IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2019-CA-01615

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION — APPELLANT

VS.

MISSISSIPPI WORKERS' COMPENSATION SELF-INSURED GUARANTY ASSOCIATION — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF MADISON COUNTY, MISSISSIPPI
CIVIL ACTION NO. CI-2004-0252-C

BRIEF OF APPELLANT MISSISSIPPI INSURANCE GUARANTY ASSOCIATION

ORAL ARGUMENT NOT REQUESTED

JAMES D. HOLLAND (MSB[redacted]
JAN F. GADOW (MSB[redacted]
PAGE, KRUGER & HOLLAND, P.A.
P. O. Box 1163
Jackson, MS 39215-1163
Telephone: (601) 420-0333
Facsimile: (601) 420-0033

COUNSEL FOR APPELLANT,
MISSISSIPPI INSURANCE GUARANTY
ASSOCIATION

CERTIFICATE OF INTERESTED PARTIES

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION **APPELLANT**

VS.

MISSISSIPPI WORKERS' COMPENSATION SELF-INSURED GUARANTY ASSOCIATION **APPELLEE**

In order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case:

Honorable William E. Chapman, III, Trial Court Judge;

Mississippi Insurance Guaranty Association, Appellant;

James D. Holland, Jan F. Gadow, Page, Kruger & Holland, P.A., Attorneys for Appellant;

Mississippi Workers' Compensation Self-Insured Guaranty Association, Appellee;

A. Spencer Gilbert, III, Attorneys for Appellee.

THIS, the 7th day of March, 2011.

JAMES D. HOLLAND
JAN F. GADOW
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

1. Mississippi

2. Other

STATUTES:

OTHER:

STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument is not necessary to a resolution of the issue on appeal. The issue presented involves application of unambiguous statutes to undisputed facts; the parties' positions are clear and the record uncomplicated. The facts and legal arguments can be adequately presented in the briefs and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUES

Whether the trial court erred in granting MWCSIGA's Motion for Summary Judgment and Granting Declaratory Relief because:

As a Matter of Law, MWCSIGA is not a "claimant", the Reliance Policy is not "direct insurance" as to MWCSIGA, and MWCSIGA's Claim against MIGA is not a "covered claim"; and/or

As a Matter of Law, MWCSIGA's Alleged "covered claim" is Subject to Reduction, Setoff, or Credit, Pursuant to Miss. Code Ann. Section 83-23-123, in the Amount Warren Recovered from the UM Policies.

I. STATEMENT OF THE CASE

The Mississippi Workers' Compensation Individual Self-Insurer Guaranty Association ("MWCSIGA" or "MWCISIGA" herein) sued the Mississippi Insurance Guaranty Association ("MIGA") in the Madison County Circuit Court, claiming reimbursement for the workers' compensation benefits MWCSIGA had paid to Bobby Warren after his employer sought bankruptcy protection. (C.P. 10-13) MIGA timely answered, denying any liability. (C.P. 20-26) Following limited discovery over a long period of time, MWCSIGA moved for summary judgment (C.P. 156-331); MIGA responded and also filed a cross-motion for summary judgment. (C.P. 334-364) After various responses, memoranda and replies, the trial court granted MWCISA's motion for summary judgment and for declaratory relief, denied MIGA's motion for summary judgment, and entered final judgment in favor of MWCSIGA. (C.P. 668-69) MIGA timely perfected this appeal from the trial court's final judgment, which this Court must reverse and render. (C.P. 671-72)

Both parties to this appeal were created by statute for different purposes and, in those statutes, there are no provisions for or intention stated allowing one to seek reimbursement from the other for monies paid under said statutes.

II. STATEMENT OF THE FACTS

In July 1991, the Mississippi Workers' Compensation Commission ("Commission") issued an Order permitting B.C. Rogers Processors, Inc., ("Rogers") to be a self-insurer pursuant to Miss. Code Ann. § 71-3-75 for purposes of its obligations under the Mississippi Workers' Compensation Law. (C.P. 145, 164, 278) In compliance

with this Order, and as a condition of self-insuring, Rogers posted a $300,000 bond and obtained excess workers' compensation insurance from Reliance National Indemnity Company ("Reliance") with a self-insured retention (deductible) of $225,000 per claim. (C.P. 145, 165, 278-79) From November 1, 1994 to November 1, 1995, Rogers had workers' compensation excess insurance coverage from Reliance under Specific Excess Workers' Compensation and Employer's Liability Policy Number NXC 0104272-02. (C.P. 145, 165) A copy of the Reliance policy is part of the record. (C.P. 284-304)

On October 15, 1995, Bobby Warren sustained injuries in an automobile accident while in the course and scope of his employment with Rogers, yielding a workers' compensation claim. (C.P. 145, 150, 165) Rogers initially paid Warren his workers' compensation benefits, to the extent of their self-insured retention of $225,000.00, then in November 2001 looked to Reliance, which indemnified Rogers for an additional $129,205.73 it paid on Warren's claim. (C.P. 150, 287) Reliance indemnified Rogers for Warren workers' compensation claim expenses until May 2001, when a Pennsylvania court placed Reliance in rehabilitation due to its insolvency. (C.P. 165, 171)

In October 2001, the same court placed Reliance in liquidation, but Rogers continued payment of the Warren claim. (C.P. 165, 171, 319-31) After the Reliance liquidation, Rogers paid Warren another $167,419.53.[1] (C.P. 150-51) Rogers then filed a Chapter 11 bankruptcy petition on November 19, 2001, and ceased paying its workers' comp obligations. (C.P. 165-66) ***In re B.C. Rogers Poultry, Inc.,*** No. 01-06516-JEE (Bankr.S.D.Miss.).

