IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BANK OF COMMERCE	**APPELLANTS**
VS.	**NO. 2010-CA-00622**
SOUTHGROUP INSURANCE AND FINANCIAL SERVICES, LLC AND NORMAN F. WHITE D/B/A/ BARRY & BREWER	**APPELLEES**

BRIEF OF SOUTHGROUP INSURANCE AND FINANCIAL SERVICES, LLC AND NORMAN F. WHITE D/B/A/ BARRY & BREWER

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Bank of Commerce, Greenwood, Mississippi, plaintiff/appellant;
2. SouthGroup Insurance and Financial Services, LLC, defendant/appellee;
3. Norman F. White d/b/a Barry & Brewer, defenant/appellee;
4. H. D. Brock, attorney for plaintiff/appellee, Bank of Commerce;
5. Charles J. Swayze, Jr., attorney for plaintiff/appellee, Bank of Commerce;
6. Whittington, Brock & Swayze, P.A., attorneys at law, of counsel for plaintiff/appellant, Bank of Commerce;
7. David A. Barfield, attorney for defendants/appellees, SouthGroup Insurance and Financial Services, LLC and Norman F. White;
8. Steven L. Lacey, attorney for defendants/appellees, SouthGroup Insurance and Financial Services, LLC and Norman F. White;
9. Barfield & Associates, Attorneys at Law, P.A. of counsel for defendants/appellees; and
10. Honorable Margaret Carey-McCray, Circuit Judge.

Respectfully submitted, this the 28th day of December, 2010.

Steven L. Lacey

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

For many years prior to June 20, 2004, Norman F. White ("White") served as insurance agent for the Bank of Commerce. Prior to that date, the Bank had liability insurance coverage with Fidelity & Deposit Insurance Company ("F&D"). On a date prior to June 20, 2004, White and Ken Hill, a representative of F&D, conferred with Don Case, who, at that time, was President of the Bank, for the purpose of discussing the Bank's liability insurance coverage. White and Hill discussed with Case liability coverage provided by an endorsement known as the "Broad Form Entity Coverage Endorsement." White advised Case of the availability of this "entity" coverage, but he did not recommend it or advise the Bank to purchase it. White's opinion was that the Bank could only act through its officers or directors and since they were covered by the policy, the Bank did not need entity coverage. R. Vol. 1 p. 15 at ¶¶ 4-6. The Bank had coverage for its officers and directors which White deemed sufficient to protect the Bank. *Id.*

During the 2004 renewal process, with the approval of the Bank, White sought bids from various liability insurance carriers. The Bank ultimately purchased insurance coverage from the Chubb Group of Insurance Companies ("Chubb"). The Bank's policy was issued by Federal Insurance Company, with a policy period from June 20, 2004, to June 20, 2007, and is hereinafter sometimes referred to as the "the Chubb Policy". The Chubb Policy did not include a Broad Form Entity Coverage Endorsement. R. Vol. 1 p. 16 at ¶ 7. A true and correct copy of the Chubb Policy was delivered to the Bank by White during August 2004. *Id.*

In October 2004, the Bank of Commerce (the "Bank") was served with process in six (6) civil actions filed in the Circuit Court of Leflore County, Mississippi. The Plaintiffs in those cases alleged, among other things, that the Bank made loans to finance various residential properties for resale under an illegal scheme. R. Vol. 1 p. 16 at ¶ 8. By letter dated January 18, 2005, Chubb

advised the Bank that it had no entity coverage under the Chubb Policy, and that therefore, Chubb had no duty either to defend the lawsuits filed in state court or to indemnify the Bank for any loss thereunder. R. Vol. 1 pp. 16-17 at ¶ 9. The letter from J. Steve Bailey, on behalf of Chubb, to Steve Lary of the Bank, states in part:

> Please note that the Policy does not provide coverage to any Organization (Bank of Commerce) other than for its indemnification of Insured Persons. Because there are no Insured Persons named as defendants in the six suits submitted for coverage, there is no coverage available under the D & O section for any of the actions.

