

**To: New Jersey Law Revision Commission**  
**From: Frank N. Ricigliani**  
**Re: New Jersey Property-Liability Insurance Guaranty Association Act**  
**Date: April 7, 2014**

## MEMORANDUM

This potential project arises out of Staff's review of the Appellate Division's decision in *Oyola v. Xing Lan Liu*<sup>1</sup> and the language of the New Jersey Property-Liability Insurance Guaranty Association Act (PLIGA or the Act).<sup>2</sup>

*Oyola v. Xing Lan Liu* arose out of a car accident in which Oyola was severely injured while operating a motor vehicle in the course of his employment. The vehicle driven by Oyola was struck by a vehicle operated by Liu and owned by Weyna Chen.<sup>3</sup> Oyola's claim against Chen and Liu was settled by a payment by Chen's liability insurance carrier in the amount of the policy's maximum of \$15,000, but Oyola's own insurance carrier (Consumer First Insurance Company) insured Oyola for up to \$100,000 in underinsured motorist coverage.<sup>4</sup> Consumer First was named in the original complaint, but was declared insolvent during the proceedings and was dismissed by stipulation.<sup>5</sup> Oyola's policy with Consumer First also provided for the reduction of coverage in the amount of any payments made by the party legally responsible for the accident.<sup>6</sup> Thus, Consumer First should have paid out \$85,000,<sup>7</sup> but Consumer First's eventual declaration of insolvency prevented recovery. In reaction, Oyola amended his complaint to include the New Jersey Property-Liability Insurance Guaranty Association ("the Association") as a defendant, alleging N.J.S. 17:30A-8(a)(1) obligated the Association to pay the unpaid "covered claims [\$85,000] against an insolvent insurer."<sup>8</sup> A month after adding the Association as a defendant, "Oyola's workers' compensation carrier paid . . . a total of \$171,074.11 on Oyola's behalf."<sup>9</sup>

The purpose of the PLIGA<sup>10</sup> is, in relevant part, "to provide a mechanism for the payment of covered claims under certain insurance policies, [ ] to minimize financial loss to claimants or policyholders because of the insolvency of an insurer, [and to] administer and pay claims asserted against the Unsatisfied Claim and Judgment Fund."<sup>11</sup> Most importantly, the Act obligates the Association to pay damages an insured's qualifying "covered claims against an insolvent insurer."<sup>12</sup> The Association's obligation extends only to the statutory maximum of \$300,000 per claimant.<sup>13</sup> In its definitions section, the Act requires the insured to exhaust

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<sup>1</sup> *Oyola v. Xing Lan Liu*, 431 N.J. Super. 493, *certif. denied* 216 N.J. 86 (2013).

<sup>2</sup> N.J.S. § 17:30A-1-20 (2013).

<sup>3</sup> *Id.* at 495.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* Chen's Insurer was the party legally responsible for the accident for purposes of the settlement agreement. *Id.*

<sup>7</sup> \$100,000 minus the \$15,000 payment from Chen's insurance policy.

<sup>8</sup> *Oyola*, 431 N.J. Super. at 495-96.

<sup>9</sup> *Id.* at 496.

<sup>10</sup> N.J.S. § 17:30A-1-20 (2013).

<sup>11</sup> N.J.S. § 17:30A-1 (2013).

<sup>12</sup> *Id.* § 30A-8(a)(1).

<sup>13</sup> *Id.*

with respect to other insurance, the application of a credit for the maximum limit under the [other insurance] policy, except [in cases of indivisible injury] exhaustion shall be deemed to have occurred only after a credit for the maximum limits under all other [policies held by the insured]. . . With respect to . . . workers' compensation insurance, 'exhaust' means the application of a credit for the amount of recovery under the insurance policy. . . The *amount of a covered claim payable* by the [A]ssociation shall be reduced by the amount of any applicable credits.<sup>14</sup>

Oyola prevailed at trial, and the appeal arose out of the parties' conflicting interpretations of the statutory language italicized above. Oyola argued that the workers' compensation payment he received (\$171,074.11) should be credited against his *total damages*, while the Association argued that the statute required the worker's compensation payment first offset the amount of the Association's *statutory obligation* to replace the \$85,000 recovery lost as a result of Consumer First's insolvency.<sup>15</sup> The parties "stipulated that Oyola's total damages w[ould] exceed recovery from solvent insurers, including workers' compensation, by at least \$85,000."<sup>16</sup> The Association's argument, if successful, would have nullified any obligation it owed Oyola.

