

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BERTIN C. CHEVIS

PLAINTIFF/APPELLANT

VERSUS

NO. 2010-CA-00861

MISSISSIPPI FARM BUREAU
MUTUAL INSURANCE COMPANY

DEFENDANTS/APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF HANCOCK COUNTY, MISSISSIPPI
HANCOCK COUNTY CIRCUIT COURT NO. 08-0514

=====
BRIEF OF APPELLANTS
=====

ORAL ARGUMENT NOT REQUESTED

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MISSISSIPPI FARM BUREAU
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CERTIFICATE OF INTERESTED PARTIES

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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Plaintiff/Appellant Bertin C. Chevis, MD and his wife Belva Chevis, by and through counsel of record, John F. Ketcherside, Esq., 14 Braewood Cove, PO Box 10574, Jackson, TN 38305.

2. Defendant/Appellee Mississippi Farm Bureau Mutual Insurance Company, by and through counsel of record, John A. Banahan, Esq., Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC, PO Drawer 1529, Pascagoula, MS 39568.

3. Defendants (in Trial Court - not on appeal) Audobon Insurance Group (AIG), AIG Claim Services, Inc., and The Mississippi Windstorm Underwriting Association, by and through counsel of record, James H. Heidelberg, Heidelberg Steinberger Colmer & Burrow, P.O. Box 1407, Pascagoula, MS 39568-1407

4. The Honorable John C. Gargiulo, Circuit Court Judge.

Respectfully submitted,

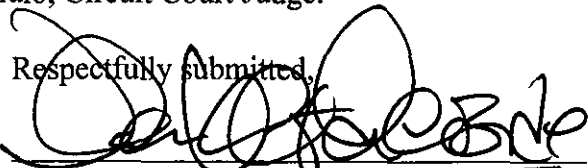

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STATEMENT OF ISSUES

1. THE POLICY IN QUESTION FAILED TO DEFINE "WINDSTORM" AND THE CLAIMED EXCLUSION IS THEREFORE VAGUE AND UNENFORCEABLE.
2. THE POLICY IN QUESTION COVERED "NAMED STORMS" AND APPLIED TO HURRICANE KATRINA.
3. MISSISSIPPI FARM BUREAU SOLD AND BROKERED THEIR "BUSINESS PACKAGE OF INSURANCE" AND IS LIABLE FOR ALL COVERAGES THEREIN.
4. THE HONORABLE TRIAL COURT ERRED IN FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND THAT SUMMARY JUDGMENT WAS PROPER.
5. THE DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE TO PLAINTIFF FOR HIS LOSSES.

STATEMENT OF THE CASE

BACKGROUND AND PROCEDURAL POSTURE

The Plaintiff in this action is Dr. Bertin C. Chevis, local Bay St. Louis, MS, physician and owner of the property that is, and office building that was located at 307 Ulman Avenue in that town. Dr. Chevis resides in Hancock County, Mississippi at 10030 Cain Road.

The Defendant in this appeal is Mississippi Farm Bureau Mutual Insurance Company (Farm Bureau), a Mississippi insurance company with offices in Hancock County. In February, 2005, Dr. Chevis met with agents Farm Bureau to change over all of his business coverage to their company. Dr. Chevis bought a "Business Package" of insurance which he was told would cover him for everything but flood. He wrote checks to different companies at the Farm Bureau office for the coverage he bought there.

On August 29, 2005, Bay St. Louis along with many other coastal communities was struck by Hurricane Katrina. The Chevis' had evacuated, and were not in Bay St. Louis at the time of the storm. When they returned they found Dr. Chevis' building severely damaged by the storm, and it eventually had to be removed from the property. Dr. Chevis made claims with Farm Bureau for his losses. He was directed to different entities for claims and was never fully compensated for his losses. Being aggrieved, Dr. Chevis filed suit on August 28, 2008 against Keith Ladner of Farm Bureau, Theodore Bilbo of Farm Bureau, Mississippi Farm Bureau Mutual Insurance Company, Audobon Insurance Group (A wholly owned subsidiary of American International Group), AIG Claim Services, Inc., and the Mississippi Windstorm Underwriting Association (MWUA). Dr. Chevis dismissed the individual agents,

the various Defendants have filed motions to dismiss or for judgment, and not all witnesses or party representatives have been produced for deposition.