R. Vol. 1 p. 16-17 at ¶ 9.

On July 18, 2005, twenty-three (23) separate complaints were filed in United States District Court against the Bank of Commerce, a second bank, and various other parties. These Complaints alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). These federal court complaints were subsequently amended to name Terry Green, an officer of the Bank, as a defendant. R. Vol. 1 p. 17 at ¶ 10. When the federal lawsuits were commenced, Chubb declined to provide a defense for the Bank. Chubb did subsequently undertake the defense of Green, as an insured under the Employee and Officer coverage of the Chubb Policy. Since Chubb had to defend Terry Green, it agreed to undertake the defense of the Bank as well, albeit pursuant to a complete reservation of rights. R. Vol. 1 p. 17 at ¶ 11. The Bank, at all times, denied any and all wrongful conduct alleged in the Complaints filed against it. R. Vol. 1 p. 19 at ¶ 20.

In a settlement conference held on March 20, 2008, before a United States Magistrate Judge in the pending federal lawsuits, at which all interested parties were represented, a representative of Chubb announced that a settlement had been reached as to Plaintiffs' claims against Terry Green, an officer of the Bank. Chubb announced that it was withdrawing from the cases and providing no

further legal expense coverage to the Bank. Green was released from liability by the Plaintiffs. R. Vol. 1 p. 18-19 at ¶ 16.

On March 31, 2008, the settlement conference resumed before the United States Magistrate Judge. At this time, the Bank agreed to a settlement of all 23 pending federal lawsuits in return for a payment to the Plaintiffs of $600,000. At the time of the settlement of the federal lawsuits, the Bank and Chubb also entered into a settlement agreement pursuant to which they released each other from further liability. In consideration of the mutual releases, Chubb increased its settlement payment by $100,000. R. Vol. 1 p. 19 at ¶¶ 17-18. Prior to settling the pending lawsuits, the Bank was advised by its lead attorney, F. Ewin Henson, III, that the estimated cost of trial of the first federal case then set for trial would exceed $1,000,000. R. Vol. 1 p. 19 at ¶ 19.

On July 17, 2008, after settling the twenty-three (23) separate RICO complaints outlined above, the Bank filed its complaint in this action against SouthGroup Insurance and Financial Services, LLC ("SouthGroup"), and Norman F. White, d/b/a Barry & Brewer ("White"). R. Vol. 1 pp. 1-6. The Bank alleged that it engaged White and SouthGroup to procure liability insurance coverage broad enough to fully protect the Bank and its officers and directors; that, in the course of renewal of the Bank's liability insurance coverage, White and SouthGroup negligently misrepresented to the Bank that "entity coverage" was not necessary; that the Bank relied upon this negligent misrepresentation; and that the Bank thereafter suffered damages as a direct result of the Defendants' erroneous representations and negligent misrepresentations. *Id.* The Defendants denied any and all liability to the Bank. R. Vol. 1 pp. 8-14.

The parties prepared and filed a detailed Stipulation of Facts in this action. R. Vol. 1 pp. 15-20. The Defendants contend that the stipulated facts support the trial Court's entry of summary judgment in their favor as to all claims asserted against them. The Motion for Summary Judgment

was made on two separate and independent grounds: (1) that the Bank's claims are barred by the statute of limitations; and (2) that the damages sought by the Bank were a voluntary payment made by the Bank to settle certain litigation and may not be recovered from the Defendants under Mississippi's voluntary payment doctrine. R. Vol. 1 pp. 22-23. The Circuit Court properly granted the Defendants' Motion for Summary Judgment for the reasons outlined below. R. Vol. 1 pp. 33-37.

SUMMARY OF THE ARGUMENT

It is undisputed that, after the initial state court complaints were filed against the Bank (and others), Chubb declined to provide indemnity or a defense to the Bank. R. Vol. 1 pp. 16-17. While the state court complaints were still pending, twenty-three (23) federal court complaints were filed alleging Racketeer Influenced and Corrupt Organizations Act ("RICO") violations. R. Vol. 1 pp. 17. When the federal lawsuits were commenced, Chubb again declined to provide indemnity or a defense to the Bank. R. Vol. 1 pp. 17. After the federal complaints were amended and Terry Green, an officer of the Bank, was named as a defendant, Chubb undertook the defense of Green, as an insured under the Employee and Officer coverage of the Chubb Policy. *Id.* Only then did Chubb also undertake to provide a defense to the Bank in the federal lawsuits but it did so under a full reservation of rights. *Id.* It is also undisputed that Chubb at all times took the position that the Chubb Policy provided no coverage to the Bank for the claims asserted against the Bank in the state court complaints and in the federal court complaints.

