While the Association's role is to reduce the inequity that would occur should claimants be left without any potential source of recovery when an insurer becomes insolvent, it is not intended as a failsafe to guarantee complete recovery to those unfortunate claimants. *See* 44 C.J.S. Insurance § 218 (noting that a claimant will not always be put in the same position as if the insurer had not become insolvent). By including the offset provisions in the Act, the Legislature

limited the Association's obligations to account for its limited role and funding sources, and to avoid duplication of recovery and windfalls.

The trial court's Order wrongly relies upon the South Carolina Life and Accident Health Insurance Guaranty Association ("SCLAHIGA") to suggest a more expansive obligation for this unrelated Association. (1/24/13 Order at 6; R. ____). The SCLAHIGA is not a sister organization of the Association, and its purpose—found in an entirely different statutory enactment creating a separate and distinct association handling completely different claims by its own processes—cannot be transposed to serve as the purpose of the Act at issue here. As previously noted, the purpose of the Act has already been determined by this State's Supreme Court—to provide **some** protection to claimants like Brock who cannot recover from an insolvent insurer. *See Carolinas Roofing*, 315 S.C. at 557, 446 S.E.2d at 424.

The trial court nonetheless appears to have recognized the limited purpose of the Act. By holding that the Association is obligated to offset UM and PIP payments, the trial court found the Association was not required to pay the full $185,000.00 Brock claimed was due from the Association in order to make him whole. (1/24/13 Order; R. ____). This is consistent with the Act's limited purpose of providing some protection, while not necessarily fully compensating the insured to the extent owed by the insolvent insurer. *See id.*

Despite recognizing the Act's limited purpose, the trial court inexplicably permitted offset of PIP and UM while refusing to offset liability and medical coverage even though the Act provides that all insurance payments from any solvent insurer should be offset. *See* S.C. Code Ann. § 38-31-100(1). As the trial court rightly notes,

the statute does not list or limit the types of insurance that may be offset, instead broadly referring to "all payments" and "any such policy" where the claim arises from the same facts, injury or loss as the covered claim. (1/24/13 Order; p. ___, p. 7-8, R. ____).

Therefore, nothing in the Record or in the language of the statute evidences any intent of the Legislature to treat one type of policy differently than the other. By permitting offset of PIP and UM coverage, the trial court rightly found that the Association could offset other insurance payments, even if Brock was not paid the full amount of his claim. The trial court, however, acted contrary to the express language of the statute and the Legislature's intent by treating liability and medical coverage differently, thereby improperly expanding the obligations of the Association and, by extension, South Carolina policy holders who ultimately are charged for the assessments funding the Association. Consequently, the trial court's ruling regarding liability and medical insurance payments should be reversed.

III. The Act Requires Offset Of The $25,000.00 Limit Of Mason's Nationwide Liability Policy.

Even if some basis existed to treat certain types of insurance differently rather than requiring offset of all insurance payments arising under the same facts, injury or loss as the Act states, payments from liability insurance carriers certainly should be offset. Not only does the Act expressly require it, the vast majority of cases from around the country hold that liability insurance payments should be offset.

A. The Act expressly requires offset of liability insurance payments from the insurers of joint tortfeasors.

As noted above, the Act requires the Association to offset the full limits set forth on the declaration pages of policies from solvent insurers providing coverage for the same facts, injury or loss. S.C. Code Ann. § 38-31-100(1). The Act further contains a specific provision stating that payments by liability insurers of joint tortfeasors necessarily arise under the same facts, injury or loss as the claim against the Association:

> A claim under a policy providing liability coverage to a person who may be jointly and severally liable with or a joint tortfeasor with the person covered under the policy of the insolvent insurer that gives rise to the covered claim **must** be considered to be a claim arising from the same facts, injury, or loss that gave rise to the covered claim against the association. Any amount payable on a covered claim under this chapter **must** be reduced by the full and combined policy limits of all joint tortfeasors.

S.C. Code Ann. § 38-31-100(1)(a) (emphasis added). Moreover, to the extent the Association's liability is reduced, the liability of the insured of the insolvent insurer is reduced as well. S.C. Code Ann. § 38-31-100(1)(b).

In this case, Brock received liability coverage proceeds in the amount of $22,500.00 from a $25,000.00 Nationwide policy insuring Mason, the driver of the vehicle in which Brock was a passenger. (1/24/13 Order at 3; R. ____; *see also* Association's Memorandum in Support of its Motion for Summary Judgment Ex. 2 p. 1; R. ____). Mason is a joint tortfeasor with Stevens, the driver of the other vehicle involved in the collision and the insured under Aequicap's policy.

