IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01263

WILLIAM J. LEITCH, JR. **APPELLANT**

VS.

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF DE SOTO COUNTY

BRIEF OF APPELLEE

Oral Argument Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case:

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CLIFFORD C. WHITNEY III

THIS THE 13th DAY OF JUNE, 2008.

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STATEMENT REGARDING ORAL ARGUMENT

MIGA submits that oral argument in this case would be helpful to the Court. The issue at hand is one of first impression in this state and involves the construction of an important statutory provision governing the rights and obligations of the Mississippi Insurance Guaranty Association. As the Court will see from the discussion in this Brief, the question of whether MIGA is entitled to credit under statute for uninsured motorist benefits paid to the claimant from solvent insurance involves complex issues of statutory interpretation and analysis of out-of-state authority. The Court could well benefit from clarification of these matters during oral argument.

Respectfully submitted,

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION

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STATEMENT OF ISSUE

Whether the exhaustion provision of the Mississippi Insurance Guaranty Association Law, Miss. Code Ann. § 83-23-123, requires a claimant first to exhaust the uninsured motorist coverage of his own solvent automobile policy and whether the Mississippi Insurance Guaranty Association is entitled to a credit against its statutory obligations in the amount of the solvent UM insurance.

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings and Disposition Below.

This case involves an issue of first impression as to whether this Court will follow the nearly uniform view of other courts in the nation that the solvent uninsured motorist coverage must be exhausted ahead of the statutory benefits provided by an insurance guaranty association. The present case concerns an accident in which the Appellant, William Leitch, allegedly collided with a truck owned by the Defendant, H-G&F Co., Inc., and insured by the now-insolvent Reliance Insurance Company ("Reliance"). Mr. Leitch filed a declaratory judgment action against the Mississippi Insurance Guaranty Association ("MIGA"), seeking a ruling that MIGA is obligated because of the Reliance insolvency to pay the full amount of MIGA's $300,000 statutory liability limits, without any credit for $300,000 paid to Mr. Leitch by State Farm Insurance under his own uninsured motorist coverage. MIGA moved for summary judgment on the grounds that the exhaustion statute, Miss. Code Ann. §83-23-123, entitles MIGA to the credit and thereby absolves MIGA of liability. The Circuit Court of De Soto County granted MIGA's motion by an order entered on June 26, 2007 (Appellant Leitch's Record Excerpts ["L.E."] 43-45). The trial court entered final judgment in favor of MIGA on July 17, 2007. L.E. 4. Mr.

Leitch has appealed.

B. Statement of Facts.

On January 19, 1998, William Leitch was involved in a collision while driving his automobile in De Soto County, Mississippi. Mr. Leitch's vehicle allegedly collided with the rear of a tractor-trailer operated by Jack Dillard while he was on the business of his employer, H-G&F Co., Inc. Mr. Leitch was allegedly injured as a result of the collision. Amended Complaint, ¶ 5 (L.E. 21). At the time of the accident, H-G&F had liability insurance on the truck-trailer through Reliance, which has since been declared insolvent. *Id.*

Mr. Leitch filed a tort action in De Soto County against Dillard and H-G&F seeking to recover for his alleged injuries. He also named his auto insurance carrier, State Farm Mutual Automobile Insurance Company, as a defendant. Amended Complaint, ¶ 6. Mr. Leitch settled with State Farm and received a payment of $300,000 from the uninsured motorist ("UM") coverage of the solvent State Farm policy. *Id.* Mr. Leitch filed the present declaratory judgment action against MIGA on August 20, 2004.

SUMMARY OF ARGUMENT

MIGA is responsible by statute to pay up to $300,000 on claims against policies issued by insolvent insurers such as Reliance.[1] However, the Association is only a "safety net" for claimants and is not itself an insurance company. The Mississippi Insurance Guaranty Association Law (the "Guaranty Act"), Miss. Code Ann. §§ 83-23-101, et seq., established a number of mechanisms to ensure that MIGA is truly the coverage of last resort. These include the exhaustion statute, Miss.

[1] There is a $50 "deductible" that must be subtracted from the $300,000 maximum, as specified in Miss. Code Ann. § 83-23-115(1)(a)(iii).

Code Ann. § 83-23-123, which provides that a person with a claim against an insolvent policy must first exhaust any coverage offered by solvent policies, with the amount of any solvent insurance being credited against MIGA's $300,000 limit.

