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

BRIEF OF APPELLANT BANK OF COMMERCE

ORAL ARGUMENT REQUESTED

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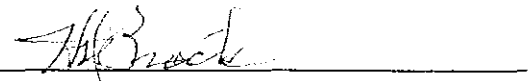
I. CERTIFICATE OF INTERESTED PERSONS

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, defendant/appellee;
4. H. D. Brock, attorney for plaintiff/appellant, Bank of Commerce;
5. Charles J. Swayze, Jr., attorney for plaintiff/appellant, 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. Barfield & Associates, attorneys at law, of counsel for defendants/appellees;

9. Honorable Margaret Carey-McCray, Circuit Judge.

Respectfully submitted,



H. D. BROCK (MBN 4563), ATTORNEY
FOR APPELLANT, BANK OF COMMERCE

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III. STATEMENT OF ISSUES

Was the Lower Court in error denying the Motion for Summary Judgment of the Bank of Commerce and granting the Motion for Summary Judgment of SouthGroup Insurance and Financial Services, LLC and Norman F. White on the following issues:

A. That the claim of the Bank of Commerce was barred by the three year Statute of Limitations, Miss. Code Ann. §15-1-49.

B. That the claim of The Bank of Commerce was barred under the Mississippi Voluntary Payment Doctrine.

IV. STATEMENT OF THE CASE

A. Course of Proceedings in Lower Court

This is an appeal by the plaintiff/appellant, The Bank of Commerce of Greenwood, Mississippi (referred to herein as "The Bank of Commerce"or the "Bank") wherein The Bank of Commerce filed a Complaint against the defendants/appellees, SouthGroup Insurance and Financial Services, LLC (referred to herein as "SouthGroup"), and an agent of SouthGroup, Norman F. White (referred to herein as "White"). The claim of The Bank of Commerce was based on the negligent representations and misrepresentations by White that The Bank of Commerce did not need to purchase an endorsement to its liability insurance policy known as "Broad Form Entity Coverage Endorsement" or "Entity Coverage" (R 16; Ex "C"). The Bank of Commerce had purchased an "Directors and Officers Endorsement" ("D & O Coverage"), which White advised The Bank of Commerce was sufficient coverage for the Bank (R 17; Ex "C"). The Bank relied on these representations. The case was presented to the Lower Court under a Stipulation of Facts (R 15-20) and Motions for Summary Judgment filed by plaintiff and defendants, and oral arguments. On May 13, 2010, the Leflore County Circuit Judge entered an order granting the Motion for Summary Judgment sought by SouthGroup and White and denying the Motion for Summary Judgment sought by The Bank of Commerce (R 33; RE 3-8). The Order of the Lower Court was based on two issues: (a) that The Complaint filed by The Bank of Commerce was time barred under the applicable Statute of Limitations of three years, Miss. Code Ann. §15-1-49; and (b) that The Bank of Commerce was barred from recovering any claim against SouthGroup and White under

the Mississippi Voluntary Payment Doctrine ® 33; RE 4-8). These issues were raised as affirmative defenses by SouthGroup and White in their Answer to the Complaint of The Bank of Commerce maintaining that White, as agent for SouthGroup, was negligent and made improper recommendations and misrepresentations to The Bank of Commerce relative to liability insurance coverage ® 1-14). The Bank of Commerce filed a Notice of Appeal on June 3, 2010, ® 38).

B. Statement of Facts

All of the relevant facts were presented to the Lower Court under a Stipulation of Facts entered into on June 1, 2009, by The Bank of Commerce, as plaintiff, and SouthGroup and White, as defendants ® 15). All references hereinafter to the Stipulation of Facts shall be cited herein as "Stip" with the referenced paragraph (¶), as well as to the transcript record. References to the Exhibits to the Stipulation of Facts (included as attachments to the approved Joint Motion to Supplement Record) are further referenced as "Ex" and the letter of the Exhibit ("A" through "F").