This appeal arises from Farm Bureau's Motion for Summary Judgment. The Motion was filed on July 1, and is based on an exclusion for water, wind or hail. Ladner and Bilbo, Farm Bureau's agents, sold all of the policies through the Farm Bureau office. No definition is given for windstorm in the Farm Bureau policy containing the purported exclusion. The Honorable Trial Court Judge, on March 3, 2010, entered Summary Judgment for Farm Bureau, finding that even though all policies were sold from the same office as part of a business package, their coverage exclusion for an undefined peril would be given effect. The Judgment was made final by Agreed Order dated April 21, 2010. Because this leaves Dr. Chevis without payment for damages and losses in the amount of over Two Hundred Thousand Dollars (\$200,00.00), he filed this appeal.

Appellant seeks redress from this Court finding that Farm Bureau through its agents sold all of the coverages to him in the "Business Package" of coverage and that they are therefore liable for all losses, that the claimed exclusions are vague and unenforceable and there are genuine issues of material fact making summary judgment improper.

STATEMENT OF FACTS RELEVANT TO ISSUES

Dr. Bertin C. Chevis owned the property at 307 Ulman Avenue in Bay St. Louis for a period of years prior to the relevant events of his lawsuit. For approximately ten years before Hurricane Katrina destroyed the building, Dr. Chevis used it as his medical office. In February of 2005, Dr. Chevis purchased a "Business Package" of insurance from Farm Bureau agents Keath Ladner and Theodore Bilbo at Farm Bureau's office in

Hancock County. This was represented as coverage for everything except flood insurance coverage, with coverages from Farm Bureau, Audubon (AIG) and Mississippi Windstorm Underwriting Association, all purchased in the Farm Bureau office. On or about August 29, 2005, Hurricane Katrina struck Bay St. Louis and other areas of the Gulf Coast. The storm damaged Plaintiff's property so badly that (also considering the slow claim, adjustment and incomplete payment process) it was a total loss.

Dr. Chevis cooperated fully with the insurers and adjusters, but his medical practice building was a total loss, and his claims were only partially paid. The final date of breach and continued acts of negligence was January 25, 2007. Farm Bureau paid part of Dr. Chevis' claim, including contents and partial payment from the MWUA. Farm Bureau claimed that there was an exclusion for windstorm, although that term is not defined in the policy.

On August 28, 2008, Dr. Chevis filed his lawsuit against the agents, insurers and adjusting company. He caused all parties to be served. Defendants requested additional time to file their Answers or otherwise respond, to which Plaintiff agreed. Defendants filed Motions to Dismiss and for Summary Judgment. This appeal arises from Summary Judgment granted by Honorable John C. Garguilo, Circuit Court Judge. The Court found that the Farm Bureau policy did not define "windstorm" but that the policy was not vague because the Court could go outside the policy for a definition. The Court did not consider Plaintiff's argument that because all of the coverages were sold through Farm Bureau in its office in Hancock County, a fact issue, that Farm Bureau was liable. There is no dispute that Farm Bureau's agents, Keath Ladner and Theodore Bilbo, sold all of the coverage in question to Dr. Chevis at Farm Bureau's office, no dispute that windstorm is

not defined in the policy, and no dispute that Farm Bureau did not pay the policy amount for a total loss.

SUMMARY OF THE ARGUMENT

Plaintiff Bertin C. Chevis owned and used the property that is the subject of this case for years as his medical practice before it was lost to Hurricane Katrina. In the Spring of 2005 he changed insurance carriers to Farm Bureau and bought a "Business Package" of insurance from them that was to cover everything but flood coverage. He paid his premiums at the Farm Bureau office in Hancock County, albeit some checks to different entities. Dr. Chevis' building was damaged severely by the hurricane and eventually was a total loss. When he made a claim for his loss, he was directed to different offices and adjusters and after a prolonged and painful process was only partially paid for the total loss of his building. Although he had bought insurance including named storm coverage that should have covered all of his losses, his insurers have left him with over Two Hundred Thousand Dollars (\$200,00.00) in losses. Because he was not paid for his damages, he filed suit against all the parties he could identify as responsible. Farm Bureau, the insurer where he had purchased all of his coverage, filed a Motion for Summary Judgment, claiming that an undefined exclusion barred his claim against them and that they were not responsible to their insured for anything beyond coverage for contents. The Honorable Trial Court Judge went outside the policy for the definition of exclusionary language and dismissed the primary insurer without considering agency and fact issues raised by the Plaintiff. We respectfully argue that the Honorable Trial Court Judge should have construed the vague exclusionary language against the insurer as required by Mississippi law and found that numerous fact and agency issues exist which require trial, and denied Defendant's Motion.

