IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1180

THE FLORIDA DEPARTMENT OF FINANCIAL SERVICES, as Receiver for Aries Insurance Company,

Petitioner,

vs.

OCEAN BANK,

Respondent.
_____/

ON REVIEW FROM A CERTIFIED QUESTION OF THE FIRST DISTRICT COURT OF APPEAL IN CASE NO. 1D04-3906

RESPONDENT'S ANSWER BRIEF ON THE MERITS

COFFEY & WRIGHT, LLP
By: Kendall Coffey
Co-Counsel for Respondent
Grand Bay Office Plaza, PH2B
2665 South Bayshore Drive
Miami, Florida 33133
Telephone: 305.857.9797
Facsimile: 305.859.9919

TABAS, FREEDMAN, SOLOFF & MILLER
By: Joel L. Tabas
Co-counsel for Respondent
25 S.E. Second Avenue, Suite 919
Miami, Florida 33131
Telephone: 305.375.8171
Facsimile: 305.381.7708

AKERMAN SENTERFITT
By: J. Riley Davis
Co-counsel for Respondent
106 East College Avenue, Suite 1200
P. O. Box 1877
Tallahassee, Florida 32302-1877
Telephone: 850.224.9634
Facsimile: 850.222.0103

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Florida Statutes:

State Rules:

Other Authorities:

INTRODUCTION

The underlying major question in this case concerns who gets six parcels of real estate in Miami-Dade County.[1] It is not an issue with transcendent public implications. Instead, this is a property dispute between two litigants that, with respect to the relevant places and people, is confined to a single county.

That county is Miami-Dade. As the local action rule requires, the subject matter jurisdiction of foreclosure controversies is lodged only in the county where the realty is situated. In the present case, Miami-Dade envelops not only the real property but also the human and documentary elements of the transactions at issue. Even so, the Receiver relies primarily upon an out-of-context sentence contained in recent statutory language to create an untenable theory for beaming the Miami-Dade foreclosure dispute up to Leon County. Ironically, while stretching and spinning to insist that exclusive jurisdiction concerning all receivership assets can only exist in Leon County, the Receiver has nonetheless been litigating no less than three different lawsuits in the state courts of South Florida.[2] (Supp.App. A)

Plainly, the public interest does not compel this Court to accept jurisdiction to decide whether the Receiver can misplace a foreclosure controversy into a forum commended by neither jurisdictional doctrine nor public policy

---

[1] *Goedmakers v. Goedmakers*, 520 So.2d 575, 579 (Fla. 1988) (Analysis centers upon "the underlying major question in the case.").

[2] Moreover, the Receiver has also actively participated in a bankruptcy case in the Southern District of Florida, a case central to this controversy (Supp. App A)

considerations. Just as clearly, the local action rule's long-standing jurisprudence-common law principles that this Court has consistently re-validated-should not be displaced by cutting and pasting a few words from a modest statutory adjustment that treated a fundamentally different scenario.

For the reasons that follow, the exercise of this Court's discretionary jurisdiction is not justified, and even if jurisdiction were accepted, the result reached by the First District Court of Appeal should be affirmed.[3]

STATEMENT OF THE CASE AND OF THE FACTS

A. The Ocean Bank Mortgages

Ocean Bank is a state banking institution organized under Florida law with its principal place of business in Miami, Florida. App. Vol. I at 19. Also headquartered in Miami-Dade County were Aries Insurance Company ("Aries"), the insolvent insurer, along with Onyx Insurance Group, Inc. ("Onyx"), the parent of Aries, and various other affiliated companies. App. Vol. I at 443-469.

Aries was an automobile insurer operating from 1983 until the arrival of the Receiver in 2002. App. Vol. I at 9-17. Some four years prior to the Aries

[3]Citations to the three appendices that Ocean Bank submitted to the First District Court of appeal are referred to as "App. Vol. ___, at ___". When the Respondent's supplemental appendix is cited, the reference is "Supp. App., at ___".

Receivership, in 1998, Ocean Bank had loaned $16,000,000 to Onyx, secured by among other things, mortgages in property located at 585, 560, 540 and 530 N.W. 161 Road, Miami, Florida, (the "Home Office") and 2600 S.W. 3rd Avenue, Miami, Florida (the "Office Condo") (collectively referred to as the "Miami-Dade County Properties"). App. Vol. I, at 308-309, 345-347. Ownership of the Miami-Dade Properties was held by Onyx until a mere month before commencement of the Receivership proceeding. Evidently at the behest of the Florida Department of Insurance n/k/a the Department of Financial Services (DFS"), App. Vol. I, at 4-9, and certainly without Ocean Bank's prior knowledge or consent, Onyx transferred title to the Miami-Dade Properties to Aries on or about April 10, 2002. Quit-claim Deeds, App. Vol. I at 4-8.[4]

B. The Aries Receivership Proceeding

Just one month later, on May 9, 2002, the Leon County Circuit Court (the "Receivership Court") appointed DFS as Receiver for Aries and entered a notice of automatic stay under Section 631.041(1) of the Florida Statutes ("Rehabilitation Order"). App. Vol. I at 9-17. Within days, the Receiver occupied and took control of the Miami-Dade Properties. A local resident, Hugh Dates, was appointed

[4]Curiously, while the transfer documents are dated October 1, 2001, they were not recorded until April 10, 2002. The transfer from Onyx, the mortgagor, to Aries clearly violated Ocean Bank's loan documents. App. Vol. I at 4-8.

Special Deputy Receiver for the Aries Receivership. Supp. App. B. Two different private law firms based in Miami were appointed to represent the Receiver in the Aries cases. Meanwhile, the Receivership's main in-house lawyer also resided in Miami. App. Vol. III at 715. All the while, the Receiver conducted its operations in Miami-Dade, the county where millions of pages of documents were situated, where the 1998 mortgage loan closing took place, the insurance companies were based, lawyers and fact witnesses resided and, of course, as noted before, where all the disputed property is situated. App. Vol. I at 18-44, Vol. II at 304-442.

C. Ocean Bank's Foreclosure Action

The mortgage debts owed Ocean Bank were not paid following the May entry of the Rehabilitation Order. App. Vol. II at 304-305. Those obligations continued to mount dramatically and were still ignored when the Receiver, having failed at rehabilitation, secured an order for the liquidation of Aries on November 14, 2002 ("the Liquidation Order") App. Vol. II at 287-303. After months of defaults by Onyx, the Miami-based mortgagor, on March 17, 2003, Ocean Bank, commenced a foreclosure action (the "Miami Foreclosure Action") styled *Ocean Bank v. The Green Tree Ins. Group, Inc.*, Case No. 03-06486-CA-30 in the Miami-Dade Circuit Court seeking a judgment, among other things, to

foreclose its mortgages against the properties owned by Onyx, Aries and other affiliates. App. Vol. I at 18-286.

The Miami Foreclosure Action was filed in the Miami-Dade Circuit Court because all the parcels of real property being foreclosed are located in that county. App. Vol. 1 at 37-41, ¶¶81-94. Further, because a foreclosure seeks to gain title as "against the whole world" and must include known holders of any possible interest, more than a dozen other Miami-Dade persons and entities were joined along with assorted minor defendants. App. Vol. I at 328-347.

Significantly, the foreclosure was filed after the entry of the Liquidation Order in the Aries Receivership, a milestone event for secured creditors. For secured claims, Chapter 631 explicitly delineates a critical distinction between the Rehabilitation Order and the Liquidation Order.[5] While the statutory scheme imposes a stay during the rehabilitation period, once liquidation is ordered, that stay no longer applies to secured claims and the secured creditor is specifically authorized to proceed against its collateral. Thus, the automatic stay provision, Section 631.041 of the Florida Insurers Rehabilitation and Liquidation Act states, in pertinent part, that:

[5]Among other things, the order of liquidation also fixes the date for certain rights and liabilities of the insurer, creditors and other parties, Section 631.251, Fla. Stat. (2005), and invokes the operation of the insurance guaranty fund that is responsible for paying the covered claims of the failed insurer. §631.395, Fla. Stat. (2005).

> (1) An application or petition under §631.031 operates as a matter of law as an automatic stay applicable to all persons and entities, other than the receiver, which shall be permanent and survive the entry of an order of conservation, rehabilitation, or liquidation ....

But upon entry of an order of liquidation, secured claims are expressly exempted from the stay:

> (d) Any act to create, perfect, or enforce a lien against property of the insurer, *except a secured claim as defined in §631.011(21) may proceed under §631.191 after the order of liquidation is entered.*

§631.041(1)(d) (emphasis added).

