2007-CA-01593 T/CE

CERTIFICATE OF INTERESTED PERSONS

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

1. Honorable Henry L. Lackey — Circuit Court Judge

2. Guidant Mutual Insurance Company — Appellant/Cross-Appellee

3. Indemnity Insurance Company of North America — Appellee/Cross-Appellant

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CERTIFIED this the 23 day of April, 2008.

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Appellant/Cross Appellee would welcome oral argument to the extent this Court finds argument appropriate pursuant to Miss. R. Civ. P. 34(b) but does not request it.

STATEMENT OF THE ISSUES

1. The Lower Court Erred in Finding That Indemnity Insurance of North America Was Not Co-primary Insurer with Guidant Mutual Insurance Company for the Subject Accident Giving Rise to this Action

2. The Lower Court Erred in Finding That the Personal Umbrella Policy Issued by Guidant Mutual Insurance Company Was Primary to the Business Automobile Liability Policy Issued by Indemnity Insurance Of North America

3. Guidant Mutual Insurance Company Was Not a "Volunteer" When Settling the Anderson Claims in the Underlying Action

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STATEMENT OF THE CASE

A. Procedural History

In 1995, two lawsuits were filed in the Circuit Court of Marshall County, Mississippi, alleging damages in the amount of four million, one hundred and fifty thousand dollars ($4,150,000.00) against four defendants. The automobile accident which was subject of the actions occurred when a vehicle driven by a volunteer fireman on his way to a fire, collided with the plaintiffs' vehicle. The Plaintiffs sued the fireman, the fire department, Marshall County, and the Board of Supervisors. Three insurance companies and four insurance policies were implicated, and a coverage dispute ensued.[1]

On December 3, 1997, the Appellee/Cross-Appellant, Indemnity Insurance of North America ("IINA"), brought a declaratory judgment action in the United States District Court for the Northern District of Mississippi, naming as defendants, the Appellant/Cross-Appellee, Preferred Risk Mutual Insurance Company (now "Guidant") and Titan Indemnity Company ("Titan"). R. 2: 227. IINA sought a determination by the federal court that Guidant had a duty to defend all defendants named in the underlying lawsuits, that IINA had no duty to defend any of the defendants, that Titan and IINA had coverage on an excess basis only, and that the Guidant personal automobile policy of

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[1] INA insured the volunteer fire department and Marshal County through a business automobile liability policy (No. HO3325374). Titan Indemnity insured the Board of Supervisors through a business liability policy (No. 35-BA-03485). Preferred Risk, now Guidant Mutual, insured the fireman, James E. Hingle ("Hingle"), through an automobile policy (No. 003888-283). Hingle also had coverage under a personal umbrella excess policy (No. 8437-593).

James Hingle and the Guidant umbrella policy of James Hingle both afforded primary coverage for all defendants. *Id.* Titan sought to have the matter dismissed, arguing that Marshall County was the proper forum for resolution. Guidant took the position that neither IINA's nor Titan's policies were true excess policies since both policies provided immediate coverage if other coverages were unavailable and that application of the rule of repugnancy required all insurers to pro-rate coverage. Without a determination as to the merits of IINA's motion, the action was dismissed on April 15, 1998 by the district court on grounds that the action served no purpose beyond duplication of parallel state court proceedings.

On June 19, 1998, IINA filed same the action in Marshall County, naming the same defendants and seeking the same resolution. R. 1:1-147-2:162; R.E. 1. IINA subsequently filed a Motion for Summary Judgment on July 17, 1998.[2] Titan attempted to remove the action to federal court and filed a motion to dismiss but the federal district court remanded the case to Marshall County where it remained. R. 2:164-66. In its remand order, the federal court found that Titan was estopped from invoking federal jurisdiction due to its position in the prior federal declaratory judgment action that Marshall County was the proper forum for resolution of the insurance dispute. R. 2:164. At the time of this remand order, the underlying action had been pending in the Circuit Court of Marshall County for approximately three years with Guidant providing a

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[2] R. 5: 587-96. IINA again claimed the Guidant policies were primary, while the business auto liability policy of Hingle's employer was excess only for the non-owned auto Hingle was driving (not owned by the fire department). IINA also sought a determination that Guidant had a duty to defend all defendants and that IINA was entitled to reimbursement for the cost of defending its insureds.

defense to its insured Hingle the entire time and IINA providing a defense to Marshall County and Slayden Volunteer Fire Department.

On August 2, 1999, the lower court issued an order holding IINA's summary judgment motion in abeyance until such time as "there has been a final determination on the merits of the underlying case." R. 2:167-68. On January 24, 2003, the Marshall County Board of Supervisors was dismissed from the underlying lawsuit filed by the Andersons, when the court granted its motion for summary judgment, finding that Hingle did not work for the Board of Supervisors and, thus, the Board had no liability for any negligence of Hingle. R. 2:192. Thereafter, Titan Indemnity filed a summary judgment motion in the declaratory judgment action, which was granted, resulting in Titan's dismissal from this action. R. 2:187; 206. The Andersons, Plaintiffs in the underlying litigation, sought to intervene and compel mediation. R. 2:169. On July 30, 2001, the lower court issued an order holding the Anderson's motion in abeyance pending completion of discovery in the underlying lawsuits.

On the eve of trial before a Marshall County jury, Guidant settled the claims of the Andersons on behalf of all defendants, subsequently paying the sum of seven hundred and fifty thousand dollars ($750,000.00). While initially participating in the settlement discussions with Guidant, IINA ultimately declined to contribute to the settlement with the Andersons.

