

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-05-63
Appellate Case No. 2015-000246

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SC Court of Appeals

Janette Buchanan and Shana Smallwood, Individually
and as Co-Personal Representatives of the Estate of
James S. Buchanan, Respondents,

v.

The South Carolina Property and Casualty Insurance
Guaranty Association, Appellant.

**APPELLANT'S PETITION FOR REHEARING
OF THE COURT'S JULY 13, 2016 OPINION**

Howard A. VanDine
A. Mattison Bogan
Erik T. Norton
Tara C. Sullivan
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant The South Carolina Property and Casualty Insurance Guaranty Association

Introduction

Pursuant to Rule 221(a), SCACR, Appellant South Carolina Property and Casualty Guaranty Association (“Appellant” or “Association”) respectfully submits this petition for rehearing of this Court’s July 13, 2016 memorandum opinion No. 5424 (“the Opinion”). As explained more fully below, the Opinion misapprehends or overlooks significant points of law that, when properly considered, require reversal of the Court’s order affirming the trial court’s grant of summary judgment in favor of Respondents Janette Buchanan and Shana Smallwood, Individually and as Co-Personal Representatives of the Estate of James S. Buchanan (“Respondent” or “Buchanan”).

Argument

The Opinion erred by determining that the Association’s statutory offset should be deducted from a claimant’s total “damages” amount rather than the statutory limit of the Association’s responsibility. (Opinion at 6.) First, the Opinion misapprehends the plain language of the Guaranty Act (the “Act”), and the Court’s decision is inconsistent with recent decisions of the South Carolina Supreme Court limiting the Association’s obligation to pay a covered claim. (*Id.* at 5-6.) Moreover, the Opinion is out of step with the majority of jurisdictions that have considered the same language.

Second, this Court determined that no ambiguity exists despite reading the plain language differently than the South Carolina Supreme Court, cases from a majority of other jurisdictions and the conclusions of learned treatises. This Court should reconsider its Order after construing the language consistent with *S.C. Prop. and Cas. Ins. Guar. Ass’n*, 410 S.C. 361, 764 S.E.2d 920 (2014), cases from other jurisdictions, other legal authority, and the public policy underlying the

Act. The Court's decision creates ambiguity where the Supreme Court found none to exist previously.

I. The Opinion misapprehends the plain language of the Act and contradicts *Brock*.

When purporting to consider the plain meaning of the Act, the Opinion ignores the actual language in the Act limiting the obligation of the Association for payment of a covered claim. The Opinion also fails to read the statute as a whole and ignores the South Carolina Supreme Court's holding in *Brock*. Specifically, the Opinion overlooks the effect of the words "any amount payable" in the offset provision and misreads the Act's limitations on the Association's obligations to pay a covered claim.

Under the Act, a "covered claim" is defined in relevant part as:

"Covered claim" means an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State.

S.C. Code Ann. § 38-31-20. Therefore, the definition of "covered claim" includes all amounts owed to the insured by an insolvent insurer. The definition of covered claim does not speak at all to the amount owed to the insured by the Association.

Instead, the Act addresses the obligation of the Association as to the amount payable on a covered claim to insureds of insolvent insurers in Sections 38-31-60 and 38-31-100. In Section 38-31-60, which sets forth the Association's powers and duties, the Act specifically limits the Association's obligation to pay a covered claim even before the offset provision is applied.

Specifically, Section 38-31-60 provides that the Association “is considered the insurer to the extent of *its obligation* on the covered claims,” demonstrating that the Association’s obligation is distinct from the covered claim. The Opinion fails to acknowledge this portion of the Act. In fact, the Act expressly defines the Association’s obligation as only a portion of the covered claim, stating: “[The Association’s] obligation includes only the amount each covered claim is in excess of two hundred fifty dollars and is less than three hundred thousand dollars.” S.C. Code Ann. § 38-31-60(a)(iv). In other words, the express language of the Act provides that the Association’s obligation can never be more than \$300,000 while a covered claim could exceed this amount. Therefore, the Association’s obligation cannot be synonymous with the definition of covered claim, as the Opinion rules, and can never exceed \$300,000.

