IN THE SUPREME COURT OF MISSISSIPPI

BAGGETT TRANSPORTATION COMPANY **APPELLANT**

VS. **NO. 2006-TS-00679**

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF
MADISON COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT BAGGETT TRANSPORTATION COMPANY

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

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Respectfully submitted,

Baggett Transportation Company

By: _____
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I. STATEMENT OF THE ISSUES

Baggett Transportation Company presents to this Court the following issues for determination on the appeal:

1. Whether the trial court erred in denying Baggett Transportation Company ("Baggett") recovery under the Mississippi Insurance Guaranty Act (the "Guaranty Act") for the "covered claims" asserted by three Mississippi residents.

2. Whether the trial court's final judgment incorrectly disallowed three distinct "covered claims."

3. The extent to which recoveries from other states' insurance guaranty associations offset Baggett's recovery from the Mississippi Insurance Guaranty Association ("MIGA").

II. STATEMENT OF THE CASE AND FACTS

This brief is submitted by the Appellant, Baggett, in support of its appeal from the Madison County Circuit Court's Final Judgment regarding Baggett's claims for recovery under the Guaranty Act. Baggett's claims were based on an otherwise insured judgment awarded to three Mississippi residents. Baggett and MIGA filed motions for summary judgment both seeking and denying recovery, respectively.[1] R-000110. The lower court, in denying Baggett's motion, ruled that Baggett was not entitled to recover under the Guaranty Act because it is not a resident of Mississippi, although its judgment creditors are. R-000111. The lower court's ruling disregarded the number of "covered claims" asserted because of its ruling on the overriding issue of Baggett's "standing." *Id.* It also failed to reach the issue of calculating the recovery and offset available to Baggett. *Id.*

Few of the facts in this case, if any, are in dispute. This action stems from a trucking accident that occurred on Interstate 10 in Mississippi on November 11, 1999. R-000063-64. The

[1] Citations to the record will be in the following format: [R-000000], to indicate the page of the Record of Excerpts entered as Tab 1.

accident involved a Baggett trailer that jackknifed and caused a vehicle collision resulting in the death of James A. Bowlin. R-000003, 000015, and 000039, at (C). The owner and driver of the truck was Delbert Wayne Stagner, a resident of Missouri. R-000039, at (C). Cynthia B. Bowlin, Pamela Bowlin Ruh, and Timothy Allen Bowlin (the "Bowlins"), Mr. Bowlin's three statutory heirs and all Mississippi residents, filed a wrongful death action against Stagner and Baggett in the United States District Court for the Southern District of Mississippi. R-000003, R-000015. Each of the Bowlins asserted independent rights of recovery under Miss. Code Ann. § 11-7-13 for the death of Mr. Bowlin. R-000039, at (C).

At the time of the accident, Baggett had in effect a policy of liability insurance with Reliance National Indemnity Company ("Reliance"), an insurer licensed to transact insurance in Mississippi. R-000039, at (H). The Reliance policy provided liability coverage for $5,000,000 in claims for any occurrence. *Id.* Baggett and Stagner made claims to Reliance for the defense of the Bowlins' lawsuit, and Reliance assumed defense of the case. However, on October 3, 2001, prior to the disposition of the lawsuit, the Commonwealth Court of Pennsylvania declared Reliance insolvent and sent it into receivership. *Id.* Baggett defended the Bowlins' claims following Reliance's insolvency.

Stagner filed a claim for the three Bowlin plaintiffs with his home state's Insurance Guaranty Association. R-000039, at (J). That claim was settled, and the Missouri Insurance Guaranty Association provided coverage for $245,000. *Id.* The settlement proceeds were paid to the Bowlins on behalf of Stagner, and Stagner was dismissed with prejudice. *Id.*

Upon notice of Reliance's insolvency, Baggett filed claims with the Insurance Guaranty Associations of Alabama ("AIGA")–the location of Baggett's principal place of business[2]–and Mississippi–the Bowlin claimants' state of residence. R-000039, at (I). Both AIGA and MIGA

[2] Baggett is a corporation organized under the laws of the State of Delaware, but has its principal place of business in Alabama.

refused to defend the Bowlins' claims. R-000040, at (L). Thereafter, Baggett filed third-party claims against the AIGA and MIGA in the ongoing federal lawsuit. *Id.*

Subsequently, a consent judgment was entered in the Bowlins' lawsuit in which each of the Bowlins was awarded $301,666.67, for a total judgment of $905,000.01.[3] R-000008-000009. The terms of payment on the judgment provided that Baggett was to make a $101,666.67 initial payment to each of the Bowlins and pay each of them $10,000 every three months thereafter unless and until AIGA and MIGA paid out their limits under each state's Guaranty Act or the judgment was satisfied. *Id.* All sums provided by AIGA and MIGA were to be paid directly to the Bowlins. *Id.* Following the judgment, the federal court declined to exercise supplemental jurisdiction over the third-party state law claims brought by Baggett against AIGA and MIGA. R-000011. Thus, this underlying lawsuit was filed against MIGA and another similar action was filed in Alabama against AIGA. R-000040, at (N).

