IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1180

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

Petitioner,

v.

OCEAN BANK,

Respondent.

_____/

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The issue in this case is not "who gets six parcels of real estate" as suggested by Ocean Bank ("Respondent"). Rather, the real issue is whether the comprehensive system enacted by the Florida Legislature for dealing with insolvent insurers will be respected and enforced or will the lower court precedent be allowed to stay on the books, thus creating a gaping hole in the uniformity of jurisdiction in the Circuit Court of Leon County for issues arising in the administration of insolvent insurers. Narrowly read, the lower court decision stands for the proposition that the Circuit Court of Leon County is without subject matter jurisdiction to hear and adjudicate a declaratory judgment complaint voluntarily brought to that court by Respondent and the properly plead counterclaim to that complaint filed by the Receiver. More broadly construed, the lower court's decision stands for the proposition that issues of the construction and application of sections of the Florida Insurers Rehabilitation and Liquidation Act ("Rehabilitation and Liquidation Act" or "Chapter 631") and the Florida Insurance Holding Company Act as they apply to assets of an insolvent insurer are not the exclusive domain of the Circuit Court of Leon County.

The practical result of the lower court's ruling will be to transfer these important issues for decision to the United States Bankruptcy Court for the

Southern District of Florida. The effect of the lower court's ruling here and in other cases will be to cause confusion and increased litigation expense thus defeating the stated purpose of Chapter 631 to provide for the speedy and economical rehabilitation and liquidation of insurance companies. *See* § 631.001, Fla. Stat. This rehabilitation and liquidation process affects every policyholder in the State of Florida through the assessment scheme of the Florida Insurance Guaranty Association Act, Sections 631.50-631.70, Florida Statutes, which passes along the losses of failed insurance companies to every policyholder in the state through higher premiums. The Bankruptcy Court should not be the court deciding these important issues affecting policyholders throughout the state.

The lower court's ruling is in contravention of the Florida Legislature's clear intent that the Circuit Court of Leon County have exclusive subject matter jurisdiction and venue over these issues. Although Respondent would belittle the system for regulating insurance set up by the Florida Legislature, there is such a system and its continued vitality protects the citizens of this state and their property. One part of that system is the recent investiture of exclusive jurisdiction and venue in the Circuit Court of Leon County to hear claims against the assets or property of an insurer that has been placed in receivership, plainly stated in Section 631.021(6), Florida Statutes. The District Court of Appeal understood the critical

role of the system when it certified the question of the Circuit Court of Leon County's jurisdiction as one of great public importance to be resolved by this Court.

Contrary to Respondent's representations, the Receiver's counterclaims are not fraudulent transfer claims but rather statutory claims governed by the Rehabilitation and Liquidation Act (i.e. Sections 631.262 and 631.399) and regulations promulgated under the Florida Insurance Holding Company Act (i.e. Fla. Admin. Code Ann. R. 69O-143.046 & 69O-143.047). The Receiver's counterclaim to declare Respondent's mortgages void was brought to protect Receivership property and is therefore squarely within the Legislature's grant of exclusive jurisdiction and venue to the Circuit Court of Leon County. Respondent conceded as much when it filed its declaratory complaint in the Circuit Court of Leon County seeking a declaration that its mortgages with respect to the property are not voidable despite having already begun an action to foreclose in Miami-Dade County. As Judge Benton stated in his dissenting opinion:

> Substantively, the Legislature has given the Circuit Court of Leon County exclusive jurisdiction over what are sometimes intricate questions arising under the Florida Insurers Rehabilitation and Liquidation Act, sections 631.001-.399, Florida Statutes (2004), and part IV of chapter 628, entitled Insurance Holding Companies. See

> §§ 628.801-.803, Fla. Stat. (2004). Until those questions are resolved, any foreclosure action can wait.

Ocean Bank v. Florida Dep't of Fin. Servs., 902 So. 2d 833, 836 (Fla. 1st DCA 2005) (Benton, J., dissenting). Throughout the Answer Brief, Respondent charges that the Receiver is simply trying to extinguish foreclosure rights. Foreclosure is not what this case is about. If Respondent has any right to foreclose after the question of the validity of its mortgages has been resolved, it will be able to do so.

