IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ARACELY ZAMORA-GARCIA, et al., in their own name and right, and on behalf of all others similarly situated,	§	
Petitioners/Plaintiffs	§	
v.	§	C.A. No. M-05-331
MARC MOORE, DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, et al.,	§	
Respondents/Defendants.	§	

DEFENDANT STONINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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MARC MOORE, DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, DEPARTMENT OF HOMELAND SECURITY, et al., *Respondents/Defendants.*	§	

DEFENDANT STONINGTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, Stonington Insurance Company, f/k/a Nobel Insurance Company ("Stonington"), files this Motion for Partial Summary Judgment, and in support shows the following:

I. Introduction

A. The Indemnitor Notice Class Claims

Under Federal Rule of Civil Procedure 23, the Court certified two plaintiff classes in this case: (1) the Indemnitor Notice Class, and (2) the Bonded Immigrant Class.[1] The two classes assert contract claims against Fairmont

[1] *See generally* Order Granting In Part and Denying In Part Plaintiffs' Motion to Certify Surety Bond Classes ("Certification Order"), *Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

Specialty Insurance Company (f/k/a Ranger Insurance Company), Stonington Insurance Company (f/k/a Noble Insurance Company), and Aaron Federal Bonding Agency (sometimes known as U.S. Immigration Bonds and Services), an assumed name for Don Vannerson, deceased ("Aaron Bonding").[2] With respect to the class claims, this summary judgment focuses on the Indemnitor Notice Class claims, and Stonington reserves the right to timely file a summary judgment on the Bonded Immigrant Class claims at a later date.

Plaintiff Irma Sandoval is the class representative of the Indemnitor Notice Class. Ms. Sandoval represents a class of plaintiffs who served or are serving as Indemnitors on immigration-surety bonds posted by Ranger Insurance Company ("Ranger") or Nobel Insurance Company ("Nobel") to secure the release of bonded immigrants detained by the Immigration and Naturalization Services ("INS"), the predecessor agency to the Department of Homeland Security ("DHS").[3] Ms. Sandoval and the Indemnitor Notice Class seek to recover

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[2] Aaron Federal Bonding Agency and U.S. Immigration Bonds and Services were assumed names for Don Vannerson. Mr. Vannerson died on March 1, 2004, almost two years after the predecessor action was filed. *See* Suggestion of Death, *Zamora-Garcia, et al. v. Tromski*, *et al.*, No. M-02-144, Dkt. 87 (S.D. Tex. Mar. 30, 2004). No efforts were made to substitute a personal representative of Mr. Vannerson's estate until Plaintiffs filed their Motion to Add Co-Executors Rodney Vannerson and Eleni Papadakis as Party Defendants on March 9, 2006. *See Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 39 (S.D. Tex. Mar. 9, 2006). Shortly thereafter, and prior to appearing in this lawsuit, Rodney Vannerson and Eleni Papadakis resigned as the Co-Executors of the Vannerson Estate. The first appearance in this lawsuit by an estate representative was filed by Michael Padilla, as Independent Administrator, on May 22, 2006. *See* Defendant's, Michael Padilla as Independent Administrator of the Estate of Don Vannerson, Original Answer, *Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 73 (S.D. Tex. May 22, 2006).

[3] *See* Certification Order at 39, *Zamora-Garcia et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

damages under Federal Rule of Civil Procedure 23(b)(3) for a single breach of contract claim resulting from Defendants alleged failure to notify the Indemnitors and Bonded Immigrants of scheduled appearances before the DHS.[4]

B. Stonington is entitled to a dismissal of all Indemnitor Notice Class claims that accrued before September 30, 2001, because they are barred by the applicable four-year statute of limitations.

Stonington was added a defendant to this lawsuit on September 30, 2005.[5] In Texas, breach of contract claims must be filed within four years from the date they accrued or they are barred by the statute of limitations. *See* TEX. CIV. PRAC. & REM. Code §16.0004(a)(3). Consequently, all breach of contract claims asserted by the Indemnitor Notice Class that accrued prior to September 30, 2001, are barred by limitations, and should be dismissed as a matter of law.