ARGUMENT

STANDARD OF REVIEW

On appeal, the Court reviews summary judgment de novo. The Mississippi Supreme Court said in Architex Ass'n, Inc., v. Scottsdale Ins. Co., 27 So.3d 1148, 1156 (Miss. 2010), “This Court has stated that...[t]he circuit court’s grant [or denial] of a motion for summary judgment is reviewed by this Court de novo. See *Wilner v. White*, 929 So.2d 315, 318 (Miss.2006)...In this Court’s de novo review, ‘[t]he evidence must be viewed in the light most favorable to the party against whom the motion has been made.’ *Daniels v. GNB, Inc.*, 629 So.2d 595, 599 (Miss.1993)” Here, the Trial Court not only decided the narrow issue of definition of a policy exclusion term, but decided jury fact issues against Plaintiff, and entered final judgment in favor of the Defendant.

ISSUES ON APPEAL

1. THE POLICY IN QUESTION FAILED TO DEFINE “WINDSTORM” AND THE CLAIMED EXCLUSION IS THEREFORE VAGUE AND UNENFORCEABLE.

The Honorable Trial Court Judge finds, in granting Summary Judgment, that “the Farm Bureau policy at issue does not define ‘windstorm’”. The Court then notes that because Plaintiff stated in discovery that his building was not destroyed by flood, it must have been destroyed by wind and there was no question for the jury. The Court found that it is acceptable to go outside the policy to find definitions for undefined policy terms of art, here a term that resulted in exclusion. In support Defendant and the Trial Court cite the Fifth Circuit case of Kemp v. American Universal Ins. Co., 391 F.2d 533 (5th Cir. 1968). Which apparently allows the Court freedom to find its own definitions for undefined policy terms.

We respectfully suggest that Mississippi law is correctly set forth in Corban v. United Services Automobile Ass'n, 20 So.3d 601 (Miss. 2009) "The substantive contract law of this state likewise has been clearly declared by this Court to include the following concepts...if a contract is clear and unambiguous, then it must be interpreted as written...If a contract contains ambiguous or unclear language, then ambiguities must be resolved in favor of the non-drafting party...exclusions and limitations on coverage are also construed in favor of the insured. Language in exclusionary clauses must be "clear and unmistakable," as those clauses are strictly interpreted. *United States Fid. & Guar. Co. V. Martin*, 998 So.2d 956, 963 (Miss.2008)(internal citations omitted). See also *Frazier v. N. Miss. Shopping Ctr. Inc.*, 458 So.2d 1051, 1054 (Miss.1984)("[a] construction leading to an absurd, harsh or unreasonable result in a contract should be avoided unless the terms are express and free of doubt.")"

Clearly, then, undefined terms must be construed against the insurer, especially in exclusionary language. We respectfully urge that the undefined exclusionary terms in Defendant Farm Bureau's policies be construed in Plaintiff's favor. Dr. Chevis is not seeking double coverage, but he should be compensated once for the total loss of his property.

2. THE POLICY IN QUESTION COVERED "NAMED STORMS" AND APPLIED TO HURRICANE KATRINA.

Plaintiff has repeatedly noted that all coverages were purchased through Farm Bureau Insurance, and has stated that the coverage he purchased through Farm Bureau was "named storm" coverage. The Court reporter who prepared and provided the motion hearing

transcript did not attach the exhibits offered at the hearing. Attached hereto and incorporated herein by this reference is the paperwork that was offered at the hearing which shows Plaintiff purchased "named storm" coverage through Farm Bureau. There was a dispute over the Record on Appeal¹ and we did not have another opportunity to review the record after the Trial Court Judge's Order. Whether Farm Bureau provided what was purchased through its office is certainly a Jury issue. Because Dr. Chevis was offered and purchased named storm coverage through Farm Bureau we respectfully urge they were bound to provide it without exclusion. See Fonte v. Audubon Ins. Co., 8 So.3d 161 (Miss. 2009) This particular issue was raised but never addressed by the Trial Court Judge. This is an issue for the jury.

