IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1180

THE FLORIDA DEPARTMENT OF FINANCIAL SERVICES, as Receiver for Aries Insurance Company,	ON REVIEW FROM A CERTIFIED QUESTION OF THE FIRST DISTRICT
Petitioner,	COURT OF APPEAL IN CASE NO. 1D04-3906.

v.

OCEAN BANK,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the Florida Department of Financial Services, as Receiver for Aries Insurance Company, is the Defendant, and the Respondent, Ocean Bank, is the Plaintiff, in a declaratory judgment proceeding filed as an adversary proceeding in the Aries Receivership Proceeding pending in the Circuit Court for Leon County, Case No. 02-CA-1128-E. Ocean Bank sought a declaration that the issue of the validity of its mortgage on property owned by the insolvent insurer should be litigated in Miami-Dade County. In its counterclaims, the Receiver sought, in part, a declaration that the mortgage is void. Ocean Bank moved to dismiss this counterclaim. The Receivership Court denied the motion to dismiss on July 16, 2004.

Ocean Bank sought a second time to prevent litigation of the Receiver's counterclaim by seeking a writ of prohibition. The District Court of Appeal for the First District granted the writ on March 31, 2005, but certified a question of great public importance. Judge Benton filed a dissenting opinion in which he explained the substantive and procedural problems with granting a writ of prohibition.

The Receiver sought reconsideration of the District Court's ruling and requested that the court clarify the certified question. Reconsideration and

clarification were denied on June 6, 2005. The Receiver filed its Notice to Invoke Discretionary Jurisdiction on June 30, 2005.

STATEMENT OF THE CASE AND THE FACTS

In 1998, the management of Aries Insurance Company ("Aries") engineered a transaction that transferred valuable real estate that belonged to Aries and its sister corporation, American Skyhawk Insurance Company ("American Skyhawk"), to their corporate parent, Onyx Insurance Group, Inc. ("Onyx Group"). Aries did not receive fair and full consideration for the transfer of this valuable real estate as required by applicable statutes, and the Receiver, as a result of an extensive investigation, concluded that the transfer constituted an illegal distribution which is recoverable by the Receiver under the Florida Insurers Rehabilitation and Liquidation Act ("Rehabilitation and Liquidation Act"), Section 631.399, Florida Statutes. The Receiver further concluded that the transfer of real estate did not comply with the requirements of the Florida Insurance Holding Company Act.

As part of this transaction wherein the valuable real estate was transferred from Aries and American Skyhawk to Onyx Group, Ocean Bank assisted Aries' management by providing the cash necessary to effectuate the transaction by entering into a $6.5 million mortgage loan transaction with Onyx Group. In subsequent years, Ocean Bank made further advances against the same real estate collateral under an advance clause in the mortgage.

By quit-claim deeds dated October 1, 2001, Onyx Group reconveyed the same real estate, under and subject to the Ocean Bank mortgage, back to Aries as a contribution of capital to enable Aries to meet its statutory capital requirements as of December 31, 2001. The deeds to the real estate were not recorded until April 10, 2002, a month before Aries was placed in rehabilitation by the Florida Department of Insurance. As a result of the quit-claim deeds, Aries became, and is today, the record title holder of the real estate subject to the Ocean Bank mortgage. (*See* Quit-claim Deeds, App. vol. 1, OB 0004-0008.)

On March 17, 2003, Ocean Bank filed an omnibus 24-count foreclosure complaint in the Circuit Court of Miami-Dade County (the "Foreclosure Action") seeking to foreclose on collateral, both real and personal, which it alleged secured approximately $17 million in numerous loans made by Ocean Bank to various corporate entities and individuals associated with the Fraynd Family, who owned and controlled Aries as part of their Onyx Group of companies. (*See* Ocean Bank Foreclosure Action, App. vol. 1, OB 0018-0286.)

The Receiver has never been served with process in the Foreclosure Action and is not a party to that action. (*See* Ocean Bank Pet. for Writ of Prohibition at 8; *see also* Declaratory Judgment Complaint ¶ 22, App. vol. 2, OB-0313.) The Receiver also has not been correctly named as a party in the Ocean Bank

Foreclosure Action. The Florida Department of Insurance appears as a defendant as the Receiver of *Aries Insurance Group, Inc.*, not Aries Insurance Company. (*See* Ocean Bank Foreclosure Action ¶¶ 9 and 81, App. vol. 1, OB0018-0286.) Aries Insurance Group, Inc. and Aries Insurance Company are separate and distinct corporations.