In creating the exemption from a receiver's post-liquidation stay for a "secured claim as defined by §631.011(21)," Chapter 631 defines a "secured claim" as including "any claim secured by mortgage, trust deed, pledge, deposit as security, escrow or otherwise." §631.011(21) Fla. Stat. (2005). Accordingly, pursuant to Section 631.041(1)(d), upon the entry of the Liquidation Order, Ocean Bank's mortgage claim was explicitly authorized to "proceed under §631.191." Section 631.191 in turn, provides a secured lender with the option of either surrendering its security to become a general creditor – a path Ocean Bank assuredly did not take – or, as was undertaken here, "the claim may be discharged by resort to the security." §631.191(2)(a) Fla. Stat.(2005). In the present case, Ocean Bank sued to enforce its liens against the Miami-Dade Properties claimed

by Aries, an insolvent insurer, and thereby to discharge its secured claims "by resort to its security." *Id*.

In order to complete the foreclosure in which the Receiver, as owner of record, was a necessary party, Ocean Bank joined the Receiver as a defendant in the Miami Foreclosure Action. App. Vol. I at 326, *et seq*. The Receiver, however, refused to accept service of the complaint. App. Vol I at 313. In the meantime, while effectively paralyzing the Miami Foreclosure Action, the Receiver, which would remain in possession of the mortgaged property for years, refused to make mortgage payments to Ocean Bank. App. Vol. II at 304-305. In fact, despite the many months of rent free possession of the Miami-Dade Properties, App. Vol. II at 304-305, the Receiver failed to pay a dime toward real estate taxes for any of those parcels. App. Vol. II at 317. Along the same line, the Receiver failed to maintain properly the physical and structural character of the Home Office and Office Condo properties. App. Vol. II at 304-305. But it was willing to pocket any rentals on the properties even though under Section 697.07 of the Florida Statutes, Ocean Bank was legally entitled to the rents, all of which were duly pledged to it under the loan documents. *Id*.

D.. Ocean Bank's Declaratory Action

Ocean Bank, with the Miami Foreclosure Action thwarted by the Receiver's refusal to accept service, filed a Complaint for Declaratory Judgment and Alternatively, for Stay Relief or a Determination of the Validity and Priority of Ocean Bank's Secured Claims (the "Declaratory Action") on June 24, 2003. App. Vol. II at 306-442. The Declaratory Action sought, among other things,[6] a determination that the Receiver should accept service of process since the Liquidation Order authorized Ocean Bank to "resort to its security" by foreclosing, Sections 631.041(3) and 631.191(1), and that the validity of Ocean Bank's Miami-Dade mortgages should be adjudicated in Miami-Dade.[7]

E. The Bankruptcies of Aries' Affiliates

Meanwhile, on July 9, 2003, Onyx and four other affiliates of Aries (collectively, the Debtors"), each filed Chapter 7 petitions in the Bankruptcy Court for the Southern District of Florida. App. Vol. II at 443-469. After the bankruptcies were filed, Ocean Bank filed a Notice of Removal of the Miami Foreclosure

---

[6]This declaratory action also included several issues not material to the mortgage foreclosure controversy, issues that responded to the Receiver's demand for the turn-over funds in a different Aries receivership dispute. App. Vol. II at 306-442.

[7]When DFS refuses to accept service in a receivership, "The person denied service may petition the circuit court having jurisdiction over the delinquency proceeding for relief from the receiver's refusal to accept service." §631.021(5), Fla. Stat. (2005).

Action, App. Vol. III at 684-689, transferring the circuit court action to the United States Bankruptcy Court in Miami. No party moved to remand the Miami Foreclosure Action, which, while lodged in a federal forum, inherited the parties and jurisdictional foundation of the action as it existed in Miami-Dade Circuit Court. *First Republicbank v. Norglass*, Inc., 958 F.2d 117 (5th Cir. 1992**)**

On or about July 21, 2003, after the Debtors' bankruptcy filings, the Receiver filed the Receiver's Counterclaim to the Declaratory Action (the "Counterclaim") in the Receivership Court. Receiver's Counterclaim, App. Vol. 3 at 690-715. Without naming Debtor Onyx as a party, the Receiver alleged, among other things, that real property which is the subject of the Miami Foreclosure Action was fraudulently transferred from Aries to Onyx in 1998. Based on those allegations, the Receiver asked the Receivership Court in Tallahassee to void Ocean Bank's mortgage and security interests in the Miami-Dade properties. That claim, relying on Section 631.261, allows the Receiver to attack allegedly fraudulent transfers based on the same causes of action that are available to creditors and stockholders of the insurer under general law. *See* §726.01, Fla. Stat. (2005).

F. Ocean Bank's Motion to Dismiss the Counterclaim

On October 31, 2003, Ocean Bank moved to dismiss the Receiver's Counterclaim urging that the Receivership Court not attempt to supplant the Miami-Dade jurisdiction held by the U.S. Bankruptcy Court over the issues related to the Miami-Dade Properties. App. Vol. III at 716-719. That motion, based principally upon the local action rule, was heard on June 7, 2004. App. Vol. III at 720-826. At the hearing, the Receivership Court initially indicated a desire to defer to the bankruptcy court concerning the foreclosure controversy. Nonetheless, even though nothing in the record suggested that the bankruptcy judge would treat the Receiver unfairly, the Receivership Court voiced concern over whether that court would properly consider the Receiver's interests. App. Vol. III at 755,760, 764):

> ... but if I was satisfied that the bankruptcy court would hear from the receiver and would have all of that information when that determination was made...
>
> I would almost be inclined to say well, let the bankruptcy court take a shot at it, but I don't sense that the receiver is going to be heard.

The hearing adjourned without a ruling. *Id.* at 720-826.

Thereafter, in order to address the Receivership Court's apparent concerns whether the Receiver would "be heard" in the bankruptcy court, United States Bankruptcy Court Judge Robert A. Mark issued an order on July 1, 2004, App.

Vol. III at 827-828, clarifying the scope of the Miami Foreclosure Action as well as the jurisdiction to hear any related claims, defenses or counterclaims. The bankruptcy court's order, which was filed with the Receivership Court on July 2, 2004, App. Vol. III at 829-836, explained that the Miami Foreclosure Action encompassed:

> The validity, extent and priority of any and all claims, liens and interests in and to the real property which is the subject matter of these proceedings, including but not limited to, any challenges that Aries Receiver may wish to make regarding claims for cancellation of Ocean Bank's, or other parties' mortgages, lien rights, or priorities.

App. Vol. III at 827-828. In light of that framework, the U.S. Bankruptcy Court explicitly verified that the Receiver's rights could be fully asserted and would be properly respected:

> (2) The Aries Receiver shall have the right to bring and assert any claims, counterclaims, cross-claims or other challenges – whether such challenges are based upon state law (including, but not limited to, any matters that may be raised in such regard under Chapter 631, Fla. Stat.), or federal law- that Aries Receiver may have or wish to assert against any of the parties herein, including, but not limited to, Ocean Bank, related to the determination of the validity, extent and priority of all claims, liens, or interest in and to the property which is the subject matter of these proceedings.

Apparently, though, Judge Mark's unequivocal assurance that the Receiver's contentions would be fully heard and fairly treated in the Miami Foreclosure

Action was unavailing. On July 16, 2004, the Receivership Court denied Ocean Bank's Motion to Dismiss the Counterclaims without any findings of fact or conclusions of law. App. Vol. I, at 1-3.

Following that ruling, Ocean Bank sought a writ of prohibition to preclude the Receivership Court's assertion of jurisdiction concerning the adjudication of the right to the Miami Dade Properties. In that proceeding, the First District Court of Appeal ruled that under the local action rule this dispute over ownership of the Miami-Dade Properties had to be brought in the county "where the land is situated." *Ocean Bank v. State of Florida, Department of Financial Services*, 902 So. 2d 833, 835 (Fla. 1st DCA 2005), *citing*, *Goedmakers v. Goedmakers*, 520 So. 2d 575 (Fla. 1988); *Georgia Casualty Co. v. O'Donnell*, 147 So. 267 (1933); *Sales v. Berzin*, 212 So. 2d 23 (Fla. 4th DCA 1968). Finding that the Receiver's attempt to void Ocean Bank's mortgages, if sustained, would necessarily adjudicate and dispose of the foreclosure claims, the District Court of Appeal concluded that the fraudulent transfer claim and mortgage foreclosure litigation could not be properly segregated to create two different cases in two different Florida counties:

> Here, if the Receivership court voids the mortgages, then Ocean Bank would lose its liens and the foreclosure action would be over.

Ocean Bank, 902 So.2d at 835.

Applying the settled principle that Florida's compulsory counterclaim rule mandates a broad realistic interpretation in order to avoid numerous lawsuits arising from the same facts, the court held that claims to cancel the mortgages being foreclosed were inextricably part of the mortgage foreclosure action. As a result, because a foreclosure controversy can only be litigated in the county in which the land is situated, the court granted prohibition pursuant to the local action rule while certifying the following question as having public importance:

> IS A CLAIM TO VOID A MORTGAGE A COMPULSORY COUNTERCLAIM IN A PENDING MORTGAGE FORECLOSURE ACTION SUCH THAT A RECEIVERSHIP COURT DOES NOT HAVE JURISDICTION TO SEPARATELY CONSIDER A CLAIM TO VOID THE MORTGAGE IN A RECEIVERSHIP ACTION?

