IN THE MISSISSIPPI SUPREME COURT
CAUSE NO. 2010-CA-00961

LOUISIANA EXTENDED CARE CENTERS, INC., ET AL. APPELLANTS/DEFENDANTS

VS.

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY

BRIEF OF APPELLEE

Oral Argument Requested

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THIS THE 11TH DAY OF MAY, 2011.

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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 payments made by solvent insurance covering different periods of a single, continuing "medical incident" 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,

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STATEMENT OF ISSUES

1. Whether this case involves a single "medical incident" and single "covered claim" arising from the on-going care and treatment of the nursing home resident, or whether there were multiple, separate occurrences and claims based on each incident occurring during the ten year nursing home stay.

2. Whether the Mississippi Insurance Guaranty Association ("MIGA") is entitled to a credit under Miss. Code Ann. § 83-23-123(1) for payments to the claimant from solvent insurance policies covering different chronological portions of the same continuing "medical incident".

STATEMENT OF THE CASE

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

This case involves two declaratory judgment actions filed by MIGA in the Circuit Court of Madison County in June 2005, seeking a ruling as to MIGA's entitlement to a credit under Miss. Code Ann. § 83-23-123 for solvent insurance payments made to the plaintiffs in two separate nursing home negligence suits. The plaintiffs in the underlying tort suits were the Estate of Roberta Lane ("Lane") and the Estate of Eva Montgomery ("Montgomery") and the defendants were Louisiana Extended Care Centers, Inc. and other persons and entities affiliated with Magnolia Management Company, the parent company of the owners and operators of the nursing homes. The tort suit parties are defendants in the declaratory judgment actions.

On August 20, 2007 the Circuit Court of Madison County issued an Order consolidating MIGA's declaratory judgment actions, as the two cases involve identical legal and factual issues. See Docket, included in Appellants' Record

Excerpts at 1. MIGA subsequently filed a Motion for Summary Judgment (S. R.16-25; R.E. 1) in the consolidated cases on September 11, 2009, and Lane, Montgomery and the other declaratory judgment defendants filed a cross motion for summary judgment (S. R. 258-283; R.E. 2). By an Opinion and Order dated May 14, 2010 (Appellants' Excerpts at 2), the Hon. Samac Richardson granted summary judgment for MIGA and denied the defendants' cross motion, holding that the solvent insurance payments to Lane and Montgomery absolved MIGA under § 83-23-123 of any liability. A Final Judgment (Appellants' Excerpts at 3) was entered on June 24, 2010, after Lane and Montgomery had already filed their Notice of Appeal on June 11, 2010.

B. Statement of Facts.

1. Magnolia Management Company.

Magnolia Management Corporation, Louisiana Extended Care Centers, Inc. and certain of their subsidiaries, affiliates, employees, officers and directors (collectively "Magnolia") own and operate nursing homes. Among these nursing homes are Heritage Manor of Rolling Fork ("Heritage Manor") and the Adams County Nursing Center ("ACNC"). Roberta Lane was a resident/patient at Heritage Manor, and Eva Montgomery was a resident/patient of ACNC in Natchez.

2. Magnolia's Insurance Coverage.

Magnolia was covered under a Health Care Facility Professional Liability Policy issued by Reciprocal of America ("ROA"), formerly Virginia Insurance

Reciprocal, covering "Medical Incidents." The 1995-1996 policy is found at R.E. 3 (S. R. Ex. A 001147-001177). The policy was issued on an annual basis for the period from August 1, 1995 to September 1, 1999. Magnolia was the primary insured and certain of its subsidiaries, affiliates, employees, officers and directors (including Louisiana Extended Care Centers, Inc., David Stallard, Elton G. Beebe, Jr., Edward E. Crow) were also covered.

The ROA policy insured against "all sums which the Insured shall be legally obligated to pay as damages because of injury to which this policy applies arising out of a Medical Incident, occurring during the Policy Period." Policy, § I(A). A "Medical Incident" is defined as "any act or omission . . . in the furnishing of professional health care services." The definition states that "any such act or omission, together with related acts or omissions in furnishing such services to any one person, shall be considered one Medical Incident." Policy § VII(D) (emphasis added).