The Bank of Commerce maintains that the following facts, all set forth in the Stipulation of Facts by the parties, are relevant to the issues presented for review:

(1) White was an agent and employee of SouthGroup and for many years prior to June 20, 2004, served as insurance agent for the Bank (*Stip* ¶¶ 3 and 4; R 15);

(2) Prior to June 20, 2004, White discussed with the Bank's president the Bank's liability insurance coverage. White advised of the availability of coverage known as "entity coverage" but did not recommend or advise the Bank to purchase such coverage in that the Bank had Directors & Officers (D & O) Coverage which

White deemed sufficient to protect the Bank (*Stip* ¶ 6; R 15-16; Ex "C");

(3) Through the efforts and recommendations of White and SouthGroup, the Bank purchased a general liability insurance policy from the Chubb Group of Insurance Companies with an effective date of June 20, 2004 (the "Chubb Policy"). The Chubb Policy did not include a broad form entity coverage endorsement (*Stip* ¶ 7; R 16);

(4) In October of 2004, The Bank of Commerce was served process under six complaints filed in the Leflore County Circuit Court regarding loans on residential properties. These suits were subsequently voluntarily dismissed on April 13, 2006, (*Stip* ¶¶ 8 and 9; R 16-17). The Bank was reimbursed by White for all expenses, including attorney's fees, incurred in the defense of the state filed lawsuits prior to dismissal (*Stip* ¶ 14; R 18);

(5) By letter of January 18, 2005, the Chubb Group of Insurance Companies ("Chubb") advised The Bank of Commerce that the Bank had no entity coverage under the Chubb Policy, hence, Chubb had no liability to either defend the state lawsuits nor indemnify The Bank of Commerce for any loss thereunder (*Stip* ¶ 9; R 16-17; Ex "B");

(6) On July 18, 2005, twenty-three separate complaints were filed against The Bank of Commerce, a second bank, and various other parties alleging violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The RICO complaints ultimately named Terry Green, one of the Bank's loan officers, as a defendant in all of the federal lawsuits (*Stip* ¶ 10; R 17);

(7) By letter dated January 12, 2006, as agent for and on behalf of SouthGroup, White advised the Bank's president that:

> Although presented and discussed with the bank, I never recommended or advised the Bank of Commerce to enclose (sic) the subject policy to include Entity Coverage. My position then, as it would be now, is that the entity cannot commit any action, action must be committed by an individual, be that an officer or a director, and naming said individual triggers coverage under the policy, including legal fees (*Stip* ¶ 12; R 17; Ex "C").

(8) White's representations that the Bank did not need entity coverage were accurate so long as Green, an officer of the Bank, was included as a defendant with the Bank in all twenty-three federal lawsuits in that Chubb provided all costs of defense, including legal fees for both Green and the Bank (*Stip* ¶ 11; R 17).

(9) On March 20, 2008, during a mediation proceeding held before the United States Magistrate in the federal lawsuits, a representative of Chubb announced that a final settlement with the RICO plaintiffs had been reached on behalf of Green for $400,000.00, that Green was being dismissed from the lawsuits, and that Chubb was withdrawing from the cases and providing no further legal expense coverage to the Bank (*Stip* ¶ 16; R 18-19);

(10) In early 2008, the lead defense attorney for the Bank and Green in the federal RICO cases estimated the cost of trial of the first of the federal lawsuits, which was then set for trial, would exceed $1,000,000.00 (*Stip* ¶ 19; R 19; Ex "F").

(11) On March 31, 2008, at a resumption of the mediation proceedings, Chubb agreed to increase its prior settlement offer to the RICO plaintiffs by $100,000.00

and the Bank agreed to pay the RICO plaintiffs $600,000.00 in settlement of all of the twenty-three pending federal lawsuits (*Stip* ¶¶ 17 and 18; R 19);

(12) The Bank acknowledges that the Chubb Policy contains a $25,000.00 deductible or retention amount, and thereby sought damages from SouthGroup and White in a total amount of $575,000.00 by Complaint filed in the Leflore County Circuit Court on July 17, 2008, (*Stip* ¶ 22; R 19).

The Lower Court found that the applicable three year Statute of Limitations commenced on January 18, 2005, the date on which Chubb advised The Bank of Commerce that it had no entity coverage (*Stip* ¶ 9; R 16; RE 7; Ex "B"). That letter was solely in reference to the Circuit Court lawsuits filed in October of 2004, all of which were subsequently dismissed. Moreover, White voluntarily paid all of the expenses and legal fees of The Bank of Commerce prior to Chubb assuming the defense (*Stip* ¶ 14; R 18). The Lower Court further ruled that the Bank's settlement payment to the RICO plaintiffs was made without compulsion, fraud, mistake of fact and was payment of claims which the Bank contended that it did not owe, hence, recovery was barred under the Mississippi Voluntary Payment Doctrine (R 36-37; RE 7-8).