In the present case, William Leitch received $300,000 from his own solvent uninsured motorist policy. Recognizing the clear applicability of the exhaustion statute to this payment, the trial court granted MIGA's motion for summary judgment and allowed MIGA a $300,000 credit that extinguished MIGA's obligations. This decision comports with the unambiguous meaning of the exhaustion statute. Therefore, the lower court's grant of summary judgment should be affirmed.

ARGUMENT

A. Standard of Review.

The Court applies a *de novo* standard of review to the grant of a motion for summary judgment. *Windham v. Latco of Mississippi, Inc.*, 972 So.2d 608, 610 (Miss. 2008). The same *de novo* standard applies to the review of statutory interpretation. *Hedgepeth v. Johnson*, 975 So.2d 235, 237 (Miss. 2008).

B. The Guaranty Act and the Exhaustion Provision.

The Guaranty Act governs the rights and obligations of MIGA. The Guaranty Act is derived from the Post-Assessment Property and Liability Insurance Guaranty Association Model Act (the "Model Act"), which was drafted by the National Association of Insurance Commissioners and has been adopted in every state. *Mississippi Ins. Guar. Ass'n v. Vaughn,* 529 So.2d 540, 543 (Miss. 1988). Mr. Leitch correctly points out in his brief that the Guaranty Act's purposes *include* avoiding financial loss to claimants. However, the Guaranty Act has other purposes as well, including providing a payment mechanism, avoiding excessive delay in payment, assisting in detection and

prevention of insolvencies, and providing a mechanism for assessing insurers for the cost of insolvencies. Miss. Code Ann. § 83-23-103. "Avoiding" loss to claimants and policyholders has to be harmonized with these other purposes. *See Surles v. State ex rel. McNeels*, 357 So.2d 319, 320-321 (Miss. 1978) (words, phrases and sentences of statute are to be understood with due regard to the context, and in that sense which best harmonizes with all other parts of statute).

The Guaranty Act's purposes considered as a whole can be accomplished only if the limited resources of MIGA are spread over as many claims as possible, in order that they might be available to pay those claimants who are truly without any other source of insurance. As the Supreme Court of New Jersey explained in construing that state's version of the Model Act,

> [T]he legislative desire to assist claimants cannot be, and is not intended to be, bureaucratic benevolence. The Legislature did not give [the insurance guaranty association] unfettered discretion to accommodate all claimants for any claims. The conservation of resources is a major goal. The Legislature signaled the need for restraint and caution in the payment of claims, and did so in a myriad of ways. . . . "[A]lthough the scope of relief under the Act is to be construed liberally to effect its purposes, clearly one concern of the Legislature is to conserve limited Association resources to better assure their availability to serve core purposes."

Carpenter Technology Corp. v. Admiral Ins. Co., 800 A.2d 54, 60-61 (N.J. 2002) (citations omitted).

Thus, the Act was never intended to fully replace insurance policies that have become insolvent. That is why the Act limits payment to $300,000, even when the insolvent policy has much higher limits and when the claimant has experienced much greater damages. Miss. Code Ann. § 83-23-115(1)(a)(iii). That is why the Act only authorizes the payment of claims by Mississippi residents or pertaining to Mississippi property. Miss. Code Ann. § 83-23-109(f). That is why the Act immunizes MIGA from any obligation for punitive damages, even where they are covered by the policy. *Id.* That is why solvent insurers have no subrogation rights against MIGA, even though

they might have had those rights against the insurer itself. *Id.*

That is also why all solvent insurance must be exhausted first, with a credit applied against MIGA's obligation, even though the insolvent insurer did not have any such rights. Miss. Code Ann. §83-23-123. *Carpenter Technology*, 800 A.2d at 60. Section 83-23-123 (which we will also refer to as the "exhaustion statute") provides in pertinent part as follows:

> § 83-23-123. Recovery reduced if duplicated
>
> (1) Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer, which is also a covered claim, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this article shall be reduced by the amount of any recovery under such insurance policy.

There are two parts to this provision. The first is a requirement that the claimant exhaust all solvent insurance before looking to MIGA for payment. The second provides that MIGA's obligations under the Act are reduced by the amount of the available recovery from a solvent policy.

C. UM Coverage Must Be Exhausted Ahead of Guaranty Association Benefits.

The Mississippi Supreme Court has yet to consider whether § 83-23-123 requires exhaustion of and a credit for a claimant's uninsured motorist coverage under his automobile policy. However, we submit that this requirement is clear from the language of the exhaustion statute itself. On its face, § 83-23-123 means that a person having a claim against a solvent insurance policy based on the same operative facts as his "covered claim" against an insovent policy is required to exhaust first his rights under the solvent policy.