Magnolia, Louisiana Extended Care Centers, Inc., and/or certain of their subsidiaries, affiliates, officers and directors, including Defendants in this case, were covered by "occurrence" type professional liability policies issued by the following insurance carriers for the following policy periods:

a.	8/1/89 - 8/1/95	St. Paul Fire & Marine Ins.	$1mm/$3mm $5mm excess
b.	8/1/95 - 9/1/99	ROA	$11mm/$13mm $1mm/$3mm

c. 9/1/99 - 6/18/00 Caliber Ins. Co. $1mm/$3mm
$10mm excess

d. 6/18/00 - 1/1/01 Colony Ins. Co. $1mm/$1mm

e. 1/1/01 - 6/18/02 U. S. Risk/Lloyd's of London $1mm/$3mm

These policies (on CD) were introduced as Exhibit to MIGA's Motion for Summary Judgment, and their 2,200 pages are found in paper form in Exhibit A to the Supplemental Record, Volumes I - XIII. The policies other than ROA's define a covered "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions."

ROA was placed into liquidation by Order of the State Corporation Commission at Richmond, Virginia dated June 20,2003. Exhibit "B" to MIGA's Motion for Summary Judgment (S. R. 26-30; R.E. 4). The ROA policy or policies issued to Magnolia are within the scope and application of the Mississippi Insurance Guaranty Association Act, Miss. Code Ann. § 83-23-105.

3. The Lane Case

On September 13, 2000, the Estate of Roberta Lane filed an action in the Circuit Court of Sharkey County, Mississippi, against Louisiana Extended Care, Legacy and Magnolia, in Cause No. 2000-59 (the "Lane Case"). The Amended Complaint in the Lane Case alleges negligence on the part of the Defendants, as the owners/operators of Heritage Manor, in caring for Roberta Lane while she was

a resident at Heritage Manor from 1989 to 1998. (S. R. 31-53; R.E. 5). MIGA was not made a party to the Lane Case.

Contrary to what counsel opposite would have the Court believe, the Amended Complaint in the Lane Case does not specify discrete incidents of wrongdoing occurring on certain dates. Instead it makes the following broad allegations of negligence in the overall care and treatment of the patient, as follows:

> 19. Defendants [the nursing home] owed a duty to residents, including ROBERTA LANE, to provide adequate and appropriate custodial care and supervision, which a reasonably careful person would provide under similar circumstances.
>
> 20. Defendants' employees owed a duty to residents, including ROBERTA LANE, to exercise reasonable care in providing care and services in a safe and beneficial manner.
>
> 21. Defendants breached this duty by failing to deliver care and services that a reasonably careful person would have provided under similar circumstances by failing to prevent mistreatment, abuse and neglect of ROBERTA LANE.

Lane Amended Complaint (S. R. 31-53; R.E. 5) at 5. Although the Amended Complaint contains a laundry list of the types of negligent care allegedly occurring over a ten year period, it never specifies when these incidents occurred, nor does the complaint attempt to connect a specific injury to a specific act or omission. Amended Complaint, ¶ 22 at pp. 5-9 (S. R. 31-53; R.E. 5). Thus, the damage allegation in the Amended Complaint reads as follows:

> 24. As a direct and proximate result of the negligence of Defendants as set out above, ROBERTA LANE suffered injuries, including falls, dehydration, weight loss, symptomatic hyperglycemia, urinary tract infections, bone fractures, pneumonia, pressure sores, ear infections, anemia, and also suffered extreme pain, suffering, mental anguish, embarrassment, and fright, all of which required hospitalization and medical treatment, and all of which required ROBERTA LANE to incur significant hospital and medical expenses.

Amended Complaint, ¶ 24 at p. 10 (S. R. 31-53; R.E. 5).

In 2004, Louisiana Extended Care, Legacy and Magnolia settled the claims of the Estate of Roberta Lane for $750,000.00. St. Paul Fire and Marine Insurance Company (a solvent insurance company) paid $450,000.00 of the settlement. The Estate of Roberta Lane was to attempt to collect the remaining $300,000.00 of the settlement from MIGA. MIGA was not a party to the settlement.

