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

MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION — APPELLANT

VERSUS

UNITED STATES FIRE INSURANCE COMPANY, ET AL. — APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY
FIRST JUDICIAL DISTRICT

REPLY BRIEF FOR APPELLANT
RESPONSE BRIEF FOR CROSS-APPELLEE
MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION

ORAL ARGUMENT REQUESTED

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2. Did the MWUA Board have jurisdiction to order the true-up?

3. Did the true-up, in effect, allow extra-statutory appeals of the MWUA percentages of participation calculated and placed in effect in June 2005?

REQUEST FOR ORAL ARGUMENT

Contrary to the oral argument statements of certain of the Appellees, this appeal does involve questions of first impression concerning the operation and authority of the MWUA as it was constituted in 2005. The facts are not simple and involve matters that fall within the unique field of expertise of the Commissioner. The MWUA respectfully suggests that oral argument would be of benefit to this Court in considering whether the Chancellor erred in setting aside the majority of the Commissioner's decisions, which upheld the actions of the MWUA and which recognized that the responsibility of accurately reporting individual member company data to the MWUA lies with the MWUA member.

INTRODUCTION

Throughout the process of these member company appeals, the MWUA has most definitely learned the meaning of the old adage that no good deed goes unpunished. As a result of responding to its member companies' concerns and affording **all** of them a **single, equal opportunity** to correct their errors in premium reporting, the MWUA Board and its counsel (not to mention former Deputy Commissioner of Insurance Lee Harrell) have all found themselves to be the subject of unjustified accusations and aspersions. The MWUA Board and its counsel have been accused of nefarious purposes in ordering the true-up. Mr. Harrell has been accused of improper conduct in upholding the true-up in the decisions he issued on behalf of the Commissioner of Insurance. The MWUA's former accountant, Jim Redd, has been the subject of accusations of incompetence, if not worse, regarding the MWUA's method of reinsurance allocation.

The point of these tactics on behalf of the complaining companies that engage in them is to divert attention from their own internal errors and failures through which they either did not participate in the true-up the Board afforded or did not participate in it to the extent they wish they had. The motive for these unjustified accusations is simple: money, specifically the size of the assessments to these companies caused by the Hurricane Katrina damage suffered by MWUA policyholders.

The accusations and aspersions are false. The true-up was the only fair, efficient, and non-discriminatory way for the MWUA to offer all member companies a chance to correct errors. The MWUA provided that chance, even though the errors that prompted that change were the responsibility of the member companies themselves and not the MWUA. The MWUA had authority to order the true-up and to enforce the deadline for submission of corrected figures. That authority was necessary and incidental to operating the MWUA. Those companies who failed to meet

reporting deadlines denied themselves any credits and applicable exclusions by their own failures. The Commissioner rightly held that the MWUA and its other member companies were not the ones to bear the burden of noncompliant companies' errors. The Chancellor erred by substituting his judgment for that of the Commissioner, and the Commissioner's decisions regarding validity of the true-up and all other issues should be reinstated.

STATEMENT OF THE CASE ON CROSS-APPEAL

I. Course of Proceedings and Disposition Below on Cross-Appeal

For 35 years, the MWUA allowed companies to report their voluntary credits for essential property insurance in subsidiary and affiliate groups. In late 2006, the MWUA's legal counsel advised that the statutes governing the MWUA did not specifically speak to the allowance of group reporting. Because of this, the MWUA made the decision to discontinue allowance of group reporting on a go-forward basis for reporting of premium data, including voluntary premium credit data. The MWUA so notified its members.

Union National Fire Insurance Company ("Union National"), Homesite Insurance Company ("Homesite"), and Aegis Security Insurance Company ("Aegis") have taken the position that group reporting of premium data should never have been allowed by the MWUA in the first place. They challenged the MWUA's decision to discontinue grouping only on a go-forward basis. They contended that the practice of reporting voluntary credits in groups should be discontinued retroactively -- but only for the years 2004 and 2005.[1] The MWUA Board rejected that position, as did the Commissioner. Upon review of the Commissioner's decision, the Chancellor also

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[1] While these companies contend that the practice of allowing affiliated group reporting of premium data was actually illegal, they are only concerned to attempt to require de-grouping of data for the policy years that involve their Katrina assessments.

determined that a reasonable interpretation of the MWUA statutes did allow for group reporting. The Chancellor properly upheld the decision of the Commissioner on this point. Union National, Homesite, and Aegis filed notices of cross-appeal in this Court, again challenging allowance of the practice of group reporting for the years 2004 and 2005.

Zurich American Insurance Company ("Zurich") has taken the primary position that the MWUA had no authority or jurisdiction to order a true-up in early 2006. As characterized by Zurich, the true-up constituted an extra-statutory appeal beyond the allowable time limits contained in the MWUA plan and its governing statutes. Because no MWUA member company appealed from the percentages of participation issued by the MWUA Board in June 2005, Zurich contends that those June 2005 percentages of participation must be reinstated. Neither the Commissioner nor the Chancellor agreed with Zurich on this point.[2]

II. Statement of Facts on Cross-Appeal

A. Group Reporting: For 35 Years, the MWUA Followed the Practice of Allowing Its Member Companies to Report Premium Data for Voluntary Credits in Groups.

From 1971 until 2006, the MWUA and its predecessor, the Mississippi Insurance Underwriting Association ("MIUA"), explicitly allowed its member companies that are affiliated to report their premium data to the MWUA in groups. The insurer's report form sent annually to every member of the MWUA contained a section clearly noting that companies could report premium data in affiliated company groups. In 2005, the 350 MWUA member companies reduced into 196 reporting companies and company groups. In other words, the practice of group reporting was one

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2 Zurich presented an alternative argument that the true-up as initiated by the MWUA Board was arbitrary and capricious. Zurich's argument does not rest on excuses for its errors in reporting. Rather, Zurich criticizes the true-up process as being discriminatory, ad hoc, and misleading.

that was both longstanding and widespread. Most MWUA member companies supported it, including some of the member companies involved in this appeal.[3]

The theory behind allowing such group reporting is that it encourages companies to voluntarily write wind and hail insurance coverage in the coast area. A group of companies can shift the writing of coast area wind and hail insurance policies to certain members within the group and encourage those particular companies to write as many wind and hail insurance policies as possible. Other members of the group are then allowed to share in those wind and hail premiums for purposes of calculating voluntary credits to determine percentages of participation. The practice allows company groups to spread or allocate risk in whatever fashion they see fit and, at the same time, encourages writing of more wind and hail policies in the coast area.

In the statutes concerning the MWUA as they existed in 2005, the Mississippi legislature was silent as to whether group premium reporting for voluntary credits was an allowable practice. The statutory language to which Union National, Homesite, and Aegis point for their arguments against grouping stated:

> A member shall, in accordance with the plan of operation, annually receive credit for essential property insurance voluntarily written in a coast area, and its participation in the writings of the association shall be reduced in accordance with the provisions of the plan of operation. Each member's participation in the association shall be determined annually in the manner provided in the plan of operation.

Miss. Code Ann. §83-34-9. The statute simply does not speak to the practice of group reporting, one way or the other. However, the statutes, Plan of Operation ("Plan"), and Manual of Rules and

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Specifically, Farmers, OneBeacon, and Zurich all filed their premium data as part of affiliated company groups. In fact, Farmers asserts that it should have been allowed, after the true-up deadline, to submit new data in which it would group itself with a different affiliated company than it had in the past.

Procedures ("Rules") all provide that the purpose of the MWUA was to make sure that an adequate market for wind and hail insurance coverage would be available in Mississippi's six coast area counties. Laws 1987, Ch. 459, §1; RE Tab 11 at §I; RE Tab 12 at §§I, VII. The practice of group reporting encouraged the development of an adequate market.