Id.[8]

After the Receiver's motion for rehearing was denied, it served notice of its intent to seek this Court's discretionary jurisdiction pursuant to the certification of a question of great public importance. This Court deferred the jurisdictional issues for consideration along with the substance of this proceeding.

[8]Among other things, the brief dissent assumed that the declaratory relief action had been adjudicated raising proclaimed obstacles to Ocean Bank's petition for prohibition. *Id.* No such adjudication is reflected in the record. In any event, as has been discussed, the declaratory questions largely overlap with the issues decided by the First District.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction of this local dispute because this dispute does not involve a question of great public importance but instead involves a narrow principle of law, encompassing a unique set of facts, and impacting few. Moreover, the Receiver's argument that the Receivership Court is the only court which can litigate controversies relating to alleged receivership assets rings particularly hollow where the Receiver is presently choosing to bring lawsuits involving alleged assets in various venues outside the Receivership Court.

On the merits, the District Court of Appeal correctly applied the local action rule to require that the entire foreclosure controversy be litigated in the county where the land is situated, Miami-Dade County. It is indisputable that the local action rule applies to foreclosure actions. This well-settled common law rule has been properly applied to the insurance receivership where Sections 631.041(d) and 631.191(2)(a), specifically authorize a secured lender to proceed against assets of a failed insurance company after the order of liquidation is entered here. The Receiver's proposition that, pursuant to Section 631.021(6), exclusive jurisdiction of the Counterclaim resides in Leon County Circuit Court is wrong for a multitude of reasons. The exclusive jurisdiction language of Section 631.021(6) refers to parallel out-of-state proceedings, not intrastate proceedings involving Florida real estate such as those at issue here. Furthermore, that Section 631.021(6) refers to

inter-state controversies is evidenced by the structure of Section 631.021 as a whole, the placement of the exclusive jurisdiction language after the sentence regarding domiciliary court in Section 631.021(6), the purpose of the Uniform Insurers Liquidation Act, and the severe disruption a contrary interpretation would inflict on numerous other Florida Statutes. Moreover, an interpretation that Section 631.021(6) refers to intrastate proceedings renders meaningless various Florida Statutes and nullifies Sections 631.041(d) and 631.191(2)(a), which authorize a lender to proceed against assets of a failed insurance company.

The Receiver's interpretation also renders Section 631.021(6) unconstitutional because it would violate Article V Section 5(b) of the Florida Constitution. In any event, Section 631.021(6) cannot be applied retroactively to Ocean Bank because such application will attach new legal consequences by thwarting Ocean Bank's ability to proceed with the foreclosure proceeding.

Courts around the country have uniformly held that the local action rule applies to a fraudulent transfer action, which, in substance, is the cause of action sued upon in the Counterclaim. Even if the Counterclaim, standing alone, were not subject of the local action rule, because the Counterclaim seeks the same relief as the foreclosure - title to the Miami-Dade Properties - both claims are inextricably and logically related. Further, the Receiver's "first-served" argument - that service

was effected in the action subject of the Counterclaim and not the foreclosure action - is disingenuous and incorrect. Because the local action rule is jurisdictional, the "first-served" rule is inapplicable.

LEGAL ARGUMENT

A. This Court Should Decline to Accept Jurisdiction of This Local Dispute

Pursuant to Rule 9.030(2)(a)(v) of the Florida Rules of Appellate Procedure, this Court has the discretionary jurisdiction to review decisions of the District Courts of Appeal that pass upon a question certified to be of great public importance. While, as a threshold matter, the district court passed upon the question certified to be of great public importance, the issue here is whether or not the question certified is, in fact, of *great public* importance.

Certification of a question as one of great public importance does not automatically vest jurisdiction in this Court or require this Court to decide the case. Rule 9.030 (2)(a)(v) and Article V, Section 3(b)(4) of the Florida Constitution provide that the discretionary jurisdiction of the Supreme Court **may** be sought to review such decisions. In this case, even though the First District Court of Appeal did pass upon the question certified to be one of great public importance, this Court should exercise its discretion **not** to decide the case because the actual legal

question deals with a narrow principle of law, encompasses a unique set of facts, and impacts a very limited group.

This Court frequently refuses to accept jurisdiction to address certified questions involving limited issues addressing unique facts. *See e.g. State v. Brooks*, 788 So.2d 247 (Fla. 2001) (declining to consider whether a reasonable mistake as to the age of the victim may be considered in mitigation in sentencing an individual for sexual battery); *Dade County Property Appraiser v. Lisboa*, 737 So.2d 1078 (Fla. 1999) (declining to consider whether an alien residing in the United States pending application for political asylum can satisfy the constitutional and statutory residency requirements to qualify for Florida's homestead tax exemption); *State v. Sowell*, 734 So.2d 421 (Fla. 1999) (declining to address whether statutory amendments abrogated the common law defense of medical necessity as applied to a seriously ill individual who cultivates marijuana solely for personal use to obtain medical relief).

The certified question presented in this case will only affect insurers who have been placed in rehabilitation and liquidation in a delinquency proceeding under Chapter 631, Florida Statutes, and a banking institution who loaned money to the parent company of the insurer and received as collateral from the parent company real property titled in the name of the parent company at the time of the loan. While choosing to litigate other cases in South Florida, in this instance, the

Receiver challenged the validity of the mortgage received by Ocean Bank before the Receivership Court in Leon County, rather than in the appropriate foreclosure action filed in Miami-Dade County, Florida, where the real property is located, where all of the parties are located, and where attorneys and witnesses are located.

Great public importance is not found in this very narrow issue. It simply involves a limited and rare issue between the Receiver and a secured creditor involving real property in Miami-Dade County, Florida that was used as collateral in a loan between Ocean Bank and the parent company (Onyx) of the insurer (Aries). Even more unusual is the fact that the title to the real property in question was transferred back to Aries by the parent company (Onyx) in April, 2002, after Aries had been placed under confidential administrative supervision by the Division of Rehabilitation and Liquidation. (Supp. App. C)

Accordingly, the determination by this Court as to whether a claim to void a mortgage is a compulsory counterclaim in a pending mortgage foreclosure action such that the Receivership Court does not have jurisdiction to separately consider the claim to void the mortgage in a receivership action, is very unique, specific and limited in application and should not be considered by this Court to be of great public importance that would justify this Court exercising its discretionary jurisdiction and accepting this case for review.

B. The District Court of Appeal Correctly Applied the Local Action Rule to Require That the Foreclosure Controversy Be Litigated in the County Where the Land is Situated

This Court has repeatedly affirmed the local action rule as a firmly entrenched doctrine anchored in principles of subject matter jurisdiction. *Goedmakers,* 520 So.2d at 578 (Fla. 1988) ("[C]ourts have no jurisdiction in actions relating to real property located outside their territorial boundaries"), *citing Georgia,* 147 So. 267 (1933). *See also Ruth v. Department of Legal Affairs,* 684 So.2d 181, 186 (Fla. 1996) ("...[A] court that does not have territorial and consequently *in rem* jurisdiction must transfer the case to a court that does.") In applying local action analysis, the *Goedmakers'* decision framed the issue in terms of the substance of the litigation. "Whether or not the action is local or transitory depends *on the underlying major question in the case*." *Goedmakers,* 520 So.2d at 579 (emphasis added), *citing Lakeland Ideal Farm & Drainage Dist. v. Mitchell,* 97 Fla. 890, 122 So. 516 (1929). Thus, because the underlying major questions in foreclosure actions center upon determining the ultimate ownership of the property, these cases have invariably respected the dictates of the local action rule. *Georgia Casualty,* 147 So. at 292, (Foreclosure "must be brought in the county where the land lies.") In *Alexdex Corp. v. Nachon Enterprises, Inc.*, 641 So.2d 858 (Fla. 1994), in a related context, this Court further observed:

> An action to foreclose a mechanic's lien, like an action to foreclose a mortgage on land, is an action seeking to judicially convert a lien interest (an equitable interest) against a land title to a legal title to the land and in such an action the result sought by the action requires the trial court to act directly on the title to the real property.