The settlement documents attempt to artificially parse out the continuing acts pled in the Amended Complaint into individual incidents, e.g., instead of referencing the ongoing failure to turn the patient in bed, as alleged in the complaint (¶ 22), the settlement documents cite a specific day of a specific incident, which of course occurred on a day outside of the ROA policy periods. The Defendants then attempted to limit the settlement to delineated acts occurring outside the effective dates of the ROA policy(s). MIGA submits that this was a transparent and ineffectual attempt to prevent MIGA from obtaining a credit under the Guaranty Act for the payments from solvent insurance. See settlement

documents attached to MIGA's Motion for Summary Judgment as Exhibit "D" (S. R. 54-120; R. E. 6).

4. **The Montgomery Case.**

On January 24, 2002, Georgia Smith, as Conservator for Eva Montgomery, filed an action in the Circuit Court of Adams County, Mississippi, against certain Magnolia defendants in Cause No. 02-KV-0012-S (the "Montgomery Case").[1] As in the Lane Case, the complaint in the Montgomery Case (S. R. 121-155; R.E. 7) broadly alleged negligence on the part of the defendants, as owners/operators of the ACNC in caring for Eva Montgomery while she was a resident from approximately 1993 until the time of the filing of suit, citing to the same laundry list of types of negligent acts as in the Lane Case. The Complaint contains the identical broad allegations as are quoted above with regard to the Amended Complaint in Lane. Montgomery Complaint, ¶¶ 27-29 (S. R. 121-155; R.E. 7). The same attorneys represented the Conservator of Eva Montgomery in the Montgomery Case as represented the Estate of Roberta Lane in the Lane Case.

Just as in the Lane Case, the complaint in the Montgomery Case also did not assert separate claims based on discrete incidents of wrongdoing occurring on certain dates, nor did it connect any certain injuries to any certain incidents. Instead, it alleged that "the scope and severity of the ***recurrent wrongs*** inflicted

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1 Eva Montgomery has since passed away, and her Estate was substituted as a party.

upon EVA MONTGOMERY while under the care of the facility accelerated the deterioration of her health and physical condition beyond that caused by the normal aging process and resulted in physical and emotional trauma . . ." (emphasis added). Complaint ¶20 (S. R. 121-155; R.E. 7). In short, this complaint on its face pled a series of related acts or omissions in furnishing services to one person.

In 2005, the Montgomery Defendants agreed upon a settlement of the Montgomery Case for a total sum of $1,300,000. Solvent insurers of the nursing home paid $700,000 of the settlement, with Adams Community Centers, LLC paying another $300,000. Georgia Smith, as Conservator for Eva Montgomery, was to attempt to collect yet another $300,000.00 from MIGA. As was done with the settlement of the Lane Case, the Montgomery Case settlement documents attempt to artificially parse out the continuing acts occurring during the patient's stay at the nursing home and to limit the settlement to delineated acts occurring on certain dates during different policy periods than the ROA policy(s). Exhibit "F" to MIGA's Motion for Summary Judgment (S. R. 156-241; R.E. 8). Again, it is apparent that this was done in a self-serving attempt to prevent MIGA from obtaining a credit under the Guaranty Act for the payments from solvent insurance. MIGA was not a party to the settlement of the Montgomery Case or to the recitals contained in the documentation of the settlement.

5. MIGA's Defense of Magnolia and Notice of Exhaustion Statute Rights.

MIGA provided a defense for Magnolia defendants in both the Lane and Montgomery Cases. MIGA shared the defense costs on a pro rata basis together with the solvent insurers of Magnolia and its related entities and persons. MIGA notified the Magnolia defendants that MIGA claimed a right to a credit under Miss. Code Ann. § 83-23-123 for all payments by solvent insurers covering any portion of the patients' stay in the nursing homes. MIGA's Summary Judgment Exhibits "D" (S. R. 54-120; R. E. 6) and "G" (S. R. 346-353; R.E. 9).