Because the Association’s obligation can never exceed \$300,000, the amounts of other coverage must be offset against the obligation amount, not the covered claim amount. The South Carolina Supreme Court held as much in *Brock*, stating that the Association “is allowed to offset the full limits of such other coverage against its *obligations* under the Act.” 410 S.C. at 366, 764 S.E.2d at 922 (emphasis added). Because the Act in Section 38-31-60 defines the Association’s obligation such that it can never exceed \$300,000, the holding in *Brock* means that the offset must be deducted from the statutory cap of \$300,000.

Similarly, the Act’s offset provision, Section 38-31-100, provides in relevant part:

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(a)(emphasis added). Again, as in Section 38-31-60, the Legislature differentiates what the Association is required to pay from the amount of the covered claim. Had

the Legislature intended for the offset to be applied against the covered claim, it could have simply provided that “[T]he amount of a covered claims must be reduced...” Instead, the Legislature wrote the Act to say that “[A]ny amount payable on a covered claim must be reduced,” thereby differentiating what the Association must pay from the amount of a covered claim and establishing the possibility that no amount will be paid on a covered claim. Therefore, the plain meaning of Section 38-31-100 is that “any amount payable on” is synonymous with the “obligation” of the Association in Section 38-31-60, which can never exceed the statutory cap of \$300,000. Hence, the amounts of available coverage must be offset against the statutory cap, which is the same thing as the Association’s obligation or the amount payable by the Association, when the amount of the covered claim exceeds \$300,000, as in this case.

The Opinion misreads Section 38-31-100 when it says that “if the Legislature had intended the statutory cap to be reduced by the recovery, it could have drafted [§ 38-31-100(1)] to read ‘the Association’s *obligation* under this chapter must be reduced by the total recovery.’ However, instead, the Legislature said that ‘the *claim* must be reduced by the total recovery.’” (Opinion at 6.) The Opinion fails to recognize, however, that the reference to the “claim” in Section 38-31-100 refers to payments for worker’s compensation claims only.

Worker’s compensation policies are treated differently under the Act because they do not have set limits and the statutory cap does not apply. See S.C. Code Ann. § 42-5-10 (requiring employers to secure payment of all compensation to employees required by Chapter 42); S.C. Code Ann. § 38-31-60(a)(iv)(“However, the association shall pay the full amount of any covered worker’s compensation claim.”). Section 38-31-100 is no exception. The first clause of Section 38-31-100 does not apply to worker’s compensation policies because it refers to the policy limits, stating: “[A]ny 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,..." As explained above, this clause calls for a reduction of "any amount payable on a covered claim," or the Association's obligation, which can never be more than \$300,000 under the Act. *See* S.C. Code Ann. § 38-31-60(a)(iv).

The second clause of Section 38-31-100, on the other hand, applies *only* to worker's compensation policies because it refers to policies with "no applicable limits." Specifically, the second clause provides, "...or, where there are no applicable limits, the claim must be reduced by the total recovery." Of course, this clause could not refer to an offset against the statutory cap because there the Act expressly excludes worker's compensation claims from the statutory cap.

Therefore, the Opinion is wrong when it says the Legislature's use of the word "claim" means that the offset should be applied against the claim amount in this case. In fact, the Legislature's use of the word "claim" when referring to worker's compensation claims where the cap is not applicable while expressly limiting the Association's payment to "any amount payable on a claim" for all other policies where the cap applies demonstrates that the Legislature intended for the offset to be applied against the cap in cases like this one where the cap is the extent of the Association's obligation.

