IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CA-00961

LOUISIANA EXTENDED CARE CENTERS, INC.; LEGACY HEALTH CARE SERVICES, INC.; MAGNOLIA MANAGEMENT CORPORATION; AND ESTATE OF ROBERTA LANE, by and through ALICE HAYES, ADMINISTRATRIX;GEORGIA SMITH, AS CONSERVATOR FOR EVA MONTGOMERY; ADAMS COMMUNITYCARE CENTER, LLC; LEGACY HEALTH CARE SERVICES, INC.; LOUISIANA EXTENDED CARE CENTERS, INC.; LEGACY CARE, INC.; MAGNOLIA MANAGEMENT CORPORATION; JOHN STASSI; DAVID STALLARD; ELTON G. BEEBE, JR.; EDWARD E. CROW, — APPELLANTS

v.

MISSISSIPPI INSURANCE GUARANTY ASSOCATION — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Appellants:

Alice Hayes

Georgia Smith

Louisiana Extended Care Centers, Inc.

Legacy Health Care Services, Inc.

Magnolia Management Corporation

Adams Community Care Center, LLC

Legacy Health Care Services, Inc.

Louisiana Extended Care Centers, Inc.

Legacy Care, Inc.

Magnolia Management Corporation

John Stassi

David Stallard

Elton G. Beebe, Jr.

Edward E. Crow

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Appellee:

Mississippi Insurance Guaranty Association

Clifford C. Whitney III
VARNER, PARKER & SESSUMS, P.A.
1110 Jackson Street
Post Office Box 1237
Vicksburg, Mississippi 39181

Circuit Court Judge:
Honorable Samac S. Richardson
The 20th Judicial Circuit
128 West North Street
Canton, MS 39046

Respectfully submitted,

By: _____

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STATEMENT OF THE ISSUES

1. Whether the Circuit Court of Madison County erred in finding that, as a matter of law, Mississippi Insurance Guaranty Association (MIGA) is not statutorily obligated to indemnify Appellants/Defendants the statutory maximum of $300,000 for claims covered by an insolvent insurer pursuant to Miss. Code Ann. § 83-23-101, *et seq.*?

2. Whether the Circuit Court of Madison County erred in holding that, as a matter of law, Mississippi Insurance Guaranty Association (MIGA) was entitled to credit for amounts paid by solvent insurance carriers to settle negligence claims against nursing homes pursuant to Miss. Code Ann. § 83-23-123, that were not "covered claims" pursuant to Miss. Code Ann. § 83-23-109(f)?

3. Whether the Circuit Court of Madison County erred in finding that, as a matter of law, Defendants/Appellants' settlement with solvent insurance carriers absolves Mississippi Insurance Guaranty Association (MIGA) of its statutory obligation to indemnify when there existed no solvent insurance coverage for the claims for which the insolvent insurer was obligated to pay?

4. Whether the Circuit Court of Madison County erred in granting Mississippi Insurance Guaranty Association (MIGA) Motion for Summary Judgment and denying Defendants/Appellants' Cross-Motion for Summary Judgment?

STATEMENT REGARDING ORAL ARGUMENT

Defendant/Appellants respectfully request oral argument due to the important issues raised by this appeal. This appeal turns on a clear understanding of the record, applicable case law, and statutory law. A thorough discussion of the record and applicable law will be beneficial to this Court and the parties.

STATEMENT OF THE CASE

The Estate of Eva Montgomery, by an through a conservator, filed a nursing home negligence action in the Circuit Court of Adams County, Mississippi against the owners and operators of a nursing home ("Montgomery case"). The Complaint alleged that the owners and operators of the nursing home were negligent in caring for Eva Montgomery during her residency from approximately June 8, 1993 to July of 2003. Specifically, it was alleged that while Ms. Montgomery was a resident at the nursing home she suffered: falls on at least fifty-four (54) occasions from 08/10/93 through 12/9/99; multiple injuries received between 01/30/95 and 08/04/99 including scratches, abrasions, and bruises; dehydration in 12/94 and on 02/01/01; weight loss (over the period of 10/24/95 – 12/21/99); pressure ulcers/skin breakdown on various occasions from 10/10/95 through 08/27/00; contractures in 12/00; UTI on 08/14/92; infections on 07/01/96, 12/21/98, and 11/21/00; multiple incidents of failure by the facility to follow physician's orders; and fraudulent, incomplete, or inaccurate documentation throughout the residency.

The Estate of Roberta Lane, by and through an Administratrix, filed a nursing home negligence action in the Circuit Court of Sharkey County, Mississippi, against the owners and operators of a nursing home (the "Lane case"). It was alleged that the defendants were negligent as the owners and operators of the nursing home during Roberta Lane's residency from approximately 1989 to 1998. Specifically, the Lane Complaint alleged that during her residency, Ms. Lane suffered: an infected amputation stump in January 1995; falls in June 1995, May 1996, December 1996, March 1997, September 1997, September 1998, October 16, 1998 and a fall which resulted in a fractured hip on October 25, 1998; a fractured finger in September 1997; multiple open

wounds throughout June 1996 to June 1998; an ear infection in November 1997 and several incidents of hyperglemcia and hypoglycemia at various times during her residency.

During the period that Ms. Montgomery and Ms. Lane were residents at the nursing homes, several insurers issued policies of insurance insuring one or more of the nursing home defendants. One such insurer, Reciprocal of America (ROA), was declared insolvent and placed into liquidation on June 20, 2003. Pursuant to the provisions of the Mississippi Insurance Guaranty Association Law ("The Guaranty Act"), Miss. Code Ann. §§83-23-101 *et seq.*, Mississippi Insurance Guaranty Association ("MIGA") assumed ROA's obligations under the ROA policies. The respective nursing homes and their insurers, excluding the insolvent ROA, subsequently settled the claims brought on behalf of Ms. Lane and Ms. Montgomery for any exposures ***arising out of the coverage periods of their policies***, specifically reserving the right to recover an additional $300,000 from MIGA; the statutory limit that may be recovered from MIGA pursuant to Miss. Code Ann. §83-23-115(1)(a)(iii) for the ROA coverage. MIGA then informed the nursing home defendants that it had no duty to indemnify and would make no indemnity payment to settle or otherwise resolve the Conservators' claims for negligent acts that occurred during the time that ROA was providing coverage.

The nursing home defendants, the Estate of Eva Montgomery, and the Estate of Roberta Lane (hereinafter collectively the "Defendants") filed motions with the respective Circuit Courts to approve the parties' settlements. As the interests of MIGA were affected by the settlement reached, it was served a copy of the motion and attended the hearings. Following the hearings, the settlements were approved by the Circuit Courts.

Subsequently, MIGA filed declaratory actions in both the Montgomery and Lane cases seeking to have the Circuit Courts construe the applicable provisions of the ROA policies and the Guaranty Act statutes to determine whether MIGA was obligated to indemnify the Defendants for the claims occurring during the insolvent ROA's coverage period. Both declaratory actions were consolidated into one action before the Circuit Court of Madison County.

On September 11, 2009, MIGA filed a Motion for Summary Judgment and a Memorandum in Support asserting entitlement to credit for amounts paid by the solvent insurers to settle claims for injuries arising out of the coverage periods of their policies pursuant to Miss. Code Ann. §§83-23-123. In opposition, Defendants responded with a Cross-Motion for Summary Judgment and Memorandum of Support. Defendants sought an Order requiring MIGA to indemnify the Defendants the statutory maximum of $300,000, as provided by law, as there existed no solvent insurance coverage for the incidents for which MIGA and ROA were obligated to pay thereby rendering the exhaustion provision of Miss. Code Ann. §§83-23-123 inapplicable.