SUMMARY OF ARGUMENT

The issue before the Court is whether a claim for injuries arising out of long term nursing home care involves a single occurrence or "medical incident" for purposes of insurance coverage, or whether it involves a separate occurrence for every day that the patient was not turned in bed, experienced a fall or was otherwise mistreated. Put another way, do Lane and Montgomery have dozens of separate "covered claims" for every time someone failed to treat a bed sore or turn the patient in bed? The ROA policy and the applicable law make it clear that there was a single medical incident and a single "covered claim" insured by multiple insurance policies. Because some of the applicable policies were solvent, the payments made under those policies absolve MIGA of liability pursuant to Miss. Code Ann. § 83-23-123. Therefore, the trial court correctly entered a summary judgment in favor of MIGA, which is a ruling that this Court should now affirm.

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 Insurance Guaranty Act and the Exhaustion Provision.

The Mississippi Insurance Guaranty Association Law (the "Insurance Guaranty Law") established MIGA and is derived from the Post-Assessment Property and Liability Insurance Guaranty Association Model Act, drafted by the National Association of Insurance Commissioners (NAIC) and adopted in a majority of states. *Mississippi Ins. Guar. Ass'n v. Vaughn*, 529 So.2d 540 (Miss. 1988). MIGA is NOT an insurer; it provides "last resort" assistance, up to a statutory maximum of $300,000. *National Union Fire Ins. Co. v. Mississippi Ins. Guar. Ass'n*, 990 So.2d 174, 176 (Miss. 2008).

The "exhaustion provision" of the Insurance Guaranty Law, Miss. Code Ann. §83-23-123(1), provides as follows:

> 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.

This provision requires that all sources of solvent insurance covering the same "covered claim" must be exhausted ahead of MIGA. *National Union*, 990 So.2d at 177-178. "Covered claim" is defined as follows:

> "Covered claim" means 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; or (2) the property from which the claim arises is permanently located in this state.

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

C. The Lane and Montgomery Cases Each Involve a Single Medical Incident Constituting a Single "Covered Claim" on which Payments Were Made by Solvent Insurance that Serve as a Credit against MIGA's Obligations.

The pivotal question in this case is whether Lane and Montgomery experienced a single "medical incident" arising from their overall care in the nursing homes, or whether they experienced numerous separate and discrete "medical incidents" occurring over the ten years that they were residents. Simply put, if there was a single claim for one continuing incident, MIGA is entitled to a credit for the proceeds of solvent policies that paid on portions of that claim. Lane and Montgomery can prevail only if it is found that each episode of bed sores, poor nutrition, falling out of a wheelchair, etc. was a separate and discrete

medical incident giving rise to a separate and discrete claim (and also separate policy limits).

The first step in the analysis of the question of single versus multiple claims is to consider the relevant policy language. MIGA's obligations cannot be greater than those of the insolvent insurer (ROA) under the policy. Miss. Code Ann. § 83-23-115(b). The ROA policy covers "medical incidents" and sets a policy limit for each separate "medical incident." A medical incident is defined to include "related acts or omissions in furnishing such [health care] services to any one person." (ROA Policy. S. R. Ex. A 001147-001177; R.E. 3) Although the issue has not yet been considered by the Mississippi Supreme Court or the Court of Appeals, the United States Court of Appeals for the Fifth Circuit has held in several insurance coverage cases that, under policies where a "medical incident" includes all related acts or omissions, different incidents of mistreatment occurring during a nursing home stay constitute a single "medical incident." *North American Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 554-555 (5th Cir. 2008).

Lane and Montgomery argue that each separate act of negligence in the care and treatment of these patients constitutes a separate medical incident and a separate claim. They contend that you have to dissect the "continuous or repeated exposure" into segments that coincide with a particular policy period. Appellants' Brief at 22. Yet, the broad definition of "occurrence" or "medical

incident" encompasses more than segments of on-going events - it includes ***all*** of the related acts that occurred over the period the claimant was under the care of the nursing home. Properly viewed, the occurrences involved here were single incidents of a ten-year duration, which were covered by multiple policies; they were not a hash of separate incidents conveniently falling within discrete policy periods to help Lane and Montgomery maximize the available coverage.