C. All claims against Stonington asserted by absentee Indemnitor Notice Class members with Ranger bonds should be dismissed because there is no privity of contract.

As demonstrated later in this motion, most of the absentee Indemnitor Notice Class members obtained immigration bonds from Ranger Insurance Company.[6] Nobel and Stonington had no involvement or dealings with these indemnitors.[7] More importantly, there is no privity of contract between Stonington

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[4] *See id.* at 16-18.

[5] *See* Plaintiffs' Third Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("Plaintiffs' Third Amended Complaint"), *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 2 (S.D. Tex. Sept. 30, 2005).

[6] *See infra* at notes 22-23 and accompanying text.

[7] The Indemnitor Notice Class representative, Irma Sandoval, obtained an immigration bond from Nobel Insurance Company. *See* Ex. 1, Manuel Sandoval bond file at BF-224. There is no class representative in this case who obtained a bond from Ranger or its successor, Fairmont. Fairmont has requested a dismissal of all class claims against it

and the indemnitors with Ranger bonds, and such indemnitors suffered no harm from Stonington. Therefore, all class claims asserted against Stonington by absentee Indemnitors with Ranger bonds should be dismissed as a matter of law.

D. Stonington is also entitled to a dismissal of individual claims asserted by Aracely Zamora, Juana Zamora, and Alberta Rubio

In addition to the class action claims, Plaintiffs Aracely and Juana Zamora filed individual claims against Stonington and the other Defendants in this case for intentional infliction of emotional distress.[8] Stonington seeks a dismissal of all tort claims asserted by Aracely and Juana Zamora because they are barred by the applicable two-year statute of limitations. *See* TEX. CIV. PRAC & REM. CODE § 16.003(a) ("[A] person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues."). Furthermore, the Zamoras never had any involvement or dealings with Stonington, and suffered no injury from Stonington. Therefore, the Zamoras cannot establish the other elements of their tort cause of action. *See Kroger Texas L.P. v. Suberu*, 216 S.W.3d 788, 795-96 (Tex. 2006) (cause of action for intentional infliction of emotional distress requires proof that defendant's extreme and outrageous conduct caused plaintiff's emotional distress).

Finally, Alberta Rubio seeks contract damages against Stonington and the other Defendants for their alleged failure to return collateral that she allegedly

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on this basis. *See* Defendant Fairmont's Motion for Summary Judgment, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 153 (S.D. Tex. Sept. 6, 2007).

[8] *See* Plaintiffs' Sixth Amended Complaint at ¶¶ 145-155, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006).

paid in connection with the immigration bond she obtained for her son, Miguel Rubio.[9] However, there is no evidence that Ms. Rubio ever paid collateral in connection with her son's bond, and therefore, this claim should be dismissed as well.

II. Summary Judgment Standard of Review

Summary judgment is proper in a case where there is no genuine issue of material fact. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*. 477 U.S. 317, 322 (1986). A defendant who seeks summary judgment on a plaintiff's cause of action must demonstrate the absence of a genuine issue of material fact by either (1) submitting summary judgment evidence that negates the existence of a material element of plaintiff's claim or (2) showing there is no evidence to support an essential element of plaintiff's claim. *J. Giels Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1251 (1st Cir. 1996); *see Celotex Corp.*, 477 U.S. at 322-23. In this case, members of the Indemnitor Notice Class whose breach of contract claims accrued before September 30, 2001 are barred by limitations. Moreover, the indemnitors with Ranger bonds cannot establish that they had a contractual relationship with Stonington, or that they suffered any injury from Stonington.