On November 15, 2005, Guidant filed a Motion for Summary Judgment in the declaratory judgment action, seeking partial reimbursement of the settlement payments made to the Andersons. R. 2:207; R.E. 2. Guidant again argued that the umbrella

policy was excess to IINA's business auto liability policy issued to Marshall County. *Id.* IINA answered Guidant's Motion for Summary Judgment and submitted a supplement to their own Motion for Summary Judgment on July 18, 2006, which had been held in abeyance since August of 1999 pending a determination of liability. R. 6:796. IINA alleged Guidant was a volunteer when it paid the settlement, that IINA had no duty to defend and was owed reimbursement for defense costs. After hearing the dual motions for summary judgment, the lower court issued an order on July 30, 2006, sustaining defendant's motion for summary judgment and sustaining plaintiff's motion for summary judgment finding (1) that the request of IINA to be reimbursed for defense costs was denied because Marshall County and the Slayden Fire Department were insureds of IINA, who owed them a defense to the claims of the Andersons; (2) that Guidant's request for contribution from IINA for any of the settlement costs was denied because the two policies issued by Guidant were primary to the IINA policy and were not exhausted by the settlement; (3) that IINA was not obligated to participate in the settlement of the Anderson's claims "without consent"; and, (4) that Guidant was not entitled to reimbursement from IINA for settlement costs. R. 6:817. Guidant filed a Notice of Appeal on August 10, 2006. R. 6:820; R.E. 4. IINA subsequently filed a Motion to Re-open Time for Cross-Appeal, followed by a Notice of Cross-Appeal on September 22, 2006. R. 6:828; 841.

After the appeal was perfected, the lower court issued another order in this matter, this time expressly finding that Guidant was a "volunteer payor." *See* R. 9:1276; R.E. 5. The lower court reaffirmed its prior conclusion that IINA was under no obligation

to contribute to the Hingle settlement; this time, costs were taxed to Guidant. *Id.* The lower court did not disturb its prior ruling that Marshall County and Slayden Volunteer Fire Department were IINA insureds and thus not entitled to defense costs. After a briefing schedule issued, it came to the attention of counsel that the July 30, 2006 Order granting in part each party's motion for summary judgment was not a final order.[3] Accordingly, the parties jointly moved to dismiss the appeal for the sole purpose of obtaining one. Upon returning to the lower court, a final judgment was entered. Rec. Supp. at 1:1-7; R.E. 6. Guidant appealed that ruling on August 27, 2007. *Id.* at 1:8-9; R.E. 7. An amended notice of appeal was filed on September 10, 2007. *Id.* at 19-30; R.E. 8.

B. Facts

An automobile accident occurred on November 22, 1994 in Marshall County, Mississippi, which involved Sam and Ruby Anderson ("the Andersons") and Slayden, Mississippi fireman, James Hingle. R. 2:148-154. On or about November 15, 1995, the Andersons filed two lawsuits in Marshall County Circuit Court. *Id.* One suit named James Hingle as the Defendant, alleging Hingle's negligence in operating his vehicle caused the Andersons damages in the amount of four million, one hundred and fifty thousand dollars ($4,150,000.00). *Id.* The second lawsuit filed sought the same

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[3] When defendant Titan was dismissed from this action, the lower court did so without prejudice, then remaining two other parties to the declaratory action. When the lower court granted in part both parties' motions for summary judgment, the matter was not dismissed nor was a final judgment rendered on that occasion, thus, making the appeal interlocutory. Neither party sought permission of this court or of the court below for permission to appeal the July 30, 2006 order. When the lower court issued its November 16, 2006 order granting IINA's motion for summary judgment, no Rule 54(b) certification was entered.

damages and was amended to name Marshall County, the Marshall County Board of Supervisors, and Slayden Mt. Pleasant Fire Department No. 600 as Defendants liable for the negligence of Hingle, their employee, agent, servant, or representative. R. 2:151-154. At the time of the accident, Hingle, as a volunteer fireman, was driving his personally owed automobile to the scene of a fire pursuant to his duties with Marshall County and the Volunteer Fire Department.

Thereafter, the dispute between the three insurers identified *supra* ensued, the particulars of which are described herein. Indemnity Insurance of North America (IINA) insured Marshall County and the volunteer fire department, having issued a business automobile liability policy with policy limits of three hundred thousand dollars ($300,000.00). R.1:10-73. IINA disputed owing a defense to its insured. Titan Indemnity Company insured the Marshall County Board of Supervisors, having issued a business automobile liability policy, also with policy limits of three hundred thousand dollars ($300,000.00). R.1:115-143. Preferred Risk (now Guidant Mutual Insurance Company) insured James Hingle under a personal automobile liability policy with limits of five hundred thousand dollars ($500,000.00) and a personal umbrella excess policy with limits of one million dollars ($1,000,000.00). R.1:73-114.

SUMMARY OF ARGUMENTS

The lower court erred in rejecting Guidant's position that the auto policies issued by IINA and Guidant were primary for the November 22, 1994, accident involving Hingle and the Andersons. IINA's auto policy covered Marshall County and the volunteer fire department, the entities whose business Hingle was engaged when responding to the

fire call at the time of the accident. In accordance with well established principles, both auto polices should have been considered primary in view of their equidistant proximity to the risk of loss occasioned by the fire call giving rise to this loss.

Compounding that error, the lower court's finding that Hingle's personal umbrella policy was also primary to the IINA auto policy as regards this accident ultimately led to its final erroneous determination that Guidant was a "volunteer" when, in protecting its insured on the eve of trial, it settled the Anderson claims.

Nevertheless, in the process of deciding the coverage questions below, the lower court correctly rejected IINA's effort to escape their contractual obligations to provide a defense to their named insureds, Marshall County and the volunteer fire department by denying IINA's request for reimbursement of defense costs. All arguments presented here succeed or fail by resort to legal principles; there are no fact questions presented in this appeal.