A hearing on the Motions for Summary Judgment was held on February 8, 2010 wherein the Circuit Court of Madison County heard arguments by both parties. On May 14, 2010, the Circuit Court Judge entered an Order granting MIGA's Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment finding that MIGA was entitled to credit for amounts paid by the other insurance carriers to settle the claims in the nursing home cases.

Defendants filed a timely Notice of Appeal on June 11, 2010 asking this Court to reverse the decision of the Circuit Court. The instant appeal followed.

STATEMENT OF FACTS

I. The Montgomery Case

The Estate of Eva Montgomery, by and through a conservator, filed a nursing home negligence action in the Circuit Court of Adams County, Mississippi against Louisiana Extended Care Centers, Inc. and Magnolia Management Corporation (hereinafter the "nursing home defendants") and others in Cause No. 01-IV-0012-S ("Montgomery case")[1]. Supp. R. 121 - 153. It was alleged that the nursing home defendants were negligent as owners and operators of Adams County Nursing Center in caring for Eva Montgomery during her residency from approximately June 8, 1993 to July of 2003. Specifically, it was alleged that while Ms. Montgomery was a resident at Adams County Nursing Center she suffered: falls on at least fifty-four (54) occasions from 08/10/93 through 12/9/99; multiple injuries received between 01/30/95 and 08/04/99 including scratches, abrasions, and bruises; dehydration in 12/94 and on 02/01/01; weight loss (over the period of 10/24/95 – 12/21/99); pressure ulcers/skin breakdown on various occasions from 10/10/95 through 08/27/00; contractures in 12/00; UTI on 08/14/92; infections on 07/01/96, 12/21/98, and 11/21/00; multiple incidents of failure by the facility to follow physician's orders; and fraudulent, incomplete, or inaccurate documentation throughout the residency. Supp. R. 121 – 153; Supp. R. 354 – 389; H.T. 16 – 17.

During the period that Montgomery was a resident at Adams Nursing Center, St. Paul Fire and Marine Insurance Company ("St. Paul"), Reciprocal of America (formerly known as Virginia Insurance Reciprocal)("ROA"), Caliber One Indemnity ("Caliber One"), Colony Insurance Company ("Colony") and Certain Underwriters at Lloyds,

London ("Lloyds") issued policies of insurance insuring one or more of the nursing home defendants.

St. Paul issued Policy No. NK00300288, effective August 1, 1992 to August 1, 1993; effective August 1, 1993 to August 1, 1994; and effective August 1, 1994 to August 1, 1995 with limits of $1,000,000 for each event for health care commercial general liability coverage and $1,000,000 for any one person for health care professional liability coverage. Exhibit A to Supp. R. 1840 – 1976; 1594 – 1711; 1712 – 1839. St. Paul also issued Policy No. 503XB6279, effective August 1, 1992 to August 1, 1993; effective August 1, 1993 to August 1, 1994; and effective August 1, 1994 to August 1, 1995, with limits of $5,000,000 each event. Exhibit A to Supp. R.113 – 146; 147 – 216; 1314 – 1337; 1366 - 1438.

ROA issued primary and excess policies insuring the nursing home with coverage from August 1, 1995 to September 1, 1999 with a total maximum coverage during Ms. Montgomery's residency in excess of the MIGA statutory limit of $300,000 pursuant to Miss. Code Ann. §83-23-115(1)(a)(iii). Exhibit A to Supp. R. 1147 – 1184; 1185 – 1216; 217 – 250; 1248 – 1313.

Caliber One issued Policy No. GPO 0001045-01, effective September 1, 1999 to June 18, 2000, with limits of $1,000,000 for each event for health care commercial general liability coverage, and $1,000,000 for any one person for health care professional liability coverage. Exhibit A to Supp. R. 1527-1593; 2075 - 2112. Colony issued Policy No. AP706014, effective June 18, 2000 to January 1, 2001, with limits of $1,000,000 for each event for health care commercial general liability coverage, and

[1] References to the Record are noted as R ___, references to the Supplemental Record are noted as Supp. R.__, and references to the Hearing Transcript are noted as H.T. ___.

$1,000,000 for any one person for health care professional liability coverage. Exhibit A to Supp. R. 1477-1526.

Lloyds issued Policy No. UP00US360029, effective January 1, 2001 to June 18, 2002, on which Adams Community Care Center, LLC, was added as a named insured, effective May 1, 2001, with limits of $1,000,000 for each event for health care commercial general liability coverage and $1,000,000 for any one person for health care professional liability coverage. Exhibit A to Supp. R. 2113 - 2236.

Following the filing of the original Montgomery Complaint on January 24, 2002, ROA assumed the defense of this action and retained counsel for all of the nursing home defendants. Subsequently, St. Paul, Caliber One, Colony, and Lloyds were placed on notice of this action and began sharing in the defense costs with ROA on a one-fourth cost share going forward.

On or about June 20, 2003, ROA was declared insolvent and placed into liquidation in the Commonwealth of Virginia. Supp. R. 26 – 30. Pursuant to the provisions of the Guaranty Act, Miss. Code Ann. §§83-23-101 *et seq.*, MIGA assumed ROA's obligations under the ROA policies. MIGA, St. Paul, Colony, and Lloyds agreed to retain Lynda Carter as counsel for the nursing home defendants following ROA's insolvency.

On or about October 6, 2004, the nursing home defendants and their insurers, St. Paul, Colony, Caliber One, and Lloyds, reached an agreement with the Conservator to settle all of the claims ***arising out of or in any way related to any incidents which occurred or accrued on or before August 1, 1995 and/or on or after September 1, 1999 or otherwise fall within or arise under the coverage periods of the referenced policies issued by St. Paul, Colony, Caliber One, and Lloyds***, which

were asserted or could have been asserted in this action. The settlement agreement specifically reserved the Conservator's right to recover an additional $300,000 from MIGA; the statutory limit that may be recovered from MIGA pursuant to Miss. Code Ann. §83-23-115(1)(a)(iii) for the ROA coverage. Supp. R. 284 - 309. By letter dated October 7, 2004, MIGA was advised of the Conservator's settlement offer seeking MIGA's maximum statutory obligation of $300,000. Supp. R. 310 - 311. However by letter dated October 19, 2004, MIGA advised that it was not obligated to contribute to any settlement on behalf of ROA. Supp. R. 312 - 316.

All insurers named above, except MIGA, conditionally accepted the Conservator's settlement demand and agreed to pay an amount to settle and release all claims against the nursing home defendants and said insurers for any exposures ***arising out of the coverage periods of their policies***. MIGA was advised of the parties' desire to settle the claims against them but refused to make any indemnity payment to settle or otherwise resolve the Conservator's claims for negligent acts that occurred during the time that ROA provided coverage. Despite MIGA's refusal to fulfill its statutory obligation, the nursing home defendants and their insurers negotiated a settlement with the Conservator to settle the claims against them.

On January 4, 2006, the nursing home defendants and the Conservator (hereinafter collectively the "Defendants") filed a motion with the Adams County Circuit Court to approve the parties' settlement agreement. Supp. R. 156 – 163. As the interests of MIGA were affected by the settlement reached, it was served with a copy of the motion to approve the settlement in order to give MIGA an opportunity to make any objection to the settlement it deemed appropriate. Following a hearing on January 20, 2006, the Adams County Circuit Court entered an order approving the motion to settle

on January 20, 2006. Supp. R. 317 - 319. MIGA attended the hearing on the motion to approve the settlement.

Subsequently, MIGA filed a declaratory action seeking to have the Circuit Court construe the applicable provisions of the ROA policies and the Guaranty Act statutes to determine whether it was obligated to indemnify the Defendants for the claims accruing during the insolvent ROA's coverage period. R. 10 - 13.