Recognizing that Aries, as the titleholder to the real estate sought to be foreclosed, was more than just a "nominal" party, and that service of process on the Receiver could not be effected without the consent of the Receivership Court, Ocean Bank on June 24, 2003, filed an action for declaratory relief in the Receivership Court, which was assigned Subsidiary Matter E to designate it as a separate adversary proceeding in the overall receivership proceeding (the "Declaratory Judgment Action"). (*See* Notice of Commencement of Filing Adversary Proceeding, Supp. App., R 0004-0006.)

In the Bank's Complaint for Declaratory Judgment, and Alternatively, For Stay Relief or a Determination of the Validity and Priority of Ocean Bank's Secured Claims ("Declaratory Judgment Complaint"), Ocean Bank asked the Receivership Court to declare the respective rights of the Receiver and Ocean Bank as to various matters:

> 1. This is an action pursuant to F.S. Florida Statutes 86.011, and other applicable Florida law, to among other things, declare and determine: (1) that Miami-Dade County is the appropriate jurisdiction and venue to determine the validity, priority and extent of its interest in certain collateral securing loan obligations due and owing to Ocean Bank, (2) that the Receiver is obligated to accept process and respond to certain foreclosure proceedings in Miami-Dade County, Florida as authorized by F.S. 631.041(d), and (3) that Ocean Bank is not impaired by any stay or is entitled to stay relief, to the extent required, to proceed to foreclosure judgment and sale in accordance with F.S. 631.041(d), including enforcement of an assignment of rents for real property located in Miami-Dade County, Florida.

(Declaratory Judgment Complaint ¶ 1, App. vol. 2, OB-0306.)

Ocean Bank invoked the jurisdiction of the Circuit Court of Leon County pursuant to the Uniform Declaratory Judgment Act:

> 28. Pursuant to F.S. 86.011, this Court has jurisdiction to declare the rights and status of Ocean Bank and the Receiver. Ocean Bank contends that it is entitled to an adjudication that Miami-Dade County is the appropriate jurisdiction and venue to determine the validity, priority and extent of its interest in certain collateral securing loan obligations due and owing to Ocean Bank. Pursuant to section 631.041(d), the automatic stay does not apply to '[a]ny act to create, perfect, or enforce a lien against property of the insurer, except that a secured claim as defined in s. 631.011(17) may proceed under s. 631.191 after the order of liquidation is entered.

(Declaratory Judgment Complaint ¶ 28, App. vol. 2, OB-0315.)

In paragraph 36 of the Declaratory Judgment Complaint, Ocean Bank alleged as follows:

> 36. The secured claims Ocean Bank seeks to enforce in the Dade Action are not void or voidable by the Receiver and the property, particularly the real property and related rents, do not constitute premium funds or any other asset belonging to the insurer.

(Declaratory Judgment Complaint ¶ 36, App. vol. 2, OB-0317.)

The Receiver filed an answer to the Declaratory Judgment Complaint. In response to paragraph 28 alleging the jurisdiction of the Receivership Court to adjudicate the Declaratory Judgment Complaint, the Receiver responded as follows:

> 28. Denied as stated. It is admitted that pursuant to **Florida Statutes**, ***Section 86.011***, this Court has jurisdiction to declare the rights and status of Ocean Bank and the Receiver. It is denied that Ocean Bank is entitled to an adjudication that Miami-Dade County is the appropriate jurisdiction and venue to determine the validity, priority, and extent of its interest in certain collateral securing loan obligations due and owing to Ocean Bank. It is further denied that Ocean Bank is entitled to relief from the automatic stay on the grounds that it is proceeding on a secured claim as defined in **Florida Statutes**, ***Section 631.011 (17)***. To the contrary, the Receiver has alleged that Ocean Bank does not possess a valid and enforceable security interest either to the real estate that it seeks to foreclose nor the personalty that it seeks to foreclose upon in its Dade Action. Since the Dade Action seeks to proceed against property owned and possessed by the Receiver, this Court must first determine whether Ocean Bank is, in fact, the holder of a

> valid and non-voidable security interest in either the real estate or the personalty before granting any relief from stay to Ocean Bank.