Respondent points to the Receiver's litigation of other receivership matters outside of the Circuit Court of Leon County as inconsistent with Section 631.021(6). It is not. The cases to which Respondent points simply do not involve Receivership property; rather, the Receiver is litigating causes of action to recover damages to the Receivership for others' malfeasance with respect to the insolvent insurer. These cases must be litigated wherever the defendants are found.

ARGUMENT

Until subsection (6) was added to Section 631.021 in 2004, the Circuit Court of Leon County was designated as the venue for conduct of all receivership cases. As of July 1, 2004, the Legislature mandated that the original jurisdiction and venue of the Circuit Court of Leon County set forth in subsections (1) and (2) of Section 631.021 would now be exclusive original jurisdiction "with respect to assets or property of any insurer subject to [conservation, rehabilitation or liquidation] proceedings." § 631.021(6), Fla. Stat.

Respondent properly instituted its declaratory action in the Circuit Court of Leon County. That the court's jurisdiction had not yet been made exclusive at the time of filing takes away nothing from the fact that the court had original jurisdiction when Respondent's action was filed and has it today over both Respondent's action to declare its mortgages valid and the Receiver's action to declare those mortgages void. That Respondent also filed an action to foreclose the mortgages in the Circuit Court of Miami-Dade County (now removed to the United States Bankruptcy Court for the Southern District of Florida) is simply a distractor. The declaratory actions are properly served and pending in the Circuit Court for Leon County, the court with exclusive jurisdiction and venue under current law and the one that is familiar with the issues and uniquely situated to

handle them. The local action rule cannot supplant the clear intent of the Legislature to vest exclusive jurisdiction and venue of this case in the Circuit Court of Leon County.

I. The Receivership Court Has Exclusive Jurisdiction and Venue Over Respondent's Declaratory Action and the Receiver's Counterclaims Pursuant to Section 631.021(6), Florida Statutes.

Section 631.021 is situated in Part I of Chapter 631, which contains the statutory sections dealing with "Insurer Insolvency: Rehabilitation and Liquidation" which make up the Rehabilitation and Liquidation Act. When read as a whole, Section 631.021 indisputably evidences an intent by the Legislature that jurisdiction over receivership proceedings is in the Circuit Court of Leon County. Once a liquidation order has been entered, subsection (6) of Section 631.021 gives the Circuit Court of Leon County exclusive jurisdiction over claims against receivership property.

The Insurers Rehabilitation and Liquidation Model Act ("Model Act"), from which the provisions of Section 631.021 were likely taken by the Legislature, supports this interpretation of the statute. The Legislature's action was consistent with the drafting note provided in the Model Act when it originally designated the Circuit Court of Leon County as the specific court with jurisdiction and venue over receivership cases:

> **Drafting Note:** Each state will need to consider the appropriate court and county for delinquency proceedings under this Act. In general, the venue is more appropriate if it is in the county where the office of the insurance commissioner is located. This assures expeditious and expert handling by concentrating such cases in the court with the most experience with regulatory affairs of all kinds, including insurance . . .

The Insurers Rehabilitation and Liquidation Model Act (revised), *available at* http://www.naic.org/receivership/issues_drafts_papers.htm. The Legislature thus chose the Circuit Court of Leon County in Tallahassee, where the Department of Financial Services' offices are located, to serve as its expert court. The Legislature may have taken further note of the benefits in expertise and efficiency in 2004 when it added the following italicized portion of Section 5(A) of the Model Act almost word-for-word to create subsection (6) of Section 631.021:

> The conservation, rehabilitation and liquidation of insurance companies and other persons subject to the provisions of this Act are a matter of vital public interest affecting the relationships between insureds and their insurers. The efficient administration of such activities requires that a single court have jurisdiction over these persons, their assets, and all claims against these persons. *The domiciliary court acquiring jurisdiction over persons subject to the provisions of this Act may exercise its jurisdiction to the exclusion of all other courts, except as limited by the provisions of this Act. Upon the issuance of an order under Section 10, 11, 17 or 20 of this Act, the court shall have exclusive jurisdiction with respect to assets or any claims against these persons.* Except as

> otherwise provided in this section, the court may issue orders which bar the institution or prosecution of any actions, counterclaims, cross-complaints, proceedings, arbitration proceedings, writs or other dispute resolution proceedings.