II. The Lane Case

The Estate of Roberta Lane, by and through an Administratrix, filed a nursing home negligence action in the Circuit Court of Sharkey County, Mississippi, against Louisiana Extended Care Centers, Inc. Magnolia Management Corporation, and Legacy Health Care Services, Inc., (the "nursing home defendants") in Cause No. 2000-59 (the "Lane case"). Supp. R. 31 – 51. It was alleged and pled that the nursing home defendants were negligent as the owners and operators of Heritage Manor of Rolling Fork nursing home during Roberta Lane's residency from approximately 1989 to 1998. Specifically, the Lane Complaint alleged that during her residency, Ms. Lane suffered: an infected amputation stump in January 1995; falls in June 1995, May 1996, December 1996, March 1997, September 1997, September 1998, October 16, 1998 and a fall which resulted in a fractured hip on October 25, 1998; a fractured finger in September 1997; a Stage II stasis ulcer in June 1996; a Stage II superficial wound or abrasion in June 1998; an ear infection in November 1997 and several incidents of hyperglemcia and hypoglycemia at various times during her residency. Supp. R. 31 – 51; Supp. R. 390 – 419; H.T. 16 – 17.

During the period that Lane was a resident at Heritage Manor, St. Paul Fire and Marine Insurance Company ("St. Paul") and Reciprocal of America (formerly known as

Virginia Insurance Reciprocal) ("ROA") issued policies of insurance insuring the nursing home defendants. St. Paul issued policy NK00300290 effective August 1, 1992 to August 1, 1995, with limits of $1,000,000 for each event for health care commercial general liability coverage and $1,000,000 any one person for health care professional liability coverage. Exhibit A to Supp. R. 371 – 507; 508 – 631; 632 - 766. St. Paul also issued a second policy, effective August 1, 1992 to August 1, 1995, with limits of $5,000,000 for each event for health care umbrella excess liability coverage. Exhibit A to Supp. R. 1 – 112. ROA issued primary and excess policies insuring the defendants with coverage from August 1, 1995 to September 1, 1999 with a total maximum coverage during Ms. Lane's residency in excess of the MIGA statutory limit of $300,000 pursuant to Miss. Code Ann. §83-23-115(1)(a)(iii). Exhibit A to Supp. R. 1147 – 1184; 1185 – 1216; 217 – 250; 1248 – 1313.

Following the filing of the original Lane Complaint in September 2000, ROA assumed the defense of this action and retained counsel for all of the nursing home defendants. In November 2002, St. Paul was placed on notice of the Lane action, and St. Paul began sharing in the costs for defending with ROA on a 50/50 basis in November 2002. On or about June 20, 2003, ROA was declared insolvent and placed into liquidation in the Commonwealth of Virginia. Pursuant to the provisions of the Guaranty Act, Miss. Code Ann. §§83-23-101 *et seq.*, MIGA assumed ROA's obligations under the ROA policies. MIGA and St. Paul agreed to retain Lynda Carter as counsel for the defendants following ROA's insolvency.

In the spring of 2004, MIGA and St. Paul agreed to attempt to settle the Estate's claims against the nursing home defendants through mediation. However on June 22, 2004, one day prior to a scheduled June 23, 2004 mediation, MIGA issued a letter

informing St. Paul and the Estate that it had changed its position regarding its obligation to indemnify. Supp. R. 320-321. MIGA further stated that while it would attend the mediation and continue to provide a defense to the defendants, it claimed no duty to indemnify under the provisions of the ROA policies and Miss. Code Ann. §83-23-123. Supp. R. 320 – 321. On June 23, 2004, the parties, including MIGA, attended a mediation in Hinds County, Mississippi. However, due to MIGA's refusal to indemnify the nursing home defendants, the mediation was unsuccessful. Such refusal to indemnify was without justifiable basis or a viable argument.

Following the failed mediation, the Estate offered to settle its claims against the nursing home defendants on August 17, 2004 for the claims and damages that ***occurred or accrued during the coverage period provided by the St. Paul policies*** and ***$300,000 for and all claims, causes of action and damages that occurred or accrued during the coverage period provided by ROA.*** Supp. R. 322 - 332.

The nursing home defendants determined that the amount of $300,000 for alleged negligent acts that occurred during the ROA coverage period would be a reasonable settlement value since most of the claimed injuries suffered by Ms. Lane were due to the negligence of the nursing home defendants that occurred ***during the ROA coverage period*** including, six falls, the last of which resulted in a broken hip, a fractured finger, multiple open wounds, one or more infections and several incidents of hyperglemcia and hypoglycemia. Each of those incidents constituted ***a separate and unrelated "medical incident" as defined by the insurance policies, including that of ROA.***

St. Paul conditionally accepted the Estate's settlement demand and agreed to pay to settle and release all claims against the nursing home defendants and St. Paul for any exposures ***arising out of the coverage periods of the St. Paul policies***.

MIGA was advised of the Estate's offer and the nursing home defendants' desire to settle the claims against them. MIGA continued to insist that it had no duty to indemnify them or otherwise resolve the Estate's claims for negligent acts that occurred during the time that ROA was providing coverage.

On May 9, 2005, the nursing home defendants and the Lane Estate (hereinafter collectively the "Defendants") filed a motion with the Sharkey County Circuit Court to approve the parties' settlement agreement. Supp. R. 54 – 66. Since the interests of MIGA were affected by the settlement reached, it was served with a copy of the motion to approve the settlement in order to give MIGA an opportunity to make any objection it deemed appropriate. Following a hearing on June 23, 2005, the Sharkey County Circuit Court entered an order approving the motion to settle on August 10, 2005. Supp. R. 346 - 353. MIGA attended the hearing on the motion to approve the settlement.

Subsequently, MIGA filed a declaratory action seeking to have the Circuit Court construe the applicable provisions of the ROA policies and The Guaranty Act statutes to determine whether it was obligated to indemnify the nursing home defendants for the claims occurring during the insolvent ROA's coverage period. R. 10 – 13. Both declaratory actions in the Montgomery and Lane cases were consolidated into one action before the Circuit Court of Madison County. R. 114 – 115.

On September 11, 2009, MIGA filed a Motion for Summary Judgment and a Memorandum in Support asserting entitlement to credit for amounts paid by the solvent insurers to settle claims for injuries arising out of the coverage periods of their policies

pursuant to Miss. Code Ann. §§83-23-123. Supp. R. 16 - 257. In opposition, Defendants responded with a Cross-Motion for Summary Judgment and Memorandum of Support. Defendants sought an Order requiring MIGA to indemnify the Defendants the statutory maximum provided by law as there existed no solvent coverage for the incidents for which MIGA was obligated to pay thereby rendering the exhaustion provision of Miss. Code Ann. §§83-23-123 inapplicable. Supp. R. 258 - 419.

A hearing on the Motions for Summary Judgment was held on February 8, 2010 wherein the Circuit Court of Madison County heard arguments by both parties. H.T. 4 – 31. On May 14, 2010, the Circuit Court Judge entered an Order granting MIGA's Motion for Summary Judgment and Denying Defendants' Cross-Motion for Summary Judgment finding that MIGA was entitled to credit for amounts paid by the other insurance carriers to settle the claims in the nursing home cases. R. 344 – 347. The Circuit Court incorrectly held that the settled nursing homes claims covered injuries of a continuing nature thereby implicating the coverage from the solvent insurance carriers who provided coverage for injuries accruing outside of the insolvent ROA coverage. R. 344-347. As a result, the Circuit Court held that MIGA was entitled to set off the amounts paid by the solvent insurers to eliminate its obligation to pay under the Guaranty Act. R. 344 – 347.