Accordingly, to the extent the Bank claims it relied on the alleged misrepresentations of the Defendants, that the Bank did not need entity coverage, the Bank knew these representations to be incorrect at the latest, on January 18, 2005 when Chubb declined coverage and a defense to the Bank. The Bank did not file suit against the Defendants until July 17, 2008, well over three years after the Bank actually knew and/or should have known that White's opinion that the Bank did not need entity

coverage was wrong and the Bank would be damaged by a lack of coverage and the lack of a defense.

Plaintiffs Claims for Negligent Misrepresentation Are Barred by the Statute of Limitations

The Mississippi Supreme Court has clearly held that a claim for negligent misrepresentation with respect to insurance begins to run when the insured is placed on notice of a possible problem with the procurement and understanding of the terms of the insurance policy. *See Oaks v. Sellers,* 953 So.2d 1077, 1084 (Miss. 2007). The Bank became aware, at the latest, in January 2005, that the Chubb Policy would not cover and protect the Bank against the claims of wrongful conduct made in the six state court lawsuits filed in the latter part of 2004, and that, therefore, the coverage under the Chubb Policy was not "broad enough to fully protect the Bank and its officers and directors." R. Vol. 1 pp. 16-17 at ¶9. This case was not filed until July 2008. Plaintiff's claims are barred by the applicable statute of limitations. *See* Miss. Code Ann. § 15-1-49. As such, the Circuit Court's ruling with respect to the Defendants' statute of limitations defense should be affirmed. R. Vol. 1 pp. 32-37.

Voluntary Payment

On the voluntary payment issue, the Defendants respectfully submit that, on the stipulated facts, the Bank's settlement payment may not be recovered. R. Vol. 1 pp. 15-20. In fact, the Bank argues that its "sole motivation" in settling the RICO cases for $600,000 was its desire to avoid future legal expenses. *Appellant's Brief* at p. 19. The Bank has presented no affidavits or documents that set forth facts that demonstrate the requisite compulsion to pay. It has made no showing of an immediate and urgent necessity to pay, or of dire consequences to the Bank in the event that it declined to settle. As such, the trial court's ruling with respect to the Defendants' voluntary payment defense should be affirmed. R. Vol. 1 pp. 32-37.

ARGUMENT

I. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

A. *The Bank's Claims Are Barred by the Statute of Limitations*

Under Mississippi law, the insured is charged with the knowledge of the terms and conditions of its insurance policy. *Oaks v. Sellers*, 953 So.2d 1077 (Miss. 2007). The policy in question – the Chubb Policy – was delivered to the Bank in August 2004. R. Vol. 1 p. 16 at ¶ 7. The policy, on its face, did not provide entity coverage for the Bank, and the first Declarations page of the Chubb Policy reflects that it provides no lender liability coverage. R. Vol. 1 p. 16 at ¶ 7. Accordingly, from the date of the delivery of the policy, the Bank knew or should have known that it did not have entity coverage or lender liability coverage. Of course, in this case, the Bank knew all along that it did not have entity coverage. Entity coverage was presented to and discussed with the Bank, and it had the opportunity to procure such coverage regardless of White's opinion as to its necessity or advisability. R. Vol. 1 p. 15-16 at ¶ 6. Because the Bank is charged with the knowledge of the terms and conditions of its policy, it knew or should have known in August 2004, when the policy was delivered, that it provided no entity coverage or lender liability coverage. The Bank had actual knowledge that the policy did not provide entity coverage because it admittedly did not purchase such coverage, allegedly in reliance on White's opinion that it was not necessary. The statute of limitations on any claim by the Bank of Commerce for failure to procure adequate liability insurance coverage would therefore have expired in August 2007.

Even if the statute of limitations did not begin to run in August 2004, the Bank without question became aware in January 2005 that the Chubb Policy would not cover and protect the Bank against the claims of wrongful conduct made in the six lawsuits filed in state court in the latter part of 2004, and that therefore, the coverage under the Chubb Policy was not "broad enough to fully

protect the Bank and its officers and directors." R. Vol. 1 p. 2 at ¶ 8. The parties have stipulated that Chubb advised the Bank by letter dated January 18, 2005, that the Bank did not have entity coverage. R. Vol. 1 p. 15-16 at ¶¶ 8-9. Chubb's letter clearly put the Bank on notice, as of January 18, 2005, that it did not have entity coverage. Assuming that Chubb's letter was the first notice to the Bank that it did not have insurance coverage broad enough to fully protect the Bank, then any action regarding White's alleged misrepresentation was required to be filed within three years, or by January 18, 2008. *See* Miss. Code Ann. § 15-1-49. The Bank did not file its action until July 17, 2008, and its claims are therefore barred.