V. SUMMARY OF THE ARGUMENT

This case on appeal presents the Court with two issues:

A. Appellant, The Bank of Commerce, argues that the Court should revisit the ruling in Oaks vs. Sellers, 953 So. 2d 1077 (Miss. 2007) as to when the three year Statute of Limitations, Section 15-1-49 of the Mississippi Code Ann., commences with respect to a claim, or potential claim, of an insured against an insurance agent for failure to provide liability coverage expected by the insured. The Oaks Court found that the Statute of Limitation commences upon the insured receiving notice that the coverage desired or expected was not included in the insurance policy. The Bank's claim is based on negligent representations and misrepresentations made by the Bank's long time insurance agent, White. The Bank argues that what distinguishes its case from Oaks, Id., is that White acknowledged his representations and recommendations to the Bank and in fact personally paid all of the Bank's expenses, including attorney's fees, incurred after the lack of expected coverage was discovered. Hence, the Bank had no claim against White nor SouthGroup in that the Bank had no damages. The lack of coverage of the Bank as an entity arose again on a later date when a number of federal lawsuits were filed against the Bank on July 18, 2005. Those lawsuits ultimately named a bank officer as a defendant, together with the Bank, and the insurer, Chubb, did undertake the cost of defense for both the loan officer, Green, as well as the Bank for a period of more than two years. Again, the Bank had no damages or losses and no basis to bring an action against White and SouthGroup. Ultimately, Chubb settled the federal lawsuits on behalf of the loan officer, Green, on March 20, 2008, announcing

that Green was being released as a defendant and that Chubb was no longer providing a defense to the Bank. Only then, did the Bank settle the federal lawsuits by paying $600,000.00, which settlement was facilitated by Chubb paying an additional $100,000.00 to the federal plaintiffs as an inducement to the Bank to settle and release Chubb (*Stip* ¶ 17-18; R 19). This case on appeal was commenced by the Bank against White and SouthGroup on July 17, 2008. The Bank contends that the Statute of Limitations relative to its claim against White and SouthGroup should not have commenced until the Bank suffered an actual loss for the first time on March 31, 2008. At the earliest, the Statute of Limitations would have commenced upon the filing of the federal lawsuits against the Bank on July 18, 2005, however, even under that scenario, the Bank commenced this action on July 17, 2008, within three years. Accordingly, the Bank argues that the Lower Court's ruling that the Bank's claim against White and SouthGroup was time barred was clearly erroneous and/or this Court's ruling in Oaks, Id., be amended or clarified as to commencement date of the Statute of Limitations until an actual loss by the insured occurs or should be reasonably anticipated.

If the ruling in Oaks, Id., that an insured is limited to a three year window in which to bring a legal action against its insurance agent for failure to procure needed insurance is determined to be a hard and fast ruling under any circumstances, such will encourage, in fact require, lawsuits to be filed prior to there existing any claim in that there are no damages. It may well be that no damages ever occur due to lack of coverage in an insurance policy, yet, the Oaks decision would require legal action against the insurance agent as a protective measure. The Bank respectfully submits

that this ruling, if strictly applied, has the effect of encouraging litigation rather than discouraging litigation. Such application does not promote judicial economy and correct application of the ruling should be that the Statute of Limitations commences upon the insured suffering an actual loss or at the time that the insured should reasonably anticipate a potential loss. The earliest date on which the Bank could have reasonably anticipated a monetary loss due to a lack of entity coverage under its Chubb policy was the date on which the twenty-three RICO federal suits were filed on July 18, 2005. The Bank filed its Complaint against White and SouthGroup within three years on July 17, 2008. Therefore, the trial court erred in finding that the Bank's claim is time barred.