Id. at 861, *quoting Publix Super Markets, Inc. v. Cheesbro Roofing, Inc.*, 502 So.2d 484 (Fla. 5th DCA 1987); *Sierra v. International Medical Centers, Inc.*, 538 So.2d 102, 103 (Fla. 3d DCA 1989) (Foreclosure of insurance receiver's property must take place in the county where the subject property is located).[9]

Applying this settled jurisprudence, the First District properly found below that a claim to cancel the very mortgages that are being foreclosed is inextricably intertwined with that foreclosure action, requiring compulsory joinder of the cancellation and foreclosure issues. *Ocean Bank*, 902 So.2d at 835, *citing Londono v. Turkey Creek, Inc.*, 609 So.2d 14, 19 (Fla. 1992) ("transaction or occurrence" requires a "broad realistic interpretation"). Especially when the colliding claims of mortgage foreclosure and mortgage cancellation are examined in juxtaposition, it

[9] *See also Hudlett v. Sanderson*, 715 So.2d 1050, 1052 (Fla. 4th DCA 1998) (Under the local action rule, a circuit court lacked jurisdiction of mortgage foreclosure on real property in another county); *Tavernier Towne v. Eagle Nat. Bank of Miami*, 593 So.2d 306, 307 (Fla. 3rd DCA 1992) (Court transferred foreclosure action because circuit court lacked jurisdiction under local action rule.)

becomes unmistakable that the "underlying major question" in this matter is which party will get the Miami-Dade Properties. *Goedmakers,* 520 So.2d at 578.

C. Florida Law Specifically Authorizes Secured Lenders to Proceed Against Assets Claimed by the Receiver In Accordance With the Local Action Rule

While the Receiver presumes that the rights of a secured lender can be downgraded to suit its convenience, Florida law overwhelms that dismissive posturing. This Court has emphasized, in the context of protecting the rights of mortgage lenders, "[s]afeguarding the validity of such contracts, and assuring the right of enforcement thereof, is an obligation of the courts which has constitutional dimensions." *David v. Sun Federal S. & L. Ass'n*, 461 So.2d 93, 94 (Fla. 1984).

Moreover, the insurance statutes of Florida staunchly protect, as they must, the rights of secured creditors with respect to their collateral. Thus, once liquidation is ordered, Ocean Bank's right to foreclose its collateral is explicitly validated by the pivotal components of Florida's Insurers Rehabilitation and Liquidation Act, Sections 631.041(d) (vacating the post-liquidation stay as to secured claims) and 631.191(2)(a) (secured creditors "may resort to the security.") Taken together, these provisions *specifically authorize* an action to enforce a lien in a proceeding outside of the insurer liquidation proceeding. *See e.g. Sierra*, 538

So.2d at 103. As the court established in *Sierra,* "We hold, in response to the question presented, that the automatic stay provision of Section 631.041(1)(d) does not prevent a foreclosure action on a secured claim. The foreclosure action may proceed here in Dade County where the land is located." *Id.*, *cited approvingly* in *Nova Ins. Group, Inc. v. Florida Dept. of Ins.*, 606 So.2d 429, 434 (Fla. 1st DCA 1972).

While the Receiver omits any mention of the secured creditor's statutory entitlement to resort to its collateral, these provisions such as Section 631.191(2)(a) are conceived for the very purpose of permitting foreclosures to proceed properly. *Sierra*, 538 So.2d at 103. Since a foreclosure of land in Miami-Dade County is not maintainable in Tallahassee, *Georgia Casualty*, *Hudlett*, and *Tavernier Towne Associates,* it necessarily follows that these laws preserve the right of a secured creditor to litigate the foreclosure controversy in the county where the land is situated, because only there can be found subject matter to effectuate the foreclosure remedy. *Sierra*, 538 So.2d at 103 ("... in Dade County where the land is located.").

D. The "Exclusive Jurisdiction" Language Refers to Circumstances Involving Parallel Out-of-State Proceedings

In aggressive efforts to deny such foreclosure rights to lenders like Ocean Bank, the Receiver selectively and misleadingly carves out language from a new

subsection found at the end of Section 631.021. Imputing drastic consequences to that out of context sentence, the Receiver stampedes over an array of critical statutory provisions, as well as fundamental maxims of statutory construction, to insist that subject matter jurisdiction only exists in Leon County over action to adjudicate interests in any assets or properties claimed by the Receiver. In offering this remarkable proposition, the Receiver discusses only the second sentence of the recently added subsection six.

> The domiciliary court acquiring jurisdiction over persons subject to this chapter may exercise exclusive jurisdiction to the exclusion of all other courts, except as limited by the provisions of this chapter. *Upon the issuance of an order of conservation, rehabilitation, or liquidation, the Circuit Court of Leon County shall have exclusive jurisdiction with respect to assets or property of any insurer subject to such proceedings and claims against said insurer's assets or property.*

§631.021(6). Initial Brief at 14 (emphasis supplied by Petitioner).

While insisting that this "exclusive jurisdiction" language sweeps with an unlimited breadth, even in derogation of the long-standing local action rule, the Receiver utterly ignores the first sentence of subsection six. And yet, that critical first sentence explains the reference to "exclusive jurisdiction."

Thus, the starting point for Section 631.021(6) is language explicitly speaking to the "domiciliary court acquiring jurisdiction . . .." This framework is critical because subsection six does not deal with all Florida insurance

receiverships but rather those scenarios that involve a "domiciliary court."[10] The term "domiciliary," in turn, has a well known meaning and is only used to describe situations in which receiverships of courts in two different states have, at least in part, overlapping jurisdiction with respect to a particular subject. *See e.g. Florida Ins. Guaranty Ass'n, Inc. v. State ex rel. Dept. of Ins.*, 400 So.2d 813 (Fla. 1st DCA 1981) (treating Florida assets in conjunction with "domiciliary" receiver appointed in Illinois). Accordingly, the reference to "exclusive jurisdiction," follows and is governed by "domiciliary court," a widely recognized term that speaks to those circumstances in which out-of-state receiverships operate in conjunction with Florida based assets. *See generally Hobbs v. Don Mealey Chevrolet, Inc.*, 642 So.2d 1149, 1157-58 (Fla. 5th DCA 1994) (discussing assorted issues arising from interstate insurance controversies involving Florida issues as well as domiciliary receiver and domiciliary state contentions).

---

[10]The maxim that threshold language ordinarily circumscribes the words that follow has been firmly embraced by this Court. *City of West Palm Beach v. Board of Trustees of the Internal Improvement Fund*, 746 So.2d 1085, 1090(Fla. 1999). As this Court explained:

> Where a statute first uses "terms each evidently confined and limited to a particular class of a known species of things," and later uses a broader term, the more general word is construed as applying to the "same kind of species with those comprehended by the preceding limited and confined terms."

Id. at 1091.

The interplay of such issues is not uncommon in Florida. *Frontier Ins. Co. v. American Title Services,* 838 So.2d 1178, 1179 (Fla. 5th DCA 2003) (New York the domiciliary state for failed insurer); *American Bonding Co. v. Coastal Metal Sales, Inc.*, 679 So.2d 1250, 1253 n.3 (Fla. 2nd DCA 1996) (compelling obedience to Arizona order as a constitutional obligation raises "several difficult issues"). Indeed, this jurisdictional tension can arise whenever a domiciliary court outside of Florida attempts to determine the ownership of Florida assets. *Insurance Com'r of State of Cal. v. State ex rel. Dept. of Ins. of State,* 411 So.2d 269, 272 (Fla. 1st DCA 1982) (refusing to mandate that "these Florida marshaled funds of the insolvent insurer be sent to the domiciliary receiver in California"), or when private litigants in Florida pursue claims against in-state assets of insolvent out-of-state insurers. *See generally Validity, Construction and Application of the Uniform Insurers Liquidation Act* (the "Uniform Act"), 44 A.L.R. 5th 683, §1 (important purpose of the Act is "to prevent the attempts of local creditors to seize the assets within the state of a foreign insurer for whom a receiver has been appointed").[11] Thus, Section 631.021(6) addresses the landscape where the domiciliary court and its receiver might attempt action concerning these in-state assets. *See e.g. Florida Ins.*

[11]When domiciliary courts appear on Florida's insurance horizons, the focus often centers upon securing Florida-based assets. *Insurance Com'r of State of Cal. v. State ex rel. Dept. of Ins. of State*, 411 So.2d 269, 272-73 (Fla. 1st DCA 1982) (since California is a non-reciprocal state, Florida is not bound by its directives).

Guaranty Ass'n, Inc. v. State ex rel. Dept. of Ins., 400 So.2d at 814 (Fla. 1st DCA 1981). *See generally Uniform Act,* §1 (the Act addresses "confusion inherent in the forced liquidation of a multi-state insurance corporation, especially with respect to assets in foreign jurisdictions.") Because the interaction with domiciliary courts and receiverships is an ongoing reality for Florida, a particular treatment for those cases would be logical, including the 2004 language purporting to entrust such assets to the Leon Circuit Court. *Compare Frontier Ins. Co. v. American Title Services*, 838 So.2d 1178 (Fla. 5th DCA 2003) (reinstating stay concerning New York receivership that had been vacated in Citrus County in order "to cooperate with reciprocal states in delinquency proceedings"). Any such entrustment seems all the more reasonable because the Florida assets that are implicated in out-of-state receiverships ordinarily consist of cash and security deposited with the State Treasury. In all events, it is plain that the "domiciliary court" framework has no application whatsoever to the present case.