In October 2006, the MWUA Board considered whether its previous practice of allowing group reporting was expressly allowed by statute. The MWUA Board's legal counsel advised that it was not. Thus, rather than acknowledging group reporting as "illegal" as Union National, Homesite, and Aegis suggest, the MWUA Board, on advice of its counsel, noted that group reporting was not expressly allowed by Miss. Code Ann. §83-34-9. Accordingly, the MWUA Board decided that, on a go-forward basis beginning in 2006, member companies would no longer be allowed to report their coast area premiums for voluntary credit on a group basis. Instead, each company would be required to report individually. The MWUA Board's notice to members in that regard stated:

> 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.

(RV42 at 2840.) On deposition in this matter, the MWUA's manager Joe Shumaker similarly acknowledged that it was his understanding from legal counsel that the MWUA statutes do not expressly speak to group reporting of premiums. (RV42 at 2905.) This understanding was, however, a far cry from an admission that group reporting was somehow "illegal."

The statutes currently in effect regarding the MWUA do speak directly to the practice of group reporting of premiums by affiliated member companies. Effective March 22, 2007, group reporting is expressly recognized as an allowable practice. Miss. Code Ann. §83-34-9(1) (Supp.

2010).

The Commissioner rejected the arguments of Union National, Homesite, and Aegis that the practice of group reporting had been illegal. Rather, the Commissioner held that the MWUA's interpretation of its governing statutes to allow the MWUA Board, in its discretion, to permit group reporting was reasonable. The MWUA statutory scheme did not prohibit group reporting. It simply did not mention the practice, one way or the other. However, the practice of allowing group reporting was entirely consistent with the MWUA's purpose of encouraging writing of wind and hail insurance policies in the coast area. The Chancellor agreed and upheld the Commissioner's ruling on this point, stating:

> The information presented by Aegis, including the history of grouping, the open and obvious nature of group reporting (every annual report has an entire section dedicated to the question of group reporting), and the varied opinions presented by the appealing companies themselves is sufficient for this Court to find that the Commissioner's decision was neither arbitrary nor capricious.
>
> Aegis, Homesite, and Union National Fire also argue that allowing group reporting violated a statutory provision, specifically Section 83-34-9. These companies contend that this statute does not allow for group filing. This Court is unconvinced that this statute grants any rights to Aegis, Homesite, and Union National Fire regarding grouping in any manner. As the Commissioner found, nothing in the statute prohibits group reporting. As such, the Commissioner's decisions to allow the group reporting that existed from 1971 through 2005 to remain in place does not deny Aegis, Homesite, and Union National Fire any statutory rights and therefore should be affirmed.

(RV29 at 4192-93.) The Chancellor's decision on this point was correct.

Pursuant to Miss. R. App. P. 28(i), the MWUA further adopts and incorporates fully by reference the Statement of Facts submitted by Allstate Property and Casualty Insurance Company in its Brief of Cross-Appellee at pages 3-5.

B. Facts Regarding the Jurisdictional Assertions Made By Zurich[4]

By March 1, 2005, the MWUA's member companies had submitted their insurer's reports of net direct premium data based on premiums written during the year 2004. By April 1, 2005, the MWUA's member companies had submitted their final reports of 2004 premium data for voluntary credit concerning policies voluntarily written in the coast area and farm property exclusions. Based on these submissions of premium data by its member companies, on June 15, 2005, the MWUA notified its members of their percentages of participation for 2005. It is true that no member company appealed concerning its percentage of participation as calculated by the MWUA at that time.

As has already been detailed in previous briefing, after the MWUA's second assessment to cover its policyholders' Hurricane Katrina damage claims, several companies notified the MWUA of errors in their premium data submitted by the March 1 and April 1, 2005 deadlines. Other companies notified the Commissioner of Insurance regarding similar concerns. It was at that point that the MWUA Board ordered the true-up with a deadline of March 1, 2006 for all member companies to submit corrected premium data. The MWUA Board notified all member companies of the true-up and of the true-up deadline by letter dated January 17, 2006. The letter was sent by

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In addition to its factual assertions concerning untimely member company appeals, Zurich makes numerous assertions and accusations concerning correction of the Audubon error, alleged misleading statements by the MWUA regarding the true-up, and the impartiality of Lee Harrell (the former Deputy Commissioner of Insurance who heard and decided several of the member company appeals after the MWUA's third Katrina assessment). These allegations and accusations are primarily directed to Zurich's alternative position that the true-up was held in an arbitrary and capricious manner and are therefore dealt with *infra* at Reply Argument on Direct Appeal, section IV. These allegations and accusations are meritless, regardless of which of its arguments Zurich intends that they support and regardless of which other companies have advanced similar accusations to try to divert from the fact that they, themselves, missed the original deadline and then the true-up deadline.

first class mail to the regular mailing address of each member company. No member company (including Zurich) appealed from the January 11, 2006 decision to hold the true-up or appealed from the deadline established by the MWUA Board for the true-up.[5]

The MWUA Board treated as timely all member appeals submitted after the third Katrina assessment and considered them. None of the appeals were rejected as being untimely, and the MWUA did not assert at the Commission level or Chancery Court level that either the Commissioner or Chancellor lacked jurisdiction to consider the member company appeals.

SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

I. The Group Reporting Issue

The MWUA allowed group reporting since its creation in 1987, and the practice has never previously been challenged. In allowing group reporting, the MWUA continued the practice of its predecessor, the MIUA, which had been in effect since 1971. There is no basis for a challenge to the practice here. Rather than prohibit group reporting, the MWUA statutes simply do not speak to it one way or another. The statutes are general in nature, and leave refinements and procedures for reporting of premium data to the MWUA. Both the Commissioner and the Chancellor were correct in their decisions upholding the MWUA's practice of allowing group reporting, which was not prohibited by Miss. Code Ann. §83-34-9.

The position of the Cross-Appellants on this issue is telling. Although they claim that group

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Zurich advances the idea in its Brief at page 8 that the MWUA Board's notification letter of January 17, 2006 did not convey a "final decision" of the MWUA Board because it did not set any percentages or impose any assessment. However, there is nothing in the MWUA statutes, Plan, or Rules that defines final decisions of the MWUA Board as only those that convey percentages of participation or that impose assessments. It is clear that the January 17 letter and enclosed adopted motion did, in fact, convey the MWUA Board's final decision to hold the true-up, as well as its final decision concerning the absolute March 1, 2006 deadline for submission of corrected premium data.

reporting was illegal, they do not seek to undo all 35 years of group reporting. Instead, they only seek to undo group reporting for years that may affect their assessments for Hurricane Katrina. Union National and Homesite clearly advance this contention to try to relieve themselves of their own failure to timely provide data during the true-up. This Court should affirm the decisions of the Commissioner and the Chancellor on the issue of grouping.

Additionally, pursuant to Miss. R. App. P. 28(i), the MWUA adopts and incorporates by reference the Summary of the Argument on this issue contained in the Brief of Cross-Appellee Allstate Property and Casualty Insurance Company in its Brief of Cross-Appellee at pages 5-6.

II. The Jurisdictional Issue Raised By Zurich

The MWUA Board treated all of its member company appeals as timely, as did the Commissioner and the Chancellor. The true-up was not an extra-statutory appeal. Rather, the MWUA Board's decision to hold the true-up was an independent decision that the MWUA Board was empowered to make in the interest of fairness to **all** MWUA members. There is nothing in the MWUA statutes, Plan, or Rules that prevent the MWUA Board from making decisions necessary to fair operation of the Association just because no member company has an appeal pending.

Ironically, however, if the principles underlying Zurich's jurisdictional argument are found to be correct, then all of the member company appeals at issue in these consolidated cases should have been dismissed from the beginning (including Zurich's). No member company appealed from the MWUA Board's January 11, 2006 decision to hold the true-up or from the January 17, 2006 notice setting March 1, 2006 as the absolute deadline for submission of corrected premium data. If there is indeed a jurisdictional defect, it is notable for the first time on appeal.

