NO. 2010-CC-0076

IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION, HARTFORD INSURANCE COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE MIDWEST, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY

Appellants

v.

UNION NATIONAL FIRE INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, A SUBSIDIARY OF CRUM & FORSTER HOLDING, INC., RLI INSURANCE COMPANY, ONEBEACON INSURANCE GROUP, AEGIS SECURITY INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY (FOR ITSELF AND ITS SUBSIDIARIES WHO ARE MEMBERS OF MWUA), HOMESITE INSURANCE COMPANY, FARMERS INSURANCE GROUP OF COMPANIES AND ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY

Appellees

AMICI CURIAE BRIEF OF AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, AMERICAN RELIABLE INSURANCE COMPANY AND AMERICAN SECURITY INSURANCE COMPANY IN SUPPORT OF IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY

American Bankers Insurance Company of Florida, American Reliable Insurance Company, and American Security Insurance Company, hereinafter referred to collectively as the "American Companies," are affiliated property and casualty insurance companies authorized to do and doing business in the state of Mississippi. Among other things, they issue property and casualty insurance policies in Mississippi, including voluntary policies on properties located in the six counties comprising the "Coast Area." MWUA Plan of Operation, Section II. As such, the American Companies are member companies of the MWUA and have been for a number of years. MCA § 83-34-9. Like other member companies, the American Companies are assigned participation percentages by the MWUA each year based on their written premiums and appropriate credit for policies written on Coast Area properties. As members of the MWUA, they received assessments from the MWUA, based on their previously-assigned participation percentages, attributable to MWUA policyholder losses as a result of Hurricane Katrina.

In accordance with trial court's Agreed Order of Consolidation and Scheduling entered May 14, 2008, the American Companies were served summonses notifying them of the consolidated actions at issue in this appeal. Each

of the American Companies entered a written appearance to participate as an "Interested Party" in the instant action.

The American Companies have an interest in the outcome of this appeal. Depending upon how this Court rules, the American Companies could be adversely impacted either in the form of having to make additional payments or being precluded from submitting corrected data. The American Companies therefore have a substantial legitimate interest that will likely be affected by the outcome of this case. Moreover, having participated as an Interested Party throughout these proceedings, the American Companies believe that there are matters of fact or law that may otherwise escape the Court's attention. No one party to this appeal fully represents the American Companies' positions regarding all of the issues on appeal.

SUMMARY OF THE ARGUMENT

The Chancery Court's decision regarding the MWUA's March 1, 2006 Deadline should be affirmed. The March 1, 2006 deadline imposed by MWUA was arbitrary, exceeded MWUA's authority and failed to comply with the process set forth in MCA § 83-34-29. Additionally, equity demands an accounting for all member companies. In light of the magnitude of Hurricane Katrina and its aftermath, equity requires that member companies be allowed to resubmit

calculations to ensure accuracy and fairness. An arbitrary deadline, such as the one urged by MWUA, is not necessary and will serve only to prejudice member companies who have been unfairly assessed based upon inaccurate and incomplete information. Likewise, the Chancery Court's decision on grouping should be affirmed. MCA § 83-34-9 does not prohibit group reporting. Group reporting has been the accepted practice since 1971 and none of the member companies have challenged this practice previously. Alternatively, should this Court reverse the Chancery Court's decision and prohibit group submissions, equity requires that such a rule apply across the board to all member companies and all companies should be required to submit on an individual basis.

ARGUMENT

I. The Chancery Court's Decision Regarding the MWUA's March 1, 2006 Deadline Should Be Affirmed.

The MWUA's deadline of March 1, 2006 was arbitrary and exceeded MWUA's authority. No member company questions that the MWUA has statutory authority to make rules. The process, though, for setting those rules is important, because the process ensures fundamental fairness. MWUA's failure to follow the process set forth in MCA § 83-34-29 is part of the reason for the current problems. Following the process of obtaining the Commissioner's approval and publishing

those rules provides the kind of notice member companies should be afforded when the stakes are so high. Accordingly, the Chancellor's ruling that the March 1 deadline is arbitrary and capricious should be affirmed.