3. MISSISSIPPI FARM BUREAU SOLD AND BROKERED THEIR "BUSINESS PACKAGE OF INSURANCE" AND IS LIABLE FOR ALL COVERAGES THEREIN.

It is clear even from the limited record necessary to consider this appeal that all of the coverage Dr. Chevis bought to cover his office were bought through the Farm Bureau office in Hancock County, from Farm Bureau agents Keath Ladner and Theodore Bilbo. This issue was raised in the original Complaint and consistently asserted throughout the proceedings. The issue of agency was never addressed by the Trial Court Judge; as soon as he went outside the policy to define undefined exclusionary terms he decided all the pending fact issues and dismissed the primary insurer. The record shows that all of the coverages were bought through Farm Bureau, yet they were dismissed without any consideration. We

¹Defendant sought to introduce hundreds of pages of documents that were not of record at the time summary judgment was entered and the transcript was not provided with exhibits; the later documents were removed.

respectfully urge that this is not proper under Rule 56 or any of the Mississippi law on point. See Fonte, supra, and Miller v. R.B. Wall Oil Co., Inc., 970 So.2d 127 (Miss. 2007) stating that the existence of agency is a fact issue for the jury.

4. THE HONORABLE TRIAL COURT ERRED IN FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND THAT SUMMARY JUDGMENT WAS PROPER.

As noted above, the Trial Court Judge granted summary judgment in favor of Farm Bureau when a number of jury issues remain. The Rule 56, MRCP, states, in pertinent part “summary judgment...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Here, the Honorable Trial Court Judge went outside the contract to define an undefined exclusionary clause and summarily dismissed the insurer and broker for all of the coverages in question without actually considering any fact issues. In Fonte, supra, the Supreme Court states:

‘A summary judgment motion is only properly granted when no genuine issue of material fact exists.’ *Jackson Clinic for Women, P.A. v. Henley*, 965 So.2d 643, 649 (Miss.2007)(citing *PPG Architectural Finishes, Inc., v. Lowery*, 909 So.2d 47, 49 (Miss.2005); *Miller v. Meeks*, 762 So.2d 302, 304 (Miss.2000)). ‘[T]he evidence must be viewed in the light most favorable to the party against whom the motion has been made.’ *One South*, 963 So.2d at 1160; *Green v. Allendale Planting Co.*, 954 So.2d 1032, 1037 (Miss. 2007) (quoting *Price v Purdue Pharma Co.*, 920 So.2d 479, 483 (Miss. 2006)). “The moving party has the burden of demonstrating that no genuine issue of material fact(s) exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact.” *Id.* (quoting *Howard v. City of Biloxi*, 943 So.2d 751, 754 (Miss.Ct.App. 2006)).

The Comment to Rule 56 States:

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

The Trial Court Judge dismissed Farm Bureau after providing his own definition for an undefined exclusionary term and finding that since Plaintiff stated his building was not destroyed by flood, it must have been windstorm. The Court would have to find that a jury could not find that Plaintiff was entitled to insurance coverage for his Katrina-related damages, when many juries have found just that, and occasionally awarding punitive damages for non-payment. Here, the Farm Bureau policy even provides for coverage in certain cases notwithstanding the exclusion. In the endorsement provided by Defendant with his motion² Farm Bureau states that a covered loss that would not have occurred but for the excluded hazard is itself covered. The example is windstorm or hail that damages a heating system causing a fire. Here, Plaintiff alleged later negligence that would not have damaged the property but for storm damage. Under Corban, supra, the exclusionary language would have to be construed in favor of the insured. This alone requires reversal, as well as the many agency and fact issues which were never considered by the Trial Court.