1 This amount was not sought in the underlying case and is not at issue in this appeal.

The Commission entered an order in January 2002, finding Rogers in default in payment of its workers' compensation obligations and ordering its $300,000 surety bond to be liquidated and paid to the MWCSIGA for use in satisfying Rogers' outstanding workers' comp obligations, including Warren's claim. MWCSIGA thereafter began paying Rogers' workers' comp obligations, including the benefits to Warren. (C.P. 166, 315-17) The Commission's Order notes that MWCSIGA was to assume administrative responsibility for the claims on which Rogers had defaulted, consistent with Miss. Code Ann. Section 71-3-159 (Rev. 2000). (C.P. 316) Since beginning payments of workers' comp benefits to Warren in January 2002 until the time of Warren's death, MWCSIGA paid a total of $111,739.78 on this claim. (C.P. 168) This is the only amount sought by MWCSIGA in the underlying action or at issue in this appeal.

In 1997, as amended in 1998, Warren and his wife sued Moore (the allegedly at-fault driver), Progressive Gulf Insurance Company, Northbrook National Insurance Company, and an unknown insurance company. (C.P. 152, 166, 189, 210-11, 214-15) The combined UM coverage was more than $4 million. (C.P. 166) Progressive provided liability coverage to Moore with limits of $10,000 and $20,000 and UM coverage to Moore with limits of $10,000 and $20,000; Rogers carried insurance on 178 vehicles with uninsured motorist/underinsured motorist coverage of $25,000/$50,000 for each of these vehicles. (C.P. 179, 221) Clearly, Moore was an underinsured motorist for purposes of the Warrens' claim. Rogers intervened in the action in March of 1999 and asserted a subrogation claim against the defendants, including the underinsured motorist carriers, for workers' compensation benefits it had previously paid and would continue to pay to Warren. (C.P. 153, 224) With Rogers' bankruptcy, the case was removed to federal court; but in December 2002, the federal court granted the Warrens'

motion to remand back to state Court. (C.P. 154) In 2003, Warren recovered more than $4,000,000 in settlement from UM carriers. (C.P. 166; 262-63)

Warren died in the spring of 2004 from causes unrelated to his workers' compensation injuries. (C.P. 166) At the time of Warren's death and in addition to the $4 million he received in settlement of the UM case, he had been paid $564,158.85 in benefits by Rogers and MWCSIGA from October 1995 through March 2004. MWCSIGA paid $111,739.78 of that amount from January 2002. (C.P. 168, 306-13)

MWCSIGA subsequently sought reimbursement of $117,262.66 from MIGA, plus prejudgment interest, costs, and attorney's fees; MIGA denied any liability to indemnify or reimburse MWCSIGA under the Reliance Excess Policy, resulting in MWCSIGA's[2] August 2004 complaint in the Madison County Circuit Court, which is the genesis of this appeal. (C.P. 168, 173)

On cross-motions for summary judgment, the Madison County Circuit Court denied MIGA's motion, granted MWCSIGA's motion. (C.P. 668-70) The trial court entered a final judgment to that effect and awarded MWCSIGA $111,739.78 as reimbursement for the workers' comp benefits MWCSIGA paid. (C.P. 668-70)

III. SUMMARY OF THE ARGUMENT

A *de novo* review of the matters presented reveals that, pursuant to the MIGA statutory scheme and as a matter of law, MWCSIGA is not a "claimant", the demand was not for an "unpaid" sum, the Reliance policy is not "direct insurance" for the benefit of MWCSIGA, and MWCSIGA's claim for reimbursement of its statutory obligation does

2 Effective July 1, 2004, the MWCSIGA was renamed the Mississippi Workers' Compensation Individual Self-insurer Guaranty Association", with the amendment of Miss. Code Ann. Section 71-3-159.

not constitute a "covered claim". Because MIGA can pay only "covered claims", MWCSIGA's quest for reimbursement must fail. Assuming, *arguendo*, that MWCSIGA is a "claimant" to whom the Reliance policy constitutes "direct insurance" and that MWCSIGA's claim is a "covered claim", the statutory limitation relevant to the subject appeal requires that MIGA reduce any amount payable on the alleged "covered claim" by the $4 million Warren recovered from UM policy proceeds, which leaves MIGA liable for no amount. Because MIGA is not liable in any amount, the issues of costs and interest are moot. This Court should reverse the trial court's grant of summary judgment and declaratory relief in favor of MWCSIGA and render summary judgment in favor of MIGA.

IV. THE TRIAL COURT ERRED IN GRANTING MWCSIGA'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DECLARATORY RELIEF TO MWCSIGA AND IN DENYING MIGA'S MOTION FOR SUMMARY JUDGMENT.

A. Standard of Review

This Court's review of a trial court's grant or denial of summary judgment is *de novo*. ***Townsend v. Doosan Infracore American Corp.,*** 3 So.3d 150, 153 (¶ 5) (Miss. App. 2009) (citing ***Webb v. Braswell,*** 930 So.2d 387, 395 (¶ 12) (Miss. 2006)); ***MIGA v. Cole,*** 954 So.2d 407, 409 (¶ 8) (Miss. 2007) (citations therein omitted). When the evidence considered in the light most favorable to the nonmoving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Townsend,*** 3 So.3d at 153 (¶ 5) (citing ***Hubbard v. Wansley,*** 954 So.2d 951, 956 (¶ 9) (Miss. 2007) (citing M.R.C.P. 56 (c))). This Court also reviews *de novo* other questions of law, including declaratory relief.