ARGUMENT ON CROSS-APPEAL

I. The MWUA Statutes Were Silent on Grouping – Not Prohibitive.

The Commissioner and Chancellor were both correct in their interpretation of Miss. Code Ann. §83-34-9. The statute nowhere expressly prohibits grouping. There was nothing about the MWUA's use of the practice of grouping that was arbitrary or capricious. Rather it was a well-reasoned attempt to encourage voluntary writing of wind and hail insurance in the coast area. That is completely consistent with the purposes of the MWUA. The Mississippi legislature has since spoken directly to the practice of grouping and approved it. Miss. Code Ann. §83-34-9(1) (Supp. 2010).

Pursuant to Miss. R. App. P. 28(i), the MWUA adopts and incorporates by reference the Argument on this issue contained in the Brief of Cross-Appellee Allstate Property and Casualty Insurance Company in its Brief of Cross-Appellee at pages 6-15.

II. Zurich's Jurisdictional Arguments

A. The Flawed Idea that the Decision to Hold the True-Up Constituted an Extra-Statutory Appeal

Zurich argues that no member company appealed the MWUA's published percentages of participation issued in June 2005 and that those percentages of participation, with no true-up, must stand because of that fact. In conjunction, Zurich argues that the true-up was somehow an allowance by the MWUA Board of an extra-statutory appeal because no member company had challenged the June 2005 percentages of participation. This argument ignores the MWUA Board's authority to make decisions in its own right for the fair, efficient, and non-discriminatory operation of the MWUA, independent of any member appeal. There is nothing in the statutes, Plan, or Rules of the

MWUA that limits the Board to making decisions only when a member has appealed.[6] Rather, the MWUA Board was left by the legislature and the Plan with the authority to make decisions as necessary to operation of the Association.

The MWUA's Plan does expressly provide that it will be administered by an eight-person Board of Directors, subject to the review of the Commissioner. RV2 at 101. The Board's duties are broadly defined:

> SECTION XIII – DUTIES OF THE BOARD
>
> 1. The Board shall meet as often as may be required to perform the general duties of the administration of the Plan . . . .
>
> 2. The Board shall be empowered to contract with Servicing Insurers and provide reimbursement for all costs and expenses incurred by such Servicing Insurers; to appoint or otherwise contract for the services of a Manager and an Attorney; to approve expenses; levy assessments including preliminary assessments; disburse funds **and perform all other duties provided herein or necessary or incidental to the administration of the Plan** . . . .

(RV2 at 101-02) (emphasis added). The statutes establishing the MWUA require that the Plan provide for "the efficient, economical, fair and nondiscriminatory administration of the association." Miss. Code Ann. §83-34-13. The Plan, as quoted above, carries this statutory command forward by providing the MWUA Board with the authority to make the decisions necessary or incidental to such

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6 The MWUA statutes, Plan, and Rules have all been quoted extensively in previous briefing to this Court. There is nothing in them that limits the MWUA Board's decision-making power based on whether or not a member company appeals a previous decision. In fact, such provision would hamstring the Board's ability to fairly and efficiently administer the MWUA.

administration of the Plan.[7]

The decision to hold the true-up was an independent decision of the MWUA Board that it was empowered to make, regardless of whether any member company had appealed after the Board's dissemination of the June 2005 percentages of participation. Upon notification by several MWUA members, including the MWUA's servicing carrier, that there had been errors in previous premium data reporting, the MWUA Board had the authority as necessary and incidental to the administration of the Plan, to order the true-up. The only statutory constraint was that the true-up be ordered in a manner that was fair and non-discriminatory to all members, and the MWUA Board adhered to that legislative command. The true-up was ordered equally for **all** members, who were **all** provided with equal notice, and who were **all** made subject to the same deadline.[8]

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As noted *infra* in regard to the arguments of other complaining MWUA member companies, nothing requires that the MWUA Board amend the Plan every time it makes a decision, because nothing requires that every MWUA Board decision be reflected in the Plan. Since changes to the Plan must be submitted to and approved by the Commissioner, such a requirement would, in fact, make administration of the Plan overly burdensome if not impossible. It would also move the Commissioner from being a non-voting member of the MWUA Board to a superauthority with veto power over every Board decision.

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In contrast to Zurich, some complaining member companies now argue that there was no deadline whatsoever for appealing percentages of participation. They quote out of context a statement by MWUA counsel in which he was discussing creation of a special deadline in the future for member appeals of the initial publication of percentages of participation. Discussion of creating such a deadline does not negate the fact that member appeals on any issue (including percentages of participation) were governed by the deadlines in the statutes, Plan, and Rules – 15 days to appeal to the MWUA Board from any of its decisions, followed by 30 days from the final MWUA decision to appeal to the Commissioner of Insurance. Miss. Code Ann. §83-34-19; Plan, Section VIII.1 (RE Tab 11 at 100; RV2 at 100); Rule, Section IX. APPEALS (RE Tab 12; RV3 at 238.)

B. The Irony in Zurich's Jurisdictional Argument

The MWUA treated all of its members' appeals from the third Katrina assessment as timely.[9] The MWUA did not assert a lack of jurisdiction over the appeals. Neither the Commissioner nor the Chancellor accepted Zurich's arguments that there was a lack of jurisdiction over the appeals. However, the irony in Zurich's jurisdictional argument is that if the principles it espouses from *South Central Turf, Inc. v. City of Jackson*, 526 So. 2d 558 (Miss. 1988) and *Gatlin v. Cook*, 380 So. 2d 236 (Miss. 1980) have any application here, then the MWUA, Commissioner, and Chancellor had no jurisdiction over any of these member company appeals (including Zurich's), and all should have been dismissed. No member company appealed within 15 days from the MWUA Board's decision to hold the true-up or to impose and enforce the March 1, 2006 deadline for submission of corrected figures, both of which were published to member companies by letter dated January 17, 2006. Moreover, the MWUA Board's decision on how to allocate reinsurance proceeds occurred no later than 1998 after Hurricane Georges and was never previously challenged. The MWUA's decision to allow group reporting occurred upon its formation in 1987 and continued an MIUA practice in effect since 1971. It was never previously challenged. The decision to pursue companies that wrongfully under-reported mobile home premiums as auto premiums was a decision of the

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One complaining company – RLI – continues to argue that it had pending an appeal from the MWUA's second assessment in December 2005 and characterizes as ludicrous the idea that it was dealt with by a phone call from MWUA management. An examination of RLI's letter demonstrates that, although the subject line indicated an appeal, the letter actually consisted only of questions about the assessment. There is nothing ludicrous about the fact that those questions were answered in a phone call. More importantly, however – and a fact RLI ignores – the true-up mooted any questions about percentages of participation on which the second assessment was based. RLI actually participated in the true-up. Although it now claims it wants to submit further corrections, there is no question RLI knew about the true-up, participated in it, and had opportunity to correct any matters involved in the questions detailed in its letter concerning the second assessment.

Mississippi Department of Insurance, not a decision of the MWUA Board.

The MWUA has not pursued the concept of a jurisdictional defect in these appeals in any attempt to shortstop the arguments by the complaining members. If, however, there is a jurisdictional defect, then it must be noted, regardless of the fact that it has not been noted previously. *Latiker v. State*, 991 So. 2d 1239, (¶6) (Miss. Ct. App. 2008) (defect in subject matter jurisdiction can be noted for first time on appeal); *Wiggins v. Perry*, 989 So.2d 419, (¶17) (Miss. 2008) (same). If Zurich's concept is accepted, then none of the challenges brought by these complaining member companies is jurisdictionally valid, and all must be dismissed.

REPLY ARGUMENT ON DIRECT APPEAL

I. The Chancellor Clearly Applied the Wrong Standard of Review.

A. The Proper Standard of Review.

Several of the Appellee companies continue to tell this Court that the Chancellor applied the correct standard of review, citing *Owens-Corning v. Mississippi Ins. Guar. Ass'n*, 947 So. 2d 944 (Miss. 2007). None acknowledge that *Owens-Corning* does not apply here, because it was a direct civil action, not an appeal from an administrative agency. That distinction, however, is critical. Those companies who advance the argument that across-the-board *de novo* review is appropriate based on *Owens-Corning* misdirected the Chancellor in that regard. This Court should not be similarly misdirected.