II. Equity Demands Another Accounting for all Member Companies

One of the four core values of MWUA is: "To provide an equitable method whereby every licensed insurer writing windstorm and hail coverage in Mississippi is required to meet its responsibility." See Mississippi Windstorm Underwriting Associate Plan of Operation, Part I, Section I, attached hereto as Exhibit B. Thus, equitable principles are the backdrop to the adjudication of the issues on appeal. The rules of equity are not inflexible and are "sufficiently elastic" to allow the chancellor to exercise the court's conscience in reaching a fair resolution. 30A C.J.S. *Equity* § 2. Elasticity is particularly appropriate here where everyone acknowledges there has "never before been anything like Hurricane Katrina." The magnitude of the catastrophe wrought by Hurricane Katrina is a "game changer" presenting "challenging circumstances." In meting equity, the trial court exercised its broad equitable powers to achieve substantial justice, and therefore, should be affirmed.

Both MWUA and the *Amici Curiae,* Liberty, et al. argue that if the April 1, 2006, deadline is not rigidly applied, the recalculation will go on "*ad infinitum.*"

MWUA further contends that the Chancellor's ruling makes it impossible for the MWUA to "operate and timely pay valid policyholder claims." (MWUA's Brief, p. 48) MWUA's fears that member companies will eventually ignore assessments and lose confidence in the MWUA are rank speculation. There is no reason to reach such an extreme conclusion. In the wake of the worst natural disaster in the history of the United States, every governmental entity and private enterprise were strained beyond their capacities. It is, therefore, not surprising that mistakes were made in calculation and submission of data, necessitating additional true-ups. But this does not mean that allowing resubmission; therefore, recalculation of participation percentages will go on forever. There has now been sufficient time for companies to ensure the accuracy of their data and submit corrected reports for a final true-up. The MWUA has wisely stated that if the trial court is affirmed, the appropriate step going forward is to allow all member companies to resubmit their premium data. Allowing resubmission even five years later is not an unreasonable time period. See Plan of Operation of the North Carolina Insurance Underwriting Association, Section 1, attached hereto as Exhibit A (association maintains five open policy fiscal years in order to facilitate processing of loss reserves or loss handling expenses).

The MWUA treats its arbitrary deadline for submission of corrected data as if it were a statute of limitation. Statutes of limitations are intended to promote

timely and efficient litigation of claims. Statutes of limitations exist to afford a potential plaintiff a reasonable time to present his claim but also to shield a plaintiff from having to defend a case where there may be substantial prejudice from loss of evidence by death or disappearance of witnesses, loss or destruction of documents, or even fading memories. *Board of Regents of State of New York v. Tomanio*, 100 S.Ct. 1790 (1980). Such issues do not exist in the instant appeal, and, therefore, the balancing of the equities favors allowing resubmission. As appellee Homesite points out, the MWUA has admitted that its accounting on Hurricane Katrina is still open and subject to revision (as indeed it must be given the pendency of this case, the outcome of which will certainly require reassessments across the board). Homesite also pointed out that the MWUA continues to pursue members it believes under-reported premium upon which their assessments were based. The MWUA should simply not be allowed to have it both ways, i.e., to pursue under-reporters while using an arbitrary deadline to prevent those who believe they have been over-assessed from resubmitting their data. The stakes are too large here for such a game of "gotcha" based on alleged technicalities.

Moreover, the changes to the statutes that govern the MWUA mean that "most of the issues raised in this appeal are incapable of occurring under the new

MWUA." (MWUA's Brief, p. 12 n. 11) The concern that recalculations will continue *ad infinitum* and be a problem in the future is without merit.[1]

The MWUA and *Amici Curiae,* Liberty, et al., argue that allowing another true-up would "punish" other member companies because reallocation could result in an additional assessment. But it is not a punishment if reallocation requires them to pay that which they owed in the first place but avoided because of the mere mistakes of other member companies. Those member companies fortunate enough to avoid payment of assessments because the true participation percentages were not accurate have had the benefit of the use of the money for these four years. Thus, they can claim no prejudice or punishment if there is a reallocation of participation percentages.