Tunica County v. Hampton Co. Nat. Sur., LLC, 27 So.3d 1128, 1131 (¶ 8) (Miss. 2009) (citations therein omitted).

B. Legal Argument

> The Mississippi Insurance Guaranty Association Law was enacted to protect policy holders of certain kinds of insurance in the event of their insurer's insolvency. MIGA is a statutorily-created unincorporated association consisting of insurance companies doing business in Mississippi. Each solvent insurer doing business in this state is assessed a pro rata share of amounts paid on behalf of insolvent insurers. MIGA is prohibited by statute from paying anything other than a covered claim, and the statute further requires that all other sources of insurance must be exhausted before looking to MIGA for any coverage.

Leitch v. MIGA, 27 So.3d 396, 398 (¶ 7) (Miss. 2010) (quoting ***MIGA v. Byars,*** 614 So.2d 959, 963 (Miss. 1993)(internal citations omitted)).

MIGA is not an insurance company, but a non-profit, unincorporated entity created by Miss. Code Ann. § 83-23-111, to which Miss. Code Ann §§83-23-101, *et seq.*, the Mississippi Insurance Guaranty Association Law applies. (C.P. 145, 166) The purpose of this MIGA Law is to protect Mississippi resident *claimants* and *policyholders* from insolvent insurance companies and to require other sources of payment and financially healthy insurance companies to contribute to afford this protection of the public. ***National Union Fire Ins. Co. v. MIGA,*** 990 So.2d 174, 176 (¶ 6) (Miss. 2008); ***Owens Corning v. MIGA,*** 947 So.2d 944, 946 (¶ 8), 948 (¶ 14) (Miss. 2007) (citations therein omitted); Miss. Code Ann. § 83-23-103. As stated by the legislature, MIGA's purpose, similar to that of MWCSIF, 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 . . . and to provide an association to assess the cost of such protection among insurers." Miss. Code Ann. § 83-23-103.

MWCSIGA is also a non-profit unincorporated entity created by statute, to wit: Miss. Code Ann. Sections 71-3-151, *et seq.*. (C.P. 166) The purpose of this ISGA Act is "to provide a mechanism for the payment of the covered claims under the Workers' Compensation Law, to avoid excessive delay in payment and to avoid financial loss to claimants because of the insolvency of a self-insurer . . . ." Miss. Code Ann. § 71-3-153. **MWCSIGA admits that it was obligated, by statute and legislative purpose, to make Warren's workers' compensation payments after Rogers' bankruptcy.** (C.P. 375) The only remaining question is whether MWCSIGA is entitled to reimbursement from MIGA for those payments.

The purpose of the enabling statutes for both MWCSIGA and MIGA Law, which "shall" serve as an aid and guide to interpretation of this Law, must be liberally construed. Miss. Code Ann. § 71-3-155 and §83-23-107. *See also* ***MIGA v. Cole,*** 954 So.2d 407, 410 (¶ 11) Miss. 2007) (citations therein omitted); ***Owens Corning,*** 947 So.2d at 946 (¶ 8). Nonetheless, MIGA's duties and responsibilities are limited and strictly controlled by statute. ***National Union Fire,*** 990 So.2d at 177 (¶ 6) (citations therein omitted); ***Owens Corning,*** 947 So.2d at 946 (¶ 8). For example, MIGA may pay only covered claims and then only after other sources of recovery have been exhausted. ***Cole,*** 954 So.2d at 411 (¶ 11) (quoting ***MIGA v. Byars,*** 614 So.2d 959, 963 (Miss. 1993)); ***Owens Corning,*** 947 So.2d at 946 (¶ 8); Miss. Code Ann. §§ 83-23-115 (1)(a); 83-23-123. As a matter of law, MWCSIGA's claim for reimbursement from MIGA is simply not allowed. This result is in accord with the purpose of the MIGA Law. Miss. Code Ann. §83-23-109(f).

MWCSIGA can not meet the definition of "claimant" or "policyholder" under the statute. Its claim is not "unpaid" and the law specifically prohibits claim due "any

reinsurer, insurer, insurance pool or underwriting association, as subrogation recoveries of otherwise . . ." Miss. Code Ann. §83-23-109(f). Moreover, MIGA statutes do not apply to "any insurance provided by or guaranteed by government". Miss. Code Ann. §83-23-105(i).

1. MWCSIGA is not a "claimant" as defined by Miss. Code Ann. § 83-23-109.

The MIGA law defines "claimant" as "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." Miss. Code Ann. § 83-23-109 (c). Rogers was the named insured under the Reliance policy, but Rogers is not making a claim and MWCSIGA is not making a claim on Rogers' behalf or to benefit Rogers. Warren was an insured employee of Rogers, pursuant to the Workers' Compensation statutes, and Warren could have instituted a liability claim for his workers' comp benefits, but Warren is not making the subject claim and MWCSIGA is not making a claim on Warren's behalf or to benefit Warren. MWCSIGA is making a claim against MIGA to reimburse MWCSIGA the amounts it was statutorily obligated to pay for Warren's workers' comp benefits. As a matter of law, MWCSIGA is not a "claimant" as defined by the MIGA Law and this Court's inquiry can end here. Subrogation claims are not allowed against MIGA. Miss. Code Ann. §83-23-109(f).