The Chancellor was required to sit in this case as an intermediate appellate court, reviewing the decisions of the Commissioner, *i.e.*, the decisions of an administrative agency. This is a limited standard of review. *Davis-Everett v. Dale*, 926 So. 2d 279, 279, 281 (Miss. Ct. App. 2006). The Chancellor should not have overturned the decisions of the Commissioner of Insurance where those decisions were, in fact, supported by substantial evidence, were not arbitrary or capricious, were not

beyond the Commissioner's power to make, and did not violate any statutory or constitutional rights of the complaining member companies. *Id. See also Bay St. Louis Cmty. Ass'n v. Commission on Marine Resources*, 808 So. 2d 885, 890 (Miss. 2001) (prohibiting substitution of the court's judgment for the agency's judgment and prohibiting reweighing of evidence).

Similarly, as pointed out by the MWUA Board in its principle brief, the Commissioner applied the correct standard of review of the MWUA Board's decision, conducting a *de novo* evidentiary hearing and fact-finding but giving deference to the MWUA Board's overall decision involving interpretation of its own Plan and Rules. *Morf v. North Cent. Miss. Bd. of Realtors, Inc.*, 27 So. 3d 1188, (¶29) (Miss. Ct. App. 2009) (deference given to private association board applying its own rules and regulations; board reviewed under arbitrary and capricious standard).[10] To the extent the complaining member companies convinced the Chancellor that the Commissioner had applied the wrong standard of review, the Chancellor was misdirected. The same should not happen to this Court.

Only those questions on this appeal involving statutory construction receive *de novo* review, but even then deference is still given to the Commissioner, as ultimate administration of the MWUA statutes is committed to the Commissioner. *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 238 (Miss. 2008).

Finally, OneBeacon, United States Fire, and RLI have gone so far as to cite this Court's decisions concerning the standard of review that applies when the Chancellor sits as a trial court, *i.e.*, as the fact-finder. They argue that, to the extent the Chancellor made any fact-findings, such findings should receive deferential review. *See* Brief for OneBeacon at p. 27; Brief for United States

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[10] On this appeal, only Zurich cites *Morf*. The other Appellee companies ignore it.

Fire at p. 21; Brief for RLI at pp. 18-19. This ignores the fact that, sitting as an appellate court, the Chancellor should not have made any fact findings at all. *Bay St. Louis Cmty. Ass'n*, 808 So. 2d at 890. As acknowledged by the Appellees, no evidence was introduced at the Chancery Court hearing – only arguments of counsel on appeal. Evidence was introduced at the Commission level in the form of stipulations, documents, and testimony on disputed issues (introduced live and by way of deposition). It was the Commissioner who properly made fact findings in this matter and whose findings should have been given deference. *Dale*, 926 So. 2d at 279, 281. The Chancellor's failure to give that deference – as opposed to reweighing evidence and issuing new findings – requires reinstatement of the Commissioner's decisions.

B. The Chancellor Did Improperly Substitute His Own Fact Findings and Judgments for Those of the Commissioner.

Several of the complaining member companies imply to this Court that, because there were numerous stipulations entered, there were no factual disputes. To the contrary, the briefs before this Court make the existence of a large number of factual disputes quite obvious. Despite entry of many stipulations between the parties, there was also documentary evidence and testimony on disputed issues, from which the Commissioner made fact-findings and drew inferences after weighing the evidence.

Contrary to assertions in the briefs of the Appellees, the Chancellor did step into the role of a fact-finder and did reweigh evidence, substituting himself for the Commissioner. He clearly entered findings of fact concerning the true-up and the actions of each member company. *See* RV29 at 4160-4179 under heading "Findings of Fact And History of These Appeals." Numerous fact findings made by the Chancellor contradict the findings made by the Commissioner. That is immediately apparent solely from a side-by-side reading of the Commissioner's opinions and the

Chancellor's.

Some of the Chancellor's findings demonstrate misunderstanding concerning the MWUA statutes, Plan, and Rules. As an example, the Chancellor found that "OneBeacon did receive the February 1, 2006 letter from MWUA concerning the true-up but did not respond as the letter did not address the farm property exclusion." (RV29 at 4174-75.) However, the farm property exclusion is simply one part of the determination of net direct premiums. This is clearly defined by statute available for all to see. Miss. Code Ann. §83-24-1. The January 17, 2006 and February 1, 2006 letters expressly allowed for companies to submit information that would correct their net direct premium figures.

In short, the Commissioner should have been granted deference based on experience in the field of insurance and, particularly, in the specialized field of residual insurance markets. *Mississippi Ins. Comm. v. Mississippi State Rating Bureau*, 220 So. 2d 328, 333 (Miss. 1969). At the urging of the Appellee member companies that deference was not properly granted, and it led the Chancellor into error.

II. The Statutes, Plan, and Rules of the MWUA Do Not Require that Member Companies Receive Voluntary Credits They Did Not Timely Claim.

A. The MWUA Had the Authority to Set Deadlines for Member Companies to Report Desired Voluntary Credits, and It Validly Set Such a Deadline When It Ordered the True-Up.

The statutes forming and governing the MWUA require that it establish a Plan that provides for the for "the efficient, economical, fair and nondiscriminatory administration of the association." Miss. Code Ann. §83-34-13. In establishing the Plan, the MWUA, with approval of the Commissioner, provided that its Board would be empowered to:

> contract with Servicing Insurers and provide reimbursement for all costs and expenses incurred by such Servicing Insurers; to appoint or

> otherwise contract for the services of a Manager and an Attorney; to approve expenses; levy assessments including preliminary assessments; disburse funds **and perform all other duties provided herein or necessary or incidental to the administration of the Plan**
> . . . .

(RV2 at 101-02) (emphasis added). This is completely consistent with Mississippi law, which grants state-created entities such as the MWUA the powers that are "necessarily implied" by its legislative grant of authority. *Mississippi Pub. Serv. Comm'n v. Columbus & Greenville Ry. Co.*, 573 So. 2d 1343, 1346 (Miss. 1990).

None of the appealing member companies now seriously argue – nor should they – that the MWUA did not have the implied authority to set deadlines for submission of premium data. Those functions as to which an entity such as the MWUA has implied authority are as follows:

> "Necessarily implied" refers to a logical necessity and means that no other interpretation is permitted by the words of the instrument construed, and it has been defined as an implication which yields so strong a probability of intent that any intention to the contrary cannot be supposed leaving no room for doubt. *Strong v. Bostick*, 420 So. 2d 1356, 1361 (Miss. 1982) (citing 42 *C.J.S. Implication* at 405 (1944)). Furthermore, any such power exercised by an administrative agency must be found within the four corners of the statute under which it operates.

Columbus & Greenville Ry. Co., 573 So. 2d at 1346-47. It is an absolutely logical necessity for the MWUA to have the authority to set deadlines for member submission of premium data.

Apparently in recognition of this fact, those member companies who seek to avoid the effect of their own errors and/or lack of participation in the true-up turn to an argument that, although the MWUA could set deadlines, the deadlines themselves had to be stated in the Plan in the Rules. There is absolutely nothing to support this proposition.