B. The second issue presented on this appeal is the determination by the Lower Court that the Bank's claim was barred under the Mississippi Voluntary Payment Doctrine. The Bank argues that this case does not come within the rule of that doctrine in that the Bank was faced with legal fees totally disproportionate to the amount of settlement paid by the Bank to the federal plaintiffs. At that time, the Bank had been apprised by its lead counsel that the cost of defense of only the first of the twenty-three pending federal lawsuits was estimated at one million dollars. The Bank argues on this appeal that under the facts of this case, the Bank was in fact under business compulsion to settle all of the federal lawsuits.[1]

C. Should this Court determine that the Lower Court reached erroneous legal conclusions under the Stipulated Facts as regards the two issues set forth above, then

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[1] It should be noted that SouthGroup and White were apprised of the settlement negotiations in Federal Court and recommendations was made that their errors and omissions insurance carrier have a representative attend the mediation (*Stip* ¶ 15; Ex "E").

the Bank submits that the Final Judgment of the Lower Court must be reversed. However, the Bank further submits that, in view of the fact that there are no material facts in dispute in this case, the Court should further reverse the decision of the trial court in denying the Bank's Motion for Summary Judgment. This Court should grant Summary Judgment in favor of the Bank in the amount of $575,000.00, representing the Bank's actual loss of $600,000.00, less $25,000.00 deductible, as set forth in the Chubb policy, in that the negligent representations and erroneous misrepresentations made by White, as agent for SouthGroup, were the direct cause of the monetary loss suffered by the Bank.

VI. ARGUMENT

The case before this Court on this appeal requires determination of conclusions of law presented on undisputed facts based upon stipulated facts by all parties. The Lower Court, relying solely on Oaks, Id., concluded that the applicable three year Statute of Limitations commenced upon the Bank receiving a letter from its insurer, Chubb, dated January 18, 2005, (*Stip* ¶ 9; Ex "B"; RE 7). The error by the trial court at arriving at this conclusion is that the Chubb letter was sent in reference to six state court actions that were subsequently voluntarily dismissed. Moreover, White, agent for SouthGroup, personally reimbursed the Bank for all of its expenses, including legal fees, incurred with respect to the State Court actions (*Stip* ¶ 9; R 17). Accordingly, the Bank had suffered no loss resulting from White's mistaken or erroneous representations and had no cause of action against either White or SouthGroup. Unfortunately, the lack of entity coverage arose again on July 18, 2005, when the twenty-three federal RICO complaints were filed naming the Bank as one of the defendants. Chubb provided a legal defense of the Bank and its loan officer, Green, which defense was very costly and protracted for a period of more than two years with an enormous amount of discovery undertaken. Again, the Bank had suffered no loss while Chubb provided all costs of its defense. However, even if this Court finds that the filing of the RICO lawsuits placed the Bank on notice of a potential loss, and commenced the running of the three year Statute of Limitations, the Bank, nonetheless, filed its Complaint against White and SouthGroup on July 17, 2008, which was within three years of the filing of the federal lawsuits. Of course, the Bank contends that the three year Statute of Limitations did

not commence until the Bank suffered an actual loss on March 31, 2008, when the Bank determined to pay the RICO plaintiffs $600,000.00 as part of the total settlement in all of the federal lawsuits. Even then, after Green had been released from the federal lawsuits, Chubb paid an additional $100,000.00 to the settlement pool for release from the Bank (*Stip* ¶ 18; R 19). The distinguishing factors in the case *sub judice* from the facts in the Oaks case are hereinafter addressed.

The second issue presented to this Court on this appeal is whether the Bank's payment of $600,000.00 to settle the twenty-three RICO lawsuits falls within the rule of the Mississippi Voluntary Payment Doctrine. The Bank of Commerce submits that application of this doctrine under the facts of this case is purely illogical. The Bank's lead counsel in the RICO suits estimated the cost of trying only the first of the federal lawsuits to exceed one million dollars and estimated that the costs of trial of all of the RICO suits would exceed three million dollars (*Stip* ¶ 19; Ex "E"). Although the Bank persistently denied liability under the RICO Complaints, a jury verdict in twenty-three cases was not assured. In fact, the Bank officials owed a duty to its shareholders not to incur the liabilities associated with jury trials, and more importantly, not to incur the legal fees and other expenses of which the Bank had been forewarned.

Should this Court determine that the trial court reached the proper legal conclusions in either of the foregoing issues, then the judgment of the trial court must be affirmed. On the other hand, if this Court determines that erroneous legal conclusions were determined by the trial court considering the Stipulated Facts presented, then the issue arises as to whether the Lower Court was in error in denying

the Bank's Motion for Summary Judgment. There is no issue that White made misrepresentations and erroneous representations to the Bank, both orally and in writing (*Stip* ¶ 12; R 17; Ex. "B"). The lack of entity coverage resulted directly in a monetary loss to the Bank of $600,000.00, less $25,000.00 deductible in the Chubb policy. Accordingly, the Bank submits that the proper course of action by this Court should be to reverse the decision of the Lower Court denying the Bank's Motion for Summary Judgment, there being no genuine issue of any material fact in this case.