Nonetheless, MWCSIGA is also, as a matter of law, not a policyholder as to any insolvent insurance company, so the purpose of the MIGA Law (to benefit claimants or policyholders) would not be served by MIGA's reimbursing MWCSIGA. ***National Union Fire,*** 990 So.2d at 176 (¶ 6); ***Owens Corning,*** 947 So.2d at 946 (¶ 8), 948 (¶ 14); Miss. Code Ann. § 83-23-103. Warren was a claimant and Rogers was a policyholder as to

Reliance, an insolvent insurance company. Warren received his workers' comp benefits without delay and suffered no financial loss as a result of Reliance's insolvency, so MIGA's reimbursing MWCSIGA would have no impact on the timeliness of Warren's benefit payments nor would it prevent financial loss to him. MWCSIGA is not seeking reimbursement in order to pay Rogers, so MIGA's reimbursing MWCSIGA would also have no impact on the timeliness of any payments to Rogers nor would it prevent any financial loss to Rogers.

In short, MIGA's purpose would not be served by reimbursing MWCSIGA, which as a matter of law is not a claimant in the first instance. Miss. Code Ann. §§ 83-23-103, 83-23-109 (c). To the contrary, MWCSIGA's payment of Warren's workers' comp benefits did in fact serve MWCSIGA's purpose, to wit: to avoid delay in payment to Warren following Rogers' bankruptcy and to avoid financial loss to Warren because of Rogers' insolvency. Miss. Code Ann. § 71-3-153.

The MIGA Law was "enacted to protect policy holders of certain kinds of insurance in the event of their insurer's insolvency." ***Leitch,*** 27 So.3d at 398 (¶ 7) (quoting ***Byars,*** 614 So.2d at 963 (internal citations omitted)). However, it is not Rogers, the policyholder, or Warren, the "claimant", making a claim against MIGA and claiming a policy of direct insurance with Reliance; rather, it is MWCSIGA. As a matter of law, MWCSIGA is neither a claimant nor a policyholder as to Reliance. It follows that the MIGA Law does not apply to the Reliance policy *vis' a vis'* MWCSIGA's claim for reimbursement. As a matter of law, the Reliance policy is not "direct insurance" as to MWCSIGA and the MIGA Law does not apply to allow payment of MWCSIGA's claim.

2. MWCSIGA's claim against MIGA for reimbursement of Warren's workers' comp benefits is not a "covered claim" pursuant to Miss. Code Ann. Section 83-23-109 (f).

A "covered claim" is defined by Miss. Code Ann. § 83-23-109 (f) as:

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

Miss. Code Ann. Section 83-23-109 (f). This Court has clearly said that Miss. Code Ann. § 83-23-109 (f) is unambiguous, therefore it is applied according to its plain meaning, without the aid of principles of statutory construction. ***Cole,*** 954 So.2d at 413 (¶¶ 20-21).

> 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 involving a once-solvent insurer that becomes *insolvent.*

Cole, 954 So.2d 413 (¶ 21). The only "claimant" for purposes of MIGA law is Warren. In addition to the benefits he received from Rogers and from MWCSIGA, Warren received in excess of $4 million dollars for his claim. As a matter of law, Warren's claim is not an unpaid claim, therefore not a "covered claim".

Rogers, the named insured on the Reliance policy, may have an unpaid claim, but Rogers is not making the claim against MIGA. MWCSIGA, the purported claimant,

is not seeking reimbursement for Rogers nor reimbursement of the monies Rogers paid for Warren's benefits; MWCSIGA is seeking to recover for itself the monies MWCSIGA paid for Warren's benefits. MWCSIGA may have an unpaid claim, but MWCSIGA's claim does not arise out of any policy of insurance to which the MIGA Law applies. Since MWCSIGA is not a "claimant", and has no unpaid claim that arises out of a policy of insurance covered by the MIGA Law, *i.e.,* direct insurance, there is no "covered claim" as a matter of law.

3. Rogers is not the "insurer" for purposes of determining what is a "covered claim" under Miss. Code Ann. Section 83-23-109 (f), but MWCSIGA is.

Presuming, *arguendo,* a proper "claimant", "direct insurance", and a "covered claim" in the first instance, the exclusionary final sentence of Miss. Code Ann. Section 83-23-109 (f) would nonetheless take MWCSIGA's claim out of the "covered claim" category. "'Covered claim' shall not include any amount . . . due any reinsurer, insurer, insurance pool, or underwriting association . . . ." All parties agree that Rogers is not an "insurer"; the question is whether MWCSIGA is an "insurer, reinsurer, insurance pool, or underwriting association".

MWCSIGA was statutorily created to serve as a substitute for workers' compensation insurance, therefore it is an "insurer, reinsurer, insurance pool, or underwriting association" within the meaning of Miss. Code. Ann. Section 83-23-109 (f). The cases which are on point clearly support this determination. ***Maryland Motor Truck Ass'n Workers' Comp. Self-Ins. v. Property & Casualty Ins. Guar. Corp***, 871 A.2d 590, 598 (Md. 2005) describes the problems with MWCSIGA's claims.