STANDARDS OF REVIEW

This matter has been brought before this Court on appeal from the lower court's grant of a motion for summary judgment, in favor of Appellee, IINA on the questions of coverage, coverage priority and contribution. This Court employs a *de novo* standard of review with respect to a lower court's denial or grant of summary judgment. *McMillan v. Rodriguez*, 823 So.2d 1173, 1176-77 (Miss. 2002); *Mississippi Ethics Comm'n v. Aseme*, 583 So. 2d 955, 957 (Miss. 1991); *Mallet v. Carter*, 803 So.2d 504, 509 (Miss. 2002). This Court has found Mississippi Rule of Civil Procedure 57 to be an appropriate vehicle for the determination of a party's status and rights under an

insurance contract. *Miller v. Allstate Ins. Co.*, 631 So. 2d 789, 790 (Miss. 1994). As no facts material to the resolutions of the lower court were disputed, all questions here raised require *de novo* review. *See e.g. Detroit Marine Engineering v. McRee*, 510 So.2d 462, 467 (Miss. 1987); *Croenne v. Irby*, 492 So.2d 1291, 1293 (Miss. 1986); *Warwick v. Gautier Util. Dist.*, 738 So.2d 212 (Miss.1999).

ARGUMENTS

I. The Lower Court Erred in Finding That Indemnity Insurance of North America Was Not Co-primary Insurer with Guidant Mutual Insurance Company for the Subject Accident Giving Rise to this Action

In the court below, the following facts material to the coverage questions were undisputed. On November 22, 1994, Hingle was involved in a serious accident with Sam and Ruby Anderson while responding to a fire alarm on behalf of Marshall County and the Slayden Volunteer Fire Department. As a volunteer member of a rural fire department, the vehicle Hingle was driving was his personally owned vehicle. Guidant automobile policy no. 003888-283 insured this vehicle and, accordingly, Guidant provided a defense to Hingle in the subsequent lawsuits brought by the Andersons. The amount claimed by the Anderson plaintiffs against Hingle individually exceeded the limits of this auto policy.

IINA issued a business automobile liability policy no. HO3325374 to Marshall County and the volunteer fire department whose business, Hingle was engaged in at the time of the accident.[4] Hingle was also insured under this policy. IINA provided a

[4] R.1:10-71. The named insured is Marshall County. The "Form of Business" is identified in the policy as "Fire Department." The producer is identified in the declarations as

defense to the volunteer fire department and Marshall County, Mississippi but provided no defense to Hingle. Although it characterized its provision of a defense to its named insureds as "under protest,"[5] IINA produced no evidence that it had ever reserved its rights in that regard.[6] Titan Indemnity refused the defense of any defendants. IINA's automobile liability policy included the following provisions:

> **OTHER INSURANCE**
>
> a. For any covered auto you own, this coverage form provides primary insurance. For any covered auto you don't own, the insurance provided by this coverage form is excess over any other collectable insurance . . . .
>
> * * * *
>
> d. When this coverage form and any other coverage form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the portion that the limit of insurance of our coverage form bears to the total of the limits of all the coverage forms and policies covering on the same basis.

By endorsement, HO3325374 also provides the following:

> Section II – LIABILITY COVERAGE is changed by adding the following:
>
> 1. WHO IS AN INSURED:

Volunteer Firemen's Insurance Services."

[5] R.1:7. When IINA moved for summary judgment below, it argued that its provision of the defense to its insureds was an obligation that arose at the filing of the Anderson complaints. *See* Additional Designation of Pleadings at 14.

[6] That said, IINA memoranda submitted below do make the representation that they reserved their rights in the defense of their insureds Marshall County and the volunteer fire department. The content of that reservation is unknown.

d. Any volunteer or employee of yours while using a covered auto you don't own, hire or borrow in your business or your personal affairs.

Insurance provided by this endorsement is excess over any other insurance available to any volunteer or employee.

R. 1:10-73.[7] The automobile policy (#003888-283) issued by Guidant to Hingle also provided the following clause:

OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.

R.1:73-106.[8] As the provisions of IINA's policy included both excess (§ a) and pro rata insurance clauses (§ b), IINA sought to allocate coverage and order priorities by judicial fiat seeking an adjudication that the Guidant auto policy was "primary" for the loss as to all defendants and its policy "excess." IINA position as regards Titan Insurance however took a different stance.[9] Acknowledging the consequences flowing under Mississippi law when excess clauses are in competition–pro rata defense and indemnity contribution,[10] IINA wanted to pro-rate coverage with Titan. Their position

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[7] Ex. A to IINA's complaint for declaratory relief at § IV(b)(5).

[8] Ex. B to IINA's complaint (PART A - LIABILITY COVERAGE; R. 1:82)

[9] R. 1-8. Titan Indemnity Company's business liability policy No. 35-BA-03485 insured Mr. Hingle as an additional insured by virtue of endorsement. Pursuant to the terms of Titan's policy, because the vehicle used by additionally insured Hingle was not owned by Marshall County, such coverage was described as excess to other collectable insurance.

[10] *See Travelers Indem. Co. v. Chappell*, 246 So.2d 498, 504 (Miss.1971) (insurers share liability pro rata based on their respective policy limits); *Allstate Ins. Co. v. Chicago Ins. Co.*, 676 So.2d 271, 275 (Miss.1996).

vis-a-via Guidant, however, took an opposite course, ostensibly supported by this Court's decision in *Travelers Idem. Co. v. Chappell*, 246 So.2d 498 (Miss. 1971).