A. The Statute of Limitations Issue.

White and SouthGroup's entire premises with respect to the applicable Statute of Limitations is that the three year statute began to run when the Bank became aware that the Chubb Policy did not provide entity coverage. It is respectfully submitted that this reliance is simply misplaced. The Bank's claim is in fact based on the fact that White represented to the Bank both orally (*Stip* ¶ 6, R 16) and in writing (*Stip* ¶ 12, R 17, Ex "C") that he did not recommend or advise entity coverage for the Bank which could only act through its officers or directors which "triggers coverage under the policy" (*Stip* ¶ 12, R 17, Ex "C"). Moreover, the lack of entity coverage was not a monetary issue with the Bank until the insurer under the Chubb Policy withdrew its agreement of legal defense on March 20, 2008 (*Stip* ¶ 16, R 18-19). The pivotal issue before the Court is, when in fact did the statute of limitation commence to run against the Bank's pending claim in this lawsuit? The Bank has no claim, and has never asserted any claim of loss as the result of the six state lawsuits, all of which were voluntarily dismissed pursuant to Court Order dated April 13, 2006. All of the Bank's

expenses, including legal fees, were covered by White in those cases (*Stip* ¶ 4; R 18). Hence, the Bank had no losses in which to complain. Although the insurer under the Chubb Policy initially declined to provide a defense for the Bank under the federal lawsuits filed on July 18, 2005, Chubb subsequently rescinded that position and did in fact undertake the defense of the Bank, including the payment of all legal fees (*Stip* ¶ 11, R 17).

Defendants' reliance and the Lower Court's ruling in the case, which was based on the Bank's claim being time-barred, relies solely on Oaks, Id. There is, however, a glaring distinction under the facts in the Oaks case and the Stipulated Facts in the Bank's pending claim. The Court found in Oaks, Id., that the Statute of Limitations commenced to run when the insured was given written notice that his umbrella liability policy protected his business only and did not provide coverage for a non-business claim brought against the policy owner. The insurance company in Oakes took no further action after its initial letter maintaining non-coverage.

While the Bank concedes that the insurer under the Chubb Policy initially took the position of non-coverage, the fact is undisputable that the insurer's position was subsequently rescinded and the insurer did in fact provide coverage including legal defense expenses to the Bank to and including until March 20, 2008, when Chubb withdrew the defense provided the Bank after settling with the RICO plaintiffs on behalf of the Bank's officer, Green. At that point, the Bank was aware that White's representations that the Bank did not need entity coverage was in fact erroneous resulting in the settlement with the RICO plaintiffs in the amount of $600,000.00 on

March 31, 2008 (*Stip* ¶ 17; R 19). It is to be noted that, even after settling on behalf of the Bank's officer, Green (who was released from liability, *Stip* ¶ 16, R 18-19), Chubb nonetheless increased its settlement offer of March 20, 2008, by $100,000.00 under the Chubb policy on or about March 31, 2008, as an inducement to the Bank to settle and enter into mutual releases with Chubb (*Stip* ¶ 17-18, R 18-19). This payment was paid under the Chubb policy, i.e., it would not have been paid but for the policy and, to the extent of the payment, provided the Bank with limited coverage. The current cause of action against Southgroup and White was commenced a few months later on July 17, 2008.

The Bank submits that it had no cause of action against the Southgroup or White until an actual loss was sustained by virtue of the negligent misrepresentation by White that the Bank did not need entity coverage.[2] At the very least, the commencement of the Statute of Limitations was tolled for the period of time that the Bank was in fact provided a legal defense and limited coverage under the Chubb policy.

The Mississippi Supreme Court has stated in Owens-Illinois, Inc. vs. Edwards, 573 So. 2d 704 (Miss. 1990) that:

> A cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested (cases cited). A cause of action must exist and be complete before an action can be commenced and, when a suit is begun before the cause of action

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[2] It is to be noted that White's position that the Bank could only act through its officers and directors "which triggers coverage" was the case until Chubb settled on March 20, 2008, on behalf of the Bank's officer Green and left the Bank faced with incurring enormous projected legal fees and expenses which compelled the Bank to settle.

accrues, it will generally be dismissed, if proper objection is made (cases cited) at 706. [3]

The issue before this Court, therefore, is to determine when the Bank did in fact have a cause of action against Southgroup and White for misrepresentation of its coverage needs. Clearly, prior to March 20, 2008, the Bank had no cause of action because the Bank had no loss. This would be comparable to a party suing its insurer under a property insurance policy for wind or water damage before the hurricane. But for the federal RICO suits being filed, and ultimately settled by Chubb and the Bank, the Bank would not have had any claims against Southgroup or White because the Bank had no damages and no reason or right to sue.

