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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE TRI-VALLEY DISTRIBUTING, INC., COOK OIL COMPANY, and SNOBIRD, INC., Debtors.	BAP No. UT-05-119 BAP No. UT-06-048
D. RAY STRONG, as Examiner for Tri-Valley Distributing, Inc. and OFFICIAL COMMITTEE OF UNSECURED CREDITORS, Plaintiffs – Appellees – Cross-Appellants, v. WESTERN UNITED LIFE ASSURANCE COMPANY, a Washington Corporation, Defendant – Appellant – Cross-Appellee.	Bankr. No. 01-36562 Bankr. No. 01-36563 Bankr. No. 01-36564 (Substantively Consolidated) Adv. No. 04-2453 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before MICHAEL, McNIFF, and JACKSON[1], Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

In this adversary proceeding, both parties appeal the bankruptcy court's order granting in part and denying in part the defendant's motion to dismiss or for

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

1 Honorable Niles L. Jackson, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, sitting by designation.

abstention.[2] The primary issue on appeal is the effect of the McCarran-Ferguson Act[3] on the bankruptcy court's jurisdiction. Finding no reversible error, we affirm.

I. BACKGROUND

Tri-Valley Distributing, Inc. ("Tri-Valley"), Cook Oil Company, and Snobird, Inc. (collectively "Debtors") filed their Chapter 11 bankruptcy petitions on or about November 6, 2001. All three corporations were owned and controlled by members of the Cook family.[4] Eventually, Debtors' cases were substantively consolidated. D. Ray Strong ("Strong") was appointed to serve as examiner in the case. A plan of reorganization was ultimately confirmed. Under the terms of the confirmed plan, Gil Miller ("Miller") was appointed to serve as distribution agent.

Approximately two weeks after filing Chapter 11, Tri-Valley conveyed a parcel of real property ("Rock Springs property") to Seven C Enterprises, Inc. ("Seven C") for no consideration and without authorization of the bankruptcy court. Seven C is also owned and controlled by the Cook family.[5] In October 2002, members of the Cook family entered into stock purchase agreements with Speedy Turtle Petroleum, Inc. ("Speedy Turtle") pursuant to which they sold

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[2] *Order Granting in Part, and Denying in Part, Motion of Defendant Western United Life Assurance Company to Dismiss or for Abstention ("Appealed Order")* at 6, *in* Cross-Appellants' App. Vol. 2 at 310.

[3] 15 U.S.C. §§ 1011-1015.

[4] *First Amended Complaint* at 3, ¶ 9, *in* Cross-Appellants' App. Vol. 1 at 127. In this appeal, we are reviewing the bankruptcy court's resolution of defendant's motion to dismiss. Accordingly, we must treat all well-pleaded allegations in the complaint as true and construe them in a light most favorable to the plaintiff. *Ford v. West*, 222 F.3d 767, 771 (10th Cir. 2000). We note also that our recitation of the facts herein are limited to the basic facts since a complete understanding of the Cook family's sizeable yet intricate financial web is not necessary to disposition on appeal.

[5] Transfer of the Rock Springs property was made by warranty deed executed by Noel Cook representing himself as president of Tri-Valley. Whether Noel Cook was in fact president of Tri-Valley is disputed. However, Noel Cook was, at the time of the transfer, also a control person of Seven C.

common stock of both Seven C and Tri-Valley to Speedy Turtle. A few months later, Western United Life Assurance Company ("WULA") financed a loan for Speedy Turtle, secured primarily by real properties owned by Seven C, one of which was the Rock Springs property.[6] Speedy Turtle defaulted on the loan, and WULA foreclosed on various Seven C properties securing the debt, including the Rock Springs property.

