IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CC-00076

MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION — APPELLANT

v.

UNITED STATES FIRE INSURANCE COMPANY, et al. — APPELLEES

APPEAL FROM THE CHANCERY COURT OF
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

REPLY BRIEF OF APPELLEE AND CROSS APPELLANT HOMESITE INSURANCE COMPANY

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

Homesite has cross-appealed on the issue of grouping by various MWUA members in their reporting of premium figures and voluntary credits. Section 83-34-49 expressly requires that each member's premium figures be considered separately. Small companies like Homesite were harmed by large affiliated companies who in grouping their writings were able to improperly borrow each other's voluntary credits in their premium reports for purposes of lowering their assessments, at the expense of the remaining members who under this zero-sum assessment regime were then required to make up the difference.

ARGUMENT

I. THE MWUA AND EXECUTIVE OFFICERS ADMIT THAT GROUPING WAS NEVER PERMITTED UNDER THE MWUA'S CONTROLLING STATUTES

As discussed more fully in Homesite's opening brief, the Mississippi Windstorm Underwriting Association ("MWUA") was the entity created and charged by Mississippi statute with administering a program of assessments and credits to its member companies, which members included all companies writing and selling property insurance in the State of Mississippi. Miss. Code Ann. §§ 83-34-1, 83-34-9. MWUA admits that in years prior it had erroneously permitted grouping, but argued that "[t]he theory behind allowing such group reporting is that it encourages companies to voluntarily write wind and hail insurance coverage in the coast area." MWUA Reply at 6 ("Reply"). MWUA's premise is incorrect. It was the system of granting *voluntary credits* that was enacted to encourage companies to voluntarily write wind and hail insurance coverage in the coastal area. Miss. Code Ann. § 83-34-9. Grouping has never been permitted by statute.

In fact, MWUA conducted its own legal analysis of its governing legislation and determined that group reporting was not permitted by MWUA's governing statutes. Upon reaching that legal conclusion, MWUA notified its members and ordered that each member company report on an individual basis, and not by group:

> It has come to our attention that the statutes that create and govern MWUA do not allow for the use of group numbers in the determination of percentages of participation. Like Statutory Annual Statements, **the data for MWUA must be by Member company and not by groups of member companies**. Each insurance company writing property insurance in Mississippi is a separate Member of MWUA and must submit its own separate data.

(Ex. v.4 at 1-9)

The MWUA's Director, Joe Shumaker, testified in a hearing before the Chancery Court and admitted that the Mississippi statues had always expressly prohibited member companies from reporting on a group basis for the purpose of calculating assessments:

Q. ... When did the Windpool first become aware that it was not proper for them to allow the member companies to use group numbers in the determination of their percentages of participation?

A. Well, it was sometime immediately that – prior to the annual meeting in October of '06.

Q. How did the Windpool become aware of that?

A. A legal counsel advised us.

Q. All right. And prior to that time, the Windpool was not aware that it – that it was – there was no authority for them to allow them to use group numbers?

A. If there was any violation or – of the statutes, the Windpool management was not aware of it.

Q. Not aware of it. But you do agree that there is no authority for the Windpool to allow companies to report on a group basis, correct?

A. Legal counsel advised us of that, yes.

Q. As a matter of fact, the Windpool has put out a memo to that effect to all member companies, have they not?

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THE WITNESS: Yes, this is a bulletin that was sent to all the member companies which were submitting group data, advising them that it had come to our attention that the statues did not allow for the use of the group numbers.

MR. JERNIGAN, CONTINUED:

Q. Okay. And we can agree, can we not, Mr. Shumaker, **that the statutes have never allowed for the use of group numbers, correct**?

A. **It's my understanding, yes.**

Q. All right. And if the companies reported on a group basis, they were doing so because the Windpool allowed that in contravention of the statute, correct?

A. We were allowing – we were under the assumption that it could be – was authorized.

(C.P. v.55 p.80-82) (emphasis added).

In opposition to Homesite's Cross-Appeal, other member companies seeking to protect the huge reductions in their assessments created by the practice of grouping (which in this zero-sum assessment regime merely shifts that assessment burden to the non-grouping member companies like Homesite) have supported their arguments by primarily relying on a theory of "deference" to MWUA and the executive officers charged with administering the statutes. However, MWUA was not entitled to deference in any of its decisions, because MWUA's enabling statutes did not permit group reporting—they expressly required individual reporting. The statutes require that each member participate in MWUA losses by the proportion of property insurance policies that *each such member* wrote as compared to *all members*, not each member

as compared to its group members, or group members compared to all members.[1] The requirement is for individual reporting, and for individual participation. Any other mechanism violates the governing statutes, and shifts the assessment burden to members, like Homesite, that cannot group.