(Receiver's Answer with Counterclaims ¶ 28, App. vol. 3, OB 0701-0702.)

In response to Ocean Bank's allegations that its security interests were not void or voidable by the Receiver, as set forth in paragraph 36 of the Declaratory Judgment Complaint, the Receiver responded as follows:

> 36. Denied. It is denied that the secured claims Ocean Bank seeks to enforce in the Dade action are not void or voidable by the Receiver and the property, particularly the real property and related rents, do not constitute assets belonging to the insurer. To the contrary, Ocean Bank's secured interest in the real estate that it is attempting to foreclose is void and unenforceable for the reasons more fully set forth in the Counterclaims. With respect to its alleged security interest in personalty, the funds which Ocean Bank seeks to foreclose upon are, in fact, premium funds belonging to the Receiver as to which Ocean Bank does not have a valid, enforceable security interest.

(Receiver's Answer with Counterclaims ¶ 36, App. vol. 3, OB-0704.)

The Receiver asserted two counterclaims in its answer to the Declaratory Judgment Complaint. The Receiver's first counterclaim elaborated on its response to Ocean Bank's allegations in paragraph 36 of its Declaratory Judgment Complaint, i.e., that its mortgage on the Aries real estate was not "void or voidable

by the Receiver," (App. vol. 2, OB-0317), and requested counter-relief, i.e., a declaration that the Ocean Bank mortgage is void.

Ocean Bank filed a motion to dismiss both of the Receiver's counterclaims. With respect to the Receiver's counterclaim to declare the Ocean Bank mortgage void, Ocean Bank argued that the local action rule barred the Receivership Court from considering and determining whether Ocean Bank's mortgage was void. After briefs and oral argument of counsel, the Receivership Court, by order dated July 16, 2004, denied Ocean Bank's motion to dismiss. (Order of July 16, 2004, App. vol. 1, OB 0001-0003.)

Rather than filing a response to the Receiver's counterclaims on the merits, Ocean Bank repudiated the allegations made in its Declaratory Judgment Complaint that the Receivership Court had jurisdiction to declare the respective rights of the Receiver and Ocean Bank as to the mortgage and instead filed the Petition for Writ of Prohibition with the District Court arguing that the Receivership Court did not have subject matter jurisdiction over the very matters that Ocean Bank had brought to the Receivership Court for decision.

In a per curiam opinion entered on March 31, 2005, the District Court granted the writ of prohibition. Judge Benton filed a dissenting opinion. The District Court certified the following question to be of great 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?

Opinion at 6. The Receiver filed its Motion for Rehearing En Banc, or in the Alternative, Motion for Rehearing and/or for Clarification which was denied by the District Court on June 6, 2005. The Receiver filed its Notice to Invoke Discretionary Jurisdiction on June 30, 2005.

ISSUE ON APPEAL

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?

SUMMARY OF THE ARGUMENT

The issue before the Court is the subject matter jurisdiction of the Circuit Court of Leon County ("Receivership Court") under the Rehabilitation and Liquidation Act. Ocean Bank's Petition for Writ of Prohibition sought to prohibit the Receivership Court from adjudicating the Receiver's request that the court declare that Ocean Bank's mortgage on property owned by Aries Insurance Company (the insolvent insurer), and located in Miami-Dade County, is void based on the application of certain provisions of the Rehabilitation and Liquidation Act and the Insurance Company Holding Act.

On March 31, 2005, the District Court of Appeal granted the writ of prohibition and issued a per curiam opinion holding that the Receiver's request for declaratory relief had to be brought as a compulsory counterclaim in the Foreclosure Action in Miami-Dade County even though the Receiver had not been served with process. Judge Benton filed a dissenting opinion.

While the District Court concluded that the Receiver's claim for declaratory relief is a compulsory counterclaim to the Foreclosure Action, the underlying rationale of the opinion must be that the Receivership Court lacked subject matter jurisdiction to hear the Receiver's claim because it affects a mortgage on real estate located in Miami-Dade County. A writ of prohibition would only be appropriate if

the Receivership Court exceeded its subject matter jurisdiction - the writ is not a proper remedy to correct a procedural problem such as a counterclaim asserted in the wrong lawsuit.