Accordingly, the phrase "exclusive jurisdiction" in the second sentence of subsection six should be interpreted in light of the preceding "domiciliary court" language of that same section. "Likewise, 'statutory phrases are not to be read in isolation, but rather within the context of the entire section.'" *Acosta v. Richster*, 671 So.2d 149, 153 (Fla. 1996). Moreover, when, as here, the context is expressed by the opening sentence of a provision, the meaning of that gateway language

should be honored. *Hechtman v. Nations Title Ins. Of New York*, 840 So.2d 993, 996 (Fla. 2003) (First sentence of statute cannot be ignored in interpreting subsequent language.) *See also Acosta*, 671 So.2d at 154 (examining context and focusing on the first sentence of the subsection). If both sentences of Section 631.021(b) are construed not in isolation, but in tandem, it is evident that any "exclusive jurisdiction" in Leon County speaks to those situations in which domiciliary courts with domiciliary receiverships purport to deal with assets in Florida. *See also Jones v. ETS of New Orleans, Inc.*, 793 So.2d 912, 914 (Fla. 2001) ("Accordingly, 'statutory phrases are not to be read in isolation, but rather within the entire section.'")

Compounding the Receiver's indifference toward the critical opening words of subsection six is its disregard of other key provisions of Section 631.021. For example, subsection one provides that "the circuit court shall have original jurisdiction of any delinquency proceeding under this chapter ...." If the Receiver's assertion that subsection six creates "exclusive jurisdiction" in the Leon Circuit Court over every alleged receivership asset were valid,[12] section one would be rendered meaningless. After all, it would be pointless and incongruous to provide

[12]A lawsuit, as a chose in action, is very plainly an asset and property of a receivership. §631.011(17)(a), Fla. Stat. (2005) ("'Property' includes: All right, title and interest of the insolvent entity ... and includes choses in action ...."); *Allen v. Lamon*, 99 Fla. 1041, 128 So. 254 (1930).

explicitly in Section 631.021(1) that the "circuit court" has "original jurisdiction" of delinquency proceedings if the Leon Circuit Court has, in effect, "exclusive jurisdiction" over those proceedings based on Section 631.021(6). Far more compelling would be a proper reconciliation of the two, recognizing that while "delinquency proceedings" pursuant to Section 631.021(1) are maintainable in circuit court, cases of a "domiciliary court" – almost invariably implicating out-of-state receiverships – are governed by subsection six. *Hawkins v. Ford Motor Co.,* 748 So.2d 993, 1000 (Fla. 1999) ("It is clear that the Legislature purposefully distinguished the two factual scenarios....") Rather than accept the Receiver's invitation to trivialize other statutory elements, Florida's doctrine calls for harmonization. *Hechtman,* 840 So.2d at 996 ("significance and effect must be given to every word, phrase, sentence, and part of the statute if possible").

Elsewhere in Section 631.021, yet another provision confirms the irrationality of the Receiver's theory of interpretation. Subsection two of Section 631.021 – the statutory home of subsection six – states the following:

> (2) The venue of a delinquency proceeding or summary proceeding against a domestic, foreign, or alien insurer shall be in the Circuit Court of Leon County.

§631.021(2). This express provision for Leon County *venue* concerning a "domestic, foreign or other" insurer is clearly incompatible with the Receiver's

claim that for all such insurers, exclusive *jurisdiction* lies in Leon County. If subsection six conferred exclusive jurisdiction in Tallahassee as argued by the Receiver, then a provision merely conferring venue in Leon County would be an empty exercise in complete futility.

Therefore, the Receiver's contention that subsection six must be read to confer "exclusive jurisdiction" in receivership matters for the Leon Circuit Court is not only an unacceptable distortion of an out-of-context sentence, it would wrongly relegate other subsections of the same provision to manifest irrelevancy. *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So.2d 360, 367-68 (Fla. 2005) *quoting Unruh v. State*, 669 So.2d 242, 245 (Fla. 1996) ("As a fundamental rule of statutory interpretation, courts should avoid readings that would render part of a statute meaningless.") Rather than construe subsections one and two, the principal jurisdictional and venue components of Section 631.021 as nullities, it is instead "the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the same act." *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, 9 (Fla. 2005).

Moreover, in addition to the other components of Section 631.021, the key sections of Chapter 631 that authorize a secured creditor to proceed against its collateral would also be severely undermined by the Receiver's "exclusive

jurisdiction" claim. As discussed earlier, Sections 631.041(d) and 631.191(2)(a) grant the secured creditor the right to foreclose, a right that is assuredly to be pursued in a court with subject matter jurisdiction:

> We hold, in response to the question presented, that the automatic stay provision of section 631.041(d) does not prevent a foreclosure action on a secured claim. The foreclosure action may proceed here in Dade County where the land is located. " *Georgia Casualty Co. v. O'Donnell,* 109 Fla. 290, 147 So. 267 (1933) (suit to foreclose a mortgage is local and must be brought in county where land lies.) *See also* §47.011, Fla. Stat (1987).

Sierra, 538 So.2d at 103.

If, as urged by the Receiver, the disposition of whatever assets that it might claim could only be litigated in Leon County, the lender's foreclosure remedy as to any realty in Florida's sixty-six other counties would be disabled. Indeed, according to the Receiver's thesis, simply by making a *claim* that a particular property constitutes its asset, the Receiver could compel litigation in Leon County, even though this would thwart the secured creditor's statutory and contractual rights to pursue a meaningful foreclosure of its mortgage.[13]

[13]Distressingly, the present facts underscore the potential for such manipulations. Even though the foreclosure was filed after the order of liquidation – requiring under Florida law that the stay be lifted – the Receiver simply ignored Section 631.041(d), and refused to accept service of process. Then, when Ocean Bank followed the statutory directive to petition the Receivership Court to require the Receiver to accept service, it counterclaimed against Ocean Bank, suggesting that Ocean Bank voluntarily submitted the foreclosure controversy to the Leon Receivership Court. In any case, since the local action rule is the issue, nothing a

Underscoring the fallacies of the Receiver's theory is its hopeless contradictions of its own "exclusive jurisdiction" contention. Since litigation claims undeniably constitute assets, *supra* n. 15, and since assets – according to the Receiver's argument here – would be within the exclusive jurisdiction of the Leon courts, no such litigation claims could be litigated outside of Tallahassee. And yet, the Receiver's own actions speak much louder than the words it presents to this Court. In three different cases, the Receiver has voluntarily chosen to submit its litigation assets for determination by South Florida courts. **(**Supp. App. A**)** Additionally, the Receiver has actively participated in the bankruptcy cases of the Aries affiliates. (Supp. App. A) Paradoxically, the Receiver has been litigating these cases and consuming the resources of those courts even though, based on the Receiver's latest argument, if valid, would mean that there is no jurisdiction for any of those proceedings.

E. The Receiver's Interpretation of Section 631.021(6) Renders that Section Unconstitutional

If the Receiver were correct that the Florida legislature intended pursuant to Section 631.021(6) to vest exclusive jurisdiction over assets claimed by an

---

litigant does can alter the calculus for subject matter jurisdiction. *Antioch*, *supra,* at 872 ("Therefore, the [local action rule] governs subject matter jurisdiction, not venue, and cannot be waived because subject matter jurisdiction cannot be conferred by waiver or consent.").

insurance receiver only in the Leon Circuit Court, as distinguished from any other *Florida circuit court*, than Section 631.021(6) would be unconstitutional. Article V, Section 5(b) of the Florida Constitution provides in pertinent part:

> Jurisdiction of the circuit court shall be uniform throughout the state.

Art. V, § 5(b), Fla. Const.

This constitutional provision clearly preempts the Receiver's theory about Section 636.021(6) because if only the Leon Circuit Court could exercise subject matter jurisdiction in Chapter 631 cases, circuit court jurisdiction would not be uniform throughout the state. It is axiomatic that the plain meaning of state constitutional provisions must be honored. *Florida League of Cities v. Smith*, 607 So.2d 397, 400 (Fla. 1992) ("In any event, the law is settled that when constitutional language is precise, its exact letters must be enforced and extrinsic guides to construction are not allowed to defect the plain language.") Accordingly, the Florida legislature simply has no authority to limit the subject matter jurisdiction of the circuit courts over particular matters to a single circuit.[14] As this

[14]By contrast, the local action rule is a uniform principle that, as discussed earlier, confers jurisdiction over actions involving real estate upon each court with respect to the property within that court's territorial scope.

Court has emphasized, "What the Constitution's plain language says on this subject is what the courts of Florida enforce." *B.H. v. State of Florida,* 645 So.2d 987, 992 (Fla. 1994).

