



NEW JERSEY LAW REVISION COMMISSION

**Draft Final Report Regarding the
Application of Set-offs Under the Property-Liability Insurance
Guaranty Association Act, N.J.S. 17:30A-1 *et seq.***

February 08, 2021

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Executive Summary

The New Jersey Property-Liability Insurance Guaranty Association acts as a safety net for claimants and policyholders of insolvent insurance companies by providing statutory benefits to insureds and claimants whose policies no longer provide protection against loss.¹

In *Oyola v. Xing Lan Liu*, the Appellate Division considered how to interpret the statutory language of the New Jersey Property-Liability Insurance Guaranty Association Act (PLIGAA), N.J.S. 17:30A-5.² The Court examined the statute, which states that “[t]he amount of a covered claim payable by the association shall be reduced by the amount of any applicable credits.”³ Ultimately, the Court determined that workers’ compensation and other payments should be set off only against the insured’s total damages in calculating the New Jersey Property-Liability Guaranty Association’s obligation to pay a claim.²

Due to the highly specialized nature of this area of law, the Commission sought information to determine whether modification of PLIGAA was necessary to clarify the statute. In light of the research conducted and the input received from PLIGA, Staff recommends the conclusion of the Commission’s work in this area.

Background

In January 2009, plaintiff George Oyola (“Oyola”) was operating a flatbed truck in the course of his employment when he was struck and seriously injured by a motorist.⁴ Oyola and his wife filed suit, and received \$15,000, the maximum available through the motorist’s insurance policy.⁵ The Oyolas had \$100,000 in uninsured motorist coverage, subject to a reduction paid by the party legally responsible for the accident. Thus, after defendant’s policy paid them \$15,000, the Oyolas were entitled to receive \$85,000 from their insurer.⁶

The plaintiff’s insurer, Consumer First Insurance Company, however, was declared insolvent in 2009.⁷ As a result of his insurance company’s inability to satisfy the underinsured portion of his claim, Oyola amended his complaint to include the New Jersey Property-Liability Guaranty Association (“PLIGA”) as a defendant. The amended complaint alleged that N.J.S. 17:30A-8(a)(1) obligated PLIGA to pay the unpaid “covered claims [\$85,000] against an insolvent insurer.”⁸ One month after naming PLIGA as a defendant, Oyola’s worker’s compensation carrier paid \$158,940.69 in medical expenses and \$12,133.42 in indemnity expenses for a total of

¹ New Jersey Property-Liability Insurance Guaranty Association, www.njguaranty.org (last visited Feb. 3, 2021).

² *Oyola v. Xing Lan Liu*, 431 N.J. Super. 493 (App. Div. 2013).

³ N.J.S. 17:30A-5 (West 2020).

⁴ *Oyola* 431 N.J. Super. at 495.

⁵ *Id.*

⁶ *Id.* at 495-96.

⁷ *Id.* at 495

⁸ *Id.* at 495-96.

\$171,074.11.⁹ At the time of the action, a final disability determination was still pending.¹⁰ The parties stipulated that Oyola’s total damages would “exceed recovery from solvent insurers, including workers’ compensation, by at least \$85,000.”¹¹

In August of 2012, the parties moved for summary judgment.¹² Relying on the 2004 amendments to PLIGAA, PLIGA argued that it was “relieved of any responsibility to make payment on Oyola’s claim because the workers’ compensation benefits exceeded the Association’s obligation.”¹³ Oyola countered that PLIGA was obligated to satisfy their claim “because their losses exceed[ed] the \$85,000 otherwise payable under their insurance policy.”¹⁴

At trial, Oyola prevailed against PLIGA. On appeal, PLIGA argued that the amount of benefits the plaintiff received extinguished any obligation it might have.¹⁵

The Appellate Court relied on the New Jersey Supreme Court’s decision in *Thomsen v. Mercer Charles* in reaching its decision.¹⁶ The Supreme Court described the issue in *Thomsen* as:

whether the setoff applies to the entire amount payable on the person's loss . . . or whether the solvent insurer's payment is applied directly to the statutory maximum that the Association may pay on a ‘covered claim.’ Under the latter interpretation, the amount of the claimant's damages claim is only relevant to the extent it is less than the \$300,000 statutory cap. Thus, the latter interpretation substantially minimizes tort victims' ability to recover their damages.¹⁷

The Legislature amended PLIGAA in 2004, but since the incident in *Thomsen* occurred prior to the amendment, it was the pre-2004 statute that controlled. The 2004 amendments moved the phrase at issue in *Oyola*, and *Thomsen*, from N.J.S. 17:30A-12 to 17:30A-5 and revised the phrase from “[a]n amount payable on a covered claim” to “the amount of a covered claim payable.” The Court determined that “[t]he two phrases are virtually indistinguishable, and the language in the amendment in no way indicates that it was intended to overrule *Thomsen*.”¹⁸

In *Thomsen*, the plaintiff received an aggregate award of \$2 million from two \$1 million policies.¹⁹ The solvent insurer paid the plaintiff \$1 million and the insolvent insurer’s unpaid obligation totaled \$1 million.²⁰ The question before the Court was whether under N.J.S. 17:30A-12b, PLIGA was required to cover up to \$300,000 of the insolvent insurer’s unpaid obligation, or whether the \$1 million payment by the solvent insurer effectively nullified

⁹ *Id.* at 496.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 497.