The Receiver submits that statutory law and well-established case law give the Receivership Court subject matter jurisdiction to hear the Receiver's claim for a declaration that the mortgage is void. The Receiver's claim has been properly asserted as a counterclaim in the Declaratory Judgment Action filed in the Receivership Court and served on the Receiver.

From a policy standpoint, the result of the District Court's decision will be to vest jurisdiction in courts other than the Circuit Court of Leon County issues of interpretation and application of the Rehabilitation and Liquidation Act. In the instant case, these issues will be determined by the United States Bankruptcy Court for the Southern District of Florida (where the Foreclosure Action is now pending). Any appeals on these issues will be heard by the federal courts - not the Florida courts. This result is inconsistent with clear legislative intent to have the Circuit Court of Leon County exercise exclusive jurisdiction over these issues.

ARGUMENT

I. Section 631.021(6), Florida Statutes, Grants Exclusive Jurisdiction to the Circuit Court of Leon County with Respect to Property of Insolvent Insurers and All Claims Against Their Property.

Section 631.021(6), Florida Statutes, provides as follows:

> 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** (emphasis supplied).

This subsection of Section 631.021 became effective on July 1, 2004, and was the controlling jurisdictional statute when Judge Ferris entered her order of July 16, 2004, denying Ocean Bank's motion to dismiss. As Judge Benton recognized in his dissent, Opinion at 7, the second sentence of this subsection vests exclusive jurisdiction in the Circuit Court of Leon County to adjudicate Ocean Bank's claim against the Aries real estate and the Receiver's Counterclaim. This legislative grant of exclusive jurisdiction to the Circuit Court of Leon County renders the local action rule inapplicable to Ocean Bank's allegations in the Declaratory

Judgment Action that its security interest is not void or voidable as well as the Receiver's counterclaim to declare Ocean Bank's mortgage on Aries property void.

Under the rules governing the applicability of new laws to pending cases, subsection (6) of Section 631.021 as a procedural statute applied retroactively as a basis for jurisdiction over this case. Under Florida law, "[t]he general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995); s*ee also City of Lakeland v. Cantinella*, 129 So. 2d 133, 136 (Fla. 1961) (stating that "remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.").

In applying this rule to legislation affecting jurisdiction, the Florida courts have uniformly held that statutes which transfer or assign exclusive jurisdiction from one tribunal to another are "procedural in nature" and "may be held immediately applicable to pending cases." *Florida Birth-Related Neuro. Inj. Comp. Assoc. v. Demarko*, 640 So. 2d 181, 182 (Fla. 1st DCA 1994) (holding that

a statute transferring jurisdiction over claims brought under the Florida Birth-Related Neurological Injury Compensation Act from the judge of compensation claims to the Florida Division of Administration Hearings to be immediately applicable to pending cases); *see also City of Lakeland*, 129 So. 2d at 136 (holding that a statute which allowed the Florida Industrial Commission to assume jurisdiction over claims previously adjudicated by the courts was remedial or procedural in nature and should be applied retrospectively); *Eastern Airlines v. Planet Reliance Ins. Co.*, 695 So. 2d 732, 733-34 (Fla. 1st DCA 1996) (same); *Napp-Deady Assoc. v. Ramsey*, 599 So. 2d 228, 229 (Fla. 1st DCA 1992) (same); *cf. Gordon v. John Deere*, 264 So. 2d 419, 420 (Fla. 1972) (holding that Florida's long arm statute, which created personal jurisdiction where none existed before, could not be applied retroactively because it in essence created a previously non-existing remedy).

In this case, Section 631.021(6) does not act to "create new or take away vested rights" from Ocean Bank. *City of Lakeland*, 129 So. 2d at 136. On the contrary, it merely establishes that the Circuit Court of Leon County has exclusive jurisdiction over the property of the insolvent insurer and claims against the property. As such, the statutory provision is properly applied to immediately

confer exclusive jurisdiction upon the Receivership Court to adjudicate Ocean Bank's claim against property in the name of the insolvent insurer.