An agency decision that violates its governing statute must be reversed under any standard as a matter of law. *Am. Federated Life Ins. Co., Federated Life Ins. Co. v. Dale*, 701 So.2d 809, 811 (Miss. 1997). As discussed above, grouping was not permitted by MWUA's governing statutes, and MWUA has agreed both in writing and in testimony that grouping was not permitted under its governing statutes. Therefore, grouping should not be permitted here. Accordingly, the Mississippi Supreme Court should order that MWUA de-group the premium reports and consider the separate premium numbers for each member, prior to the recalculation of assessments for these named Appellees as ordered by the Hinds County Chancery Court.[2]

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[1] Miss. Code Ann. § 83-34-9 (emphasis added):

> All members of the association shall participate in its writings, expenses, profits and losses in the proportion that the net direct premiums **of each such member** written in this state during the preceding calendar year **bears to the aggregate net direct premiums written in this state by all members of the association**, as certified to the association by the commissioner after review of annual statements, other reports and any other statistics the commissioner shall deem necessary to provide the information herein required and which the commissioner is hereby authorized and empowered to obtain from any member of the association....

[2] MWUA has argued that Homesite's position on de-grouping should not be allowed because Homesite has only asked to de-group policy years 2004 and 2005, and if grouping is not allowed as to any year, all previous years should then be de-grouped—which then leads to an alleged procedural quagmire in verifying old data. The only relevant open years are policy years 2004 and 2005, which are the only policy years before the Court, and the only years subject to this appeal. The Court may properly limit an order on de-grouping to policy years 2004 and 2005.

II. THE MWUA GOVERNING STATUTES LOUDLY PROCLAIMED THAT THE PRECISE FORMULA FOR CALCULATING PARTICIPATION PERCENTAGES UTILIZING VOLUNTARY CREDITS REQUIRED COMPARING INDIVIDUAL REPORTING TO THAT OF ALL MEMBERS, NOT TO GROUP MEMBERS

The analysis of whether group reporting was permitted is a question of law, and proceeds by *de novo* review. *Powe v. Byrd*, 892 So.2d 223, 227 (Miss. 2004); *Arceo v. Tolliver*, 19 So.3d 67, 70 (Miss. 2009); *Sheppard v. Miss. State Highway Patrol*, 693 So.2d 1326, 1328 (Miss. 1997). A *de novo* review of the issue of grouping yields the same conclusion reached by MWUA—that grouping was not permitted by statute. As noted above, Mississippi Code Annotated Section 83-34-9 and Section IX of the MWUA Plan of Operation provide that each and every member company must report individually so that assessments are determined on an individual basis:

> All members of the association **shall participate** in its writings, expenses profits and losses **in the proportion that the net direct premiums of <u>each</u> such member** written in this state during the preceding calendar year **bears to the aggregate net direct premiums written in this state by <u>all</u> members of the association** . . . . (emphasis added)

It is a fundamental rule of statutory construction in Mississippi that use of the word "shall" establishes an absolute requirement under the applicable statute. *Division of Medicaid v. Miss. Independent Pharmacies Ass'n*, 20 So.3d 1236, 1239 (Miss. 2009). Moreover, where the language used by the legislature in a statute is plain and unambiguous and conveys a clear directive, there is no occasion to resort to rules of statutory construction. *Miss Power Co. v. Jones*, 369 So.2d 1381, 1388 (Miss. 1979); *Forman v. Carter*, 269 So.2d 865 (Miss. 1972); *State v. Heard*, 246 Miss. 774, 151 So.2d 417 (1963). In fact, there is no need to step outside the language of the statute at all.

Despite MWUA protestations that the MWUA statutes were silent on grouping, it is clear that the statutes spoke loudly in declaring that members shall participate on an individual basis.

There are no grounds for any alternative interpretation. The statute does not provide that each member shall participate based their net direct premiums, when combined with other group members premiums, relative to the net direct premiums of all members. It does not provide that each group shall participate based upon their net direct premiums, when compared with all members as a whole. Rather, the statute establishes an absolute requirement under Mississippi law that participation percentages be based upon the net direct premiums of each member as compared to the net direct premiums of all members. It sets forth a precise formula for calculating this simple ratio, and the MWUA's failure to execute the statutory mandate had profound consequences when the Katrina assessments were made.

