UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

Plaintiff,

v. 4:08cv443-WS

GENERAL REINSURANCE CORPORATION,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR REMAND

This case was originally filed in state court. The defendant, General Reinsurance Corporation ("Gen Re"), removed the case to this court, alleging diversity jurisdiction. The plaintiff, the Florida Department of Financial Services ("DFS"), has moved to remand the case to the state court.

I.

The Aries Insurance Company ("Aries") was an insurance company organized under the laws of Florida. On May 9, 2002, DFS filed a petition with the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, seeking to place Aries into receivership pursuant to the Florida Insurers Rehabilitation and Liquidation Act (the "Liquidation Act"), which is set forth in Chapter 631, Florida Statutes. On November 14,

2002, Aries consented to the appointment of DFS as receiver for purposes of liquidation. That same day, the circuit court entered a consent order appointing DFS as receiver for Aries.

During the course of its receivership, DFS discovered that Aries made some improper preferential transfers within six months of the rehabilitation date. Accordingly, on September 16, 2008, DFS filed a claim in state court against Gen Re, the recipient of those transfers. As authorized by section 631.262 of the Liquidation Act, DFS sought to void and recover $4.6 million in preferential transfers. DFS also asserted a claim for damages under Chapter 628, which provides that the recipient of an improper payment of dividends "shall be liable in the amount thereof to the insurer." Fla. Stat. § 628.391(2). DFS's complaint to recover preferential transfers and improper dividends was assigned Case No. 02-CA-1128J, making it an auxiliary action to the main receivership action—assigned Case No. 02-CA-1128—that was filed in the same court in 2002.

II.

In its motion to remand, DFS raised two arguments. DFS first argued that diversity jurisdiction is lacking because DFS, a department of the State of Florida, is not a "citizen" for purposes of diversity jurisdiction. DFS next argued that, even if DFS is found to be a "citizen" for diversity purposes, the court should nonetheless abstain under the principles espoused by the Supreme Court in Burford v. Sun Oil Co., 319 U.S. 315 (1943).

In a reply brief, DFS briefly suggested for the first time that the McCarran-

Ferguson Act, 15 U.S.C. §§ 1011-1015, supports remand in this case. In its surreply, Gen Re responded—albeit without elaboration—to DFS's newly-raised argument. Given the importance of the McCarran-Ferguson issue, the court gave each of the parties an opportunity to file a memorandum directed solely to the McCarran-Ferguson issue. Each of the parties was also given an opportunity to respond to their opponent's memorandum. The briefing on the McCarran-Ferguson issue is now complete.

III.

A.

Florida's Liquidation Act sets forth a comprehensive scheme for administering delinquency proceedings involving insolvent insurance companies. When revising the Liquidation Act in 2002, the Florida Legislature specifically provided that "[t]he purposes of [the Act], *which are integral elements of the regulation of the business of insurance and are of vital public interest and concern,*" are to "[p]rotect the interests of policyholders, creditors, and other claimants and the public," to enhance "the efficiency and economy of the liquidation process," and to "minimize legal uncertainty and litigation." Fla. Stat. § 631.001(3)(a), (e) (emphasis added). The legislative staff explained its 2002 revisions of the Act's "purposes" section as follows:

> [L]anguage has been added to explain that the entire chapter is part of the "regulation of the business of insurance," a phrase designed to avoid any threat of Federal preemption by fitting within the specific language of the McCarran-Ferguson Act. The phrase "vital public interest and concern" will help give an expansive interpretation to the department's powers in delinquency proceedings and help avoid Federal interference. Also, language is added to clarify that the department, as Receiver, has the authority to maximize recovery of assets on behalf of the policyholders,

> creditors, other claimants, and the estate. This provision is added to eliminate frivolous litigation which had challenged the department's right to bring such claims.

Senate Staff Analysis and Economic Impact Statement, S.B. 432 (March 1, 2002).