The First District Court of Appeal's opinion in *Chase Bank of Texas National Association v. State of Florida, Department of Insurance*, 860 So. 2d 472 (Fla. 1st DCA 2003), is also authority as to the applicability of legislative amendments to Chapter 631 to pending insolvency cases. In *Chase*, the receiver's fraud claim against the bank had been dismissed for lack of jurisdiction earlier in the litigation. While the proceeding was still pending, the Legislature amended Chapter 631 to authorize jurisdiction over the dismissed claim. The circuit court found that the amendments conferred jurisdiction over the newly asserted claim. *Chase*, 860 So. 2d at 475. The *Chase* panel affirmed the circuit court's finding, stating that "[i]t has been the case all along that the circuit court has jurisdiction to hear a claim on behalf of a receiver, but if there was ever any doubt about that point, it was removed by the 2002 amendments to the statute." 860 So. 2d at 477.

II. Section 631.021(1), Florida Statutes, Grants Original Jurisdiction to the Circuit Court of Leon County to Decide All Proceedings Involving Insolvent Insurers.

In addition to the grant of exclusive jurisdiction contained in subsection (6), subsection (1) of Section 631.021 vests the Circuit Court of Leon County with broad jurisdiction over all matters related to the insolvency proceedings of

insurance companies. Section 631.021(1), Florida Statutes, provides that "[t]he circuit court shall have original jurisdiction of any delinquency proceeding under this chapter . . ." In *Chase*, 860 So. 2d 472 (Fla. 1st DCA 2003), the First District Court of Appeal found that when the Rehabilitation and Liquidation Act set forth in Chapter 631 of the Florida Statutes was enacted, the Legislature gave the Circuit Court of Leon County broad subject matter jurisdiction "over the entire proceeding in which the claim will be litigated." *Chase*, 860 So. 2d at 478. The *Chase* court explained that "[a]n insurance litigation is not a monolithic proceeding like a criminal case or an individual civil action." 860 So. 2d at 477-78. "Rather, it is a comprehensive proceeding that may include within its scope a cluster of different claims, much like the administration of a large estate." 860 So. 2d at 478.

Despite this substantial legislative grant of jurisdiction to the Receivership Court, in granting the writ of prohibition, the District Court apparently found that the local action rule operates to extinguish the Receivership Court's subject matter jurisdiction over the counterclaim filed by the Receiver and, by implication, jurisdiction over the Declaratory Judgment Action as it relates to Ocean Bank's mortgage, as well. As *Chase* made clear, the question of the Circuit Court of Leon County's broad jurisdiction over insurance liquidation proceedings is a settled one. In some cases the Department of Financial Services may not have authority to

bring a particular claim, but "[w]hether it is proper to assert a certain kind of claim within the context of a delinquency proceeding is another matter . . . a question of authority, not jurisdiction." *Chase*, 860 So. 2d at 476. And as the Receiver argues *infra*, the legislative policy underlying the Rehabilitation and Liquidation Act requires that the Receivership Court be permitted to determine the respective rights of the Receiver and Ocean Bank as to Ocean Bank's mortgage.

In sum, the Legislature's broad grant of jurisdiction to the Circuit Court of Leon County over insolvency proceedings, Section 631.021(1), Florida Statutes, and exclusive jurisdiction "with respect to assets or property of any insurer subject to such proceedings and claims against said insurer's assets or property," Section 631.021(6), Florida Statutes, requires that the certified question be answered in the negative.

III. The Legislative Policy Underlying the Florida Insurers Rehabilitation and Liquidation Act Requires That the Receivership Court Be Permitted to Determine the Respective Rights of the Receiver and Ocean Bank as to Ocean Bank's Mortgage.

The Receiver's First Counterclaim sets forth in detail the basis of the Receiver's claim to declare the Ocean Bank mortgage void. A judicial determination of the counterclaim will require interpretation of various sections of the Rehabilitation and Liquidation Act as to which there is no existing judicial

authority. Although not cited in the counterclaim itself, the underlying transactions also implicate the provisions of the Florida Insurance Holding Company Act and the regulations promulgated under it, because transactions between regulated insurance companies and their non-regulated corporate parents must be "fair and reasonable." Fla. Admin. Code Ann. R. 69O-143.046 & 69O-143.047 (2004) (formerly Fla. Admin. Code Ann. R. 4-143.046 & 4-143.047 (1998)). Here again, there is no Florida decisional law construing the regulations and standards under the Florida Insurance Holding Company Act and, therefore, the Receivership Court will have to make these determinations *ab initio*.

It is clear under the comprehensive statutory scheme created by the Florida Legislature to deal with the insolvency of regulated insurance companies that it was the intent of the Legislature that the Leon County Circuit Court handle all matters related to insurance company insolvency proceedings and that appeals should be taken to the First District Court of Appeal to assure uniformity of interpretation.