WULA was placed into receivership in Washington state court under Washington state insurance law on March 4, 2002. The state court's receivership order contained language enjoining all persons from instituting or further prosecuting any action, at law or in equity, and from taking any action or interfering in any way with the receiver's title, possession, or control of WULA or its assets.[7] The order also authorized the receiver "to sue or defend on behalf of Western United, or to do so in the interest of Western United's policyholders, creditors, and the public in the courts, tribunals, agencies, and arbitration panels of this State and any other states . . . ."[8]

Four months after WULA was placed into receivership, Strong, Miller, and WULA, through its receiver, entered into a stipulation respecting disposition of the properties WULA had foreclosed upon due to the default of the Speedy Turtle loan.[9] Pursuant to the Stipulation, the parties agreed to cooperatively market the properties in order to preserve their value during the pending litigation. Under

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[6] The loan transaction was actually a refinance of a previous loan made by WULA's parent corporation Metropolitan Mortgage & Securities Inc., which has filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code. *See First Amended Complaint* at 6, 8, *in* Cross-Appellants' App. Vol. 1 at 130, 132.

[7] *Amended Order of Rehabilitation and Appointment of Receiver ("Receivership Order")* at 4, ¶ 12, *in* Cross-Appellants' App. at Tab 1.

[8] *Id.* at 2, ¶ 4, *in* Cross-Appellants' App. at Tab 1.

[9] *Stipulation Respecting Disposition of Property ("Stipulation"), in* Cross-Appellants' App. Vol. 1 at 46.

the Stipulation, all net proceeds of the sales were to be retained by the parties in a separate account under the supervision of WULA's receiver and Strong "pending agreement of the Parties or order of the Bankruptcy Court regarding its disposition . . . ."[10] Most of the properties have been sold and their sales proceeds are being held under escrow agreements entered into by the parties. The escrow agreements state that the "[f]unds are held in escrow for the purpose of holding funds until a determination, either by negotiated resolution or by a final Order of the United States Bankruptcy Court for the District of Utah."[11]

On March 19, 2004, Strong and the Official Committee of Unsecured Creditors (collectively referred to as "Strong"), filed an adversary proceeding,[12] claiming fraudulent transfers of property from Seven C to WULA under Utah's Uniform Fraudulent Transfer Act[13] and negligent lending.[14] Strong subsequently amended his complaint, adding various causes of action under the Bankruptcy Code relating specifically to the Rock Springs property.[15]

On December 29, 2004, WULA filed its motion to dismiss the adversary

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[10] *Id.* at 3-4, ¶ 3, *in* Cross-Appellants' App. Vol. 1 at 48-49.

[11] *See Escrow Instructions* at 1, *in* Cross-Appellants' App. Vol. 2 at 252. The escrow agent is First American Title Insurance Company in Salt Lake City, Utah.

[12] Strong and the Official Committee of Unsecured Creditors were appointed as representatives of the estate and assigned the rights and claims of the estate pursuant to Paragraphs 6.34B and 6.41 of the confirmed reorganization plan. *See* Cross-Appellants' Supplement to Briefs.

[13] Utah Code Ann. § 25-6-5 & § 25-6-6 (1953). Tri-Valley was a creditor of Seven C at the time Seven C encumbered its real property in the loan transaction from WULA to Speedy Turtle.

[14] *See Complaint in* Cross-Appellants' App. Vol. 1 at 1.

[15] *See First Amended Complaint in* Cross-Appellants' App. Vol. 1 at 125. Strong's Bankruptcy Code claims include unauthorized post-petition transfer based on 11 U.S.C. § 549, violation of the automatic stay based on 11 U.S.C. § 362, and unauthorized use of property of the estate based on 11 U.S.C. § 363.

proceeding,[16] claiming the bankruptcy court had no jurisdiction to hear the claims against it because state insurance law reverse preempts the bankruptcy court's jurisdiction pursuant to the McCarran-Ferguson Act. Alternatively, WULA requested that the bankruptcy court abstain from hearing Strong's claims in the interest of comity with Washington state courts and Washington state insurance law pursuant to the permissive abstention powers provided for in 28 U.S.C. § 1334(c)(1).[17]

The bankruptcy court granted WULA's motion in part and denied it in part. The court retained jurisdiction over that portion of the adversary proceeding pertaining to the Rock Springs property on the ground that the property belonged to Debtors on the date the bankruptcy petition was filed. However, pursuant to the McCarran-Ferguson Act, the bankruptcy court abstained from exercising jurisdiction over the causes of action alleging fraudulent transfers by Seven C and negligent lending by WULA. As a result, WULA appeals that portion of the decision whereby the bankruptcy court retained jurisdiction over the Rock Springs property. Strong cross-appeals the bankruptcy court's decision to abstain from hearing the remaining causes of action.

II. JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[18] The bankruptcy court's Appealed Order is not a final order because an order is considered final only if "it 'ends the litigation on the

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[16] *See Motion of Defendant Western United Life Assurance Company to Dismiss or for Abstention, in* Cross-Appellants' App. Vol. 1 at 103.

[17] *See Memorandum in Support of Western United Life Assurance Company's Motion to Dismiss or for Abstention, in* Cross-Appellants' App. Vol. 1 at 106.

[18] 28 U.S.C. § 158.

merits and leaves nothing for the court to do but execute the judgment.'"[19] However, this Court has determined that the Appealed Order is a final collateral order. A final collateral order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[20] Therefore, this Court has granted leave to appeal.[21] The parties have consented to review of both the appeal and the cross-appeal by this Court.[22]

III. STANDARD OF REVIEW

In reviewing the Appealed Order, we must treat all well-pleaded allegations as true,[23] therefore the facts are not in dispute. The issue presented, the effect of the McCarran-Ferguson Act on the bankruptcy court's jurisdiction, involves a question of law. Questions of law are reviewable *de novo*.[24] *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.[25]

IV. ANALYSIS

WULA argues the bankruptcy court erred in retaining jurisdiction over Strong's Rock Springs claims. WULA asserts that application of the McCarran-

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[19] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Caitlin v. United States*, 324 U.S. 229, 233 (1945)).

[20] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 768 (10th Cir. BAP 1997); *In re Fox*, 241 B.R. 224, 230 (10th Cir. BAP 1999).

[21] *See Order Granting Leave to Appeal*, dated January 26, 2006.

[22] WULA initially lodged the main appeal in the Utah District Court but subsequently agreed to transfer it to this Court after this Court entered its Order Granting Leave to Appeal in Strong's cross-appeal.

[23] *Ford v. West*, 222 F.3d 767, 771 (10th Cir. 2000).

[24] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

[25] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

Ferguson Act deprives the court of jurisdiction over all claims made by Strong in the adversary proceeding. Strong contends the bankruptcy court erred in abstaining from hearing his other claims on the basis of the McCarran-Ferguson Act. Having reviewed the Appealed Order, we conclude that the results reached by the bankruptcy court are proper. However, our method of arriving at such permissible results follows a slightly different path. Our position is that the McCarran-Ferguson Act does not apply. Therefore, the bankruptcy court's retention of jurisdiction over the Rock Springs claims is justified. Additionally, although the McCarran-Ferguson Act does not apply, the bankruptcy court's refusal to hear the Strong's other claims is supportable on the alternative ground of permissive abstention.

A. McCarran-Ferguson Act Reverse Preemption

The McCarran-Ferguson Act was enacted "for the specific purpose of consigning to the States broad and primary responsibility for regulating the insurance industry."[26] It provides in pertinent part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]"[27] Accordingly, the McCarran-Ferguson Act saves certain state insurance laws from federal preemption. This is also known as "reverse preemption."[28]

WULA argues the precedent set by the United States Court of Appeals for the Tenth Circuit in *Davister Corp. v. United Republic Life Insurance Co.*,[29]

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[26] *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998).

[27] 15 U.S.C. § 1012(b).

[28] *See Munich*, 141 F.3d at 590.