The Mississippi Supreme Court recently considered the issue of when the statute of limitations begins to run on a claim against an insurance agent for failure to procure requested insurance coverage in *Oaks v. Sellers*, 953 So.2d 1077 (Miss. 2007). On January 13, 2003, Donald Sellers filed suit against DeSoto Insurance, Inc., Eddie Oaks, Brenda Oaks, and Oaks Insurance Company and alleged that the defendants, as his insurance agents, negligently breached duties owed to him by failing to procure an umbrella insurance policy, for business and personal liability, in the amount of $1,000,000, and by negligently misrepresenting to Sellers that he had complete coverage including personal, umbrella liability coverage in the amount of $1,000,000. The defendants moved for summary judgment and asserted that Sellers's claim was barred by the statutes of limitations. The Circuit Court denied the motion for summary judgment, and the defendants filed a petition for interlocutory appeal with the Supreme Court, which the Supreme Court granted. *Id.* at 1078.

In July 1993, Sellers sought complete insurance coverage, including coverage for his unincorporated business (Donnie's Amoco) located in DeSoto County, Mississippi, from the defendants. Eddie Oaks and Brenda Oaks, agents for DeSoto Insurance, obtained a business liability policy for $1,000,000 and an umbrella insurance policy for up to $1,000,000 through American

States Insurance Company. The umbrella insurance policy provided coverage for business liability only and not personal liability. The same policy was renewed by payment of the premiums. *Id.* at 1079.

In September 1996, Sellers's son was involved in a motor vehicle collision in Tennessee while driving Sellers's car. Shane Thurman and his minor son, Dalton, were traveling in the vehicle with Sellers's son, and, as a result of the accident, Thurman suffered serious injuries, and his minor son was killed. Sellers's son was not working for his father at the time of the accident. Sellers's insurance policy was in full force and effect on the day of the accident. *Id.*

Sellers notified the defendants of the accident, and the defendants filed a loss notice and sent it to American States. On August 26, 1997, American States sent Sellers written notice denying his claim on the basis that the umbrella policy did not provide coverage to Sellers's son because he was not actually in the course and scope of Sellers's business at the time of the accident. *Id.*

Thereafter, Sellers and his son were named as defendants in a Tennessee lawsuit concerning the collision. Sellers's automobile insurance carrier (State Farm) defended him in the Tennessee action based on the theory of imputed liability. In January 2000, the Tennessee circuit court determined Sellers's son to be liable for the injuries suffered by Shane Thurman and for the wrongful death of Thurman's minor son. The Tennessee circuit court also determined that Sellers had no imputed liability under the business purpose doctrine or the Tennessee family purpose doctrine. *Id.*

The ruling of the Tennessee trial court was appealed. On February 16, 2001, the Tennessee Court of Appeals handed down an opinion which affirmed the trial court ruling that there was no business purpose. However, the Tennessee Court of Appeals reversed the trial court's ruling as to imputed liability and held that Sellers was personally liable for the injuries caused by his son's

negligence pursuant to the Tennessee family purpose doctrine. The Tennessee Supreme Court thereafter denied certiorari, which made the ruling of the Tennessee Court of Appeals final. *Id.*

In January 2003, following the denial of the writ of certiorari, Sellers filed suit against the defendants for failure to procure the requested insurance and failure to adequately explain the coverage. As stated above, the defendants moved for summary judgment on the basis of the statute of limitations, and the trial court denied that motion. The defendants filed a petition for interlocutory appeal, which the Supreme Court granted. *Id.* at 1079-80.

The Supreme Court noted that the issue before the Court was whether Sellers was barred by the statute of limitations, and that there is no dispute between the parties that Section 15-1-49 of the Mississippi Code was applicable. Section 15-1-49(1) provides that "[a]ll actions for which no other period of limitations is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." The defendants argued that the statute of limitations began to run on August 26, 1997, the date that American States denied Sellers's claim. Sellers, on the other hand, argued that the statute of limitations began to run on the date of actual injury, which he claimed was February 16, 2001, when the Tennessee Court of Appeals imputed liability to him. The Mississippi Supreme Court concluded:

> Giving Sellers all benefit of the doubt, he knew in August 1997 that his claim was denied, which placed him on notice of a possible problem with the procurement and understanding of the terms of his insurance policy. Sellers did not file his claim until more than five years later, and well outside the three-year statute of limitations under Miss. Code Ann. § 15-1-49. We find that Sellers's claims are barred by the statute of limitations.