In fact, Chapter 631 is based upon a model act drafted by the National Association of Insurance Commissioners, and thus Florida is just one of the many states that have uniformly vested jurisdiction of matters concerning insolvent insurance companies in a particular court in the state court system. *See, e.g., Bryant v. United Shortline,* 972 S.W.2d 26, 29 (Tex. 1998) (citing *Bard v. Charles R.*

Myers Ins. Agency, Inc., 839 S.W.2d 791, 797 (Tex. 1992), for the proposition that there is "a compelling policy interest in having claims against an insolvent insurer's estate resolved in a single proceeding," . . . "'ensuring fair and consistent treatment of all claims'"). For example, in the case of *In re Reliance Group Holdings, Inc., et al. v. Reliance Insurance Company*, 273 B.R. 374 (Bankr. E.D. Pa. 2002), the Bankruptcy Court for the Eastern District of Pennsylvania exercised its discretionary abstention power and remanded back to the Commonwealth Court of Pennsylvania, which is the equivalent of the Leon County Circuit Court for insurance insolvency proceedings in Pennsylvania, a petition filed by the Receiver of Reliance Insurance Company to recover certain amounts of money from the bankrupt debtor holding company. The bankruptcy trustee had removed the petition to bankruptcy court. The court's rationale for remanding the removed petition back to the Commonwealth Court was that an adjudication of the issues involved would require the application and interpretation of specialized state insurance statutes, which were uniquely suited to be determined by the Commonwealth Court of Pennsylvania.

IV. The Receiver Is Not Required to Bring its Claim to Declare Ocean Bank's Mortgage Void as a Counterclaim in the Ocean Bank Foreclosure Action.

Ocean Bank argued below that the issue of whether its mortgage is void is within the exclusive jurisdiction of the Bankruptcy Court for the Southern District of Florida where the Foreclosure Action is presently pending. Ocean Bank's Foreclosure Action is only pending in the Bankruptcy Court for the Southern District of Florida as a result of Ocean Bank removing the case from the Miami-Dade Circuit Court to the Bankruptcy Court following the bankruptcy filing of several of the corporations named as defendants in its complaint. The Receiver is not a party to the Foreclosure Action since it has never been served with process.

Ocean Bank's Foreclosure Action is not a "Bankruptcy Case" in the normal sense since Ocean Bank is not a bankruptcy debtor. The only bankruptcy debtor having any relationship to Ocean Bank's Foreclosure Action is Onyx Insurance Group, Inc., which executed the Ocean Bank mortgage in 1998. Onyx Insurance Group, Inc., in its bankruptcy schedules, however, does not claim the Aries real estate as property of its debtor estate. (*See* Schedule A, Real Property of Onyx Insurance Group, Inc., App. vol. 2, OB-0519.)

Ocean Bank asserted below that an order entered by Bankruptcy Judge Robert Mark has clarified that the Bankruptcy Court would be willing to hear any "claims, counterclaims, cross-claims, or other challenges" that the Receiver might want to raise. This order was totally irrelevant to the issue before the District

Court and is nothing more than an advisory opinion drafted *ex parte* by Ocean Bank's counsel and issued at the *ex parte* request of Ocean Bank's counsel. Included in the Receiver's Supplemental Appendix at pages R 0007-0011 is a copy of the transcript reflecting the genesis of this order and the *ore tenus* motion of counsel for Ocean Bank seeking the order from the court. In agreeing to enter a highly unusual advisory opinion, the Bankruptcy Court cautioned as follows:

> THE COURT: Okay. Well, despite my saying there was nothing before me, if it's that simple and may facilitate, you can refer in an order to an *ore tenus* motion to clarify the scope of the proceeding and put in language that the -- I don't know if you want to say if the receiver participates, but just say the receiver -- any claim by the receiver challenging the validity of the bank's security interest, or however you want to phrase it --
>
> MR. TABAS: Yes, sir.
>
> THE COURT: -- could properly be brought as a defense or counterclaim in this proceeding.
>
> MR. TABAS: Thank you, Judge. That will be helpful.
>
> THE COURT: You need to draft it carefully that I'm not ruling on issues that may be in front of the judge there as to whether the receiver can be sued or not.