5. THE DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE TO PLAINTIFF FOR HIS LOSSES.

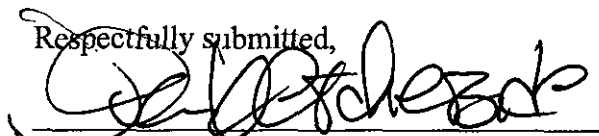
²Unfortunately the Clerk missed pages when numbering the record; the endorsement is the first unnumbered page following page 54 in the Record.

For the reasons noted above, agency by Farm Bureau, promise to provide named storm coverage, coverage under the contract and other reasons, Farm Bureau is liable to Plaintiff, along with all other Defendants, for his losses. Plaintiff pled this and has consistently maintained the same. It is a jury issue if agency exists and if the Defendants acted together.

CONCLUSION

For all of the above and foregoing reasons, Plaintiff/Appellant Bertin C. Chevis moves this Honorable Court reverse the Judgment of the Trial Court with instructions to construe the policy exclusions against Farm Bureau, consistent with Mississippi Law, deny Summary Judgment, allow this matter to proceed to trial, and for such other and further relief as deemed just in the premises.

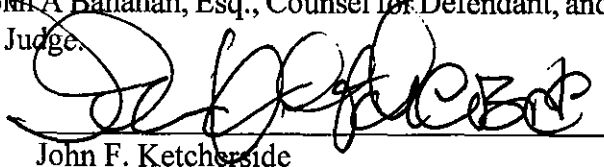
Respectfully submitted,



JOHN F. KETCHERSIDE, MS Bar [REDACTED]
14 Braewood Cove, PO Box 10574
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Attorney for Plaintiff/Appellant

Certificate of Service

I, John F. Ketcherside, hereby certify that on this the 29th day of March, 2011, I have mailed the original and four copies of the above and foregoing Brief of Appellant to the Clerk of the Supreme Court, one copy to John A. Banahan, Esq., Counsel for Defendant, and one copy to John C. Gargiulo, Trial Court Judge.



John F. Ketcherside

FARM BUREAU INSURANCE
P.O. BOX 175, KILN, MS 39556-0175 • 228-255-1133

• FAX 228-255-1326

BRANCH OFFICE

412 HWY 90, BAY ST. LOUIS, MS 39520 • 228-467-6327

• FAX 228-467-6577

TEDDY BILBO
AGENCY MANAGER

KEATH LADNER
AGENT

DEBORAH ALFORD
AGENT

RONNIE BOONE
AGENT

GARY RIDDLE
AGENT

DATE:

2-7-05

TO:

Attn: Scott

COMPANY:

FAX:

467-3805

FROM:

Teddy Bilbo

NUMBER OF PAGES INCLUDING COVER PAGE:

2

COMMENTS:

Please note the correction on
bottom of attached

*****CONFIDENTIAL NOTICE*****

The information in this telecopy is confidential and may be legally privilege. It is intended only for the use of
the person whom it is addressed.

THANK YOU!!!!

Farm Bureau Insurance*P.O. Box 175**Kiln, MS 39556**228-255-1133 • Fax 228-255-1326**February 7, 2005*

Attached is proposal for the business package. The premium for the hazard with a \$2000 deductible is \$1522.00. The premium for the wind & hail is \$4624.34. The wind & hail has a \$750 no named storm deductible and a 2% deductible on a named storm. There is also a \$30.00 membership fee.

Also the business package policy has a million dollar liability limit. Carrying a \$500,000 liability limit would only decrease the premium by \$72.00. I would advise against lowering the liability. Please note that each premium will need a separate check made payable as follows:

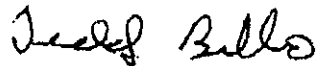
Farm Bureau-\$1522.00

MWUA-\$4624.34

Farm Bureau-\$30.00

If you have any questions, please feel free to contact my office.