The attempt of *Amici Curiae,* Liberty, et al., to analogize the body of law addressing the issue of vacating default judgments falls short. The situation before the Court is more akin to a party seeking leave to amend an answer as opposed to setting aside a default judgment. Moreover, said *Amici Curiae* have misconstrued the cases which discuss the prejudice that a plaintiff may suffer if a default is set

[1] MWUA and *Amici Curiae,* Liberty et al., cannot deny that in one sense the allocation of participation percentages under the 2005 statutory scheme is never final. What if a carrier discovered a mistake of overstating voluntary premiums and self-reported that its participation percentages were too low? No doubt there would be no objection to reallocation of participation percentages even if long after March 1, 2006.

aside. What is *not* meant by prejudice is that the plaintiff would have to prove the merits of his case. Wright, Miller & Cain, *Fed. Pract. & Proc.*, §2699. The passage of time making it more difficult for the plaintiff to prove his case or the substantial expenditures in prosecuting his case are the kind of things that constitute prejudice in the world of default judgments. Here *Amici Curiae,* Liberty, et al., can claim none of that kind of prejudice. Moreover, neither MWUA nor said *Amici Curiae* dispute that other member companies may otherwise be entitled to reallocation but for the alleged failure to submit corrected data in a timely fashion. In other words, there is no dispute that if corrected data had been submitted by March 1, 2006, said *Amici Curiae's* fair share would be more than they have paid to date.

III. The Chancery Court's Decision on Grouping Should be Affirmed

The Chancery Court properly ruled that § 83-34-9 does not prohibit group reporting. It has been an accepted practice with the MWUA since 1971, and is permitted in a number of other states. None of the member companies now objecting has ever before challenged the practice despite that fact that grouping no doubt would have then, as now, effected their percentage of participation. By failing to object to the practice of grouping in prior assessments, those member companies now objecting have effectively ratified the practice of grouping and waived the right to now object to the practice. This "rule" was accepted as fair by

all member companies before they knew its effect as a result of Katrina. The longstanding practice of grouping should therefore be affirmed.

IV. Either All Members Should be Permitted to File on a Group Basis, or None of Them Should

As explained above, the American Companies believe that the decision of the Chancery Court allowing group submissions should be affirmed and that all member companies should be permitted to resubmit their data after this Court issues its decision in this matter. In the interest of fairness and equity, companies who resubmit should be permitted to do so in groups as they choose, regardless of whether they previously did so or not. In the event that this Court reverses the Chancery Court's decision and prohibits group submissions, however, equity requires that the same rule should apply to all. Either all members should have the chance to re-file on a group basis or none of the members' assessments should be based on group submissions.

Respectfully submitted,

By: _____

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ATTORNEY FOR AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, AMERICANRELIABLE INSURANCE COMPANY AND AMERICAN SECURITY INSURANCE COMPANY

CERTIFICATE OF SERVICE

I, Monty Simpkins, do hereby certify that a copy of the AMICI CURIAE BRIEF OF AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, AMERICAN RELIABLE INSURANCE COMPANY AND AMERICAN SECURITY INSURANCE COMPANY IN SUPPORT OF IN SUPPORT OF APPELLEES/CROSS-APPELLANTS has been sent via First Class Mail to the following:

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Honorable Dewayne Thomas
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P.O. Box 686
Jackson, MS 39205-0686
TRIAL JUDGE

So certified this, the 30th day of December, 2010.

Monty Simpkins

CERTIFICATE OF SERVICE

I, Monty Simpkins, do hereby certify that an original and five copies of the foregoing has been filed with the Clerk of the Supreme Court of Mississippi and that a copy has been sent via First Class Mail to the following:

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So certified this, the 7th day of December, 2010.