Construing *Chappell, supra*, as an absolute mandate that the insurer for the vehicle involved in the accident is always primary to all other carriers whose coverage is implicated by the loss, IINA began its long legal odyssey to escape its obligations to Hingle for the November 22, 1994 loss. Yet, IINA was not content to escape its duty to participate in the defense of Hingle, a defense which was provided by Guidant anyway. Instead, contrary to well established law, IINA succeeded in having the lower court read *Chapell, supra*, as allowing the personal umbrella policy of Hingle to likewise provide an escape from the obligations to their own named insureds. While the latter result is treated *infra*, suffice it to say that *Chapell, supra*, cannot be read broadly enough to escape its responsibilities to its named insureds. Appellant Guidant admits that the long standing rule in Mississippi is to the effect that the insurer for the owner of the vehicle involved in the accident is considered the primary insurer. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co* 797 So.2d 981, 983 (Miss.2001). And while there are good and sound reasons for this rule, in its zeal to escape its obligations, IINA lost sight of who it insured in the first instance. Simply stated, "primary insurance coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability." *Union Indem. Ins. Co. of New York v. Certain Underwriters at Lloyd's,* 614 F. Supp. 1015, 1017 (S.D. Tex. 1985). Upon the happening of the event giving rise to this

insurance dispute, both policies were available to both Hingle and to the fire department defendant. As clearly set forth in their policy, there can be no doubt that absent the existence of the Guidant policy, the IINA policy would afford primary coverage for this accident, arising as it does out of the course and scope of Hingle's employment with the fire department "while using a covered auto you don't own, hire or borrow in your business." R. 1: 27. Ultimately, what undergirds consideration of primary and secondary insurance coverage priority disputes is the relative proximity the risk bears to the loss and there can be more than one "primary" insurer after any loss. As a matter of sound public policy as well as policy interpretation, IINA and Guidant were clearly co-primary insurers in this case as regards the fire department/Marshall County defendants.

As to James Hingle, Guidant never denied it had the primary obligation to defend and indemnify this firefighter. IINA however ignored its pro-rata obligations under its policy to "pay [its] share" with full knowledge that its "policy cover[ed] on the same basis [this loss], *either excess or primary*." R. 1:10-73. And although the lower court could have arrived at the correct result by simply giving full effect to both pro-rata clauses once it had correctly determined the "primary insurer" question, there was likewise another "universal answer to [this] dilemma" where two like clauses [are] mutually repugnant:

> [I]gnore them, thus making the coverage of both policies primary. *Allstate Ins. Co. v. Avis Rent-A-Car Sys., Inc.*, 947 P.2d 341, 347 (Colo.1997); *Universal Underwriters Ins. Co., v. Allstate Ins. Co.*, 99 Md.App. 595, 638 A.2d 1220, 1224 (1994); *Rogers v. Snappy Car Rental, Inc.*, I272 N.J.Super. 346, 639 A.2d 1154, 1160 (1993); 8a John A. Appleman, *Insurance Law and Practice* § 4909 at 399 (Rev. ed.1981); 16 George J. Couch et al., *Couch on Insurance* 2d 62:2 at 436

(Rev. ed. 1983).

Titan Indem. Co. v. American Justice Ins. Reciprocal, 758 So.2d 1037, 1043 (Miss. App. 2000). *See also Chappell*, 246 So.2d at 501-04 (where two clauses providing concurrent coverage are "indistinguishable in meaning and intent" such that "one cannot rationally choose between them," the clauses are held to be "mutually repugnant and must be [therefore] disregarded."); *Allstate Ins. Co. v. Chicago Ins. Co.*, 676 So. 2d 271 (Miss. 1996). In sum, the lower court was correct in determining that "Marshall County, Mississippi and Slayden Fire Department were the insureds of Indemnity and as such, Indemnity owed them the duty of a defense." 6:819 R.E. 4. It clearly erred however in finding that Guidant was the primary insurer for these defendants on the Anderson claim as a matter of law.

II. The Lower Court Erred in Finding That the Personal Umbrella Policy Issued by Guidant Mutual Insurance Company Was Primary to the Business Automobile Liability Policy Issued by Indemnity Insurance Of North America

In reaching its conclusions, the lower court determined that "the policies issued by Guidant were primary coverage. " 6:819 R.E. 4. In making this determination, the lower court completely disregarded Guidant's arguments below that the Guidant Personal Excess Liability Policy No. 8437-593 insuring James Hingle individually was straight excess insurance coverage, not implicated until the limits of both INA and Guidant's auto policies were applied to the loss. The Personal Excess Liability Policy No. 8437-593 contained the following clauses:

PART A - LIABILITY COVERAGE

LIABILITY We will pay the ultimate net loss that any covered person becomes legally obligated to pay because of personal injury or property damage to which the insurance applies occurring during the policy period. We will pay only that part of the ultimate net loss which is in excess of the applicable underlying limit or retained limit.

* * * *

Any insurance provided by this policy shall be excess over any other collectable insurance which applies to any part of the ultimate net loss. This does not apply to any policy specifically designed to provide coverage after benefits of this policy are used up.

R.1:107-114.[11]

As argued in the court below, umbrella coverages, almost without dispute, are regarded as true excess, over and above any type of primary coverage, excess provisions arising in any manner, or escape clauses. 8A Appleman, *Insurance Law and Practice* § 4909.85 at 453-54. Numerous courts confronted situations like that presented in the court below have arrived at the correct ordering of priorities by reference to the intended design of this type of insurance product:

> True excess coverage policies carry the various names of excess, blanket, umbrella, catastrophe and the like. "[T]hese are policies of insurance sold at comparatively modest cost to pick up where primary coverages end, in order to provide an extended protection.... It should be noted that these policies often provide a primary coverage in areas which

[11]Ex. B to IINA's complaint (PART A - LIABILITY COVERAGE).