In ***Maryland Motor Truck***, the Court of Appeals of Maryland held that a self-insurance group is considered an insurer, and therefore was barred from pursuing a claim against the Property and Casualty Insurance Guaranty Corporation (PCIGC). As is the case in Mississippi, Maryland's statutes require every Maryland employer to secure workers' compensation for its covered employees. ***Md. Motor Truck,*** 871 A.2d at 590. In 1993, a number of Maryland trucking companies decided to participate in a private self-insurance group, the Maryland Motor Truck Association (MMTA), a non-profit trade organization, which established the Maryland Motor Truck Association Workers' Compensation Self-Insurance Group (MMTA Group) for certain members. ***Id.,*** at 591. MMTA Group obtained a policy of excess insurance from Reliance for the period from February 1999 to June 2000, for claims exceeding $150,000. During that period, four claims exceeding $150,000 were filed against MMTA Group member trucking companies and MMTA Group submitted the excess amounts of those claims to Reliance. ***Id.*** When Reliance was declared insolvent and ordered liquidated, MMTA Group filed a claim with the Property and Casualty Insurance Guaranty Corporation (PCIGC), which denied the claim on grounds that it was not a "covered claim" because the MMTA Group was an "insurer" and a "covered claim" does not include an amount due to an "insurer". ***Id.***

The Court of Appeals of Maryland granted *certiorari* and agreed with the circuit court that MMTA Group was indeed an insurer; therefore, the Court affirmed the trial court's grant of PCIGC's motion for summary judgment because "covered claim" does not include an amount due to an "insurer". ***Md. Motor Truck,*** 871 A.2d at 598. The Maryland Court said "it seems clear that these workers' compensation self-insurance groups fall well within the definition of 'insurer'". ***Id.***

In ***Louisiana Safety Ass'n of Timbermen Self-Insurers Fund v. Louisiana Insurance Guaranty Association,*** 17 So. 3d 350 (La. 2009), the court addressed this specific issue presented by the case at bar, to wit: whether the unpaid claims of the self insured fund arising from the insolvency of Reliance were "covered claims" under the state's guaranty law. Recognizing the fallacies of arguments strikingly similar to those urged by MWCSIGA, the Louisiana court first found that the primary characteristic of the business of insurance is the transferring or spreading of risk and thus, so long as this characteristic is present, the business of insurance is not limited to traditionally recognized areas of insurance. ***LA Timbermen,*** 17 So.3d at 358, n.7. Secondly, the court found that the Reliance policy was "reinsurance" and not "excess insurance", supporting the ruling that a self-insured claim against the Guaranty Association was prohibited because the definition prohibits payments due any insurer. ***Id.,*** at 359-60.

The Louisiana and Mississippi statutes both prohibit claims by those spreading risk such as "reinsurers, insurers . . . or insurance pools". ***Id.***, at 355 (citing La. Rev. Stat. Section 22:1379 (3)(b)); Miss. Code Ann. Section 83-23-109 (f). The Louisiana court found that the self-insured fund was an "insurer" and thus the claim was not a "covered claim". Like MWCSIGA's enabling statute, the Louisiana statute was created as a way for employers to satisfy their workers' compensation obligations. ***Id.***, at 352.[3]

As with MWCSIGA, the Louisiana self-insured fund could not overcome the requirement that a "covered claim" must be for both "direct insurance" and not a claim of an "insurer". Insurance has long been defined as more than the traditional insurance

3 This finding is also consistent with other jurisdictions and what MWCSIGA admits is the "majority view". ***Laguna Beach v. CIGA***, 106 Cal.Rptr.3d 552 (Cal.App. 2 Dist. 2010); ***Massachusetts Care Self Ins. Group v. Massachusetts Insurers Insolvency Fund***, 2009 WL 3245256 (Mass.Super.2009); ***Ventulett v. Maine Insurance Guaranty Association***, 583 A.2d 1022 (Me. 1990); ***Maryland Motor Truck v. Property & Casualty Insurance Guaranty Association***, 871 A.2d 590 (Md. 2005); *but see*, ***LeBlanc v. W-Industries of Louisiana***, 2009 WL 911014 (E.D.La.2009).

policy. Insurance includes "'a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies'". ***Id.,*** at 357 (quoting La. Rev. Stat. § 22:5 (9)(a)). MWCSIGA is all about insurance and was created to allow employers to address and answer the statutory requirements for providing their employees' statutory workers' compensation coverage. "The primary characteristic of the business of insurance is the transferring or spreading of risk". ***Id*** ., at 358, n. 7 (citations omitted).

Our courts have held that self-insurance is a "risk-sharing pool". MWCSIGA cites some of these cases, but leaves out that the Mississippi Supreme Court has determined that self insured funds are "risk-sharing pools". ***McCoy v. South Central Bell,*** 688 So.2d 214, 216 (Miss. 1996). Further, in ***Vogel v. American Warranty Home Service Corp.***, 695 F.2d 877, 882 n.6 (5th Cir. 1983), the Court stated:

> "A contract of insurance," in Mississippi, "is an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction, loss, or injury of something in which the assured or other party has an interest, as an indemnity therefore." Miss. Code Ann. § 83-5-5 (1972). The Mississippi Attorney General has rendered an opinion that limited home warranties are contracts of insurance, and the Mississippi Department of Insurance has been so advising companies that offer such warranties.

And in ***Burley v. Homeowners Warranty Corp.,*** 773 F.Supp. 844, 853-54 (S.D. Miss. 1990):

> Plaintiffs next urge that under Miss. Code Ann. § 83-5-5 (1972), HOW must be considered an "insurance company." That statute defines "insurance company" to include all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance or *guaranteeing the obligations of others* (emphasis added). Moreover, a contract of insurance is defined as an agreement by which one party for a consideration promises to pay for its equivalent or to do some act of value to the assured, upon ... loss ... in which the assured or other party has an interest, as an indemnity therefore.

Mississippi statutes require all employers to provide Workers' Compensation protection for their employees. The requirement remains no matter what method an employer chooses to meet its obligation to provide that protection and includes purchasing insurance or self-insuring.

> [W]hile the Guarantee Act does not expressly mention employer-provided self-insurance, it references workers' compensation insurance, which statutorily includes employers with permission to self insure. Accordingly, an employer self-insured for worker's compensation purposes provides 'other insurance of a class covered by' the Guarantee Act . . . . [W]hile a self-insured employer may not be an 'insurer' when it protects itself against general civil liabilities, an employer is expressly deemed an 'insurer if issued a certificate to self-insure for workers' compensation. It reasonably follows that the workers' compensation liability protection an employer provided itself under the self-insurance program is a class of 'insurance'.