B. There Was Nothing Secret, Hidden, Unpromulgated, or Misleading with Regard to the True-Up Deadline.

What was placed in the Plan was the MWUA Board's empowerment to perform all of the duties necessary or incidental to the Plan's administration. This would include establishment of and enforcement of deadlines for submission of premium data. There is simply nothing requiring that the Plan be amended each time a deadline is set so that the deadline can be placed in the Plan itself. The Plan is a general governing document. Details of day-to-day procedural operations of the MWUA on any number of subjects are obviously not included in it and were never meant to be included in it. The same is true of the Rules.[11]

Rather, the MWUA gives notice to its members of relevant day-to-day operational procedures by first class, United States mail, at the members' regular mailing addresses. This includes notice of the deadlines for submission of premium data. There is nothing requiring that the MWUA do otherwise, and there is nothing unreasonable about the practice. The Rules of Civil Procedure and Appellate Procedure established by this Court recognize first class United States mail as an acceptable method of service of notices. The force of this manner of service of notices is so great that this Court employs a strong presumption that notices conveyed by first class United States mail to a person or entity's regular mailing address reached that person or entity. *Holt v. Mississippi Emp. Sec. Comm'n*, 724 So. 2d 466, ¶¶17-24 (Miss. 1998). A bare denial that mail was received is insufficient to overcome this presumption, particularly when facts show that earlier and later notices were received at same address – a fact that is true as to all the complaining member companies in

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11 Just as an example, the mathematical formulas used for calculating assessments are not engrafted into the Plan or Rules. No one contends they must be, and there is no basis for the contention that other day-to-day operating procedures must be.

this matter. *See id.*

Just as the MWUA gave notice of its regular deadlines for submission of premium data by first class United States mail to its members' regular mailing addresses (via the Welcome Packet[12] and via the yearly insurer's reporting form), it gave notice of the true-up deadline by the same means, sending two letters to each member company – one letter on January 17, 2006 and another on February 1, 2006. The February 1, 2006 letter included with it a sample bordereau for reporting voluntary premium credits. Both letters clearly set out the applicable deadline for submitting corrected figures and clearly stated that submissions at any later date would not be considered.[13] Nothing whatsoever was hidden. All MWUA member companies had the same opportunity.

In fact, the idea that there was anything hidden about the existence of a system for claiming voluntary credits is nothing less than absurd. The existence of the system is noted in the MWUA's governing statutes. It is in the Plan. It is in the Rules. To the point, the Rules expressly state:

> I. A participating company shall annually receive credit toward participation in the Association for Essential Property Insurance voluntarily written in the "Pool." **Each participating company in order to receive such credit, shall set up the necessary statistical**

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12 The complaint is made that the Welcome Packet was somehow secret because it was sent out only once at the beginning of an insurer's membership in the MWUA. It is suggested that it is not reasonable for a member to be expected to keep a copy of the packet on file and comply with it. The MWUA would simply note that this argument is being made by sophisticated financial institutions who are required by law to stay abreast of any number of regulatory, reporting, and compliance issues in each of the various states in which they do business.

13 OneBeacon and United States Fire argue that these deadlines were never properly "promulgated" as part of the idea that the deadlines had to be placed in the Plan or the Rules. While there is no requirement that these deadlines be placed within the Plan or Manual of Rules, to "promulgate" something means to "publish" it or make it know by open declaration. To publish something simply means to make it known or disseminate it. http://www.merriam-webster.com/dictionary. The MWUA did both in writing via United States mail.

> **procedure whereby they can accurately determine and furnish to the Association their voluntary writings.** Such information shall be verified to the satisfaction of the Association and shall be submitted in a form mutually agreed on by the Company and the Association.

(RE Tab 12 at 238; RV3 at 238.) (emphasis added). Each member company knew it was responsible for its own accurate reporting and reporting systems.[14]

The Rules further state in relevant part:

> VII. CREDIT FOR BUSINESS WRITTEN ON A VOLUNTARY BASIS
>
> > Member companies shall receive annually credit for Essential Property Insurance voluntarily written and their participation in the "Pool" shall be reduced accordingly. Member companies participation in the expenses of the Association shall not be reduced thereby. **The method of determination of such credit shall be as authorized by the Plan of Operation as implemented by the Board of Directors.**

(RE Tab 12 at 237; RV3 at 237; Manual of Rules and Procedures, Section VII) (emphasis added). When the MWUA Board established the true-up and true-up deadline, it did nothing more than what it was authorized to do. It implemented a correction period for submission of premium data. It set a deadline. It did so in an appropriate manner with no need whatsoever to amend the Plan or the Rules.[15]

14

Several of the complaining companies try to blame the MWUA for not auditing them. They do not point to any supposed audit duties given to the MWUA under the previous governing statutes. They ignore that the MWUA had no way to know what any member company's correct premiums were, other than by relying on the member company to report correctly. If a company did not report correctly, that was its own failure, not the MWUA's.

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Some complaining companies cite *Luedke v. Audubon Ins. Co.*, 874 So. 2d 1029 (Miss. Ct. App. 2004) for the proposition that the MWUA has conceded the Rules are merely an internal (continued...)

Finally, the argument is made by several of the complaining member companies that the letters notifying them of the true-up and the true-up deadline were somehow misleading with regard to submission of premium data for claiming voluntary credits. Nothing could be further from the truth. Both letters gave notice of the chance to submit corrected premium data, both as to net direct premiums and voluntary credits for writings in the coast area. The January 17, 2006 letter stated:

> [T]he Board of Directors has granted the member companies a single opportunity to submit corrected and/or supplemental information for their **2004 net direct premiums and 2004 voluntary windstorm and hail premiums.**

(RE at Tab 14; RV36 at 821) (emphasis added). The enclosed motion stated:

> By February 1, 2006, every member will be notified that MWUA is allowing them a single opportunity to correct the following reported information:
> A. Annual 2004 net direct premiums and
> B. Annual 2004 premiums for voluntary writings *i.e.*, policies sold in George, Hancock, Harrison, Jackson, Pearl River, and Stone Counties that provide insurance against windstorm and hail perils.

(RE at Tab 14; RV36 at 822).

Thus, there was no question from the outset that both net direct premiums and voluntary credit premiums were at issue. As one Appellee (Farmers) has acknowledged, the total MWUA Katrina damage claims constituted a "pie." Any change in one member's premium numbers would cause a change in all members' percentages of participation by which the pie was divided. This is obvious. Any suggestion that the true-up notification was misleading because it suggested there

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[15](...continued)
document and that this means the Rules have little or no effect. *Luedke* was a dispute between the MWUA and one of its policyholders, not an MWUA member, and the Rules had no bearing on the policy of insurance. As an internal governing document describing the role of the MWUA and its member companies, however, the Rules obviously do have force and effect internally as between the MWUA and its member companies.

would be no changes should be disregarded. The motion enclosed with the January 17, 2006 letter could not have made it more obvious that there would be changes when it stated:

> A number of members have reported corrected 2004 premium information to Mississippi Windstorm Underwriting Association ("MWUA") after the December 2, 2005 assessment for Hurricane Katrina. The MWUA Board of Directors believes that it is equitable in the present circumstances to allow all members to provide corrected 2004 premium information.

(RE at Tab 14; RV36 at 822).[16] If even one member reported corrected premium data, there would be a change. The letter notified the MWUA members that there was not only one incoming set of corrected premium data, but several. This, in and of itself, obviously dictated that the percentages of participation – and therefore assessment amounts – would change.

The subsequent February 1, 2006 letter again stated directly that the true-up period applied both to reported net direct premiums for 2004 and voluntary premiums for 2004. There was nothing hidden or misleading. Nothing was left unpromulgated or unpublished. Some companies simply did not comply with their original responsibility to timely report correct and accurate voluntary credit premium information to the MWUA or with the true-up. They seek to divert responsibility for their own failure to the MWUA. They cannot do so. The Commissioner was correct in declining to allow them to do so. The Chancellor erred in allowing them to pass the buck. The Commissioner's decisions on this point should be reinstated. Companies that missed the true-up deadline were not

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The suggestion has been made that companies could not tell there was anything wrong with their premium data until after the third assessment was issued. That is obviously untrue. The entire true-up was caused by reports of incorrect premium data after the second assessment. The suggestion also ignores the fact that responsibility for submitting correct premium data rests solely with each member company. Any company that bothered to examine its own data could have easily ascertained whether these prior submissions were erroneous.

denied voluntary credits by the MWUA. These companies denied the credits to themselves.[17]

III. The Statutes, Plan, and Rules of the MWUA Do Not Require that Member Companies Receive Farm Property Exclusions They Do Not Timely Claim.