In seeking to exhaust the sources of coverage in Alabama, Baggett filed for recovery against AIGA in the Circuit Court of Jefferson County, Alabama (Civil Action No. CV-0306467). R-000040, at (O). On May 26, 2005, the Alabama Circuit Court ordered the AIGA to pay $149,900 to Baggett as partial satisfaction of the judgment rendered in favor of the Mississippi residents in the federal case. *Id.* Pursuant to the federal judgment, Baggett disbursed one-third of this award ($49,966.00) to each of the Bowlins.

The underlying case seeking recovery from MIGA resumed following a stay pending the ruling from the Alabama judgment. Both Baggett and MIGA filed motions for summary judgment. Baggett moved the lower court to require MIGA to adhere to the Guaranty Act and cover the claims made by the three Mississippi claimants. Baggett asserted that because the

[3] Prior to the judgment, the decedent's uninsured motorist carrier, Allstate Insurance Company, paid $16,667.67 to each of the three Bowlins extinguishing its $50,000 policy. R-000040, at (K).

Bowlins were each Mississippi residents and each entitled to claim proceeds from an insured act, the Guaranty Act allows coverage up to $300,000 per claim. *Id.*

Conversely, MIGA asked the lower court to interpret the Guaranty Act to block the Bowlins from being considered "claimants" for purposes of recovery. MIGA argued that Baggett was the sole claimant, and that because Baggett was not a resident of Mississippi, it did not have standing to file claims under the Guaranty Act. Even if Baggett was entitled to make a claim, MIGA suggested that it would only be entitled to one claim, limiting recovery to $300,000.

The lower court ruled in favor of MIGA on both motions for summary judgment. This appeal followed.

III. SUMMARY OF THE ARGUMENT

Mississippi's Guaranty Act provides the mechanism for certain claims to be paid in the event an insurance company becomes insolvent. The Mississippi Guaranty Act is part of a national framework providing an added measure of protection to avoid economic losses to domestic insureds *and* claimants because of the failures of insurers. In order to safeguard against the catastrophic results of suddenly uninsured losses, the Guaranty Act was liberally written and is construed to favor payment.

The Guaranty Act makes it clear – "covered claims" are to be paid by MIGA if the "claimant or insured is a resident of this state at the time of the insured event." Miss. Code Ann. § 83-23-109(f). It is undisputed that the Bowlins made insured claims under Baggett's policy that Reliance could not pay because of its insolvency. The Bowlins have not been fully paid on the judgment against Baggett, and by the terms of that judgment, they are the beneficiaries of any recovery from MIGA in this case. As such, they stand at risk of losing their award for damages if MIGA does not stand as Baggett's backstop as Reliance did. Because the Bowlins are

Mississippi residents, the Guaranty Act allows their claims to be covered by MIGA. While Baggett has its principal place of business in Alabama, the protections of the Guaranty Act are nevertheless allowed if Mississippi residents are claimants to otherwise covered proceeds.

There are a total of three distinct "covered claims" presented here. Under the Guaranty Act, a "claimant" is defined as any person who brings a liability claim. This Court has explained that multiple beneficiaries of wrongful death cases can result in multiple wrongful death claimants to one litigable event. In the underlying federal tort case, three Mississippi residents brought such liability claims. Thus, there are three claimants to an insolvent insurance policy, each of whom is a Mississippi resident. Following the clear reading of the Guaranty Act, MIGA is required to step into the shoes of the insolvent insurer and pay the claims of the three residents, up to the statutory maximum.

Finally, the Guaranty Act allows MIGA to offset the payment made by the AIGA for the Bowlins' claims against Baggett. MIGA is not entitled to offset the settlement proceeds provided by Stagner because he was no longer a party in the lawsuit when the damages attributable to Baggett were established. Finally, the offset from the AIGA must be applied to the total damages awarded the Bowlins, not the statutory maximum, to conform to the purpose of the Guaranty Act.

IV. ARGUMENT

A. Applicable Standard of Review

This Court reviews summary judgment decisions "*de novo*, making its own determination on the motion, separate and apart from that of the trial court." *Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79, 81 (Miss. 1991). All evidentiary matters before the Court are considered and will be viewed in the light most favorable to the nonmoving party, giving it the benefit of every reasonable doubt. *Gorman-Rupp Co. v. Hall*, 908 So.2d 749, 753 (Miss. App.

2005). If any fact issues exist or judgment was not warranted as a matter of law, the decision to grant summary judgment must be reversed. *McDaniel v. Shaklee U.S., Inc.*, 807 So.2d 393, 395 (Miss. 2001).

B. Baggett Presented "Covered Claims" Under the Guaranty Act and Is Entitled to Recovery from MIGA

1. Function and Application of the Guaranty Act.

The Guaranty Act serves as the backstop to prevent financial catastrophe when claims are asserted against insolvent insurance companies. Miss. Code Ann. §§ 83-23-101 *et seq.* (Rev. 2003). MIGA was established to carry out this purpose and is required to pay those claims covered by the Act in excess of $50 and up to $300,000 per claimant. Miss. Code Ann. § 83-23-115(1)(a)(iii) (Supp. 2003). Indeed, in certain cases of insolvency, MIGA steps into the shoes of the defaulted insurance company and, in effect, assumes its coverage obligations. *Bank of Mississippi v. Mississippi Life & Health Ins. Guar. Ass'n*, 850 So.2d 127, 134 (Miss. App. 2003).

