**IN THE SUPREME COURT OF MISSISSIPPI**

**BANK OF COMMERCE** — **APPELLANT**

**VERSUS** — **NO. 2010-CA-00622**

**SOUTHGROUP INSURANCE AND FINANCIAL SERVICES, LLC AND NORMAN F. WHITE D/B/A BARRY & BREWER** — **APPELLEES**

**APPEAL FROM THE CIRCUIT COURT OF LEFLORE COUNTY, MISSISSIPPI**
**CIVIL ACTION NO. 2008-0089**

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# REPLY BRIEF OF APPELLANT BANK OF COMMERCE

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## ORAL ARGUMENT REQUESTED

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## REPLY OF APPELLANT BANK OF COMMERCE TO BRIEF OF APPELLEE

The Bank of Commerce, (referred to herein as "the Bank") does not disagree with the factual matters set forth by the Appellees, SouthGroup Insurance and Financial Services, LLC ("SouthGroup") and Norman F. White d/b/a Barry & Brewer ("White"). The Bank's disagreement with, and reply to, the Appellee's Brief are factual issues which are not addressed in Appellee's Brief and the conclusions of law erroneously based on the stipulated facts.

It is important to note that the claim of negligent misrepresentation made to the Bank by White, as agent for SouthGroup, and on which the Bank relied, is never contested in these proceedings. Rather, SouthGroup and White have solely rested their defense to the Bank's claim for indemnification on two affirmative defenses:

1. The Bank's claims are barred by the statute of limitations; and
2. The Volunteer Payment Doctrine under Mississippi law.

This Reply will briefly address those defenses.

### A. THE STATUTE OF LIMITATIONS ISSUE

the first affirmative defense is that the Bank's claim for indemnification is barred by the three year statute of limitations under Mississippi Code Ann. § 15-1-49. The reliance

on this affirmative defense is primarily based on this Court's ruling in Oaks v. Sellers, 953 So. 2d 1077 (Miss. 2007). The brief of SouthGroup and White correctly set forth the factual background in Oaks. In the case at bar, two sets of events occurred giving rise to insurance issues after SouthGroup procured a liability insurance policy on behalf of the Bank through the Chubb Group of insurance companies ("Chubb"). The first set of events involved the filing of six lawsuits by multiple plaintiffs in the Circuit Court of Leflore County in which the Bank was named as a defendant. As regards those claims, the Bank does not deny receipt of a letter from Chubb setting forth the reasons that the Bank, as a corporate entity, did not have coverage under the Chubb policy. It is respectfully submitted that this notice specifically addressed the six lawsuits filed in state court (*Stip.* ¶ 9; Ex. "B"). The Bank has never, and does not now, make claim against SouthGroup and White relating to the lack of insurance coverage in the six state lawsuits for the simple reason that: (a) those lawsuits were in fact voluntarily dismissed on April 13, 2006; and (b) the Bank suffered no loss and incurred no expenses relating to these claims in that White reimbursed the Bank for all expenses, including attorney's fees, incurred prior to dismissal of said lawsuits (*Stip.* ¶ 14; R. 18).

The second set of events occurring while the Chubb policy insuring the Bank was in effect, was the filing of 23 separate lawsuits in the Federal Court for the Northern District of Mississippi on July 18, 2005. Again, Chubb initially refused any coverage to the Bank, but subsequently undertook all costs of defense of the Bank under the Chubb policy based on the Bank's obligation of indemnification of a loan officer who was eventually named as a defendant in all of the Federal lawsuits. More than two years later, Chubb paid the Federal lawsuit plaintiffs $400,000.00 for the release of the Bank's loan officer, who was admittedly

a covered party under the Chubb policy. Even though the Bank's loan officer was dismissed as a defendant in the Federal lawsuits (*Stip.* ¶ 16; R. 18-19), Chubb did in fact thereafter pay an additional $100,000.00 to facilitate the Bank's settlement with the Federal plaintiffs and for a mutual release with the Bank (*Stip.* ¶ 18; R. 19). Accordingly, under these undisputed facts, it is the Bank's position that its only loss and claim for damages arose as the result of the 23 Federal lawsuits filed on July 18, 2005, and even though the Bank suffered no loss until March 2008, the Complaint filed against SouthGroup and White was filed on July 17, 2008, within the three year statute of limitations of the first knowledge of events triggering Chubb's position of non-entity coverage in the Federal lawsuits.