> might not be included in the basic coverage, since it is the intent of the company to afford a comprehensive protection in order that such peace of mind may truly be enjoyed... [T]his involves no attempt upon the part of a primary insurer to limit a portion of its risk by describing it as 'excess,' nor the employment of devices to escape responsibility. Therefore, umbrella coverages, almost without dispute, are regarded as true excess over and above ***any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses.***"

Insurance Company of North America v. American Economy Ins. Co., 746 F.Supp. 59, 62 (W.D. Ok. 1990) (quoting 8A Appleman, *Insurance Law and Practice* § 4909.85 (1981) (emphasis supplied). *See also Washington Ins. Guar. Ass'n v. Guaranty Nat. Ins. Co.*, 685 F.Supp. 1160, 1162-63 (W.D. Wash.,1988) ("umbrella coverage involves no attempt upon the part of a primary insurer to limit a portion of its risk by describing it as "excess", nor the employment of devices to escape responsibility.")[12] IINA's contention, that its auto policy is excess to Hingle's personal umbrella because the provisions of the IINA policy make it expressly excess ("specifically designed") when Hingle was operating a vehicle not owned by Marshall County, has been rejected by courts confronting such arguments by similarly aligned insurers.

In *Occidental Fire and Casualty Co. v. Brocious*, 772 F.2d 47 (3d Cir.1985), the Third Circuit Court of Appeals considered three policies competing for pure excess status. One policy provided excess coverage where the covered vehicle was not owned by the insured. The second policy examined stated that if the loss was covered by other valid and collectible insurance, the policy would be in excess of and would not contribute with other such insurance. Another policy had an excess clause repugnant

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[12]Hingle's umbrella policy required him to maintain underlying insurance applicable to the types of losses covered by the umbrella. R. 1:114.

with one of the other two policies.[13] The Third Circuit found that the second policy was a true umbrella policy that should not be prorated with the other policies, in part, because the second policy was not an attempt by a primary insurer to avoid coverage or to limit risk. *Brocious*, 772 F.2d at 54. The language relied upon by IINA in policy # HO3325374 is purely the expression by a primary insurer to avoid coverage; Hingle's personal umbrella contains no such attempt. Similarly, in *Allstate Insurance Co. v. Employers Liability Assurance Corp.*, 445 F.2d 1278 (5th Cir.1971), the Fifth Circuit Court of Appeals had before it four policies, two of which (Allstate and USF&G) had "other insurance" clauses which provided coverage on an excess basis as to non-owned vehicles. Employers's policy, denominated an "Umbrella Policy," also defined its excess coverage obligation by reference to other collectable insurance applicable to the "ultimate net loss". The Fifth Circuit found that the Employers policy was a true excess or umbrella policy since Allstate and USF&G had issued essentially primary policies, "although, insofar as is pertinent to the covered occurrence here involved, they promised their insured only secondary or excess coverage." *Allstate Insurance Co.*, 445 F.2d at 1283. Consequently, the umbrella policy as true excess, was not required to contribute pro-rata with the underlying primary policies that contained excess clauses for non-owned vehicles. That is the result that the lower court should have reached in this case. *See also Aetna Casualty and Surety Co. v. United Services Automobile Assn*, 676 F.Supp. 79 (E.D.Pa.1987); *Home Insurance Co. v. Liberty Mutual Ins.* Co., 678 F.Supp. 1066 (S.D.N.Y.1988); *Washington Ins. Guar. Ass'n.*, 685 F.Supp. at 1165

[13]IINA argued that Titan's excess policy had to be prorated with its policy prior to that carrier being dismissed on grounds of mutual repugnancy.

("It seems to us, by definition and longstanding principle, that an excess insurer is not generally liable for any part of the loss or damage which is covered by other insurance (be it collectible or uncollectible, but is liable only for the amount of loss or damage in excess of the coverage provided by all other applicable insurance policies.") (*citing* 16 Couch on Insurance 2d (1983) 484, Section 62:48); *Cf. Wurth v. Ideal Mutual Ins. Co.*, 34 Ohio App.3d 325, 518 N.E.2d 607, 612 (1987).

The IINA auto policy was clearly available to Hingle, Marshall County and the volunteer fire department and, accordingly, was "collectable" within the meaning of the umbrella's definitions of "retained limit" and "underlying limit." *See Contential Cas. Co. v. Hester*, 360 So. 2d 695, 697 (Miss. 1978). IINA's argument below, that the excess provisions contained in the IINA auto policy converts this otherwise primary policy into a true excess policy for this loss and for all defendants is misplaced. Marshall County in each instance paid a full premium for the benefit of coverage of non-owned vehicles. The specific risk of injury to persons arising out of the volunteer firemen activities of the kind giving rise to this accident was specifically countenanced by the IINA auto policy and should not be ignored. *K.L.M. Distributing Co. V. Washington General Ins. Corp.*, 215 So. 2d 710. 713 (Miss. 1968). By its terms, the coverage limits of the personal umbrella policy issued was in excess to the limits of any underlying policies available to Hingle, Marshall County and Slayden Volunteer Fire Department, including IINA's auto policy. Pure excess policies such as Guidant No. 8437-593 are never intended to provide primary coverage, *McCurl v. Trucking Employees of North Jersey Welfare Fund, Inc.,* 124 F.3d 471, 479 (3rd Cir. 1997), and it was error of the lower court to find

IINA's auto policy excess to the umbrella policy, and by implication, primary for the loss. *See United States Fire Ins. Co. v. Maryland Cas. Co.*, 447 A.2d 896 (Md. 1982) (umbrella contributes only after primary and ordinary excess coverages as "other collectable insurance" are exhausted).