In Section 103, the Legislature made its intent in passing the Guaranty Act very clear:

> The purpose of this article is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer . . . .

Miss. Code Ann. § 83-23-103 (Supp. 2003). To aid in interpreting the Act, the Legislature acknowledged that the statutes within the Act "shall be liberally construed to effect the purpose under Miss. Code Ann. § 85-23-103." Miss. Code Ann. § 83-23-107 (Supp. 2003); *see also, Bank of Mississippi v. Mississippi Life & Health Ins. Guar. Ass'n*, 850 So.2d 127, 134 (Miss. App. 2003); *Mississippi Ins. Guar. Ass'n. v. Byars*, 614 So.2d 959, 963 (Miss. 1993); *Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Ass'n.*, 560 So.2d 129, 135 (Miss. 1989). Accordingly, where reasonable interpretations can be drawn in the application of the Act, construction in favor of avoiding financial losses to claimants and policyholders should be employed.

There is no dispute that Reliance is an "insolvent insurer" within the meaning of the Guaranty Act. Miss. Code Ann. § 83-23-109(g). Equally accepted is the fact that Baggett's policy with Reliance is one of those "certain policies" of liability insurance identified in the Act. Miss. Code Ann. §§ 83-23-103 and 105 (Supp. 2003). Therefore, even a conservative interpretation of the Guaranty Act positions the subject claims well within the framework created by the Legislature to protect persons with "covered claims" from catastrophic loss.

2. The Claims Made to MIGA Are "Covered Claims."

Under the Guaranty Act, MIGA must pay, up to the statutory cap, all "covered claims." Miss. Code Ann. §§ 83-23-109,115 (Supp. 2003). The Act defines a "covered claim" as:

> an unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this article applies issued by an insurer, if such insurer becomes an insolvent insurer and (1) the claimant or insured is a resident of this state at the time of the insured event, provided that 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 . . . .

Miss. Code Ann. § 83-23-109 (emphasis added).

The lower court found that Baggett's claims were not "covered claims" because Baggett was not a resident of Mississippi. In its Final Judgment, the court held:

> While the statute is to be liberally construed, the Court finds that the claim of Baggett in this case is not a "covered claim" as defined by the statute. The statute is clear and unambiguous and requires that in order for Baggett to proceed, Baggett must establish that it is a resident of Mississippi . . . Baggett is not, nor has it ever been, a Mississippi resident.

R-000111.

In rendering its decision, the lower court looked only to the residency of Baggett to determine whether a "covered claim" could be found. Baggett, however, is the insured, and the Guaranty Act allows coverage if either the insured or the claimant(s) are Mississippi residents.

Miss. Code Ann. § 83-23-109. To determine the "claimants," it is only necessary to identify "***any person*** instituting a liability claim." Miss. Code Ann. § 83-23-109(c)(Supp. 2003)(emphasis added). The Bowlins met this requirement when they instituted the liability claims against Baggett in the underlying federal wrongful death lawsuit. As residents of Mississippi, their claims are "covered."

This Court's decision in *Byars* serves as precedent to the issue of whether the residency of the Bowlins triggers coverage under the under the Guaranty Act. There, Byars, a Mississippi resident, was injured in a motorcycle accident. *Byars,* 614 So.2d at 960-61. Byars sued the out-of-state helmet manufacturer and retailer, but each of their insurers had become insolvent. *Id.* MIGA was asked to step into the shoes of the insolvent insurers, but it refused coverage. *Id.* Byars settled its claims with the retailer for $375,000. *Id.* at 962. Of that amount, the retailer paid Byars $75,000 and assigned its right to sue MIGA for the $300,000 balance. *Id.* With a $300,000 remaining judgment against the non-resident retailer, Byars sued MIGA. *Id.*

The argument MIGA made in *Byars* is exactly the same as it made to the court below, and this Court flatly rejected it.

> The appellant MIGA contends that Byars's claim is not a "covered claim," because the insured, A.C.O., is a Michigan corporation and not a Mississippi resident. However, the above statute clearly requires that the insured (A.C.O.) *OR* the claimant (Byars) be a resident of Mississippi in order to fall under MIGA's umbrella. Both parties stipulated as to Byars's Mississippi residency. Therefore, a literal reading of § 83-23-109(c) clearly affords the claimant Byars coverage.

Id. at 964 (emphasis in original). The Court concluded, "[t]o rule otherwise would in essence be re-writing the statute." *Id.*

Byars is very similar to the case at issue here. An out-of-state insured was potentially liable for injuries suffered to a Mississippi resident. A settlement was reached in the litigation regarding the tort claims, and the insured agreed to pay a certain sum, then collect the balance of

the settlement agreement from MIGA. In both cases, the Mississippi residents were at risk of forfeiting their damage awards. The only notable difference between *Byars* and the present case is the fact that the insured in *Byars* had assigned its right to assert claims against MIGA to Byars. Here, the Federal Court judgment requires Baggett to use the proceeds of any recovery to satisfy its obligation to the Bowlin claimants.