In Florida, "[a] delinquency proceeding pursuant to [Chapter 631] constitutes the sole and exclusive method of liquidating . . . an insurer." Fla. Stat. § 631.021(3).[1] When an insurance company is placed in delinquency proceedings, the Circuit Court of Leon County is vested with exclusive jurisdiction over all Liquidation Act proceedings. In the words of the statute:

> The domiciliary court acquiring jurisdiction over persons subject to this chapter may exercise 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.

Fla. Stat. § 631.021(6).

Section 631.262(1) authorizes DFS, in its capacity as receiver of an insolvent insurer, to recover assets of the insurer that were transferred without fair consideration within six months prior to the filing of a petition in a delinquency proceeding.[2] Any such

---

[1] Such a delinquency proceeding must be filed "in the name of the state on the relation of the department [DFS]." Fla. Stat. § 631.021(3).

[2] Section 631.262(1) provides that:

> Every transfer made or suffered and every obligation incurred by an insurer or affiliate within 1 year prior to the filing of a successful petition in any delinquency proceeding under this chapter, upon a showing by the receiver that the same was incurred without fair consideration, or with

transfer is presumed to be void and fraudulent, with the burden of proof upon the transferee to show otherwise. Absent a successful rebuttal by the transferee, the transferred assets are deemed to be assets of the insurer, which are subject to the exclusive jurisdiction of the Circuit Court of Leon County under section 631.021(6). Moreover, statutory claims for the recovery of fraudulent transfers vest solely in the receiver as a result of the receivership proceedings and—pursuant to section 631.001(3)—are deemed by the State of Florida to be "integral elements of the regulation of the business of insurance."

B.

Congress enacted the McCarran-Ferguson Act in 1945 to make clear that the states have broad responsibility for regulating the insurance industry. See 15 U.S.C. § 1011 (providing that "Congress hereby declares that the continued regulation . . . by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States"). To that end, Section 2(b) of the McCarran-Ferguson Act provides, in relevant part, that "[n]o 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." 15 U.S.C. § 1012(b). The McCarran-Ferguson Act thus

---

> actual intent to hinder, delay, or defraud either then-existing or future creditors of the insurer, shall be fraudulent and voidable. However, every such transfer or obligation incurred or suffered within 6 months prior to the filing of the above petition shall be presumed void and fraudulent, with the burden of proof upon the obligee or transferee to show otherwise.

reverses the normal preemption of federal laws over state laws where (1) the state law was enacted for the "purpose of regulating the business of insurance;" (2) the federal statute does not specifically relate "to the business of insurance;" and (3) the federal statute operates to "invalidate, impair, or supersede" the state law.

In this case, the federal law at issue is the removal statute, which indisputedly does *not* specifically relate to the business of insurance. Moreover, the removal statute, when used to remove a Liquidation Act proceeding to recover preferential transfers, clearly "invalidates, impairs, or supersedes" the Liquidation Act's provisions vesting exclusive jurisdiction in the Circuit Court of Leon County with respect to the assets or property of any insurer subject to Liquidation Act proceedings. Reverse preemption thus applies if the Liquidation Act—in particular, the Act's exclusive jurisdiction provision—was enacted for the "purpose of regulating the business of insurance."

The Florida Legislature left little doubt about the purposes of the Liquidation Act as a whole. The statute itself provides that "[t]he purposes of [the Liquidation Act] . . . are integral elements of the regulation of the business of insurance and are of vital public interest and concern." Fla. Stat. § 631.001(3). The provision vesting exclusive jurisdiction in the Circuit Court of Leon County is not excepted from the Florida Legislature's pronounced purpose.[3] Indeed, this court is satisfied that the provision serves to regulate the business of insurance in that it contributes to the economical, efficient and orderly liquidation of insurance companies and, thereby, protects the

[3] The court assumes, without deciding, that—when determining the preemptive power of a state statute under the McCarran-Ferguson Act—the focus should be on the particular provision at issue rather than the statutory scheme as a whole.

interests of policyholders. See United States Dep't of Treasury v. Fabe, 508 U.S. 491, 508 (1993) (holding that an insurance liquidation priority statute regulates the business of insurance, within the meaning of the McCarran-Ferguson Act, to the extent that the statute's provisions have the purpose of protecting policyholders' interests); In re: Amwest Sur. Ins. Co., 245 F. Supp. 2d 1038, 1044 (D. Neb. 2002) (explaining that "[a]ffording the state court ultimate control over all issues relating to collection and distribution of the insolvent insurance company's assets protects policyholders").