Roth v. L.A. Door, 115 Cal.App.4th 1249, 1257, 1259 (Cal.App. 4 Dist. 2004) (quoting ***Denny's Inc. v. Workers' Comp. Appeals Bd***, 104 Cal.App.4th 1433, 1441 (Cal.App. 5 Dist. 2003)).

So even overlooking the bars presented because MWCSIGA is not a "claimant", has no "direct insurance", and no "unpaid" and "covered claim" in the first instance, the exclusionary final sentence of Miss. Code Ann. Section 83-23-109 (f) takes MWCSIGA's claim out of the "covered claim" category because, as a matter of law, MWCSIGA is an "insurer, reinsurer, insurance pool, or underwriting association".

4. MWCSIGA, after Rogers' bankruptcy and Reliance's insolvency, stood in the shoes of Rogers to the extent of its workers' comp obligations and rights under the Reliance policy, pursuant to Miss. Code Ann. Section 71-3-163 (1) (a) and (b).

Miss. Code Ann. Section 71-3-163 reads:

> 1) Each [Mississippi Workers' Compensation Self-Insurer Guaranty] association shall:

> (a) Be obligated to the extent of its covered claims existing prior to the date of default and arising within thirty (30) days after the date of default. In no event shall an association be obligated to a claimant in an amount in excess of the obligation of the defaulting member self-insurer of such association.
>
> (b) Be deemed the self-insurer to the extent of obligations on its covered claims and to such extent shall have all rights, duties and obligations of the individual self-insurer in default or insolvent group self-insurer in default as if such self-insurer were not in default.

Warren's workers' comp claim against Rogers, an individual self-insurer, arose in October 1995; Rogers was found in default in payment of its workers' comp obligations in January 2002. Presuming Warren's claim is a "covered claim" as used in § 71-3-163[4], MWCSIGA was, as a matter of law, subrogated by statute to Rogers' rights and obligations as to Warren's claim. Rogers' obligations as to Warren's claim were to pay him workers' compensation benefits. MWCSIGA was not obligated to Warren in any amount greater than Rogers' obligation. Miss. Code Ann. § 71-3-163 (1) (a). The trial court and MWCSIGA are correct that MWCSIGA was, as a matter of law, subrogated to Rogers' rights and obligations as to Warren's workers' comp claim, pursuant to Miss. Code Ann. Section 71-3-163. (C.P. 157) No claim for subrogation may be maintained against MIGA. Miss. Code Ann. §83-23-109(f).

So MWCSIGA wants to "stand in Rogers' shoes" to the extent that such a position will allow it to make a claim against MIGA. Once there, MWCSIGA abandons any pretense of its claim being for Rogers' benefit and ignores that a "covered claim" shall not include any money claimed in subrogation. This is simply an attempt to have

4 MWCSIGA statutes, not MIGA Law.

MIGA compensate MWCSIGA for its statutory duties.[5].

5. *Any "covered claim" is subject to reduction, setoff, or credit, pursuant to Miss. Code Ann. Section 83-23-123, in the amount Warren recovered from the UM policies.*

The MIGA statutes involve two interrelated concepts that support the proposition that MIGA is only the "guarantor of last resort". First, a claimant is required to collect/exhaust any and all benefits to which it may be entitled under all funds available from other sources, including policies of insurance other than excess policies. Second, MIGA is entitled to credit against its liability for the amounts the "claimant" receives from other sources. When there is another source of funds available, MIGA can not make payments under its statutory scheme. So, presuming, *arguendo,* MWCSIGA is a proper "claimant", with "direct insurance", and a "covered claim" in the first instance, and also presuming arguendo that MWCSIGA is standing in Rogers' shoes to the extent that Rogers has a claim against Reliance/MIGA, the purported "covered claim" is subject to reduction/setoff/credit, leaving MIGA liable for no amount. As was the case in ***Leitch,*** 27 So.3d at 398 (¶ 8), the first step in this inquiry is an examination of Miss. Code Ann. Section 83-23-123 (1), which provides:

> 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.

Miss. Code Ann. § 83-23-123 (1) (emphasis added). MWCSIGA's/Rogers' claim is for reimbursement of benefits paid for Warren's injuries and lost wages caused by an

---

5 In fact, MWCSIGA's own statutory scheme addresses from whom MWCSIGA may seek reimbursement. Rather than MIGA, MWCSIGA should have looked to Rogers for reimbursement of the amounts paid for Warren's benefits. Miss. Code Ann. Section 71-3-169 (2).

accident; Warren's claim, likewise, was for injuries and lost wages caused by an accident. (See Warren's own Complaint, C.P. 12-13) "[S]o the claim against the workers' compensation carrier [Reliance] (for reimbursement of those losses) was the same legal claim as the one against the [other driver and the] UM carrier[s]." ***MIGA v. Blakeney,*** 2011 WL 103554 (¶ 14) (Miss. January 13, 2011).

In addition to being covered by Rogers' Reliance policy, the claim to cover Warren's injuries and lost wages was covered by Rogers' Northbrook insurance policy, which included uninsured motorist coverage. There is no assertion that Northbrook is or was an insolvent insurer. It follows that this legal claim constitutes "a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer". Miss. Code Ann. § 83-23-123 (1); ***Leitch,*** 27 So.3d at 398-99 (¶ 9). Again assuming *arguendo* MWCSIGA's position, this same legal claim for reimbursement of benefits paid for Warren's injuries and lost wages is also a "covered claim" pursuant to Miss. Code Ann. § 83-23-109 (f). ***Leitch,*** 27 So.3d at 399 (¶ 11).