The *Byars* Court made it clear that the residency of the claimants satisfies the residency requirement of the Guaranty Act.[4] The Court reached this decision succinctly, in part, because the language of the Act is so straight forward in this regard. However, before reaching this conclusion, the Court made sure to highlight the overriding policy with which coverage decisions under the Guaranty Act are to be made. Liberal construction is required to ensure prompt coverage for financial losses stemming from insolvent insurers. It is also required to hold strong the policy of "avoid[ing] excessive delay[s] in payment and [] financial loss to claimants" who are Mississippi residents. Miss. Code Ann. § 83-23-103.

In both *Byars* and the present case, Mississippi residents were faced with financial losses that would have been covered by insolvent insurers. In both cases, the claimants sued the out-of-state insureds for the damages and settled their claims. While the Mississippi residents had received a small portion of the damages awarded, collection on the balance was not guaranteed. The claimants were undoubtedly required to wait for the balance of their damages. More importantly, they were at risk of forfeiting their claims if the insureds could not satisfy their judgments. This Court rejected this threat to Mississippi residents in the *Byars* case because it would be in direct contradiction to the Guaranty Act's express policy of avoiding excessive

[4] Baggett is aware of two cases before the court that involve this issue in which the Court has issued opinions that have not yet been released for publication. However, because Miss.R.App.Proc. 35-B(b) prohibits quoting, citing or referring to unpublished opinions, Baggett will not refer to them other than to state that it is aware of their existence and requests an opportunity to address the opinions if and when they are released for publication.

delays and financial losses to Mississippi claimants.

MIGA may argue that the claims are not "covered" because Baggett is acting as the insured and the claimant. Such an interpretation would undoubtedly leave Mississippi residents in jeopardy of both having excessive delays in receiving their damages and conditioning their recovery on the viability of a business. This flies in the face of the stated purpose of the Guaranty Act.

Moreover, MIGA's theory contradicts a plain reading of the Guaranty Act. The Guaranty Act uses the conjunctive "or" in separating the insured and claimants for purposes of determining coverage for a claim. Miss. Code Ann. § 83-23-109; *See also, Byars,* 614 So.2d at 964. It also allows a statutory cap "per claimant" in Section 115 to prescribe the maximum coverage allowed. Miss. Code Ann. § 83-23-115(1)(a)(Supp. 2003). Mississippi law is clear that "'the primary rule of construction is to ascertain the intent of the Legislature from the statute as a whole and from the language used therein.'" *Narkeeta Timber Co., Inc. v. Jenkins*, 777 So.2d 39, 41 (Miss. 2000) (quoting *Clark v. State ex rel. Miss. State Med. Ass'n*, 381 So.2d 1046, 1048 (Miss. 1980)). "Words in common use when used in a statute should be given their usual and ordinary meaning." *Roberts v. Mississippi Republican Party State Exec. Comm.*, 465 So.2d 1050, 1052 (Miss. 1985).

The Mississippi Legislature's language in defining "claimant" as "any person instituting a liability claim" and then its use of "per claimant" in Miss. Code Ann. § 83-23-115 can only mean that the Legislature intended that coverage can exist for those residents that are insured and for those Mississippi residents who may become beneficiaries to such policies.

Assuming *arguendo* that Baggett could be considered both the claimant and the insured, an equally if not more reasonable reading would acknowledge that "claimants" were written to be those asserting the tort liability claims. When presented with guidelines requiring liberal

interpretation favoring payment and disfavoring excessive delays and financial losses to Mississippi residents, surely the reading which follows the stated policy should be adopted.

The Guaranty Act states that a "covered claim" exists if either Baggett or the Bowlins are Mississippi residents. Because there is no question about the residency of the Bowlins in this case, the lower court should have found the claims covered and directed MIGA to reimburse Baggett.

C. Baggett Presented Three Distinct Claims Payable by MIGA

1. "Covered Claims" are Determined by Number of Claimants, Not by the Number of Lawsuits Filed.

For purposes of the Guaranty Act, the number of "covered claims" is determined by the number of claimants existing under a policy of insurance from an insolvent insurer. Under the Guaranty Act, MIGA is "deemed the insurer" and shall have all "obligations of the insolvent insurer as if the insurer had not become insolvent." Miss. Code Ann. § 83-23-115(1)(b). While the Act makes no reference to causes of action in determining the number of "covered claims" allowed, it absolutely provides for multiple claims. The following section makes this clear:

> The association shall:
> (a) **Be obligated to the extent of the covered claims existing prior to the determination of insolvency** and arising within thirty (30) days after the determination of insolvency, or before the policy expiration date if less than thirty (30) days after the determination, or before the insured replaces the policy or causes its cancellation if he does so within thirty (30) days of the determination. **Such obligation shall be satisfied by paying the claimant an amount as follows**:
> (i) The full amount of a covered claim for benefits under a workers' compensation insurance coverage;
> (ii) An amount in excess of Fifty Dollars ($50.00) per policy for a covered claim for the return of unearned premium;
> (iii) An amount in excess of Fifty Dollars ($50.00) but not exceeding Three Hundred Thousand Dollars ($300,000.00) **per claimant** for all other covered claims.