Furthermore, Aracely and Juana Zamora's individual claim for intentional infliction of emotional distress is barred by the applicable two-year statute of limitations. Moreover, there is no evidence that Stonington had any involvement in the alleged misconduct relating to the Zamoras' tort claim. Similarly, there is

[9] *See id.* at ¶¶124-128.

no evidence that Alberta Rubio paid any collateral in connection with Miguel Rubio's bond, or that she is entitled to a refund for such collateral. For these reasons, Stonington is entitled to a partial summary judgment on the above noted claims.

III. Summary Judgment Evidence.

In support of its motion, Defendant Stonington includes evidence in the attached appendix, which is incorporated by reference in this motion.[10] The motion for summary judgment is based on the following evidence:

Exhibit 1	Manuel Sandoval's bond file
Exhibit 2	Aracely Zamora's bond file
Exhibit 3	Excerpts from Plaintiffs' Excel spreadsheets identifying 4713 Ranger Indemnitors and 2105 Nobel Indemnitors produced via email on May 29, 2007.

IV. All Indemnitor Notice Class claims that accrued prior to September 30, 2001, are barred by the applicable statute of limitations.

Many of the absentee Indemnitor Notice Class members are barred by the four-year statute of limitations from asserting breach of contract claims against Stonington. In the certification order, the Court defined the Indemnitor Notice Class as:

> (a) those who served or are serving as Indemnitors on a surety bond posted by the a Bonding Defendant to secure the release of a Bonded Immigrant detained by the Federal Defendants, and
> (b) who have fully paid their up-front, non-reimbursable fees to the Bonding Defendants pursuant to the terms of the bonding contracts, and

[10] *See also* Affidavit of Susan Logsdon in Support of Stonington's Motion for Partial Summary Judgment filed with this motion.

(c) where the Bonding Defendant's records indicate that on or after April 16, 1998, it received a "Notice to Obligor to Deliver Alien" indicating that the INS/DHS had scheduled an appearance for deportation for the Bonded Immigrant, and where the Bonding Defendant did not provide notice of the requested appearance for deportation to either the Indemnitor or the Bonded Immigrant.

Irma Sandoval and the Indemnitor Notice Class's breach of contract claim consists of the "Bonding Defendants'"[11] alleged routine failure to abide by the following provision in the Terms and Condition contract:

> [Bonded Immigrant] and INDEMNITOR will be notified by AGENCY of all appearances requested by the U.S. IMMIGRATION AND NATURALIZATION SERVICE of which AGENCY receives notice.[12]

In Texas, "[t]he limitations period on actions for breach of contract is four years." *Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 618 (Tex. App.—Texarkana 2002, pet. denied); TEX. CIV. PRAC. & REM. Code §16.004(a)(3); *see also* TEX. CIV. PRAC. & REM. Code §16.051; *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002). "It is well-settled law that a breach of contract claim accrues when the contract is breached." *Stine*, 80 S.W.3d at 593.

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[11] In their Complaint, Plaintiffs collectively refer to Fairmont Specialty Insurance Company (f/k/a Ranger Insurance Company), Stonington Insurance Company (f/k/a Noble Insurance Company), and Aaron Federal Bonding as the "Bonding Defendants," imputing the conduct of Aaron Federal Bonding to Fairmont and Stonington. *See* Plaintiffs' Sixth Amended Complaint at ¶ 1, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006). *But see* Certification Order at n. 5, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007) ("[T]he Court notes that whether Insurer Defendants Fairmont and Stonington are liable for Aaron Bonding's conduct is an issue yet to be resolved.").

[12] *See* Certification Order at 16-17; *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007), *see also* Plaintiffs' Sixth Amended Complaint at ¶5, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006); and Ex. 1, Manuel Sandoval bond file at BF-238 at ¶ 4 (Terms and Conditions Under Immigration Bond).

Under the allegations of the Plaintiffs' Sixth Amended Complaint, Ms. Sandoval's and the absentee Indemnitor Notice Class members' breach of contract claims accrued when Aaron received demands from the INS/DHS to deliver bonded immigrants for appearances, and Defendants failed to provide such notice to the indemnitors and bonded immigrants.[13] However, Stonington was added as a party to this action on September 30, 2005, when Plaintiffs filed their Third Amended Class Action Complaint.[14] Thus, any claim that accrued before September 30, 2001, is barred by the statute of limitations.