The next step in evaluating the single versus multiple claim issue is to review the allegations of the complaints. Mississippi follows the rule that an insurer's obligation under a liability policy to defend and indemnify is based on the claims as they are pled on the face of the complaint in the underlying tort action against the insured. *U.S. Fidelity & Guarn. Co. v. Omnibank,* 812 So.2d 196, 200 (Miss. 2002). Contrary to what Lane and Montgomery would have the Court believe, their complaints do ***not*** assert discrete claims for each of the dozens and dozens of examples of mistreatment they say occurred in the nursing homes over the ten years of residency.

You do not see separate allegations in the complaints, for example, that a fall occurred on "x" day in 1995, resulting from the negligent operation of the wheelchair by a nurse on that date and causing a the patient to suffer a fractured hip; that Nurse "Jones" failed to turn the patient in bed on such-and-such a date, resulting in pressure sores and infections; and so forth. Instead, the Lane and Montgomery complaints were pled in the following progression: 1) Lane and

Montgomery were residents of the nursing homes for a 10+ year period (see Lane Amended Compl., ¶ 11, S. R. 31-53; R.E. 5); 2) the nursing homes negligently failed to discharge their duty to the residents during their stay, by such conduct as failing to provide adequate nutritional intake, failure to provide adequate hygiene, failure to provide sufficient staffing, etc. (Am. Compl. ¶ 22, S. R. 31-53; R.E. 5); and 3) ***as a direct result of all of these negligent acts***, the patients suffered such injuries as "falls, dehydration, weight loss, symptomatic hyperglycemia, urinary tract infections, bone fractures, pneumonia, pressure sores, ear infections, anemia, and also suffered extreme pain, suffering, mental anguish . . ." (Am. Compl. ¶ 24, S. R. 31-53; R.E. 5). No specific damage claims were connected to any specific incident. In short, the Lane and Montgomery cases are about a series of interrelated incidents allegedly evidencing overall negligence by the nursing homes in caring for the patients and leading to generalized damages.

The absurdity of the Lane and Montgomery's attempt to dissect the nursing home care into separate claims is highlighted by the astronomical stacking of policy limits that would result. If each of the patients' falls, bed sores, ear infections, etc. were a separate occurrence or medical incident, then the claimants would be entitled to a separate "per occurrence" or "per incident" policy limit for each such incident. This would enable the claimants to stack all of the multiple policy limits to reach total insurance coverage in the tens of

millions of dollars for a single nursing home stay. The related incident language in the policies is designed to prevent just such an outcome.

The issue of single versus multiple occurrences has come up a number of times in many contexts in the case law relating to insurance coverage. For example, there is the Mississippi Court of Appeals decision in *Cooper v. Missey*, 881 So.2d 889, 893 (Miss. App. 2004). In *Cooper*, the claimant was assaulted on the insured's property and then his unconscious body was moved to different outdoor locations on three separate occasions over a twelve hour period, without the defendants obtaining medical aid for the claimant. The claimant tried to contend that each separate incident of moving him and failing to obtain medical assistance was a separate occurrence under the policy, which defined "occurrence" to include "continuous and repeated exposure to the same general conditions."

The Court of Appeals held that the three separate acts of moving the unconscious person were a continuous exposure to the same general conditions and therefore constituted but a single "occurrence" under the policy. Otherwise, as the Court put it, "every minute could constitute a separate occurrence under the policy." 881 So.2d at 895. Likewise, under Lane's and Montgomery's interpretation, every minute of their stays at the nursing homes would be a separate incident and separate claim under the policies, which *Cooper* demonstrates is not a proper construction of the insurance coverage.