Miss. Code Ann. § 83-23-115(1)(a)(Supp. 2003) (emphasis added). Given that MIGA steps into the shoes of the insolvent insurer and is wholly subject to the obligations thereof, against whom

– but for the insolvency – the claims would be made, the determinative issue is the number of "claims" that could be made under the policy by "claimants," not the causes of action which might be asserted.

There has never been an issue that Baggett's insurance policy with Reliance allowed for a $5,000,000 cap per accident, providing no cap on the number of claimants allowed. The accident resulting in the death of Mr. Bowlin produced three covered claimants.

Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 2004), also provides for compensatory damages for all beneficiaries, wherein it states:

> the party ***or parties*** suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration ***all the damages of every kind*** to the decedent and all damages of every kind to any and ***all parties*** interested in the suit.

(emphasis added). Indeed, although one cause of action is contemplated by the wrongful death statute, it recognizes the separate claims and damages of all beneficiaries within the suit.

In *Long v. McKinney*, 897 So.2d 160 (Miss. 2004), this Court conducted a thorough review of the wrongful death statute. The *Long* Court's analysis supports the conclusion that there are different **claims** and **claimants** under the statute even though they must be brought in one suit, wherein it found, "[w]rongful death litigation often involves **two or more claimants.**" *Id.* at 173.

The Court noted that:

> [I]n order to fully appreciate the potential for conflicts of interest in wrongful death litigation, it is necessary to first recognize that, in wrongful death litigation, there are several kinds of damages which may be pursued, and these damages are not due to the same **claimants**.

Id. at 169. As an example, the Court explained, the estate is entitled to recover funeral costs and final medical expenses while the beneficiaries are entitled to recover for loss of society and companionship. *Id.* "Each beneficiary must consider whether to bring their own individual

claim" for the damages entitled to each. *Id.* Despite the number of claimants, the Court concluded, "the gravemen of all such claims is the requirement that the claimants prove that the death was caused by the same wrongful act." *Id.* at 173.

The *Long* decision is directly on point with the issue at hand. Although a wrongful death presents one "litigable event" it presents more than one **claim** by more than one **claimant**. MIGA's position that there could only be one claim or claimant cannot be reconciled with the precedent of this Court. Each Bowlin asserted wrongful death claims against Baggett for the death of their family member. As such, each is a claimant to the insurance policy benefits from Reliance. Because each of the Bowlin claimants is a Mississippi resident, each has presented "covered claims" for the purposes of coverage under the Guaranty Act.

2. Other State Court's Decisions Allow Multiple Claimants for Guaranty Act Protection Despite Law Limiting Causes of Action.

Other states, interpreting law similar to the Guaranty Act, have held that the respective guaranty association is responsible for multiple "covered claims" even where an occurrence gives rise to a single cause of action. Indeed, "Courts . . . have consistently held that the per-claim cap applies to the claim of each and every plaintiff, and not to the aggregate claim of the insured under the policy." J. David Leslie & Martin C. Pentz, *Insurer Insolvency*, 4 LAW AND PRAC. OF INS. COVERAGE LITIG. § 58:3(b)(1), (2005).

In *Keystone Aerial Surveys, Inc. v. Pennsylvania Prop. & Cas. Ins. Guar. Assoc.*, 829 A.2d 297 (Pa. 2003), the Pennsylvania Supreme Court considered a case similar to the one *sub judice*. In *Keystone*, Thomas Campbell died in an airplane crash. *Id.* at 298. His wife and four children commenced a wrongful death action in the United States District Court for the Southern District of Texas against the defendant and ultimately settled for 1.5 millions dollars, or $300,000 each. *Id.* at 298-9. After the defendant's insurer had been declared insolvent, the state's guaranty association ("PPCIGA") was asked to step in for the claims. *Id.* at 299.

PPCIGA denied the multiple claims and asserted only one claim could be brought per litigable event. *Id.* A suit was brought against the PPCIGA to recover for each plaintiff up to the $250,000 statutory cap. *Id.*

The Pennsylvania Supreme Court held that a surviving spouse and children each had "covered claims" for loss of consortium arising out of the wrongful death. *Keystone*, 829 A.2d at 302. The court explained that the state's guaranty statute speaks in terms of "claims" and "claimants," rather than in terms of "causes of action." *Id.* at 303-4. Finding the term "claimant" to mean "one possessed with a claim," the court concluded that derivative claims were covered by the guaranty act. *Id.* "[N]othing in the [PPCIGA Act] indicates those with derivative claims are any less 'claimants' than those possessed with direct claims." *Id.* at 304.