Thank you,



Teddy Bilbo



Mississippi Farm Bureau Mutual Insurance Company

Policy No:

Business Package for

DR. BERTIN C. CHEVIS

Located at

307 ULMAN AVE. BAY ST. LOUIS, MS. 39520

Wind Zone Seacoast (no wind)

County Hancock

Construction Frame--D

Town Class 5

Deductible 2,000

Building and Contents

Business Class Office

| | Insurance Amount | Rate Factor | Total Premium |
|--------------------------|---------------------|-------------|---------------|
| <u>Fire</u> | | | |
| Building | \$ 265,100 | 0.228 | \$ 604.00 |
| Stock and Fixtures | \$ 80,000 | 0.228 | \$ 182.00 |
| <u>Extended Coverage</u> | | | |
| Building | \$ 345,100 | 0.147 | \$ 507.00 |
| <u>Vandalism and MM</u> | | | |
| Building | \$ 345,100 | 0.0035 | \$ 12.00 |

Liability and Medical

Limits 1,000,000

Square Feet

Business Building 3,360

4.75

\$ 160.00

If applicable choose

ONLY 4, 5, 6, 7

☐ Greenhouse (\$5,000 limit)

☐ Restaurant

☐ Tavern/Bar

☐ Swimming Pool

Number of Pools

0.00

\$ -

☐ Gas Pumps

Number of Pumps

0.00

\$ -

☒ 56.90

\$ 57.00

1, I
need
is
line

Endorsements

| | | | | | |
|---------|--|------------------------|--------|----|---|
| CAP-15 | <input type="checkbox"/> Mercantile Open Stock | Trade Group 1 | | \$ | - |
| CAP-16 | <input type="checkbox"/> Exterior Signs | | 0 | \$ | - |
| CAP-17 | <input type="checkbox"/> Glass | 1/4 or less | 0 | \$ | - |
| | <input type="checkbox"/> Glass above 2nd Floor | 1/4 plus | 0 | \$ | - |
| CAP-25 | <input type="checkbox"/> Burglary and Robbery | | 6.33 | \$ | - |
| CAP-29 | <input type="checkbox"/> Products Hazard | Sales | 5.10 | \$ | - |
| CAP-31 | <input type="checkbox"/> Loss of Income | 4 Months Income | 0.00 | \$ | - |
| CAP-42 | <input type="checkbox"/> Earthquake | Building \$ 265,100 | 0.00 | \$ | - |
| | | Contents \$ 80,000 | 0.00 | \$ | - |
| MFB-6 | <input type="checkbox"/> Collapse Endorsement | Building \$ 265,100 | 0.0000 | \$ | - |
| | | Contents \$ 80,000 | | | |
| CAP-44A | <input type="checkbox"/> Roof Surfacing-ACV | | 0.00 | \$ | - |

CAP-39 Applies to policy

Total Premium \$ 1,522.00

| Home Office Use Only | | | | | | |
|----------------------|-------|-------|-----|-----------|--------------|--|
| Change Date | | Month | Day | Year | | |
| Expiration Date | | | | | | |
| Peril | Class | C/P | FB | | Prorate Prem | |
| 10 | 002 | 1 | 14 | 345,100 | #NUM! | |
| 20 | 222 | | 14 | 345,100 | #NUM! | |
| 20 | 888 | | | 345,100 | #NUM! | |
| 28 | 0 | | | 345,100 | #NUM! | |
| 39 | 004 | | | - | #NUM! | |
| 39 | 005 | | | - | #NUM! | |
| 39 | 006 | | | - | #NUM! | |
| 39 | 007 | | | - | #NUM! | |
| 39 | 009 | | | - | #NUM! | |
| 40 | 522 | | | 1,000,000 | #NUM! | |
| 40 | 804 | | | 1,000,000 | #NUM! | |
| 40 | 410 | | | 1,000,000 | #NUM! | |
| Total Premium | | | | | #NUM! | |

| Days in effect | | #NUM! |
|-----------------|----------|-------|
| Remaining days | | #NUM! |
| Earned factor | | #NUM! |
| Unearned factor | | #NUM! |
| Current Prem | New Prem | |
| \$ | 786.00 | |
| \$ | 607.00 | |
| \$ | - | |
| \$ | 12.00 | |
| \$ | - | |
| \$ | - | |
| \$ | - | |
| \$ | - | |
| \$ | - | |
| \$ | 160.00 | |
| \$ | 57.00 | |
| \$ | - | |
| \$ | 1,522.00 | |

(Rev. 08-10-04)

Date Rated: _____

Rated by: _____

Print Date: 2/7/2005 9:30