B. THE VOLUNTEER PAYMENT ISSUE

The crux of this issue to be decided by this Court is whether the Bank made payment in settlement of the claims of all plaintiffs in the 23 pending Federal lawsuits voluntarily without reasonable business necessity or compulsion. SouthGroup and White correctly state that the compelling reason the Bank determined to settle the Federal lawsuits, was in fact that the estimated cost of defense would exceed $3,000,000.00 (*Stip.* ¶ 19; Ex. "E", Affidavit of Ewin Henson, attorney for Bank). As stated on page 12 of the Bank's brief filed herein "Although the Bank persistently denied liability under the RICO Complaints, a jury verdict in 23 cases was not assured". The determination to settle the Federal lawsuits for a payment of $600,000.00 was made due to the fact that the Bank's certain expenses were simply "disproportionately greater" than the settlement paid. Moreover, this determination was not made without notice to SouthGroup and White who were given notice and opportunity to participate in the settlement mediations leading to the

Bank's decision (Stip. ¶ 15; Ex. "E").

The distinction by SouthGroup and White to the facts found in Glantz Contracting Company v. General Electric Company, 379 So. 2d, 912 (Miss. 1980), reflects that the Glantz Court found two reasons that precluded application of the "volunteer" rule, to-wit:

> First, the payor (General Electric) must have full knowledge of all of the facts which would render the payment voluntary and . . ., 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. Glantz at 917-918.

The Glantz Court further cited with favor the following language from Cheshire Oil Co., Inc. v. Springfield Realty Corp., 385 A. 2d, 835 (N.H. 1978): "The payment of money or the making of a contract might be made 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." Glantz p. 918.

Without proceeding to protracted litigation in each of the 23 federal lawsuits in which the Bank was named as a defendant, the Bank had no idea of its ultimate liability, if any. The only certainty of loss that the Bank faced was that the cost of such litigation was "disproportionately greater" than the settlement made. Under the circumstances of the case *sub judice*, the Bank was placed in and an untenable position to either "fix" its losses in the 23 federal lawsuits with a multitude of plaintiffs in each, a decision made without any input by SouthGroup or White, even though given opportunity to do so, or alternatively, to litigate over a period of years and then attempt to collect its losses and costs against SouthGroup and White for negligent misrepresentation of coverage under

the Chubb liability insurance policy. The decision made by the Bank was under business necessity tantamount to compulsion, and hence, the volunteer payment rule under these unusual circumstances should not be enforced.

## CONCLUSION

Under the stipulation of facts by the parties in this case, the Complaint filed by the Bank was within the three year statute of limitations after being apprised of non-insurance coverage in the claims against the Bank resulting in the present Complaint filed by the Bank against SouthGroup and White, and further, under the unusual facts presented in this case, the Bank's payment to settle, not only its liability but its inevitable costs, was in fact reasonable and tantamount to business compulsion, hence negating the voluntary payment rule. Again, the issue of indemnification is not argued by SouthGroup and White, and if this Court finds that the Bank's claim was not in fact time barred and that its payment to settle the 23 federal lawsuits does not invoke the voluntary payment rule, then this Court should reverse and render in the Bank's favor.

Respectfully submitted, this the 15th day of February, 2011.

BANK OF COMMERCE

BY: _____

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## CERTIFICATE OF SERVICE

I, H. D. Brock, attorney for Bank of Commerce, do hereby certify that I have on this date forwarded a true and correct copy of the foregoing Reply of Appellant Bank of Commerce to Brief of Appellee, via U.S. Mail, postage prepaid, to the following:

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This the 15th day of February, 2011.

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