West Virginia also follows this guidance. In *West Virginia Ins. Guar. Ass'n v. Potts*, 550 S.E.2d 660 (W. Va. 2001), the highest court of West Virginia held that a "victim's spouse and children" claiming loss of consortium for the presented distinct "covered claims," despite that state's single cause of action statute for medical malpractice. *Id.* The court reasoned:

> We note . . . that the statutes refer to covered "claims" rather than to covered "occurrences." In particular, W.Va.Code § 33-26-8(1)(a) (1985) specifically states that the [IGA] is obligated to pay covered "claims" rather than covered "occurrences." The failure to allow each injured party to recover would largely defeat the remedial purpose of our Guaranty Act, which provides that "[t]his article shall be ***liberally*** construed to effect [its] purpose."

Id. (emphasis in original).

In Oklahoma, *Oglesby v. Liberty Mut. Ins. Co.*, 832 P.2d 834 (Okla. 1992) presented the issue of whether three beneficiaries of a wrongful death action could assert multiple "covered claims" for recovery under the guaranty law. *Id.* at 839. There, the supreme court focused on the statutory language obligating the Oklahoma association to pay "each covered claim." *Id.* at 840. In so doing the court found:

> . . . § 2007 does not use the word "occurrence." It expressly applies the $150,000 limit to "claims." There is no basis for substituting the word "occurrence" for "claims" in order to aggregate multiple claims arising from a single incident.
>
> The plain meaning of the text of § 2007 does not support aggregation of multiple claims. A finding that only one claim may arise out of a single occurrence would largely defeat the remedial purpose of the Oklahoma Guaranty Association Act – to protect claimants and policyholders from financial losses associated with the insolvency of an insurance company. Recovery against losses resulting from the insolvency of insurance carriers, which the Legislature intended to provide, would often prove illusory. Both the language of § 2007 and the Legislature's expressed intent align us with those courts holding that multiple claims may arise from a single occurrence.

Id. at 840. (Footnotes omitted.)

In *Cooper v. Huddy*, 581 So.2d 723, 725 (La. App. 1991), a Louisiana court was called upon to decide whether the wrongful death claim of three beneficiaries constituted five 'covered claims' under the state's guaranty fund law. Similar to the reasoning of the courts above, the court stated that it was "clear" that the statutory language and the insolvent insurer's policy mandated that "*each* of the plaintiffs' claims [was] a 'covered claim.'" *Id.* at 726. Thus, it held that each of the three plaintiffs was entitled to the statutory maximum recoverable under the Act. *Id.*

Similarly, the Court of Appeals of California held that the California Act allowed a claimant to recover from the California guaranty association on a per claim basis rather than a per occurrence basis in *CD Investment Co. v. California Ins. Guar. Ass'n.*, 84 Cal.App.4th 1410, 1423-1424, (Cal. Ct. App. 2000). The court noted:

> In creating CIGA, the California Legislature understood the difference between "claim" and "occurrence." That understanding is apparent in the CIGA legislation itself. The statute defines "covered claims" as the "obligations of an insolvent insurer" and goes on to say that, with the exception of workers' compensation insurance, covered claims are limited to those where the "claimant or insured is a resident of this state at the time of the insured occurrence . . . ." We therefore decline to interpret "claim" to be an "occurrence."

> Nevertheless, the use of "occurrence" in the *insurance policy* defines the extent of CIGA's obligations since CIGA is responsible only for claims that are "within the coverage of an insurance policy of the insolvent insurer . . . ."

Id. at 1423-4 (internal citations omitted).[5]

Each of these courts has interpreted their respective guaranty laws similarly. Like Mississippi, each of the states' legislatures could have specifically offered recovery on a *per occurrence* or *per cause of action* basis. However, they did not. Mississippi's Legislature was no less cognizant of the language used in creating the Guaranty Act. It undoubtedly understood that choosing the term "per claimant" rather than *per occurrence* or *per cause of action* provided support for *each* claimant, regardless of the number of litigable events which triggered coverage.

3. The *Wickline* Decision Does Not Bar Multiple Claimants Under the Guaranty Act.

MIGA may claim that *Wickline v. USF&G*, 530 So.2d 708 (Miss. 1998), instructs a different interpretation of the Guaranty Act. It does not. *Wickline* involved a fatal car accident in which the passenger decedent's beneficiaries (her mother and sister) brought suit against the driver's insurer. *Id.* at 710. The plaintiffs sought to recover from the driver's insurer separately under an uninsured motorist coverage theory in which they "stacked" coverage for four cars covered under the policy, though only one of the four was involved in the accident. *Id.* at 711. The Court ruled that the decedent's heirs at law should be in the same position as the decedent in the lawsuit. *Id.* at 715.

Wickline is readily distinguishable from the action *sub judice*. Not only has the decision been seriously called into question by *Meyers v. American States Ins. Co.*, No. 2003-CA-01669,

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[5] For other states' decisions following the reasoning of those discussed here, see *Reliance Ins. Co. v. Plum Creek Timber Co., L.P.*, No. A99C11263MMJ, 2004 WL 838634, at *4 (Del. Super. Ct. Apr. 15, 2004) (finding recovery available for 65,000 claimants); and *Katz v. Ohio Insurance Guaranty Association*, 812 N.E. 2d 1266 (Ohio 2004) (finding recovery for multiple claimants available up to the limits of the insurance policy).