Monty Simpkins

PLAN OF OPERATION
OF THE
NORTH CAROLINA INSURANCE UNDERWRITING ASSOCIATION

The North Carolina Insurance Underwriting Association has been established by Article 45 of Chapter 58 of the General Statutes of North Carolina to provide a method whereby adequate Fire, Extended Coverage, Additional Extended Coverage, Optional Perils Coverage, Business Income and Extra Expense Coverage, Vandalism and Malicious Mischief, Windstorm and Hail Coverage and Crime Insurance, as herein defined and limited, may be provided in the Beach area of North Carolina and Windstorm and Hail Coverage may be provided in the Coastal area of North Carolina.

Section I – Purpose of the North Carolina Insurance Underwriting Association

1. To provide an adequate market for Fire, Extended Coverage, Additional Extended Coverage, Optional Peril Coverage and Vandalism and Malicious Mischief Insurance that is necessary to the economic welfare of the Beach area in order to insure its growth and development.

2. To provide adequate insurance upon property in the Beach area that is necessary to enable homeowners and commercial owners to obtain financing for the purchase and improvement of their property.

3. To provide an equitable method whereby every licensed insurer writing Fire, Extended Coverage and Vandalism and Malicious Mischief Insurance in North Carolina is required to meet its public responsibility.

4. To provide a mandatory Plan to assure an adequate market for Fire, Extended Coverage, Additional Extended Coverage, Optional Perils Coverage, Business Income and Extra Expense Coverage and Vandalism and Malicious Mischief Insurance in Beach areas of North Carolina, to fulfill the purposes provided in General Statute 58-45-1, and to be exempt from State and federal taxation to the fullest extent permitted by law; and, to assure an adequate market for Crime Insurance, as herein defined and limited, in the same Beach area; and, to offer separate policies of Windstorm and Hail Insurance in the Beach area and Coastal area of North Carolina.

EXHIBIT

A

MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION

. Plan of Operation

· Part I

The Mississippi Windstorm Underwriting Association was established by HB 274, 1987 session of the Mississippi Legislature to provide a method whereby an adequate market for Windstorm and Hail Insurance may be provided in the Coast Area of Mississippi.

SECTION I - **PURPOSE OF THE MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION**

. To provide an adequate market for windstorm and hail coverage which is necessary to the economic welfare of the Coast area in order to insure its orderly growth and development.

. To provide adequate insurance upon property in the Coast area which is necessary to enable homeowners and commercial owners to obtain financing for the purchase and improvement of their property.

. To provide an equitable method whereby every licensed insurer writing Windstorm and Hail coverage in Mississippi is required to meet its public responsibility.

. To provide a mandatory Plan to assure an adequate market for Windstorm and Hail Coverage in the Coast area of Mississippi and to fulfill the Purposes provided by the Mississippi Legislature.

SECTION II - **DEFINITIONS OF TERMS**

. "Essential Property Insurance" means insurance against direct loss to property as defined and limited in the standard Windstorm and Hail endorsement thereon, as approved by the Commissioner.

. "Association" means the Mississippi Windstorm Underwriting Association established by HB 274, 1987 session of the Mississippi Legislature.

. "Plan of Operation" means the Plan of Operation of the Association approved or promulgated by the Commissioner pursuant to HB 274, 1987 session of the Mississippi Legislature.

. "Insurable Property" means builder's risk and real property at fixed locations in Coast area or the contents located therein, (but shall not include insurance on motor vehicles) which property is determined by the Association, after inspection and pursuant to the criteria specified in the Plan of Operation to be an insurable condition.

. "Commissioner" means the Insurance Commissioner of the State of Mississippi.

. "Coast Area" means all of that area of the State of Mississippi located in Hancock, Harrison, Jackson, Pearl River, Stone and George Counties.

EXHIBIT

B