III. Guidant Mutual Insurance Company Was Not a "Volunteer" When Settling the Anderson Claims in the Underlying Action

Appellant/Cross Appellee settled the Andersons' claims on the eve of trial before a Marshall County jury.[14] Had that trial taken place, defendants would have been confronting plaintiffs substantially injured in an accident that was, *without dispute, covered by both IINA's auto policy as well as both Guidant policies.* As the onset, it must be pointed out that IINA never disputed it had coverage obligations to its named insureds as the lower court correctly found. Insurance coverage was never the issue with IINA; only coverage priority.

IINA, like Guidant, always comprehended that the Andersons' claims against Hingle and the other defendants were serious and substantial. That understanding motivated IINA in 1997 to initiate litigation over the coverage priority dispute that still remained before the lower court on the eve of trial. IINA knew and understood that its contractual obligations under its business automobile liability policy extended to all defendants sued in the underlying action. It also knew that their insureds were being sued for $4,150,000.00, an amount far in excess of the combined limits of the IINA auto

[14]The settlement resolved cause no. M95-378 (against Marshall County and the Slayden Mount Pleasant Fire Department #600) and cause no. M95-379 (against James E. Hingle individually)

policy as well as both Guidant policies. Thus, in full view of those obligations, and on the eve of trial when the Andersons sought to intervene in the coverage litigation to compel mediation, IINA did not object. R. 6:772-77. R.E. 3. IINA, like all of the remaining defendants in this litigation, desired settlement of this case short of trial. While in this posture, on February 21, 2003, counsel for Guidant put counsel for IINA on notice of the firm offer by the Anderson plaintiffs to settle the matter in return for a release of all of the defendants. R. 6:778-79. R.E. 3. IINA responded to that offer with its own offer. R. 6:780-81;R.E. 3.[15] In short, IINA always acknowledged their obligation to participate in settlement, even when the settlement proposed was for an amount ($750,000.00) under the combined limits of both Guidant policies. R. 6:780-81; R.E. 3.

Ultimately the matter was settled for seven hundred and fifty thousand dollars ($750,000.00), with Guidant reserving its rights to proceed against IINA for contribution and indemnity as a result of its failure to meaningfully participate in the settlement. R.6:782-86;R.E.3. The Guidant automobile policy (no. 003888-283) had limits of two hundred thousand dollars ($200,000.00) per person and five hundred thousand ($500,000.00) per occurrence. The offer to settle communicated to IINA by Guidant contemplated (1) exhausting the per person limits for Sam Anderson's claim but not the per occurrence limits of the Guidant auto policy; (2) exhaustion of the three hundred thousand dollar ($300,000.00) limits of the IINA auto policy; and (3) payment of the remainder settlement from the personal umbrella. R. 6:778-79; R.E. 3. IINA responded

[15] The counter-offer itself is somewhat remarkable. Here, IINA does not dispute its obligations to insure for the loss and fund the settlement; only that after deduction of the costs incurred in defending their own named insureds, and application of the umbrella policy coverage, its prorata share would be five thousand dollars ($5,000.00).

by agreeing in principle to the proposed distribution on the Guidant auto policy but arguing that its auto policy coverage should be prorated with the personal umbrella policy. R. 6:780-81; R.E. 3. IINA's offer also sought reimbursement of its attorney fees for defending its named insureds, a position the lower court ultimately rejected. *Id.*

Rejecting IINA's offer, Guidant paid Sam Anderson its per person limits of two hundred and fifty thousand dollars ($250,000.00) under the Guidant auto policy. R. 4:554. Guidant also paid fifty thousand dollars ($50,000.00) to Ruby Anderson under that policy.[16] R.4:555. And while the limits of the auto policy were not exhausted by this payment, **this was the exact amounts and schedule of distributions agreed to by IINA**. R. 6:780-81;R.E. 3. Guidant also paid Sam Anderson four hundred and fifty thousand dollars ($450,000.00) under the personal umbrella. R. 4:553. In return, IINA was released as were their named insureds. R. 6:782-86; R.E.3. Accordingly, on this record, there is no credible argument that Guidant was a volunteer in this matter.[17]

This Court has been very clear on what a volunteer means within the specific context of insurance disputes: a volunteer is "'[a] stranger or intermeddler who has no interest to protect and is under no legal or moral obligation to pay.'" *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 255 So.2d 667, 668 (Miss. 1971) (quoting *Massachusetts Bonding & Insurance Co. v. Car & General Insurance Corporation*, 152

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[16] Mrs. Anderson's claim was primarily for loss of consortium with her severely injured spouse. Seven hundred thousand dollars paid to Mr. Anderson and fifty thousand dollars to his wife was the offer by plaintiffs to settle the case.

[17] IINA raised the volunteer argument in this case in January, 2006, inspired no doubt by their counsel's fight in *Liberty Mutual Fire Ins. Co. v. Fireman's Fund Ins. Co.*, 235 Fed. Appx. 213 (5th Cir. 2007). R. 6:739-44.

F.Supp. 477, 482 (D.C. Pa.1957)). Obviously, at the time of the settlement, Guidant had a legally recognizable interest to protect and it was no stranger to the controversy between the Andersons and Hingle on the one hand and IINA and itself on the other. It was intimately involved in the protection of James Hingle, whom it owed a contractual obligation to defend and was providing that defense. It was likewise intimately involved in the dispute with IINA over the proper interpretation of the subject insurance policies' "other insurance" provisions, a dispute that ranged over federal and state courts for a number of years without resolution. IINA collected substantial premiums from Marshal County and in return, contractually obligated itself to defend and indemnify not only Marshall County but also employees and agents of its Volunteer Fire Department. To paraphrase from the *State Farm* decision cited *supra.*,

> [I]t stands undisputed that both [IINA] and [Guidant] had entered into solemn contracts of insurance by which they contracted for a premium to defend the insured against any and all claims, and to act in his best interest in negotiating and settling all claims made against him. This obligation and duty to the insured transcends any hypertechnical right of either insurer to pay only in strict accord with the 'Other Insurance' clause of each contract.