2005 WL 1384698, *5 (Miss.2005), it is indeed factually dissimilar. In *Wickline*, the plaintiffs sought recovery directly from the driver's insurer rather than under the Mississippi Guaranty Act. *Id.* at 710. Moreover, the plaintiffs' theory of recovery was premised on uninsured motorist benefits and "stacking" coverage in the subject policy. *Id.* at 711. While *Wickline* holds one cause of action was required, it makes clear that the language of the policy controls. In *Wickline*, the policy language provided:

> The limit of bodily liability shown in the schedule or in the Declarations for '***each person***' for Uninsured Motorist Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one accident.

Id. at 715 (emphasis added).

The *Wickline* court went on to hold that the "per person" limits of liability as found in the policy applied, rather than the "per accident" limits. *Id.* at 716.

In this case, it is undisputed Baggett's policy with Reliance contains no "per person" limitation. Instead, the policy specifically provides that Reliance will pay all sums resulting from an insured accident. Consequently, Reliance would have paid any number of claimants injured by the accident, up to the $5,000,000 limit. While the policy in *Wickline* provided coverage for a single person's injuries only, there is no such limitation here. Consequently, if *Wickline* has any authority, it is clearly based on significantly different policy provisions and cannot be applied to the present case.

The lower court chose not to make specific findings as to the issue of the number of "covered claims" presented because it found that Baggett did not have standing to assert the "covered claims." As discussed above, this Court recognizes the plain language of the statute to allow Guaranty Act protection when either the insured or claimants are Mississippi residents. The same reasoning that supports one "covered claim," combined with this Court's analysis under the wrongful death statute, makes clear that three distinct "covered claims" were

presented. Therefore, three "covered claims" exist allowing Baggett to recover $300,000 each, less the $50 statutory amount and the offset from the AIGA.

D. MIGA Is Only Entitled to an Offset of the AIGA Recovery.

As stated above and made clear by the Legislature, the Guaranty Act was created to "avoid excessive delay and to avoid financial loss to claimants" because of the insolvency of an insurer. Miss. Code Ann. § 83-23-103. Persons who may be able to seek recovery from more than one insurance guaranty association must first apply for recovery from the guaranty association of the state of the insured's residence. Miss. Code Ann. § 83-23-123(2). Any recovery from that state's guaranty association will serve as a credit to the amount of recovery from MIGA. *Id.*

While the lower court did not reach the issue of offset due to its decision on the "covered claims" issue, upon finding the three claims covered, some calculation is required to determine the amount of recovery afforded under the Act. As stated above, a judgment was rendered against Baggett for an otherwise insured amount of $301,666.67 per claimant, or $905,000.01 in total. Pursuant to the Act, Baggett applied to the guaranty association of Alabama, its state of residence. AIGA reimbursed Baggett a total of $149,900, and Baggett directed that money to the Bowlins equally as required by the Federal Court judgment. The Guaranty Act will therefore provide coverage as follows: $301,667.67 per covered claim, less $49,996 per claimant recovery from AIGA, or $251,700 per claim, subject to the $50 statutory deductible for each claim. This amount clearly falls within the Act because it is not "in excess of the obligation of the insolvent insurer under the policy from which the claim arises" and does "not exceed[] Three Hundred Thousand Dollars ($300,000) per claimant." Miss. Code Ann. § 83-23-115(a)(Supp. 2003).

This Court has not addressed the calculation issue before now. It is likely MIGA will suggest other creative methods to determine the amount recoverable, whether in calculations or

offsets. Indeed, it argued to the trial court that it was entitled to several offsets, including from the uninsured motorist policy payment and the Stagner recovery. It also argued that offsets should be made against the $300,000 statutory limit rather than the uninsured judgments. Courts from across the country have been presented similar theories of limiting recovery and have adhered to the formula urged here by Baggett.

In *Aztec Well Servicing Co. v. Prop. and Cas. Ins. Guar. Ass'n of the State of New Mexico*, 853 P.2d 726, 728-9 (N.M. 1993), the Supreme Court of New Mexico decided a case involving four claimants injured in an oil well fire who had received judgments against their employer. One of the four, Cole, was awarded a judgment of $598,000. *Id.* at 729. While the employer's insurance company was viable, its exposure was limited to $300,000, and an excess carrier was liable for the balance. *Id.* However, the excess carrier became insolvent. Following full payment under the primary policy, the employer brought a declaratory judgment against the guaranty association for the $298,000 balance. The association argued that it owed nothing on behalf of Cole because reducing the statutory maximum of $100,000 by the amount paid by the primary insurer would be beyond the limits of the guaranty association. *Id.* at 730.

The state supreme court, interpreting a provision identical to Mississippi's offset provision cited above, found the offset provision applies to the damages awarded, not the statutory cap under the guaranty laws. *Id.* at 731. The court noted that the offset provisions were meant to avoid a windfall or double recovery, "not to reduce the amount of the claimant's damages that remain partially unsatisfied." *Id.* Moreover, "To interpret the Act as the Association does would eviscerate its express purpose of avoiding financial loss to a legitimate claimant as a result of the insolvency of its insurer to which the claimant paid premiums." *Id.*

In *CD Investment Co.*, 84 Cal. App. 4th at 1416, three solvent insurers paid a total of $1,500,000 on a $4,000,000 judgment. When application was made to CIGA to step in for an

insolvent insurer, CIGA argued it owed nothing because the payments made by the solvent insurers exceeded its statutory limit of $500,000. In rejecting this argument, the court found, "CIGA's contention is flawed because it improperly uses the payments by the solvent insurers to offset (and in this case, eliminate) CIGA's own obligation to make payments." *Id.* at 1427. The court found that the non-duplication provision "simply ensures that CIGA is the insurer of last resort," and ruled the offset was applied to the total uninsured loss, not the statutory maximum. *Id.* at 1426.