Because Mason is a joint tortfeasor with Stevens, Brock's claim against Mason's liability coverage necessarily arises under the same facts, injury or loss as Brock's

claim against Aequicap. The Act therefore expressly requires the Association to offset the full limits of Mason's Nationwide liability policy. *See* S.C. Code Ann. § 38-31-100(1)(a).

The trial court failed to recognize this provision of the Act when erroneously ruling that the Association could not offset liability insurance payments from other solvent insurers. Thus, the trial court should be reversed and the Association should be permitted to offset the $25,000.00 available from Nationwide.

B. The majority of other jurisdictions permit offset of liability insurance payments.

No South Carolina cases directly address the Association's entitlement to a setoff of liability insurance. However, the clear majority of states addressing this issue support the Association's right to such setoff. (*See* Table C, showing states establishing the right to offset for liability insurance payments from solvent insurers).

Despite the clear weight of authority regarding offset of liability insurance payments, the trial court notes that "several other courts have held an offset of any benefits rendered by solvent insurers for the same injury that results in a recovery less than the full amount to which the insured is entitled unfairly penalizes the injured party." (1/24/13 Order at 8; R. ____) (*citing Gibson v. Ala. Ins. Guar. Ass'n*, 601 So. 2d 416, 416-19 (Ala. 1992); *Harris v. Lee*, 387 So. 2d 1145, 1146 (La. 1980); *R & R*, 199 P.3d at 925-27; *Int'l Collection*, 555 A.2d at 980). These cases are readily distinguishable and not applicable to the present analysis. The significant distinction is that the statutes relied on in the cited cases require the claim under the other insurance to be a covered claim for the Association to be entitled to an offset whereas South

Carolina's statute requires only that the claim under the other insurance arise from the same facts, injury or loss for the Association to be entitled to an offset. *See* Table A.

Because the statutes applied in the other cases have the "covered claim" standard for an offset rather than the "same facts, injury or loss" standard found in South Carolina's offset statute, these other cases are not instructive on the interpretation of South Carolina's Act. To the extent the statute contains some ambiguity requiring analysis outside of South Carolina authority, the trial court should have relied on courts interpreting statutes containing the "same facts, injury or loss" standard found in South Carolina's offset statute, which have uniformly held that the Association is entitled to offset amounts received from other liability insurance. (*See* Table B.)

IV. The Act Requires Offset Of The $40,590.45 for Medical Benefits Paid on Behalf of Brock.

As with liability insurance, there is simply no basis for the trial court to treat medical insurance coverage differently than UM, PIP or any other type of insurance with regard to the Association's right to offset payments from solvent insurers. The trial court ruled that medical insurance payments should not be offset because (1) the collateral source rule prohibits it and (2) to do so would penalize those with private pay benefits. (1/24/13 Order p. 8-11, R. ____). Both reasons are incorrect, contrary to the Act's plain language, and inconsistent with the majority view from other states.

A. The collateral source rule does not prohibit offset in this case.

"The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer." *In re W.B. Easton Constr. Co., Inc.*, 320 S.C. 90,

92, 463 S.E.2d 317, 318 (1995). However, the collateral source rule is a creature of common law, and therefore, was superseded by codification of the Act's offset requirements. *See Estate of Rattenni v. Grainger*, 298 S.C. 276, 278, 379 S.E.2d 890, 891 (1989) (noting that the General Assembly can abrogate the collateral source rule by statute).

The trial court noted that had the Legislature intended to abrogate the collateral source rule, it could have amended the offset statute to specifically provide the particular forms of coverage to which the offset would apply. However, the trial court ignores the fact that the Legislature specifically provided that all other insurance coverage related to the same facts, injury or loss must be offset. The term "all" encompasses all forms of insurance without the need for listing every specific type, as explained above. *See* Section I.A.

Furthermore, courts must read statutes "so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations omitted). The Act directly contradicts the collateral source rule by requiring the Association to offset collateral sources—namely, those claims under other insurance policies arising from the same facts, injury or loss as the claim against the Association. As such, if the collateral source rule was applicable to determining the Association's liability to claimants, the Association's liability could never be reduced by any collateral sources and the offset provisions of the Act would be rendered completely meaningless.