The distinguishing factors in Oaks, supra., and the Bank's current case before this Court, is partly found in the language of the Supreme Court in p. 21 in Oaks as compared with the Stipulated Facts by the parties in this case, to-wit:

(a) In Oaks, the Court found **"Thereafter, American States paid no insurance proceeds on Sellers' claim."** (Sellers, like the Bank, was the insured.)

In the Bank's case, Chubb (the insurer as was American States in Oaks) did in fact pay insurance proceeds by undertaking an expensive defense of the Bank for an extended period of time subsequent to July 18, 2005, when the twenty-three federal lawsuits were filed *(Stip* ¶ 11 R 17), and continued to provide the Bank with costs of defense until March 20, 2008, *(Stip* ¶ 16, R 18-19).

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[3] The Court should be apprised that Owens-Illinois, Inc., Id. was limited to consideration of a claim for latent injury or disease. p. 13 Oaks, supra.

(b) In Oaks the Court found: **"American States' denial of coverage deprived Sellers of legal representation paid by American States."**

As stated above, Chubb, unlike American States, did in fact provide a legal defense in all twenty-three federal lawsuits against the Bank for more than two years.

(c) In Oaks the Court found: **"In addition, the denial of benefits by American States placed Sellers on notice that the defendants did not procure the type of business and personal insurance he believed he had purchased."**

Although the Bank was placed on notice that it did not have entity coverage, the representations of White that they were sufficiently covered by directors and officers coverage proved to be correct and his negligent misrepresentations did not become material until Chubb withdrew its defense on March 20, 2008.

(d) In Oaks the Court found: **"After American States denied coverage on August 26, 1997, Sellers had to face the wrongful death lawsuit without the possibility of any insurance coverage under the $1,000,000.00 umbrella policy issued by American States."**

Compare this to the fact that the Bank was not denied coverage, not only by way of all defense costs for a period of more than two years; settling with the RICO plaintiffs on behalf of Terry Green; and after settling on behalf of Green, who was released from liability, *(Stip* ¶ 16, R 18-19) Chubb did in fact make a further contribution of $100,000.00 to the settlement fund, which with the Bank's offer of $600,000.00 and Chubb's previous payment on behalf of Green, did in fact settle all twenty-three of the federal RICO claims. Unlike American States, which provided no coverage for its

insured, Mr. Sellers, Chubb paid compensation of $400,000.00 under its policy for the Green settlement, plus $100,000.00 on March 31, 2008 and, in addition, footed the enormous legal and defense expenses on behalf of the Bank and Green for an extended period of time. In Young vs. Southern Farm Bureau Life Insurance, 592 So. 2d 103 (Miss. 1991), this Court found that the Statute of Limitations did not begin to run under the accidental death benefit provision of a life insurance policy until the insurance company notified the insured that it would not pay the accidental death benefits (at 107). Chubb advised the Bank that it did not have entity coverage but, nonetheless, paid $400,000.00 to the RICO plaintiffs under its policy and paid an additional $100,000.00 for a release from the Bank. Chubb did refuse to make further payment and under the Young ruling, such refusal triggered the Bank's cause of action and commenced the Statute of Limitations running.

Because of the totally different extenuating circumstances, the Bank maintains that Oaks is not applicable or, at the least, distinguishable from the facts before this Court, and that the three year Statute of Limitations did not commence until March 31, 2008, when Chubb paid a final payment of $100,000.00 and entered into mutual releases with the Bank in the RICO cases, or at the very earliest, on July 18, 2005, when the RICO cases were filed. In any event, the Bank timely filed its Complaint against White and Southgroup on July 17, 2008, which under any scenario was within the three year Statute of Limitations.