Plaintiffs cannot avoid the statute of limitations by claiming that their contract claims accruing before September 30, 2001 are timely under the "relation back" provision of Federal Rule of Civil Procedure 15(c)(3). Plaintiff Aracely Zamora originally filed the predecessor action, Case No. M-02-144, on April 16, 2002, against the federal government.[15] Aaron Federal Bonding Agency was added as a defendant in the First Amended Class Action Complaint, filed on May 7, 2002.[16] More than three years later, on September 30, 2005, Stonington and Nobel were added as defendants to the Third Amended Class Action

[13] *See* Plaintiffs' Sixth Amended Complaint at ¶¶ 112-122, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114, (S.D. Tex. Oct. 27, 2006).

[14] Plaintiffs' Third Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("Plaintiffs' Third Amended Complaint"), *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 2 (S.D. Tex. Sept. 30, 2005).

[15] *See* Plaintiffs' Petition for Writ of Habeas Corpus and Class Action Complaint, *Zamora-Garcia, et al. v. Tromski*, et al., No. M-02-144, Dkt. 1 (S.D. Tex. Apr. 16, 2002).

[16] *See* Plaintiffs' First Amended Petition for Writ of Habeas Corpus and Class Action Complaint, *Zamora-Garcia, et al. v. Tromski*, et al., No. M-02-144, Dkt. 2 (S.D. Tex. May 7, 2002).

Complaint.[17]

Federal Rule of Civil Procedure 15(c)(3) states:

> c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

FED. R. CIV. P. 15(c)(3). Rule 15(c)'s "relates back" provision does not apply to Stonington because an amended complaint adding a defendant does not relate back to the original complaint if Plaintiff has shown neither factual mistake nor legal mistake concerning the identity of the proper party. *See Soto v. Brooklyn Corr. Facility*, 80 F.3d 34, 36 (2nd Cir. 1996); *see also Jacobson v. Osborne*, 133 F.3d 315, 319-20 (5th Cir. 1998) (Rule 15(c)(3) "is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification."). In this case, Plaintiffs have not shown and cannot show that they delayed adding Stonington as a party to this litigation as a result of factual or legal mistake.

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[17] *See* Plaintiffs' Third Amended Complaint, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 150 (S.D. Tex. Sept. 30, 2005). The Court severed the Third Amended Complaint from cause number M-02-144, and assigned it a new cause number, M-05-331. *See* Order of Severance, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 151 (S.D. Tex. Sept. 30, 2005); *see also* Plaintiffs' Third Amended Complaint, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 2 (S.D. Tex. Sept. 30, 2005).

Indeed, they offer no explanation for their delay in adding Stonington.[18] Moreover, Plaintiffs have failed to show that within the period provided by Rule 4(m) for service of the summons and complaint,[19] Stonington received such notice of the institution of the action that Stonington will not be prejudiced in maintaining a defense on the merits, and that Stonington knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[20] *See* FED. R. CIV. P. 15(c)(3); *see also Bailey v. U.S.*, 289 F. Supp.2d 1197, 1207 (D. Haw. 2003) (amended complaint adding new defendants did not relate back to the date of the original complaint in wrongful death action where plaintiffs failed to show the requirements of Rule(c)(3) were met).

Moreover, Texas procedural law does not rescue the absentee Notice Class Members claims from the effect of limitations.[21] "Texas Civil Practice &

[18] *See* Plaintiffs' Motion to File Third Amended Petition for Writ of Habeas Corpus and Class Action Complaint, *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 148 (S.D. Tex. Sept. 30, 2005). Plaintiffs' motion is little more than a pleading title, and it is not supported by any factual allegations or legal authority.

[19] Rule 4(m) allows 120 days for service of the summons and complaint unless an extension is obtained. See FED. R. CIV. P. 4(m).