Defendants filed a timely Notice of Appeal on June 11, 2010 asking this Court to reverse the decision of the Circuit Court and Order MIGA to indemnify the Defendants in the amount of $300,000 pursuant to the Guaranty Act. Miss. Code Ann. § 83-23-101, *et seq.* R. 348 – 350.

SUMMARY OF THE ARGUMENT

ROA issued primary and excess policies insuring nursing homes with coverage from August 1, 1995 to September 1, 1999. ROA was subsequently declared insolvent and placed into liquidation. Pursuant to the Guaranty Act, Miss. Code Ann. § 83-23-101 *et seq.*, MIGA was statutorily obligated to step into the shoes of the insolvent ROA insurer, provide a defense, and pay a judgment or settlement against the insured up to a statutory maximum of $300,000. Miss. Code Ann. § 115. Instead, MIGA claimed that its statutory obligation to pay was absolved by the solvent insurers' payments to settle negligence claims against the insured nursing homes that accrued during their respective policy coverage. The Circuit Court of Madison County agreed with MIGA's position. However, such an interpretation of the Guaranty Act statutes is incorrect.

According to the non-duplication provision of Miss. Code Ann. § 83-23-123, only claims which are specifically defined by the Guaranty Act as "covered claims" must be exhausted before seeking recovery from MIGA. Under the plain reading of the statute, only amounts paid by solvent insurers for "covered claims" will reduce MIGA's liability under the Guaranty Act.

In the instant matter, the settled nursing home claims are not "covered claims" as defined under the Guaranty Act. That is, the settled claims did not arise out of and were not within an insurance policy that had become insolvent. Miss. Code Ann. §83-23-109 (f). Indeed, the only "covered claims" are the claims that accrued during the coverage period of the insolvent ROA.

The claims that were settled by the solvent insurers corresponded to injuries and damages that accrued during their respective coverage periods. The insolvent ROA

policy did not provide any insurance coverage for these periods thereby eliminating any contractual duty to pay for the injuries and damages implicated by the settlements.

Moreover, during the insolvent ROA coverage, ***there existed no other insurance that could be exhausted under Miss. Code § 83-23-123.*** As such, ***there existed no solvent coverage for the damages for which MIGA is obligated to pay*** rendering the application of the non-duplication provision improper. Consequently, MIGA is not entitled to a credit for the payments by the solvent insurers and is required to indemnify Defendants in the amount of $300,000 for each settlement in the Montgomery and Lane cases, for the claims that accrued during the ROA coverage period. An interpretation to the contrary turns the language of the Guaranty Act and insurance policies on their head.

STANDARD OF REVIEW

In reviewing a Circuit Court's ruling on summary judgment, this Court applies a *de novo* standard of review. *Monsanto Co. v. Hall*, 912 So.2d 134, 136 (2005). Similarly, when the Court is required to interpret statutory provisions, the standard of review is *de novo*. *Warren v. Johnston*, 908 So.2d 744 (Miss. 2005). On appeal, this Court:

> [E]mploys a *de novo* standard of review in reviewing a lower court's grant of summary judgment motion. Summary Judgment is appropriate if the evidence before the Court – admission in the pleadings, answers to interrogatories, depositions, affidavits, etc. – shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. This court does not try issues on a Rule 56 motion, but only determines whether there are issues to be tried. In reaching this determination, the Court examines affidavits and other evidence to determine whether a triable issue exists, rather than the purpose of resolving that issue.

Leitch v. Mississippi Ins. Guar. Ass'n, 27 So.3d 396, 397 (Miss. 2010).

ARGUMENT

I. The Circuit Court Erred in Holding that MIGA is Entitled to Credit for Payments By Solvent Insurers to Settle Negligence Claims that Accrued During Their Respective Coverage Periods for Which the Insolvent Insurer did not Provide Coverage and Erred in Holding that MIGA is not Required to Indemnify Defendants Pursuant to Miss. Code Ann. § 83-23-123

a. The Settled Claims Are Not "Covered Claims" Within the Meaning of the Guaranty Act

The purpose of the Mississippi Insurance Guaranty Association Law (hereinafter the "Guaranty Act") "is to provide a mechanism for the payment of ***covered claims*** under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." Miss. Code Ann. § 83-23-103 (emphasis added). The Guaranty Act statutes are to be liberally construed to effect the purpose under § 83-23-103. *See, e.g., Miss. Ins. Guar. Ass'n v. Harkins & Co.*, 652 So.2d 732, 735 (Miss. 1995). The stated purpose "shall constitute an aid and guide to interpretation" of the provisions of the MIGA statutes. Miss. Code Ann. § 83-23-107. Generally, MIGA is required to step into the shoes of the insolvent insurer and is statutorily obligated to provide a defense against a claim and to pay a judgment against the insured of an insolvent insurance company up to a statutory maximum of $300,000. Miss. Code Ann. § 83-23-115(b). However, MIGA is prohibited by statute from paying anything other than a "covered claim". *Miss. Ins. Guar. Ass'n v. Byars*, 614 So.2d 959, 963 (Miss. 1993). Further, MIGA's payment must not be duplicated thereby requiring that all other sources of insurance encompassing the "covered claim" be exhausted before looking to MIGA for any coverage. *Id.* The instant appeal centers around the interpretation of the non-duplication of recovery provision.

The Circuit Court of Madison County agreed with MIGA that the settled nursing home claims were "covered claims" entitling MIGA to a credit for the payments made by the solvent insurers pursuant to the non-duplication provision. However, such an interpretation is in direct conflict with the statutory language of the Guaranty Act and turns its very purpose on its head. A review of the statutory language will expose the Circuit Court and MIGA's misinterpretation of the relevant statutes.

The non-duplication provision of the Guaranty Act provides:

> Any person have 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.

Miss. Code Ann. § 83-23-123(1)(emphasis added). Under a plain reading of the statute, an offset of recovery is only permitted on "covered claims." A covered claim under MIGA is defined as:

> "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 resident 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). In other words, a "covered claim" refers to a claim arising out of and within an insurance policy issued by the now insolvent insurer. Thus, under the very words of the statute, the settled nursing home claims are not "covered claims" as they do not arise out of an insurance policy issued by a now insolvent insurer. In the instant action, the only "covered claims" as defined by the Guaranty Act are the claims for injuries that occurred to Montgomery and Lane

during the coverage period of the insolvent ROA. Consequently, as the settled nursing home claims are not "covered claims" within the confines of § 83-23-109(f), the non-duplication provision of the Guaranty Act is inapplicable. Specifically, Miss. Code Ann. §83-23-123(1) provides that in the event another insurance policy under a solvent carrier provided coverage for the injuries complained of, the proceeds of the second policy covering those same injuries would first have to be exhausted before MIGA would be statutorily mandated to contribute to any settlement. In the instant appeal, there are no other insurance policies covering the injuries suffered by Ms. Montgomery and Ms. Lane during the coverage period for the insolvent ROA. As such, there exists no solvent insurance coverage that requires exhaustion prior to seeking recovery from MIGA. Therefore, MIGA is in no way entitled to an offset that would have the effect of extinguishing its liability.

b. There Exists No Solvent Insurance for the Injuries for which MIGA is Obligated to Pay

During the ROA insurance coverage period, there existed no other insurance that covered the injuries during that time period. Consequently, there was no solvent insurance applicable to the claims during the period of August 1, 1995 to September 1, 1999, thereby precluding MIGA from receiving any credit for the payments received through the settlements. H. T. 14 – 18.