Given the existence of a claim for Warren's injuries and wages against the UM carrier(s) and presuming a claim for Warren's injuries and wages that is a "covered claim" as defined in the MIGA statutes, this Court has said:

> we must apply the following mandatory statutory language: "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) (Rev. 1999). In restating the statutory language and inserting the appropriate nomenclature, the statute reads: "Any amount payable [by MIGA][6] shall be reduced by the amount of any recovery [from [the solvent insurer]][7]."

Leitch, 27 So.3d at 399 (¶ 12). The amount payable by MIGA for benefits under

6 Brackets in original.
7 Exterior brackets in original.

workers' comp insurance coverage is the full amount of the covered claim. Miss. Code Ann. § 83-23-115 (1)(a)(i). Warren recovered in excess of $4 million from Northbrook. Consequently, and as a matter of law, MIGA is statutorily required to reduce any amount payable by $4 million, leaving MIGA liable for no additional amount. ***Leitch,*** 27 So.3d at 400-01 (¶¶ 16-18). Recent case law leaves no room to argue about the mandatory nature of MIGA's exhaustion/reduction provision.

Leitch was injured in a traffic accident with a truck driven by Dillard, an employee of H-G&F, who owned the truck Dillard was driving. At the time of the wreck, the H-G&F truck was insured by Reliance, which was declared an insolvent insurer, thereby triggering MIGA's involvement, sometime between Leitch's accident and the issuance of the Mississippi Supreme Court's opinion on the matter. ***Leitch,*** 27 So.3d at 397 (¶ 2). Leitch was also covered by his personal State Farm policy, which included UM limits of $300,000. ***Leitch,*** 27 So.3d at 397 (¶ 3). Leitch sued Dillard, H-G&F, and then added State Farm; State Farm settled for $300,000, but Leitch persisted in his action against Dillard and H-G&F. Leitch next filed a declaratory judgment action against MIGA, asking the court to rule that any amount he received from State Farm, his own UM carrier, did not reduce MIGA's obligation. ***Leitch,*** 27 So.3d at 397 (¶¶ 3-4). MIGA moved for summary judgment, urging that its obligation must be reduced by State Farm's $300,000 UM settlement, pursuant to Miss. Code Ann. Section 83-23-123. The trial court agreed and granted MIGA's motion, which action was affirmed by both the Mississippi Court of Appeals and the Mississippi Supreme Court. ***Leitch,*** 27 So.3d at 397 (¶ 5).

Further support for the mandatory nature of the MIGA exhaustion provision is found in ***National Union Fire Ins. Co. v. MIGA,*** 990 So.2d 174 (Miss. 2008). In

National Union, this Court addressed and answered in the affirmative a question certified by the Fifth Circuit, to wit: whether a solvent carrier's insurance policy, which provides primary coverage and an "other insurance" clause stating that it is excess to any other primary insurance, must be exhausted pursuant to Miss. Code Ann. § 83-23-123 before MIGA's statutory coverage of the insolvent carrier's primary policy. ***National Union,*** 990 So.2d at 176 (¶ 1). The underlying suit involved a patient who sued two of her doctors, each of whom was covered under a different insurance policy, one issued by PHICO and the other issued by National Union. All parties agreed that the PHICO policy was primary. PHICO assumed defense of both doctors, settled on behalf of one, and was then declared insolvent. MIGA assumed the defense of the remaining doctor and concluded it had no duty to pay prior to exhaustion of coverage under the National Union policy. National Union filed a declaratory judgment action; MIGA filed a counterclaim for declaratory judgment; both parties filed motions for summary judgment. The district court granted MIGA's motion for summary judgment and National Union appealed to the Fifth Circuit, which certified to this Court the question set forth previously. ***National Union,*** 990 So.2d at 176 (¶¶ 2-4).

Noting that MIGA is not an insurance company and that its duties and responsibilities are strictly controlled by statute, this Court determined that MIGA's obligation to stand in the shoes of PHICO, under § 83-23-115 (1)(b), is limited and qualified by provisions in other MIGA statutes, specifically including § 83-23-123 (1) which requires exhaustion. ***National Union,*** 990 So.2d at 176-77 (¶ 6). As stated by this Court, Section 83-23-123 (1) "eliminates from MIGA's statutory guaranty any obligation to pay a claim prior to the exhaustion of all other-insurance, other than coverage under true excess policies." ***National Union,*** 990 So.2d at 176-77 (¶ 6).

While a true excess carrier does not contract for or receive premiums to provide primary coverage and cannot therefore be required to "drop down" and provide primary coverage in place of an insolvent primary insurer, the same cannot be said for a carrier who does contract for and receive premiums to provide primary coverage; an "other insurance" clause does not transform a primary policy to a true excess policy. ***National Union,*** 990 So.2d at 176-77, n.6 (¶¶ 6-8). The concurring opinion insightfully notes that this exhaustion requirement "gives effect to this express purpose[8] by forcing claimants to seek coverage under a policy issued by a solvent insurer before turning to MIGA to fulfill the obligations of an insolvent insurer. It also serves the purpose of preventing the depletion of MIGA's limited funds in situations in which there are solvent sources of insurance covering the same claim." ***National Union,*** 990 So.2d at 182 (¶ 25) (Diaz, J., concurring).