The New Jersey Supreme Court's decision in *Thomsen* is the principal authority on the issue presented to the Appellate Division in *Oyola*. The Supreme Court described that issue as: whether the [reduction in applicable credits] 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 [or statutory obligation] that the Association m[ust] 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.<sup>17</sup>

The Court in *Thomsen* was presented with facts only slightly different from that in *Oyola*. In essence, the solvent insurer in *Thomsen* paid the plaintiff \$1 million and the insolvent insurer's unpaid obligation totaled \$1 million. The question was whether the Association was required to cover up to \$300,000—the Act's ceiling for the Association's liability—of the insolvent insurer's unpaid obligation, or whether the \$1 million payment by the solvent insurer effectively nullified the Association's obligation to pay its statutory maximum.

The rule in *Thomsen* states: "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."<sup>18</sup> As a result, credits recovered from a solvent insurer are deducted against the insured's total damages first, and not the Association's obligation to replace

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<sup>14</sup> *Id.* § 30A-5 (emphasis added).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Thomsen v. Mercer-Charles*, 187 N.J. 197, 207–208 (2006).

<sup>18</sup> *Id.* at 211.

the covered claim of an insolvent insurer. Thus, in *Thomsen*, the plaintiff's total damages were calculated at \$2 million as a result of a settlement, and the plaintiff received \$1 million from a solvent insurer. Of the \$1 million the plaintiff lost solely as a consequence of another insurer's declaration of insolvency after the settlement agreement but before the insurer paid the damages,<sup>19</sup> the Association was liable for up to \$300,000, despite the fact that the plaintiff received \$1 million from the other, solvent insurance company pursuant to the settlement agreement. The plaintiff ultimately received \$1.3 million<sup>20</sup> from the relevant parties.

The Legislature amended the PLIGA in 2004, and the Court's decision in *Thomsen* was governed by the pre-2004 amendments to the statute, even though *Thomsen* was decided by the Court two years later (in 2006). This was due to the fact that the operative facts giving rise to the plaintiff's claim in *Thomsen* took place prior to the effective date of the 2004 amendments. The 2004 amendments moved the phrase at issue in *Oyola* and *Thomsen*<sup>21</sup> from 30A-12 to 30A-5, and re-worded the phrase from "[a]n amount payable on a covered claim" (pre-amendment and controlling phrase in *Thomsen*) to the current phrase "the amount of a covered claim payable." (post-amendment and controlling phrase in *Oyola*).<sup>22</sup> In *Oyola*, the Association argued that the Legislature's amendments in 2004 had altered the rule in *Thomsen*, and compelled the result that the N.J. Supreme Court had expressly rejected in *Thomsen*.

The *Oyola* court opined that the two phrases are "virtually indistinguishable,"<sup>23</sup> and that the statutory amendments in 2004 were not intended to overrule *Thomsen* because, *inter alia*, "the legislative history does not mention *Thomsen*."<sup>24</sup> It is of concern, however, that *Thomsen*—though applying the pre-2004 statutory text—was not decided until 2006, so the Legislature could not have been cognizant of *Thomsen* while drafting or voting to enact the 2004 amendments.

While the Legislature's intent to "minimize financial loss to claimants or policyholders because of the insolvency of an insurer"<sup>25</sup> via the statute's mechanism for loss-reduction is clearly expressed in the Act, the statutory language at issue in *Oyola* is, at the very least, capable of multiple interpretations<sup>26</sup>.

After the last sentence in the current version of N.J.S. § 17:30A-5, the following sentence could be added to clarify legislative intent: "The credit shall be deducted from . . . [t]he insured's total damages." This would codify the *Thomsen* rule. Adopting the rule proposed by the Association, on the other hand, has not been supported by the Court and would "substantially minimize[] tort victims' ability to recover their damages."<sup>27</sup> This seems directly contrary to the purposes of the Act.<sup>28</sup> Statutory changes would provide clarification of the rule for future cases.

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<sup>19</sup> *Thomsen*, 187 N.J. at 201–202.

<sup>20</sup> *Thomsen*, 187 N.J. at 202.

<sup>21</sup> See *supra* note 14.

<sup>22</sup> P.L. 2004, c. 175, §§ 2, 7.

<sup>23</sup> *Oyola v. Xing Lan Liu*, 431 N.J. Super. 493, 499, *certif. denied* 216 N.J. 86 (2013).

<sup>24</sup> *Id.* at 500.

<sup>25</sup> N.J.S. § 17:30A-2 (2013).

<sup>26</sup> *Thomsen v. Mercer-Charles*, 187 N.J. 197, 207 (2006).

<sup>27</sup> *Thomsen*, 187 N.J. at 208 (2006).

<sup>28</sup> See N.J.S. § 17:30A-2 (2013).

Staff seeks authorization from the Commission to undertake a project in this area in order to clarify the statutory language in keeping with the determination of the New Jersey Supreme Court in *Thomsen* and the Appellate Division in *Oyola*.