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

RE3

MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION — APPELLANT

VS.

UNION NATIONAL FIRE INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, HOMESITE INSURANCE COMPANY, RLI INSURANCE COMPANY, ONEBEACON INSURANCE GROUP, ZURICH AMERICAN INSURANCE COMPANY, FARMERS INSURANCE GROUP OF COMPANIES, AEGIS SECURITY INSURANCE COMPANY AND ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY — APPELLEES

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

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT UNION NATIONAL FIRE INSURANCE COMPANY

(ORAL ARGUMENT REQUESTED)

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I. The entity and executive officers that administered the windpool program construed the statutes to expressly prohibit grouping.

The Mississippi Windstorm Underwriting Association (MWUA) was the entity charged with administering the program of assessments to member companies under the applicable statutes. MWUA internally determined that group reporting was not permitted by the Mississippi statutes governing MWUA and ordered that each Member should report separately. It remains undisputed that MWUA has formally adopted the following position regarding grouping by member companies:

> 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)

Through the following testimony at the hearing, the Director of MWUA, Joe Shumaker, ultimately concurred that the enabling statutes 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?

MR. COPELAND: It went to the ones that he grouped. Maybe it's not the ones.

Q. Well, I misstate that, then. It did put out a --

MR. COPELAND: Depending on which one you got here. I think it was one of both.

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 Union National Fire Insurance Company's Cross-Appeal, the member companies seeking to protect their huge assessment reductions through the practice of grouping have relied primarily on a theory of "deference" to the executive officers charged with administering the

statutes.[1] However, under this proposed standard, the Court would have instead been required to find that grouping was not permitted. Based on the evidence above, it is undisputed that MWUA expressly concluded that grouping was not permitted under the relevant statutes. As indicated in the same official correspondence, and despite the prior practice of allowing group reports, the issue of *legality* under the enabling legislation had not previously come to their attention.[2] Accordingly, the Mississippi Supreme Court should order that MWUA separately consider the premium figures and voluntary credits for each member that previously filed a group report, prior to the recalculation of assessments for these named Appellees as ordered by the Hinds County Chancery Court.

II. The windpool statutes provide a precise formula for calculation of participation percentages utilizing voluntary credits.

A *de novo* review of the issue of grouping yields the same conclusion reached by MWUA -- that grouping was not permitted by statute. Miss. Code Ann. § 83-34-9 and Section IX of the MWUA Plan of Operation provide that each and every Member 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 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....(emphasis added)

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[1] Despite the request for deference on the issue of grouping, Union National Fire agrees that the Chancellor properly ruled that MWUA was not entitled to deference in any of its decisions. *See Owens Corning v. Mississippi Insurance Guaranty Association*, 947 So. 2d 944 (Miss. 2007). Regardless of the standard of review, as pointed out in Union National Fire's Brief of Appellee and Cross-Appellant, an agency decision that violates a governing statute must be reversed as a matter of law. *Am. Federated Life Ins. Co., Federated Life Ins. Co. v. Dale*, 701 So.2d 809, 811 (Miss. 1997).

[2] Because Union National Fire had raised this issue in its appeal just a few weeks earlier in October of 2006, it is obvious that Union National Fire's appeal brought it to their attention. MWUA obviously concurred in the merit of Union National Fire's position despite the Commissioner's subsequent refusal to follow MWUA's interpretation.

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). The statute does not provide that each member shall participate based their net direct premiums when combined with other "affiliated" members' premiums. It commands that a participation percentage is calculated based on the net direct premiums of each member divided by the net direct premiums of all members. It is a precise formula for calculating a simple percentage, with profound results in a disaster such as Hurricane Katrina. 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] For whatever reason some companies may have incorporated new companies as their business expanded or diversified, or whether these "affiliated" companies were former competitors that merged, each member remains a distinct entity under the windpool statutes and all corporate jurisprudence in Mississippi. While it is apparent that an order of de-grouping may financially impact some, this is a zero-sum system where small members such as Union National Fire have carried the burden of financing the benefits that large conglomerates have obtained by reducing their windpool assessments through the exclusive trading of voluntary credits among themselves.

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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.**

In its review of MWUA's denial of all appeals, the Commissioner found that grouping of member companies was permissible because of long-standing practice of accepting group reporting.[4] (R.E. 8) As to the stipulations regarding this longstanding practice, Union National Fire was not a named party to that proceeding. Union National Fire had already presented its appeal and received rulings from the Commissioner in separate matters. The appeal record referenced by Allstate that contained this stipulation was a consolidated appeal of six other Appellees named herein that was ordered by the Chancellor to be resolved by the Commissioner prior to joinder and consolidation with Union National Fire's appeal which was already pending and waiting in Chancery Court.