[20] *See supra* at note 18.

[21] Under Federal Rule 15 (c)(1): "An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statutes of limitations applicable to the date of the original pleading." FED. R. CIV. P. 15(c)(1). There is a split among the federal circuit courts as to whether state procedural rules or federal procedural rules govern the relation back principles set forth in Rule 15(c)(1). *See Oros v. Hull & Assocs.*, 217 F.R.D. 401, 404-05 (N.D. Ohio 2003) (discussing circuit split). In *McGregor v. Louisiana State Univ.*, 3 F.3d 850, 864-65 (5th Cir. 1993), the Fifth Circuit applied Louisiana procedural law in determining that the amended pleadings did not relate back to the original pleadings. As discussed above, neither the federal procedural rules, nor the Texas procedural rules, prevent limitations from barring certain Indemnitor Notice Class claims against Stonington.

Remedies Code section 16.068 (Vernon 1986) permits the amendment of pleadings after the statute of limitations has run to change 'the facts or grounds of liability or defense,' but this section does not authorize the addition of new defendants after the claims against them have been barred by limitation." *Cothrum Drilling Co. v. Partee*, 790 S.W.2d 796, 800 (Tex. App.—Eastland 1990, writ denied); *see also Koch Oil Co. v. Wilber*, 895 S.W.2d 854, 863 (Tex. App.—Beaumont 1995, writ denied) (amended pleadings do not prevent the running of the statute of limitations against parties who are added by amended pleadings); and *Leeds v. Cooley*, 702 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("The statute of limitations is tolled at the time a party defendant is brought into the suit and not when the original pleading is filed."). Therefore, the absentee Indemnitor Notice Class members' claims against Stonington that accrued prior to September 30, 2001, are barred by the applicable four-year statute limitation, and should be dismissed as a matter of law.

V. All Ranger Indemnitor class claims must be dismissed because there is no privity of contract between the absentee Ranger Indemnitors and Stonington.

The immigration bonds at issue in this case were issued either by Nobel or Ranger.[22] Plaintiffs allege there are 4713 potential class members of the Indemnitor Notice Class who obtained immigrations bond from Ranger ("Ranger Indemnitors"), and approximately 2105 potential class members of the Indemnitor Notice Class who obtained immigration bonds from Nobel ("Nobel

[22] *Compare* Ex. 1 Manuel Sandoval bond file at BF-224 (immigration bond issued by Nobel) *with* Ex. 2, Aracely Zamora bond file at BF-056 (immigration bond issued by Ranger).

Indemnitors").[23] To the extent that the Ranger Indemnitors attempt to assert breach of contract claims against Stonington, those claims must be dismissed because there is no privity of contract between the Ranger Indemnitors and Stonington.

In its certification order, this Court set forth the elements of a cause of action for breach of contract in Texas:

> Under Texas law, the elements of a breach of contract cause of action are: (1) the existence of a valid contract; (2) performance or tendered performance by plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the defendant's breach. *E.g., McLaughlin, Inc. v. Northstar Drilling Tech., Inc.*, 138 S.W.3d 24, 27 (Tex. App.—San Antonio 2004, no pet.); *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Lewis v. Bank of Am. NA*, 343 F.3d 540, 544-45 (5th Cir. 2003).[24]

In this case, the Ranger Indemnitors cannot prove their breach of contract claims against Stonington because they had no contract with Stonington—or any other dealings with Stonington. There is no evidence that privity of contract exists between the Ranger Indemnitors and Stonington.

"In a breach of contract action, the plaintiff has the burden to prove that the defendant has obligated himself under the contract . . . . Maintenance of an action for breach of contract requires privity between the damaged party and the party sought to be held liable." *Cannon v. ICO Tubular Serv., Inc.*, 905 S.W.2d 380, 392-393 (Tex. App.—Houston [1st Dist.] 1995, no writ), *abrogated on other*

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[23] *See* Exhibit 3, excerpts from Plaintiffs' Excel spreadsheets identifying 4713 Ranger Indemnitors and 2105 Nobel Indemnitors.