Likewise, in *Cimini v. Nevada Insurance Guaranty Association*, 915 P.2d 279 (Nev. 1996)(citing Nev. Rev. Stat. § 687A.100(1)) (Michie 1995), the Supreme Court of Nevada interpreted a nonduplication provision identical to Miss. Code Ann. § 83-23-123(1). Cimini recovered $15,000 from each of the two uninsured policies and sought an additional $15,000 as a result of the insolvency of a third uninsured insurer. The Guaranty Association argued that, since Cimini had already recovered more than the policy limits of the third policy, it was not obligated to provide payment. However, the court found that the Nevada Association could not reduce its obligation by the amount recovered from the claimant under his underinsured motorist policy. *Id.* at 445-6. Because the claimant's damages exceeded recovery under both the solvent and insolvent policies, the Nevada Association was not relieved of its obligation to the claimant.

Many other states can be found with similar interpretations of offset provisions in their guaranty laws. *See, e.g., Connecticut Ins. Guar. Ass'n. v. Union Carbide Corp.*, 585 A.2d 1216, 1222 (Conn. 1991) (finding that to offset claims against the statutory maximum, rather than the effectively uninsured damages would undercut the protective purpose behind the state's guaranty act); *Cimini v. Nevada Ins. Guar. Ass'n*, 915 P.2d 279 (Nev. 1996) (interpreting a non-duplication provision almost identical to Mississippi's to require guaranty association payment despite the fact that payments by solvent insurers exceeded the insolvent insurer's coverage);

Rhode Island Insurers' Insolvency Fund v. Benoit, 723 A.2d 303 (R. I. 1999) (refusing to offset a guaranty association's obligations for recovery of uninsured motorist coverage); *Alabama Ins. Guar. Assoc. v. Stephenson*, 514 So.2d 1000 (Ala. 1987) (holding that benefits paid under a claimant's employee health plan do not fall within the provision of the offset portions of the Alabama Act); *Alabama Ins. Guar. Assoc. v. Magic City Trucking*, 547 So.2d 849 (Ala. 1989) (holding that worker's compensation benefits do not fall under the offset provisions).

MIGA is undeniably entitled to offset. However, it is not entitled to offset beyond the AIGA recovery. It is important to note that the payments made by the uninsured motorist coverage and the Missouri guaranty recovery on behalf of Stagner were made prior to the judgment entered against Baggett. Furthermore, Stagner was an insured who was distinctly identified as a party in the federal lawsuit. He settled the claims against him, but not the claims against Baggett. Damages were apportioned to Baggett only after Stagner's dismissal and the uninsured motorist payment was made. While the Missouri and uninsured motorist payments did reduce the claimants' right to assign full damages to Baggett, the net amount after recovery from these sources yielded Baggett's uninsured liability. These payments should not be again used to reduce MIGA's payment obligations when they have already been applied to reduce the total damages assigned to Baggett.

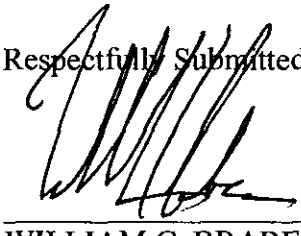
MIGA is entitled to offset the amount paid by the AIGA *only* against the *total amount of damages* incurred by Baggett, the total of the three judgments from federal court, or $905,000.01. Therefore, the MIGA still would be liable to Baggett for the judgments for each of the three Bowlin claimants (totaling $905,000.01) less the offset of $149,900, which equals a total of $755,100, or $251,700 per claim. This amount clearly falls within the Mississippi Act.

CONCLUSION

The lower court erred in finding Baggett's application to MIGA failed to constitute "covered claims" under the Guaranty Act. The residency requirements necessary to establish coverage may be found in either the insured or the claimants. The lower court's failure to reach decisions as to the number of claimants and recovery allowed per claimant was also in error. The three Bowlins, and each of them, are entitled to recover under Mississippi's wrongful death statute and the insolvent policy of insurance. As such, they are each entitled to be protected to the $300,000 per claimant statutory maximum. Taking into account the amounts they have recovered from the AIGA, the Guaranty Act obligates MIGA to reimburse Baggett for the $755,100.01, or $251,700 per claimant, losses. Baggett respectfully requests this Court to reverse the decision of the lower court and award Baggett the statutory amounts to which it is entitled under the Guaranty Act.

Dated this the 7th day of February, 2007.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that I have this day mailed, postage prepaid, a true and correct copy of the above document to the following counsel of record:

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This the 9th day of February 2007.

William C. Brabec