The Lane and Montgomery Complaints allege numerous and separate acts of negligence by the employees of the nursing homes in providing nursing care to Lane and Montgomery during their residencies. The Complaints allege that the residents suffered separate and individual injuries as a result of the action and inactions of the nursing home employees. Specifically, while Montgomery was a resident at Adams County Nursing Center, she suffered: falls on at least fifty-four (54) occasions from

08/10/93 through 12/9/99; multiple injuries received between 01/30/95 and 08/04/99 including scratches, abrasions, and bruises; dehydration in 12/94 and on 02/01/01; weight loss (over the period of 10/24/95 – 12/21/99); pressure ulcers/skin breakdown on various occasions from 10/10/95 through 08/27/00; contractures in 12/00; UTI on 08/14/92; infections on 07/01/96, 12/21/98, and 11/21/00; multiple incidents of failure by the facility to follow physician's orders; and fraudulent, incomplete, or inaccurate documentation throughout the residency. Supp. R. 354 - 389. Similarly, while Lane was a resident at Heritage Manor, she suffered: falls in May 1996, December 1996, March 1997, September 1997, September 1998, October 16, 1998 and a fall which resulted in a fractured hip on October 25, 1998; a fractured finger in September 1997; a Stage II stasis ulcer in June 1996; multiple open wounds; an ear infection in November 1997 and several incidents of hyperglemcia and hypoglycemia at various times during her residency. Supp. R. 390 - 419.

Each of these incidents constitute a separate and unrelated "medical incident" as defined by the applicable insurance policies. "Whether there was one occurrence of more is determined by the policies' respective terms." *Royal Ins. Co. of America v. Caliber One Indemnity Co.*, 465 F.3d 614, 621 (5th Cir. 2006). The pertinent provisions in the policies are as follows:

1. The ***ROA*** policies define "medical incident" as:

   > "[a]ny such act or omission, together with all ***related acts or omissions*** in the furnishing of such services to one or more person shall be considered one Medical Incident." ROA Policy Section VIII (G).

2. The ***St. Paul*** Health Care Facility Professional Liability Protection policies state:

Professional liability coverage. We'll pay amounts you and others protected under this agreement are legally required to pay to compensate others for injury or death resulting from any of the following:

*the providing or failure to provide professional services while this agreement is still in effect.

The Umbrella Excess Liability Protection policies state:

Bodily Injury and Property Damage Liability

We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:

- happens ***while this agreement is in effect;*** and is
- caused by an event

Event means an accident, including ***continuous or repeated exposure to substantially the same general harmful conditions***.

3. The ***Coliny*** Insurance Policy provides:

Section I – Coverages

Coverage A. Bodily Injury and Property Damage Liability

1. **Insuring Agreement.**

A. We will pay on behalf of the insured the "ultimate net loss" in excess of the "retained limit" which the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

This insurance applies to "bodily injury" or "property damage" only if:

(1)The "bodily injury" or "property damage" is caused by any "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" ***occurs during the policy period***.

Section V – Definitions

"Occurrence" means an accident, including ***continuous or repeated exposure to substantially the same general harmful conditions***.

4. ***Caliber*** Insurance Policy states:

Coverage A. Bodily Injury and Property Damage Liability

1. Insuring Agreement.

A. We will pay on behalf of the insured the "ultimate net loss" in excess of the "retained limit" which the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

This insurance applies to "bodily injury" or "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by any "occurrence" that takes place in the "coverage territory"; and
(2) The "bodily injury" or "property damage" occurs during the policy period.

Section V – Definitions

"Occurrence" means an accident, including ***continuous or repeated exposure to substantially the same general harmful conditions.***

5. ***U.S. Risk/Lloyd's*** of London Policy states:

Professional, General and Employee Benefit Liability Policy
Section I – Coverages

(A) Professional Liability Insurance:

We will pay those sums in excess of the deductible amount specified in Item 4 of the Declarations which the "Insured" becomes legally obligated to pay as "Damages" as a result of any "Occurrence" caused by a "Medical Incident;" provided that such "Medical Incident" first occurs in the "Coverage Territory" and during the "Policy Period."

Section V – Definitions

"Medical Incident" means any act, error or omission arising out of the providing of or failure to provide "Professional Health Care Services" by the "Insured" or any person for whom the "Insured" is legally responsible.

> "Occurrence" means an event, or ***continuous, intermittent or repeated exposure to conditions*** which causes "Injury" under Insuring Agreement (A) or "Bodily Injury", "Property Damage" or "Advertising Injury" under Insuring Agreement (B).

Exhibit A to Supp. R. 238 – 245; 450 – 452; 15 – 31; 1501 – 1514; 2079 – 2102; 2156 - 2175 (emphasis added); H.T. 23 - 25. These policies, including the ROA policy, combine multiple occurrences into a single occurrence when the incidents ***occur within the coverage period*** and when they include exposure to ***related acts that are substantially the same general harmful conditions.*** That is, the insurers are only contractually obligated to pay for injuries that arise from exposure to related acts within the coverage period. Certainly, a fall that occurred on June 10, 1993 (for which St. Paul provided insurance coverage) would not be related nor constitute a substantially similar harmful condition as the development of a pressure ulcer on October 10, 1995 (for which ROA provided insurance coverage). These are two separate and divisible injuries that in no way constitute a single occurrence pursuant to the policies. H.T. 17. Indeed, had ROA not become insolvent, ROA would only have paid to settle incidents and injuries within its coverage. An insurance carrier would not have agreed to settle incidents and injuries that fell outside of its coverage. Instead, it would limit any settlement to those incidents and injuries that occurred within its coverage period. As a result of MIGA's statutory obligation to step into the shoes of ROA, MIGA became responsible for the incidents and injuries that ROA would have been had it not become insolvent.

The instant matter is akin to the facts and holding in *Universal Underwriters Ins. Co. v. Ford*, 734 So.2d 173 (Miss. 1999). *Ford* involved an employee who embezzled money from her employer on 175 different occasions. This Court held 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." *Id.* (*citing Business Interiors, Inc. v. Aetna Cas. & Sur. Co.*, 751 F.2d 361 (10th Cir. 1984). Since the policy did not unambiguously state that multiple injuries may not result in multiple occurrences, the *Ford* court found that the policy was ambiguous and held that each act of embezzlement constituted a separate occurrence. Based on the language of the applicable insurance policies, the cause here requires the same result.

Recently, the Fifth Circuit Court of Appeals addressed similar insurance policies in *Royal Ins. Co. of America v. Caliber One Indemnity Co.*, 465 F.3d 614 (5th Cir. 2006). H.T. 18 – 22. In *Royal*, an excess carrier sued two primary insurance carriers in state court to recover $1,000,000 it paid on behalf of the parties' common insured to settle wrongful death and survival claims arising out of the care of a nursing home resident. *Id.* at 616. Subsequently, the case was removed to federal court. Except for brief hospitalizations, the nursing home resident remained at the home for almost three years. *Id.* During the residency, the nursing home was insured by a primary insurer for two out of the three years ("Hartford"), another primary insurer during the third year ("Caliber"), with an excess insurer providing coverage in the last two years of the residency ("Royal"). *Id.* One of the issues addressed by the appellate court included whether the primary limits for Harford and Caliber could be stacked to create a higher policy limit. *Id.* at 621.

The court looked to the policy terms to determine whether there were single or multiple occurrences. *Id.* The *Royal* court held that the pleading at the time of the settlement focused on the last several months of the resident's life and the injuries and conditions leading to her death; all of which occurred during the Caliber's policy period.