Id. at 1084.

In this case, it is likewise undisputed that Section 15-1-49(1) provides the three year statute of limitations that is applicable to this case. The Bank was informed by Chubb on January 18, 2005,

that the policy's coverage did not provide "coverage broad enough to fully protect the Bank and its officers and directors" R. Vol. 1 p. 2 at ¶ 8. Chubb's letter clearly placed the Bank on notice of a problem with the coverage that it allegedly told SouthGroup that it desired and expected. Chubb's letter also clearly put the Bank on notice that White's opinion that the Bank did not need entity coverage was incorrect and if the Bank had in fact relied on that opinion, it had done so to its detriment.

The statute of limitations began to run, at the latest, on or about January 18, 2005, and any claim based upon failure to procure coverage or a negligent misrepresentation should have been commenced within three years thereafter, or in January 2008. The claims asserted in the present action, which were filed on July 17, 2008, and said claims are therefore barred by the three-year statute of limitations.

B. The Volunteer Doctrine Under Mississippi Law

The "volunteer doctrine," a common law construct consistently followed under Mississippi law, provides that "[a] voluntary payment cannot be recovered back, and a voluntary payment within the meaning of this rule is a payment made without compulsion, fraud, mistake of fact, or agreement to repay a demand which the payor does not owe, and which is not enforceable against him, instead of invoking the remedy or defense which the law affords against such demand." *Genesis Insurance Company v. Wausau insurance Companies,* 343 F.3d 733, 736 (5th Cir.2003); *McDaniel Brothers Construction Company v. Burk-Hallman Company,* 253 Miss. 417, 175 So.2d 603, 605 (Miss.1965).

The Mississippi Supreme Court has authored several important and dispositive opinions pursuant to this doctrine. In particular, *Hartford Cas. Ins. Co. v. Halliburton Company,* 826 So.2d 1206 (Miss. 2001), and *Certain Underwriters at Lloyds of London v. Knotsman,* 783 So. 2d 694 (Miss. 2001). *Hartford* and *Knotsman* both reaffirm long-standing principles of Mississippi

indemnity law and demonstrate, quite succinctly on the record before this Court, that the trial court judgment against the Bank must be affirmed. *Hartford* declares two "critical" prerequisites for indemnity in this case as: (1) The damages which [the Bank] seeks to shift [were imposed on the Bank] as a result of some legal obligation to the [underlying Federal Plaintiffs]; and (2) [The Bank] did not actively or affirmatively participate in the wrong. *Hartford* at 1216, *citing Home Ins. Co. v. Atlas Tank Mfg. Co.,* 230 So. 2d 549,551 (Miss. 1970); *Bush v. City of Laurel,* 215 So. 2d 256 (Miss. 1968); *Southwest Miss. Elec. Power Ass'n v. Harragill,* 254 Miss. 460, 182 So. 2d 220 (1966).

Moreover, under *Hartford,* for the Bank to recover in this case, the Bank would have to have *alleged and proved* that "(1) [the Bank] was legally liable to the [Federal Plaintiffs], (2) [The Bank] paid under compulsion, and (3) the amount [the Bank] paid was reasonable." *Hartford* at 1216, citing *Knotsman,* at 698, and *Keys v. Rehab. Ctrs., Inc.,* 574 So. 2d 579, 584 (Miss. 1990). Otherwise, the Bank's settlement payment was "voluntary" for which there can be no indemnity. *Hartford,* at 1216. Indeed, under *Hartford,* "potential" liability of the Bank to the Federal Plaintiffs would not be sufficient to support an indemnity claim. *Id.,* at 1216. The Court in *Hartford* made it quite clear that a predicate to the Bank recovering from SouthGroup, in this case, would be that the Bank prove it was "liable" to the Federal Plaintiffs. *Id.* at 1217. Additionally, the Bank would be obligated to prove "the amount it paid in settlement was reasonable." *Id.* The Bank, in this case, has provided no such evidence.

