THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2013-CP-05-63
Appellate Case No. 2015-002156

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,..... Petitioner.

GUARANTY ASSOCIATION'S REPLY IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Court should grant the Association's petition for certiorari. The decision of the Court of Appeals contradicts this Court's holding in *S.C. Prop. and Cas. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (2014), and the plain language of the South Carolina Property and Casualty Insurance Guaranty Act, S.C. Code Ann. § 38-31-10 to -170 ("the Act"). Similarly, authorities from other jurisdictions apply statutes that are verbatim as to the relevant sections that support this Court's holding and contradict the decision by the Court of Appeals. Review is warranted because of the contradiction between the Court of Appeals decision and *Brock*. Further, unless reversed, the Court of Appeals decision will result in higher premiums for South Carolina consumers because the Court of Appeals ignored the express intent of the legislature to limit the liability of the Association and the insurers that fund it through premium dollars.

LAW/ANALYSIS

I. Brock held that the Association may offset the full limits of other available insurance coverage against the Association's obligation, not the covered claim.

The Association's Petition accurately stated the holding in *Brock*. The Act states that the Association "is considered the insurer to the extent of its obligation on the covered claims." S.C. Code Ann. § 38-31-60. This section of the Act further states that "[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. *Brock* expressly held 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. This Court therefore has rejected expressly the Court of Appeals' holding that the other coverage should be offset against the covered claim, instead holding that

the other coverage should be offset against the Association's maximum obligation of $300,000.

Buchanan argues that *Brock* did not involve worker's compensation, but that is of no moment here. (Ret. 11). The Act treats worker's compensation entirely differently, eliminating any cap on the Association's obligation and making any argument about the offset moot. The Court of Appeals' failure to recognize this distinction is, in large part, the problem with its Decision.

Buchanan also argues that *Brock* treated the entire settlement as the obligation, but that is entirely consistent with the Association's argument here. (Ret. 11). In *Brock*, the extent of the obligation , which was $185,000, was less than the $300,000 maximum obligation for the Association, so the claim was under the maximum obligation amount. 410 S.C. at 367, 764 S.E.2d at 923. In this case however, the covered claim of $800,000 exceeds the maximum statutory cap, so the extent of the Association's obligation is the maximum statutory amount of $300,000.

Therefore, because this Court explicitly has held that the Association is entitled to set off other available insurance against its maximum obligation of $300,000, the Court of Appeals decision is in direct conflict with this Court's holding in *Brock* and the petition for certiorari should be granted.

II. The Court of Appeals misapplied the plain language of the Act.

Buchanan incorrectly argues that the words "[a]ny amount payable on a covered claim" somehow means the amount of the covered claim itself. (Ret. 15). This cannot be so. Buchanan implausibly argues that the covered claim really is the limits of insurance under the insolvent insurer's policy as if every demand for insurance coverage is a demand for the policy limits.

(Id.) The plain language instead shows that the "amount payable" is something different than the "covered claim," and the amount payable therefore can be nothing other than the Association's obligation to pay between $250 and $300,000 "on a covered claim." The General Assembly does not include superfluous or meaningless language in the Code. *See CFRE, LLC v. Greenville Cty. Assessor,* 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (providing courts must read a statute "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.'" (citations omitted)).

Therefore, the Court of Appeals decision misapplies the Act and the Petition for Certiorari should be granted.

III. The Legislature intended for the Association's obligation to be limited to protect South Carolina consumers from increased premiums which provide some protection to insureds of insolvent insurers.

The Association is funded by insurers, which in turn pass this cost on to consumers. As a result, this Court in *Brock* recognized that the Association only provides *some* protection to claimants of insolvent insurers. 410 S.C. at 367-68, 764 S.E.2d at 923. Buchanan argues that the Legislature did not intend for the Association's liability to be capped at $300,000 and could have written the Act that way if it did intend this result. (Ret. 21). But the Legislature did just that in Section 38-31-60(a), which 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 losss with a solvent insurer equal to or in excess of three hundred thousand dollars and applicable to claimant's loss." So the General Assemply capped the extent of the obligation for claims like this one but not for worker's compensation claims, thereby recognizing

the limited nature of the coverage for claims like Buchanan's.

Therefore, the Legislature expressly stated its intent for no claimant like Buchanan with more than $300,000 in applicable coverage to recover from the Association. The Court of Appeals ignored the plain language of the Act and expressed legislative intent in Section 38-31-60. The Petition for Certiorari should be granted.

IV. The Holdings of a Majority of Other Jurisdictions Support This Court's Holding in *Brock* and contradict the Court of Appeals decision.

This issue was briefed thoroughly below but ignored by the Court of Appeals decision, which discussed none of the cases from other jurisdictions. A detailed summary of the cases cited from other jurisdictions is located in the Appellate Record. The clear majority of states agree with this Court's holding in *Brock*. Moreover, the vast majority of states analyzing language just like South Carolina's agree with this Court in *Brock*.

Of the nine states expressly applying the offset to their guaranty association's full statutory cap, five of them were based on the ***exact same language*** found in South Carolina's offset provision requiring the reduction of "any amount payable on a covered claim." *Marra v. Wilson*, No. CIV.A. 00C-08-019RRC, 2003 WL 367831, at *5-6 (Del. Super. Ct. Feb. 20, 2013); *Leitch v. Miss. Ins. Guar. Ass'n*, 27 So. 3d 405, 409-10 (Miss. Ct. App. 2009), *aff'd*, 27 So. 3d 396 (Miss. 2010); *N.H. Ins. Guar. Ass'n v. Pitco Frialator, Inc.*, 705 A.2d 1190, 1194 (N.H. 1998); *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834, 843 (Okla. 1992); *Blackwell v. Penn. Ins. Guar. Ass'n*, 567 A.2d 1103, 1105-06 (Pa. Super. Ct. 1989). Of these five cases involving the same statutory language, Respondents previously conceded that the *Marra* and *Blackwell* cases support the Association's position that the statutory offset is applied to reduce the Association's statutory cap without distinction. Respondents' Brief at pp. 39-40 and 48; *see Marra*, 2003 WL 367831, at *5-

6; *Blackwell*, 567 A.2d at 1105-06. The remaining four cases also have similar statutory constructions and also should inform this Court's decision.

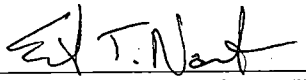
Therefore, the Court of Appeals decision contradicts both this Court's holding in *Brock* and other jurisdictions addressing situations involving the same statutory language as South Carolina. As such, the Petition for Certiorari should be granted.

Conclusion

For the foregoing reasons and those set forth in the Petition for Certiorari, this Court should grant this petition for writ of certiorari. The decision of the Court of Appeals and the Orders of the trial court should be reversed.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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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):

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