Therefore, while the jurisdiction of our courts is broadly defined by the state constitution, and while the legislature may further define a court's jurisdiction, it may do so only if, as redefined, the change is not in conflict with the constitution. *Alexdex, supra.* Whenever possible a statute should be construed so as not to conflict with the constitution. *Florida Dept. Of Children And Families v. F.L.,* 880 So.2d 602 (Fla. 2004). In effect, courts are obligated to construe statutes in a manner that avoids a holding that a statute may be unconstitutional. *State v. Giorgetti,* 868 So.2d 512 (Fla. 2004). The rules of statutory construction require that all doubts of a statute be resolved in favor of its validity when reasonably possible and consistent with constitutional rights. *State v. Brake*, 796 So.2d 522 (Fla. 2001). The court's duty to construe a statute in such a way as to uphold its constitutionality is dependent on the court's ability to arrive at a fair construction that is consistent with the federal and state constitutions, as well as legislative intent; if the court is unable to arrive at a fair construction that will achieve such a result, it has a duty to declare the legislation to be in conflict with the constitution and, to the extent of such conflict, to be invalid. *Department of State, Division of Elections v. Martin,* 885 So.2d 453 (Fla. 1st DCA 2004). Accordingly, the rules of

statutory construction require that courts look for a reason to uphold the acts of the legislature and adopt a reasonable view that will do so. *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So.2d 320 (Fla. 3d DCA 2003). In the present case, the statute is much more properly construed to avoid any constitutional conflict rather than by accepting the Receiver's badly strained contentions. Even if we were free to ignore the plain language of the constitution, we would not be persuaded by this argument." *Florida League of Cities*, 607 So.2d at 950-51.

F. Section 631.021(6) Is Not Retroactive

Along with other deficiencies, the Receiver's assertions concerning Section 631.021(6) include the mistaken assumption that Section 631.021(6) added in 2004 operates retroactively to cases filed in 2002 and 2003. That assumption ignores the general rule. "In Florida, without clear legislative intent to the contrary, a law is presumed to apply prospectively." *Bates v. State*, 750 So.2d 6, 10 (Fla. 1999) (cites omitted). While the Receiver tries to dodge that presumption by characterizing the impact on Ocean Bank as merely procedural or remedial, Florida law relies not merely on labels, but requires analysis of "whether the new provision attaches new legal consequences to events completed before its enactment." *Metropolitan Dade Co. v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999). In the present case, the Receiver's Leon-only theory under Section 631.021(6) would empower it to thwart indefinitely Ocean Bank's right to enforce its mortgages,

since there is no jurisdiction to foreclose them outside of Miami-Dade, and since the Receiver – the alleged property owner – cannot be effectively sued there. To say the least, these are "new legal consequences" and significant burdens which should not be applied retroactively. *Metropolitan,* 737 So.2d at 499. Tellingly, in the most analogous case under Chapter 631, which is the framework for the Receiver's assorted contentions, this Court held that where remedies available under a new law constitute "inadequate substitution" for those rights that were previously available, retroactivity should be denied. *Springer v. Colburn*, 162 So.2d 513, 516 (Fla. 1964).

Moreover, regardless of whether the enactment of Section 631.021(6) in 2004 was substantive, remedial, or procedural, the legislature has evidenced its expressed intent that this amendment not be applied retroactively. Subsection six was enacted in 2004 and the bill enacting this subsection specifically provides "the act shall take effect July 1, 2004. (*See* Chapter 2004-374, Section 28, Laws of Florida). Thus, the legislation enacting subsection six by its own terms provided that the amendment should not be retroactively applied. *See State, Dept. of Revenue v. Zuckerman-Vernon Corp.*, 354 So.2d 353, 358 (Fla. 1977), *rehearing denied 1978* ("The 1977 Legislature's inclusion of an effective date ... effectively rebuts any argument that retroactive application of the law was intended.")

G. Also Untenable is the Receiver's Contention that Section 631.021(6) Has Displaced the Local Action Rule

Without even attempting to reconcile the inconsistency with its "exclusive jurisdiction" theory under Section 631.021(6), the Receiver contends that subsection one's conferral of "original jurisdiction" upon the "circuit court" for "delinquency proceedings" has the same effect of overriding the local action rule. This, too, is a flimsy contention that can be readily dispelled for any number of reasons.

First, the "original jurisdiction" provision of Section 631.021(1) is, by its terms, a jurisdiction to entertain "delinquency proceedings." As defined in Chapter 631, a "delinquency proceeding" means:

> ... any proceeding commenced against an insurer pursuant to this chapter for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer.

§631.011(5), Fla. Stat. Thus, this definition confirms the unremarkable premise that "original jurisdiction" in the circuit court, which would certainly include Leon County, exists to adjudicate any petition to impose delinquency proceedings upon an insurer. But the present case is a dispute over land in Miami-Dade,[15] not about

[15]The Receiver's citation to *Chase Bank of Texas Nat. Ass'n v. State, Dept. of Insurance,* 860 So.2d 472 (Fla. 1st DCA 2003), which has nothing to do with local action issues, adds nothing to the issues before this Court. That decision deals with *in personam* claims arising from a receivership and speaks to circuit court jurisdiction in general, not with respect to real estate or other matters of *in rem* jurisdiction.

the Receiver's right to petition the circuit court for an order placing an insurer into liquidation.

As to foreclosure actions by secured lenders, Section 631.021(1) imposes no jurisdictional confinement to Leon County. To the contrary, as discussed earlier, the key provisions of Chapter 631 essentially release secured claims from the Receivership Court once liquidation is ordered. §§631.041(d) and 631.191(2)(a). Necessarily, by validating the lender's right to "resort to the security," Section 631.191(2)(a), this structure authorizes foreclosure actions in the county where the land is situated. *Sierra*, 538 So.2d at 103. Rather than thwart the enforcement of secured claims, the *Sierra* court properly construed Sections 631.041(d) and 631.192(2)(a) as comporting with the jurisdictional mandate of the local action rule. *Sierra*, 538 So.2d at 103. Nothing in the generic wording of Section 631.021(a) ("original jurisdiction," "circuit court") operates to overturn that well-reasoned analysis.[16]

[16] Although the legislature has revisited Chapter 631 several times subsequent to the *Sierra* case, it made no effort to revise the terms of the "original jurisdiction" provision Section 631.001(1), or the secured creditors protections in Section 631.041(d) and Section 631.191(2)(a). This is compelling evidence that *Sierra*'s holding was implicitly embraced. *City of Hollywood v. Lombardi*, 770 So.2d 1196, 1202 (Fla. 2002) (Legislature presumed to know case law concerning statutes and "to have adopted prior judicial constructions of a law" unless contrary intent is expressed.)

H. The Receiver's Theories Are At Odds With Common Law Principles

The Receiver's assorted theories not only fly in the face of specifically enacted rights for secured creditors, *Sierra*, 538 So.2d at 103, they also flout the settled principle that statutes are to be construed consistently with the common law. *Florida Dept. of Health & Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091, 1098 (Fla. 2002), *rehearing denied 2003* (Statutes in derogation of common law "must expressly so provide.") Without question, the local action rule is a mainstay of Florida's common law that has enjoyed decades of recognition. *Georgia Casualty*; *Goedmakers*. Furthermore, the *Sierra* decision, with its adherence to the statutory safeguards for secured creditors in insurance receiverships, has remained the leading case on the issue. "A good example of the application of the secured claim exemption may be found in *Sierra*." *Nova Insurance Group*, 606 So.2d at 434.[17] Especially because the Receiver's latest theory of interpretation is so destructive to these well recognized principles, its multitude of gaps and inconsistencies afford no basis for overriding decades of local action jurisprudence. *Thornber v. City of Ft. Walton Beach*, 568 So.2d at 914, 918 (Fla. 1990) (Common law is not changed unless "a statute unequivocally states that it changes the

[17]*Sierra* was also cited approvingly in a leading insurance treatise. 3 Couch on Insurance (3d Ed.) §5:17 (2005).

common law or is so repugnant to the common law that the two cannot co-exist ...").[18]

I. Receiver Misrepresents the Nature of the Counterclaim

In an apparent attempt to minimize its contravention of the local action rule, the Receiver spins its claims against Ocean Bank as centering upon an illegal distribution governed by the Florida Insurers Rehabilitation Act and the Florida Insurance Holding Company Act ("FIHCA"). Initial Brief at 13. The Counterclaim does not, however, present a claim anchored upon an intricate interplay of insurance concepts to recover illicit distributions committed by allegedly transgressing insurers. Indeed, Onyx – the alleged beneficiary of the criticized distributions – is not even a party here. Rather, the Counterclaim seeks relief[19] pursuant to Sections 631.261(3) and 726.105, both of which are in the nature of fraudulent transfer actions. Rather than a truly independent cause of action, Section

[18]The principle that the court reviewing an administrative determination must defer to the agency interpretation of a statute so long as it is consistent with legislative intent and is supported by competent, substantial evidence did not apply to the Department of Insurance receivership action; rather than being an administrative proceeding, a receivership action is a judicial proceeding in which the court is the fact finder and final decision maker. *Florida Dept. of Ins. v. Cypress Ins. Co.*, 660 So.2d 1177 (Fla. 1st DCA 1995).