Contrary to Mr. Leitch's contention, the Mississippi Supreme Court has held that there is no inherent conflict between § 83-23-123(1) and the definition of "covered claim" found in § 83-23-109(f). *Mississippi Ins. Guar. Ass'n v. Cole ex rel. Dillon*, 954 So.2d 407, 413 (Miss. 2007).

In *Cole*, the Court held that reading the definition of "covered claim" together with the exhaustion statute unavoidably leads to the conclusion that, in order for there to be a requirement that the solvent policy be exhausted, it must provide coverage for the same claim as the insolvent policy. Therefore, the Court held that a claim against a policy covering a co-defendant does not have to be exhausted, because it covers a different claim (i.e., a claim for a different person's wrongdoing) than the "covered claim" to which the insolvent policy applies. 954 So.2d at 414.

In sharp contrast to *Cole*, the present case involves an identical claim arising from the same operative facts against two different policies, one solvent and the other insolvent. Black's Law Dictionary defines "claim" as "the aggregate of operative facts giving rise to a right enforceable by a court." The operative facts giving rise to Mr. Leitch's claim against the insolvent Reliance policy were those surrounding Jack Dillard's alleged negligent operation of the truck in question. This claim is clearly a "covered claim" under Miss. Code Ann. § 83-23-109(f), which defines a covered claim as "an unpaid claim, . . . 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. . ."

By statute, the claim against the UM coverage of Mr. Leitch's solvent State Farm policy was based on the very same operative facts as the Reliance claim – the alleged negligent operation of the truck by Jack Dillard. Miss. Code Ann. § 83-11-101(1) provides that "no automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or *provisions undertaking to pay the insured all sums which he shall be legally entitled to recover* as damages for bodily injury or death *from the owner or operator of an uninsured motor vehicle*." (Emphasis added.) Thus, the Supreme Court held, in a case on which Mr. Leitch relied

in his brief, that UM insurance is specifically designed to provide coverage for "bodily injuries caused by accident arising out of the ownership, maintenance and use of an uninsured automobile", i.e., the identical matter that is covered by an owner/operator's liability policy. *Hodges v. Canal Ins. Co.*, 223 So.2d 630, 634 (Miss. 1969). Therefore, the UM claim is a "covered claim" falling within the exhaustion requirement.

MIGA vs Cole does not lead to a contrary conclusion, as Mr. Leitch would have the Court believe. This is made clear by *Zhou v. Jennifer Mall Restaurant, Inc.*, 699 A.2d 348 (D. C. App. 1997). Just as in *Cole*, the issue before the D.C. Court of Appeals (the highest court in the District of Columbia) in *Zhou* was whether the District of Columbia Insurance Guaranty Association (DCIGA) was entitled to an exhaustion statute credit for a joint tortfeasor's solvent insurance. The plaintiff had collided with a drunk driver, who had been served alcohol at a restaurant. The claimant sued the driver for negligence and the restaurant owner for violating the dram shop act. The driver's solvent insurance paid the plaintiff $200,000 to settle, but the restaurant's carrier was insolvent and DCIGA stepped in. 699 A.2d at 350. DCIGA claimed that it was entitled to an offset for the driver's insurance payment, under an exhaustion statute identical to Mississippi's. The Court of Appeals disagreed and held that the claim against the driver's carrier did not qualify under the exhaustion statute, because it was not a "covered claim" , i.e., "the same kind of claim, but against a solvent insurer, as one that could have been brought against the insolvent insurer covered by the Act." 699 A.2d at 357.

The D.C. Court of Appeals went on to contrast the joint tortfeasor situation – where there is no exhaustion requirement – with the situations to which the exhaustion statute applies. The court chose UM insurance as a prime example of coverage which has to be exhausted first. The court used

a hypothetical identical to the present case in the following passage:

> Our interpretation is also consistent with the contrary result, applying statutory provisions equivalent to D.C.Code § 35-1910(a) [the exhaustion statute] in cases involving claims made under an individual's uninsured motorist policy. This situation typically arises in the following circumstances: driver A, who has uninsured motorists insurance, is involved in an accident with driver B, the tortfeasor. When driver B's insurance is declared insolvent, driver A recovers from his or her own uninsured motorists policy. Driver A then attempts to recover from the state insurance guaranty association which has stepped into the shoes of the tortfeasor's insolvent insurer. Because the claim against driver A's uninsured motorists policy is the same claim as the one brought against driver B's insolvent insurer, the insurance association can deduct the amount recovered from the injured party's uninsured motorists policy from the amount it is statutorily obligated to pay to the injured party. [Citations omitted.] These cases stand for the proposition that where an injured plaintiff has alternative sources of insurance covering the same claim as the claim against the insolvent insurer, the courts interpret the nonduplication [exhaustion] provision as requiring the plaintiff to exhaust the solvent policy and deduct the amount recovered from the obligation due by the state insurance guaranty association.

699 A.2d at 354 (citations omitted). Thus, *Zhou* makes it clear that uninsured motorist insurance does pertain to the same "covered claim" as the driver's insolvent liability insurance and must be exhausted first.

Nearly every court that has considered the issue has agreed that UM coverage falls within the exhaustion statute. *Stecher v. Iowa Ins. Guar. Ass'n*, 465 N.W.2d 887, 889 (Iowa 1991). As one insurance law commentator put it, "the courts . . . have been consistent in requiring policyholders involved in automobile accidents to exhaust claims under their uninsured motorist provisions." 5 *Law and Prac. of Ins. Coverage Litig.* § 58:23 (2008). The following is a partial list of the myriad decisions requiring exhaustion of solvent uninsured motorist coverage: *Lucas v. Illinois Ins. Guar. Fund*, 367 N.E.2d 469, 471 (Ill. App. 1977); *Prutzman v. Armstrong*, 579 P.2d 359, 362 (Wash. 1978); *Vokey v. Massachusetts Insurers Insolvency Fund*, 409 N.E.2d 783, 786 (Mass. 1980);

Rinehart v. Hartford Casualty Ins. Co., 371 S.E.2d 788, 791 (N.C. App. 1988); *Witkowski v. Brown*, 576 A.2d 669, 671 (Del. Super. 1989); *Northland Ins. Co. v. Virginia Property & Casualty Ins. Guar. Ass'n*, 392 S.E.2d 682, 684 (Va. 1990); *Burke v. Valley Lines, Inc.*, 421 Pa. Super. 362, 617 A.2d 1335 (1992); *Pinkham v. Morrill*, 622 A.2d 90, 93 (Me. 1993); *Robinson v. Gailno*, 880 A.2d 127, 134-137 (Conn. 2005).

Applying the exhaustion statute to this case, Mr. Leitch first had to exhaust his rights under his solvent State Farm policy, which he did when he sued State Farm and obtained policy proceeds of $300,000 under the uninsured motorist coverage. The second sentence in § 83-23-123(1) then required that MIGA's $300,000 statutory liability be reduced by the $300,000 collected from State Farm, leaving a balance of "0" owed by MIGA. The trial court was therefore correct in concluding that MIGA was entitled to a summary judgment.

CONCLUSION

This case involves a claim for injuries arising from the allegedly negligence operation of a truck by Jack Dillard, while employed by H-G&F, Co. The Leitch claim was covered under two policies, the insolvent Reliance policy of H-G&F and the uninsured motorist coverage of the plaintiff's solvent automobile policy. The claim was a "covered claim" under the Guaranty Act, due to its being against insurance of the kind covered by the Guaranty Act and asserted against an insolvent carrier, as well as a solvent one. The unambiguous language of Miss. Code Ann. § 83-23-123(1) required that the claim first be exhausted against the solvent policy and that MIGA receive a credit for any amount collected. After MIGA was credited with the $300,000 paid to the claimant from his uninsured motorist coverage, MIGA was left with no further liability. Therefore, this Court should affirm the entry of summary judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CLIFFORD C. WHITNEY III, Attorney for Mississippi Insurance Guaranty Association, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and foregoing document to the following:

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THIS THE 13th DAY OF June, 2008.

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CLIFFORD C. WHITNEY III

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01263

WILLIAM J. LEITCH, JR. **APPELLANT**

VS.

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION **APPELLEE**

AMENDED CERTIFICATE OF SERVICE

I, CLIFFORD C. WHITNEY III, Attorney for Mississippi Insurance Guaranty Association, do hereby certify that I have this day mailed, postage prepaid, by United States Mail, hand-delivered, or via facsimile, a true and correct copy of the above and Appellee's Brief to the following:

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THIS THE 16th DAY OF June, 2008.

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