Nevertheless, long-standing practice by itself is not sufficient to save a construction that is plainly wrong. Whether or not the Commissioner is entitled to deference in his review of MWUA's actions, practice and procedure has no material force where the interpretation is contrary to statutory language. *Miss. State Tax Comm'n v. Moselle Fuel Co.*, 568 So. 2d 720 (Miss. 1990). "While we do afford great deference to the agency's interpretation of its own statutes and rules, if the agency's interpretation is contrary to the unambiguous terms or best reading of a statute, no deference is due." *Barton v. Blount,* 981 So. 2d 299, 301 (Miss. App. 2007); *see Miss. Ethics Comm'n v. Grisham*, 957 So. 2d 997, 1001-02 (Miss. 2007)(practice in areas of administration committed to agency responsibility is normally given weight in interpretation except where practice is contrary to statute). Although new legislation enacted after Hurricane Katrina would be irrelevant to interpretation of the statutes currently under review, it is equally gleaned from this new legislation's express provisions allowing grouping that it had not been previously permitted.

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[4] The Chancery Court found this fact to be relevant, only after concluding that the enabling legislation failed to address the grouping issue.

As in the case of all the calculation errors made by MWUA during the assessment process, it costs MWUA absolutely nothing to remedy grouping at the same time.[5] 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 of assessments for these Appellees as ordered by the Hinds County Chancery Court.

III. MWUA's remedy for addressing the admitted grouping violation was legally defective and non-responsive to Union National Fire's appeal.

Despite its recognition that grouping expressly violated the windpool statutes, MWUA proposed to correct the problem only on a go-forward basis for future assessments. (C.P. v.55 p.80-82) Such a remedy might have been sufficient had no member appealed any assessment within the prescribed three-year statute of limitations on this issue. However, Union National Fire's appeal on this very issue had certainly been brought within the statute of limitations applicable to the Hurricane Katrina assessments, and in fact, was pending review by MWUA and/or the Commissioner at the time this particular remedy was chosen by the MWUA Board. Recognizing the strength of Union National Fire's position, this prospective remedy proposed by the MWUA Board was nothing more than an arbitrary means for attempting to deny Union National Fire the relief it had requested. If grouping by MWUA was admittedly illegal and a request for relief already pending, correction of the problem only on a go-forward basis was legally defective and non-responsive to the appeal standing before it for two policy years where grouping was improperly permitted.[6] This further

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[5] In fact, it is presumed that MWUA's entire legal costs and attorneys' fees from its 5-year fight against its own members over the refusal to allow corrections, including the costs of this appeal, will be added to member assessments.

[6] Allstate requests affirmation of MWUA's prospective remedy based on *Tew v. Dixieland Finance, Inc.*, 527 So. 2d 665, 673 (Miss. 1988). However, *Tew* involved conflicting regulations from two different agencies with a need for the two agencies to reconcile their conflict since the appealing party could not have adhered to both regulations in the past. Here, we are dealing with

demonstrates how a few individuals at MWUA chose a path arbitrarily designed solely to make its job easier in the aftermath of Hurricane Katrina.[7] MWUA is an association that is made up of all its members, and its members are the MWUA. This underlying principal has been ignored by the MWUA Board throughout the assessment process and the many appeals to the Board that followed.

It is also asserted that the grouping issue for the two policy-years made part of Union National Fire's appeal should be ignored since Union National Fire failed to contest earlier policy years in which profits were made by all members. Regardless of the irrelevance of policy years not made part of this appeal, there is no proof in the record that Union National Fire ever profited from the practice of other members' grouping. In fact, had Union National Fire sought recalculation of any assessments prior to policy-year 2004, MWUA would undoubtedly be jumping up and down now screaming for application of the same three-year statute of limitations it chose to ignore in the denial of all assessment appeals following Hurricane Katrina, except the refund granted its own servicing carrier. There is no legal basis for denying Union National Fire relief because it chose out of respect for existing law to limit its claims to those years falling within the three year statute of limitations. The suggestion that Union National Fire's appeals of policy years 2004 and 2005 should be denied solely because they did not also seek recalculation of all assessments made in the history of MWUA is without any legal basis. Until Hurricane Katrina, the one previous member assessment

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a single statute that has existed since 1987 with a single interpretation by a single entity. The Mississippi Supreme Court only needs to determine whether or not grouping was permitted for policy years 2004 and 2005 since the issue was part of Union National Fire's timely appeal.