[24] *See* Certification Order at 16; *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

grounds by Lane Bank Equipment Co. v. Smith Southern Equipment, Inc., 10 S.W.3d 308, 312 (Tex. 2000); *see also Texas Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605, 607 (Tex. 2004) ("Privity of contract, as a necessary predicate to suit on a contract, has a long and settled history in this State."); *McIntosh v. Wiley*, 2006 WL 3691109, at *2 (S.D. Tex. Dec. 11, 2006) (Plaintiff's breach of contract claim was dismissed against one of the defendants because the defendant was not a party to the contract, and thus there was no privity of contract as required under Texas law).

Transactions between the Ranger Indemnitors and Ranger cannot create contractual obligations between the Ranger Indemnitors and Stonington. It is "a black-letter, axiomatic rule that a contract between other parties cannot create an obligation or duty on a non-contracting party, which non-contracting party was a stranger to the basic underlying . . . contract." *City of Beaumont v. Excavators & Constructors, Inc.*, 870 S.W.2d 123, 129 (Tex. App.—Beaumont 1993, writ denied) (Telephone company which was not party to contract between excavator and city had no duty arising out of ordinary contract to avoid causing delay or inefficiency in contractor's performance). Because there is no privity of contract between the Ranger Indemnitors and Stonington, the breach of contract claims asserted by the Ranger Indemnitors against Stonington must be dismissed as a matter of law.

VI. Aracely Zamora and Juana Zamora individual claims against Stonington for intentional infliction of emotional distress should also be dismissed.

A. Plaintiffs' allegations and factual background.

According to Plaintiffs, Aracely Zamora is a Mexican national who has resided in the United States since 1982.[25] She and her mother, Juana Zamora, live in Mission, Texas.[26] In February of 2000, Aracely was detained by the federal authorities and placed under removal proceedings for helping two young girls enter the U.S. illegally.[27] To secure Aracely's release from detention, Juana Zamora contacted Juvencio Pena, Aracely's cousin.[28] Mr. Pena, on Juana Zamora's behalf, entered a contract with Aaron Bonding by which Aaron Bonding agreed to post an immigration-surety bond on Aracely Zamora's behalf.[29] Also, according to Plaintiffs, Aaron Bonding served as the agent of Ranger in contracting with Pena.[30]

On September 20, 2001, an immigration judge ordered Aracely's removal from the United States, and subsequently the DHS issued a demand on the bond to Aaron Bonding, requiring that Aaron Bonding present Aracely Zamora for an appearance before the DHS on December 12, 2001.[31] Plaintiffs allege that

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[25] *See* Plaintiffs' Sixth Amended Complaint at ¶ 82, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

[26] *See id.*

[27] *See id.*

[28] *See id.* at ¶ 83.

[29] *See id.*

[30] *See id.*

[31] *See id* at ¶ 84.

Aracely was not timely presented to the DHS, and the bond was declared breached by the DHS.[32]

Moreover, Plaintiffs contend that on April 15, 2002, Defendant Santiago Sol, as agent for Aaron Bonding, went to the home of Juana Zamora in Mission, Texas, looking for Aracely Zamora to turn her into the DHS.[33] According to Plaintiffs, Mr. Sol falsely asserted that he had a warrant for Aracely's removal, issued in December 2001, and that he was authorized to arrest her.[34] Plaintiffs further allege that Aracely was not home on April 15, 2002, so Mr. Sol returned to the Zamora home, and to the homes of relatives, over the next few days.[35] Even though there is no allegation that Mr. Sol ever in fact detained Aracely Zamora—or even met or spoke with her—Juana and Aracely Zamora claim Mr. Sol caused them great emotional distress.[36] As a result of Mr. Sol and Aaron Bonding's alleged actions, Juana and Aracely Zamora assert a cause of action for intentional infliction of emotional distress.[37]

B. The Zamoras' tort claim against Stonington is barred by the two-year statute of limitations.

To the extent that Aracely and Juana Zamora seek to hold Stonington liable for Mr. Sol and Aaron Bonding's alleged tortious conduct, their claim is

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[32] *See id.*

[33] *See id.* at ¶¶ 146-149.