Additionally, the Court in *Hartford* relied upon *Knotsman* to further make it clear that a company seeking indemnity from another cannot "consistently" deny liability to the injured person, settle with the injured person and then seek indemnity. *Hartford,* at 1217-18. Like the insurer seeking indemnity in *Hartford,* the Bank has "consistently denied" any wrongdoing or fault in the

underlying RICO cases. In fact, the Bank stipulated as follows: "The Bank of Commerce, at all times, denied any and all liability for any and all of the allegations of the various complaints." R. p. 19 at ¶ 20. In the instant case, the Bank was not compelled to pay the Federal Plaintiffs anything at all and admits that it's "sole motivation" to settle the underlying RICO allegations was to avoid the estimated cost of defense. *See* Appellants Brief at p. 19.

This Court in *Knotsman* affirmed summary judgment against the insurer of Texas Snubbing on an attempted indemnity claim against Tomlinson. *Knotsman,* at p 696. The insurer settled claims of the injured persons against Texas Snubbing after Texas Snubbing denied any negligence or liability to the injured persons. *Id.*, 697. The insurer then sued Tomlinson on an alleged indemnity claim, premised in part on a written indemnity agreement. *Id.*, at 697. Tomlinson denied the validity of the written indemnity agreement and further asserted "neither the contract nor Mississippi law required Tomlinson to reimburse Texas Snubbing [or its insurer] for voluntary settlement payments it made to claimants." *Id.*

Affirming the summary judgment in favor of Tomlinson on the attempted indemnity claim of the insurer, this Court noted the trial court correctly concluded Texas Snubbing (or its insurer), to recover in indemnity, would have to prove (1) Texas Snubbing was "legally liable" to the injured persons, (2) Texas Snubbing paid "under compulsion," and (3) the amount Texas Snubbing paid was "reasonable." *Knotsman,* at p. 698. Since Texas Snubbing had "consistently denied liability or any wrongdoing" associated with the event at issue, even in the pleadings filed in the indemnity action, this Court noted Texas Snubbing could not prove legal liability to the injured persons or payment under compulsion. *Id.*, at 699. Simply put, the Bank has "consistently denied" any liability to the to the underlying RICO claim. R. p. 19 at ¶ 20. Under *Hartford, Knotsman* and *Keys,* this alone sufficiently defeats the Banks claim and requires that the trial court judgment be affirmed.

The Banks' reliance on *Glantz Contracting Company v. General Electric Company*, 379 So.2d 912 (Miss. 1980) is misplaced. In *Glantz*, a prime contractor brought action against subcontractor to recoup overpayment mistakenly made for nonsite allocable general administrative and overhead costs, for which National Aeronautics and Space Administration would not reimburse the prime contractor. Regarding, the voluntary payment issue this Court in *Glantz* specifically stated that at least two reasons precluded application of the volunteer rule. The two reasons were stated as follows:

> At least two reasons preclude application of the "volunteer" rule in this case. First, the payor must have full knowledge of all the facts which would render the payment voluntary. *See 66Am.Jur.2d, Restitution and Implied Contracts, s* 95 (1973). In the case at bar, it seems obvious that GE could not have full knowledge of the facts, i. e., whether or not payments made were in actuality valid payments, without an audit of the transactions between the parties. It is also obvious that such an audit was at the discretion of the government, and not GE. Both Glantz and GE appear to have fully understood that an audit of the contract would be made by the government at the end of the performance of the contract. At such time, there would be made any adjustments that needed to be made to the payments under the contract. Second, the determination of whether payments are made on a voluntary basis depends on the facts of the particular case and whether such facts indicate an intent on the part of the payor to waive his rights. As held in *Cheshire Oil Co., Inc. v. Springfield Realty Corp.*, 385 A.2d 835 (N.H.1978):
>
> (T)he payment of money or the making of a contract might be under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover the money paid or excuse him from performing the contract.
>
> Here, it can be seen that GE was under extreme compulsion and pressure from NASA to implement the contract for the cleaning of the cryogenic system and also to finish the cleaning of the cryogenic system. Obviously had GE attempted to audit each month's billing and then determine whether the payments made under it were indeed allowable, a subsequent interruption of work would probably have occurred on Glantz's part. Under the exigencies of the situation in which GE found itself, to attempt at the end of each monthly billing to accurately determine whether such payments were indeed valid was not feasible. Further, it has been held that time constraints under which payments

> are made can operate to keep the payments from being voluntary. *Johnson v. City of Brockton,* 391 N.E.2d 940 (Mass.App.1979).