In the Fifth Circuit case of *North American Specialty*, the underlying suit by a nursing home patient alleged "that the nursing home's 'pattern and practice of ongoing neglect' caused Mr. Carr to suffer from 'a dislocated shoulder, pressure sores, skin tears and contusions, ulcers,' and other 'pain' and 'indignity' resulting from failures of basic care." 541 F.3d at 554. As in the present case, there were successive, non-overlapping primary policies covering different portions of the two year period over which the alleged negligent care occurred in the nursing home. North American was the excess carrier and argued that the plaintiff "had sued for discrete acts of negligence occurring over the course of the three primary policy periods such that the primary coverage limits should be 'stacked.' North American's excess coverage then would not be triggered until the limit of the total of all three primary policies ($2.5 million) has been reached." 541 F.3d at 554-555.

The policy in question in *North American* covered "medical incidents", which was defined verbatim identically to the definition in the ROA policy in this case - as "any act or omission. . . in the providing of or failure to provide professional health care services to your patients . . ." Also identical to the ROA policy was the provision stating that "[a]ll related 'medical incidents' arising out of the providing of or failure to provide professional health care services to any one person shall be considered one 'medical incident.'" Id. The Fifth Circuit held that the term "related" means having a logical or causal connection. Id.

This brings us to the denouement of *North American*. The Fifth Circuit applied the term "related" and found that the series of individual acts of negligent treatment by the nursing home necessarily had a logical and causal connection with each other, thereby making them part of a single continuing incident. The following analysis by the Court rings very true in this case as well:

> Thus, while one could argue that each day the nursing home committed an act of negligence in failing to properly feed or treat Mr. Carr, these events are all "related." North American points out that Mr. Carr's problems began with poor nutritional care, followed by a shoulder injury, which led to mobility problems, which led to sores, skin ulcers and similar conditions. While North American contends these are discrete events, they all stemmed from a pattern of neglect and incompetence. Indeed, as noted above, the district court concluded that the Carrs' theory of the case in its complaint, continuing into its presentation of evidence at trial, was one of a continuing pattern of neglect, not a series of discrete events. In this appeal, North American has not pointed to any specific evidence showing discrete, unrelated injuries leading to discrete damages with individualized, unrelated damages.

541 F.3d at 558. Neither have Lane or Montgomery pointed to any "specific evidence showing discrete, unrelated injuries" that in turn caused discrete, individualized damages. Instead, the totality of the damages claimed here were alleged to have arisen from the entire course of treatment received at the nursing home.

In another Fifth Circuit case, which applied Mississippi law, the plaintiff was the victim of embezzlement by an employee. *Madison Materials Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 523 F.3d 541, 545 (5th Cir. 2008). The myriad acts

of embezzlement occurred over a ten-year period, during which time 10 different policies covering employee dishonesty were in effect. The St. Paul policy in question in that case covered "occurrences", which were defined to include "a series of related acts." 523 F.3d at 543.

The plaintiff - just like Lane and Montgomery in this case - tried to argue that the occurrences of employee dishonesty which happened during each policy period could be segregated from the other incidents, so that each different policy was responsible only for the incidents occurring during its coverage period. The Fifth Circuit rejected this contention and held that all ten years of embezzlement were one occurrence covered by all ten policies, including under the one-year St. Paul policy, whose policy period was the tenth year of the criminal activity. 523 F.3d at 544. The Court noted that "nowhere does policy language state or even imply that acts committed outside of the policy period in question cannot be part of a 'related acts' occurrence within that policy period." *Id.* Similarly, in the present case, there is nothing to indicate that the ten years of alleged negligent acts in the nursing home were not part of an overall medical incident.

The cases on which Lane and Montgomery rely are inapposite. One of these cases is *Universal Underwriters Ins. Co. v. Ford*, 734 So.2d 173 (Miss. 1999), where the Mississippi Supreme Court ruled that a "factual issue of whether multiple acts are sufficiently related to constitute one occurrence of loss only arises where the applicable policy language unambiguously states that multiple acts may be so

treated." 734 So.2d at 178. The problem for Lane and Montgomery is that the critical factor in *Ford* was the fact that the policy in question did not contain a "repeated and continuous exposure" or "related act or omission" provision. An entirely different outcome is required under the broad definitions of occurrence/medical incident in the ROA policy and in the St. Paul, Caliber, Colony and U.S. Risk policies, which do join related acts or omissions into one occurrence and hence one claim. *Cooper*, 881 So.2d at 895; *Madison Materials*, 523 F.3d at 544.