Id. at 623. Expert testimony was presented that employees were negligent at different times during the period that the first primary policy was in effect and that the negligence caused discrete injuries to the resident. The breaches of the standard of care included: failure to clean the resident and apply medication leading to rashes; failure to supervise the resident and secure her in her wheelchair causing bruises on her hands; failure to treat the resident's severe stomach pain; and failure to prevent a urinary tract infection and skin tears. *Id.* "These breaches of the standard of care and the resulting injuries are divisible from the alleged acts of negligence that occurred a year later that caused pneumonia, and a massive, infected Stage IV pressure sore and resulting sepsis, leading to [the resident's] death." *Id.*

The Caliber Policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The court found that "most if not all of the alleged negligence involved acts or omission of caregivers, not the conditions of the nursing home's facilities or the ambient air." *Id.* at 624. The appellate court stated:

> The numerous independent grounds of negligence that were alleged to have occurred throughout the residency cannot be unified as repeated exposure to substantially the same conditions. The acts and omission that caused Trevino's Stage IV pressure sore, pneumonia, and other injuries that allegedly resulted in her death are divisible from the acts and omissions and Trevino's resulting injuries during Hartford's policy period.

Id. 624-25. Thus, the claims asserted were multiple occurrences, not a single occurrence involving an indivisible injury thereby prohibiting stacking. *Id.* at 625. The situation here warrants the same result.

The Lane Estate settled with the nursing home defendants for injuries which occurred or accrued prior to August 1, 1995 and fell within or arise under St. Paul coverage period. Similarly, the Montgomery Estate settled with the nursing home

defendants for claims arising out of incidents which occurred or accrued on or before August 1, 1995 and/or on or after September 1, 1999; claims that arose under the coverage periods of the policies issued by St. Paul, Colony, Caliber One, and Lloyds. Any claims that accrued on or after August 1, 1995 and on or before September 1, 1999, the coverage period for ROA, were in no way implicated by the settlements as they involved injuries that were distinct and divisible from those covered by the ROA policy. The Circuit Court and MIGA 's interpretation to the contrary is simply incorrect.

The very arguments asserted by MIGA in its Motion for Summary Judgment were rejected by this Court in *Miss. Ins. Guaranty Ass'n v. Cole*, 954 So.2d 407 (Miss. 2007). This Court held that the claims against co-defendants were not "covered claims" under the Guaranty Act. Thus the patient was not required to first exhaust her rights under the policy covering the co-defendants before seeking recovery from MIGA and any recovery from the co-defendants' insurer would not reduce the recovery from MIGA. *Id.* In interpreting the meaning of "covered claim," this Court noted:

> In its unambiguous and simplest terms, a "covered claim" is an unpaid claim, with a few restrictions, that is "issued by an insurer, if such insurer becomes an insolvent insurer and "meets condition (1) or (2) of the definition. ***The clear and unambiguous key to the definition is that a "covered claim," under the Guaranty Act, relates to circumstances involve a once-solvent insurer that becomes solvent.***

Id. at 413 (emphasis added). This Court then analyzed the proposed statutory language of §83-23-123 (1) which provided:

> Any person having a claim against an insurer ***under any provision in an insurance policy other than the policy of an insolvent insurer,*** which is also a covered claim, shall be required to exhaust first his right under such policy regardless of the nature of the insurance coverage and regardless of whether the coverage is written as first party or third party coverage, including, but not limited to, coverages available to co-defendants or joint tortfeasors in any claim or action . . .

Id. (*citing* to S.B. 2353, 2005 Leg., 120th Sess. (Miss. 2005)). The fact that the legislature did not adopt the proposed amendment further supported the fact that the current statute does not require exhaustion of the insurance by co-defendants. "The statute states that a 'covered claim' arises from an insurance policy issued from a later insolvent insurance carrier." *Id.*

Ultimately, this Court determined that the claims against the co-defendants, who had solvent insurance policies, were not "covered claims," thereby rejecting MIGA's assertion of a credit entitlement for the amounts paid by the solvent insurers. Although the *Coles* case dealt with insurance payments from co-defendants, this Court's reasoning and analysis in the case is most certainly helpful to resolve the issues presented by the instant matter. The clear and unambiguous terms of the non-duplication provision require that the claims alleged arise out of and is within an insurance policy issued from a later insolvent insurance carrier. Here, there is no solvent insurance coverage for the claims that MIGA is required to pay. The claims that were settled by the solvent insurance companies were for incidents that occurred outside of the ROA coverage and as such were not part of a "covered claim" pursuant to the Guaranty Act. As in *Coles,* the insurance coverage for the settled claims remained solvent at all times and did not implicate the claims for which ROA and MIGA have liability.

Despite the settlement payments from solvent insurance carriers providing coverage for dates outside of the ROA coverage, MIGA continues to have an obligation to contribute its statutory maximum coverage of $300,000 for incidents and injuries that occurred during the ROA coverage. From August 1, 1995 until September 1, 1999, when Ms. Montgomery suffered from falls, multiple injuries including scratches,

abrasions, and bruises, pressure ulcers, and infections, the only insurance policy in effect was that of ROA, which later became insolvent implicating MIGA's obligation and liability. Similarly, from August 1, 1995 until September 1,1999, when Ms. Lane suffered a fractured finger on September 20, 1997 and seven falls with three of them occurring between September 27, 1998 and October 25, 1998, with the final fall resulting in a hip fracture, the only insurance policy in effect was that of ROA who later became insolvent implicating MIGA's obligation and liability.

Also instructive to the issues presented in the instant matter is the decision in *Leitch v. Miss. Ins. Guaranty Ass'n.*, 27 So.3d 396 (Miss. 2010). Although the Circuit Court relied on this case in its ruling, the Circuit Court misinterpreted this Court's ruling. In *Leitch*, the plaintiff filed a negligence action against the driver of a truck and its owner for injuries he suffered when the truck suddenly pulled out in front of him. *Id.* at 397. At the time of the accident, the owner of the truck had liability insurance which later became insolvent. Subsequently, the plaintiff amended his complaint to add his auto insurance carrier, State Farm Mutual Automobile Insurance Co. as a defendant seeking to recover $300,000; the policy limit of his uninsured motorist coverage. *Id.* Following a settlement with State Farm for the policy limits, the plaintiff filed a declaratory action against MIGA seeking to have the court declare that MIGA was obligated to pay the $300,000 statutory liability limit because of the liability insurance's insolvency. *Id.* MIGA made a motion for summary judgment contending that it was entitled to credit the settlement with State Farm against its liability thereby absolving it of any obligation. *Id.*

Applying the reasoning from *Coles,* this Court found that the claim for uninsured motorist benefits against State Farm was a "covered claim" as defined by 83-23-109 (f)

as his claim against the solvent insurer was the same claim against MIGA. *Id.* at 399. In reaching its decision, this Court clarified its reasoning in *Coles* by stating:

> 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).

Id. at 400 (emphasis added). Applying this rationale, the *Leitch* case presented a plaintiff who made a claim against the solvent insurer, State Farm, which was the same as the "covered claim" he now pursued against MIGA. Accordingly, MIGA was entitled to reduce its obligation in the amount of the settlement. *Id.* at 401.

Certainly, this is not the type of situation presented here. The claims that were settled with the solvent insurance carriers are not the same claims as those that MIGA is obligated to pay. That is, the settlements resolved claims for distinct injuries that Ms. Montgomery and Ms. Lane suffered during their nursing home residencies outside of the ROA coverage. Unlike *Leitch*, the claims pursued against the solvent insurers are not the same claims Defendants pursue against MIGA. It necessarily follows that the claims against the solvent insurance carriers are not "covered claims" as defined by the Mississippi Supreme Court in *Coles* and *Leitch.*

Moreover, in *Leitch*, the solvent insurance carrier covered the same incident and injuries that the insolvent insurer covered. As discussed in detail above, that is not the situation presented here. The solvent insurers settled negligence claims for incidents and injuries during their respective coverage periods. The solvent insurers did not insure against any incidents and injuries during the insolvent ROA's coverage. Unlike the *Leitch* scenario, the only insurance coverage available for the injuries and incidents

from August 1, 1995 to September 1, 1999 was the insolvent ROA coverage. Consequently, there exists no solvent insurance that could be exhausted under Miss. Code Ann. § 83-23-123.