Id. (emphasis added). Thus, the Legislature apparently followed the recommendation of the drafters of the Model Act and gave the Circuit Court of Leon County exclusive jurisdiction and venue over most receivership matters.

Respondent's unsupported assertion that "subsection six does not deal with all Florida insurance receiverships but rather those scenarios that involve an out-of-state 'domiciliary court'" is simply not true. To the extent that the term "domiciliary" has a "well-known meaning" (Answer Br. at 24), it means the state where the insurer is domiciled. In this case, that state is Florida. The term "domiciliary court" is not defined in the Model Act or in Chapter 631 and can only be read as a term of art the Model Act drafters used to describe the home court ultimately designated by the legislatures for conduct of receivership cases. There is no reference to interstate proceedings. The Florida Legislature appears to have adopted this term verbatim from the Model Act where it might have specified the Circuit Court of Leon County.[1]

[1] The case cited several times by Respondent as an example of the purpose of Section 631.021(6) does not even use the term "domiciliary court," *see Florida Insurance Guaranty Association, Inc. v. State ex rel. Department of Insurance*, 400

Given the language of the Model Act from which Section 631.021(6) is apparently derived, there is clearly no legislative intent to refer to out-of-state courts in this particular section. In fact, the Model Act puts all matters dealing with interstate receiverships into a separate article, Article 3, entitled "Interstate Relations," with eleven sections specifically devoted to such proceedings. Further, contrary to Respondent's unsupported assertions, the phrase "domiciliary court" is not used in any of Florida's statutory sections governing interstate receivership matters. Finally, the rules of construction cited by Respondent instead support the Receiver's position, in that when all of the subsections of Section 631.021 are taken together, with due regard to the Model Act provisions from which subsection (6) seems to be derived, it is clear that the Legislature sought to centralize adjudication of insurance receivership cases in the Circuit Court of Leon County.

So. 2d 813 (Fla. 1st DCA 1981), and obviously in 1981 when that case was decided the statute did not include the term "domiciliary court" or the statutory section at issue here. The other case cited by Respondent for the proposition that "domiciliary court" is a widely recognized term, *Hobbs v. Don Mealey Chevrolet, Inc.*, 642 So. 2d 1149 (Fla. 5th DCA 1994), does not mention the term "domiciliary court" either. Finally, the cases cited on page 25 of the Answer Brief as examples of receivership cases involving multiple states are simply irrelevant as the case before this Court concerns a Florida-based insurer.

II. Section 631.021(6) Applies to This Case Regardless of its Effective Date.

Respondent's complaints of unfair retroactivity are unsound. The Receiver only argues that the 2004 amendment was immediately effective toward this then-pending case. Florida courts have uniformly held that statutes which transfer or assign exclusive jurisdiction from one tribunal to another "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) (a statute transferring jurisdiction over certain claims from the judge of compensation claims to the Florida Division of Administration Hearings was immediately applicable to pending cases).[2]

III. The Local Action Rule Simply Has Nothing to Do With This Case.

By seeking to focus attention on its foreclosure action, Respondent tries to distract the Court from the central fact of exclusive jurisdiction and venue in the Circuit Court for Leon County over Respondent's declaratory claim and the

[2] In addition, *Chase Bank of Texas National Association v. State of Florida, Department of Insurance*, 860 So. 2d 472 (Fla. 1st DCA 2003), supports 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 on 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 and the *Chase* panel affirmed.

Receiver's counterclaim. The local action rule simply does not come into play because subsection (6) of Section 631.021 provides the necessary basis for subject matter jurisdiction. The cases cited by Respondent actually support the Receiver's position in this regard. For example, *Aledex Corp. v. Nachon Enterprises, Inc.*, 641 So. 2d 858 (Fla. 1994), does not mention the local action rule and is actually a statutory jurisdiction case. This Court in *Alexdex* stated that "[a]bsent a constitutional prohibition or restriction, the legislature is free to vest courts with exclusive, concurrent, original, appellate, or final jurisdiction." 641 So. 2d at 861 (citing *State v. Sullivan*, 116 So. 255 (1928)).