Lane and Montgomery also mistakenly rely on *Royal Ins. Co. of America v. Caliber One Indem. Co.*, 465 F.3d 614 (5th Cir. 2006), for the proposition that a series of adverse incidents in a nursing home do not constitute a single "occurrence". In *Caliber One*, the Fifth Circuit distinguished between two types of policies that provided primary coverage - one by Caliber One Insurance that defined "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions," and the other by Hartford that covered "medical incidents" that, like ROA's in this case, included "all related acts or omissions in the furnishing of such services." The Court held that the Caliber One policy language ("continuous or repeated exposure") was meant only to apply to repeated exposure to certain environmental conditions, such as the presence of asbestos fibers in the air, and not to a series of incidents in the care of a nursing home patient. 465 F.3d at 624. On the other hand, the Court held that "the

Hartford policy does not treat the acts and omissions leading to discrete injuries to Trevino [the claimant] that occurred when its policy was in effect as separate occurrences. Hartford's policy provides that 'any act or omission in the furnishing of professional health care services to any person . . . together with all related acts or omissions in the furnishing of such services shall be considered one "medical incident"'" *Id.* The ROA policy in ths case contains the Hartford policy language and not the Caliber One provision, and thus *Royal Ins.* supports rather than undercuts MIGA's position.

In addition, *Cooper v. Missey* makes it clear that, no matter what Texas law may say about the "continuous or repeated exposure" provision in the Caliber One policy, such a provision is not interpreted under Mississippi law to apply only to exposure to environmental conditions. Under *Cooper*, one occurrence also flows from separate but related physical acts committed by a tortfeasor against the claimant. 881 So.2d at 895.

Lane and Montgomery further contend that the solvent policies apply to different "covered claims" than the insolvent ROA policy, and hence the solvent policies cannot serve as a credit under Miss. Code Ann. § 83-23-123. This argument is based on a misconstruction of this Court's holding in *Mississippi Ins. Guar. Ass'n v. Cole ex rel. Dillon*, 954 So.2d 407 (Miss. 2007). First of all, *Cole* dealt with MIGA's right to credit for payments by the insurers of co-defendants, which is not the issue here. Secondly, the Supreme Court later clarified its

application of the "covered claim" requirement in *Cole* in its later decision in *Leitch v. Mississippi Ins. Guar. Ass'n*, 27 So.3d 396, 400 (Miss. 2010), where the Court stated as follows:

> Although our result in *Cole* was correct, our reasoning requires clarification. Our analysis should have focused on determining whether the plaintiff's "covered claim" (as defined in the MIGA statutes) was the same claim as the plaintiff's claim against each of the other insured defendants. For MIGA to have a statutory obligation and authority to pay, any "claim" against a solvent insurer that is the same as the "covered claim" against MIGA must first be exhausted. Miss. Code Ann. § 83-23-123(1) (Rev.1999).

27 So.2d at 400.

Once again, the problem lies with Lane's and Montgomery's interpretation the number of "claims" or "incidents" involved in the present case. Lane's and Montgomery's claim against the solvent insurance is the same as the "covered claim" against MIGA - a claim for the on-going acts of mistreatment occurring throughout the patients' ten-year nursing home stay. The claim arising from this single continuing incident meets the "covered claim" requirement of § 83-23-123 and mandates that MIGA receive a credit for the solvent insurance which far exceeded the $300,000 cap on MIGA's liability.

Lane and Montgomery also rely upon the decision of the California Court of Appeals for the Second District in *CD Investment Co., v. California Ins. Guar. Ass'n.*, 84 Cal. App.4th 1410 (2000), which does not reflect the law of Mississippi. First of all, the California court jumped to the conclusion that an occurrence (even

a continuous exposure type claim) does not coincide with a "covered claim" under the insurance guaranty law, i.e., you can have multiple "covered claims" despite there only being a single "occurrence" covered by the policy. 84 Cal. App.4th at 1423. This view is puzzling, since the court also held that "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 ....'" 84 Cal. App.4th at 1424.