Although there is no reported opinion in Mississippi that directly addresses the issue presented here, opinions from other states support Defendants' interpretation[2]. In *CD Investment Co., v. California Ins. Guar. Ass'n.*, 84 Cal.App.4th 1410 (2000), a money judgment was entered against the defendants. To pay the judgment, the defendants looked to their insurers; two of which became insolvent. *Id.* at 1415. Three solvent insurers paid a portion towards the judgment. With respect to the insolvent insurers, the defendants sought recovery from the California Insurance Guarantee Association (CIGA) which is required by statute to pay a "covered claim" on behalf of an insolvent insurer, up to a maximum of $500,000. *Id.* CIGA refused to make any payments contending that it was entitled to a credit of the amount paid by the solvent insurers which exceeded and extinguished its liability. *Id.* at 1416.

CD Investment had a separate covered claim under each of the insolvent insurers' policies, ***none of which were covered by any other insurance.*** *Id.* at 1426. Given the lack of other insurance, CIGA's $500,000 cap had not been met on any of those claims. Additionally, CIGA's contention was flawed because it improperly used the payments by the solvent insurers to offset and eliminate its own obligation to make payments on behalf of the insolvent insurers. *Id.* at 1427. In soundly rejecting CIGA's interpretation, the court stated:

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[2] This Court has recently stated: "Although our interpretations are not controlled by the decisions of other jurisdictions, they aid us in our determination of what is a reasonable interpretation – particularly where those other jurisdictions have interpreted the same or substantially similar language." *Leitch v. Mississippi Ins. Guar. Ass'n*, 27 So.3d 396, 400 (Miss. 2010).

> On this issue, we do not write on a clean slate. The courts of other states, in applying their own insurance guaranty laws, have soundly rejected CIGA's interpretation.
>
> . . . .
>
> As the Supreme Court of Connecticut has explained: "The evident purpose of providing in [the 'other insurance' provisions] for a reduction of a covered claim 'by the amount of any recovery' from other available ***insurance was to prevent a person from twice receiving benefits for the same loss or otherwise obtaining a windfall, not to reduce the amount of a claim for a loss that remains partially unsatisfied.*** . . .

Id.(emphasis added), *accord Cimini v. Nevada Ins. Guar. Ass'n*, 915 P.2d 279, 282 (Nev. 1996); *Aztec v. Prop. & Cas. Ins. Guar. Ass'n.*, 853 P.2d 726, 731 (N.M. 1993). Further, the court noted that CIGA's interpretation would lead to absurd consequences.

> For example, under CIGA's view, a company would purchase two successive policies, each from a different insurer, and each providing $500,000 in coverage. The insurance is sued for several million dollars in a case alleging continuous and progressive property damage. One of the insurers has become insolvent, so the insured files a claim with CIGA. The insured also files a claim with the solvent insurer. The case settles for $1 million (a reasonable sum), and the solvent insurer pays its policy limits of $500,000. CIGA would then refuse to pay anything on the ground that the insured had already recovered $500,000. In addition, the insured would sustain a loss on the premiums paid to the insolvent insurer.
>
> In contrast, if the insured had purchased only the policy from the insolvent insurer, it would still receive $500,000 (paid by CIGA), and it would receive all of the insurance benefits for which it paid. Thus, under CIGA's interpretation, the insured would be put in a worse position for having bought two policies. We decline to apply the CIGA statutes in this manner.

Id. at 1428.

MIGA's interpretation of the Mississippi statute would lead to similar absurd consequences. The interpretation which the Circuit Court and MIGA urges this Court to adopt would also leave injured claimants financially at a loss because of the ROA insolvency; the very ill that was to be avoided by the creation of the Act. MIGA's interpretation simply cannot be reconciled with the purpose behind that Act's enactment; that is to protect policyholders in the event of an insurer's insolvency. *See, e.g., Bank of*

Mississippi v. Mississippi Life and Health Ins. Guar. Ass'n, 850 So.2d 127, 134 (Miss. Ct. App. 2003). It is axiomatic that statutes are to be construed in a manner that effectuates their purpose. *See, e.g., Leitch*, 27 So.3d at 398 (The guaranty law statutes "shall be liberally construed in order to effect the purpose under §83-23-103" of protecting the public or claimants against financial loss because of the insolvency of insurers.) *See also Washington Ins. Guar. Ass'n. v. McKinstry Co.,* 784 P.2d 190 (1990)(Washington's equivalent of MIGA was liable up to its statutory limit, without any credit for the sums received by the claimant pursuant to the primary coverage."[T]he statute provides for a reduction of [the fund's] statutory obligation only where a claimant, has another source of recovery for the claim ***against the insolvent insurer,*** not where a claimant has any other source of recovery." *Id.* at 192 (emphasis in original)).

Finally, the Circuit Court and MIGA's interpretation of the Guaranty Act statutes is in direct conflict with a court's role to interpret the law as passed by the Legislature. *Fairley v. George County*, 871 So.2d 713, 718 (Miss. 2004). In essence, MIGA invites this Court to ignore the limiting language of the non-duplication provision implicating only "covered claims" and hold that claimants are required to exhaust any conceivable insurance policy for any conceivable claim that may be pending. Indeed, MIGA's interpretation would render the limiting phrase within the non-duplication provision meaningless. In keeping with its role of interpreting the law as passed, this Court should determine that only those claims which are also "covered claims" as specifically defined by the Guaranty Act must be exhausted under the non-duplication provision, in accordance with the language of the statute as it exists in its present form. Miss. Code Ann. § 83-23-123 (1). Accordingly, as the settled nursing home claims are not "covered claims," MIGA is not entitled to a credit for the payments made by the solvent insurers in

the instant matter and is required to indemnify Defendants in the amount of $300,000 for the claims arising out of the insolvent ROA coverage in each of the Montgomery and Lane cases.

CONCLUSION

MIGA seeks to alter the meaning, purpose, and terms of the statute and insurance policies in order to reap a windfall for payments made by insurance carriers providing coverage entirely outside of the ROA coverage. Such an interpretation is certainly in direct conflict with the purpose and meaning behind the Guaranty Act and must be emphatically rejected by this Court. For the reasons stated above, Defendants respectfully request that this Court reverse the Circuit Court's grant of MIGA's Motion for Summary Judgment and denial of Defendants' Cross-Motion for Summary Judgment and Order MIGA to indemnify Defendants for the statutory maximum amount of $300,000 in each of the Montgomery and Lane cases.

Respectfully submitted,

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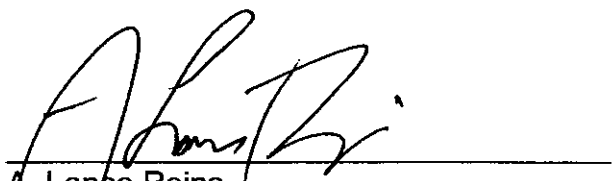
CERTIFICATE OF FILING

I hereby certify that I, A. Lance Reins, counsel for the Appellants, on this 13th day of December, 2010 deposited with Federal Express for delivery to the Mississippi Supreme Court Clerk's Office, the following original documents and copies:

The original and three (3) copies of the above Appellants' Brief.

This certificate of filing is made pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure.



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I hereby certify that a true and correct copy of the foregoing Appellants' Brief has been furnished to the following via Federal Express, on this the 13th day of December 2010:

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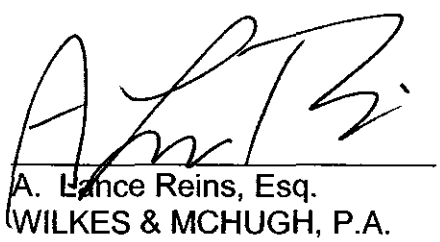

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Miss. Code Ann. § 83-23-101

C
West's Annotated Mississippi Code Currentness
Title 83. Insurance
Chapter 23. Insolvent Insurance Companies; Insurance Guaranty Association
Article 3. Insurance Guaranty Association
→ **§ 83-23-101. Short title**

This article shall be known and may be cited as the Mississippi Insurance Guaranty Association Law.