Finally, numerous other state courts have found that their respective offset statutes abrogated the common law collateral source rule. (*See* Table D, noting states that recognize an abrogation of the collateral source rule in light of statutory provisions.)

Accordingly, application of the collateral source rule to the offset provisions of the Act is contrary to the Act's express terms, the intent of the Legislature, basic tenets of statutory construction, and common sense. The Act therefore must be read to abrogate the collateral source rule, and the trial court erred by applying it in this case to find medical insurance coverage should not be offset.

B. Permitting offset of medical insurance payments does not penalize private pay patients.

The trial court wrongly reasons that the Association should not be allowed to offset medical insurance payments because it would "penalize" Brock for "having purchased and utilizing the benefit of his private pay insurance." (1/24/13 Order p. 15; R. ____). This is far from the case, and illustrates the trial court's misapprehension of how the Act operates.

In this case, Brock was afforded the benefit of $40,590.45 in medical insurance coverage from Blue Cross/Blue Shield of Arkansas ("BC/BS"), his health insurance provider, to receive treatment related to injuries suffered as a result of the accident. (1/24/13 Order at 3; R. ____). At the time of the settlement, BC/BS had subrogation rights against any funds Brock would receive from Aequicap, and therefore, Brock would have been required to repay the BC/BS lien from the settlement amount he negotiated. *See* S.C. Code Ann. § 38-71-190 (permitting subrogation by insurer to

right of insured's recovery against liable third party). However, BC/BS is statutorily barred from pursuing any subrogation rights against Brock upon Aequicap's insolvency:

> No claim held by an insurer, reinsurer, insurance pool, or underwriting association based on an assignment or on rights of subrogation, or otherwise, may be received from a claimant or asserted in any legal action against a person insured under a policy issued by an insolvent insurer or the association except to the extent the amount of the claim exceeds the obligation of the association under this chapter.

S.C. Code Ann. § 38-31-100(4).[2]

Brock therefore clearly received the benefit of the medical insurance for which he paid. Because the Act protects him by prohibiting the subrogation rights his health insurer otherwise would have, he is no longer required to make any subrogation payments to his health insurer and is able to retain the full benefit of his health insurance payments. S.C. Code Ann. § 38-31-100(4). As a result, to allow Brock to keep these benefits without an offset would amount to a duplication of recovery and a windfall.

In fact, when applying Brock's interpretation of the Act to prohibit any offsets at all, Brock would actually receive $65,590.45 **more** than he would have had Aequicap not become insolvent. Had Aequicap not become insolvent, Brock would not have been entitled to the $25,000.00 in UM coverage and would have been required to reimburse BC/BS for his medical benefits of $40,590.45. Plainly, the offset statute cannot be construed to allow the windfall advocated by Brock.

[2] In any event, BC/BS waived its subrogation claim against Brock and was accordingly dismissed from this action in the circuit court. (1/24/13 Order at 12; R. ___).

Therefore, the trial court erred by finding that the Association could not offset the benefits paid by BC/BS on Brock's behalf and should be reversed.

C. The majority of other jurisdictions permit offset of health insurance coverage.

Again, no South Carolina cases directly address the Association's entitlement to an offset for a claimant's health insurance coverage. However, the clear majority of states addressing this issue have expressed agreement with the Association's contention that it is entitled to offset the health insurance benefits paid on Brock's behalf. (*See* Table E, detailing states setting off health insurance benefits.)

And again, despite this clear weight of authority, the trial court relies on a handful of cases from other courts finding that guaranty associations are not entitled to offset medical insurance benefits. (1/24/13 Order p. 12-15, R. ____). However, these cases are distinguishable.

For example, the "non-duplication of recovery" statute at issue in *Harris v. Lee*, cited by the trial court on page 12 of the Order, provides:

> Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer **which is also a covered claim**, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this Part shall be reduced by the amount of any recovery under such insurance policy.

387 So.2d at 1146 (*citing* La. Rev. Stat. Ann. 22:1386(1)) (emphasis added). Again, this statute differs from South Carolina's offset statute because it requires that a claim under other insurance be a covered claim for the Association to offset such other insurance. Because health insurance is not covered by the Act, health insurance claims could not be covered claims, and therefore, the Association was not entitled to offset

the health insurance benefits received by the claimant. *Id.* Because the wording and import of the statute at issue in *Harris* is not the same as South Carolina's, this decision is of no moment here.