[29] 152 F.3d 1277 (10th Cir. 1998).

which interpreted the McCarran-Ferguson Act, prohibits the bankruptcy court from exercising jurisdiction in this matter. We disagree. In *Davister*, the Tenth Circuit Court of Appeals held that the McCarran-Ferguson Act reverse preempted an action to compel arbitration pursuant to the Federal Arbitration Act when the defendant insurance company was under the control of the Commissioner of the Utah Insurance Department, and insolvency and liquidation proceedings were underway in Utah state court. The Tenth Circuit's analysis in *Davister* is based on the Supreme Court case of *United States v. Fabe*[30] and its three-part test for ascertaining whether the McCarran-Ferguson Act is applicable. The three-part reverse preemption test is as follows: (1) is the federal statute at issue specifically related to the business of insurance; (2) was the state statute enacted for purposes of regulating the business of insurance; (3) would application of the federal statute invalidate, impair, or supersede the state statute?[31]

We agree with WULA that the first two parts of the McCarran-Ferguson test are met. First, the Bankruptcy Code does not specifically relate to the business of insurance.[32] Second, the Washington statutes at issue, which govern insolvent insurers, were enacted for the purpose of regulating the business of insurance.[33] However, we are not convinced the bankruptcy court's jurisdiction

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[30] 508 U.S. 491 (1993) (federal statute granting the United States a priority claim had to yield to the Ohio statutory procedure for liquidation of an insolvent insurance company).

[31] *Davister*, 152 F.3d at 1279, n.1 (citing *Fabe*, 508 U.S. at 500-01).

[32] *Barnett Bank v. Nelson*, 517 U.S. 25, 42 (1996).

[33] *See Fabe*, 508 U.S. at 508 (finding that an Ohio statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law enacted for the purpose of regulating the business of insurance); *Davister*, 152 F.3d at 1281 (finding that a Utah statute consolidating all claims against a liquidating insurer was enacted for the purpose of regulating the business of insurance); *Munich*, 141 F.3d at 594 (finding Oklahoma statutes which regulate delinquency proceedings in connection with insolvent insurance companies were enacted for the purpose of regulating insurance).

over the Rock Springs claims invalidates, impairs, or supersedes state law.

WULA argues that the bankruptcy court's Appealed Order retaining jurisdiction meets the third part of the McCarran-Ferguson Act test because some of Strong's claims will be "resolved [in] a forum other than the receivership court," and that such an order obviously "conflicts with [state] law giving the state court the power to enjoin any action interfering with the delinquency proceedings."[34] If WULA's argument were accepted as true, the reach of the McCarran-Ferguson Act would be limitless in the insolvent insurer context. And, as articulated by the United States Court of Appeals for the Fourth Circuit, "[w]e are skeptical that Congress intended, through the McCarran-Ferguson Act, to remove federal jurisdiction over every claim that might be asserted against an insurer in state insolvency proceedings."[35] More importantly, this is also the position of the Tenth Circuit Court as specifically stated in *Davister*:

> [W]e do not view *Fabe* to permit *all* actions arising under a state insurance liquidation statute to "automatically fall under the purview of the McCarran-Ferguson Act." As we have noted, a carefully constructed three-part test must be satisfied before the Act can apply. This examination must be implemented on a case-by-case basis, and the result will be dictated by the precise statutes involved in each case.[36]

A careful consideration of the facts in this particular case leads us to the conclusion that the bankruptcy court's exercise of jurisdiction over the Rock Springs claims does not invalidate, impair, or supersede the state statute.

The Washington insurance statutes do not provide for exclusive jurisdiction over all claims related to an insolvent insurer. In fact, they contemplate that such claims may need to be resolved in other forums. Section 48.31.111 of the Revised Code of Washington provides in part:

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[34] Appellant's Brief at 10 (second alteration in original).

[35] *Gross v. Weingarten*, 217 F.3d 208, 222 (4th Cir. 2000).

[36] *Davister*, 152 F.3d at 1280, n.2.

> Commencement of delinquency proceeding by commissioner – Jurisdiction of courts
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> . . . .
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> (2) No court of this state has jurisdiction to entertain a complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of an insurer, or praying for an injunction or restraining order or other relief preliminary to, incidental to, or relating to the proceedings, other than in accordance with this chapter.
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> . . . .
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> (4) If the court on motion of a party finds that an action should as a matter of substantial justice be tried in a forum outside this state, the court may enter an appropriate order to stay further proceedings on the action in this state.[37]

Additionally, the state court's Receivership Order gives WULA's receiver the following powers:

> The Receiver is authorized to sue or defend on behalf of Western United, or to do so in the interest of Western United's policyholders, creditors, and the public in the courts, tribunals, agencies, and arbitration panels of this State and any other states, and to take such other actions as the nature of this cause and the interests of the policyholders, creditors, and the public may require.[38]

In accordance with these powers, WULA's receiver willingly entered into the Stipulation, which gives the bankruptcy court the right to decide the disposition of proceeds from the sales of property in the absence of an agreement by the parties, with the knowledge of the Washington insurance commissioner. WULA should not now be heard to complain about the forum it has selected for resolving Strong's claims against it.