[34] *See id.* at ¶ 148.

[35] *See id.* at ¶ 88.

[36] *See id.*

[37] *See id.* at ¶¶ 146-155.

barred by the two-year statute of limitations. *See* TEX. CIV. PRAC & REM. CODE § 16.003(a) ("[A] person must bring suit for . . . personal injury . . . not later than two years after the day the cause of action accrues."). "[T]he applicable limitations period for a claim of intentional infliction of emotional distress is two years from the accrual of the cause of action." *Bhalli v. Methodist Hosp.*, 896 S.W.2d 207, 211 (Tex. App.—Houston [1st Dist.] 1995, writ denied). According to Plaintiffs' complaint, the alleged actions by Aaron Bonding and Santiago Sol occurred in April 2002, which is when their claim for intentional infliction of emotional distress accrued. *See id.* at 212 (a cause of action for intentional infliction of emotional distress accrues when the tortious acts have ceased).[38] Yet, as previously noted, Stonington was not added as a party to this lawsuit until September 30, 2005, when Plaintiffs filed their Third Amended Class Action Complaint.[39] Applying the same analysis for the Indemnitor Notice Class claims, Plaintiffs' Aracely and Juana Zamoras' claim against Stonington for intentional infliction of emotional distress is also barred by the applicable two-year statute of limitations as a matter of law.[40] Therefore, the Zamoras tort claim against Stonington must be dismissed as a matter of law.

C. There is no evidence that Stonington had any involvement in Aaron

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[38] *See id.* at ¶¶ 82-89 and ¶¶ 146-155.

[39] *Compare* Plaintiffs' Third Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("Plaintiffs' Third Amended Complaint"), *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 2 (S.D. Tex. Sept. 30, 2005) *with* Plaintiffs' Second Amended Petition for Writ of Habeas Corpus and Class Action Complaint ("Plaintiffs' Second Amended Complaint"), *Zamora-Garcia, et al. v. Tromski, et al.*, No. M-02-144, Dkt. 36 (S.D. Tex. July 31, 2003).

[40] *See supra* at Part IV.

and Sol's alleged conduct.

In addition to the statute of limitations problem, the Zamoras cannot establish the other elements of their tort cause of action. In Texas, to prevail on a claim for intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused plaintiff emotional distress; and (4) the emotional distress was severe. *See Kroger Texas L.P. v. Suberu*, 216 S.W.3d 788, 795-96 (Tex. 2006). In this case, the Zamoras cannot establish the first, second and third elements of their cause of action because there is no allegation—and no evidence—that Stonington or Nobel had any involvement, or engaged in any conduct, relating to the Zamoras' alleged claims of emotional distress.[41] According to Plaintiffs, Aaron Bonding served as the agent of Ranger in contracting with Aracely's cousin, Mr. Pena.[42] More importantly, Aracely Zamora's bond file confirms Ranger posted Ms. Zamora's immigration bond, not Nobel or Stonington.[43] There is no evidence that Nobel or Stonington posted a bond for Ms. Zamora, or had any other dealings with her.[44] As such, Nobel and Stonington had no reason or duty to locate Ms.

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[41] *See* Plaintiffs' Sixth Amended Complaint at ¶¶ 82-89 and ¶¶ 145-155, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

[42] *Id.* at ¶ 83.

[43] *See* Exhibit 2, Aracely Zamora bond at BF-056.

[44] *See generally id.*

Zamora to deliver her to the INS.[45] Consequently, Aracely and Juana Zamora cannot establish the elements of their cause of action, and their claim against Stonington for intentional infliction of emotional distress must be dismissed as a matter of law.