A. The MWUA Had Authority to Set Deadlines for Member Companies to Report Desired Farm Property Exclusions, and It Validly Set Such a Deadline When It Ordered the True-Up.

One company, OneBeacon, complains that it did not receive the appropriate exclusion of net direct premiums for farm property. It raises many of the same arguments as the companies that failed to timely claim voluntary premium credits, and those points made in the MWUA's Argument at Part II, above, apply equally to OneBeacon. There are, however, some additional points to be noted.

Although farm property data must be submitted quarterly, the farm property exclusion has nothing to do with voluntary premium credits. Rather, it has to do with calculation of net direct premiums. "Net direct premiums" were defined as:

> gross direct premiums, excluding reinsurance assumed and ceded, written on property in this state for the windstorm and hail causes of loss or equivalent causes of loss components of property insurance policies, including the windstorm and hail causes of loss or equivalent causes of loss components of approved residential package policies and commercial multiple peril policies, less return premiums upon

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17 The facts regarding the complaining member companies that made errors are detailed at the MWUA's Brief for Appellant at pages 29-36 and need not be restated here. Suffice it to say that it is clear that the MWUA is not responsible for its member companies' failures to follow the rules to establish and monitor their own reporting procedures. *Minnesota Life and Health Ins. Guar. Assoc. v. Department of Commerce*, 400 N.W.2d 769 (Minn. Ct. App. 1987), cited by the member companies is not to the contrary. In that case, the Guaranty Association erred in its interpretation of a statutory definition of annuity contracts and issued an unequal assessment based on it. A re-assessment was ordered because the mistake and inequality was caused by the Guaranty Association, itself. Here, there was no mistake by the MWUA. The mistakes at hand were made by the very members who take the MWUA to task here. Members should not be able to rely on their own reporting errors to require another true-up.

> cancelled contracts, dividends credited or paid to policyholders or the unused or unabsorbed portion of premium deposits and **excluding premiums on farm property.**

Miss. Code Ann. §83-34-1 (emphasis added). The Legislature did not define farm property. It left establishment of that definition up to the MWUA. *Id.* The MWUA defined "farm property" as:

> barns, granaries, outbuildings and other structures used in connection therewith, and their contents; also, livestock, poultry, hay and grain in stacks, farm implements and machinery; situated on land used for truck, fruit, livestock, dairy or other farm purposes.
>
> This "Farm Property" definition does not include dwellings and auxiliary outbuildings in connection therewith.

(RE Tab 13 at 816-17, 818; RV 36 at 816-17, 818.)[18] This definition was promulgated, published, and disseminated to member companies such as OneBeacon in the MWUA Welcome Packet, regardless of whether OneBeacon chose to retain it.

The MWUA had the same authority to set a true-up deadline for net direct premiums as it did for voluntary premium credits. There was nothing hidden about the true-up deadline. OneBeacon was aware of the deadline, even if it forgot to let its Chief Financial Officer Specialty Lines, Andy Borst, know of the deadline. (RE Tab 10 at 1929; RV53 at 81-82.) There was nothing secret or hidden about the fact that the true-up letters, quoted in part above, stated that net direct premiums were at issue. That the February 1, 2006 letter stated net direct premium figures had been compared to reports separately filed with the Mississippi Department of Insurance does not change this. Total figures had been compared. However, such a comparison would not tell the MWUA what portion

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OneBeacon incorrectly asserts that its assessment would be zero if it were allowed to late-submit corrected premium data. Excluded farm property does not include farm dwellings and outbuildings. The record concerning OneBeacon demonstrates that it wrote insurance on farm dwellings.

of reported premiums constituted farm property. Farm property writings, like voluntary premiums, had to be reported quarterly to the MWUA in order to be excluded from the total premium figure reported to the MWUA and to the Mississippi Department of Insurance. Again, if a company had made errors, only that company would know – not the MWUA.

There was nothing secret or hidden about the definition of farm property. OneBeacon admits that Mr. Borst was immediately provided the definition of farm property over the telephone when he called the MWUA on December 29, 2005. (RE Tab 10 at 1928-30; RV53 at 79-80.) Thus, prior to the true-up deadline, OneBeacon possessed the definition of farm property. It just did nothing with that definition until after the true-up deadline.[19] After the true-up deadline, Mr. Borst and OneBeacon counsel visited the MWUA to learn more about claiming the farm property exclusion. OneBeacon offers no reason why the same action could not have been taken before the true-up deadline. There is no reason, other than yet another internal company failure. The division of OneBeacon that normally handles MWUA matters (the comptroller) was aware of the true-up deadline. Personnel in that division of OneBeacon simply did not tell Mr. Borst about the deadline until it had passed.

The existence of a farm property exclusion from net direct premiums was openly part of the MWUA governing statutes. OneBeacon was sent the Welcome Packet with the definition of farm property, whether it retained that packet or not. In any event, by 2005 and early 2006 OneBeacon had been a member of the MWUA for many years. It had never previously undertaken its duty to

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Despite all the complaints that MWUA counsel did not provide an answer to a similar email inquiry, it is evident that MWUA counsel did answer the inquiry by providing the definition of farm property. The email reply went to the person who had emailed MWUA counsel. If that reply was not then forwarded on to OneBeacon, it is not the fault of MWUA counsel.

follow the MWUA statutes and definitions concerning farm property. When it decided to do so in 2006, the deadline for submitting corrected premium data for 2005 had already passed. The Commissioner's decision refusing to shift responsibility for this failure to the MWUA was correct, and the Chancellor's decision holding otherwise was in error. The Commissioner's decision should be reinstated.

IV. The True-Up Was the Only Way Under the Circumstances to Administer Katrina Assessments Fairly, Efficiently, and in a Non-Discriminatory Manner.

Several of the complaining member companies attack the true-up by launching accusations that the MWUA, its counsel, and then-Deputy Insurance Commissioner Lee Harrell acted with some nefarious purpose to benefit Audubon Insurance Company ("Audubon"), which was the MWUA's servicing carrier. The falsity of these accusations is demonstrated, first and foremost, by the fact that the MWUA did not simply allow correction of the Audubon error and leave all other members' figures the same. Rather, the Board instituted a true-up for all, treating all MWUA members identically – servicing carrier or not.[20]

Although the accusation is made that the MWUA hid the Audubon adjustment, it did not. It simply treated it the same way that it treated the financial and assessment information of all other member companies. Not one company's financial information or assessment information or particular errors were disclosed to any other of the member companies. All companies **were** told that several companies desired to submit corrected data. The MWUA treated all its members with

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20 The complaining companies ignore that the Audubon error could have been corrected without allowing any true-up of anyone's figures, including Audubon's. As servicing carrier, Audubon could have billed back to the MWUA as an expense the amount assessed to it on policies belonging to the MWUA. (RE Tab 12 at 238; RV3 at 238.) All MWUA members would then have had to share that dollar amount as an expense at their full 10% participation percentage. Obviously, such a result would have been detrimental to the MWUA members as a whole and was something to be avoided.

identical confidentiality. The complaining member companies before this Court have chosen to make their information public, but that was their decision, not the MWUA's.

Moreover, the executive session Board minutes containing the discussion of Audubon and of the true-up did, in fact, contain attorney-client privileged discussion by the MWUA's counsel. The MWUA is not a partnership as some have suggested. Rather, it is an unincorporated association.[21] As such, it validly withheld the executive session minutes from production in this litigation until ordered otherwise, as it had a valid interest in protecting its attorney-client privilege. *United States v. American Soc. of Composers, Authors and Publishers*, 129 F. Supp.2d 327, 337-38 (S.D.N.Y. 2001) (general counsel for unincorporated association represents the association and does not have attorney-client relationship with members of association).