State Farm Mut. Auto. Ins. Co., 255 So.2d at 668. Guidant, as continually argued throughout the course of this litigation, believes it did not owe coverage for Hingle under his individual umbrella policy until his auto policy and the auto policy issued by IINA was exhausted. But, it was not willing to risk the fireman's future financial well-being or a significant judgment against the remaining defendants to prove the point. Returning to this Court's decision in *State Farm, supra*:

> The majority of cases now recognize the undesirability of rewarding the insurer which refuses to honor its contractual

> obligations, and hold that payment by an insurer which properly undertakes a burden of settlement or defense does not render it a volunteer, not entitled to recover.

State Farm Mut. Auto. Ins. Co., 255 So.2d at 669. Guidant was no volunteer. *Genesis Ins. Co. v. Wausau Ins. Co.* 343 F.3d 733 (5th Cir. 2003), a case IINA relied upon below, does not compel a different result.

In *Genesis*, *supra*, the disputants were a commercial liability carrier (Genesis) and an automobile insurer (Wausau). The accident giving rise to the plaintiff's claim in the underlying action, involved a vehicle owned and operated by the casino. Hence, the automobile insurer undertook the defense of the case until, years later, the plaintiff amended her complaint to add a premise liability claim, implicating the insurance offered by the CGL carrier, Genesis. Genesis promptly filed a declaratory judgment action, asserting that Wausau "provide[d] coverage for the entirety of the [plaintiff's] claim." While the declaratory judgment action was still pending, the underlying litigation was *settled by contribution of both carriers* to the settlement of the plaintiff's claims. *Genesis Ins. Co.,* 343 F.3d at 735. Genesis then sought to recoup what it paid to the plaintiff from the other joint contributor, the automobile insurer, Wausau. Though the appellate court ultimately affirmed the district court's findings that Genesis was under no legal compulsion to contribute to the settlement, it likewise reversed the trial court's findings that Genesis was a "volunteer" as Wausau had urged in that case and IINA urges in this one.

There are material distinctions between the case presented in this appeal and *Genesis*, *supra*. Unlike *Genesis*, IINA defended Marshall County throughout this

litigation and acknowledged coverage for Hingle as well, albeit on an excess basis. And unlike the *Genesis* parties, the primary question in our case was not which carrier was going to have to pay when the defendants were found liable at the end of the day, but rather, how much. IINA always acknowledged contingent exposure in the courts below. Perhaps, most importantly, the final offer to settle presented to the defendants on the eve of trial exceeded the limits of the Guidant auto policy by two hundred and fifty thousand dollars ($250,000.00). With IINA stubbornly persisting in its position that its policy did not come into play until the limits of the umbrella policy was exhausted, where was the additional monies to fund the settlement going to come from?[18] By its persistent filings in state and federal court, it became clear that IINA would not countenance any resolution of the plaintiffs' claims against its insureds regardless of the substantial damages at issue and coetaneous risk of a substantial verdict if it did not recoup attorney fees for defending its own named insureds. It should not be rewarded for those actions now, as most authorities would agree.

As noted by a leading treatise, "the 'volunteer doctrine' has not been recognized by many courts." Keeton, R. & Widiss, A., *Insurance Law* § 310(d)(3). With good reason. In this instance, liability in the underlying action was never seriously in dispute. The significant dispute in this case was the question posed by the coverage priority positions of the various insurers. It occupied two courts and resulted in the expending of substantial judicial resources. And still, with trial looming, it was not resolved.

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[18] Even IINA its final alternate offer to prorate involved payment from the personal umbrella. R. 6:780-81; R.E. 3

> In most circumstances applications of the so-called "volunteer doctrine" are very suspect because a rule denying subrogation to a "volunteer" insurer tends to discourage an insurer from settling with the insured in a case of doubtful coverage. . .Such a rule is generally undesirable.

Id. Cf. State Farm Mut. Auto. Ins. Co., supra. In as much as the *State Farm* decision cited *supra* articulates the public policy of this state as it concerns proper application of the volunteer doctrine, any findings of the Fifth Circuit inconsistent with that policy should be rejected. *Genesis Ins. Co.*, 343 F.3d at 740.[19]

Here, though the coverage dispute was again before the lower court , the circuit court had not ruled and the trial was imminent. With this undisputed posture, it is strange that IINA would call Guidant a volunteer after agreeing that the plaintiffs should intervene in the coverage dispute litigation for the purpose of *compelling mediation.* Indeed, as early as January, 2000, IINA agreed to the principle of both carriers funding the settlement with each reserving to themselves the rights to continue to litigate the coverage issue. R. 6: 787. R.E. 3. Under such circumstances, IINA should be estopped to argue Guidant is a volunteer for taking the action IINA agreed should be taken three years before the settlement. *See also Genesis Ins. Co.*, 343 F.3d at 736.