When examining similar jurisdictional provisions in other states' insurer liquidation laws, several courts have concluded that such provisions were enacted for the purpose of regulating insurance. For example, in Covington II v. Sun Life of Canada (U.S.) Holdings, No. C-2-00-069, 2000 WL 33964592 (S.D. Ohio May 17, 2000), the court examined the jurisdictional provision in Ohio's insurer liquidation law in the context of a preferential transfer action—removed to federal court—originally filed in state court by the liquidator of an insolvent insurer. The court remanded the action to state court, finding that the Ohio law vesting exclusive jurisdiction of insurer delinquency proceedings in the Franklin County Court of Common Pleas was a law enacted for the purpose of regulating the business of insurance. The court explained:

> By vesting exclusive jurisdiction over all claims relating to insolvent insurance companies in the Franklin County Court of Common Pleas, the State of Ohio aims to protect the relationship between insurer and insured (1) by eliminating the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders, who are often relying on policies with the same or similar provisions, (2) by assuring both the insurance company and its policyholders that the insurance company will be

> liquidated in an organized fashion, and (3) by preventing the unnecessary and wasteful dissipation of the insolvent insurance company's funds that would occur if the Liquidator had to litigate unconnected suits in different forums across the country.

Id. at *8.

In In re: Amwest Sur. Ins. Co., a case filed by an insurance company liquidator to recover preferential transfers, the court examined a provision in Nebraska's insurer liquidation law requiring that "[a]ll actions authorized by the [liquidation law] shall be brought in the district court of Lancaster County." Concluding that such provision was enacted for the purpose of regulating the business of insurance, the court remanded the liquidator's action to state court under the McCarran-Ferguson Act's reverse preemption doctrine. The court explained:

> This statutory designation of forum promotes the orderly adjudication of claims; prevents the unnecessary and wasteful dissipation of the insolvent company's funds that would occur if the liquidator had to defend unconnected suits in different forums; and eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of significant interest to insurance companies and policyholders. Requiring all claims related to preserving the policyholders' rights to be brought in one forum allows the Liquidator, under the supervision of the Lancaster County district court, to conserve resources in the process of marshalling the remaining assets of the insurer, thereby maximizing the benefits available to the company's policyholders.

Id. at 1045 (citations omitted); see also Munich American Reinsurance Co. v. Crawford, 141 F.3d 585, 592 (5th Cir. 1998) (holding that Oklahoma's law vesting exclusive jurisdiction of insurer delinquency proceedings in the Oklahoma state court was "enacted clearly for the purpose of regulating the business of insurance").

As the courts did in Covington and Amwest, this court concludes that application of the federal removal statute would interfere with the state's comprehensive administrative scheme for liquidating and marshalling the assets of an insolvent insurance company. Because that scheme was enacted for the express purpose of regulating the business of insurance, the McCarran-Ferguson Act applies, causing the state Liquidation Act to preempt the federal removal statute. Because the federal removal statute does not apply here, this court lacks jurisdiction over the action.[4]

Accordingly, it is ORDERED:

1. DFS's motion to remand (doc. 9) is GRANTED.

2. This case shall be REMANDED to the Circuit Court in and for Leon County, Florida.

3. The Clerk shall enter judgment accordingly. Each party shall bear its own costs with respect to the removal.

DONE AND ORDERED this 2nd day of February, 2009.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

[4] The court does not decide whether DFS, in its capacity as receiver for Aries, is a "citizen" for purposes of diversity jurisdiction. Whether DFS is a "citizen" or not, the case must be remanded to the state receivership court from which it came.