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 Bank of Tex. Nat'l Ass'n v. State of Fla., Dep't of Ins.*, 860 So. 2d 472, 478 (Fla. 1st DCA 2003). "An insurance litigation is not a monolithic proceeding like a criminal case or an individual civil action," but 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." *Id.* at 477-78. Here, the case before the Court is simply one in a cluster of claims. Respondent's citation to *Nova Insurance Group v. Florida Department of Insurance*, 606 So. 2d 429 (Fla. 1st DCA 1992), supports this point. In *Nova*, the court noted the "broad variety of

claims which must be brought in the court administering the receivership." 606 So. 2d at 433. As an example, the *Nova* court cited *Sunset Commercial Bank v. Florida Department of Insurance,* 509 So. 2d 366 (Fla. 1st DCA 1987), in which the bank was required to pursue its contractual claim on a promissory note in the receivership court per Section 631.181. The *Sunset* court noted that "the statutory scheme contemplates that all claims against an entity in receivership be filed with the receiver and determined by the receivership court." 509 So. 2d at 367 (citing *Mall Bank v. State ex rel. Dep't of Ins.*, 462 So. 2d 519 (Fla. 1st DCA 1985)).

Respondent's main complaint seems to be that it will somehow lose its ability to foreclose on the properties when and if it has a legal basis to do so. This is just not the case. By providing an exception – "except as limited by the provisions of this chapter" – in Section 631.021(6)'s grant of exclusive jurisdiction and venue, the Legislature has provided for litigation of claims elsewhere should such litigation be statutorily authorized. The Receiver does not dispute that if Respondent has a valid right it should be able to exercise it under the statutes. It was Respondent however that filed this case to determine the validity of its right, and under the jurisdictional and venue statutes specifically applicable to insurance cases this case is to be heard in Leon County. Respondent is not hampered in any way from resorting to Sections 631.041(d) or 631.191(2)(a). Nowhere in its brief

does Respondent describe how litigation in Leon County would hurt its case. The disability is illusory.[3]

IV. The Certified Question Presents an Issue of Great Public Importance the Court Should Resolve.

Whether this court accepts a case that has been certified is in its absolute discretion, and the Court may or may not hear a case on the basis that it involves a "narrow issue with very unique facts."[4] This Court should exercise its discretion to decide the case because the actual legal question deals not with a narrow principle of law but a broad statutory scheme aimed at protecting the financial interests of all of the citizens of Florida. The cases cited by Respondent as examples of the Court's frequent refusal to accept jurisdiction in cases involving limited issues

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[3] Respondent's assertion that "[t]he Florida legislature simply has no authority to limit the subject matter jurisdiction of the circuit courts over particular matters to a single circuit" (Answer Br. at 32), has not been supported by citations to case law. Further, the selection of the Circuit Court of Leon County among the circuit courts is in the nature of a statutory venue provision. In any event, if Respondent's constitutional argument were correct, Respondent's own reading of subsection (6) as solely applicable in interstate receiverships would also violate the Florida Constitution.

[4] For example, the Court has heard many cases dealing with "a narrow principle of law" (Answer Br. at 17), often because the issue has been phrased that way by the district courts. *See, e.g., Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 394 (Fla. 2005) (accepting jurisdiction to "answer this narrow question in the affirmative"); *Lashkajani v. Lashkajani*, 911 So. 2d 1154 (Fla. 2005) (same); *State v. Bodden*, 877 So. 2d 680, 684 (Fla. 2004) (same).

addressing unique facts are just that - inapposite here where a fundamental part of a state regulatory scheme - jurisdiction - is at issue.[5]

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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[5] In fact, at least one of these cases was not properly cited to the court. *State v. Brooks*, 788 So. 2d 247 (Fla. 2001), was initially accepted for review and then dismissed because the case had been consolidated with another case in which the question was considered and answered in the affirmative.

CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

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

_____

E. BARCLAY CALE