It is obvious from this dialogue between counsel and the court that Judge Mark was sensitive to the inherent powers of the Receivership Court acting pursuant to a state insurance insolvency statute. The McCarran-Ferguson Act, 15

U.S.C. § 1012(b), provides that state insurance solvency statutes reverse preempt conflicting provisions of general federal statutes, including the Bankruptcy Code. *See U.S. Department of Treasury v. Fabe*, 508 U.S. 491 (1993). (*See also* Letter from Receiver's counsel to counsel for the Bankruptcy Trustee of the Aries affiliates discussing the implications of the McCarran-Ferguson Act, Supp. App., R 0012-0030.)

Until Ocean Bank obtains relief from the Receivership Court to serve process on the Receiver, and the Receiver is made a party to the Ocean Bank Foreclosure Action, nothing that has occurred in the Bankruptcy Court has any relevance to the jurisdiction of the Circuit Court of Leon County to hear and determine the Receiver's request for a declaration that the Ocean Bank mortgage is void.

V. The District Court of Appeal's Conclusion That the Receiver's Claim Must Be Asserted As a Compulsory Counterclaim Ignores Well Settled Authority That a Party Has No Duty to Plead a Counterclaim Where Service of Process Has Not Been Effected and That a Counterclaim Is Properly Asserted in the Action Where the Party Is First Served.

The well-settled law governing counterclaims is that a party has no duty to file a compulsory counterclaim in an action in which it has not been served. *See Cason v. Florida Favorite Fertilizer, Inc.*, 547 So. 2d 703, 706 (Fla. 2d DCA 1989); *see also Mabie v. Garden Street Mgmt. Corp.*, 387 So. 2d 920 (Fla. 1981);

Hollywood Lakes Country Club, Inc. v. Silver & Waldman, P.A., 737 So. 2d 1194 (Fla. 3d DCA 1999). Rule 1.170(a), Florida Rules of Civil Procedure, provides in pertinent part that "the pleader need not state a claim if (1) at the time the action was commenced the claim was the subject of another pending action . . ." In order for the action to be "pending" for purposes of Rule 1.170(a), Florida Rules of Civil Procedure, the defendant must have been served. For example, in *Cason*, a party initiated an action in Polk County the same day his defendant sued him in Hillsborough County. The court found that assuming one claim was a compulsory counterclaim to the other, the Hillsborough County claim had to be heard in Polk County because the Polk County defendant had been served first. *Cason*, 547 So. 2d at 706.

As the Receiver argued below, Ocean Bank's failure to serve the Receiver in the Foreclosure Action precludes litigation of the Receiver's counterclaim in that forum. In this case, Ocean Bank initiated its Declaratory Judgment Action in the Receivership Court and served the Receiver. The Receiver has never been served in the Foreclosure Action. As a result, the Receiver's claim to declare Ocean Bank's mortgage void was properly asserted in the Declaratory Judgment Action.

VI. The District Court of Appeal's Conclusion That the Receiver's Claim Is Subject to the Local Action Rule Fails to Properly Differentiate Between Actions That Directly Affect Title to Real Estate and Actions That Have an Indirect Effect on Real Estate.

The District Court of Appeal, while acknowledging that Ocean Bank's mortgage does not transfer title to real estate, Opinion at 5, still concluded that the Receiver's action to declare Ocean Bank's mortgage void is subject to the local action rule pursuant to *Goedmakers v. Goedmakers*, 520 So. 2d 575 (Fla. 1988). The court reached this conclusion by noting "if the receivership court voids the mortgages, then Ocean Bank would lose its liens and the foreclosure action would be over." Opinion at 5. This, however, would be true in any *in personam* action between two parties to void an obligation where the obligation is secured by a lien on real estate. Even though an obligation is voided and a mortgage securing the obligation becomes unenforceable, title to real estate will not have changed or been directly affected in any way.