CREDIT(S)

Laws 1970, Ch. 446, § 1, eff. from and after passage (approved April 6, 1970).

Current through the 2010 Regular and 1st Extraordinary Sessions

END OF DOCUMENT

C
West's Annotated Mississippi Code Currentness
Title 83. Insurance
Chapter 23. Insolvent Insurance Companies; Insurance Guaranty Association
Article 3. Insurance Guaranty Association
→ **§ 83-23-103. Purpose**

The purpose of this article is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

CREDIT(S)

Laws 1970, Ch. 446, § 2, eff. from and after passage (approved April 6, 1970).

Current through the 2010 Regular and 1st Extraordinary Sessions

END OF DOCUMENT

C
West's Annotated Mississippi Code Currentness
Title 83. Insurance
Chapter 23. Insolvent Insurance Companies; Insurance Guaranty Association
Article 3. Insurance Guaranty Association
§ 83-23-107. Construction

This article shall be liberally construed to effect the purpose under section 83-23-103, which shall constitute an aid and guide to interpretation.

CREDIT(S)

Laws 1970, Ch. 446, § 4, eff. from and after passage (approved April 6, 1970).

Current through the 2010 Regular and 1st Extraordinary Sessions

END OF DOCUMENT

C

West's Annotated Mississippi Code Currentness
Title 83. Insurance
Chapter 23. Insolvent Insurance Companies; Insurance Guaranty Association
Article 3. Insurance Guaranty Association
→ **§ 83-23-109. Definitions**

As used in this article:

(a) "Affiliate" means a person who directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with an insolvent insurer on December 31 of the year next preceding the date the insurer becomes an insolvent insurer.

(b) "Association" means the Mississippi Insurance Guaranty Association created under Section 83-23-111.

(c) "Claimant" means any insured making a first-party claim or any person instituting a liability claim, provided that no person who is an affiliate of the insolvent insurer may be a claimant.

(d) "Commissioner" means the Commissioner of Insurance.

(e) "Control" means the possession, direct or indirect, of the power to direct or cause direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact.

(f) "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. "Covered claim" shall not include any amount awarded as punitive or exemplary damages; or sought as a return of premium under any retrospective rating plan; or due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise and shall preclude recovery thereof from the insured of any insolvent carrier to the extent of the policy limits.

(g) "Insolvent insurer" means an insurer licensed to transact insurance in this state either at the time the policy was issued or when the insured event occurred and against whom an order of liquidation with a finding of insolvency has been entered by a court of competent jurisdiction, in the insurer's state of domicile or of this state and the order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable order.

(h) "Member insurer" means any person who (1) writes any kind of insurance to which this article applies under Section 83-23-105, including the exchange of reciprocal or interinsurance contracts, and (2) is licensed to transact insurance in this state.

(i) "Net direct written premiums" means direct gross premiums written in this state on insurance policies to which this article applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.

(j) "Person" means any individual, corporation, partnership, association, or voluntary organization.

CREDIT(S)

Laws 1970, Ch. 446, § 5; Laws 1992, Ch. 412, § 2, eff. July 1, 1992.

Current through the 2010 Regular and 1st Extraordinary Sessions

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C

West's Annotated Mississippi Code Currentness

Title 83. Insurance

Chapter 23. Insolvent Insurance Companies; Insurance Guaranty Association

Article 3. Insurance Guaranty Association

→ § 83-23-115. Powers and obligations

(1) The association shall:

(a) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within thirty (30) days after the determination of insolvency, or before the policy expiration date if less than thirty (30) days after the determination, or before the insured replaces the policy or causes its cancellation if he does so within thirty (30) days of the determination. Such obligation shall be satisfied by paying the claimant an amount as follows:

(i) The full amount of a covered claim for benefits under a workers' compensation insurance coverage;

(ii) An amount in excess of Fifty Dollars ($50.00) per policy for a covered claim for the return of unearned premium;

(iii) An amount in excess of Fifty Dollars ($50.00) but not exceeding Three Hundred Thousand Dollars ($300,000.00) per claimant for all other covered claims.

In no event shall the association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises.

(b) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

(c) Assess insurers amounts necessary to pay the obligations of the association under paragraph (a) subsequent to an insolvency, the expenses of handling covered claims subsequent to an insolvency, and the cost of examinations under Section 83-23-125 and other expenses authorized by this article. The assessments of each member insurer shall be in the proportion that the net direct written premiums of the member insurer for the preceding calendar year bears to the net direct written premiums of all member insurers for the preceding calendar year. Each member insurer shall be notified of the assessment not later than thirty (30) days before it is due. No member insurer may be assessed in any year an amount greater than one percent (1%) of that member insurer's net direct written premiums for the preceding calendar year. If the maximum assessment, together

with the other assets of the association, does not provide in any one (1) year an amount sufficient to make all necessary payments, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. The association may exempt or defer, in whole or in part, the assessment of any member insurer, if the assessment would cause the member insurer's financial statement to reflect amounts of capital or surplus less than the minimum amounts required for a certificate of authority by any jurisdiction in which the member insurer is authorized to transact insurance. Each member insurer may set off, against any assessment, authorized payments made on covered claims and expenses incurred in the payment of such claims by the member insurer.

(d) Investigate claims brought against the association; adjust, compromise, settle, and pay covered claims to the extent of the association's obligation; deny all other claims; and may review settlements, releases, and judgments to which the insolvent insurer or its insureds were parties, to determine the extent to which such settlements, releases, and judgments may be properly contested.

(e) Notify such persons as the commissioner directs under Section 83-23-119(2)(a).

(f) Handle claims through its employees or through one or more insurers or other persons designated as servicing facilities. Designation of a servicing facility is subject to the approval of the commissioner, but such designation may be declined by a member insurer.

(g) Reimburse each servicing facility for obligations of the association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the association, and shall pay the other expenses of the association authorized by this article.

(2) The association may:

(a) Employ or retain such persons as are necessary to handle claims and perform other duties of the associ- ation.

(b) Borrow funds necessary to effect the purposes of this article in accord with the plan of operation.

(c) Sue or be sued.

(d) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this article.

(e) Perform such other acts as are necessary or proper to effectuate the purpose of this article.

(f) Refund to the member insurers in proportion to the contribution of each member insurer to the association that amount by which the assets of the association exceed the liabilities if, at the end of any calendar year, the

board of directors finds that the assets of the association exceed the liabilities of the association as estimated by the board of directors for the coming year.

CREDIT(S)

Laws 1970, Ch. 446, § 8; Laws 1992, Ch. 412, § 4, eff. July 1, 1992.

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West's Annotated Mississippi Code Currentness
Title 83. Insurance
Chapter 23. Insolvent Insurance Companies; Insurance Guaranty Association
Article 3. Insurance Guaranty Association
→ **§ 83-23-123. Recovery reduced if duplicated**

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

(2) Any person having a claim which may be recovered under more than one (1) insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured, except that if it is a first party claim for damage to property with a permanent location, he shall seek recovery first from the association of the location of the property, and if it is a workmen's compensation claim, he shall seek recovery first from the association of the residence of the claimant. Any recovery under this article shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent.

CREDIT(S)

Laws 1970, Ch. 446, § 12, eff. from and after passage (approved April 6, 1970).

Current through the 2010 Regular and 1st Extraordinary Sessions

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