¹⁶ *Thomsen v. Mercer-Charles*, 187 N.J. 197 (2006).

¹⁷ *Id.* at 207-08.

¹⁸ *Oyola*, 431 N.J. Super. at 499.

¹⁹ *Thomsen*, 187 N.J. at 202.

²⁰ *Id.* at 202.

the Association’s obligation to pay its statutory maximum. The Court found the language of the statute ambiguous, and said that the “dispute about the proper determination and fulfillment of the legislative intent underlying Section 12b cannot be resolved by an examination of the statutory language alone[.]”²¹ It therefore consulted extrinsic sources.²²

The Supreme Court noted that PLIGAA was modeled on an act drafted by the National Association of Insurance Commissioners (NAIC). Section 12 originally was entitled “Priority of claim of associations in other states” and did not address setoffs until 1996, when N.J.S. 17:30A-12b was enacted.²³ The NAIC originally titled its analogous paragraph “Nonduplication of Recovery” but changed the title to “Exhaustion of Other Coverage” in 2006 “to better reflect the intent of the section.”²⁴

The Court then considered how the same provision in other states’ insurance guaranty association acts had been interpreted.²⁵ Summarizing its survey, the Court noted that other courts had rejected the argument PLIGA presented in *Thomsen*.²⁶ It also noted that the purpose of a model act is to promote a consistent approach to the legislative language and application thereof.²⁷ The Court affirmed the trial court’s ruling, which interpreted section 12b as other states had, holding that “when an insured is covered by both a solvent and an insolvent insurer and the solvent insurer has paid the insured an amount exceeding the Act’s maximum payment, but which falls short of the insured’s total damages, the insured may seek compensation from the Association.”²⁸

The Appellate Court noted that PLIGAA’s argument in *Oyola* was exactly that which had been rejected in *Thomsen*.²⁹ It also found that the difference in statutory language before the 2004 amendments, which was central to *Thomsen*, and after was “minimal.”³⁰ Based on this, the Appellate Court opined that the amended language was not intended to overrule *Thomsen*.³¹ It ruled that PLIGAA is “remedial legislation designed, in part, to minimize financial loss to claimants and deserving of liberal construction” and therefore “compelling the Association to pay only advances the Act’s legislative purpose.”³²

The New Jersey Property-Liability Insurance Guaranty Association

The New Jersey Property-Liability Insurance Guaranty Association (“PLIGA”) was established in 1974, pursuant to the New Jersey Property-Liability Insurance Guaranty Association

²¹ *Id.* at 207.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (quoting the Post-Assessment Property and Liability Guaranty Association Model Act, NAIC Model Laws, Regulations and Guidelines, at 540-1 (2006)).

²⁵ *Id.* at 209.

²⁶ *Id.* at 210.

²⁷ *Id.*

²⁸ *Id.* at 210-11.

²⁹ *Oyola*, 431 N.J. Super. at 497.

³⁰ *Id.* at 499.

³¹ *Id.*

³² *Id.* at 501 (internal cites omitted).

Act (“PLIGAA”), N.J.S. 17:30A-1 *et seq.*³³ PLIGA notes that the purpose of guaranty funds is to provide certain protections for insureds who have purchased coverage from insurance companies that ultimately lack the financial resources to pay claims due to insolvency.³⁴ PLIGAA, in turn, is intended “to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, [and] to minimize financial loss to claimants or policyholders because of the insolvency of an insurer[.]”³⁵

PLIGAA requires any company that is licensed to sell insurance in New Jersey to be a member of PLIGA. PLIGA is funded, in part, by assessments on its members who, in turn, can recover these assessments through policy surcharges.³⁶ The statutory maximum payable by PLIGA for any covered claim is \$300,000 per claimant.³⁷

The NAIC Model Act

The 2004 amendments to PLIGAA were based on a model act issued by the National Association of Insurance Commissioners (“NAIC”). NAIC is the standard-setting and regulatory body created and governed by the chief insurance regulators from each state, the District of Columbia, and five U.S. territories.³⁸

While most of PLIGAA tracks the model act, there are some differences between the two. For example, when the Legislature amended PLIGAA in 2004, it included an exclusion for first-party claims by any insured with a net worth of more than \$25 million on December 31st of the year prior to the year of the insurer’s insolvency.³⁹ The model act limits such claims to insureds with a net worth of less than \$50 million; the NAIC considered and then rejected the \$25 million threshold.⁴⁰

The phrase at issue in this project appears in the Definitions section of PLIGAA.⁴¹ It reads, “The amount of a covered claim payable by the association shall be reduced by the amount of any applicable credits[.]” In the model act, this phrase appears in Section 14, Exhaustion of Other Coverage, as follows: “Any amount payable on a covered claim under this Act shall be reduced by the full applicable limits stated in the other insurance policy, or by the amount of the recovery

³³ New Jersey Property-Liability Insurance Guaranty Association, <https://www.njguaranty.org/Funds/pliga.aspx> (last visited Feb. 3, 2021).