[7] As established by the record, reinsurance proceeds were not properly allocated between 2004 and 2005 policy years solely as a matter of convenience to MWUA's bookkeeper. MWUA then issued its servicing carrier and member, AIG (Audubon), an immediate refund as a result of AIG's own inadvertent error without the need for an appeal and without notice of the refund to all remaining members who were expected to make up for a huge loss of supporting funds to pay claims on MWUA policies as a result of the AIG refund.

over the last two decades was manageable. It only became damaging to its members after MWUA fell $545 million short on the reinsurance coverage it secured for the policies issued to coastal residents for Hurricane Katrina. Because MWUA's prospective remedy for addressing the admitted grouping violation was legally defective and non-responsive to Union National Fire's appeal, the Mississippi Supreme Court should find in favor of Union National Fire's cross-appeal on the issue of grouping.

IV. Allstate's arguments are procedurally barred and irrelevant to statutory interpretation.

Allstate made no arguments, supplied no record of its own and failed to substantively participate in the lower court. Allstate is procedurally barred from asserting any arguments on appeal. A party may not pursue arguments in the Mississippi Supreme Court for the first time on appeal, whether appellant or appellee. *See Fidelity & Deposit Co. of Maryland v. Ralph McKnight & Son Const., Inc.*, 28 So. 3d 1382 (Miss 2010). Because Allstate's appearance at this juncture is a mystery given its absence from all prior proceedings, its brief should be set aside.

Allstate expends considerable effort with public policy arguments such as the one that grouping promotes the writing of policies on the Coast. Allstate suggests that these smaller companies appealing the grouping issue are merely resentful of Allstate because it was able to obtain significant reductions in its assessment by the $7 million worth of credits it received for issuing policies on the coast. It also repeats themes of undue profits to those who did not have voluntary premiums from coastal writings such as reported by Allstate. Finally, it claims that its payment of a half billion dollars in claims on coastal policies reduced assessments to the remaining members.

Arguments of public policy can never be the basis for ignoring governing statutory law. *Am. Federated Life Ins. Co. v. Dale*, 701 So.2d 809, 813 (Miss. 1997). An agency decision that violates a governing statute must be reversed under any standard. *Id.* at 812-13. Despite the irrelevance of

these public policy arguments by Allstate, the $7 million of coastal premiums allegedly written by "Allstate" are presumably credits borrowed from other separate members with whom Allstate grouped to offset its own writings.[8] If this is the case, its claims of nobility fall short. As set forth in other parts of this appeal, Union National Fire actually wrote its own coastal policies but failed to receive credit after discovery of a reporting mistake and timely appeal to the MWUA Board of Directors. There is also no correlation between Allstate's assertion that it paid a half billion dollars in claims on coastal policies thereby reducing assessments to the remaining members. That argument makes the unsupported assumption that Allstate's policyholders would have gone directly to MWUA for a policy instead of simply buying from another member also issuing policies on the coast. More importantly, Allstate fails to acknowledge the massive amount of coastal premiums received over the years prior to satisfying their contractual/policy obligations to those coastal policyholders after Hurricane Katrina. In sum, Allstate's arguments are procedurally barred, irrelevant to statutory interpretation and overwhelmingly unpersuasive.

CONCLUSION

The Chancery Court properly ruled that Appellees' assessments be recalculated based on revised premium figures from these Appellees to accurately reflect the amount of business conducted by each in this State. Consistent with the precise statutory formula for determining participation percentages, MWUA should separate and de-group the premium reports of affiliated members prior to making the correction to the participation percentages of Appellees.

WHEREFORE, the judgment of the Chancery Court of Hinds County should be AFFIRMED on appeal, and REVERSED and RENDERED on Union National's Cross-Appeal.

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[8] Union National Fire is unaware of confirmation of Allstate's factual claims in the record, and Allstate does not indicate which corporate entity actually issued these policies on the coast.

Respectfully submitted the 9th day of May, 2011.

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CERTIFICATE OF SERVICE

I, the undersigned representative for Union National Fire Insurance Company, do hereby certify that I have this day sent via U. S Mail, postage prepaid, a true and correct copy of the above and foregoing to each the following individuals:

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