As this Court in *Goedmakers* made clear, the mere fact that an action may have an indirect effect on real estate or involves real estate, does not make it subject to the local action rule:

> Clearly, many in personam actions *involve* real property. However, the presence of real property as an issue does not make it a local action. Whether or not the action is local or transitory depends upon the underlying major

> question in the case. *Lakeland Ideal Farm & Drainage District v. Mitchell*, 97 Fla. 890, 122 So. 516 (1929). As the Fourth District explained in *Sales v. Berzin*, 212 So. 2d 23, 24 (Fla. 4th DCA 1968), when a plaintiff seeks to compel a change in the title to real property, the local action rule requires the suit to be brought in the county where the land is situated. However, when the suit is merely for payment of money, such as the purchase price of the property, there is no "property in litigation" and the third alternative location specified in the venue statute is not available to the plaintiff. *Id.* at 25. See also *Coon v. Abner*, 246 So. 2d 143 (Fla. 3d DCA 1971) (in suit for cancellation of note on real property located in Dade County, venue proper in Orange County where note was executed and made payable, not in Dade County); *Royal v. Parado*, 462 So. 2d 849 (Fla. 1st DCA 1985), (action for rescission or cancellation of contract for sale or exchange of land is transitory, not local action required to be brought where the land is located); *Jutagir v. Marlin*, 453 So. 2d 503 (Fla. 3d DCA 1984) (complaint to rescind agreement to sell land to which there was counterclaim for a specific performance is truly an in personam action and not a local action which had to be heard where the land was located); *St. Laurent v. Resort Marketing Associates, Inc.*, 399 So. 2d 362 (Fla. 2d DCA 1981) (in suit for breach of sales marketing agreement for sale of ownership units at condominium resort located in Monroe County, no property in litigation, as such).

Goedmakers, 520 So. 2d at 579.

The case most factually similar to the instant case that was cited with approval by this Court in *Goedmakers* is *Coon v. Abner*, 246 So. 2d 143 (Fla. 3d DCA 1971). In *Coon*, the complaint sought a declaratory decree that a promissory

note and mortgages on real estate were usurious and void and the complaint requested cancellation of the note and cancellation and discharge of record of the mortgages securing the note. The defendant could not be sued in Miami-Dade County under the applicable venue rules and the plaintiff attempted to establish venue under the local action rule arguing that, since the property subject to the mortgages securing the promissory note was in Miami-Dade County, venue would properly lie in Miami-Dade County under the local action rule. The lower court dismissed the complaint because of improper venue and the Third District Court of Appeal affirmed the decision.

Simply put, the local action rule should not be applied with its "full rigidity in suits of equity," such as the Receiver's claim to declare the mortgage void. *Royal v. Parado*, 462 So. 2d 849, 853 (Fla. 1st DCA 1985) (noting that rescission is an equitable remedy); *see also Coon v. Abner*, *supra* (action for cancellation of an alleged usurious note is equitable). "The local action rule does not preclude an action [where two parties] only seek an equitable remedy that will not directly affect the property or its title." *Ruth v. Department of Legal Affairs*, 684 So. 2d 181, 186 (Fla. 1996). "In personam jurisdiction alone provides the court with authority to determine the equitable rights of the two parties." 684 So. 2d at 186. Further, the local action rule "does not limit a court's in personam jurisdiction . . .

even if the relief sought might incidentally affect real property located outside of the court's territory." *Bauman v. Rayburn*, 878 So. 2d 1273, 1274 (Fla. 5th DCA 2004).

In this case, if the Receivership Court declares the mortgage void, the local action rule will not be violated because the dispute over the mortgage between the two parties to the dispute will have been decided. Title will not have changed. And any question regarding the state of title between the Receiver and all other parties will still be a matter for determination in the courts of Miami-Dade County. *See Bauman*, 878 So. 2d at 1275 (where the major question in the case is not title but whether some wrong has occurred between the parties to the litigation, "[t]o grant such relief only involves the exercise of in personam jurisdiction . . . and, accordingly, the 'local action rule' does not apply"). If Ocean Bank should prevail on the Receiver's counterclaim before the Receivership Court, however, the judgment will be binding on the Receiver in the Foreclosure Action.

CONCLUSION

For all of the foregoing reasons, the Receiver respectfully requests that the Court answer the question certified by the District Court in the negative and find that the Circuit Court of Leon County has jurisdiction over the Receiver's Counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for The Florida Department of Financial Services, as Receiver of Aries Insurance Company, hereby certifies that this Petitioner's Initial Brief on the Merits was furnished on this 31st day of August, 2005, by U.S. mail to the parties and counsel listed below:

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Counsel for The Florida Department of Financial Services, as Receiver of Aries Insurance Company, hereby certifies that this Petitioner's Initial Brief on the Merits complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____

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