In both fact and law, it is undisputed that each and every insurance company in Mississippi becomes and remains a separate member of MWUA as an absolute condition of doing business in this State.[3] It is undisputed that members must be assessed based upon the ratio of their individual net direct premium versus the aggregate net direct premiums for all numbers. It is undisputed that MWUA's own writings and testimony admit that grouping was not permitted under the governing statutes. It is also undisputed that the policy years 2004 and 2005 are still open, and that a final assessment or final "true up" has yet to come. Accordingly, the Mississippi Supreme Court should order that MWUA de-group the premium reports of all members and consider the separate premium numbers for each member prior to its recalculation

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[3] Miss. Code Ann. § 83-34-3 affirms the following in this regard:

> There is hereby created the Mississippi Windstorm Underwriting Association, consisting of all insurers authorized to write and engaged in writing property insurance within this state on a direct basis. Every such insurer **shall** be a member of the association and **shall** remain a member of the association so long as the association is in existence **as a condition of its authority to continue to transact the business of insurance in this state.**

of assessments for these Appellees as otherwise ordered by the judgment of the Hinds County Chancery Court.

III. MWUA'S REMEDY FOR ADDRESSING THE ADMITTED GROUPING VIOLATION WAS LEGALLY DEFECTIVE AND NON-RESPONSIVE TO HOMESITE'S APPEAL

Despite its recognition that grouping expressly violated its governing statutes, MWUA proposed to correct the problem only on a going-forward basis, starting with policy year 2006. Such a remedy might have been sufficient had the policy years been closed and no member appealed any assessment within the prescribed three-year statute of limitations.[4] However, that is not the case here. MWUA has kept open the 2004 and 2005 policy years. MWUA has admitted that it had no legal basis for permitting group reporting during those years. MWUA counsel admitted in argument before the Chancery Court that if MWUA is ordered to provide each member its correct voluntary credits, it would not be difficult or result in a lengthy delay to calculate the final assessments. Transcript at 38:1-13.

MWUA continues to assert that it should have been allowed to accept group reporting from affiliated members because that was the way it was always done—from 1971 to 2006. In other words, MWUA shamelessly argues they should have been allowed to continue doing it wrong because they have always done it wrong. However, the passage of time does not make something done wrong, right. Prior to Hurricane Katrina, there were no prior assessments for members to challenge, except for a single assessment in 1998 that was not materially affected by group reporting. MWUA does not maintain discretion to grant or accept group reporting on any basis for any of these years.

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[4] MWUA and Homesite have stipulated that Homesite's appeal was timely, and MWUA has waived any challenge to the same. (C.P. v. 34 p.55 ¶70).

There is no legal or logistical reason to allow MWUA to ignore its determination that grouping should not have been permitted during the open policy years 2004 and 2005. With those years still open, and with no difficulty or undue delay to requiring that voluntary credits be properly reported, the Court should find in favor of Homesite's cross-appeal as to the grouping issue and order that MWUA proceed with de-grouping immediately.

CONCLUSION

The Chancery Court's ruling appropriately required that MWUA correctly assess all insurance companies writing property insurance in Mississippi during policy years 2004 and 2005. The MWUA Plan of Operation provides a specific mechanism for correcting such errors, which Homesite followed within all applicable statutes of limitation. All MWUA members were specifically summoned to the Chancery Court, and no member other than the Appellees filed any arguments or took any interest in these appeals in the court below.

In line with its fundamental guiding principles of fairness and equity in the administration of MWUA, it is only fair that each company pay its equitable and proper share, calculated pursuant to the existing statutory mandate which requires individual reporting. The 2004 and 2005 policy years are still open and remain subject to revision following these appeals. Because any revisions by MWUA in the assessment of one member affects all members, such that all members' assessments will have to be recalculated, the MWUA should be ordered to recalculate those assessments correcting all errors found by the Chancery Court, with the addition of individual reporting, as is required by statute.

WHEREFORE, the judgment of the Chancery Court of Hinds County should be AFFIRMED as to MWUA's appeal, and REVERSED and RENDERED on Homesite's Cross-Appeal concerning the issue of group reporting.

Respectfully submitted the 9th day of May, 2011.

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CERTIFICATE OF SERVICE

I, the undersigned representative for Homesite Insurance Company, do hereby certify that I have delivered this day for filing with the Clerk of the Mississippi Supreme Court, an original plus three copies of this Reply Brief of Appellee and Cross Appellant Homesite Insurance Company, and also sent via U.S. Mail, postage prepaid, a true and correct copy of the same to each the following individuals:

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