Finally, Guidant, would point out that by agreement with the Andersons, it has retained for itself the right to pursue IINA independently for IINA's share of the payment

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[19]*See also St. Paul Fire & Marine Insurance Co. v. Allstate Insurance Co.* 312, 543 P.2d 147, 150 (Ariz. 1975) ("We believe it is sound public policy to encourage insurance companies to make a swift settlement of claims. It would also be against public policy to force an insured, who has coverage under more than one policy, to institute legal action to collect payment for the loss in cases where a dispute arises between the insurance carriers over their respective liabilities under the policies.")

of the settlement.[20] In a similar case involving competing priorities, the United States District Court for the Western District of Oklahoma, was confronted with the argument (of a insurance carrier hoping to be found excess) that irrespective of whether the court found that the plaintiff was the true excess carrier, plaintiffs voluntary payment should eliminate its claim:

> In defense to plaintiff's motion for summary judgment, defendant claims plaintiff is estopped due to (1) plaintiff's voluntary payment of the full amount of the settlement and (2) plaintiff's misconduct in the underlying case. Although plaintiff paid the entire amount to settle the lawsuit, the release between plaintiff and the Russells assigned to plaintiff their causes of action against defendant. The public policy of settling cases and allowing injured parties to be compensated is very strong. Thus, "payment by an insurer which properly undertakes a burden of settlement or defense does not render it a volunteer, not entitled to recover." *Midwest Mutual Ins. Co. v. Indiana Ins. Co.*, 412 N.E.2d 84 (Ind.Ct.App.1980). Any other principle would leave insureds and injured persons without compensation while corporate insurance carriers litigate their disputes. The Court cannot countenance such an approach, and will not find an insurer to be a volunteer when it settles a lawsuit and then looks to another insurer for subrogation or contribution.

Insurance Company of North America v. American Economy Ins. Co., 746 F.Supp. 59, 62 (W.D. Ok. 1990). Payment in this case does not bar Guidant from recovery under the facts of this case. *See also Canal Insurance Co. v. First General Insurance Co.*, 889 F.2d 604 (5th Cir.1989) (insurer under legal obligation to defend and settle suit in best interests of its insured; if co-primary insurer fails to participate in successful settlement negotiations, voluntary payment doctrine does not preclude action for contribution).

Finally, pursuant to this Court's jurisprudence surrounding Mississippi's

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[20] *See Insurance Law* § 310(d)(3) ("The effect of the voluntary payments doctrine can be avoided by the insurer's taking an assignment of the claim of the "insureds"[at the time of its payment to the claimant]. . ."

volunteer doctrine, it is well established that one who pays under compulsion to pay is no " volunteer." *McLean v. Love*, 157 So. 361 (Miss. 1934). Defendants in the Anderson lawsuits were being sued for four million, one hundred and fifty thousand dollars ($4,150,000.00), an amount far in excess of all available insurance policy limits. Under *Hartford Accident & Indemnity Co. v. Foster*, "[w]hen a suit covered by liability insurance is for a sum in excess of the policy limits, and an offer of settlement is made within policy limits, the insurer has a fiduciary duty to look after the insured's interest at least to the same extent as its own, and also to make a knowledgeable, honest, and intelligent evaluation of the claim commensurate with its ability to do so; if insurer fails to do this, it is liable to insured for damages." *Hartford Accident & Indem. Co. v. Foster,* 528 So.2d 255, 265 (Miss.1988). It is not disputed that the Guidant personal auto policy of James Hingle offered primary coverage to him individually or that Guidant owed a duty to defend Hingle under that policy. However, IINA argued vehemently that Guidant also owed the duty to defend and indemnify Slayden Fire Department and Marshall County. Because the Court held IINA's motion to determine coverage and duties in abeyance, a real possibility remained that the lower court could decide that Guidant also owed a duty to defend the other Anderson defendants. The possibility of an excess judgment was certainly understood on the eve of trial before a Marshall County jury when Guidant acted on behalf of all defendants and settled the Anderson's claims within the coverage limits of its auto policy and, necessarily, the personal umbrella policy. Guidant's sober consideration of its fiduciary duty to Hingle mandated that it protect his rights and, in the process, those of the other defendants. The fact that Guidant was compelled to do so extinguished the possibility that the insurers would

later face a bad faith/breach of fiduciary duty for refusing to take part in the settlement of a claim involving serious and permanent injuries and alleging four million, one hundred and fifty thousand dollars ($4,150,000.00) in damages. Guidant paid this settlement under compulsion and to prevent IINA, who acted solely in its own interest, from jeopardizing all parties to the defense of the Anderson lawsuits.[21] Guidant was no volunteer.

IV. The Lower Court Correctly Rejected IINA's Effort to Escape its Contractual Obligations to Provide a Defense to its Named Insureds, Marshal, Marshal County and the Volunteer Fire Department by Denying its Request for Reimbursement of Defense Costs

For all the reasons stated heretofore, Guidant agrees with the lower court's decision to reject IINA's effort to shift the attorney fees incurred by it in the defense of its named insureds to Guidant. IINA had a duty to defend its insureds under the policy issued to the volunteer fire department; Guidant's obligation to defend Hingle under its auto policy did not encompass defense of IINA's named insureds as a matter of law.

CONCLUSION

Guidant respectfully submits that the lower court erred in determining the order of priorities with regard to the duty to indemnify defendants for the claims arising in the civil actions brought by the Andersons in cause no. M95-378 and cause no. M95-379. Guidant and IINA were co-primary insurers for all defendants in this action. Guidant, having paid the Anderson claims is entitled to be reimbursed from all monies paid out

[21] It is not without some irony that James Hingle's prudence in being absolutely covered for all eventualities placed at risk the very peace of mind anyone would expect from that foresight, thanks to IINA's machinations.

from compulsion, by agreement and in accordance with its fiduciary duties to its insureds. Accordingly, Appellant/Cross-Appellee requests the Court Reverse and Render this action in favor of Guidant and award it three hundred thousand dollars ($300,000.00), the limits of the IINA policy. Appellant/Cross Appellee requests all other relief the Court finds warranted in the premises.

Respectfully submitted, this the 23 day of April, 2008.

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CERTIFICATE OF SERVICE

I, Dion J. Shanley, of Hickman, Goza & Spragins, Attorneys at Law, Madison, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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Honorable Henry L. Lackey
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THIS, the 23 day of April, 2008.

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