Contrast the position taken by one of the California appeals courts in *CD Investment* California Court of Appeals with the view of California's highest court, the California Supreme Court, that multiple related incidents do indeed constitute one occurrence under the policy ***and*** one "claim". *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, 855 P.2d 1263, 1266 (Cal. 1993). It took tortured reasoning for the California Court of Appeals for the Second District to ignore *Bay Cities* and find that, even though a person has only one claim for one occurrence under the policy itself, he can have multiple covered claims for multiple limits against the guaranty association, even though, by the court's own admission, the guaranty association's liability is not supposed to be any greater than the insurer's under the insolvent policy.

Similarly, there are related incidents involved here which combined produced a single claim for a single set of injuries. Obviously, there can only be a "covered claim" against the guaranty association to the extent there is a

"claim" under the insolvent policy. If, as here, there is only one claim for one "medical incident" giving rise to one set of damages, there can be only one "covered claim" under the Mississippi Insurance Guaranty Law. *See* Miss. Code Ann. § 83-23-115(b).

A significant factor in *CD Investments* was that the California statute defines "covered claim" to create a separate claim and separate statutory limits for each insolvent policy providing coverage, regardless of whether there is a continuing incident or occurrence or not. Thus, the claimant was deemed to have five separate "covered claims" - one for each insolvent policy - and could "stack" the guaranty association limits. 84 Cal. App.4th at 1420; West's Ann. Cal. Ins. Code § 1063.1. Mississippi's statute is entirely different than California's when it comes to what constitutes a "covered claim". In contrast to a "covered claim" being for $500,000 ***per policy*** under *CD Investment*, MIGA's $300,000 liability limit is NOT per policy, but rather it is ***per claimant***. Miss. Code Ann. § 83-23-115(a)(iii). There is only one $300,000 limit available in this state to Lane and Montgomery. Here, there is no "stacking" of MIGA limits, and MIGA is entitled to a credit under the exhaustion statute as against its single $300,000 liability.

There are out-of-state cases that are much more relevant to the present case than *CD Investments*. For example, in *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994), the Texas Supreme Court held that medical

malpractice claims are unified, single claims under professional liability policies, even though they involve multiple acts of negligence. The court stated as follows:

> "Each Claim Occurrence" means "each act or occurrence or series of acts or occurrences arising out of one event." . . . The . . . policy language that defines the scope of "Each Claim Occurrence" to include "[a] series of acts or occurrences," is apparently intended to have a coverage effect similar to the "continuous or repeated exposure" unifying directive in commercial liability policies - but in a manner that is meaningful in the medical context. For example, ***medical malpractice frequently involves an operation or an extended course of treatment. A malpractice event may involve numerous independent grounds of negligence that cannot be unified as "repeated exposure to substantially the same conditions," but that nevertheless constitute "a series of acts or occurrences" that are related and form a single malpractice claim.***

876 S.W.2d at 853 n.21 (emphasis added). Other on-point cases include *Columbia Cas. Co. v. CP Nat., Inc.*, 175 S.W.3d 339, 348 (Tex. App. 2004) and *Aetna Cas. & Sur. Co. of Illinois v. Medical Protective Co. of Ft. Wayne*, 575 F. Supp. 901, 903 (N.D. Ill. 1983).

The gist of the overwhelming authority we have cited in this Brief is that there is but one claim involved in the Lane and Montgomery Cases; that the claim was covered by both solvent and insolvent insurance; and that MIGA correctly received a credit for the solvent insurance under § 83-23-123(1) that absolved it of any further liability.

CONCLUSION

These cases involve one broad "medical incident" spanning the term of the patients' residency at the nursing homes. The insolvent ROA policies covered this incident, as did other solvent policies. The plain language of Miss. Code Ann. § 83-23-123(1) makes it clear that MIGA was entitled to a credit for the amounts paid by these solvent insurers. Therefore, the Court should affirm the grant of summary judgment in favor of MIGA.

Respectfully submitted,

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION

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CERTIFICATE OF SERVICE

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This the 11th day of May, 2011.

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