Finally, the Opinion fails to consider cases from other jurisdictions consistently interpreting the exact same language from Section 38-31-100 to mean that the amount of other available coverage should be offset from the statutory cap rather than the amount of the covered claim. *See Jangula v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 207 Ariz. 468, 471, 88 P.3d 182, 185 (Ct. App. 2004) (finding that Arizona's offset statute unambiguously required application of the Arizona Property and Casualty Insurance Guaranty Fund's offset for the claimant's other recovery of \$15,000 to reduce the Arizona Fund's statutory maximum limit of \$99,900, rather than the

claimant's total damages of \$115,000, leaving the Fund liable to the claimant for only \$84,900); *Marra v. Wilson*, No. CIV.A. 00C-08-019RRC, 2003 WL 367831, at *5-6 (Del. Super. Feb. 20, 2003) (finding that Delaware's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$100,000 to reduce the Delaware Association's statutory maximum limit of \$300,000, rather than the claimant's total damages, leaving the Association liable to the claimant for only \$200,000); *Leitch v. Miss. Ins. Guar. Ass'n*, 27 So. 3d 405, 410 (Miss. Ct. App. 2009), *aff'd*, 27 So. 3d 396 (Miss. 2010) (finding that Mississippi's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$300,000 to reduce the Mississippi Association's statutory maximum limit of \$300,000, rather than the claimant's total damages, leaving the Association with no liability to the claimant); *Palmer v. Montana Ins. Guar. Ass'n*, 239 Mont. 78, 79-82, 779 P.2d 61, 62-64 (1989) (finding that Montana's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$300,000 to reduce the Montana Association's statutory maximum limit of \$300,000, rather than the claimant's total damages of more than \$1,000,000, leaving the Association with no liability to the claimant); *New Hampshire Ins. Guar. Ass'n v. Pitco Frialator, Inc.*, 142 N.H. 573, 580, 705 A.2d 1190, 1194 (1998) (finding that New Hampshire's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$300,000 to reduce the Montana Association's statutory maximum limit of \$300,000, rather than the claimant's total damages of \$500,000, leaving the Association with no liability to the claimant); *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834, 843-45 (Okla. 1992) (finding that Oklahoma's offset statute unambiguously required the claimant to exhaust her rights for other recovery and to apply the recoveries obtained against the Oklahoma Association's statutory maximum limit of \$150,000, rather than the claimant's total damages of

\$450,000); *Blackwell v. Pennsylvania Ins. Guar. Ass'n*, 390 Pa. Super. 31, 34, 567 A.2d 1103, 1103-05 (1989) (finding that Pennsylvania's offset statute unambiguously required application of the Association's offset for the claimant's other recovery of \$65,000 to reduce the Pennsylvania Association's statutory maximum limit of \$300,000, rather than the claimant's total damages of \$365,000, leaving the Association liable to the claimant for only \$234,900 (\$300,000 - \$65,000, less a \$100 deductible)).

Therefore, this Court has subverted the will of the General Assembly by failing to read Section 38-31-100 in conjunction with Sections 38-31-20 and 38-31-60 and *Brock*, along with the courts in at least seven other jurisdictions, to find that the amounts of other available insurance should be offset against the statutory cap of \$300,000 rather than the amount of the covered claim.

II. This Court's Opinion overlooked the Association's purpose and the public policy underlying the Act.

To the extent an ambiguity now exists based on this Court's unique reading of the Act's language, this Court should look to the Legislature's intent and the policy underlying the Act to construe the offset provision. *See Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706-07 (2012) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly."). As set forth below, the policy considerations underlying the intent of the Act require this Court to find that the amounts of other available coverage should be offset from the statutory obligation instead of the covered claim amount.

In the Opinion, this Court properly identified that the purpose of the Act is to provide "some protection for consumers whose insurers become insolvent." Opinion at 6 (*citing S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994)(emphasis added)). However, the Opinion misconstrued the overall purpose of the Act, which is to maximize the offsets to the Association for the benefit of

South Carolina insureds as a whole. As explained below, this Court erred when it overlooked the purpose of the Association and the underlying public policy of the Act.