[19]"WHEREFORE, the Receiver respectfully requests that this Court declare that Ocean Bank's mortgage on the real estate more fully described in paragraph 46 of the Counterclaim is void and unenforceable, pursuant to **Florida Statutes, Sections 631.261(3), 726.105,** and applicable Florida law." App. Vol. III, at 713.

631.261(3) is derivative of other, more commonplace claims, and how it relies on a fraudulent transfer action under Section 726.105:

> The department as receiver in any proceeding under this chapter may avoid any transfer of, or lien upon, the property of an insurer *which any creditor, stockholder, subscriber, or member of such insurer or affiliate might have avoided* ....

§631.261(3) (emphasis added). As this language confirms, to invoke Section 631.261(3), the plaintiff must establish a fraudulent transfer cause of action based on general principles of Florida law.[20]

J. The Local Action Rule, Governs the Receiver's Claim for Fraudulent Transfer of Real Estate

The Receiver does not, and cannot, argue that foreclosure actions are not controlled by the local action rule, *Georgia Casualty,* 147 So. at 268 ("must be brought in the county where the land lies"). Furthermore, as discussed earlier, Florida cases, including this Court's own decisions, have repeatedly held that the local action rule is jurisdictional. *Goedmakers,* 520 So.2d at 579 ("underlying

[20]Significantly, the Receiver's claim of mortgage avoidance is subject to the defenses of a bona fide holder for value (631.261(3)) and a good faith transferee for reasonably equivalent value (726.109). And nothing in the Counterclaim establishes that Ocean Bank did not act in good faith. Moreover, although the Counterclaim suggests that certain alleged transfers lacked "fair consideration," the factual allegations, to the contrary, show that Ocean Bank fully funded $16 million in loans, plenty of fair consideration and value under any reasonable view of the facts.

major question)*; Ruth, supra.* It is also indisputable that Ocean Bank seeks to foreclose the same Miami-Dade mortgages that the Receiver seeks to declare "void and unenforceable." App. Vol. I at 18-286; App. Vol.3 at 708-713, ¶¶ 46-67. As a result, because the mortgage cancellation claims asserting a fraudulent transfer are so intertwined with the action to foreclose those same mortgages, the First District found that they comprised components of an inter-related foreclosure controversy governed by the local action rule.

Even before reaching the First District's eminently correct analysis concerning compulsory counterclaims, though, an examination of the case law establishes that the Receiver's claim would still be the subject of the local action rule even if no foreclosure were pending. As discussed earlier, the Receiver's pleading, while attired in insurance nomenclature, is, in substance, a fraudulent transfer action directed at real property. By seeking the "return" of the "transfer" through a purported avoidance of Ocean Bank's liens, the Receiver's alleged cause of action would directly affect title to the Miami-Dade Properties.[21] Although there are no cases on point in Florida, state supreme and appellate courts around the

[21]That a fraudulent transfer action is primarily directed against the "res" and not a specific party is established by merely looking at the remedies to which a prevailing party is entitled. Pursuant to Section 726.108, the prevailing party in a fraudulent transfer action can secure *in rem* adjudications such as avoidance of the transfer (§726.108(1)(a)) and attachment against the asset transferred (§726.108(1)(b)).

country have almost uniformly found that the local action rule applies to a state fraudulent transfer action and must be brought in the county where the property is located. *See e.g. Malis v. Zinman,* 261 A.2d 875 (Pa. 1970) (Fraudulent transfer action is *in rem*.); *Raynolds v. Row,* 339 P.2d 358, 361 (Kan. 1959) ("Both reason and authority require the holding that plaintiff's [fraudulent conveyance] action was local and must be brought in the county in which the land is located, that is, Woodson County.") *See also Marion v. Miller,* 58 N.W. 2d 185 (Minn. 1953) (citations omitted). As the state supreme court held in *Marion,* "The great weight of authority supports the view that, under statutes the same as or similar to ours, actions to set aside conveyances of land fraudulent as to creditors affect the title to property and are local in character and triable in the county where the land is situated." *Id.* at 187.[22]

[22]*See also Ryckman v. Johnson*, 67 P. 2d 927, 929 (Wash. 1937) ("Actions to set aside fraudulent conveyances for the purpose of subjecting the property to the claims of creditors certainly affect the title to such property and clearly fall within the classification of causes 'for the determination of all questions affecting title.' The weight of authority, we think, clearly supports that view").

See also Thompson v. Calcasieu Trust & Savings Bank, 72 So. 958, 960 (La. 1916) (citation omitted) ("[T]he general rule is that an action to set aside a fraudulent conveyance of real estate must be brought in the county in which the land is located ... And this term 'conveyance' includes a mere contract of security, such as a mortgage or conditional sale"); *Durrant v. Kelly*, 588 N.Y.S. 2d 196 (N.Y. Sup. Ct., App. Div., 2nd Dep. 1992) (Proper venue for an action to set aside a fraudulent conveyance of land is the county in which the subject premises were located); *Rice v. Schubert,* 226 P. 2d 50 (Ca. 4th DCA 1951) (Fraudulent conveyance action was local and proper place for trial was the county in which the

None of the Receiver's citations support its proposition that a fraudulent transfer claim concerning real estate is immune to the local action rule. In fact, its principal authority, *Coon v. Abner,* 246 So.2d 143 (Fla. 3rd DCA 1971), actually supports Ocean Bank's position with its acknowledgment that the local action rule would govern an action which directly seeks to remove a lien on property. While finding that a cancellation of a promissory note was not a local action, the *Coon* court noted that the complaint in that case did "not allege or seek removal of a cloud or a lien on real property located in Dade County, Florida ...." *Id.* at 144.[23]

The Receiver's references to this Court's rulings in *Goedmakers* and *Ruth* also fail to support its position. *Goedmakers* was a divorce petition in which this Court determined that there was no prayer for determination of property rights and thus the local action rule was not implicated. *Goedmakers*, 520 So.2d at 577. In *Ruth*, this Court said simply that, as to *in personam* actions, the "local action rule does not preclude an action such as this where the State and the defendant only seek an equitable remedy that will not directly affect the property or its title. *Ruth*, 684 So.2d at 186. Those circumstances stand in critical contrast from the present

---

land was located); *Cable v. Cable*, 53 S.E. 2d 637 (Sup. Ct. App. W. Va. 1949) (Fraudulent transfer action was in rem.)

[23]Although the plaintiffs asserted that their complaint sought cancellation of the mortgages, the *Coon* court determined that the mortgages were not attached to the complaint and were not part of the record on appeal. *Id.*

foreclosure controversy which will very plainly affect the real property and its title. Moreover, while *Ruth* indicated that a portion of a two party dispute in that case might be *in personam*,[24] any disposition of the real estate would have to be adjudicated in accordance with local action principles. "In response to the second certified question then, a court that does not have territorial and consequently *in rem* jurisdiction, must transfer the case to a court that does." *Ruth*, 684 So.2d at 186.[25]

Thus, even when examined in isolation from the Miami Foreclosure Action, the Receiver's fraudulent transfer claim is nonetheless governed by the local action rule. *Goedmakers* ("the underlying major question").

[24] A foreclosure action, through the filing of a lis pendens and other procedures, is not a two party dispute, but an *in rem* proceeding to secure title "as against the whole world." *Compare Ruth*, 684 So.2d at 185 (federal forfeitures do not provide jurisdictions "to determine the government's interest in the property as against the whole world."

[25] Also inapposite are *Royal v. Parado,* 462 So.2d 849 (Fla. 1st DCA 1985) and *Bauman v. Rayburn*, 878 So.2d 1273 (Fla. 5th DCA 2004), cases which did not encompass foreclosures but instead treated two party disputes. In fact, it was recognized that, " ... an action directly related to the legal status of real property, such as an action to quiet title or to foreclose a mortgage or lien, must be brought in the circuit where the property is located." *Bauman,* 878 So.2d at 1274.

K. The Counterclaim is Compulsory and Must Be Asserted in the Miami Foreclosure Action

While leading cases throughout the country would treat the Receiver's fraudulent transfer claim as a local action, even if those authorities were to be ignored, the claim would nonetheless have to be resolved in Miami-Dade since it is integral component of the foreclosure controversy. The issue presented in this appeal, and as certified by the First District Court of Appeal (and even as framed by the Receiver),[26] is whether the pendency of the foreclosure action – which is indisputably the subject of the local action rule – compels the Receiver to file its purported Counterclaim in the Miami Foreclosure Action.