Accordingly, the *Glantz* Court found the above two reasons precluded application of the volunteer rule. *Glantz* is factually distinguishable from the instant case. First, GE demonstrated that under the circumstance of the contract it was impossible for GE to know that overpayments were being made. Second, based upon the contract requirements with NASA there was an urgent necessity to pay in order to finish the project. Third, the payments were reasonable considering the extreme compulsion and pressure from NASA to implement the contract and keep it on schedule. This analysis fits squarely with this Court's subsequent pronouncements in *Hartford, Knotsman* and *Keys*.

As such, Glantz demonstrates that the law outlined above in *Hartford, Knotsman* and *Keys* is not new. This Court long ago stated a "critical" prerequisite for invocation of indemnity is that the "damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person." *Home Insurance Co. of N. Y. v. Atlas Tank Mfg. Co.,* 230 So. 2d 549, 551 (Miss. 1970), citing *Bush v. City of Laurel*, 215 So. 2d 256 (Miss. 1968); *Southwest Mississippi Electric Power Association v. Harragill,* 254 Miss. 460, 182 So. 2d 220 (1966). Stated differently, and according to this Court:

> The authorities hold that to recover indemnity it is necessary for the plaintiff to allege and prove that he was legally liable to the person injured, and consequently, paid under compulsion. Otherwise, the payment is a voluntary one for which there can be no recovery. *Southwest Mississippi Electric Power Association v. Harragill,* 182 So. 2d 220, 223 (Miss. 1966).

The *Harragill* court further noted:

> This Court has declined to extend aid to those who make voluntary payments for which they were not legally liable. The basic purpose of courts, as far as civil cases are concerned, is to extend aid to those who have not been able by lawful means to

> aid themselves, and relief is not available to those who have neglected to take care of their interests. If an unjust demand is made upon a party for that which he does not owe, when he knows or ought to know all the facts, he must avail himself of the means the law affords and resist the demand.

Id., citing *McDaniel Bros. Constr. Co. v. Burk-Hallman Co.*, 175 So. 2d 603 (Miss. 1965).

Thus, the clear Mississippi rule has long been that, to recover in an indemnity action, the party seeking indemnity (here the Bank) must allege and prove legal liability to the injured party (here the underlying Federal Plaintiffs in their RICO claims). *See Keys v. Rehabilitation Centers, Inc.*, 574 So. 2d 579, 584 (Miss. 1990). As the trial court record reflects and as the parties have stipulated, the Bank consistently denied legal liability for any of the allegations in the various underlying complaints. R. p. 19 at ¶ 20.

The trial court's granting of summary judgment to the Defendants on the voluntary payment doctrine should be affirmed.

CONCLUSION

It is a stipulated fact, between the parties, that Chubb put the Bank on notice, as of January 18, 2005, that it did not have entity coverage and the opinion of White that it was not necessary was incorrect. Pursuant to *Miss. Code Ann.* § 15-1-49 any action for failure to procure such coverage or for a negligent misrepresentation about the coverage was required to be filed within three years, or by January 18, 2008. It is further stipulated that this cause of action was filed on July 17, 2008, more than three years after the Bank was put on notice that it did not have entity coverage and thereby, Chubb would not defend or indemnify the Bank. As a result, the Circuit Court ruling on the statute of limitations issue should be affirmed.

Finally, the Bank admits in its brief that its "sole motivation" in settling the RICO cases was its desire to avoid future legal expenses. *Appellant's Brief* at p. 19. In response to SouthGroup,s

summary judgement motion, the Bank presented no affidavits or documents that set forth facts that demonstrate the requisite compulsion to pay. It has made no showing of an immediate and urgent necessity to pay, or of dire consequences to the Bank in the event that it declined to settle. As such, the Circuit Court's ruling with respect to the Defendants' voluntary payment defense should also be affirmed.

Respectfully submitted this the 28th day of December, 2010.

SOUTHGROUP INSURANCE AND
FINANCIAL SERVICES, LLC

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CERTIFICATE OF SERVICE

We, David A. Barfield and Steven L. Lacey, attorneys for the Defendant, SouthGroup Insurance and Financial Services, LLC, do hereby certify that we have this day caused a true and correct copy of SouthGroup Insurance and Financial Services, LLC Appellees Brief to be mailed via United States Mail to the following:

The Honorable Margaret Carey-McCray
Circuit Judge
P.O. Box 1775
Greenville, MS 38702-1775
TRIAL COURT JUDGE

H. D. Brock, Esq.
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SO CERTIFIED, this 28th day of December, 2010.

David A. Barfield

Steven L. Lacey