The suggestion has been made that Mr. Harrell was biased and should have recused himself because he participated in the MWUA Board decision to hold the true-up. That is false. Mr. Harrell was in attendance at the Board meeting at which the decision to hold the true-up was made. (Zurich RE Tab 2 at 3549; R. at 3549.) He did not participate in the decision. The MWUA Plan of Operation provides:

> The Commissioner shall have a member of his staff to serve on the Board without vote.

(RE Tab 11 at 101; RV 2 at 101; Plan at Section XII - Annual and Special Meetings (10)). Thus Mr. Harrell's presence at the meeting was with no vote whatsoever and therefore no participation in the

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21 Although tax rules require that the MWUA file tax returns as a partnership, the governing statutes that established the MWUA clearly established an unincorporated association with members, not a partnership with partners.

decision to hold the true-up.[22] There was no impropriety in Mr. Harrell issuing the decisions that he did by appointment of the Commissioner. The decisions were, in fact, correct. Before the last Commission decision at issue here was rendered, Mr. Harrell resigned as Deputy Commissioner of Insurance, and that last decision was rendered by another hearing officer by appointment of the Commissioner. Ms. Ganucheau, a Special Assistant Attorney General who had attended the Commission hearings, independently reviewed the matter and rendered her decision consistent with the prior decisions. To do otherwise would have been to rule incorrectly.

Finally, it has been suggested by Zurich that Mr. Harrell actually expressed concern about the number of companies who might participate in a true-up. That is not so. Mr. Harrell actually stated:

> Mr. Harrell expressed concern about the possible number of companies which may appeal the MWUA assessment and seek a deferral from the Department of Insurance.

(Zurich RE Tab 2 at 3553 under "Other Business;" R. at 3553.) The appeal and deferment process due to issues of insolvency is a separate issue governed by Miss. Code Ann. §83-34-11. Companies who cannot pay their MWUA assessments without risk of insolvency can appeal them to the Commissioner and obtain a deferment. During the period of deferment, the other MWUA companies must bear the deferred amount The Commissioner orders a repayment plan, and repayments by any company that received a deferral are then distributed back to the other members pro rata. Some companies did seek deferments, and Mr. Harrell expressed valid concern about how many might do so given the size of the pie the MWUA members had to split. This issue was about

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Mr. Harrell did not recall even being present at the meeting at which the true-up was discussed, and did not recall any of the discussion of it. (RV54 at 75-79.) Given that he did not participate in the decision, that is understandable.

the impact of the size of the assessments and had nothing whatsoever to do with the true-up and submission of corrected premium figures. Deferment was an issue of legitimate concern to the Commissioner, since the Commissioner has to examine the deferment requests, either grant or deny them, and order a repayment plan for those requests that are granted.

V. There Was Nothing Inconsistent About Enforcing the True-Up Deadline While the Mississippi Department of Insurance Pursued Companies Who Purposely Engaged in Wrongful Premium Reporting to Totally Avoid Their MWUA Obligations.

Some complaining companies suggest that the MWUA acted inconsistently by enforcing the true-up deadline, when other companies who wrongfully reported mobile homes as automobiles were pursued by the Commissioner to obtain their premium figures after the deadline. This suggestion misses two critical points. First, there is an obvious difference between enforcing a deadline for voluntary submission of corrected premium data and pursuing a wrongdoer who, as it has come to light, has tried to avoid its MWUA obligations altogether. Second, and even more importantly, it was the Mississippi Insurance Department who discovered the wrongful reporting and who was pursuing the wrongdoers, not the MWUA.

While it is true that any such successful pursuit by the Mississippi Insurance Department might result in additional payments to the MWUA, that does not mean that the MWUA was acting inconsistently. The MWUA uniformly enforced its reporting requirement for the true-up. The Insurance Department enforced its reporting requirements, which are above and beyond the MWUA's.

Moreover, despite the allegations otherwise, pursuit of the mobile home issue did not mean that the reporting process for 2005 remained generally open. The MWUA advised its members that any funds recovered from companies that initially reported wrongfully would be distributed to the other MWUA members pro rata if not used to pay claims. In other words, the repayments of funds

wrongfully withheld because of wrongful reporting but later recovered would be handled just like repayment of a deferred amount under Miss. Code Ann. §83-34-11. This, in fact, prevents leaving the reporting process generally open and allows for some measure of finality.

The Chancellor was in error in holding that the mobile home issue required a new true-up. The Commissioner properly recognized that this issue was an Insurance Department issue, not an MWUA issue.

VI. MWUA Assessments Are Not Privilege Taxes Subject to the Privilege Tax Refund Statute Or to a Three Year Statute of Limitations.

A. The Privilege Tax Statute Unambiguously Excludes MWUA Assessments.

The Chancellor expressly held: "Because the windpool assessments constituted a privilege tax in Mississippi, the appealing member companies should be entitled to a refund of any and all overpayments due to miscalculations and clerical errors." (RE Tab 6 at 4187; RV29 at 4187.) Because the Chancellor held that MWUA assessments are privilege taxes, he held that the three-year statute of limitations for tax refunds applies to companies asserting a right to MWUA assessment refunds. (RE Tab 6 at 4187; RV29 at 4187.) Thus, the statements by OneBeacon and United States Fire that "[w]hether or not the assessment constitutes a privilege tax is not the issue here," are flat wrong. That is exactly the issue, and the Chancellor got it wrong at the urging of the complaining member companies.

The Appellees who argue this issue point to law dictionary definitions of privilege taxes. In this case, there is no need for a legal dictionary Miss. Code Ann. §27-73-1 clearly defines requirements regarding privilege taxes and privilege tax refunds that just do not apply here, as follows:

> If any person, firm or corporation has paid, or shall hereafter pay to the **Auditor of Public Accounts, State Tax Commission, or the**

> **Commissioner of Insurance**, through error or otherwise, whether paid under protest or not, any ad valorem, privilege or excise tax for which such person, firm or corporation was not liable, or any such taxpayer has paid any tax in excess of the sum properly due and such erroneous payment or overpayment has been paid into the proper treasury, the taxpayer shall be entitled to a refund of the taxes so erroneously paid.

Miss. Code Ann. §27-73-1 (emphasis added). This refund statute clearly does not apply to windpool assessments. The complaining member companies' MWUA assessments are payable ***to the MWUA***, not to the State Auditor, State Tax Commission, or Commissioner of Insurance. The three-year statute of limitations that applies to claiming such tax refunds thus does not apply. *See* Miss. Code Ann. §27-73-5. The Commissioner correctly held that MWUA assessments are not privilege taxes, and the three-year privilege tax statute of limitations does not apply. His decision should be reinstated.[23]

VII. The MWUA's Method of Reinsurance Allocation Was Not Arbitrary, Capricious, or Contrary to Law and Should Be Upheld.

Despite the arguments otherwise by Farmers, Union National, and Homesite, the MWUA's method of allocating reinsurance recoveries so as to eliminate assessments for previous years was neither arbitrary nor capricious. Instead, it was well-reasoned and consistent with the Property Insurance Plans Service Organization ("PIPSO") manual's directives on assessments following catastrophes.

23

Some companies have also cited the three-year statute of limitations contained in Miss. Code Ann. §15-1-49 for the proposition that it applies to appeal of MWUA member assessments. That ignores that this is not an original civil action of the type to addressed by §15-1-49. Rather, this is an appeal of an MWUA assessment to the MWUA Board, followed by an appeal to an administrative agency. By its terms, §15-1-49 is also inapplicable because the MWUA statutes, Plan and Rules prescribe another time frame – 15 days to appeal the MWUA decision to the Board, followed by 30 days to appeal to the Commissioner of Insurance.

While it is true that the decision to allocate reinsurance proceeds to eliminate the need for any assessment for the year 2004 was made in the discretion of Jim Redd, the MWUA's accountant, it is not true that Mr. Redd made this decision solely for his own convenience. Instead, Mr. Redd testified that he was following a longstanding MWUA practice established at least since 1998, following Hurricane Georges.