For purposes of the motion to dismiss, we take all of Strong's alleged facts as true. The Rock Springs property was allegedly transferred by Tri-Valley post-petition for no consideration and without authorization of the bankruptcy court.

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[37] Wash. Rev. Code § 48.31.111(2) & (4) (2006).

[38] *Receivership Order* at 2, ¶ 4, *in* Cross-Appellants' App. at Tab 1.

Strong claims it should be part of the bankruptcy estate. Because Washington state insurance law and the Washington state court's Receivership Order provide for resolution of claims relating to an insolvent insurer in other forums, and WULA's receiver agreed to the bankruptcy court's jurisdiction, we conclude that the bankruptcy court did not err in retaining jurisdiction over Strong's Rock Springs claims.

B. Permissive Abstention

The Appealed Order provides "that pursuant to McCarran-Ferguson, this Court abstains from determining all controversies or causes of action raised by [Strong] in his First Amended Complaint other than those controversies which pertain to, or seek declaratory relief with respect to the Rock Springs Property."[39] On review, we have concluded that the McCarran-Ferguson Act is inapplicable. However, our finding does not mean the bankruptcy court was obligated to retain jurisdiction over all of Strong's claims against WULA. In support of its motion to dismiss, WULA argued that in the event the McCarran-Ferguson Act did not apply, the bankruptcy court should abstain from exercising jurisdiction under the permissive abstention powers granted in 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides as follows:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with state courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.[40]

Permissive abstention is a matter within the sound discretion of the bankruptcy court.[41] Therefore, had the bankruptcy court determined the McCarran-Ferguson Act did not apply, it could have, nevertheless, abstained from hearing Strong's

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[39] *Appealed Order* at 6, *in* Cross-Appellants' App. Vol. 2 at 315.

[40] 28 U.S.C. § 1334(c)(1).

[41] *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 232 (2d Cir. 2002); *In re Thompson*, 231 B.R. 802, 806 (D. Colo. 1999).

other claims.

The claims other than the Rock Springs claims do not relate to property allegedly in the possession of any of the Debtors at the time the bankruptcy petitions were filed. These claims are related to property owned and encumbered by Seven C in the Speedy Turtle loan transaction. Although Seven C is a corporation related to Tri-Valley and Tri-Valley is an alleged creditor of Seven C, Strong's state law claims for fraudulent transfers by Seven C and negligent lending by WULA go far beyond the determination of whether the Rock Springs property is part of the bankruptcy estate. In these causes of action, state law issues predominate over bankruptcy issues.[42]

An appellate court is free to affirm a result reached by a trial court on different reasons so long as the record supports the judgment.[43] Because the bankruptcy court's refusal to hear certain of Strong's claims is supportable on the ground of discretionary abstention, we see no reason to disturb it on appeal.

V. CONCLUSION

The bankruptcy court did not err in retaining jurisdiction over Strong's claims relating to the Rock Springs property. Nor did it err in abstaining from hearing Strong's state law claims for fraudulent transfer and negligent lending relating to the other properties. Therefore, the decision of the bankruptcy court is affirmed.

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[42] *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir. 1990) (citing *Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader's Serv., Inc.)*, 81 B.R. 422 (Bankr. S.D. Tex. 1987)) (Factors to be considered in deciding whether to abstain pursuant to 28 U.S.C. § 1334(c)(1) include the extent to which state law issues predominate.).

[43] *Brumfield v. Sanders*, 232 F.3d 376, 379, n.2 (3d Cir. 2000) (quoting *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1145, n.1 (3rd Cir. 1983)); *accord Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.").