In any event, the Louisiana legislature subsequently amended its statute to more closely align with South Carolina's offset statute, which does not require that a claim under other insurance be a covered claim in order for the Association to offset the other insurance:

> § 2062. Exhaustion of other coverage
>
> A. (1) Any person having a claim against an insurer shall be required first to exhaust all coverage provided by any other policy, including the right to a defense under the other policy, if the claim under the other policy arises from the **same facts, injury or loss** that gave rise to the covered claim against the association. The requirement to exhaust shall apply without regard to whether or not the other insurance policy is a policy written by a member insurer. However, no person shall be required to exhaust any right under the policy of an insolvent insurer or any right under a life insurance policy or annuity.
>
> (2) Any amount payable on a covered claim under this Part shall be reduced by the full applicable limits stated in the other insurance policy, or by the amount of the recovery under the other insurance policy as provided herein.

La. Rev. Stat. Ann. § 2062(A) (emphasis added). Therefore, the Louisiana legislature effectively nullified the *Harris* decision by amending its statute joining the clear majority of states allowing offsets for health insurance coverage.

In fact, every case cited by the court to refute the Association's right to offset medical benefits applied different statutory language requiring that the claim under other insurance be a covered claim for the Association to offset such other insurance. (*See* Table F, demonstrating the distinguishable statutory language from other states.)

Again, the statutes applied in these other cases have the "covered claim" standard for an offset rather than the "same facts, injury or loss" standard found in South Carolina's offset statute. Because the language of the statutes at issue in these cases is not the same as South Carolina's offset statute, the analysis employed by these courts is not applicable here. Furthermore, some of these decisions have been nullified by the subsequent passage of statutes that clearly provide for the Association's right to offset health insurance benefits in their respective states, and courts interpreting statutes containing the "same facts, injury or loss" standard found in South Carolina's offset statute have uniformly held that the Association is entitled to offset amounts received from other insurance. (*See* Tables F and B.)

South Carolina's offset statute therefore unambiguously requires the Association to offset Brock's medical insurance coverage arising from the same facts, injury or loss as the claim against the Association, and the trial court's order holding otherwise is inaccurate, contrary to the Act's plain language, and inconsistent with the majority view from other states.

CONCLUSION

The Act's plain language requires Brock to exhaust the coverage provided by his liability insurance and medical insurance benefits and provides that the Association is entitled to setoff its liability to Brock by the amounts of this other coverage. For the foregoing reasons, the Association respectfully requests this Court reverse the circuit court's ruling that the Association is not entitled to the claimed offsets for Brock's liability coverage and medical insurance benefits.

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June 7, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2011-CP-10-8496

South Carolina Property and Casualty Insurance Guaranty Association,..... Appellant-Respondent,

v.

Roger Brock, Ryan Stevens, Malachi Sanders, and Health Advantage/BCBS of Arkansas,..... Defendants,

Of whom Roger Brock is the Respondent-Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant-Respondent, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document(s):

Appellant-Respondent's Initial Brief

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APPELLANT-RESPONDENT'S DESIGNATION OF MATTER FOR THE RECORD ON APPEAL

Pursuant to Rule 209, SCACR, Appellant-Respondent South Carolina Property and Casualty Insurance Guaranty Association ("Appellant-Respondent") designates the following material for inclusion in the record on appeal. Undersigned counsel certifies, pursuant to Rule 209(c), SCACR, that the designation contains no matter which is irrelevant to the appeal:

ORDERS

1. Order regarding Summary Judgment January 24, 2013.

PLEADINGS

2. Complaint.

3. Answer.

TRANSCRIPTS

4. Transcript of Hearing October 24, 2012.

MISCELLANEOUS AND OTHER MOTIONS

5. Association's Motion for Summary Judgment May 10, 2012.

6. Brock's Motion for Summary Judgment August 20, 2012.

7. Association's Memorandum in Support of Association's Motion for Summary Judgment and in Opposition to Brock's Cross-Motion for Summary Judgment October 22, 2012, with appendix and exhibits.

8. Association's Reply to Brock's Memorandum in Support of Brock's Motion for Summary Judgment October 24, 2012, with appendix.

9. Association's Supplemental Memorandum in Support of Association's Motion for Summary Judgment and in Opposition to Brock's Cross-Motion for Summary Judgment November 1, 2012.

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Appellant-Respondent's Designation of Matter for the Record on Appeal

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June 7, 2013