B. The Volunteer Payment Issue.

There is no issue in this proceeding, and in fact stipulated, that the Bank paid

$600,000.00 to settle all twenty-three of the RICO lawsuits (*Stip* ¶ 17, R 19). There is also no issue that the Bank denied any and all liability of the allegations made against the Bank under the RICO lawsuits (*Stip* ¶ 20, R 19). The issue before the Court, however, is not whether the Bank would "win or lose" the issues raised by the RICO lawsuits, the real issue was that regardless of the outcome of the trial of the RICO lawsuits, including the first one scheduled for trial in November 2008 (Ex. "F", Henson Affidavit ¶ 2), the Bank was faced with estimated legal charges for that case alone at "$1 million or more" (*Stip* ¶ 19; R 19; Ex "F"). Moreover, the cost of defense of all of the RICO cases provided by the Bank's defense attorneys was estimated to be "at least $3 million and probably in excess thereof" (Ex "F", Henson Affidavit ¶ 3).

Stated differently, the Bank was assured of being faced with what was tantamount to a $1,000,000.00 directed verdict in the way of legal expense in the trial of only the first of the RICO cases and this cost was assured irrespective of the Bank's liability in the case.

In other words, the Bank was fully aware that it was faced with an enormous financial loss just in the cost of defense of the RICO cases and this, not the likelihood of possibly losing on the merits, was the sole motivation of the Bank to pay $600,000.00 in settlement of all twenty-three of the RICO lawsuits. While SouthGroup's and White's legal discussion of the voluntary payment rule in generalized terms correctly states the doctrine and application thereof, the Bank submits that it has no application to the compulsion which motivated the Bank to settle. Surely, there must be some logic exercised in the application of any legal doctrine. The case before this Court is far

removed from the number of cases in which a party seeks recovery by subrogation or otherwise of a voluntary payment made to a third party claimant rather than defending its legal rights. E. G., Genesis Insurance Company vs. Wausan Insurance Co., 343 F. 3d 733 (5th Cir. 2003).

The restrictions made on the voluntary payment doctrine, and the exercise of sagacious logic is found in the Mississippi Supreme Court decision in Glantz Contracting Company vs. General Electric Company, 379 So. 2d 912 (Miss. 1980). The Court observed in that case that:

> . . . 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 payer to waive its rights. As held in Chesire Oil Co., Inc. vs. Springfield Realty Corp., 385 A. 2d 835 (N. H. 1978):
>
> > "The 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." Glantz, p. 917-918.

Accordingly, the Glantz court found that General Electric Co., when confronted with the choice of making certain payments or face immediate work stoppage threatening an important contract, General Electric Co. was compelled to make the payments, thereby removing such payments from the volunteer payment rule.

The Bank's motivation to settle was in no way driven by the possible exposure or non-exposure that the Bank might have had under the RICO lawsuits, but rather the real and undeniable certainty that the Bank's expenses of defense were

"disproportionately greater" than the settlement paid. [4]

Under these unusual circumstances, it is purely illogical to state that the Bank made a payment voluntarily and is thereby barred from recovering for its actual monetary loss, which was a direct result of White's negligent representations with respect to entity coverage.

C. The Bank's Motion for Summary Judgment.

Should this Court find that the Lower Court erred in granting the Motion for Summary Judgment of White and SouthGroup, then the Bank submits that conversely, the Lower Court erred in denying the Bank's Motion for Summary Judgment. Since there are no genuine issues as to any material facts, then the Bank respectfully submits that this Court should find that the Bank is entitled to summary judgment in the amount of $575,000.00 under the Stipulated Facts submitted by the parties.

[4] SouthGroup and White were given notice and opportunity to participate in the settlement mediations (*Stip* ¶ 15; Ex "E").

VII. CONCLUSION

The pivotal issues, in fact, the sole issues presented for determination by this Court on this appeal, are whether the three year Statute of Limitations or the Voluntary Payment Doctrine do in fact bar the Bank of Commerce from recovery in this case. The Bank maintains that the legal conclusions of the Lower Court on both of these issues were erroneous under the Stipulated Facts presented. If these affirmative defenses fail, then the inevitable legal conclusion to be reached is that the Bank of Commerce was and is entitled to summary judgment against SouthGroup and White in the amount of its actual loss of $575,000.00. This case should be reversed and rendered, there being no purpose of a remand once reversal is determined.

This the 6th day of October, 2010.

Respectfully submitted,

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 Brief of Appellant and Record Excerpts, via U.S. Mail, postage prepaid, to the following:

Hon. Margaret Carey-McCray
Circuit Judge
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This the 6th day of October, 2010.

H. D. BROCK