³⁴ *Id.*

³⁵ N.J.S. 17:30A-2(2)(a).

³⁶ New Jersey Property-Liability Insurance Guaranty Association, <https://www.njguaranty.org/Funds/pliga.aspx> (last visited Feb. 3, 2021).

³⁷ N.J.S. 17:30A-8(a)(1).

³⁸ National Association of Insurance Commissioners, https://content.naic.org/index_about.htm (last visited Feb. 3, 2021).

³⁹ *P.L.2004, c.175* (Advance Law).

⁴⁰ NAIC Model Laws, Regulations, Guidelines, and Other Resources—April 2009, Proceedings Citations, Section 11B. Available at www.naic.org (last visited Feb. 3, 2021).

⁴¹ N.J.S. 17A-30-5.

under the other insurance policy as provided herein...”⁴² There are also two alternatives given for this section:

Alternative 1 for Section 14A(2)(a)

- (a) The credit shall be deducted from the lesser of:
 - (i) The association’s covered claim limit;
 - (ii) The amount of the judgment or settlement of the claim; or
 - (iii) The policy limits of the policy of the insolvent insurer.

Alternative 2 for Section 14A(2)(a)

The credit shall be deducted from the lesser of:

- (i) The amount of the judgment or settlement of the claim; or
- (ii) The policy limits of the policy of the insolvent insurer.

To date, New Jersey has only adopted a previous version of the model act.⁴³ The majority of states have either adopted a previous version of the model act or have not adopted the most recent version of the act in a substantially similar manner.⁴⁴

Other State Statutes

There is diversity among states in their respective property and casualty insurance guaranty association acts.⁴⁵ Most state guaranty association acts specify a maximum payment per claim.⁴⁶ A few state acts, including New Jersey, allow for a statutory maximum per claimant.⁴⁷

Not every state has case law construing the set-off provision of their guaranty association acts. Of the states that have considered this provision, a number of them have ruled as New Jersey courts have and apply any set-off to the insured’s total amount of damages.⁴⁸ A large group has interpreted their statutory analogues in the opposite fashion, finding that any amounts recovered by an insured are applied against that state’s guaranty association’s liability.⁴⁹ This split of opinion illustrates the Appellate Division’s observation in *Oyola* that “the language at issue is susceptible

⁴² NAIC Model Laws, Regulations, Guidelines, and Other Resources—April 2009, Section 14A(2).

⁴³ NAIC Model Laws, Regulations, Guidelines, and Other Resources—3rd Quarter 2016, p. ST-540-5.

⁴⁴ NAIC Model Laws, Regulations, Guidelines, and Other Resources—3rd Quarter 2016, p. ST-540-1 to ST-540-7.

⁴⁵ National Conference of Insurance Guaranty Funds, 2019 Summary of Property and Casualty Insurance Guaranty Association Acts, Summary by Provision. Available at www.ncigf.org (last visited Feb. 3, 2021).

⁴⁶ AL, AK, AZ, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MA, MI, MN, MS, MO, MT, NE, NV, NH, NC, ND, OH, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, and WV.

⁴⁷ IN, MD, NM, NY, OK, and WY. *See also* N.J.S. 17:30A-8)(a)(1).

⁴⁸ CA, IN, MD, LA, NM, RI, SC, UT, and VT.

⁴⁹ AZ, CT, GA, IL, KS, KY, MI, NH, OH, OR, PA, and WA.

to more than one interpretation[.]”⁵⁰ However, after a thorough review of the legislative intent behind PLIGAA, the Court announced that “compelling the Association to pay only advances the Act’s legislative purpose.”⁵¹

Outreach

In connection with this Report, the Commission sought input from various stakeholders and industry groups, including the membership of the New Jersey State Bar Association’s insurance law section and the automobile and no-fault section; and counsel for PLIGA.

Counsel for PLIGA previously provided the Commission with comments regarding this project.⁵² Counsel has also informed the Commission that, since the decision in *Oyola*, PLIGA has acted in a manner consistent with the Appellate Court’s ruling. In addition, Counsel has advised the Commission that the current case law is devoid of any cases addressing the question of set-offs. Finally, according to PLIGA, any proposed statutory revision may result in a broader interpretation than was intended by the Legislature, which would impact PLIGA’s ability to deduct legitimate set-offs, such as coverage available under health insurance policies, against its statutory cap.

Conclusion

Based on the Court’s decision in *Oyola*, the lack of New Jersey case law addressing the issue of set-offs, and the concerns raised by PLIGA, Staff recommends the conclusion of the Commission’s work in this area without a recommendation to the Legislature.

⁵⁰ *Oyola*, 431 N.J. Super. at 498.

⁵¹ *Id.* at 500.

⁵² See N.J. Law Rev. Comm’n, Meeting Minutes (April 17, 2014). On file with the NJLRC.