While attempting to provide some protection for insureds of insolvent insurers, the Legislature also has recognized the financial repercussions on South Carolina insureds when claims are made against the Association. In 2001, the Act was amended to expand limitations on claims by requiring exhaustion of all other available coverages prior to submitting a claim to the Association and providing an offset to the Association for these coverages. *See* 2001 S.C. Acts 82 (stating in the “preamble” to the amendment that its purpose was “to amend Section 38-31-100. . . . relating to procedures for asserting claims and to limitations to claims, so as to require exhausting all coverage and claims and providing credit to the Guaranty Association under certain conditions.”) Thus, the amendments reflect the Legislature’s intent to limit the Association’s responsibilities, thereby protecting South Carolina insureds from increasing premiums resulting from insolvent insurers while offering some limited protection to insureds of insolvent insurance companies. *Brock*, 410 S.C. at 367-68, 764 S.E.2d at 923 (holding that the Association is “a statutory entity that exists to provide some protection for the insureds of insolvent insurance companies”); *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (finding that the Association is a “last resort”). Therefore, this Court should construe the Act to maximize the Association’s limitations on liability and credits under the Act.

Moreover, other provisions in the Act reflect the Legislature’s express intent to allow the Association to receive credits and offsets against the statutory cap rather than the claim amount. For example, Section 38-31-60(a) provides that “The association has no obligation to pay a claimant’s covered claim, except a worker’s compensation claim, if (1) the insured had primary coverage at the time of his loss with a solvent insurer equal to or in excess of three hundred

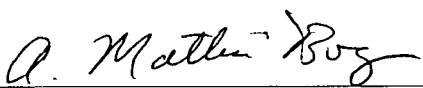
thousand dollars and applicable to claimant's loss." Importantly, this provision is in no way dependent upon the claim amount: if the insured has applicable primary coverage in equal to or in excess of \$300,000, the Association has no obligation to pay the claim.

While Respondent did not have applicable *primary* coverage available in excess of \$300,000, he did recover in excess of \$300,000 from secondary policies. It is inconceivable that the Legislature intended insureds who have applicable primary coverage equal to or in excess of \$300,000 to be treated less favorably than those recovering under third party policies. Therefore, Section 38-31-60(a) demonstrates that the Legislature intended for all other insurance coverage to be offset against the \$300,000 cap rather than the claim amount. This Court failed to recognize the import of these provisions in the Act evidencing the Legislature's intent for the offset to be applied against the statutory cap rather than the claim amount.

Conclusion

For the foregoing reasons, Appellant respectfully submits that rehearing is warranted and that this Court should reverse its ruling affirming the trial court's grant of summary judgment in favor of Respondents.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
Howard A. VanDine, III, SC Bar No. 00918
E-Mail: howard.vandine@nelsonmullins.com
A. Mattison Bogan, SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Erik T. Norton, SC Bar No. 73860
E-Mail: erik.norton@nelsonmullins.com
Tara C. Sullivan, SC Bar No. 79806
E-Mail: tara.sullivan@nelsonmullins.com
Post Office Box 11070 (29211-1070)
Columbia, SC 29211-1070
(803) 799-2000

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Attorneys for Appellant

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for The South Carolina Property and Casualty Insurance Guaranty Association, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):


Pleadings:

Appellant's Petition for Rehearing of the Court's July 13,
2016 Opinion

Counsel Served:

John S. Nichols, Esquire
Bluestein Nichols Thompson & Delgado
Post Office Box 7965
Columbia, SC 29202

Daniel W. Luginbill, Esquire
Wilson & Luginbill, LLC
Post Office Box 1150
Bamberg, SC 29003



Lisa P. Whitehurst
Administrative Assistant

July 27, 2016

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.5916
www.nelsonmullins.com

A. Mattison Bogan
Tel: 803.255.9589
Fax: 803.255.5916
matt.bogan@nelsonmullins.com

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Janette Buchanan and Shana Smallwood individually and as Co-Personal
Representatives of the Estate of James Buchanan v. The South Carolina
Property and Casualty Insurance Guaranty Association
Civil Action No. 2013-CP-05-00063
Our File: 00163/01650

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of a Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

Very truly yours,



A. Mattison Bogan

AMB:lpw
Enclosure

cc: John S. Nichols, Esquire
Daniel W. Luginbill, Esquire