VII. There is no evidence that Alberta Rubio paid any collateral to Stonington.

Alberta Rubio asserts a breach of contract claim against Stonington for its failure to return collateral that she allegedly paid in connection with the bond for her son Miguel Rubio. Specifically, Ms. Rubio contends:

> The uniform surety contracts . . . obligate the Bonding Defendants to return collateral paid under the terms of the contracts to the Indemnitors upon the cancellation of the bond at issue. The Bonding Defendants have failed to return the posted collateral to Alberta Rubio and the members of Indemnitor Collateral Class.[46]

The foregoing claim against Stonington should be dismissed as a matter of law because there is no evidence that Ms. Rubio ever paid any collateral to Stonington. In Plaintiffs' complaint, Alberta Rubio sought to be the class representative for the so-called "Indemnitor Collateral Class," representing all indemnitors who were allegedly owed a collateral refund by the bond sureties, but never received the refund.[47] In its certification order, this Court thoroughly analyzed the relevant evidence, and ultimately denied certification of the

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[45] *See id* at BF-057 at ¶ G(1) (Under the terms of the bond, the alien's release is conditioned upon the delivery by Ranger of the alien to an immigration officer or judge of the United States as specified in the appearance notice.).

[46] *See* Plaintiffs' Sixth Amended Complaint at ¶¶ 126-127, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. No. 114 (S.D. Tex. Oct. 27, 2006).

[47] *Id.* at ¶ 106.

Indemnitor Collateral Class.[48] The Court concluded that Ms. Rubio could not maintain such a claim in her own right, much less on behalf of the proposed Indemnitor Collateral Class:

> Upon reviewing the evidence submitted, the Court finds that Plaintiffs have failed establish that Ms. Rubio ever made a collateral deposit, much less a deposit reflected by the Promissory Note referenced in Plaintiffs' Motion for Class Certification, or that she is entitled to the return of any collateral on the grounds alleged by the Indemnitor [Collateral] Class. Therefore, Plaintiffs cannot establish that Ms. Rubio's breach of contract claim, or the facts upon which it is based, are common to the proposed class, nor can they show that her claim is typical of the claims of the proposed class members . . . Therefore, the Court ORDERS that Plaintiffs' Motion for Class Certification is DENIED with respect to the Indemnitor Collateral Class.[49]

No additional evidence has been produced in this case that would alter the above stated findings. Consequently, Alberta Rubio's breach of contract claim against Stonington for failure to return collateral should be dismissed as a matter of law.

VIII. Conclusion

In this case, members of the Indemnitor Notice Class whose breach of contract claims accrued before September 30, 2001, are barred by limitations. Moreover, indemnitors with Ranger bonds cannot establish that they had a contractual relationship with Stonington, or that they suffered any injury from Stonington.

Furthermore, Aracely and Juana Zamora's individual claim for intentional infliction of emotional distress is barred by the applicable two-year statute of

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[48] *See* Certification Order at 29-34, *Zamora-Garcia, et al. v. Moore, et al.*, No. M-05-331, Dkt. 139 (S.D. Tex. Apr. 25, 2007).

[49] *See id.* at 33-34.

limitations. In addition, there is no evidence that Stonington had any involvement in the alleged misconduct relating to the Zamora's tort claim. Similarly, there is no evidence that Albert Rubio paid any collateral in connection with Miguel Rubio's bond, or that she is entitled to a refund for any such collateral. For these reasons, the above noted claims against Stonington must be dismissed as a matter of law.

PRAYER FOR RELIEF

Defendant Stonington Insurance Company, f/k/a Nobel Insurance Company ("Fairmont"), requests that the Court grant its motion, and enter a partial summary judgment in its favor; and for such other and further relief, at law and in equity, as the Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of September, 2007, a true and correct copy of the foregoing, *Defendant Stonington's Motion for Partial Summary Judgment*, was duly served in accordance with the Federal Rules of Civil Procedure on:

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