The Receiver's response to that central question is a simplistic denial that it was ever served, and therefore the Receiver avers that it was not required to participate and present a counterclaim in the Miami Foreclosure Action. Initial Brief at 24.[27] In effect, even though the Miami Foreclosure Action was filed first, and even though Section 621.041(d) vacated the stay because the Receiver refused to accept service, it now proclaims that by barricading the path of the other party, it

[26]Initial Brief at 11.

[27]Of course, it was only after the Receiver refused to accept service of process that Ocean Bank filed the Declaratory Action seeking, among other things, to compel the Receiver to accept service of process in conformance with Section 631.041(d) (vacating stay as to secured claims) and Section 631.021(5) (party should petition receivership court to compel acceptance of service of process).

won a race to the courthouse. Even apart from the Receiver's unseemly enthusiasm for such machinations, its "first served" timing assertion is simply irrelevant. In fact, in every case it cites concerning the rule of priority, those competing courts each had concurrent subject matter jurisdiction. But here, as even the Receiver must acknowledge, no jurisdictional concurrency exists – only the Miami-Dade County courts can have jurisdiction over the Miami Foreclosure Action.

The futility of arguing over the timing of service of process when jurisdiction is lacking was addressed in *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobil Oil Corporation,* 455 So. 2d 412 (Fla. 2nd DCA 1984), *decision quashed in part on other grounds and approved on cited issue, Coastal Petroleum Company v. American Cyanamid Company,* 492 So. 2d 339 (Fla. 1986). In that case, Mobil Oil Company instituted a contract action against Coastal Petroleum Company in Leon County, Florida. Coastal counterclaimed and joined as a third party the Board of Trustees which, in turn, filed a claim seeking to quiet title to the property at issue, real property located in Polk County. Thereafter, Mobil initiated its own quiet title action in Polk County respecting that same property. The Trustees moved to dismiss the Polk County litigation, noting the prior Leon County litigation and *citing Mabie v. Garden Street Management Corp.,* 397 So. 2d 920 (Fla. 1981) for the proposition

that "when separate actions addressing identical issues are pending between the same parties in courts of concurrent jurisdiction, exclusive jurisdiction to try those issues lies with the court in which service of process was first effectuated." *Mobil Oil*, 455 So.2d at 414 (footnote omitted).

On appeal, the Second District Court rejected the analysis of the Board of Trustees, noting among other things, that their argument "ignores that the [service of process priority] rule does not even come into play unless the court which initially tries to exercise jurisdiction at least has subject matter jurisdiction." *Id.* The court thus held:

> The Leon County Circuit Court lacks jurisdiction of the subject matter of Mobil's reply counterclaim for the reason that the counterclaim is *in rem* in nature and local to the Polk County Circuit Court. Because the Leon County Circuit Court lacks jurisdiction over the subject matter of Mobil's reply counterclaim, the rule of priority is inapplicable."

Id. at 416 (citation and footnote omitted).

This Court affirmed: "[W]e agree with the district court in *Mobil Oil* that respondent Mobil's counterclaim was *in rem* in nature and local only to Polk County Circuit Court ... jurisdiction rested in Polk County ...." *Coastal Petroleum Company*, 492 So. 2d at 344.

L. The Receiver's Claim to Cancel Ocean Bank's Mortgages Belongs in the Same Litigation in Which Those Mortgages are Being Foreclosed

That the Receiver's Counterclaim is compulsory cannot be seriously disputed. This Court in *Londono*, 609 So.2d at 20 (citations omitted) (emphasis omitted), articulated the test for a compulsory counterclaim under Fla.R.Civ.P. 1.170(a) as follows:

> A claim has a logical relationship to the original claim if it *arises* out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis for both claims; or (2) that the aggregate core of facts upon which the original claims rests activates additional legal rights in a party defendant that would otherwise remain dormant.

Certainly, by any measure, the inter-relation between a foreclosure of mortgages and a claim to cancel the same mortgages, meets this claim.[28]

[28] Although apparently no Florida cases have previously addressed the precise issue of whether a fraudulent transfer action concerning mortgages must be asserted in foreclosure litigation, district court of appeal decisions have consistently determined that fraud-related causes of action are compulsory counterclaims to a foreclosure action. *Del Rio v. Brandon,* 696 So. 2d 1197 (Fla. 3rd DCA 1997) (to grant foreclosure, preconditions and defenses to mortgages must be determined), *citing Dykes v. Trustbank Sav., F.S.B.,* 567 So.2d 958 (Fla. 2d DCA 1990), *rev. denied,* 577 So. 2d 1330 (Fla. 1991). *See also Biondo v. Powers*, 805 So. 2d 67 (Fla. 4th DCA 2002) (fraud, unjust enrichment and conversion were compulsory counterclaims to a foreclosure action); *Key Credit, Inc. v. Espirito Santo Bank of Florida*, 610 So. 2d 568 (Fla. 3rd DCA 1992) (fraud in the inducement is a compulsory counterclaim to foreclosure action); *Meyers v. Shore Industries, Inc.*, 575 So.2d 783 (Fla. 2d DCA 1991) (fraudulent inducement claims were compulsory to a foreclosure action).

While the First District's legal analysis below is succinct and compelling, the practical considerations are also crucial. The Miami Foreclosure Action will focus on who will take title to the Miami-Dade Properties, including the validity and priority of Ocean Bank's mortgage. The Counterclaim (assuming a fraudulent transfer action can be properly pled) will also focus on who will take title to the Miami-Dade Properties, including the validity of Ocean Bank's mortgage. Thus, the issues of law and fact and the evidence in both actions will largely be the same.

Furthermore, if the Miami-Dade court enters a judgment of foreclosure in favor of Ocean Bank, the Receiver's Counterclaim would be barred under res *judicata* principles. The reverse situation would also give rise to *res judicata* - if a judgment were rendered sustaining the Counterclaim, it would be *res judicata* against Ocean Bank and would bar Ocean Bank from proceeding in the Miami Foreclosure Action. *Meyers*, 575 So. 2d at 785 (Fla. 2nd DCA 1991) ("The possibility of inconsistent verdicts or outcomes for the [counter-claimants] does exist, however.... In any event, it is possible that the [counter-claimants] run the risk of receiving inconsistent results with respect to ownership of the property.")

Thus, there is clearly an inextricable and manifestly a logical relation between the Miami Foreclosure Action and the Counterclaim: both involve the

validity of Ocean Bank's liens, both involve who will hold title to the Miami-Dade Properties, and both should be litigated in Miami-Dade County.

CONCLUSION

For all of the foregoing reasons, Ocean Bank respectfully requests that the Court decline to take jurisdiction of this matter. Alternatively, Ocean Bank requests that this Court answer the question certified by the District Court in the positive and find that the Circuit Court of Leon County does not have jurisdiction over the Receiver's Counterclaim.

Respectfully submitted,

COFFEY & WRIGHT, L.L.P.
By: Kendall Coffey
Co-Counsel for Respondent
Grand Bay Plaza, Penthouse 2B
2665 South Bayshore Drive
Coconut Grove, Florida 33133
Telephone: (305) 857-9797
Facsimile: (305) 859-9919

TABAS, FREEDMAN, SOLOFF
& MILLER
By: Joel L. Tabas
Co-counsel for Respondent
25 S.E. Second Avenue, Suite 919
Miami, Florida 33131
Telephone: 305.375.8171
Facsimile: 305.381.7708

AKERMAN SENTERFITT
Co-counsel for Respondent
106 East College Avenue, Suite 1200
P. O. Box 1877
Tallahassee, Florida 32302-1877
Telephone: 850.224.9634
Facsimile: 850.222.0103

By:_____
J. Riley Davis
Florida Bar No.: 118121

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the November _____, 2005, a duplicate copy of the Respondent's Reply Brief on the Merits was transmitted via U.S. Mail to:

Barclay Cale, Esq.
Kevin Brown, Esq.
E. Barclay Cale, P.A.
1200 Alfred I. duPont Building
169 East Flagler Street
Miami, FL 33131

Laudelina F. McDonald, Esq.
Senior Attorney
Florida Department of Financial Services
Division of Rehabilitation & Liquidation
P.O. Box 0817
Miami, FL 33152-0817

J. Riley Davis, Esq.
Akerman Senterfitt
Highpoint Center, 12th Floor
106 East College Avenue
Tallahassee, Florida 32301-7748

Joel Tabas, Esq.
Tabas, Freedman & Soloff, L.L.P.
25 Southeast 2nd Avenue
Suite 919
Miami, Florida 33131

By:_____
J. Riley Davis

CERTIFICATE OF COMPLIANCE

Counsel for the Respondent, OCEAN BANK, hereby certifies that this **RESPONDENT'S ANSWER BRIEF ON THE MERITS** complies with the font requirements of Rule 9.210(a) of the Florida Rules of Appellate Procedure.

By_____
J. Riley Davis