The Mississippi Supreme Court further clarified its position concerning the MIGA exhaustion/reduction requirement in ***MIGA v. Blakeney,*** 2011 WL 103554 (Miss. Jan. 13, 2011). Blakeney was injured in a work-related car accident and received workers' comp benefits from her employer's comp carrier, Coregis. She also collected $10,000 liability limits from the other driver's policy and settled for $60,000 of her employer's $100,000 UM policy limits. Coregis was subsequently declared insolvent and MIGA assumed Blakeney's comp claim. When MIGA learned of Blakeney's previous insurance recovery, it sought a credit not just for the $70,000 insurance proceeds recovered, but for the combined policy limits of $110,000. ***Blakeney,*** 2011 WL 103554 (¶¶ 2-3). The Commission, the circuit court, and the Mississippi Court of Appeals found

8 That being the purpose stated in Miss. Code Ann. Section 83-23-103: to avoid financial loss to claimants or policyholders, of which MWCSIGA is neither, because of the insolvency of the insurer.

MIGA was entitled to credit for the liability proceeds less collection costs, but not to any portion of the UM policy proceeds. The Mississippi Supreme Court granted MIGA's petition for *certiorari* and reversed, finding MIGA was required to reduce its amount payable by the $60,000 UM proceeds actually recovered. ***Blakeney,*** 2011 WL 103554 (¶¶ 4, 13).

The ***Blakeney*** Court laid to rest any lingering doubt that either ***Cossitt v. Nationwide Mutual Ins. Co.,*** 551 So.2d 879 (Miss. 1989), or Mississippi's workers' compensation statutes trump the MIGA exhaustion/reduction provision. ***Blakeney,*** 2011 WL 103554 (¶¶ 17—22). Instead, ***Blakeney*** plainly states that ***Leitch*** is not an aberration and that the MIGA exhaustion provision contains no exceptions for UM policies, workers' comp policies, or the workers' comp law[9]: "The question of whether UM benefits are off limits to MIGA was answered in ***Leitch***". ***Blakeney,*** 2011 WL 103554 (¶¶ 14-15). Pursuant to Miss. Code Ann. § 83-23-123, as a matter of law, MIGA is statutorily required to reduce the amount payable on the alleged "covered claim" by the $4 million UM recovery, leaving MIGA liable for no additional amount. ***Blakeney,*** 2011 WL 103554 (¶¶ 4, 13); ***Leitch,*** 27 So.3d at 400-01 (¶¶ 16-18).

6. MWCSIGA is not entitled to costs or interest.

Because MIGA is not liable to MWCSIGA in any amount, the issues of costs and interest are moot. Nonetheless, MIGA will briefly address these points.

Nothing in the MIGA Law provides for recovery of punitive damages and, likewise, MWCSIGA's complaint does not assert any basis for punitive or exemplary

9 The cost reduction provision of the workers' comp subrogation statute is likewise inapplicable to the MIGA exhaustion requirement. ***Blakeney,*** 2011 WL 103554 (¶¶ 28-29).

damages. Punitive damages are not favored and are considered an extraordinary remedy allowed only within narrow limits and with caution. ***Bradfield v. Schwartz***, 936 So.2d, 931 (Miss. 2006). Without a statutory or contract provision, there can be no recovery of attorney fees or other costs of litigation unless punitive damages are proper. ***Boling v. A-1 Detective & For Sole Service, Inc.***, 659 So.2d 586 (Miss 1995).

There is also no basis or Mississippi authority for recovery of prejudgment interest herein. Rather, Miss. Code Ann. Section 83-23-133 provides: "There shall be no liability on the part of and no cause of action of any nature shall arise against . . . the association . . . for any action taken or failure to act by them in the performance of their powers and duties under this article." This MIGA statute clearly and unambiguously precludes recovery of any attorneys fees, punitive damages, or prejudgment interest herein. Miss. Code Ann. §§83-23-109(f), 83-23-115(1)(a)(iii), 83-23-133.

V. CONCLUSION

MWCSIGA was created to handle payment of workers' comp benefits when a self-insured employer becomes unable to meet its obligations. MIGA was created for a different purpose altogether, as a fund of last resort, with recovery available only when no other monies are available. There is no provision in Mississippi law which requires MIGA to reimburse MWCSIGA for its statutory duties. Although both MWCSIGA and MIGA statutory schemes include subrogation provisions, the Legislature surely did not intend to create a perpetual, revolving cycle of reimbursement from one fund to another. When MIGA is required to step in for insolvent insurance companies, it is required to reduce the amount payable on any covered claim by the amount recovered pursuant to any other insurance policies except true excess policies. The MWCSIGA Act contains no such non-duplication or exhaustion provision. For these and all of the above and

foregoing reasons, this Court should reverse the trial court's grant of summary judgment and declaratory relief in favor of MWCSIGA and reverse and render summary judgment in favor of MIGA.

Respectfully submitted, this the 7th day of March, 2011.

MISSISSIPPI INSURANCE GUARANTY ASSOCIATION

/s/

By: JAMES D. HOLLAND (MSB [redacted]
JAN F. GADOW (MSB [redacted]
PAGE, KRUGER & HOLLAND, P.A.
P. O. Box 1163
Jackson, MS 39215-1163
Telephone: (601) 420-0333
Facsimile: (601) 420-0033

CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellant, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

A. Spencer Gilbert, III
Gilbert, PLLC
4500 I-55 North, Suite 246
Jackson, MS 39236

Honorable William B. Chapman, III
Circuit Judge, Madison County
Post Office Box 1626
Canton, MS 39046

DATED: This the 7th day of March, 2011.

/s/

James D. Holland
Jan F. Gadow