> Q. And the reason you did that was to eliminate having to have an assessment in '04?
> A. Right.
> Q. Any other reason, Mr. Redd?
> A. Well, that's the way it's been done for many years. That's the procedure we followed.
>
> . . . .
>
> Q. Can you tell me when was the last time a reinsurance recovery was made by the Wind Pool?
> A. Hurricane George.
> Q. What year was that?
> A. I don't remember.
> Q. And is it your testimony, Mr. Redd, that the allocation that was made for Hurricane George was made in this fashion?
> A. To the best I can recall.

(RV45 at 142, 143.)

The suggestion that Mr. Redd obtained no opinions concerning the propriety of this method of reinsurance allocation is not true, either. Mr. Redd clearly testified that he consulted by phone with personnel at PIPSO concerning this method of reinsurance allocation. (RV45 at 144.) He also conferred by phone with the MWUA's outside auditor before making the determination to allocate reinsurance proceeds in this fashion. (RV45 at 143-44.) Both PIPSO and a representative of the MWUA's outside auditor advised Mr. Redd that the method of allocation to close out the year 2004 and eliminate any need for a 2004 assessment was appropriate. (RV45 at 143-44.)

Although the PIPSO manual that Mr. Redd testified he consulted regularly does not speak

directly to allocation of reinsurance, it does speak to methods of assessment in the face of a catastrophe such as Hurricane Katrina. The assessment method prescribed actually requires making all catastrophe assessments only for the year in which the catastrophe occurs. The PIPSO manual states:

> 1. Current Catastrophe Losses
> We must certainly consider that a current catastrophe may place the Plan in a position of needing immediate funding. We recommend the following:
>
> . . . .
>
> c) **The catastrophe assessment should be charged to the current policy year**, any other balance in the assessment may be spread over other policy years as cited in Determination of Policy Year(s), above.

(RV4 at 428-32) (emphasis added). The PIPSO manual also notes that "[t]he closing of older years reduces record keeping detail, and hence the expenses incurred by a Plan." (RV4 at 428.)

Allocating the MWUA's reinsurance recovery so that the assessments were done based on the catastrophe year was neither arbitrary nor capricious. Something is arbitrary or capricious when it is done "without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles." *Lowe v. Lowndes County Bldg. Inspection Dept.*, 760 So. 2d 711, 713 (Miss. 2000). Mr. Redd's decision was neither arbitary nor capricious under these standards, particularly in light of the PIPSO manual's instruction that catastrophe assessments should be charged to the current policy year which, in this case, was 2005.

The Appellees that support the Chancellor's decision regarding reinsurance allocation have not pointed out anything that requires the MWUA to follow NAIC accounting. That is because there is nothing that does so. The MWUA was free to adopt the accounting methods it believed best suited to its unique position as a residual insurance market. The MWUA's accounting decisions

were obviously not arbitrary or capricious nor were they contrary to any law.

In his experience, the Commissioner recognized that the MWUA's reinsurance allocation method was appropriate for a residual market. He therefore approved it. The Chancellor's decision otherwise should be vacated, and the Commissioner's decisions on this issue should be reinstated.

VIII. There Was No Due Process Violation and No Prejudice to Any Member Company in Regard to Assessment Appeals.

The MWUA, as it was constituted in 2005, was a private, nonprofit, unincorporated association. It was not a state actor. Therefore, membership in the MWUA did not create any due process rights as between the MWUA Board and the members of the association. *Evanish v. Berry*, 536 So. 2d 7, 9 (Miss. 1988) (private club did not owe members due process rights); *Multiple Listing Serv. of Jackson, Inc. v. Century 21 Cantrell Real Estate, Inc.*, 390 So. 2d 982, 984 (Miss. 1980) (employment-related association has right to set goals and standards as long as there is no public policy violation).

Even if the MWUA were a state actor subject to due process considerations, there was no violation here. The MWUA does not dispute that its own Plan and Rules provide that appeals submitted to the Board will be decided within 15 days. Moreover, while the MWUA did not meet this 15-day deadline in all cases, each member company did, in fact, receive notice of the MWUA's decisions regarding assessments, and the appeal of each company was heard. Although some of the companies construe the term "hear" in the Plan or Rules as requiring some sort of face-to-face oral proceedings, that is not a reasonable construction of the term. For example, this Court hears appeals. Sometimes it holds oral argument. Sometimes it does not. Nevertheless, the appeal decided on written submissions was no less "heard" than the appeal decided following oral argument.

The particular situation presented by the Hurricane Katrina assessments was the pressing

need to obtain the necessary funds to pay the MWUA's policyholders' claims. The MWUA had over 18,000 claims as a result of Katrina. The MWUA's focus was on how to get those claims adjusted and its policyholders paid and, at the same time, address the incoming flood of applicants as private companies withdrew from the coast area insurance market. In the year after Katrina, the MWUA doubled in size. Eighteen months after Katrina, the MWUA had a completely new statutory scheme. These are just some of the pressing needs that, unfortunately, took precedence over the 15-day provision for decisions on appeals. The MWUA Board – consisting of unpaid appointees – continued to discuss the issues relevant to the various member companies before finally concluding each appeal. As the Commissioner found, the MWUA was not perfect and many lessons were learned as a result of Katrina. These imperfections in not meeting the appeal decision deadline did not, however, violate any possible due process rights that may have existed. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (due process requirements flexible depending upon circumstances).

CONCLUSION

The Chancellor's decision on grouping was properly deferential to that of the Commissioner and should be upheld. The Chancellor's other decisions overturning the Commissioner of Insurance should be vacated, and the Commissioner's decisions should be reinstated on all other issues.

Additionally, alternatively, and as the MWUA previously noted, finality is important if this Court agrees with the Chancellor's decision on issues other than the grouping issue. Finality will not, as argued by the complaining member companies, be achieved solely by application of principles of res judicata. A further true-up and subsequent assessment, whether for eight companies or all companies, has the liklihood of resulting in more appeals of issues that companies contend are related to that assessment. Res judicata will not provide preventative effect, because alleged issues regarding a new assessment that has not yet occurred could not possibly have been brought in this

case. *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So. 2d 224, (¶22) (Miss. 2005) (four elements required for application of res judicata, including that claim must be one that was either brought or that could have been brought).

If this Court agrees with the Chancellor and orders a further true-up, the MWUA seeks specific instructions as to what must be done to achieve finality for its accounting years 2004 and 2005. The MWUA also requests, again, that it be clarified that any further true-up would be for all member companies. If there is to be another true-up, then inclusion of all companies is the only fair solution.

Respectfully submitted, this 21st day of March, 2010.

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CERTIFICATE OF FILING

I, Rebecca Blunden, do hereby certify that I have this day caused to be hand-delivered for filing, via courier, the original and three correct paper copies and an electronic disc of the Reply Brief for Appellant/Response Brief for Cross-Appellee Mississippi Windstorm Underwriting Association to:

Ms. Kathy Gillis
Mississippi Supreme Court Clerk
Gartin Justice Building
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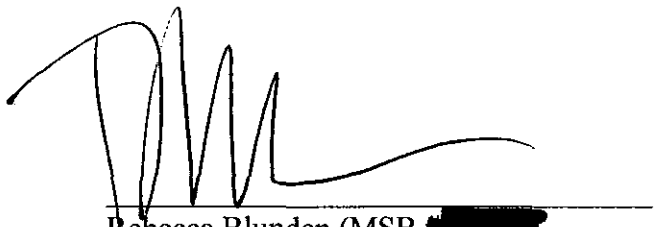
This 31st day of March, 2010.



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CERTIFICATE OF SERVICE

I, Rebecca Blunden, do hereby certify that I have this day caused to be mailed via United States Mail, first class, postage pre-paid, a true and correct copy of the Reply Brief for Appellant/Response Brief for Cross-Appellee Mississippi Windstorm Underwriting Association to:

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